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Scenic amenity, property rights, and implications for pastoral tenure in the South Island High Country

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Introduction:

It is always a great pleasure to visit Christchurch and the South Island, you are indeed very fortunate to live in such a place blessed with stunning scenic beauty. Thank you for your kind invitation.

It is the iconic and dramatic nature of your scenery that leads us here today to explore the admittedly unorthodox yet highly topical links between scenic amenity, property rights, and the implications this has for pastoral tenure in the high country, a place where scenic amenity is at an obvious premium.

Very simply, our argument that we lay before you today is threefold:

1. That scenic amenity has come of age. That it is a discrete right deserving of its unshackling from the impediments of the common law. We argue that this acknowledgment is the closing of a loop that valuers and real estate professionals accept without question. The ossified common law stance should adapt (as all good common law should do) to the reality of modern practice.
2. As a property right within the bundle of rights analogy, we investigate in whose 'bundle' does it vest? In the case of high country pastoral tenure, has it remained within the Crown's allodial bundle, or has there been an alienation to the pastoral right holder? We submit the former.
3. Lastly we examine the implications this has for the vexed issue of scenic amenity values being taken into account for the purposes of rent review under section 131 Land Act.

Scenic amenity is a thing of property *inter alia* capable of use, enjoyment and exploitation

The common law has traditionally resisted the subject matter of 'view' or 'prospect' as a property right. In 1610 *William Aldred's Case* described the putative property right in the following terms:

> [F]or prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect… But the law does not give an action for such things of delight. [1]

The stumbling block to the propertisation of view has been its whimsical idiosyncratic nature, such that it was a 'thing of mere delight' where 'beauty was in the eye of the beholder'. Hence it lacks the requisite stability or permanence to form the subject matter of a grant. Critically it is thought of as being theoretically incapable of conforming to the core property attribute of 'excludability', how can a person 'possess' or occupy a view such that he or she excludes others from the prospect?

Thus from a property rights perspective, and the analogy of the 'bundle of rights', the common law has been unwilling to isolate from within the bundle of 'use and enjoyment' rights, a discrete right to view or 'scenic right'. Thus spite fences are open slather and there are no property remedies to protect someone overlooking you.

But it is arguably not all as it seems.

Aldred's case was criticised in the late 19th century in England when it was noted

[1] *Aldred's Case* (1610) 77 ER 816 at 821

> The distinction between a right to light and a right of prospect, on the ground that one is a matter of necessity and the other of delight is…more quaint than satisfactory.[2]

This statement exemplified the inconsistency of the common law (and later statute *PLA 2007*) in tolerating analogous easement rights (such as rights to light and air) but not rights to a view. Moreover there are other rumblings:

The policy justifications behind *Aldred*[3] are no longer relevant. For example, the fear that encumbrances such as rights to view would fetter the free alienation of estates or hamper development may have been understandable in 1610. But such policy is outmoded in the modern context, in which interests are encumbered by a multiplicity of charges or burdens, statutory or otherwise.[4]

Some commentators feel that the prohibition on view forming the subject-matter of a property right may be justified where the presumed right arises impliedly or prescriptively, but certainly not where it arises by express grant, especially where 'basic contract law principles of certainty are met'.[5]

When it comes to obstruction of view cases the faint echoes of 'nuisance' are never far away. As Gray notes in his seminal essay 'Property in Thin Air' 'we must be always ready to hear the resonance of property in the dialogue of trespass and nuisance'. As a proprietary tort, nuisance is frequently employed when exploring the boundaries of property. In Australia the High Court's struggle with prospect as property was masked behind talk of nuisance in Victoria Park Racing. By the slenderest of margins it failed. In obstruction

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[2] *Dalton v Angus* (1880-81) a AC 740, 824 Lord Blackburn
[3] see for example also *Phipps v Pears* [1964] 2 All ER 35, 37
[4] Silverstone at 112-113, see also S G Maurice, *Gale on Easements* (15th ed, 1986) 27;
[5] ibid

cases, such as *Ahearn v Havler*[6] a corrugated iron fence 7 feet 6 inches high in suburban Auckland did not constitute on the facts a nuisance. But it is always a matter of degree. Property law reserves to itself the right to intervene when the obstruction in question does cross the nuisance threshold. This seems to suggest that property law has a 'watching brief' role when it comes to interferences with prospect.

Finally scenic amenity has had the misfortune of being corralled into the law of easements from its inception. This taxonomic mis-allocation has blunted the development of a distinct scenic right by obfuscating its status within the strict common law requirements of easements.

Scenic amenity is thus conventionally outside the Anglo common law's notion of property. But this perspective is overly simplistic. If one scratches beneath the surface of the assertion that view is not property, one can uncover flaws and misassumptions that underscore this base position.

In arguing the case of a scenic property right, we do not stop at the perceived deficiencies of the traditional common law position. We shall also consider the treatment of the subject in the United States, the role of environmental and conservation objectives in property rights regimes, and the notion that views, especially spectacular views, are capable of objective measurement. We say that the aphorism 'beauty is in the eye of the beholder', the *extreme subjectivist* perspective of the Anglo common law, is in contemporary terms obsolete.

[6] *Ahearn v Havler* [1967] NZLR 245, 248

Turning first to the United States, where there is less reticence when it comes to formalising scenic rights as a distinct property right. In the US 'a substantial body of case law recognizes a common law negative easement of prospect or view.'[7] American courts have struck down 'spite fences'[8], found quasi-property in a 'spectacle'[9], and specifically affirmed scenic easements[10]. There is much in American jurisprudence to inculcate the values of view, landscape, and scenic amenity into the discourse of property law.

This judicial reality has been backed in practice by the use of scenic easements since 1933 by highway authorities.[11] Scenic easements are a creature of statute with a narrow objective: 'the restoration, preservation, and enhancement of scenic beauty'[12] by 'less than fee interests'[13] along state and federal highways. The National Park Service first adopted the scenic easement mechanism in the 1930s, with plans to construct scenic parkways in Virginia and North Carolina ('the Blue Ridge Parkway') and in Tennessee, Alabama and Mississippi ('the Natchez Trace Parkway'). To minimise cost, the Park Service employed both outright fee simple purchase and the lesser right of scenic easement (in the ratio of 100 acres to 50 acres respectively). The '**primary public purpose** in acquiring the scenic right in … adjacent land was to be the observation of scenic beauty.'[14]

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[7] See for example *Johnstone v Detroit*, 245 Mich. 65, 79, (1928); *Kamrowski v State*, 31 Wis. 2d 256 (1966) cited in Cunningham 176-177

[8] see for example *Racich v Mastrovich* 273 NW 660 (1937); *Fouts v Beall* 518 S 2d 1236 (1987) cited in P Butt, *Land Law* (5th ed, 2006) [1620]

[9] cite reference to Victoria park racing

[10] *Kamrowski v State* 31 Wis. 2d 256 (1966); see also the cases cited in S Siverstone 111 footnote 37

[11] starting with the Blue Ridge Parkway in Virginia and North Carolina, and the Natchez Trace Parkway in Mississippi

[12] *Highway Beautification Act* of 1965, Title III, 23 U.S.C. s 319(b)

[13] Cunningham 174

[14] ibid 181

The state of Wisconsin was particularly active in scenic easement acquisition. Its program was and remains substantial and successful.[15] Easement enabling legislation was enacted in 1939, and as a consequence of its pioneering approach, Wisconsin was a jurisprudential pioneer for both its legislative and judicial interpretation of the nature of the statutory scenic right (at least until the 1965 federal *Highway Beautification Act* institutionalised a template for other states).

The content of the Wisconsin scenic right conveys 'scenic rights' to the State for consideration and in perpetuity, on the basis of a 'desire to preserve, protect and improve for scenic purposes' such rights.[16] The right is non-possessory; it precludes any general right of entry by the public, and precludes entry by State agents except for purposes of inspection, maintenance or enforcement of the scenic right. The property right can be changed only 'by conveying those interests or by granting a scenic easement variance'. [17]

However despite its legislative force, the imposition of a statutory scenic right did not assuage the discomfort of the common law, particularly in relation to the core issue of excludability, how does one possess such a right?

In *Kamrowski & Ors v State (State Highway Commission) ('Kamrowski')*[18] the validity of scenic easement legislation was challenged *inter alia* on this ground. The concern was the indefiniteness of the right - the inability to describe the scope of use and enjoyment by its beneficiaries. The appellants argued that there was not a 'public use' of the right because the use lacked the essential pre-requisite of 'physical occupancy'.[19] The Wisconsin Supreme Court made a number of salient observations in response:

1. The legislature is free to determine as a matter of policy 'that the protection of scenic resources along highways is a public purpose…'[20]

[15] The program includes the Mississippi Parkway/Great River Road started in 1952, amongst other parkways.
[16] refer pro forma and also historical terms in Cunningham 200-201
[17] ibid
[18] 31 Wiis. 2d 256 (1966)
[19] Kamrowski ibid 264
[20] Kamrowski 263

2. The enjoyment of the right is the 'recreation for the traveling public in viewing a relatively unspoiled natural landscape…'[21]
3. The occupation or enjoyment of the [right] was in the present case a form of 'visual occupancy'[22]
4. The right was neither 'illusory, whimsical and highly controversial… [but the] taking [of] a portion of …property rights, and just compensation will be paid for what is taken.'[23];
5. The enjoyment of the scenic right was 'direct use by the public of …rights in land …taken in the form of a scenic easement, and **not** (emphasis added) a mere incidental benefit from the owner's private use of the land'[24]; and
6. '[T]he concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses is sufficiently definite…'[25]

For the Anglo common law, the implications of *Kamrowski* (and the American position generally) should not be overlooked. That the right is 'sufficiently definite', that its 'use and enjoyment' lies in the 'viewing of a natural landscape', that it is a separate portion of property rights, and that 'surely' it is a compensable taking, are findings coherent with the 'bundle of rights' view of property. Moreover its separateness does not mean that it is a 'floating' right, rather, it is inherent to the location in question.

<u>The role of conservation objectives in property rights regimes:</u>

The pre-eminence of an ecological view of property, what Professor Joseph Sax calls the 'economy of nature', [26] has profound implications on the content of property rights. The embedding of environmental and conservation values within traditional formulations of real property interests that started in the 1960s[27] is on going and inexorable. Now the environment and the economy are inseparable. Where once the common law saw no need to recognise a concept such as a view, '[t]he objectives of society - political, economic, social or cultural are different.'[28] The simple 'view' has become part of a wider environmental concern for landscape amenity. This heightened ecological awareness challenges the

[21] Kamrowski 263
[22] Kamrowski 265
[23] Kamrowski 265
[24] Kamrowski 265
[25] Kamrowski 266
[26] J Sax, 'Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council'*, (1992-93) 45 *Stan. L. Rev.* 1433, 1442
[27] E T Freyfogle, The Owning and Taking of Sensitive Lands', (1995-1996) 43 *UCLA L. Rev.* 77, 109
[28] D E Fisher, 47

law to implement (amongst other conservation objectives) 'the particular nature of landscape and landscape values'[29] into property frameworks.

Conservation and environmental values affect property rights in two ways. The first is the impact of regulatory and legislative restriction on an owner's (formerly and purportedly) Blackstonian 'despotic dominion,'[30] that seems to grant unfettered rights to use and enjoy their land. While related to the bundle of rights, any land use restrictions imposed by environmental values are external to the bundle.[31]

The second manifestation is an intrinsic part of the divisible bundle of rights. It involves the unbundling of a right (or the creation of a new right to add to the bundle) as an instrument for environmental good. Robert Goldstein describes this as adding 'green wood in[to] the bundle of sticks.'[32] The use of property rights (whether new or re-cast[33]) to achieve environmental outcomes reflects depending on one's point of view, either a seismic shift, or an evolutionary progression in our thinking of private property rights.

From the environmental perspective, protecting iconic scenic amenity (such as New Zealand's 'spectacular lakeside landscapes'[34]) by a property right is an internally consistent assertion. Charging a fee for the use and enjoyment of the right acknowledges and validates the environmental value of this relatively untrammelled landscape. Reinforcing this 'green wood' type of right places a value on the landscape as an environmental resource. This is fitting given New Zealand's international reputation as 'clean and green'[35].

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[29] Ibid

[30] Blackstone, William, *Commentaries on the Laws of England*, (1765 (1979 ed.)).

[31] see generally J L McGregor, 'Property Rights and Environmental Protection: Is this Land Made for You and Me?', (1999) *Arizona State L.J.* 391

[32] R J Goldstein, 'Green Wood in the Bundle of Stciks: Fitting Environmental Ethics and Ecology into Real property Law', (1997-1998) 25 *B.C. Envtl. Aff. L. Rev*. 347

[33] cites to public trust doctrine?

[34] Hon David Parker, New Zealand Minister of Land Information, quoted in: New Zealand Herald, 'Protection of lakesides a betrayal say farmers', 16 November, 2007, J Booker
see also:
The National Business Review, 'Lakeside land held out from tenure review: "No development allowed," says minister,' 16 November, 2007, C. Hutching.

[35] See generally New Zealand's Ministry for the Environment report estimating the economic value of the clean green image for New Zealand exports:
Ministry for the Environment (2001) "Valuing New Zealand's Clean Green Image." Found at http://www.mfe.govt.nz/publications/sus-dev/clean-green-image-value-aug01/index.html, accessed 19 Dec 2007.

Aesthetic theories and their implementation into property rights regimes:

The common law has traditionally regarded the aesthetics of scenic amenity as individualised and whimsical. *Aldred* called prospect a thing of mere 'delight', and the tag has stuck. Logically a property right must be stable and identifiable. Where that 'right' seems anathema to these qualities, the corollary is that it cannot be objectively measured. This is a critical impediment to propertisation.

Whilst there is literature that suggests that beauty is capable of objective descriptors, time constraints today mean that we will only touch on examples of the practical implementation of scenic amenity benchmarks in New Zealand and Australia. However I refer you to our draft paper distributed for further detail in respect of quantifiable theories of beauty.

In New Zealand, Land Information New Zealand (LINZ) mimics what have been described as *cognitive objectivist* approaches in reports assessing Crown pastoral land eligibility for tenure review. [36] Landscape and visual values are measured by extrinsic factors such as 'intactness, distinctiveness, coherence, historic factors, visibility, legibility, local, regional or national significance, and vulnerability to change'.[37]

In Queensland the scenic amenity values of eucalypt forest gorges in Brisbane (where I walk often with my children) is mapped.[38] The Queensland Department of Natural Resources (DNR) defines the term 'scenic amenity' as

a measure of the relative contribution of each place in the landscape to the collective community appreciation of open space as viewed from places that are important to the public. It observes that 'the term "scenic amenity" has not been widely used in south-east Queensland, or in Australian or overseas studies'.

The measure of a location's scenic amenity is arrived at by an equation that identifies the crossover between *scenic preference* and *visual exposure* (both terms being defined distinctly). Where the two categories overlap is then deemed natural areas of highest scenic amenity worthy of conservation.

Hence both Queensland DNR and LINZ measure the value of visual landscape by using purportedly 'scientific methods'. Thus beauty is now

Comment [LU1]: Is this LINZ or DNR

[36] See for example the Conservation Resources Report into Ben Nevis Pastoral Lease PO 241 dated June 2004.
[37] See for example LINZ Reports into Carrick Station Pastoral Lease PO 357 (March 2005) and Rees Valley Pastoral Lease PO 311 (March 2005). (at www.linz.govt.nz)
[38] See for example the Moggill report, which observes that 'the term "scenic amenity" has not been widely used in south-east Queensland, or in Australian or overseas studies'. (at 3)

neither subjective, nor in the eye of the beholder, the premise upon which the New Zealand common law denies view its propertisation, but rather it is capable of objective measurement and ascertainment.

Thus we turn away from the theoretical question to the instant issue at hand in the case of high country pastoral tenure. If a property right, in whose bundle does the scenic right reside? The Crown's or the pastoral right-holders?

Pastoral right holders under the *CPLA 1998* and the generic *Land Act 1948* broadly argue that the Crown's setting of a fee for scenic amenity in its review of Crown rentals is either INVALID, UNFAIR or an amalgam of both.

The INVALIDITY argument says there is no such property right. Thus Lessee advocates have described amenity values in the following terms, as '(a)n indefinable aspect that cannot be valued in a definitive way,'[39] a mere 'pleasantness,' or simply 'a useful or desirable feature of a place.'[40] Such 21st century comments have not travelled far from *Aldred's* 'matter only of delight' in 1610. They do not take account of the common law's less than certain reasons for the rule, American precedent, the heightened role of the environment in real property regimes, or the quasi scientific benchmarking of scenic beauty benchmarks.

[39] High Country Trustees (another lobby group for high country runholders) chair Gerry Eckhoff (and former Member of Parliament with the libertarian-leaning ACT party) cited in Annette Scott, 'Report supports farmers, minister ignores findings', The New Zealand Farmer's Weekly, 16 October 2006
[40] Chairman's address, Federated Farmers of New Zealand Inc, South Island High Country Farmers Conference 2007, 8 June 2007

Operating simultaneously (and sometimes in conjunction) with the invalidity argument is the UNFAIRNESS argument.

The UNFAIRNESS argument implicitly acknowledges the right but says its imposition into rents is UNFAIR because either the right is vested in the pastoral right-holder already, or more broadly that it is UNFAIR to 'set a fee against a merino sheep for its view'.

This UNFAIRNESS analysis begs the Q: Has the right been alienated from the Crown's allodial estate to the pastoral right holder? And if so how?
Has it been alienated by the common law? Has it been alienated by statute? Or failing that is it the normative force of custom and rhetoric that seeks to effect the alienation?

Pastoral right-holder advocates argue that scenic amenity has been alienated to their bundle as a result of 'exclusive occupation' rights, perpetual 'tenure rights', or a combination of the two. The Crown regards the right as within its allodial estate. Who is right?

<u>Has the scenic right been alienated by common law?</u>

Right-holders enjoy the benefit of a widely accepted orthodoxy that pastoral leases confer 'exclusive occupation'.[41] The underlying assumptions that secure this assertion do not appear as certain or clear[42] as the assertion suggests. The APC suggested as much in its detailed

[41] Cites to critics of Ann and also Otago daily Times article 12/07
[42] The Australian Productivity Commission in its review of Australian and South Island NZ Pastoral leases in 2002 concludes the opposite.

review of Australian and South island pastoral tenure in 2002 when it said:

[get quote]

Esentially the right-holder's interest is one of pasturage only and no right to the soil. In the past right-holders have cited their 'restrictive covenants and particularly the limitation that the lessee's right is one to pasturage only and not to the soil,...as a reason for justifying concessional rents'.[43] But in claiming residual scenic rights, there is no corresponding reticence.

In claiming 'exclusive occupation' (and thus the benefits of the common law lease), right-holder advocates ignore common law issues that qualify an ambit claim to scenic amenity. These include:

1. That in arguing common law justifications, there are inconvenient leasehold principles that fail to fall neatly into place for the purposes of the exclusive occupation thesis. These include the rule that substance rather than form should dictate the nature of the interest granted[44], the nature of the 'leased premises' test, [45] and the degree of residual control a grantor may reserve to itself in the occupied land.[46]
2. Common law also respects persuasive authority. In Australia, High Court rulings in Wik, Wilson and Ward affirm pastoral leases as creatures of statute [47] ('statutory leases'). There is much similarity in history and policy that affirms the parallel effect of such persuasive authority.
3. That the claimed right of 'exclusive occupation' is not the same as the common law's 'exclusive possession.' The former is the vulgar meaning to physically occupy, the latter relates to the qualitative nature of the legal relationship between the grantee and the proprietary interest granted. The terms are not interchangeable, and frequently do not overlap. Indeed

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[43] Clayton Report [2.63] and also [[2.81] 'this concessional rate reflected the restrictive nature of the lease and the fact that at the end of the term the lessee would not have freehold title'.
[44] It is argued that the use of the phrase 'doth hereby lease and demise' in grants of pastoral leases is indicative of the grant of a lease (Otago Times) cf 'Because the tenancy/licence distinction turns on those substantive rights granted to the occupier, it remains unaffected by the label (emphasis added) which the parties chose to place upon their transaction', *Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648, 660 see also *Radaich v Smith* & *Street v Mountford*
[45] *Radaich v Smith* Thus it is difficult to assert exclusive occupational control over expansive areas of mountain range where the land use is described as 'extensive pastoralism for which such land was traditionally used in a largely undeveloped state' Clayton report [2.7]
[46] Specifically the Crown controls activities which disturb the soil or its vegetative cover, ss 15 & 16 *CPLA*, see also generally the comments in *Goston v Designer Space and Storage (2006) Ltd & Gordon* HC AK CIV 2007-404-103 2 (28 February 2007), and note cites 161 & 167
[47] Wik, Wilson, Ward

confusion as to the exact meaning of the two terms frequently leads to errors in law. [48]

Has the scenic right been alienated by statute?

There is no express or explicit conferral of a grant of 'exclusive occupation' in the CPLA or Land Act. In 1948 and again in 1998 the tenure rights were limited to exclusive pasturage rights only and no right to the soil. To the extent that right holders enjoy quiet enjoyment of their interest, it is a covenant by the Crown not to interfere with the right-holder's exclusive rights of pastoralism.

As statutory leases, we argue moreover that the combined effect of the *Land Act* and *CPLA* constitute a code that expressly or by necessary implication excludes common law or equitable doctrines.[49]

When looking at legislation, it is significant that land tenure policy makers have traditionally drawn a distinction between freehold, 'private tenancies', and 'public' or 'state' leasehold.[50]

What sets the latter statutory tenure apart are the implications of shared interests in public land, competing and at times contesting private and public agendas, and overarching national policy imperatives (soil and land conservation) that were the *raison d'etre*[51] of the pastoral lease and particularly the 1948 *Land Act*.[52]

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[48] See generally M Wonnacott, *Possession of Land* (2006)

[49] *In Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704 the High Court did not reject an argument that the *Land Act 1948* (pre CPLA) comprised a code that precluded equitable doctrines such as a lessee's claim for relief against forfeiture. It held that in an appeal under s 146, the court did not have the wide discretion it had in an analogous equitable claim. Further the court noted (at 710) that under the *CPLA* the equitable doctrine was specifically excluded (the CPLA did not apply retrospectively on the facts).

[50] H Belshaw, 'Land Tenure in New Zealand', *Far Eastern Survey* Vol.15, No. 8 (Apr 24, 1946), 115

[51] Clayton report [2.27]

[52] The Hon F C Skinner Minister for Lands in introducing the *Land Bill* in 1948 detailed the need for Crown control. 'If there is any doubts as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right of purchase in these …pastoral licences (emphasis added) Clayton report [2.23] See also K B Cumberland, 'High Country Run, the Geography of Extensive Pastoralism in New Zealand', *Economic Geography*, Vol 20 No 3 (1944) 204 and D Greasley & L Oxley, 'The Pastoral Boom and

Likewise in claiming that perpetual renewal rights confer a 'tenure right', right-holder advocates also ignore pertinent statutory issues:

1. That the right of renewal may be simply procedural rather than right-generating in itself[53]
2. That secure tenure was 'axiomatic (as) a pre-requisite to farm development'[54] and was thus offered in 1948 and replicated in the *CPLA* in 1998 as a necessary policy *quid pro quo*
3. That (cynically) it may be thus a 'legislative sleight of hand'[55]
4. That there is a long-standing distinction between perpetual leases (with terms of 999 years) and perpetually renewable leases (with terms of 33 years).[56] The former equates to a 'form of title near to freehold'[57] issued under the *Land Act* from 1892 to 1907, and the latter by necessary implication, is altogether different.

The collective sum of this is the non-vesting of scenic amenity rights in the pastoralists's statutory bundle, and its logical remainder within the Crown's bundle of rights.

Conclusion:

On 8 June 2007 Mr Donald Aubrey stated that the high country farmer has an exclusive right to the view in perpetuity, in tandem with their rights of pasturage.[58] In such circumstances it is unfair to charge a fee for scenic values. This **unfairness** does not derive from any analysis that the right is not verifiable, rather that its imposition is an onerous charge for the use and enjoyment of a right beyond core pastoral activities. It is thus unfair to set a fee 'against merino sheep for their view.'[59] However the coherency of the bundle of rights analogy suggests that pasturage and views are potentially divisible, and the prescribed statutory nature of the pastoralist's bundle suggests that scenic amenity remains with the Crown.

Long Swings in New Zealand Economic Growth: Explaining the Long depression of the 1920s' who claim this tenure serves the national interest by fettering land speculation.

[53] Page & Brower

[54] Clayton report [2.67] & [2.68]

[55] Kirby J in Wilson

[56] See generally W D Stewart, 'Land Tenure and Land Monopoly in New Zealand', *The Journal of Political Economy* Vol 17, No. 2 (Feb, 1909) 82, at 87

[57] Clayton report [3.9]

[58] Chairman's address, Federated Farmers of New Zealand Inc, South Island High Country Farmers Conference 2007, 8 June 2007

[59] Donald Aubrey, Chair South Island High Country, Address to Bluegreens Forum, Te Anau, 6 October 2007

Yet by continuing to argue unfairness, pastoral right-holders affirm that a scenic right does exist.

This internal contradiction is a concession by pastoral right holders that scenic amenity has entered the contemporary discourse of property. If the Crown can impose (fair or otherwise) a scenic amenity component in reviewing pastoral rental, this underscores the propertisation of the amenity. That the pastoralist occupies the land in furtherance of his or her exclusive pasturage right means that he or she (to borrow the language of *Kamrowski*) has visual occupation of a particular view. Such visual occupancy is an enjoyment of a discrete property right presently denied (according to conventional wisdom) to the public at large. The Crown's scenic right is separate, incorporeal, and exploitable, and can be accommodated with the statutory bundle enjoyed by the *CPLA* right holder by setting a fee for its use and enjoyment.

1. The Crown was correct in rejecting the recommendations of the interim valuation report (in particular that stock units are the fairer method of rental calculation) because it pre-supposed that pastoralism is the best use of the land, and ignored the importance of option values and the non-exploitation of scenic amenity values.