
**PROPERTY RIGHTS IN ENVIRONMENTAL MANAGEMENT:
THE NATURE OF RESOURCE CONSENTS IN THE
RESOURCE MANAGEMENT ACT 1991**

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INTRODUCTION

Controlling the use of significant natural resources is a complex task. The perception that New Zealand has an abundance of natural resources has given way to the view that unrestrained exploitation of the environment will lead to scarcity and degradation.¹ Determining who is permitted to access the environment necessarily raises difficult questions of ownership, entitlements and rights.

Environmental management involves balancing environmental imperatives with the needs of a variety of different users; many of whom attach significant economic, social or cultural importance to natural resources. Decisions determining who may use or take a resource can be extremely controversial. Some prominent recent examples include the national debate surrounding ownership and access to the foreshore and seabed; discussions about the privatisation of freshwater resources; and ongoing dispute regarding the allocation of emissions units under the New Zealand Emissions Trading Scheme (NZETS).

New Zealand has a number of regimes that control private use of publicly important resources. Existing legislation seeks to achieve goals as diverse as utilisation² and conservation.³ Generally, use of natural resources in New Zealand is restricted so as to sustain the resource. However, New Zealand also facilitates private use of the environment. Current management reflects a mixture of anthropocentric and ecological aspirations.

Traditionally, New Zealand has employed regulatory, or ‘command and control’ structures to achieve these goals.⁴ For example, resources in national parks and the conservation estate are subject to regulatory frameworks,⁵ and private activities on conservation land are governed by a system of concessions.⁶ In most cases, central and local government fulfil the role of managers of New Zealand’s natural resources in a variety of guises.

¹ Nyce, O., “Water Markets Under the Resource Management Act 1991: Do They Hold Water” (2008) 14 *Cantab. L.R.* 123, 123.

² Fisheries Act 1996, s 8(1).

³ Conservation Act 1987, ss 2 & 6(a).

⁴ Cole, D., (2000), “New Forms of Private Property: Property Rights in Environmental Goods”, *Encyclopedia of Law and Economics*, Bouckaert, B., & DeGeest, D., (eds), Cheltenham: Edward Elgar, 274-314, 275. The terms ‘regulatory’ and ‘command and control’ generally describe the same type of approach to environmental management; for consistency the term ‘regulatory’ will be used in this paper.

⁵ The National Parks Act 1980, Conservation Act 1987 and Resource Management Act 1991 respectively.

⁶ Conservation Act, Part 3B.

However, in 1983, New Zealand adopted its first private property response to an environmental problem in legislation reforming fisheries management.⁷ The resulting quota management system remains New Zealand's flagship example of the creation of private property rights in natural resources. The success of this approach remains contentious.⁸ Nonetheless, the fisheries regime does illustrate a willingness to consider private property management of the environment.

Recently, the use of private property has come to the fore in New Zealand again. Market trading in environmental resources has become prominent in the United States of America,⁹ Australia¹⁰ and in the European Union.¹¹ In addressing climate change, trading programmes are emerging as a preferred international policy response. The creation of markets for carbon has led to questions as to the appropriate legal form of tradable permits, including the question of whether a property-based permit is appropriate.¹² The NZETS expressly recognises tradable permits as personal property.¹³ This legislation represents the second significant private property management regime for natural resources in New Zealand law.

It is thus timely to examine the creation of private property rights in natural resources. The introduction of the NZETS signals a further shift away from New Zealand's current regulatory approach. In light of this change, it is important to consider the benefits and disadvantages of creating new forms of property right in an environmental context.

This analysis will focus on property law questions that have arisen in respect of New Zealand's most comprehensive environmental statute, the Resource Management Act 1991 (RMA). The RMA plays a pivotal role in determining who may utilise the coastal marine area, freshwater and air. Recently, the RMA approach to environmental management was described as "very close" to a "completely centralised regulatory system."¹⁴ Growing dissatisfaction with the management tools in the RMA has led to public discussion on

⁷ Fisheries Act 1983.

⁸ For criticisms of the fisheries regime: Wallace, C., "Environmental Justice and New Zealand's Fisheries Management System" [1999] 3 NZJEL 33; Daly, N. "Selling the Seven Seas" (1995) 16 *Multinational Monitor* 7.

⁹ For example in respect of sulphur dioxide emissions: Cole, above n4, 289-294; Clean Air Act 1970.

¹⁰ For example in respect of water management: New South Wales Water Management Act 2004 Part 2; Queensland Water Act 2000 Part 6.

¹¹ For example in respect of carbon emissions: European Union Directive 2003/87/03.

¹² See for discussion in other jurisdictions: Mace, M., "The Legal Nature of Emissions Reductions and EU Allowances: Issues Addressed in an International Workshop" (2005) 2 JEEPL 123.

¹³ Draft Settlement Systems, Emission Units and Futures Trading Bill, cl 2 (Emissions Bill).

¹⁴ Nyce, above n1, 137.

whether property rights should be granted to resource users.¹⁵ The importance of the resources managed by the RMA, together with the emergence of property rights dialogue in this area, makes the statute an important case study when considering the role of property in environmental management.

Chapter One of this paper will look at the liberal concept of property in order to discern the function of private property in New Zealand. The legal treatment of private property will be outlined in order to ascertain some implications of the creation of a new property right. The emerging use of private property in environmental management will be explored with reference to arguments both for and against the use of private property rights to control the use of natural resources.

Chapter Two will look at the current management regime for natural resources in the RMA. In particular, Chapter Two will focus on the nature of a resource consent. Uncertainty as to the nature and effect of consents will be explored, as will the divergent judicial approaches to the applicability of property law in this context. This analysis will show that current approaches to resource consents need reconsideration.

Chapter Three will consider possible solutions to the present unsatisfactory approach to resource management in the RMA. The two most prominent solutions will be explored; the creation of property rights or the development of a more clearly defined statutory licence. Arguments in favour and against the creation of property rights in the RMA will be considered. The analysis will identify some potential concerns with the creation of a private property right in resource consents.

The impetus for this analysis comes from the move to a market-based approach to environmental management. However, the aim of this paper is more modest than a full consideration of the consequences of this shift. The focus here is the legal value and nature of property rights as a component part of the general shift to privatised resource management. Despite a narrow goal, this analysis remains aware of the changing context in which property rights are adopted.

¹⁵ Gorman, P., "Water Trading Scheme Recommended", *The Press*, 29 August 2008, <http://www.stuff.co.nz/thepress/4672572a19753.html>, accessed 22 September 2008; Sinner, J., & Salmon, G., "Creating Economic Incentives for Sustainable Development: A Report to the New Zealand Business Council for Sustainable Development", *New Zealand Business Council for Sustainable Development*, November 2003, <http://www.nzbcscd.org.nz/economicincentives/incentives-for-SD-full.pdf>, accessed 22 September 2008.

Ultimately, it is argued that the creation of exclusive property rights over natural resources governed by the RMA is not the most practicable legal solution. The creation of property rights creates antecedent questions of exclusivity and entitlement that will bring further difficulty to the elaborate task of environmental management. It is suggested that further specification of a resource consent as a statutory licence, without recourse to property concepts, can provide clarity and certainty to consent holders whilst enabling appropriate action to ensure resource sustainability.

A. THE CONCEPT OF PROPERTY IN ENVIRONMENTAL LAW

1 The Idea of Property

Chapter One will explore the liberal conception of what property is and how this translates into legal treatment. In addition, the arguments for and against the application of property ideas to environmental resources will be explored.

1.1 The nature of property and property ownership

Property is a complex and contestable construct.¹⁶ In classical liberal thought ‘property rights’ attract connotations of natural right and opposition to government control.¹⁷ From a classical economic perspective, it is argued that private property is integral to achieving efficiency in the free market.¹⁸ Conversely, the utility of strong private property rights has been challenged.¹⁹ Disputes as to the inviolable nature of property, the relationship of property interests to social justice and the role of the state in property regulation are ongoing and interdisciplinary.

In practice, property is a construct of law.²⁰ Property law provides a set of rules relating to a particular object or resource with a view to pre-empting conflict and facilitating economic use.²¹ Property rules are relational as they regulate interaction between parties interested in the object of property. Honoré argues that a conception of ownership of property is common to all legal systems, irrespective of political or social origin.²² Ownership of property is characterised as “the greatest possible interest in a thing which a mature system of law

¹⁶ Cole, D., & Grossman, P., “The Meaning of Property Rights: Law versus Economics?” (2002) 78(3) *Land Economics* 317-330, 318-320.

¹⁷ Locke, J. (1794) “The Spirit of John Locke, on civil government, revived by the Constitutional Society of Sheffield”, *British Library Eighteenth Century Collections Online*, <http://galenet.galegroup.com/servlet/ECCO?vrsn=1.0&dd=O&af=BN&locID=otago&srchtp=a&d=0025800100&SU=O>, accessed 26 August 2008.

¹⁸ See for description: Rose, C., (1994), “Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory”, *Property & Persuasion*, Boulder: Westview Press, 25-47, 28.

¹⁹ See, for example of the divergent approaches: Schlager, E., and Ostrom, E., “Property-rights Regimes and Natural Resources: A Conceptual Analysis” (1992) 68(3) *Land Economics* 231, 249-262; Chan, A., “The Changing View of Property Rights in Natural Resources Management” (1989) 48(2) *American Journal of Economics and Sociology*, 193-20.

²⁰ Reich, C., “The New Property”, (1964) 73 *Yale L.J.* 733, 739.

²¹ Waldron, J., (1996) “Property Law”, *A Companion to Philosophy of Law and Legal Theory*, Patterson, D. (ed), Blackwell Publishers, 560-573, 562.

²² *Ibid*, 109.

recognises.”²³ Of course, property law is not limited to recognition of ownership interests. The concept also encompasses a range of lesser and equitable interests.²⁴ Property provides an organising system for interests in a thing or resource. However, the exact legal treatment of property differs between jurisdictions; property is not divorced from the political and economic context within which it operates.²⁵

1.2 The nature of private property & private property ownership

Property ought not be confused with the more specific idea of private property. Waldron describes three frameworks of property ownership; common, collective and private property.²⁶ Private property is of a slightly different *genus* to the others, in that it enables the owner to make management decisions about the use of the property on the basis of individual preference. Private property creates a “sanction and authority for [individual] decision-making over resources.”²⁷

The legal nature of private property interests has attracted particular attention in nations with a liberal tradition. Private property has been described as guarding the “troubled boundary” between the state and the individual.²⁸ Property interests have strong rhetorical value, as is suggested by the description property ‘right’. This perception has informed the legal approach to property rights.²⁹

1.3 Licences and statutory property

Although property law presents one structure for the management of resources, it is not the only paradigm of control that the law facilitates. The law recognises interests in objects that may be less than, or defined explicitly in opposition to, a property relationship. A statute may preclude the recognition of a private property right, whilst nonetheless creating a new relationship with a resource. Statutory language that reveals an intention to establish a non-

²³ Honoré, A., (1961) “Ownership” in *Oxford Essays in Jurisprudence*, Guest, A.G. (ed), London: Oxford University Press, 107-148, 108.

²⁴ See generally: Ziff, B., (1996), *Principles of Property Law*, Ontario: Carswell Thomson; Chambers, R., (2001), *An Introduction to Property Law in Australia*, Sydney: LBC Information Services, 75-230.

²⁵ Honoré, above n23, 109.

²⁶ Waldron, J., (1988), *The Right to Private Property*, Oxford: Clarendon Press, 38-42.

²⁷ Denman, D., (1978) *The Place of Property: A New Recognition of the Function and Form of Property Rights in Land*, The Keep, Berkhamsted: Geographical Publications Limited, 3.

²⁸ Reich, above n20, 733.

²⁹ See below at A1.4.

property interest includes a ‘bare licence’,³⁰ ‘allowance’ or ‘permission to use’.³¹ Such instruments are recognised at general law as conveying only personal rights and so are not enforceable against third parties.³² They connote no sense of exclusivity and extinguish on the death of a holder.³³ Often, such devices form part of a regulatory regime for resource management. However, where a licence is a statutory creation, the strength of the interest will depend on statutory specifications. The statutory specifications may create an interest stronger than a bare licence.³⁴

In recent times the term ‘statutory property’ has been coined in respect of interests created over resources to which property law has not previously been applied.³⁵ These resources include water, petroleum and even air.³⁶ The description ‘statutory property’ may be somewhat misleading, as in truth such instruments can represent a “new kind of entitlement... not an entitlement based on antecedent proprietary rights recognised by the general law.”³⁷ The question of whether a statutory creation is capable of recognition and enforceable under common law or equity is very contextual, often controversial and particularly problematic where the statute does not set out a clear intention in respect of the nature of the instrument.³⁸ Dependant on context, a statutory property right may exist independently of property law so may be more appropriately called a statutory licence.³⁹

The permutations of these legislative devices are many. Generally, where a person is licenced to use a thing, the property in the resource remains with the state. The logic of this distinction on a conceptual level is problematic, as in many cases a licence will imitate property and convey on the possessor functions traditionally associated with ownership.⁴⁰ However, for

³⁰ *Oxford Dictionary of Law*, (2003), Oxford: Oxford University Press, 288. Note that in some circumstances the term ‘licence’ may describe a property interest, but for simplicity a licence in this paper will mean a non-property interest unless otherwise stated.

³¹ *Ibid.*

³² Hinde, G., McMorland, D., Campbell, N. & Grinlinton, D., (2004), *Hinde McMorland & Sim Land Law in New Zealand Volume 2*, Wellington:Lexis Nexis, 18.004 (Hinde, McMorland & Sim).

³³ *Ibid.*, 18.004 & 18.006.

³⁴ *Ibid.*, 18.003.

³⁵ See for example: Storey, M. “Not of this Earth: The Extraterrestrial Nature of Statutory Property in the 21st Century”, 25 *Australian Resources and Energy Law Journal*. 51. Storey describes a taxonomy of ‘statutory property’ that as arisen when attempting to classify the nature of natural resource titles in Australia.

³⁶ *Ibid.* 50-55.

³⁷ *Harpur v Minister for Sea Fisheries* (1989) 168 CLR 314, 325 per Mason CJ, Deane and Gaudron JJ.

³⁸ Storey, above n36. This question takes on another dimension of significance in jurisdictions with constitutional protections against takings of property. In such jurisdictions an additional complication arises as a statutory creation may be property for the purposes of the constitutional provision, but not property in the sense recognised by general law or vice versa: Fisher, D., “Rights of property in water: confusion or clarity” (2004) 21 *EPLJ* 200, 207-210.

³⁹ *Ibid.* See below at B2.2 for discussion of statutory licences in respect of the RMA.

⁴⁰ Honoré, above n23, 124-128. See below at A1.4.

legal and practical purposes it simply means that the law of property may not apply to the interest; nor will any statutory provisions directed at property instruments.⁴¹ The treatment of statutory licences has been described as:⁴²

not subject to the legal principles, or generic statutory rules (such as those found in the Property Law Act 1952) that normally apply to personal property.

These devices are in this legal sense non-property interests, even though the possessor may be granted a substantial economic interest in the resource in question and may be possessed of rights traditionally associated with property ownership.

Legislative bodies are thus faced with options as to how to structure the legal relationship between users of a valuable environmental resource. Property instruments attract particular legal treatment and will receive particular consideration when dealt with under statute.⁴³ Conversely, a system of licensing or statutory property suggests an intention to avoid the general application of property concepts, even where the interest conveyed in the resource is valuable. In order to fully understand this choice, it is important to understand how property instruments are treated in law.

1.4 The legal treatment of private property

The incidents of property vary. Waldron describes property rights as bearing a Wittgensteinian “family resemblance.”⁴⁴ Such instruments share similar features, but no irreducible core.⁴⁵ Honoré provides a classic exposition of the incidences of property as a part of his liberal concept of ownership.⁴⁶

⁴¹ See Storey, above n35, for the differing consequences that may need to be considered in jurisdictions with constitutional property protections.

⁴² Grinlinton, D., “The nature of property rights in resource consents” (2007) *RMB* 37, 39.

⁴³ See below at A1.4.

⁴⁴ Waldron, above n27, 31.

⁴⁵ *Ibid.*

⁴⁶ Honoré, above n24, 112-128.

Incident of Ownership	Description
(1) The right to possess	A right to exclusive control and a claim that others ought not interfere with the thing without permission.
(2) The right to use	A right to personal enjoyment of the thing owned.
(3) The right to manage	The right to decide “how and by whom the thing owned shall be used.” ⁴⁷
(4) The right to income	A right to derive income earned by the thing owned
(5) The right to capital	A right that “consists in the power to alienate the thing and the liberty to consume.” ⁴⁸
(6) The right to security	An indefinite right to remain the owner provided the owner is solvent
(7) The incident of transmissibility	The ability to pass on the ownership interests <i>ad infinitum</i> . ⁴⁹
(8) The incident of absence of term	Continuity of the property interest independent of any determinant time period or happening.
(9) The prohibition of harmful use	Any use which harms others in society is forbidden
(10) Liability to execution	Liability for the ownership interest to be removed if certain actions are taken, for instance insolvency or judgment for payment of a debt.
(11) Residuary character	The notion that when lesser interests come to an end, the content of those interests will revert back to the owner.

The incidents of property are instantly recognisable as being subject to limitations. Different qualities may be spread between different types of property interest. Property is described as a “bundle of rights.”⁵⁰ Honoré implicitly acknowledges the fallacy that property ownership may be absolute. In practice, ownership has always been subject to some constraints, including the prohibition on harmful use. Honoré’s list broadly outlines the parameters of property

⁴⁷ Ibid, 116.

⁴⁸ Ibid, 118.

⁴⁹ Ibid, 120.

⁵⁰ Guerin, K. (2003), *Property Rights and Environmental Policy: A New Zealand Perspective*, New Zealand Treasury Working Paper 03/02, 3.

ownership in liberal societies in the “simple, uncomplicated case.”⁵¹ In this respect, the designation of a property interest in a thing raises *prima facie* assumptions as to the nature and treatment of our relations in the thing.⁵²

Our view of what property is translates into the legal treatment of property and is particularly evident in the treatment of private property. The protection of property has been described as one of the primary functions of the common law and judicial interpretation of statutes in New Zealand:⁵³

The common law has developed over centuries and is still developing to adapt to individual changing social conditions. *It is organised around a respect for individual dignity and individual possession of property...* This common law concern for individual rights permeates into the interpretation of statutes passed by Parliament. (emphasis added)

The legal devices of bailment, the presumption of compensation for statutory takings of property and the non-derogation principle are all judicial constructions designed to preserve private property interests. A recent example of the common law approach to private property is found in the Court of Appeal’s decision in *Ngati Apa v Attorney General*.⁵⁴ The Court held that customary property rights in the foreshore and seabed may continue to exist in law, notwithstanding significant regulation of that area of land by statutes including the RMA.⁵⁵ The Court held that the removal of property rights by regulatory statutes would have a “confiscatory effect.”⁵⁶

The concern of the judiciary to preserve the rights and characteristics of private property may translate into treatment of property by Parliament. The Legislation Advisory Committee (LAC) notes under the heading “Basic Principles of New Zealand’s Legal and Constitutional System”:⁵⁷

Legislation which affects such values, for example, legislation taking away a property right and providing that no compensation is to be paid, may also raise issues about the acceptability of the legislation. As Baragwanath J observed in *Cooper v Attorney-General* [1996] 3 NZLR 480 at 485, “Disregard of convention” will “bring pressure” upon the legitimacy of decisions made by elected representatives “in the sense of unchallenged public acceptance of the constitutionality of legislation...”

⁵¹ Waldron, above n26, 49.

⁵² Harris, J.W., (1996), *Property and Justice*, Oxford: Clarendon Press, 125.

⁵³ Legislation Advisory Committee (2001), *Guidelines on the Process and Content of Legislation: 2001 Edition*, Wellington: Ministry of Justice, <http://www.justice.govt.nz/lac/>, 45, accessed 26 August 2008.

⁵⁴ [2003] 3 NZLR 645 (Ngati Apa).

⁵⁵ *Ibid*, at [61] per Elias CJ and supported at [155] per Gault P and [170] per Keith & Anderson JJ.

⁵⁶ *Ibid*, at [61] per Elias CJ.

⁵⁷ Legislation Advisory Committee, above n54, 54.

The LAC advise that if a Bill proposes a taking of property, compensation should be considered. If compensation is not to be made available, the LAC suggest that the legislation make this quite clear.⁵⁸ A number of New Zealand statutes do provide compensation for confiscation of real or personal property.⁵⁹ Whilst recognising parliamentary supremacy, there is at least an expectation that Parliament will have particular regard to legislation that impacts on property rights.

Thus, legal treatment tends towards upholding the rights of individuals in property or compensating for the loss of property. There is no absolute conception of private property in New Zealand and some regulation of private interests for public ends is accepted.⁶⁰ The public interest in environmental protection is a legitimate reason for incursion on property rights in a planning and environmental context.⁶¹ The regulatory focus of the RMA may enable substantial incursion on existing property rights.⁶² The extent of the incursion on private property in the RMA has been criticised as a failure of Parliament to give sufficient weight to our “property rights heritage.”⁶³ Moreover, the RMA has been criticised for failing to recognise the crucial role that property rights play in planning law.⁶⁴ Advocates for the creation of property rights in environmental goods generally support a closer application of the traditional liberal approach to property rights in this context. As currently conceived, the RMA may not fully realise this ideal.

However, even in the strongly regulatory environment of the RMA, private property rights are a pivotal factor in decision-making and receive protection under the statute.⁶⁵ The nature of property and corresponding legal treatment suggest that incursion on recognised property interests is a sensitive and difficult issue. Common law property protections will not be

⁵⁸ Ibid, 55.

⁵⁹ See for example: Public Works Act 1950 Part V (compensation for land claimed for public works); Biosecurity Act 1993 s 162A (compensation for damage and destruction of property, or disposal of a persons goods when eradicating or managing any organism).

⁶⁰ See for example RMA ss 9-15, 58 for restrictions on land use.

⁶¹ Burrows, J., (2003), *Statute Law in New Zealand*, (3rd ed), Wellington: Lexis Nexis, 222.

⁶² *Faulkner v Gisborne District Council* [1995] 3 NZLR 662, 632: “common law property rights pertaining to use of sea or land are subject to it [the RMA].”

⁶³ Barton, B., “The Legitimacy of Regulation” (2002) 20(4) NZULR 364, 364. Referring to arguments in favour of greater recognition of property rights in the RMA: Joseph, P., “Property Rights and Environmental Regulation”, Resource Management Law Association Annual Conference, 4-7 October 2001, Wellington.

⁶⁴ Kirkpatrick, D., “Property Rights Do you have any?” (1997) 1(1) *NZJEL* 267, 281-282.

⁶⁵ Ibid. See also RMA ss 85(2) and (3) for measures that enable property rights to be exercised where the statute may otherwise restrict them.

removed without express legislative intent and statutes will not readily be interpreted as removing incidents or rights of property unless strictly required.⁶⁶

Recently, the application of property rights to environmental resources has become a pressing question. Property has been held out as a potential management framework for natural resources such as water and air. Equally, numerous permutations of statutory licences have been developed to regulate environmental use. In New Zealand, debate has arisen regarding the potential to privatise important natural resources, in particular freshwater resources.⁶⁷ This gives rise to questions regarding the appropriateness of a private property managerial framework in this new context.

2 Private Property and the Environment

2.1 *The tragedy of the commons*

The development of legal frameworks with explicit environmental ends is a relatively new phenomenon.⁶⁸ The goals of protection, conservation and sustainability are distinctly modern.⁶⁹ Attempts to regulate natural resources have been strongly influenced by the theory of the “tragedy of the commons.”⁷⁰ In Hardin’s famous account, he tells a parable of an area of land used for cattle grazing.⁷¹ Individual cattle ranchers are able to introduce extra cattle to the field and reap the benefits. However, the strain that the additional cattle put on the land is shared amongst all who use the field. The cattle ranchers are locked into a system that incentivises overuse of the resource and results in “fouling our own nest.”⁷² By analogy, the tragedy illuminates why individuals are faced with incentives to pollute eco-systems over which no managerial control is exercised. As an explanation for scarcity and limited assimilative capacity in resources, the tragedy of the commons has been influential.⁷³ The

⁶⁶ Burrows, above n61, 222. See for further explanation of current approach: *Springs Promotion Ltd v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846 at [60-63].

⁶⁷ See for example: Fox, M., *Dispute over water-trading scheme*, <http://www.stuff.co.nz/4671013a7693.html> accessed 13 September 2008.

⁶⁸ Coyle, S. & Morrow, K., (2004), *The Philosophical Foundations of Environmental Law: property, rights and nature*, Oxford: Hart Publishing, 1-17.

⁶⁹ *Ibid.*

⁷⁰ Hardin, G., “The Tragedy of the Commons” (1968) 164 *Science* 1243.

⁷¹ *Ibid.*

⁷² *Ibid.*, 1245.

⁷³ Cole, above n4, 278-280.

tragedy demands a property based solution because property ownership gives a person, persons or government the power to control resource use.⁷⁴

The tragedy is one of a lack of discernible ownership and control. The description of the problem as a tragedy of the *commons* is misleading; the tragedy is more appropriately viewed as a failure to enclose a resource.⁷⁵ The tragedy arises when the resource is open access, rather than where ownership is held in common.⁷⁶ Although the tragedy is often cited as favouring the creation of private property in environmental resources,⁷⁷ it is most appropriately viewed as neutral with respect to the nature of the property system that should result.⁷⁸

The tragedy is also useful for illustrating a dimension of environmental management that gives rise to difficulties when considering which property system to apply. In managing environmental resources, our goals are broader than the justifications for the creation of private property. Whilst private property in liberal societies is designed to facilitate individual choice and economic freedom from state intervention, environmental management has the additional goal of sustaining resources that are important to the community. An important issue is whether it is appropriate to apply property concepts to environmental resources when one of the dominant purposes of management is to sustain the object of property itself.

Thus, environmental scarcity and pollution may be addressed in a range of different ways. A private property approach is one available solution. However, the application of a private property response is not a *fait accompli*. In light of the managerial choices available for natural resources, it is important to consider the arguments made both in favour, and against, the creation of private property rights in the environment.

⁷⁴ Yandle, B. & Morriss, A.P. "The Technologies of Property Rights: Choice Among Alternative Solutions to the Tragedy of the Commons" (2001) 28 *Ecology L.Q.* 123, 124.

⁷⁵ Cole, above n4, 278.

⁷⁶ Ibid; Yandle & Morriss, above n74, 130-133.

⁷⁷ See for example Cox, S., "No Tragedy on the Commons" (1985) 7 *Environmental Ethics* 32, 49-61.

⁷⁸ Cole, above n4, 279.

2.2 Arguments in favour of a private property solution

Normative arguments in favour of private property interests in environmental resources have come from a range of disciplines. It is argued that possession of a property interest is an appropriate recognition of the importance of the resource and settles the question of control.⁷⁹ Moreover, it has been suggested that the establishment of a private property solution sharpens questions of entitlement. A practical example has been seen in New Zealand. When New Zealand's fisheries were made subject to a private property regime, Māori claims to the resource became a pressing legal and political issue.⁸⁰ The end result was a significant reallocation of fisheries quota to accommodate Māori interests.⁸¹ Proponents suggest that by bringing questions of entitlement to the fore, private property solutions foster public participation in environmental policy.⁸² Along a similar line, it has been argued that the creation of a property interest facilitates an affinity with the resource itself and an altruistic interest in its conservation.

The general theme is that individuals make better managers of environmental resources than governments.⁸³ This position has a clear relationship to public choice theory and neo-utilitarian thought.⁸⁴ The notion of efficient use is central.⁸⁵ The underlying rationale is a mistrust of the ability of government to manage in the public interest and a clear preference for individual choice over regulation. The validity of this position is difficult to quantify and has been criticised for assuming individual desire to preserve resources.⁸⁶

In addition, some economists have argued that persons with a strong property interest in a resource have an incentive to preserve the resource in order to recognise its full value.⁸⁷ As property rights are alienable and exist *ad infinitum* the ability to generate income will be increased if the capital, i.e. the resource, is sustained. In theory, this reverses the perverse

⁷⁹ Byrne, J.P. "Property and the Environment: Thoughts on an Evolving Relationship" (2004) 28 Harv. J. L. & Pub. Pol'y 679, 679-680.

⁸⁰ See for general summary of legal & political issues surrounding indigenous fishing rights in New Zealand: Boast, R., "Maori Fisheries 1986-1998: a reflection" (1999) 30(1) VUWLR 111; McHugh, P., "The legal basis for Maori claims against the Crown" (1988) 18 VUWLR 1.

⁸¹ *Ibid.*

⁸² Cole, above n4, 284. Referring to arguments made by T.L. and Leal, D.R. (1991) *Free Market Environmentalism*, Boulder: Westview Press.

⁸³ *Ibid.*

⁸⁴ Cole, above n4, 281.

⁸⁵ Efficiency: 'maximising use' Tietenberg, T., (1994), *Environment and Natural Resources Economics*, (3rd ed), New York: Harper Collins, 22.

⁸⁶ Byrne, above n79, 680-681.

⁸⁷ Guerin, above n50, 21-22.

incentive identified by the tragedy of the commons. The protection of rights in property is consistent with conservation goals as individual choices will align with positive environmental outcomes. This position is not without detractors – where the benefits of immediate use outweigh long term investment, recourse to purely economic incentives will not guarantee sustainability.⁸⁸ Most property advocates would acknowledge that some environmentally driven limitations on free market trading are appropriate.⁸⁹ One suggestion is the creation of a ‘cap and trade’ system predicated on property rights.⁹⁰

Other economic arguments have been posited in favour of a private property solution. Clear identification of ownership may enable social costs associated with resource use to be borne by the owner.⁹¹ Further, where rights are certain, the persons with the greatest need for the resource will end up in possession of the right through the operation of market forces.⁹² These arguments are predicated on a legal justification for private property; the creation of legal certainty.

In part, this certainty arises from the perceived permanence of property rights. This point has been articulated by the High Court of Australia in *Georgiadi v Australian and Overseas Telecommunications Corporation*:⁹³

...a right which has no existence apart from a statute is one that, of its nature, is susceptible to modification or extinguishment. There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course.

Notwithstanding Australia’s differing constitutional context; the statement highlights the argument that rights dependant solely on statutory verification are inherently less stable than property. The status of statutory property rights is in part independent of the instrument that created them. The protected position afforded to property rights at common law and in statutory interpretation reduces the likelihood of modification or extinguishment.⁹⁴ Further, it

⁸⁸ Wallace, above n8, 61.

⁸⁹ Nyce, above n1, 137-138.

⁹⁰ Ibid, 138.

⁹¹ Byrne, above n79, 680.

⁹² Guerin, above n50, 5-7. This argument is associated with the idea that trading in known legal instruments, such as property instruments, will reduce transaction costs and so encourage efficiency.

⁹³ (1994) 179 CLR 297 at 305-306.

⁹⁴ See discussion above at A1.4: The LAC guidelines set out that Parliament ought to be particularly mindful of legislating in a way that extinguishes property rights and ought consider compensation for such legislative measures. In contrast, statutory licences have been described as: “functional legislative responses to changing social expectations rather than predictable property instruments”, Scott, A., “Property Rights and Property Wrongs” (1983)16 *Canadian Journal of Economics* 555.

impacts on treatment of the interest when making decisions under statute. In contrast, statutory licences have no independent qualities. Thus, verification of an entitlement as a property instrument may inspire confidence for the owner's planning purposes.

Additionally, proponents argue that property rights provide certainty in the sense of foreseeable legal treatment. Property law is said to be coherent and accessible. The treatment of property instruments is predictable, as the gradual development of principles and doctrines has given rise to a clear body of precedent. In contrast the new and unknown nature of a statutory licence may create ambiguity in legal treatment.⁹⁵

New or novel property interests which are obscure, undeveloped or incapable of conforming to orthodox identity and content principles produce confusion and uncertainty and may not satisfy the pre-conditions for property verification.

This criticism of statutory licences is more persuasive in cases where the statutory specification of incidents is incomplete. Alternately, it may arise in circumstances where the need to provide for the treatment of the instrument has not been anticipated. The argument is that by creating a private property right predictable legal treatment will be guaranteed, thus encouraging investment, innovation and facilitating trade in the resource.⁹⁶

The arguments in favour of private property in natural resources are a mixture of philosophical ideas and more pragmatic notions about incentivising environmentally advantageous use. Each proposition identified is contestable. The suggestion is that within the confines of basic regulatory limits,⁹⁷ management decisions regarding natural resources should be left to individual owners.

⁹⁵ Hepburn, S., *Carbon Rights as New Property: Towards a Uniform Framework*, Seminar Paper, Presented at ANU College of Law Seminar Series, 21 August 2008, in relation to concerns expressed by the High Court of Australia in *Australian Capital Television Pty. Ltd v The Commonwealth* (1992) 177 CLR 106 at 165-166.

⁹⁶ Byrne, above n79, 679-680.

⁹⁷ For example, regulation designed to facilitate exchange of rights efficiently and with limited environmental impact: Guerin, above n50, 17.

2.3 Arguments against a private property solution

One concern associated with a shift to property rights is that this will obscure the public qualities of natural resources. Wallace identifies a variation of this concern in her critique of the Fisheries Act 1996.⁹⁸ She suggests that the use of private property rights has facilitated industry capture of fisheries, to the exclusion of other stakeholders.⁹⁹ This results in an ethos of use rather than sustainability to the detriment of community conservation aims. The overarching concern is that the identification of a property right in a natural resource will give the property holder an unwarranted elevated status.¹⁰⁰

This concern is not merely one of perception. Property treatment may be inappropriate in an environmental context. This manifests most often in the ongoing debate regarding the provision of compensation for takings of property.¹⁰¹ Specifically, if compensation is payable for restrictions on a property right in an environmental context, actions to protect the resource may be less likely due to the financial disincentive created.¹⁰² The takings concern is most acute in jurisdictions that have constitutional property protections.¹⁰³ However, an illustration of the general issue has arisen in New Zealand recently with the application of the non-derogation principle to resource consents under the RMA.¹⁰⁴

A further critique argues that it may be possible to achieve efficient and sustainable use of a resource through non-property instruments such as licences. The idea is that the use of licences will avoid the privileged connotations of property whilst providing for legal certainty and economic use. Hepburn argues in the context of the creation of statutory licences for carbon trading:¹⁰⁵

Endorsing the carbon right as a new statutory interest is a preferable alternative as it provides greater scope for particularized recognition and regulation of the interest... statutory

⁹⁸ Wallace, above n8.

⁹⁹ Ibid, 46-50.

¹⁰⁰ Ibid, 47.

¹⁰¹ Barton, above n63; c.f. Joseph, P., "The Environment, Property Rights, and Public Choice Theory" (2003) 20(4) NZULR 408.

¹⁰² Australian National Emissions Trading Taskforce, *Possible design for a national greenhouse gas emissions trading scheme: Final framework report on scheme design*, December 2007, [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/\\$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf), accessed 27 September 2008.

¹⁰³ For example: Constitution of the United States of America, 5th Amendment.

¹⁰⁴ See discussion below at B.3.2.

¹⁰⁵ Hepburn, above n95, 167.

acknowledgement of the carbon right as a new incorporeal land interests, unaligned with existing common law forms, is an appropriate progression.

The argument is that a balance can be struck between providing certainty for the holder of the licence and the need to ensure particularised treatment. This will enable appropriate incursion on the interests of users to protect the resource.

Thus, the concerns of those who favour a regulatory response to environmental problems fall into two categories. Firstly, a concern that conferral of property rights on individuals will result in differentiated treatment between stakeholders in the resource. Secondly, a concern that the application of property law will detract from the goal of environmental preservation.

2.4 Summary of arguments for and against property rights in the environment

This outline of the respective arguments for and against the creation of private property in the environment is generalised and each proposition is contentious. We may characterise the issues raised in terms of three desirable outcomes. Environmental laws aim to achieve “environmental effectiveness, economic efficiency and equity.”¹⁰⁶ Each of the arguments identified reflects some or all of these goals.

Much of the debate concerning the applicability of private property rights to environmental goods has taken place in jurisdictions that have constitutional protections for private property¹⁰⁷ or routinely use market-based mechanisms to allocate scarce resources and address pollution.¹⁰⁸ However, the debate is becoming increasingly applicable to New Zealand as we adopt explicitly private property approaches to resource management.

The RMA provides an obvious target for a discussion regarding the appropriateness of property rights in environmental management. The RMA plays a dual legislative role in that it both manages private land and creates new and important economic relationships with natural resources. In respect of its role in managing water, air and the coastal marine area, the RMA expressly denies the creation of property rights.¹⁰⁹ The appropriateness of this

¹⁰⁶ Barton B., *Emissions Trading: Legal Questions, Energy Implications*, Conference Paper, presented at Energex 2000: 8th International Conference.

¹⁰⁷ For example the United States of America: above n104.

¹⁰⁸ For example water management in Australia has become predominantly market-based in recent years: New South Wales Water Management Act 2000 Part II; Queensland Water Act 2000 Part 6.

¹⁰⁹ RMA, s 122(1).

approach is at the forefront of recent debate regarding methods of environmental management.

B. NATURE OF RESOURCE CONSENTS UNDER THE RESOURCE MANAGEMENT ACT 1991

1. Introduction to Resource Consents and the Resource Management Act 1991

Chapter One identified some perceptions and treatment of private property in New Zealand. Chapter Two will focus on the RMA with a view to identifying the nature of entitlements granted under the statute and some difficulties with legal treatment that have arisen.

The Resource Management Act 1991 (RMA) is a pivotal piece of environmental and social legislation. It is the primary legislative control on use of important resources such as freshwater, air and the coastal marine area. The goal is sustainable management of these resources.¹¹⁰ In this context, sustainable management includes managing “use, development and protection” of resources in a fashion that enables the holistic development of people and communities; whilst safeguarding and sustaining the environment.¹¹¹ The purpose of the RMA is thus very broad; it encompasses all three goals of environmental protection, economic efficiency and equity.¹¹² The purpose imports a flexible discretion into decision-making under the Act.¹¹³

The RMA provides a number of mechanisms to achieve this goal. Regulation of use is undertaken through the statute, hierarchical planning documents and a system of consents.¹¹⁴ For example, the ability to take and use water is governed specifically by ss 14 and 15 of the RMA; may be governed by any relevant national environmental standard¹¹⁵ or national policy statement¹¹⁶ and the terms of any regional policy statement¹¹⁷ or plan.¹¹⁸ In addition, persons have the ability to apply for a resource consent to obtain permission to do something that would otherwise result in a contravention of the Act’s restrictions on use of the coastal marine area, water and air.¹¹⁹

¹¹⁰ RMA, s 5(1).

¹¹¹ RMA, ss 5(2), (2)(a), (2)(b), (2)(c).

¹¹² Section 5 is supplemented by the principles found in ss 6-8.

¹¹³ Fuller, P., “The Resource Management Act 1991: ‘An Overall Broad Judgment’” (2003) 7 *NZJEL* 243, 243.

¹¹⁴ RMA, Parts 2 – 6.

¹¹⁵ RMA s 54: regulations prescribing national environmental standards.

¹¹⁶ RMA s 58(1): may state national policies or objectives in relation to the resource.

¹¹⁷ RMA s 59: to assist achieving the purpose of the Act by providing an overview of the resource management issues of the region and policies and “methods to achieve integrated management of the natural and physical resources of the whole region.”

¹¹⁸ RMA s 63(1): to assist regional councils to carry out their functions under the Act.

¹¹⁹ RMA ss 87(a)-(e).

Whilst allocation decisions should, in principle, be governed by the hierarchy of planning documents; in practice the grant of consents has determined priority of access to resources governed by the RMA.¹²⁰ In respect of the consent mechanism, the role of property law is complex. As consent holders have an interest in knowing what rights they have in a resource, a pivotal question is what entitlements are given by the grant of a consent and are they property rights.¹²¹

2. The Statutory Nature of Resource Consents

2.1 Resource consents and property rights

The starting point for determining the nature of a resource consent is s 122(1) of the RMA. Section 122 falls under the heading “Nature of resource consent”:

122 Consents not real or personal property

(1) A resource consent is neither real nor personal property.

The remainder of s 122 sets out circumstances where treatment of a consent “as if it were personal property” is appropriate: for instance for the purposes of bankruptcy,¹²² granting a charge¹²³ or for the purposes of the Personal Properties Securities Act 1999 (PPSA).¹²⁴ Section 122 of the RMA is supplemented by a number of provisions in of Part 6 of the RMA. The most relevant of these set out the criteria for determination of consent applications,¹²⁵ duration,¹²⁶ protections for existing consent holders when applying for a new consent,¹²⁷ procedures for review of consent conditions,¹²⁸ call in procedures¹²⁹ and conditions for transfer.¹³⁰

¹²⁰ Milne, P., “Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*” [2005] *Resource Management Theory and Practice* 146, 155.

¹²¹ Ibid, 151-152; Grinlinton, above n43; Barton, B., *Private Property Rights and the Public Interest*, Resource Management Law Association Conference Paper, 30 May 2007, Napier, 13.

¹²² RMA, s 122(2)(b).

¹²³ RMA, s 122(3).

¹²⁴ RMA, s 122(4).

¹²⁵ RMA, s 104.

¹²⁶ RMA, s 123(d).

¹²⁷ RMA, ss 124-124C.

¹²⁸ RMA, ss 128-132.

¹²⁹ RMA, ss 140-150AA.

¹³⁰ RMA, ss 135- 137.

There is thus a statement that the law of real and personal property is not to apply to consents. Yet, we have provisions that mimic property treatments. It has been argued that the RMA is not a complete code and that the common law of property may supplement the statutory directives as to appropriate treatment.¹³¹ The implication is that s 122(1) precludes the application of the law of *real* and *personal* property, not general property law.¹³²

It is difficult to see what scope s 122 leaves for this interpretation. Attaching general property law to the s 122 framework would create a right uncomfortably similar to a real or personal property right. Such a reading necessarily treats s 122 as creating a statutory property right that attracts property law, notwithstanding a bar on identification with common law forms of property. This approach strains the language of s 122 and leaves little room for the operation of s 122(1).

Another suggestion has been that whilst s 122(1) denies the applicability of the law of property, it nonetheless allows for treatment of a consent as a right analogous to a property right.¹³³

If resource consents are akin to property... treating them as such may not matter and may indeed lead to clearer thinking, so long as their statutory provenance and incidents are remembered.

The risk in this methodology is the confusion of property ideas and the property-like treatments in the statute. If Parliament intended in s 122(1) to create a “clean slate”¹³⁴ from which to build a new form of entitlement, reasoning by analogy to existing forms of right is inappropriate.

2.2 *Resource consents as a statutory licence*

A more plausible reading is that s 122(1) precludes the recognition of property qualities in consents. Thus consents are a form of statutory licence.¹³⁵ The language used to describe consents in the statute is consistent with this interpretation.¹³⁶ The operation of property qualities, or attempts to analogise with property, would seem contrary to the intention of

¹³¹ *Armstrong v Public Trust* [2007] 2 NZLR 859. Note also the reference to consents as having property qualities in a recent Court of Appeal decision: “[resource consents] are property which is neither real nor personal property” *Cavell v Thornton* [2008] NZCA 191 per Baragwaneth J at [43]. See above at A1.3 for discussion of the property connotations of the term ‘statutory property’.

¹³² *Ibid.*

¹³³ Williams, I., “The Waitaki River” [2005] NZLJ 177, 179.

¹³⁴ *Ibid.*

¹³⁵ See above at A1.3 for general description of statutory licences.

¹³⁶ RMA s 87. “resource consent means...a consent to do something that would otherwise contravene...”.

Parliament. Consents are properly seen as being governed by the RMA, any other relevant statute¹³⁷ and by any general law concepts that do not derive from the law of property.¹³⁸ The approach set out by Justice Potter in *Hume v Auckland Regional Council*¹³⁹ is appropriate:¹⁴⁰

The appellants' concerns with private property rights... lead to contentions which are not logical... in light of the purpose of the Act. For example s 122 which declares in subs (1) that a resource consent is neither real nor personal property, does not then in the subsections that follow, establish instances when consents will be treated as giving real or personal property rights to their holder. The exceptions merely reflect some of the incidences of real or personal property rights... but they do not confer property rights.

This statement, though accurate, highlights new problems. The RMA has some crucial gaps when it comes to the legal treatment of consents. One example is the lack of a clear method in the RMA for determining allocative priority where there exist competing users of a resource. This leaves a question as to how to treat a consent consistently with its statutory status where the statute itself is silent on the correct treatment. In addition, the bar on recognition of a property right in consents sits uncomfortably with some of the strong statutory protections for consent holders. These protections include the ability of a consent to continue to exist on the death of a holder; or the recently enacted provisions preserving the position of existing consent holders when applying for new consents.¹⁴¹ This leads to difficulties in characterising the nature of the rights that pass with consents. The resulting case law illustrates some limitations in the incomplete specification of consents and some growing concerns about the application of property law to consents.

3. The Judicial Treatment of Resource Consents

3.1 *Armstrong v Public Trust*¹⁴²

Armstrong raised a factually simple but legally vexing issue. In question were coastal permits issued in the names of two people, a father and son, for the purpose of erecting whitebait stands.¹⁴³ The father died and a dispute arose as to who became the lawful holder of the consents. The son applied to the High Court for a declaration that he assumed sole ownership

¹³⁷ See for example particular treatment of consents in the Income Tax Act 2004 including: ss YA1, DB19, CB28.

¹³⁸ Grinlinton, above n42, 37.

¹³⁹ [2002] NZRMA 49 (Hume).

¹⁴⁰ Ibid, at [39].

¹⁴¹ RMA ss 122(2)(a), 124-124.

¹⁴² [2007] 2 NZLR 859 (Armstrong).

¹⁴³ Ibid at [1].

as a joint tenant by virtue of the common law principle of survivorship.¹⁴⁴ The Public Trust, acting on behalf of the deceased's daughter, argued that s 122(1) is a barrier to the operation of the common law of property so the right of survivorship does not apply to resource consents.¹⁴⁵ Section 122(2)(a) of the RMA provides for the vesting of a consent in the representative of the holder on the holder's death "as if the consent were personal property." However, a "practical problem" arose, as s 122(2)(a) does not address circumstances where a consent has been issued in the names of more than one person.¹⁴⁶

In his decision Fogarty J states that s 122(1) can not be read as removing all property rights in consents as such an interpretation would be inconsistent with the remainder of s 122.¹⁴⁷ He suggests Parliament has provided for property rights where they are set out in the statute or are required "by necessary implication."¹⁴⁸ However, as was identified in *Hume*, the remainder of s 122 does not pass property rights in consents, it specifies circumstances where property rights are to be imitated.¹⁴⁹ The suggestion that s 122 allows for *implied* property rights is counter-intuitive. It does not leave a clear function for s 122(1).

Fogarty J identifies the purpose of s 122(1) as the prevention of the transfer of consents "except as is provided for in this statute."¹⁵⁰ He refers to the positioning of s 122 in Part 6 of the Act, near in placement to those provisions that fall under the subtitle "Transfer of Consents."¹⁵¹ However, s122 does not fall under this subheading. Part 6 of the RMA is entitled "Resource Consents" and s 122 falls under the subheading "Nature of consents." This is a logical placement for denying the applicability of all property rights, including implied property rights, in consents.

There is no reason to suggest that s 122(1) has a stronger connection with transfer provisions than to any other provision in Part 6. Part 6 encompasses provisions addressing duration, decision-making on applications and review of consent conditions.¹⁵² Section 122 appears as the first provision following those sections in Part 6 that address the creation of consents.¹⁵³ The Part 6 provisions that follow s 122 set out the legal treatment of an existing consent,

¹⁴⁴ Ibid.

¹⁴⁵ Ibid at [9].

¹⁴⁶ Ibid at [13].

¹⁴⁷ Ibid at [18].

¹⁴⁸ Ibid.

¹⁴⁹ *Hume*, above n139 at [39].

¹⁵⁰ *Armstrong*, above n142 at [19].

¹⁵¹ Ibid at [19].

¹⁵² Part 6, RMA.

¹⁵³ RMA s 87AA – 121.

including but not limited to questions of transfer.¹⁵⁴ This position implies that s 122(1) sets out the general nature of consents, rather than specifically addressing the transfer of consents.

Thus, Fogarty J minimised the effect of s 122(1). His reasoning led to the conclusion that the right of survivorship applied. Fogarty J argued that as the RMA allows for the transmission of a consent on the death of a sole holder, there is no reason why a similar right ought not exist for two holders.¹⁵⁵ As s 122(2)(a) “can bear this construction” the common law has not been supplanted by the statute.¹⁵⁶ Fogarty J concluded:¹⁵⁷

This Court will not find that the legislature has so intervened to displace the common law position as to joint tenancy, by a side-wind... To the extent that it does in fact allow property rights under the RMA, the common law as to real and personal property will apply, subject to constraints in the specific provisions of the statute.

The statement is reminiscent of property rhetoric; it implies that statutes will only remove the common law of property with very specific language.¹⁵⁸ The clear suggestion is that consents should receive property treatment. This approach is arguably incompatible with s 122(1).

However, even if Fogarty J is correct and resource consents contain property rights, the judgment does not fully explore how property law would address this circumstance. Fogarty J placed emphasis on the common law of property; notwithstanding a strong *prima facie* argument that equity demands a different outcome. Fogarty J acknowledged that the principle of survivorship was “controversial” and that the law of equity was “hostile” to it.¹⁵⁹ However, where an item of property is owned by a partnership, there is an equitable presumption that the property is held in common in equal shares.¹⁶⁰ Where valuable whitebait permits are held by two persons, it is possible their enterprise was a partnership at law.¹⁶¹ The judgment gives a false impression as to the certainty in this area of property law.

Finally, Fogarty J may have failed to fully consider statutory direction on the nature of dual consent holders rights. Grinlinton argues that s 135(1), which states a consent holder may transfer “the whole or any part” of their interest, is an indication that dual consent holders

¹⁵⁴ An exception is the provisions that relate to applications of national significance and certificates for existing use: ss 139 – 150AA. However, these have no material effect on the general scheme of Part 6.

¹⁵⁵ *Armstrong*, above n142 at [21].

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at [23].

¹⁵⁸ Compare with similar language in the *Ngati Apa* decision: Above n55.

¹⁵⁹ *Armstrong*, above n142 at [22].

¹⁶⁰ *Ramage v Alpers* [1999] BCL 949, 20.

¹⁶¹ Partnerships Act 1908 ss 3, 4, 5, 23(2); *Clark v Libra Developments* [2007] 2 NZLR 709: profit-sharing is *prima facie* evidence of partnership and no written agreement is needed at [149].

posses an equal share in the consent “in the nature of a tenancy in common.”¹⁶² The provision does not resolve the issue. It may be referring to cases where consent conditions specify the nature of the ownership; or may only apply where consent holders transfer the consent during their lifetime. Nonetheless, the provision is an indicator of parliamentary intent that is not fully explored.¹⁶³ Fogarty J’s recourse to property law may have detracted from focus on the statute itself.

Arguably, the decision reached by Fogarty J is incorrect.¹⁶⁴ It is predicated on the applicability of the common law of property to consents. However, the judgment is illustrative of the difficulties with an incomplete statutory licence. The removal of a property law approach by s 122(1) does not leave a clear directive on how to treat a consent on the death of one of several holders. It may even be possible that the consent does not survive the death of one holder.¹⁶⁵ Here, strained statutory interpretation was used to enable the application of property law. The appeal of this familiar legal method is obvious in cases where the statute does not provide a ready answer.

3.2 *Aoraki Water Trust v Meridian Energy*¹⁶⁶

The *Aoraki* decision brought difficulties surrounding the nature of resource consents to the fore.¹⁶⁷ *Aoraki Water Trust* applied to the High Court for a declaration in respect of the water in Lake Tekapo.¹⁶⁸ *Meridian Energy* held current resource consents to take more than the volume of water the lake supported. *Aoraki* applied for a declaration that existing consents “do not limit” the ability of further consents to be issued, notwithstanding an adverse impact on the initial consent.¹⁶⁹ Similarly, they sought a declaration that the relevant consent authority retained the discretion to grant further consents, or to provide for further allocation in the regional plan.¹⁷⁰

The judgment considered the most obvious gap in the RMA in respect of consents: the lack of an allocative mechanism for determining disputes between competing consent holders. A

¹⁶² Grinlinton, above n42, 38.

¹⁶³ Fogarty J did note that s 135(1) formed part of the submission of the Public Trust: *Armstrong*, above n142 at [7 – 8]. However, the provision was not discussed in his analysis of the issues.

¹⁶⁴ Grinlinton, above n42, 39.

¹⁶⁵ *Hinde McMorland & Sim*, above n32, 18.001 & 18.004.

¹⁶⁶ [2005] 2 NZLR 268 (*Aoraki*).

¹⁶⁷ See Nyce, above n1; Milne, above n120; Grinlinton, above n42, 37.

¹⁶⁸ *Aoraki*, above n166 at [3].

¹⁶⁹ *Ibid* at [20].

¹⁷⁰ *Ibid*.

pivotal issue is whether consents grant exclusive rights to take and use. This is a concern that is acute where investments require long term planning and capital outlay, or where a resource is fully allocated.

One method of resolving this issue would be to specify on the face of a consent that it may need to be modified to accommodate future applicants.¹⁷¹ However, this practice did not find favour prior to the *Aoraki* decision. This may reflect a failure to anticipated future scarcity in resources, or an unwillingness on part of consent authorities to “pick winners” where the statute provides little practical guidance as to how to do so.¹⁷²

The Court dealt with the issue in two parts. Firstly, the judgment addressed the “legal nature and effect” of the consents held by Meridian Energy.¹⁷³ The second part of the judgment considered the role of consents where a resource is fully allocated.¹⁷⁴ The first aspect of the case necessarily required a consideration of the property nature of consents and an exploration of the effect of s 122(1).

Aoraki’s application was refused. The Court found that the Act required a deliberate order of priority between users of a resource.¹⁷⁵

The sustainable management concept underpinning the Act revolves around the management of resources as opposed to leaving their fate to chance.

The Court stated that the RMA created a new form of entitlement in consents.¹⁷⁶ Consents are a form of “statutory resource licensing system.”¹⁷⁷ The Court thus acknowledged s 122(1).¹⁷⁸ The Court went on to reject the notion that a consent should be treated as though it is a bare licence. This would lead to “no enforceable order of preference or priority” between users.¹⁷⁹ Thus, priority ought to be determined temporally.

¹⁷¹ Hayward, A., “Freshwater Management: Water Markets” (2006) 10 *NZJEL* 215, 246: This has occurred with increasing frequency with consents issued in the aftermath of the *Aoraki* decision. However, this approach has no impact on existing consents and may result in an inconsistent, *ad hoc* approach to incursion on consents.

¹⁷² Ministry for the Environment and Ministry of Agriculture and Fisheries, (July 2005), *Testing the Water: Report on the Sustainable Water Programme of Action Written Submissions*, Document Number 677.

¹⁷³ *Ibid* at [21].

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at [28].

¹⁷⁶ *Ibid* at [29].

¹⁷⁷ *Ibid* at [30].

¹⁷⁸ *Ibid*. Earlier in the judgment the Court explicitly acknowledged s 122(1) (at [26]).

¹⁷⁹ *Ibid* at [30].

The Court's concern to provide for the deliberate management of resources is legitimate. However, the assumption that such an end requires a 'first in first served' approach to consents remains contestable.¹⁸⁰ In order to establish the legitimacy of a first in first served approach to allocation, the Court drew upon common law principles to show that consents grant rights of exclusive access to the resource.¹⁸¹

(a) the non-derogation principle¹⁸²

The Court held that Part 6 of the RMA creates in a resource consent:¹⁸³

... a licence *plus a right to use the subject resource*. In that sense it has similarities with a *profit à prendre*. (emphasis added).

This description enabled the application of the non-derogation principle. The Court stated that the non-derogation principle prevents the grantor of a right in property from taking actions that derogate from the rights given to the grantee. The Court said the non-derogation principle is applicable to all relationships that confer a right in property.¹⁸⁴

The non-derogation principle derives from private law. It has uncertain contours. Although the principle originates with property instruments, it may be applicable where a grant conveys something in the nature of property.¹⁸⁵ It recognises that a grantor may not do something inconsistent with an initial grant; it can be viewed as a specific application of the *contra proferentem* principle. The application of principle in a public regulatory context is from the outset somewhat removed from its private law origins. At a minimum, exclusivity must be clearly implied in the grant of a consent in order to invoke the principle.

The Court identified four indicators of exclusivity.¹⁸⁶ The language of 'granting' a consent is suggestive of a right created by the Crown.¹⁸⁷ In addition, the set term of the consent and the

¹⁸⁰ See discussion in this section regarding the effect of 'first in first served' when combined with exclusivity on sustainable management goals. The Supreme Court recently granted leave to hear an appeal on this issue: *Ngai Tahu Property Ltd v Central Plains Water Trust* [2008] NZSC 49.

¹⁸¹ To the extent specified in the consent: *Aoraki*, above n166, [28-31].

¹⁸² *Ibid* at [34].

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid*. Interesting, the Court denied that the non-derogation principle arise from an implied obligation of fair dealing, instead preferring to characterise the principle as directly related to the property nature of the resource in question.

¹⁸⁵ *Johnston & Sons Ltd v Holland* [1988] 1 E.G.L.R. 264 per Nicholls L.J.

¹⁸⁶ *Aoraki*, above n166 at [34].

¹⁸⁷ *Ibid*.

right to take property suggest exclusivity.¹⁸⁸ Finally, a consent is assignable to the person who owns or occupies the site for which the consent is granted.¹⁸⁹ The Court stated these features are “determinative” of the intention to allocate priority access to the resource.¹⁹⁰

However, these observations do not provide a complete picture of Part 6 of the RMA. Exclusivity is an important distinguishing feature between property and non-property interests; reading this quality into consents is at odds with the s 122 structure of expressly stating when property-like treatment is appropriate.¹⁹¹ The assignable nature of consents is in fact a very limited right of transfer and consents for damming and diverting water do not, unlike land use consents, “attach to the land to which each relates.”¹⁹² Part 6 also sets out that the potential for cancellation or lapse through lack of use is a feature of a consent; consents do not of themselves guarantee access to the resource.¹⁹³ Furthermore, other statutory instruments in New Zealand use the language of a grant when conveying non-exclusive interests.¹⁹⁴ The RMA further describes consents as a permit making lawful that which is unlawful; language that is suggestive of a permission and not a right.¹⁹⁵ If a consent is characterised as conveying a statutory permission to use or take a resource, the application of the non-derogation principle is plainly inappropriate. Permissions attract no presumption of exclusivity, nor any other ‘rights’ from which to derogate.¹⁹⁶

Similarly, the description of a water permit as a right to take *property* is problematic. Milne argues that there is no property in water in its natural state, throwing into question the appropriateness of a non-derogation analysis when no issue of rights in property arise on the facts.¹⁹⁷ The Court’s acceptance of the statement:¹⁹⁸

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, [35].

¹⁹¹ See above at B2.2.

¹⁹² RMA s 136(1), c.f. s 134(1). This right of transfer applies to consents for damming or diverting water only and expressly does not allow transfer to any other person. Transfers of other water use consents are generally only permissible in accordance with regional plans (s 136(2)(a)) and other consents face similar transfer restrictions: ss 135, 137.

¹⁹³ RMA ss 125(1) (lapse for failing to use consent within 5 years of grant); s 126(1) (cancellation for 5 years of non-exercise).

¹⁹⁴ Conservation Act 1987 s 17Q specifies the power to “grant” a permit which is defined in opposition to an interest in land (s 2); a permit may be granted for a term not longer than 5 years: s 17Z(2).

¹⁹⁵ RMA s 87.

¹⁹⁶ Hinde McMorland & Sim, above n32, 18.004.

¹⁹⁷ Milne, above n120, 158-159; c.f. s 121 Water and Soil Conservation Act 1967 & s 354(1)(b) RMA. The finding that there is no property in water removes any question of analogy to a *profit à prendre*: Grinlinton, above n42, 38-39.

¹⁹⁸ *Aoraki*, above n166 at [38].

The doctrine [of non-derogation] is based not upon an implication of reasonable dealing but an implied obligation on the grantor not to act in such a way *as to injure property rights granted by him to the grantee*. (emphasis added).

suggests a misinterpretation of the rights conveyed in a consent. The statement is not predicated on an analysis of the true nature of consents as specified by statute. It is inconsistent with s 122(1) which intends no property to pass in consents.¹⁹⁹

A stronger rationale for finding exclusivity is the statutory pattern for interference with existing consents only for “very limited purposes.”²⁰⁰ An obvious example is found in the procedure for changing consent conditions, in which case the holder is treated as though they were applying for a new consent with the requisite procedural protections.²⁰¹ This argument has been strengthened with ss 124-124C coming into force.²⁰² Section 124 enables an existing holder to continue operating under their consent whilst apply for a new consent. Sections 124B and 124C ensure applications made by existing consent holders are given priority for determination over others.²⁰³

Yet, even this reasoning is contestable. There are similarly strong protections for existing holders when new consent applications are made for the subject resource.²⁰⁴ The statute provides for pre-hearing meetings and mediation for particularly difficult applications.²⁰⁵ There is a clear discretion in s 104(1)(c) for the decision-maker to consider potential effects on existing consent holders. In cases such as *Aoraki*, where the existing consent holder has a substantial investment and very generous consents, the consent holder would clearly have legitimate expectation of being taken into account via s 104(1)(c).²⁰⁶ In most cases where a consent holder may be adversely affected by the grant of a consent, they may expect to be taken into account under s 104(1)(c), particularly where they have availed themselves of the submissions procedure. This is consistent with a pattern of restrained intervention with

¹⁹⁹ See above B2.

²⁰⁰ *Aoraki*, above n166 at [52].

²⁰¹ RMA s 130(1)(b). Note that s 128 does not expressly allow a review of consent conditions to accommodate the grant of further consents.

²⁰² Section 124 was substituted from 10 August 2005 by s 66 Resource Management Amendment Act 2005; ss 124A-124C were inserted on 9 August 2008 by s 67 Resource Management Amendment Act 2005.

²⁰³ RMA s 124(3).

²⁰⁴ RMA ss 93-98, 120.

²⁰⁵ RMA ss 99(1) & 99A(1).

²⁰⁶ See *Lawson v Housing New Zealand* [1997] 2 NZLR 474 at 489 per Williams J (Lawson): Where a public authority has through practice or assurances an expectation of a benefit the individual concerned ought know the case against them and be given an opportunity to respond to it. Moreover, in light of Part II of the Act focussing on the economic development of people and communities, it is difficult to see how an existing consent holder could not be taken into account by the consent authority; either as a matter of reasonableness or a relevant consideration recognised in administrative law.

existing consents and strong procedural protections for existing consent holders. However, it is not indicative of a pattern of exclusivity in respect of later applicants.

Moreover, ss 124(2)(e) preserves the discretion of consent authorities to deny existing holders the right to continue operations when applying for a new consent. Sections 124B and 124C may be overridden by regional plans that have reallocated resources to other activities.²⁰⁷ Sections 124B and 124C preserve a procedural priority to have the application determined; there is no presumption of renewal.²⁰⁸ The essence of these provisions is that they only apply in so far as the consent authority agrees that the current use remains consistent with sustainable management goals.

However, perhaps the most significant reason why the Court's finding of exclusivity is not justifiable is the purpose of the Act itself. Finding exclusive rights in consents is the "very antithesis of sustainable and efficient management of resources."²⁰⁹ Exclusive rights may entrench unsustainable users and lock up resources for long periods of time.²¹⁰ This concern is particularly acute if there is no room to *compare* applications for consents to use the same resource. In *Fleetwing v Marlborough District Council*²¹¹ the Court of Appeal stated that a comparison between proposals could not occur when determining concurrent consent applications. This removes any guarantee that initial allocation decisions will result in the *most* sustainable user being granted a consent; any applicant who reaches the threshold level of sustainable management in s 5 will be granted a consent. If this approach is combined with exclusivity of access, first in time applicants need only achieve the minimum level of sustainable management in order to be given strong rights of access to the resource.²¹² This challenges the equity of the consent regime, as well as its environmental effectiveness and economic efficiency. The most sustainable user will only be granted access to the resource if they happen to be the first applicant in time.²¹³ Part 6 of the Act is subordinate to Part 2. Thus, implying that the grant of a consent conveys exclusive rights to the resource is inappropriate.

²⁰⁷ RMA s 124A(1).

²⁰⁸ RMA s 124A(3).

²⁰⁹ Milne, above n121, 176.

²¹⁰ Ibid, 170.

²¹¹ [1997] 3 NZLR 257, 259 (*Fleetwing*): "there is no authority in one hearing to compare the relative merits of each application."

²¹² Milne, above n121, 169-170. See below at C2.1 for a discussion as to the correctness of *Fleetwing* on this point.

²¹³ See above at A2.4.

Consequently, the description of a consent as a permission plus “a right to use the subject resource” is at least questionable in the context of Part 6 of the Act.²¹⁴ The description obscures the true nature of consents which do not guarantee access to a resource. Moreover, recognising exclusivity in consents will detract from efforts to ensure best practice stewardship consistent with sustainable management. Use of the non-derogation principle to uphold exclusivity in consents has a distortionary effect; it is ultimately an *addition* to the limited use rights created by a consent rather than a *consequence* of those rights. Implying this incident of property into consents through the application of non-derogation principle elevates consents to a status “qualitatively equivalent” to property rights.²¹⁵

(b) other justifications for exclusivity

The Court recognised the doctrine of substantive legitimate expectations.²¹⁶ This principle is contentious in New Zealand.²¹⁷ If available, it provides a more acceptable basis for recognising initial consent holders’ rights. Its ostensibly administrative law origins do not directly conflict with s 122(1).²¹⁸ Arguably, the longevity and scope of the consents granted to Meridian; the substantial investment by Meridian and the repeated rejection of latter applicants because of the consents already issued provide a strong factual basis for a finding of expectation.²¹⁹ However, the rights that may reasonably be inferred from the grant of a consent are relevant; in this respect s 122(1) remains a part of the enquiry.

Finally, the Court relied on *Fleetwing* as authority for the first in first served approach to priority access.²²⁰ In *Fleetwing*, the first in first served approach was used to determine the order for hearing and determining competing consent applications.²²¹ *Fleetwing* thus establishes a procedural priority for application decisions. The Court in *Aoraki* elevated this principle to a substantive protection for existing consent holders in respect of later applications. *Fleetwing* does not provide authority for the existence of such a protection.

²¹⁴ The description a licence plus a right to use a resource has been criticised for obscuring the true nature of the interest: Hinde *McMorland & Sim*, above n32, 18.006. Such a description has been described as “properly limited to proprietary interests: Hinde, *McMorland & Sim*, 18.006.

²¹⁵ Hayward, above n171, 246.

²¹⁶ *Aoraki*, above n166 at [39].

²¹⁷ See *Te Heu Heu v Attorney General* [1999]1 NZLR 98 at 126 per Robertson J; *Lawson*, above n206, 246 per Williams J for discussion regarding the unsettled question of whether the doctrine of legitimate expectations may encompass substantive expectations in New Zealand.

²¹⁸ *R v East Sussex County Council ex p Reprotech(Pebsham) Ltd* [2002] All ER 58 at [35] per Lord Hoffman: In practice, there is little difference between expectation and estoppel. However, **there is a judicial practice of differentiating the two doctrines.**

²¹⁹ *Aoraki*, above n166 at [23] and [41].

²²⁰ *Aoraki*, above n166 at [31-32].

²²¹ *Fleetwing*, above n211, 268 per Richardson P.

In the wake of the *Aoraki* decision, the RMA was amended to specifically empower regional councils to create rules to guide future allocation decisions for water and air.²²² Yet, the *Aoraki* decision remains notable for its statements on the nature of resource consents, particularly in respect of consents already issued. *Aoraki* applies the non-derogation principle to imply the incident of exclusivity into consents.²²³ This “avoids the full effect” of s 122 of the RMA.²²⁴

(c) subsequent treatment

Subsequent cases have taken an equivocal approach to the *Aoraki* reasoning on the nature of a consent. In *Southern Alps v Queenstown Lakes District Council*²²⁵ an attempt to apply the non-derogation principle to a qualitative infringement on the exercise of a consent was restrained, with the Court finding that the “substantial” incursion had not occurred, despite an Environment Court finding to the contrary.²²⁶ In part, this was predicated on a finding that the consent in question did not require exclusive use of the river in order to be fully realised.²²⁷

However, commentators have argued that the non-derogation reasoning may not be so contained as there is no principled difference between quantitative and qualitative derogation if exclusivity is implied in the grant.²²⁸ Although the *Aoraki* decision ostensibly relates to situations of fully allocated resource, it raises questions as to the appropriateness of recognising exclusivity as an incident of consents in general.

3.3. *Marlborough District Council v Valuer-General*²²⁹

Aoraki and *Armstrong* illustrate some difficulties of applying property law to resource consents. In contrast, *Marlborough* is useful for illustrating some unforeseen effects of s 122(1).²³⁰ The case addressed the question of whether mussel farms established under coastal

²²² Milne, above n121, 170. RMA ss 30(fa) & 30(fb) (empowering the Minister of Conservation to make similar allocative rules in respect of the coastal marine area). However, this allocation by plan may not impact on consents already granted: RMA s 30(4)(a).

²²³ Ibid, 171-172; Brunette, B., “Freshwater Management and Allocation under the Resource Management Act 1991: Does First-in First-served Achieve Sustainable Management Principles?” (2006) 10 *NZJEL* 169, 198-199.

²²⁴ Brunette, above n223, 198.

²²⁵ [2008] NZRMA 47 (Southern Alps).

²²⁶ Ibid at [51].

²²⁷ Ibid at [52-53].

²²⁸ Milne, above n120, 168-169; Robinson, T., “What’s an Allocation?”, (2005) 1(8) *RMJ* 21, 23.

²²⁹ [2008] 1 NZLR 690 (Marlborough).

²³⁰ Ginlinton, D., “Do coastal permits under the RMA create rateable interests in land?”(2008) *RMB* 116, 119.

permits create a rateable interest in land under the Local Government (Rating) Act 2002 (LGRA). Ronald Young J applied s 122 strictly, with the effect that activities under a coastal permit are not rateable.

Ronald Young J considered whether mussel farms are themselves an interest in land.²³¹ His Honour found such a proposition inconsistent with the RMA. In particular, he relied on s 122(1) and s 122(5)²³² for the default position is that there is no exclusive occupation of land under a coastal permit. Ronald Young J stated:²³³

Given the plain words of s 122(1). The starting point... must be that coastal permits convey no property rights.

Thus, no interest in land may be identified in either the consent or its exercise.²³⁴ In addition, he found that mussel farms could not be land by virtue of being affixed or annexed to the seabed.²³⁵ Section 122(1) denies resource consents the characteristics of leases or licences.²³⁶ His Honour characterised a lease as a form of real property.²³⁷ His Honour found that the term “licence” in this context was meant in the “formal”²³⁸ sense as a type of personal property.²³⁹ Thus, activities under coastal permits are not rateable. A strict application of s 122(1) is the primary barrier to such a finding.²⁴⁰

The decision illustrates the “unexpected and far-reaching consequences” of s 122(1).²⁴¹ The decision is consistent with s 122(1), but may nonetheless be unsatisfactory. The exercise of a coastal permit may have effects much like commercial activities on land; in terms of the economic gain to the holder of the permit and the potential for the “imposition of consequential costs on the public purse.”²⁴² From a public policy perspective, it is desirable to recover some of the costs, for example decreasing amenity value or environmental degradation of the area, through rates.²⁴³ However, a failure to anticipate the need to accommodate consents under the LGRA has seen councils miss out on this important source

²³¹ *Marlborough*, above n229 at [2]. LGRA s 5.

²³² RMA s 122(5): coastal permits do not give exclusive possession unless the consent expressly says so or it is a necessary implication of the exercise of the consent.

²³³ *Marlborough*, above n229 at [45].

²³⁴ *Ibid* at [59].

²³⁵ This would make them the activities rateable per s 8 & Sch 1 cl 2 LGRA.

²³⁶ *Marlborough*, above n229, at [81].

²³⁷ *Ibid* at [87].

²³⁸ *Ibid* at [84].

²³⁹ *Ibid* at [87].

²⁴⁰ *Grinlinton*, above n230, 118.

²⁴¹ *Ibid*, 119.

²⁴² *Ibid*, 116.

²⁴³ *Ibid*, 120.

of revenue. The end result may be public payment for the costs of private use of a public resource.

4. Summary of Nature and Treatment of Resource Consents

The RMA indicates an intention to create in consents a form of statutory licence free from connotations of property. However, this characterisation has proven hard to implement. The divergent approaches taken in the cases described raise important questions as to when we can expect s 122(1) to be strictly applied; and whether we ought be looking at different ways of conceiving of consents. These questions are become acute as competition for scarce resources increases.

In an effort to fill the gaps in the statute, courts are increasingly reaching for property law tools. Decisions such as *Aoraki* and *Armstrong* illustrate a desire to provide predictability for consent holders. Barry Barton describes the consequence thus:²⁴⁴

We are seeing... a gradual strengthening of rights under resource consents... The property category is a strong one to be in... resource consents are becoming more and more infeasible.

The ambiguity surrounding the nature of consents has lead to calls for better definitions to ensure clarity of right.²⁴⁵ Where the status of consents is unclear it is difficult to achieve the goal of economic efficiency, as long term planning becomes difficult.²⁴⁶ If a holder has no security as to the content of a consent, issues of equity are raised as their reliance on the resource may be threatened by future grants of consents at an unforeseen date. The *Marlborough* case reflects a different concern. Failure to acknowledge a property right in consents obscures the important benefits that society conveys on consent holders. This may hinder efforts to recognise the effects of their activities; particularly where statutes conceive of such activities in property terms. This debate has manifest most prominently in respect of water permits, with calls for a move towards market trading in permits.²⁴⁷

However, the drift towards the application of property law to consents has also raised concerns. The *Aoraki* decision illustrates the concern that giving strong rights to consent holders may be inconsistent with the principle of sustainable management that underpins the

²⁴⁴ Barton, above n121, 11.

²⁴⁵ Harris Consulting AgriBusiness Group, *Property Rights in Water A Review of Stakeholders' Understanding and Behaviour*, November 2003, report prepared for MAF and Ministry for the Environment, v-vi.

²⁴⁶ See above at A2.2.

²⁴⁷ See Nyce, above n1; Hayward, above n171.

legislation. Strengthening initial consent holders' rights may impede the capacity of consent authorities to harmonise consents, to allocate to those users who best achieve sustainable management and give consent holders an elevated status in decisions affecting the resource.

Thus, the RMA has given rise to a classic debate about the appropriateness of property rights in an environmental context. Current uncertainties provide fertile ground for litigation where consents are used as securities, or where there are questions of transfer, co-ownership, competing users and possession. In these areas, questions regarding the nature of consents will continue to be of significance. In light of the recent drift to property-based treatment and identification of property law qualities in consents, there is a need to deliberately consider whether a private property management structure is appropriate.

C. CLARIFYING THE NATURE OF RESOURCE CONSENTS UNDER THE RESOURCE MANAGEMENT ACT 1991: PROPERTY RIGHT OR STATUTORY LICENCE?

Chapter One discussed the nature of private property and outlined arguments in favour and against the application of private property to the environment. Chapter Two identified some current property law issues in respect of resource consents granted under the RMA. Chapter Three will consider potential solutions to the ambiguous entitlement created by consents.

Two possible answers emerge. One option is the removal of s 122(1) and the explicit creation of a property right in consents similar in nature to the units of property used in the NZETS.²⁴⁸ This solution would require an allocative mechanism that enables a comparison between potential rights holders. The most likely approach is the creation of a property right coupled with free transferability; thus establishing a market in consents.²⁴⁹ The second solution is to continue treating consents as a form of statutory licence, with further specificity to ensure appropriate legal treatment and resolve questions of allocative priority. This chapter will argue that further specification of consents as a statutory licence is preferable to a property based solution. Continuing use of an improved statutory licence shows greater potential for achieving sustainable management in the RMA.

In practice, the design of each solution could take a number of forms. Each approach would necessarily embody a range of scientific and economic ideas.²⁵⁰ This remainder of this paper will critically assess the competing solutions from a legal perspective, beginning with an assessment of issues that may arise when creating a property right in consents.

1. Creating Property Rights in Resource Consents

1.1 Exclusivity and entitlement

There is some merit to granting exclusive access to resources governed by the RMA. As identified in Chapter One, guaranteeing access to the resource will provide clarity to consent holders as to what entitlements pass with consents, encouraging reliance on the consent and investment in the resource.

²⁴⁸ Compare the definition of ‘property’ in cl 2 of the Emissions Bill.

²⁴⁹ Currently the RMA has limited rights of transfer that, in practice, are not well utilised: Hayward, above n171, 247 RMA ss 134-147.

²⁵⁰ Nyce, above n1, 124.

Moreover, if a consent were a property right, the non-derogation reasoning used in *Aoraki* would be appropriate. However, as the RMA is currently structured and interpreted, exclusivity would undermine the statutory purpose.²⁵¹ Exclusivity in consents may entrench the first in first served approach to valuable resources, with the potential deleterious effects on sustainable management identified in Chapter Two.²⁵² In addition, creating exclusive rights in consents may precipitate a rush to secure consents, placing significant pressure on the decision making processes of consent authorities.²⁵³

Consequently, if the arguments in favour of exclusivity are to be accepted, a minimum requirement is a regime which ensures appropriate allocation. Markets are routinely employed to allocate private property rights in an environmental setting.²⁵⁴ The creation of a market in consents would involve a shift away from the regulatory nature of the RMA that would require independent analysis.²⁵⁵ Yet, the RMA does contemplate the use of economic tools²⁵⁶ and it has been argued that the RMA can accommodate a market in consents.²⁵⁷ However, the application of markets to environmental resources has proven controversial. Markets enable a comparison between potential users of a resource; but only a price-based comparison. The ability of markets to capture important ecological and social values is contentious, quite apart from the creation of property rights. In this respect, markets may not provide an allocation mechanism suitable to accommodate exclusivity in consents.

Moreover, it is questionable whether the specific resources governed by the RMA are amenable to market treatment. The range of resources, ecosystems and the different scientific considerations for each would need to be taken into account. The limits on the transfer of water consents set out in s136 of the RMA implicitly acknowledge the technical complexity of water transfer. Creating private property rights in consents would be a more significant undertaking than the creation of property units over singular, easily divisible resources such as occurred in the fisheries regime and the NZETS.

²⁵¹ Milne, above n120, 176; Brunette, above n223, 198.

²⁵² See above at B3.2(b).

²⁵³ Case law already suggests some instances of tactical applications for particularly scarce resources: *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71 at [62] per Baragwaneth J.

²⁵⁴ See for example Fisheries Act 1996 Part 4; Climate Change Response (Emissions Trading) Act Part 4.

²⁵⁵ Some recent articles that consider market design features in the context of water resources: Hayward, above n171; Memon, A. & Skelton, P., "Institutional Arrangements and Planning Practices to Allocate Freshwater Resources in New Zealand: A Way Forward" (2007) 11 *NZJEL* 241.

²⁵⁶ Functions of the Minister for the Environment: RMA s 24(h).

²⁵⁷ See for example Nyce, above n1; Hayward, above n171.

Even putting aside allocation questions, creating property rights in consents may still be a barrier to achieving environmental protection. One risk is the prospect of claims for compensation for decisions that encroach on the exercise of consents. Such claims may act as a financial disincentive to action to protect the resource. Recently, it has been suggested that if a property right is created in resource consents compensation issues are likely to become “far more prominent.”²⁵⁸ In the context of water permits issued under the RMA, it has been argued:²⁵⁹

In principle, if certain property rights are recognised concerning water, compensation should flow if they are interfered with, and the Australian example could provide guidance for New Zealand.

Compensation claims may arise as the RMA prescribes measures that may significantly restrict the exercise of a consent.²⁶⁰ For example, the specification of technical limitations on resource use in a national environmental standard may precipitate a reconsideration of the conditions of a consent.²⁶¹ Furthermore, it has been suggested that consent authorities may need to be given claw back powers in the event of a shift to market trading to accommodate unexpected environmental outcomes.²⁶²

Unlike Australia, New Zealand has no constitutional provision directed at protecting property rights.²⁶³ A legislative incursion on property will not leave a legal remedy; only actions taken under statute will raise this issue. New Zealand has a common law presumption that statutes will not remove property rights without appropriate compensation.²⁶⁴ There are some isolated examples of consideration of the compensation principle in relation to the RMA.²⁶⁵ However, New Zealand courts have been slow to recognise that interference sufficient to trigger the presumption has occurred, instead focussing on the public interest in regulation of property for environmental ends.²⁶⁶

²⁵⁸ Nyce, above n1, 147.

²⁵⁹ Ibid, 149.

²⁶⁰ For example: RMA ss 68(7), 130 (allowing rules in regional plans prescribing maximum or minimum levels of flow & rates of use of water; minimum air and water quality rules); ss 43B(6) & 128(1)(ba) (allowing review of consent conditions to require compliance with a national environmental standard).

²⁶¹ RMA ss 46B(6), 128(1)(ba).

²⁶² Memon & Skelton, above n255, 259.

²⁶³ Constitution of Australia, s 51(xxxi): acquisition of property must be on “just terms”.

²⁶⁴ This principle was acknowledged recently in a planning law context in *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 at [18] per McGrath J (*Waitakere*). However, the principle was not applied in this case as no question of takings arose on the facts.

²⁶⁵ Ibid. The Court found that where a person applying for a subdivision consent under the RMA and permission under the Local Government Act 2002 they had a genuine choice as to whether they ought undertake onerous obligations as a price for the granting of consent: at [51-52] per McGrath J.

²⁶⁶ Burrows, above n62, 222.

There is clearly no assurance that compensation claims will succeed. Such claims have not succeeded in the context of the fisheries legislation where the incursion on property rights was contemplated by the statute.²⁶⁷ Yet, even the risk of compensation claims may have a chilling effect on the ability of decision-makers to act to protect the environment. If a legal remedy is not available to rights holders, the existence of a property right may precipitate a reconsideration of legislation that infringes on consents, as is suggested by the LAC guidelines.²⁶⁸ Even though the judiciary has not been receptive to claims in this context, there is a body of academic comment that supports the provision of compensation for takings of property undertaken for environmental reasons.²⁶⁹ Similarly, those who advocate for a private property regime in environmental resources tend to consider compensation for takings a complementary approach to protect reliance on the right.²⁷⁰

Consequently there is some risk that property entitlements will raise compensation barriers to action for environmental protection. At the very least, this will bring s 85 of the RMA into sharp focus. Section 85 deems that no takings occur when land use is affected by a provision in a plan. This represents a narrow statutory bar on the takings principle. Clearly, as currently drafted, s 85 would not apply to property interests in resource consents for use of air, water or arguably the coastal marine area; nor would it apply to any takings that occurred via a method other than a plan change. Section 85 “deems” that no takings may occur in respect of land. This language provides a suggestion that where the provision does not operate, the takings principle may have some application.²⁷¹ The creation of property rights in consents may precipitate reconsideration of this already contentious provision.

Another risk inherent in the adoption of a property rights framework is the heightened likelihood of Māori claims to ownership of natural resources. In the case of water and the coastal marine area, indigenous claims of right are not new.²⁷² However, by raising questions

²⁶⁷ *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries*, unreported, 22 July 2007, CA 82/97, at p15 per Tipping J. However, it may be that the potential for compensation under that regime may not be closed off in all circumstances: “We have a current situation in New Zealand where the Government has defined property rights that mean future government action in this area [fisheries] would constitute a taking...” Guerin, K., 2002, *Protection against Government Takings: Compensation for Regulation?*, Treasury Working Paper 02/18.

²⁶⁸ See above at A1.4.

²⁶⁹ Joseph, above n101; McShane, O., “Land Management: Public and Private Costs” [2002] NZLJ 27; for an argument in favour of a limited takings regime see: Ryan, K., “Should the RMA Include a Takings Regime?” (1998) 2 *NZJEL* 63.

²⁷⁰ See for example McShane, above n 269.

²⁷¹ Joseph, above n101 426.

²⁷² For example the enactment of the Foreshore and Seabed Act 2004 ss 13 & 14 was a response to potential claims of Maori ownership over the foreshore and seabed; in addition numerous claims before the Waitangi Tribunal have dealt with questions of water ownership: Waitangi Tribunal, “Interim Report on the Rangatikaiki and Wheao Rivers”, Wai212, April 2003.

of entitlement, the adoption of private property regimes often precipitate renewed calls for a clarification of indigenous rights.²⁷³ This may be particularly important in the case of freshwater and air, as a property rights regime suggests the resource is capable of ownership, and thus capable of Māori ownership.²⁷⁴ Whilst in principle the resolution of such claims is to be encouraged; in practice resolution of entitlements may disrupt implementation. Indigenous claims are one example of the broader question of entitlements that come to the fore with property based management.²⁷⁵ The negotiation of an equitable allocation is a challenge that will arise.

Moreover, there is strong practical evidence that the creation of a property right would lead to a disproportionate emphasis on the interests of consent holders in decision-making regarding the resource. The Fisheries Act 1996 recognises the goals of sustainability and utilisation which are similar to the goal of sustainable management recognised in the RMA.²⁷⁶ Again similarly to the RMA, the Fisheries Act provides for consultation with all stakeholders, not merely permit holders, when determining quantities of fish that are able to be caught each year.²⁷⁷ However, the preponderance of scientific evidence suggests that fisheries in New Zealand remain unsustainable.²⁷⁸ Hayward argues that the cause of this is the disproportionate weight that decision-makers place on the property rights of fishers in that regime.²⁷⁹

The Fisheries QMS has created a rights-based approach in which only one set of parties – the commercial fisheries – has clearly defined rights. This in turn leads to the misconception that they are the only party with rights.

In the fisheries context, industry interests have been synonymous with use; thus debunking any suggestion that the grant of property rights necessarily facilitates an interest in conservation. Consequently, the creation of property rights raises genuine questions as to the distorting effect that property rights may have on decision-making. The Fisheries Act provides an example of a regime that provides for environmental protection and non-industry stakeholders, yet nonetheless is focussed on industry goals. The qualitative value of public

²⁷³ Nyce, above n1, 155. Memon and Skelton, above n255, 257: The potential for Maori ownership claims formed one of the reasons for not creating tradable water permits in the RMA when initially enacted.

²⁷⁴ See discussion regarding the lack of ownership of these resources: above at B3.2(b); Nyce, above n1, 141. Nothing in the RMA recognises or creates Crown ownership of either air or water, c.f. RMA s 354.

²⁷⁵ Generally, to enable a market to operate permits must be issued prospectively, rather than as a need for each use arises. A relate concern is the potential for 'sleeper' permits to be activated at times of particular scarcity: Memon & Skelton, above n255, 264.

²⁷⁶ Fisheries Act 1996, s 8. The Act has a similar focus on intergenerational equity, mitigation of adverse effects and providing for peoples' holistic wellbeing.

²⁷⁷ Fisheries Act 1996 ss 26, 5(b) & 13.

²⁷⁸ Hayward, above n171, 242.

²⁷⁹ Ibid, 243.

participation in the regime is questionable. The RMA is a statute with a similar hybrid focus on use and preservation.²⁸⁰ If the practical effect of the creation of exclusive property rights is an undue emphasis on use of resources to the exclusion of broader community interests, such an approach may not be consistent with the balanced purpose of the RMA.

1.2 Legal certainty and efficient use

As identified in Chapter One, legal certainty is a key pillar of arguments in favour of property rights in environmental resources.²⁸¹ Certainty of treatment has become a prominent concern in the RMA in light of the divergent approaches to s 122(1). Recourse to property law in the face of statutory ambiguity would be appropriate if consents are expressly made property instruments. Property law may provide guidance in cases of statutory silence on treatment and so may help fill gaps currently found in the RMA.

However, the quality of certainty associated with property rights may be overstated. As *Armstrong* illustrates, property law contains ambiguities. In *Armstrong*, Fogarty J placed considerable emphasis on the common law of property, to the neglect of potentially relevant equitable principles. Property law may not ensure a clear resolution of such difficulties as property law is not fully settled. The argument that a system of property rights will result in certainty of treatment, with consequent benefits for efficient economic use and environmental protection,²⁸² may be overstated. Cole has argued that the association between property instruments and legal certainty is not grounded in a true consideration of property law.²⁸³

No real-world institution can win in a contest against idealized institutions... The danger is that fantasy lands are designed to appear more attractive than the real world.

At the very least, the certainty associated with property rights should be compared to the certainty associated with other forms of management, for example statutory licences.²⁸⁴

Furthermore, difficulties may arise when determining what type of property right a consent should be classified as. Section 122 suggests consents are closest in origin to a personal property right.²⁸⁵ Similarly, New Zealand's most recently created environmental property

²⁸⁰ RMA Part II.

²⁸¹ See above at A2.2.

²⁸² See above at A2.2.

²⁸³ Cole, above n4, 305.

²⁸⁴ See below at C2.1 for discussion as to the higher calibre of certainty associated with licences.

²⁸⁵ See RMA ss 122(2)-(4).

regime, the NZETS, creates personal property rights.²⁸⁶ Differences in treatment between property categories need careful examination. For example, the legislation that formed the heart of the *Marlborough* decision, the LGRA, is focussed on activities undertaken on land pursuant to land law interests, or contractual agreements on land.²⁸⁷ The creation of a personal property right in consents would not attract the operation of the LGRA and resolve the *Marlborough* difficulty. It is possible that the creation of personal property rights in environmental regimes is an attempt to avoid the difficult question of ownership over the subject resource. It has been argued that clarity of ownership of rights to use a resource is more important than clarity of ownership over the resource itself.²⁸⁸ However, if a personal property right is created it may not address some of the current issues with the treatment of consents.

Moreover, if we view certainty in the alternative sense of permanence, the identification of this quality in consents is inappropriate.²⁸⁹ The RMA currently creates limitations on the duration of consents.²⁹⁰ Despite perpetual existence being identified as one of the core features of property ownership,²⁹¹ it is routinely limited in property rights instruments created for environmental purposes.²⁹² For example, the NZETS recognises limited duration property rights.²⁹³ The changing character of eco-systems, increasing scientific knowledge and varied economic use of important resources require a flexible commitment to particular modes of use. A recent illustration of the necessity for a flexible approach to duration is the rush in the 1990's to establish an aquaculture industry along New Zealand's coast. This new use of the coastal marine area had significant unanticipated amenity and environmental impacts, ultimately resulting in a moratorium on new applications.²⁹⁴

A limited duration right to use or take a resource enables reconsideration of unforeseen environmental effects and appropriate modification of use. In addition, it enables consent holders to plan for the lapse of a consent and accommodate any changing circumstances in their next application. This is a preferable alternative to unscheduled reviews of consent

²⁸⁶ Emissions Bill, cl 2.

²⁸⁷ LGRA ss 7-9 describing what is rateable.

²⁸⁸ Nyce, above n1, 143.

²⁸⁹ See above at A2.2 for discussion of certainty as meaning both permanence and predictability.

²⁹⁰ RMA s 135(1).

²⁹¹ See above at A1.4 for Honorè's description of the incidents of property.

²⁹² Fisheries Act 1996: quota under this Act generate annual catch entitlements, ss 13 & 66; NZETS: incorporates allocation plans, generally 5 years in length, in conjunction with an obligation to retire units annually, cls 63, 69-75.

²⁹³ Climate Change Response Act 2002, ss 63 & 65.

²⁹⁴ Ministry for the Environment, January 2005, *Aquaculture Reform 2004: An Overview*, <http://www.mfe.govt.nz/publications/rma/aquaculture-info-overview-jan05/index.html>, accessed 22 September 2008.

conditions. A limited duration right may thus assist planning if the need for a flexible approach to environmental access is accepted. Irrespective of whether a consent is regarded as a property right or as a statutory licence, limits on duration are likely to remain a feature of its nature.

1.3 Summary of property rights issues

Whilst the creation of property rights in consents may provide some resolution to current difficulties surrounding the incident of exclusivity, additional benefits are harder to identify. The legal certainty that proponents associate with property rights may be more illusory than tangible. There are numerous potential problems with the creation of a property right, including issues of entitlement and compensation. Much depends on the design of the property right and implementing regime; in this respect the critiques identified are speculative. At the very least, adopting a property right solution would require engagement with these issues.

Thus, the arguments in favour of creating property rights in resource consents are, from a legal standpoint, unpersuasive. In light of this, it is necessary to consider the viability of the alternative option for reform; further amendment of the RMA to clarify the nature of consents.

2. Reinforcing Consents as a Statutory Licence

2.1 Exclusivity and entitlement

The confirmation of a consent as a form of statutory licence would involve amending the RMA to ensure that the statute addresses the preponderance of circumstances where consents need legal treatment. Most obviously, this solution would involve clarifying whether a consent conveys exclusive rights to take and use a resource, and adopting a method of determining priority between competing users of a resource. In addition, *Armstrong* and *Marlborough* raise discrete issues of treatment that need addressing. The essence of a statutory licence is that ambiguities in treatment are resolved by reference to the statute, or where necessary by amendment to the statute.

This approach has the advantage of not requiring significant change to the existing regulatory structure. It is unlikely to precipitate the type of entitlement controversies that may arise with a property right, as the framework of the consent regime would remain essentially unchanged. A more difficult question is whether exclusive rights to access a resource is appropriate. As identified above, there are strong reasons for providing exclusivity to existing consent holders if a mechanism can be found to compare potential resource users and allocate rights to the most sustainable user.

In respect of the question of allocation, there exist some potential solutions in the RMA that may be used to achieve this purpose. For example, the use of national policy statements *requiring* consent authorities to adopt allocation plans for natural resources is one option.²⁹⁵ This would require a deliberate consideration of appropriate uses of the resource prior to making decisions on individual applications. Recent legislative amendment explicitly allows regional councils to allocate water by use in regional plans.²⁹⁶ Greater utilisation of planning documents for allocative purposes would give some indication as to which uses are a priority for consent authorities when issuing individual consents. The lack of any national guidance on allocation questions is a significant barrier to clarity and consistency in respect of priority and allocation currently.²⁹⁷ There is clear room for greater use of existing measures to fill gaps left by the statutory silence on the treatment of consents.

Recently, the Resource Management (Waitaki Catchment) Amendment Act 2004 established the Waitaki Catchment Allocation Board. The duties of this Board include establishing a mandatory allocation plan for water in the Waitaki catchment. The Act shifts away from a first in first served method, instead taking a whole-catchment approach to allocation planning.²⁹⁸ Importantly, the Act enables a comparison between individual applications to ensure that the best applications proceed.²⁹⁹ It is too early to fully assess the success of this

²⁹⁵ RMA s 45(1) (to state objectives and policies for matters of national significance relevant to achieving the purpose of the Act). There have been repeated calls for greater utilisation of centralised planning measures in the Act to ensure consistency of treatment and enable for better regional planning: Memon & Skelton, n256, 265-267.

²⁹⁶ RMA s 30(1)(fa). This planning allocation may not impact on existing consents: RMA s 30(4)(a).

²⁹⁷ See Memon & Skelton, above n255; Brunette, above n223 for discussion of the shift towards decentralised management of resources and the adverse effect this has on effective decision-making.

²⁹⁸ Waitaki Catchment Allocation Board, *Waitaki Catchment Water Allocation Regional Plan*, Policy 1, <http://www.ecan.govt.nz/NR/rdonlyres/60DEC539-41EB-476F-8CA4-9377FA414529/0/waitakiregionalplanjul06.pdf>, 25, accessed 30 September 2008.

²⁹⁹ Nyce, above n1, 154; Environment Canterbury, *Waitaki Regional Plan: General Questions*, <http://www.ecan.govt.nz/Resource+Consents/WaitakiConsents/faq/General/>, accessed 30 September 2008.

initiative.³⁰⁰ However, the mixture of plan-based use priorities and explicit comparison of individual applications shows promise as a means of allocation.

Moreover, it is possible that a comparative approach to consent applications may be accommodated within the current RMA framework. The position set out in *Fleetwing* has been described as “unsatisfactory from a theoretical and principled view of sustainable management.”³⁰¹ There is nothing in the RMA that explicitly determines priorities for consent applications, so it is open to the courts to allow a comparative approach.³⁰² The reasoning in the *Fleetwing* decision, which proceeded from a concern that a comparative approach would make it difficult to fulfil statutory time constraints, is unpersuasive in a climate of resource scarcity.³⁰³ Without a comparison, there is no method of ensuring the best applicant receives access to the scarce resource.

A move away from this principle is more likely to be successful where regional plans explicitly address the question of allocation. Arguably, the RMA has a “latent intention” that such plans will provide guidance on allocation decisions so as to ensure the most sustainable use of the resource.³⁰⁴ Both the Waitaki Amendment Act and the recent introduction of a tendering process for the use of the coastal marine area explicitly enable a comparison of individual applications.³⁰⁵ These moves suggest that the *Fleetwing* approach is increasingly out of touch with the purpose of the RMA. When used in conjunction with allocation directives in planning documents, a comparison of competing applications would provide consent authorities with vastly improved tools to make better decisions on initial allocations.

However, even if a suitable allocative mechanism is able to be identified, recognising exclusivity in consents is on balance inconsistent with the goal of sustainable management. Introduction of a sound allocation mechanism ought to provide some criteria by which consent authorities can make decisions as to who should be granted a permission to use a resource. Yet, if sound allocation is coupled with the grant of exclusive rights, consent authorities may not retain the necessary flexibility to ensure that sustainable management is achieved on an ongoing basis. This is particularly true if the rules guiding allocation only

³⁰⁰ Nyce, above n1, 154: A general review of the plan may proceed at any point after July 2008.

³⁰¹ Palmer, K., “Case Note: *Central Plains Water Trust v Ngai Tahu Properties Ltd*” (2007) *RMB* 32, 33.

³⁰² *Fleetwing*, above n121, 7. Richardson P acknowledged that the Act was silent on the correct manner of dealing with competing applications.

³⁰³ *Ibid*, 7. The argument lacks force in that the timeframes specified in the Act are rarely complied with in practice.

³⁰⁴ Palmer, above n301, 33.

³⁰⁵ RMA, Part 7. Specifically, ss 157-159.

address choices between use, not choices between individual users; or where an application to use a resource is made after the grant of initial consents.

For example, a consent that enables the holder to take water for irrigation upstream on a river may achieve sustainable management and be consistent with an allocation plan. Similarly, the grant of a second consent downstream for irrigation or damming purposes may also achieve sustainable management and be consistent with an allocation plan. In order for the second consent to operate, it may be necessary to modify the operation of the first consent to ensure minimum standards of water quality or minimum rates of flow. Reducing the take of the initial consent granted upstream will result in accommodation of both uses, with consequent enhancement of the values encapsulated by sustainable management.³⁰⁶ Similar issues of ensuring consistency and accommodation of later users may arise in the coastal marine area and in respect of the discharge of pollutants into the air.

Currently, the ability of consent authorities to undertake such re-evaluation of an existing consent is unclear. *Aoraki* suggests that harmonisation of consents is impossible under the RMA as no express legislative provision empowers this incursion on existing consent holders' rights.³⁰⁷ In *Southern Alps Air*, the ability to impose a safety plan on an existing consent holder was recognised in part on the basis of the consent holder's obligations to ensure safety under the Maritime Rules.³⁰⁸ Yet, the ability of consent authorities to harmonise two or more consents would seem obviously consistent with sustainable management in that it facilitates efficient use of a resource and enables modification of use to protect environmental, amenity and even safety and enjoyment values. As scarcity becomes an increasing issue in resource management, the necessity for shared resource use is likely to increase. Recognising that the permission to use a resource granted under a consent is subject to modification to accommodate other users would seem appropriate.

Thus, there are stronger reasons for ensuring that consents do not grant exclusive rights of access than for providing absolute certainty for existing consent holders. In order to ensure this occurs, amendment to the RMA is necessary. In Chapter Two, it was argued that when s 122 is interpreted in light of Part 2 of the RMA, the Act grants less than exclusive access in consents.³⁰⁹ However, the contrary position articulated in *Aoraki* suggests that further clarity is needed. It is proposed that the amendment of s 128 of the RMA to expressly enable the

³⁰⁶ Milne, above n121, 158.

³⁰⁷ *Aoraki*, above n166 at [30].

³⁰⁸ *Southern Alps*, above n225 at [53].

³⁰⁹ See above at B2 & B3.2.

modification of consent conditions to accommodate later consent applicants is appropriate. This would render the non-derogation reasoning employed in *Aoraki* redundant in respect of the question of exclusivity.

This approach would reduce the quality of access to a resource provided by consents. However, it need not remove all certainty associated with consents. The power to review consent conditions to accommodate later applicants should be coupled with a requirement that consent authorities give weight to the reliance of the initial consent holder. It is reasonable that the continued viability of the enterprise, any reasonable alternatives to changing the consent and the financial implications for the consent holder be made relevant considerations for any review which arises from the grant of another consent.³¹⁰ Furthermore, consent authorities retain the ability to indicate on the face of individual consents an intention with respect to future modifications. Similarly, if consents are issued for a limited duration, future applications to use the same resource may be accommodated in the renewal process of the existing consent rather than by way of unscheduled review of conditions. This combination of approaches will help accommodate relatively predictable access to the resource.

The end result would be that a consent conveys a permission to interfere with a resource which can be modified or impinged upon in defined circumstances. By enabling a comparison of concurrent applications and providing controlled rights to modify consents to accommodate later applicants in time, sustainable management is enhanced. This is arguably consistent with the approach the RMA currently tries to achieve with consents as a form of statutory licence.³¹¹

2.2 *Legal certainty and efficient use*

A final issue to consider in respect of statutory licences is the quality of legal certainty attributable to this approach. As identified in Chapters One and Two, certainty of treatment is an important consideration for consent holders that is not well provided for in the current consent regime. Providing for treatment in the statute will create two significant advantages over a property law approach. Firstly, such an approach enables tailored recognition of the

³¹⁰ RMA, s 131(2). This provision requires financial implications and reasonable alternatives to be considered when reviewing a coastal permit or discharge permit; and viability of the consent is relevant to reviews of restricted coastal activities: s 131(1). There is no principled reason why this criteria ought not apply to all forms of consent.

³¹¹ See above B2 & B3.2.

nature of the consent instrument.³¹² If a consent is defined purely by the statute, it removes any property based presumptions as to the nature of the instrument. The treatment of a consent may be decided on a case by case basis according to the particular character of a consent. This would not preclude property-like treatment where appropriate; s 122 clearly provides for some treatments as though a consent is a property. If interpreted as providing for the treatment of a statutory licence, s 122 does not confuse the nature of a resource consent.³¹³

Clear specification of a statutory licence removes lingering assumptions about the traditional incidents of property.³¹⁴ Recourse to property law may raise unwarranted presumptions of treatment that do not necessarily derive from statutory language. Grinlinton's argument that Fogarty J failed to fully consider the effect of s 135(1) on multiple consent holders in *Armstrong* is an example of this type of confusion.³¹⁵ If the nature of a consent is more completely specified in the RMA, the likelihood of unnecessary recourse to property concepts is reduced. As compared to property, there are no *prima facie* assumptions as to the nature of a statutory licence. Correct legal treatment is primarily a matter of statutory interpretation. Use of interpretative approaches such as the non-derogation principle is inappropriate to the extent that they imply property qualities into consents.

The second significant advantage of a statutory licence relates to the accessibility of statutory rules. Whilst property law may contain a body of rules and precedents, these are found beyond the confines of the RMA in statutes such as the Property Laws Act 2007 or in case law.³¹⁶ If we recognise consents as a statutory licence, the main specifications of a consent, including questions of transferability, exclusivity, duration and direction as to allocation will be found in the RMA and supporting plans. These ought to be both easier to locate and, if enacted with the clarity expected of legislative instruments, more settled. For example, the difficulty identified in *Armstrong* with respect to multiple consent holders could be resolved by modifying s 122(2)(a) to clearly provide for this circumstance.

Not all questions of treatment will be settled within the RMA. For example, the obvious solution to the *Marlborough* scenario is modification of the LGRA to encompass activities

³¹² Hepburn, above n95, 31.

³¹³ See above at B2.2 for a discussion as to the correct interpretation of s 122.

³¹⁴ Hepburn, n95, 31-32.

³¹⁵ See above B3.1 for outline of Grinlinton's argument in respect of the transfer of consents.

³¹⁶ See Merrill, T.W. & Smith, H.E. "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale L.J. 1, 61: legislation is preferable to common law in respect of its "clarity, universality, comprehensiveness".

undertaken pursuant to a resource consent.³¹⁷ This is a logical place to specify the treatment of a consent for ratings purposes. Similarly, where another statutory regime addresses the treatment of a range of interests for a particular purpose, it is appropriate that the treatment of consents be specified within that regime. This already occurs, for example, in the Income Tax Act 2004 which has specific provision for the tax treatment of consents.³¹⁸ Ultimately, this approach is preferable to recourse to property concepts.

There are identifiable advantages to using statutory licences in this context. The disadvantage, from the perspective of legal certainty, is the potential to fail to anticipate circumstances where guidance may be necessary in order to provide for the correct treatment of a consent. However, such circumstances are likely to be relatively minor if the most significant gaps in the RMA, relating to allocation and exclusivity, are filled. If such circumstances do arise, it is preferable to amend the statute than to fall back on property law. As illustrated by *Armstrong* and *Aoraki*, this course of action may undermine the certainty associated with consents by distracting from a focus on the statute.

2.3 Summary of statutory licence issues

Recognising consents as a form of statutory licence is consistent with sustainable management which requires the flexibility to encroach on the interests of existing consent holders where necessary to provide fair access to the resource; whilst providing some protections to ensure the exercise of consents is not arbitrarily undermined. The purpose of the suggested amendments is both to improve initial allocation decisions and to enable sustainable management to be achieved on an ongoing basis, without sacrificing the economic value of consents.

This approach is consistent with the current treatment of consents set out in the RMA itself, despite divergent suggestions in case law. Sustainable management may be achieved with an improvement in the existing regulatory framework; in this respect there is insufficient impetus to justify a move to a private property solution. Moreover, as identified above, the move to private property may raise further, difficult legal issues. From a legal perspective, current difficulties regarding legal treatment of consents are best resolved within the regulatory framework of consents currently used in the RMA.

³¹⁷ Grinlinton, above n230, 120.

³¹⁸ Income Tax Act 2004 including: ss YA1, DB19, CB28.

CONCLUSION

Discussion as to the use of private property in the environment is actively underway in New Zealand. Recently, the National Sustainable Water Programme of Action precipitated investigations into the possibility for tradable permits in water.³¹⁹ Similarly, the creation of the NZETS raises questions regarding consistency of treatment between air discharges governed by the RMA and greenhouse gas emissions. This suggests the dominant trend in environmental management is towards the recognition of private property interests. However, preliminary discussions on draft legislation to govern environmental impacts in New Zealand's Exclusive Economic Zone have included proposals for a consent process predicated on a non-property unit similar to that found in the RMA.³²⁰ The role of private property in the RMA is certain to form part of this ongoing national dialogue.

The potential move to private property management in the RMA raises several legal questions. Recognition of private property in environmental resources carries legal and political connotations that impact on resource protection. Essentially, the creation of private property rights may shift the balance of decision-making and action towards rights holders, at the expense of other stakeholders and the environmental resource. These difficulties need to be carefully considered before any shift to private property management is contemplated.

Advocates of private property rights suggest that regulatory systems have failed the environment. Present difficulties with the treatment of resource consents are pointed to as illustrative of such failure. However, the foregoing analysis clearly shows that a comparison between the current management structure of the RMA and a system of private property rights may be unfair; the RMA provides significant scope for an improved regulatory management framework. Comparisons between the RMA's current operation and private property solutions are unbalanced in that the RMA does not currently represent the full capabilities of regulatory systems. In this respect, calls for a move to property based permits in a resource management context may be premature. Innovative approaches such as the Waitaki Catchment Water Allocation Plan represent the potential for regulatory structures to balance the complex considerations necessary to ensure appropriate treatment and use of natural resources.

³¹⁹ Ministry for the Environment, April 2006, "Freshwater for the Future: Information Sheet", <http://www.mfe.govt.nz/publications/water/freshwater-infosheet-apr06/freshwater-infosheet-apr06.html>, accessed 6 October 2007.

³²⁰ Cabinet Policy Committee, Office of the Minister for the Environment, *Cabinet Paper: Proposal for Exclusive Economic Zone Environmental Effects Legislation*, <http://www.mfe.govt.nz/issues/oceans/current-work/cabinet-paper-eez-effects-legislation.html>, Paper No Cab 07-C-0751, accessed 7 October 2008.

In light of the difficulties identified with a shift to property-based permits, calls for a move to market trading predicated on property rights in natural resources should be viewed with caution. However, equally clear that the status quo in the RMA is inadequate. If the goal of sustainable management is to be achieved, clarity as to the nature of consent entitlements is a necessity. Some potential amendments have been suggested in this paper, including the introduction of a specific power in consent authorities to modify conditions of existing consents to accommodate future applicants. Similarly, it has been suggested that greater utilisation of planning documents combined with the ability to compare individual consent applications is necessary to ensure the most sustainable users are granted access to natural resources. When coupled with action to rectify the more discrete difficulties identified in *Armstrong* and *Marlborough*, these changes will reinforce the nature of consents as form of statutory licence, independent of any general property conceptions. These actions for an appropriate, and important, first step towards the realisation of sustainable environmental management in the RMA.

BIBLIOGRAPHY

STATUTES

New Zealand

Biosecurity Act 1993
Climate Change Response (Emissions Trading) Act 2008
Conservation Act 1987
Fisheries Act 1983
Fisheries Act 1996
Foreshore and Seabed Act 2004
Income Tax Act 2004
Local Government Act 2002
Local Government (Rating) Act 2002
National Parks Act 1980
Partnership Act 1908
Public Works Act 1950
Resource Management Act 1991
Resource Management Amendment Act 2005
Resource Management (Waitaki Amendment) Act 2004
Water and Soil Conservation Act 1967

Australia

Constitution of Australia
New South Wales Water Management Act 2004
Queensland Water Act 2000

United States of America

Clean Air Act 1970
Constitution of the United States of America

BILLS

Draft Settlement Systems, Emission Units and Futures Trading Bill

CASES

New Zealand

Aoraki Water Trust v Meridian Energy [2005] 2 NZLR 268
Armstrong v Public Trust [2007] 2 NZLR 859
Cavell v Thornton [2008] NZCA 191
Central Plains Water Trust v Ngai Tahu Properties Ltd [2008] NZCA 71
Clark v Libra Developments [2007] 2 NZLR 709
Faulkner v Gisborne District Council [1995] 3 NZLR 662
Fleetwing v Marlborough District Council [1997] 3 NZLR 257
Hume v Auckland Regional Council [2002] NZRMA 49
Lawson v Housing New Zealand [1997] 2 NZLR 474
Marlborough District Council v Valuer General [2008] 1 NZLR 690
New Zealand Fishing Industry Association (Inc) v Minister of Fisheries, unreported, 22 July 2007, CA 82/97
Ngai Tahu Property Ltd v Central Plains Water Trust [2008] NZSC 49
Ngati Apa v Attorney General [2003] 3 NZLR 645
Ramage v Alpers [1999] BCL 949
Southern Alps Air v Queenstown Lakes District Council [2008] NZRMA 47
Springs Promotion Ltd v Springs Stadium Residents Association Inc [2006] 1 NZLR 846
Stanley v South Canterbury Catchment Board (1971) 4 NZTPA 63
Te Heu Heu v Attorney General [1999] 1 NZLR 98
Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149

Australia

Australian Capital Television Pty. Ltd v The Commonwealth (1992) 177 CLR 106
Georgiardin v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297
Harpur v Minister for Sea Fisheries (1989) 168 CLR 314

European Union

European Union Directive 2003/87/03

United Kingdom

Johnston & Sons Ltd v Holland [1988] 1 E.G.L.R. 264
R v East Sussex County Council ex p Reprotech (Pebsham) Ltd [2002] All ER 58

WAITANGI TRIBUNAL REPORTS

Waitangi Tribunal, April 2003, “Interim Report on the Rangatikaiki and Wheao Rivers”, Wai212

BOOKS & BOOK CHAPTERS

- Burrows, J., (2003), *Statute Law in New Zealand*, (3rd ed), Wellington: Lexis Nexis
- Chambers, R., (2001), *An Introduction to Property Law in Australia*, Sydney: LBC Information Services
- Cole, D., (2000), "New Forms of Private Property: Property Rights in Environmental Goods", *Encyclopedia of Law and Economics*, Bouckaert, B. & DeGeest, D., (eds), Cheltenham: Edward Elgar, 274-314
- Coyle, S. & Morrow, K., (2004), *The Philosophical Foundations of Environmental Law: property, rights and nature*, Oxford: Hart Publishing
- Denman, D., (1978) *The Place of Property: A New Recognition of the Function and Form of Property Rights in Land*, The Keep, Berkhamsted: Geographical Publications Limited
- Harris, J.W., (1996), *Property and Justice*, Oxford: Clarendon Press
- Hinde, G., McMorland, D., Campbell, N. & Grinlinton, D., (2004), *Hinde McMorland & Sim Land Law in New Zealand*, (2nd ed), Wellington: Lexis Nexis
- Honoré, A., (1961), "Ownership", *Oxford Essays in Jurisprudence*, Guest, A., (ed), London: Oxford University Press, 107-148
- Oxford Dictionary of Law*, (2003), Oxford: Oxford University Press
- Rose, C., (1994), "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory", *Property & Persuasion*, Boulder: Westview Press, 134-147
- Tietenberg, T., (1994), *Environment and Natural Resources Economics*, (3rd ed), New York: Harper Collins
- Anderson, T., and Leal, D., (1991) *Free Market Environmentalism*, Boulder: Westview Press
- Waldron, J., (1996) "Property Law", *A Companion to Philosophy of Law and Legal Theory*, Patterson, D., (ed), Blackwell Publishers, 560-573
- Ziff, B., (1996), *Principles of Property Law*, Ontario: Carswell Thomson

ARTICLES

- Barton, B., "The Legitimacy of Regulation" (2002) 20(4) NZULR 364
- Boast, R., "Maori Fisheries 1986-1998: a reflection" (1999) 30(1) VUWLR 111
- Brunette, B., "Freshwater Management and Allocation under the Resource Management Act 1991: Does First-in First-served Achieve Sustainable Management Principles?" (2006) 10 NZJEL 169
- Byrne, J.P., "Property and the Environment: Thoughts on an Evolving Relationship" (2004) 28 Harv. J. L. & Pub. Pol'y 679
- Cox, S.J.B., "No Tragedy on the Commons" (1985) 7 *Environmental Ethics* 49
- Chan, A., "The Changing View of Property Rights in Natural Resources Management" (1989) 48(2) *American Journal of Economics and Sociology* 193
- Cole, D. & Grossman, P., "The Meaning of Property Rights: Law versus Economics?" (2002) 78(3) *Land Economics* 317-330

Daly, N., "Selling the Seven Seas" (1995) 16 *Multinational Monitor* 7

Fisher, D., "Rights of property in water: confusion or clarity" (2004) 21 *EPLJ* 200

Fuller, P., "The Resource Management Act 1991: 'An Overall Broad Judgment'" (2003) 7 *NZJEL* 243

Grinlinton, D., "Do coastal permits under the RMA create rateable interests in land?" (2008) *RMB* 116

Grinlinton, D., "The nature of property rights in resource consents" (2007) *RMB* 37

Hardin, G., "The Tragedy of the Commons" (1968) 164 *Science* 1243

Hayward, A., "Freshwater Management: Water Markets" (2006) 10 *NZJEL* 215

Joseph, P., "The Environment, Property Rights, and Public Choice Theory" (2003) 20(4) *NZULR* 408

Kirkpatrick, D., "Property Rights Do you have any?" (1997) 1(1) *NZJEL* 267

Mace, M., "The Legal Nature of Emissions Reductions and EU Allowances: Issues Addressed in an International Workshop" (2005) 2 *JEEPL* 123

McHugh, P., "The legal basis for Maori claims against the Crown" (1988) 18(1) *VUWLR* 1

McShane, O., "Land Management: Public and Private Costs" [2002] *NZLJ* 27

Memon, A. & Skelton, P., "Institutional Arrangements and Planning Practices to Allocate Freshwater Resources in New Zealand: A Way Forward" (2007) 11 *NZJEL* 241

Merrill, T. & Smith, H., "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 *Yale L.J.* 1, 61

Milne, P., "Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*" [2005] *Resource Management Theory and Practice* 146

Nyce, O., "Water Markets Under the Resource Management Act 1991: Do They Hold Water" (2008) 14 *Cantab. L.R.* 123

Palmer, K., "Case Note: *Central Plains Water Trust v Ngai Tahu Properties Ltd*" (2007) *RMB* 32

Reich, C., "The New Property" (1964) 73 *Yale L.J.* 733

Robinson, T., "What's an Allocation?" (2005) 1(8) *RMJ* 21

Ryan, K., "Should the RMA Include a Takings Regime?" (1998) 2 *NZJEL* 63

Schlager, E. and Ostrom, E., "Property-rights Regimes and Natural Resources: A Conceptual Analysis" (1992) 68(3) *Land Economics* 231

Scott, A., "Property Rights and Property Wrongs" (1983) 16 *Canadian Journal of Economics* 555

Storey, M., "Not of this Earth: The Extraterrestrial Nature of Statutory Property in the 21st Century" 25 *Australian Resources and Energy Law Journal* 51

Wallace, C., "Environmental Justice and New Zealand's Fisheries Management System" [1999] 3 *NZJEL* 33

Williams, I., "The Waitaki River" [2005] *NZLJ* 177

Yandle, B. & Morriss, A., "The Technologies of Property Rights: Choice Among Alternative Solutions to the Tragedy of the Commons" (2001) 28 Ecology L.Q. 123

CONFERENCE PAPERS

Barton B., *Emissions Trading: Legal Questions, Energy Implications*, Conference Paper, presented at Energex 2000: 8th International Conference, Las Vegas

Barton, B., *Private Property Rights and the Public Interest*, Resource Management Law Association Conference Paper, 30 May 2007, Napier

Hepburn, S., *Carbon Rights as New Property: Towards a Uniform Framework*, Seminar Paper, Presented at ANU College of Law Seminar Series, 21 August 2008, Canberra

Joseph, P., "Property Rights and Environmental Regulation", Presented at Resource Management Law Association Annual Conference, 4-7 October 2001, Wellington

GOVERNMENT & LOCAL GOVERNMENT SOURCES

New Zealand

Cabinet Policy Committee, Office of the Minister for the Environment, *Cabinet Paper: Proposal for Exclusive Economic Zone Environmental Effects Legislation*, <http://www.mfe.govt.nz/issues/oceans/current-work/cabinet-paper-eez-effects-legislation.html>, Paper No Cab 07-C-0751, accessed 7 October 2008

Environment Canterbury, *Waitaki Regional Plan: General Questions*, <http://www.ecan.govt.nz/Resource+Consents/WaitakiConsents/faq/General/>, accessed 30 September 2008

Guerin, K. (2003), *Property Rights and Environmental Policy: A New Zealand Perspective*, New Zealand Treasury Working Paper 03/02

Guerin, K., (2002), *Protection against Government Takings: Compensation for Regulation?*, New Zealand Treasury Working Paper 02/18

Harris Consulting AgriBusiness Group, November 2003, *Property Rights in Water A Review of Stakeholders' Understanding and Behaviour*, report prepared for MAF and Ministry for the Environment

Legislation Advisory Committee, 2001, *Guidelines on the Process and Content of Legislation: 2001 Edition*, Wellington: Ministry of Justice, <http://www.justice.govt.nz/lac/>, accessed 26 August 2008

Ministry for the Environment, January 2005, *Aquaculture Reform 2004: An Overview*, <http://www.mfe.govt.nz/publications/rma/aquaculture-info-overview-jan05/index.html>, accessed 22 September 2008

Ministry for the Environment, April 2006, *Freshwater for the Future: Information Sheet*, <http://www.mfe.govt.nz/publications/water.freshwater-infosheet-apr06/freshwater-infosheet-apr06.html>, accessed 6 October 2007

Ministry for the Environment and Ministry of Agriculture and Fisheries, July 2005, *Testing the Water: Report on the Sustainable Water Programme of Action Written Submissions*, Document Number 677

Waitaki Catchment Allocation Board, *Waitaki Catchment Water Allocation Regional Plan, Policy 1*, <http://www.ecan.govt.nz/NR/rdonlyres/60DEC539-41EB-476F-8CA4-9377FA414529/0/waitakiregionalplanjul06.pdf>, accessed 30 September 2008

Australia

Australian National Emissions Trading Taskforce, December 2007, *Possible design for a national greenhouse gas emissions trading scheme: Final framework report on scheme design*, [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/\\$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf), accessed 27 September 2008

NEWS RELEASES & OTHER INTERNET SOURCES

Fox, M., *Dispute over water-trading scheme*, <http://www.stuff.co.nz/4671013a7693.html>, accessed 13 September 2008

Gorman, P., “Water Trading Scheme Recommended”, *Christchurch Press*, 29 August 2008, <http://www.stuff.co.nz/thepress/4672572a19753.html>, accessed 22 September 2008

Locke, J. (1794) “The Spirit of John Locke, on civil government, revived by the Constitutional Society of Sheffield”, *British Library Eighteenth Century Collections Online*, <http://galenet.galegroup.com/servlet/ECCO?vrsn=1.0&dd=O&af=BN&locID=otago&srctp=a&d=0025800100&SU=O>, accessed 26 August 2008

Sinner, J., & Salmon, G., “Creating Economic Incentives for Sustainable Development: A Report to the New Zealand Business Council for Sustainable Development”, *New Zealand Business Council for Sustainable Development*, November 2003, <http://www.nzbcSD.org.nz/economicincentives/incentives-for-SD-full.pdf>, accessed 22 September 2008

WEBSITES

British Library Eighteenth Century Collections Online
Environment Canterbury
Fairfax Digital Media
Garnaut Review
Ministry for the Environment
Ministry of Justice
New Zealand Business Council for Sustainable Development

www.galenet.galegroup.com
www.ecan.govt.nz
www.stuff.co.nz
www.garnautreview.org
www.mfe.govt.nz
www.justice.govt.nz
www.nzbcSD.org.nz
