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### 3. Public Property and Private Use Rights: Exclusive occupation of the coastal marine area in New Zealand

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#### I. FOREWORD

This chapter of the monograph was first written in April 2009, and was subsequently updated in January 2010. There have been significant changes to New Zealand legislation since that time. In particular, the Marine and Coastal Area (Takutai Moana) Act (MCAA) was enacted on 24 March 2011. The MCAA replaces the Foreshore and Seabed Act 2004 establishing a new regime for recognition of customary rights and title over the foreshore and seabed. Importantly, section 11(3) of CMCA divests the Crown of title as owner (*dominium*) to the ‘marine coastal area’<sup>1</sup> and creates the ‘common marine and coastal area’. The common marine and coastal area is incapable of ownership by the Crown or any other person. However, in keeping with traditional approaches to common property the MCAA protects public rights of access, navigation and fishing within the common marine and coastal area.<sup>2</sup> Accordingly, the MCAA is consistent with the concepts of public property discussed in this chapter, and the balance of the chapter’s discussion on statutory and property rights remains relevant. Nevertheless, further consideration of the MCAA and its implications for statutory and property rights to public resources will be required.

#### II. INTRODUCTION

In New Zealand, the Resource Management Act 1991 (RMA) is the prevailing legislative regime for managing all natural and physical resources. This includes

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- 1 The definition of ‘marine coastal area’ under section 9 of the MCAA is different to that of ‘coastal marine area’ under section 2 of the Resource Management Act 1991.
  - 2 Makgill, R. & Rennie, H. “The Marine and Coastal Area Act 2011” [2011] (April) *Resource Management Journal* 1, compares the definitions of ‘marine coastal area’ and ‘coastal marine area’, and reviews the amended statutory regime for public rights and customary rights and title over the common marine and coastal area.

all the area between the seaward boundary of the territorial sea and the landward boundary of mean high water springs, which is defined under the RMA as the coastal marine area.<sup>3</sup> The coastal marine area is accorded special significance under the RMA because it is owned by the Crown on behalf of all New Zealanders. It is in effect public property and the preservation of its natural character and its availability for public access are matters of national importance.<sup>4</sup> The right to occupy the coastal marine area is a privilege which is not conferred lightly, since it effectively restricts the public's right to enjoy the coastal marine area.

New Zealand's coast line measures 18,000 km in length<sup>5</sup> and its territorial waters encompass 16.3 million hectares.<sup>6</sup> Its ports are crucial for international trade. Economic activity associated with tourism, boating, fishing, marine farming and urban development all take place in the coastal marine area.<sup>7</sup> Many of these activities either directly or indirectly rely on some form of coastal occupation. At the same time, access to the coastal marine area is guarded by New Zealanders as a birth right.<sup>8</sup> As population and technological capability grow, so too will the competition for occupation rights and access to the coastal marine area. The RMA sets in place a regime that looks to balance competing demands for access to the coastal marine area by allocating private use rights while preserving public access. This paper is concerned with the nature of private rights to use public property, and, more specifically, exclusive occupation of the coastal marine area.

Part III ('Property as a Bundle of Rights') provides a brief overview of the history and characteristics of private property rights. It is necessary to have something of an understanding of the nature of private property rights before entering into a discussion about the character of rights to use public property. This is because absolute property rights are extinct, if in fact they ever really existed in any practical sense.<sup>9</sup> The idea of absolute property rights was exchanged over

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3 Section 2 RMA.

4 Section 6(a) and (d) RMA.

5 Ministry for Environment, *Environment New Zealand 2007*, December 2007, p. 6.

6 Rennie, H., "Coastal Fisheries and Marine Planning in Transition" in Memon, P.A. & Perkins, H. (eds.) *Environmental Planning & Management in New Zealand*, Dunmore 2000, p. 216.

7 It is thought that about 30 per cent of the total marine environment experiences some degree of disturbance from human activities. This is sobering when the size of our population (i.e. measured by Statistics New Zealand as at December 2007 to be 4,291,900) is considered against the size of our coastal environment (i.e. at 4.4 million square kilometres it is the sixth largest in the world). See, Ministry for the Environment, *Environment New Zealand 2007*, p. 57.

8 Rennie, supra note 6 at p. 216.

9 There have always been limitations on property rights. In the seventeenth century the Court of the King's Bench considered a plaintiff's claim that the defendant had erected a pig sty too close to his house, so that the stench made his own house unlivable. The Court held the defendant had "no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of

time for a ‘bundle of rights’ approach to property. Property rights were redefined as a collection of rights and duties between people, rather than rights in respect of things. This exchange was principally driven by the growth of intangible property and new social, political and economic forces. These forces are still at work (albeit in a different way) and this helps to explain the nature of rights to use public property in the 21st century. The changing nature of property rights is a theme that is returned to in the discussion on the nature of private use rights in the coastal marine area under part VII.

Part IV (‘Public Property and the Foreshore and Seabed’) looks at the Crown’s ownership of public property. Crown property is held for the benefit of the public, who have certain rights to the use of that property. These rights are not secured as individual rights, but rather as social rights in the use of social resources. The public’s right to the foreshore and seabed (or coastal marine area) has a Roman and common law tradition. While the common law recognised that the Crown could grant private title over the foreshore and seabed, such grants were subject to the public rights of navigation and fishing. In New Zealand the common law rights to public access have been codified through legislation. There is a presumption against alienation of the coastal marine area. This is akin to the American doctrine of public trust which holds that public land under navigable waters cannot be irrevocably surrendered to private interests.

Part V (‘The Right of Public Access to the Coastal Marine Area’) is concerned with the right of public access to the coastal marine area as set out under the RMA. The RMA provides for public access to the coastal marine area as a matter of national importance.<sup>10</sup> Decision makers must turn their minds not to whether public access should be permitted, but to whether it should be excluded. On the other hand, the RMA is also concerned with the use and occupation of the coastal marine area.<sup>11</sup> Nevertheless, in keeping with the RMA’s presumption of public access, the neoliberal approach to land based activities under the RMA is reversed and private use and occupation of the coastal marine area is prohibited unless allowed by a plan or resource consent.

Part VI (‘Occupation of the Coastal Marine Area’) analyses occupation of the coastal marine area under the RMA. It shows that occupation involves three elements: that it is necessary, to the exclusion of others and without resource consent would require a lease or licence. Occupation confers private use rights on consent holders to exclude other persons from the area of land that is occupied. Bearing in mind the national importance of public access, however, the Courts

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machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants”. See, *William Aldred’s Case* (1611) 9 Co Rep 57b; 77 ER 816.

10 Section 6(d) RMA.

11 Section 12 RMA.

have been careful to limit the extent of the coastal marine area over which exclusion is granted. In general it would seem that exclusion is granted over the physical space occupied by structures allowing public access to be retained. Nevertheless, there are circumstances where occupation cannot coexist with rights of access, and in these instances public access is restricted.

Part VII ('The Nature of Private Use Rights in the Coastal Marine Area') goes on to question the nature of use rights in the coastal marine area and whether they have any of the characteristics of private property rights identified in part III. It is argued that while the RMA provides that a resource consent is not real or personal property, in reality coastal occupation confers a number of the incidents of ownership discussed in part III that go to make up the bundle of property rights. These include the rights to exclude, possess, use and transfer. These rights entitle consent holders to take actions to protect those rights under property related headings such as trespass and non-derogation of entitlement. Although they do not equate to full ownership, they do represent a limited interest in property. Nevertheless, it is argued that it is unnecessary to try to label these interests as either statutory or property rights in the strict sense of those terms. The RMA confers rights on the consent holder to use and develop public resources. These rights and associated duties govern the consent holder's conduct in respect of the sustainable management of that resource. They are, rather, an entitlement of a new kind and may be considered from an academic perspective a hybrid right composed of statutory and property rights to a public resource.

### **III. PROPERTY AS A BUNDLE OF RIGHTS**

It is important to have a notion of what property rights are, where they come from and the form they take in the 21<sup>st</sup> century. This part briefly touches on the role that natural law, legal positivism and utilitarianism played in shaping our ideas about property. Natural Law theorists explained property in terms of its theological origins, people's relationship with the natural world and morality. Property rights were absolute and could be abrogated by neither the state nor another person. Legal positivism detached property from theology, nature and morality. Instead property was viewed as the product of rules whose origin lay in legislative will. Positivism was accompanied by utilitarianism, which encouraged distribution of property in a way that achieved a net beneficial gain for society as a whole. Together, positivism and utilitarianism paved the way for the redefinition of property as a bundle of rights. This was spurred on by increasingly complex commercial transactions and government regulation, which required a property framework that allowed for separate and overlapping rights to possess, use and dispose of property. This part's summary of the aforementioned legal theories serves two purposes. Firstly, it provides a historical context within which the bundle of rights approach became the principal tool for analysing property in the

21<sup>st</sup> century. Second, it demonstrates that property rights are not a fixed concept. Rather, property rights have adapted and changed over time in response to new intellectual, social and economic forces. An appreciation of the latter point is important to the discussion of the interface between public law and private property rights under part VII.

Theories of Natural Law are derived from the ‘state of nature’ that is said to have preceded the foundation of state authority. Here people enjoyed natural rights to do with their person and their property as they wished. However, people had to rely on themselves to protect their natural rights. John Locke, writing in the 17th century, believed that in a natural state all people were equal and independent, and everyone had a natural right to defend his “life, health, liberty, or possessions”.<sup>12</sup> Locke did not consider that the sole “right to defend” in the state of nature was enough, so people established a civil society to resolve conflicts in a civil way with help from the prevailing form of government. This essentially involved people surrendering a certain amount of their freedom to the state (through social contract) in exchange for protection of their natural rights. Not surprisingly, theories of natural rights and property were fundamentally tied to debates concerning individual freedom and the relationship of citizens to state authority.<sup>13</sup>

Locke believed humankind’s rights and duties in the pre-civil society derived directly from God.<sup>14</sup> Locke’s account of property therefore has a theological dimension. Natural resources were seen not merely as material objects capable of satisfying human wants and needs, but objects created by God and intended for human use.<sup>15</sup> Locke asserted, however, that while the world had been enriched with natural resources for the use of humankind, no individual had a separate or exclusive right to those resources. There was only a common right of use. This common right excluded the possibility of private *dominium* (the Roman term for absolute ownership) over things in their natural state. What was required for the creation of private property rights was a means of transferring resources out of their natural state.<sup>16</sup>

Locke’s theory of labour provided the bridge between the common right of use and individual property rights.<sup>17</sup> Locke wrote of material objects becoming the embodiment of one’s identity. A person’s body was his foremost possession.

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12 Locke, J., *Two Treatises of Government and A Letter Concerning Toleration*, (Digireads.com edition 2005), Book II, ch 2, s 6, p. 73.

13 Coyle, S. & Morrow, K., *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*, Hart 2004, p. 58.

14 Freeman, M., *Lloyd’s Introduction to Jurisprudence*, (6th ed), Sweet and Maxwell 1994, p. 103.

15 Waldron, J., *The Right to Private Property*, Oxford University Press 2002, p. 141.

16 Coyle & Morrow, supra note 13 at pp. 47–48.

17 Ibid., p.50.

When an individual utilised his body in the form of labour and mixed that labour with land, these things became part of that person. The product of that person's labour became his property by natural right as an extension of his freedom and liberty. The protection of that property, in the form of state-supported property rights, was a protection of an individual's liberty defining the limitations of state intervention in personal affairs.<sup>18</sup> It was God, and not the state, who had given people the right to the fruits of their labour. The state was therefore under a duty to use its powers to protect the rights that God had bestowed on humankind.<sup>19</sup>

For Locke, property served as an essential precept in explanations of how, and to what extent, individual members of a civil society might possess fundamental rights to self-determination as individuals.<sup>20</sup> The inherent liberties and rights of individuals were expressed in the concept of property. Property was derived from the idea of self ownership. Locke declared that "every man has a property in his own person: this no body has an right to, but himself."<sup>21</sup> Self ownership implies that a person does not belong to anybody else, and that no one is naturally the master of another.<sup>22</sup> Property was tied to the notion of humans being the masters of themselves. It involved the maintenance of personal integrity in both a physical and non-physical sense. It protected a negative liberty insofar as it protected the security and autonomy of the individual against interference by others. It was an absolute conception of property that advanced a case for the supremacy of individual interests by defining property to be that which describes and protects the individual's autonomous sphere.<sup>23</sup> 'Locke's attempt to safeguard property rights from monarchical interference' has been described as 'so thorough that it is almost contradictory for him to leave a place for any interference. The individual's right to his property seems, for all practical purposes, absolute by Locke's scheme.'<sup>24</sup>

By the 18<sup>th</sup> century, nature, theology and morality had come to be viewed as extraneous to the determination of the extent of an individual's rights. Positivism regarded the idea of a moral foundation to law as incongruent with observations which showed that rules changed and adapted in relation to shifting social conditions.<sup>25</sup> Positivists sought to show what law is, as opposed to natural law

18 Krueckeberg, D., "The Difficult Character of Property: To Whom do things belong?" (1995) 61 *Journal of the American Planning Association* 301 at 303–304.

19 Freeman, *supra* note 14 at p. 106.

20 Coyle & Morrow, *supra* note 13 at p. 58.

21 Locke, *supra* note 12 at p. 79.

22 Tierney, B., "Dominion of Self and Natural Rights Before Locke and After" in Makinen, V. & Korkman, P. (eds.), *Transformations in Medieval and Early-Modern Rights Discourse*, Springer 2006, p. 177.

23 Underkuffler, S., "On Property: An essay" (1990) 100 *Yale Law Journal* 127 at 138–141.

24 Chernov, M., "Locke on Property: A reappraisal" (1957) 68 *Ethics* 51 at 53.

25 Coyle & Morrow, *supra* note 13 at p. 84.

notions of what it ought to be. Law was a human creation made by sovereign rulers through legislation. Positive Law embraced a scientific approach to law, distinguished from a *philosophy* of law by its empirical approach.<sup>26</sup> Empiricism involved the rejection of natural law as a system of norms because the validity of normative rules could not be logically treated as an objective fact but depended upon the relative viewpoint of those applying the rule. Positive law, on the other hand, derived from the state and was ascertainable and valid without regard to subjective considerations.<sup>27</sup> Law came to embody an authoritative body of rules considered as applying to the concrete particularities of social life rather than emerging from them.<sup>28</sup>

William Blackstone has been credited with being the first 18th century jurist to take questions of positive law seriously.<sup>29</sup> Although Blackstone prefaced his *Commentaries* with a discussion of natural law, the greater balance of his work was dedicated to the municipal laws of England. Here he supplied the common law for the first time with an accurate legal terminology.<sup>30</sup> For Blackstone the common law did not reflect universal moral truths, but rather the traditional practices of the English people. The connection between rules and social practice demonstrated that rules were an artificial product of the society which generated them. Since the authority of those rules lay in their ongoing ‘reception and usage’,<sup>31</sup> Blackstone regarded ‘a society’s laws – including its laws of property – ... as determined by the conditions of civil society rather than inherently shaped by nature.’<sup>32</sup>

And yet Blackstone is perhaps best known for his description of humankind’s absolute right to property:<sup>33</sup>

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Despite this description, Blackstone did not believe in an unfettered right to property. Rather, his comments need to be interpreted in light of his views

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26 Pound, R., “The New Philosophies of Law” [1911] *Harvard Law Review* 718 at 721.

27 Freeman, supra note 14 at p. 206.

28 Coyle & Morrow, supra note 13 at p. 72.

29 Ibid., p. 73.

30 Pound, supra note 26 at p. 722.

31 Blackstone, W., “*Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field’s Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes*, J.B. Lippincott Co. 1893, Vol. 1, p. 68.

32 Coyle & Morrow, supra note 13 at p. 73.

33 Blackstone, supra note 31 at p. 3.

on the relationship between natural law and positive law. Blackstone shared the natural law theorists' belief that the original right to private property was founded in nature. But natural rights to property only existed in a state of nature, or as long as man remained in 'a state of primeval simplicity'.<sup>34</sup> The laws concerning trespass and transfer of property were entirely derived from society and formed some of those civil advantages for which every individual resigned part of his natural liberty.<sup>35</sup> According to Blackstone's view, property rights outside of nature are a civil institution or human invention and 'all property is derived from society'.<sup>36</sup> Property rights were not insulated from government action, but could be changed or modified where the general good required direction or restraint.<sup>37</sup> The freedom of a land owner to do what he wished with his land was limited by the law of nuisance. An owner could not burn his townhouse even if there were no damage to others, 'a sensible rule, no doubt, but yielding something less than absolute dominion for him.'<sup>38</sup>

John Austin, writing at the beginning of the nineteenth century, also argued that the law did not need to conform to a moral code. Austin was a positivist for whom the law consisted of commands issued through statutes, common law and delegated legislation. Austin, seen by many as the founder of legal positivism, famously summarised positivist legal theory with his claim that '[t]he existence of law is one thing; its merit or demerit is another.'<sup>39</sup> Austin's work and the roots of legal positivism can be traced to Jeremy Bentham. Bentham's brand of legal positivism was a response to what he perceived as Blackstone's use of natural law to defend the rules made by common law judges. He was a strong advocate of codification and an opponent of the common law and judicial legislation.<sup>40</sup> For Bentham, common law scholars invariably mistook statements *about* the law for statements *of* the law. He required a scientific approach to property rights, where rights were conferred and established by legislative provisions which aimed to regulate legal relationships between individuals.<sup>41</sup> Positivist legal science heralded a shift in legal thought from the centrality of rights to the centrality of rules.<sup>42</sup> The science of rules provided the positivists with a mechanism through

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34 Ibid., p. 2.

35 Alschuler, A., "Rediscovering Blackstone" (1996) 145 *University of Pennsylvania Law Review* 1.

36 Blackstone, *supra* note 31, p. 299.

37 Barton, B., "The Legitimacy of Regulation", (2003) 20 *New Zealand Universities Law Review* 364 at 378.

38 Schorr, D., "How Blackstone Became a Blackstonian" (2009) 10 *Theoretical Inquiries in Law* 103 at 113.

39 Austin, J., *The Province of Jurisprudence Determined*, Prometheus Books 2000, p. 184,

40 Bix, B., "Legal Positivism" in Golding, M. & Edmundson, A. (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell 2005, p. 38.

41 Coyle & Morrow, *supra* note 13 at p. 95.

42 Ibid., p. 97.

which to reform rights according to utilitarianism. The principle of utility sought to order human relations so as to achieve the greatest happiness for the greatest number of people.<sup>43</sup> Property rights were seen as instrumental in achieving this social goal, and it was in the interest of society to protect individual property rights.<sup>44</sup>

By the late 19<sup>th</sup> and early 20<sup>th</sup> century, the emphasis began to shift away from the individual and towards society. Property had well and truly set sail from absolute *dominium* over things towards a set of legal relations between persons.<sup>45</sup> The preoccupation moved from one's rights to the wants of others and one's duties towards them. A person's use of his property was limited by the interests of others.<sup>46</sup> Wesley Hohfeld argued that these legal relations were defined by a 'bundle of rights' and corresponding duties between people in respect of things. The bundle of rights as a theory of property did not present a new normative idea, but an analytical and descriptive one.<sup>47</sup> According to the bundle of rights approach to property, it is not the resource itself which is owned; it is a bundle, or portion, of rights to use a resource that is owned.<sup>48</sup> Property rights are not rights of people in respect of property, but rather rights of people against other people. Legal relations cannot exist between people and things, because things cannot have rights and duties or be bound by or recognise rules.<sup>49</sup> Hohfeld's theory has been described as conveying 'the idea that one who has a right is opposed by another who has "no-right," and that these opposites are a set of legal relations that can describe any kind of property. These legal relationships are sets of claims and entitlements in tension with each other, held by people against one another.'<sup>50</sup>

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43 Morrison, W., *Jurisprudence: From the Greeks to post-modernism*, Cavendish 2000, p. 195. Morrison states that "Bentham was acutely aware that men seek their own happiness. The object of government, however, [was] to help achieve the greatest happiness to the greatest number."

44 Morrison, *ibid.*, pp. 232 to 234. Morrison states that Austin saw utility as the key principle of social justice. Although he was aware that private property was a source of social inequality, he considered that if the poor were educated in the principles of political economy they could improve their bargaining position. Once this was achieved 'they would understand that attacks on property are actually attacks on the institutions which create accumulation, they would see they are actually deeply interested in the security of property' and 'if they adjusted their numbers to the demand for their labour, they would share abundantly, with their employers, in the blessings of that useful institution.'

45 Arnold, C., "The Reconstitution of Property: Property as a Web of Interests" (2002) 26 *Harvard Environmental Law Review* 281 at 286.

46 Dias, R., *Jurisprudence* (5<sup>th</sup> ed), Stevens 1985, p. 301.

47 Johnson, D., "Reflections on the Bundle of Rights" (2007) 32 *Vermont Law Review* 247.

48 Guerin, K., *Property Rights and Environmental Policy: A New Zealand perspective*, New Zealand Treasury Working Paper 03/02, 2003, p. 3.

49 Kirkpatrick, D., "Property Rights – Do You Have Any?" (1997) 1 *New Zealand Journal of Environmental Law* 267 at 272.

50 Johnson, *supra* note 47 at 251.

The idea of property as a bundle of rights took hold in the late 19th and early 20th centuries for two distinct reasons. The first reason was to facilitate a growing economy based on intangible property. Although property as ownership of things worked for an economy based primarily on land and secondarily on tangible goods, the concept did not work very well for an economy promoting new ideas such as business identity, securities for investment, licenses and government benefits.<sup>51</sup> The second reason was to limit private property rights in response to new social, political and economic forces. Such things as urbanisation, industrialisation, new concentrations of wealth, protectionism and rising standards of living all demanded a redefinition of private property to allow for greater government regulation. These forces led to the rise of the regulatory state in the twentieth century and the development of laws that sought to regulate (amongst other things) the redistribution of wealth and protection of the environment.<sup>52</sup>

In simple terms, property rights had transcended both the physical and the individual and transformed into separate and overlapping rights to possess, use and dispose of property. In the early 1960s, Tony Honoré attempted to list the incidents of ownership that have come to be known as the bundle of rights. Honoré claimed that his list of incidents of ownership were ‘common to all “mature” legal systems.’<sup>53</sup> Adapted from Honoré’s list, the following incidents of ownership are commonly accepted as coming under the bundle of rights umbrella:

- the right to exclude;
- the right to possess;
- the right to use;
- the right to alienate (or transfer, or dispose of);
- the right to receive income; and
- the duty to refrain from using property in a way that harms others.<sup>54</sup>

Honoré in effect built on Hohfeld’s thought by taking the bundle of rights and describing them in terms of actions or events: ‘for instance, to use, to sell, to exclude – in relation to other persons with respect to things.’<sup>55</sup> If an individual held all or most of the incidents with respect to a thing he could be said to have

51 Arnold, *supra* note 45 at 288.

52 *Ibid.*, 289.

53 Johnson, *supra* note 47 at 253.

54 Arnold, *supra* note 45 at 285. Guerin, *supra* note 48 at pp. 4–5. Kirkpatrick, D., “Has the Resource Management Act Replaced the Property Law Act”, in *Intensive Resource Management*, New Zealand Law Society 2007 at p. 41.

55 Munzer, S., “The Commons and the Anticommons in the Law and Theory of Property” in Golding, M. and Edmundson, A. (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell 2005, p. 149.

ownership. If an individual had something less than the full package of incidents, as with an easements or *profit a prendre*, he had a limited property interest. The term property rights can be reserved for incidents that are advantageous to the property holder. For example, the ‘claim-right to possess’ and the powers to sell and exclude are advantageous to the property holder, whereas the duty not to use harmfully is disadvantageous to the same holder.<sup>56</sup> Nevertheless, the duty not to harm is important in the scheme of property rights because it imposes a duty on individuals not to use their property in a way that interferes with the rights of others. If, in the act of using property, an individual causes a flood on his neighbour’s property, he will have created a nuisance. ‘So the list of incidents in Honoré’s bundle, like the Hohfeldian equation, describes property ownership as entailing both rights and obligations.’<sup>57</sup>

#### IV. PUBLIC PROPERTY AND THE FORESHORE AND SEABED

Public property is property which is jointly owned by a whole community of individuals or by a democratically elected government. In Commonwealth countries such as New Zealand, such property is said to be owned by the Crown. There are two types of Crown title to real property or land. *Imperium* (sovereignty, territorial or radical title) is the Crown’s supreme legal and territorial authority over land. *Dominium* (direct or beneficial ownership) is the Crown’s absolute ownership of land.<sup>58</sup> The Crown’s absolute ownership of land is generally attended by the expectation that individuals can make use of public property. This expectation is variously referred to as a natural right, public servitude or public right. These rights are not secured for an individual interest but for a public interest. They may be described as protecting the public interest in the use and conservation of social resources.

The idea that the foreshore and seabed can be used for private purposes is not new. It would seem, however, that there has been an ongoing qualification from at least antiquity that private use may not unreasonably restrict public use. The “Institutes of Justinian”, a body of Roman law assembled in approximately 530 A.D., introduced common property law in the interests of natural resource preservation. This extended to the public the protection of the air, rivers, sea and seashores, which were unsuited for private ownership and dedicated to the use of the general public.<sup>59</sup> In Roman law, the shore and the sea were *res communes*, meaning they were owned by no one but their use was common to all. While the

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56 Ibid.

57 Johnson, *supra* note 47 at 254.

58 Boast, R., *Foreshore and Seabed*, LexisNexis 2005, pp. 14 to 16.

59 Smith, P. & Sweeny, W., “The Public Trust Doctrine and Natural Law: Emanations within penumbra” [2006] *Boston College Environmental Affairs Law Review* 307.

use was public, one could build on the shore to the extent that it did not interfere with a public use. Scholars of legal history believe that the Roman concept of common property spread throughout Europe and was eventually adopted by the medieval common law system.<sup>60</sup>

Public rights over the foreshore and seabed are recognised at common law as the rights of navigation and fishing.<sup>61</sup> Indeed, ‘the Crown owned all navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.’<sup>62</sup> While there was a presumption that the foreshore and seabed belonged to the Crown, it is an oversimplification to say that all the foreshore and seabed belonged to the Crown and could not be privately owned. It was in fact possible (albeit rare) for the Crown to grant a freehold interest over the foreshore and seabed, thereby transferring the Crown’s *dominium* or absolute ownership into private ownership. Nevertheless, such grants were subject to the public rights of navigation and fishing.<sup>63</sup> Accordingly, the House of Lords held in *Malcolmson v O’Dea*<sup>64</sup> that from the time of the Magna Carta the Crown had been prevented from establishing exclusive fishing rights by grant (*dominium*), and that the public rights of fishery could only be overturned by statute (*imperium*).

In New Zealand there was historically a tendency by Crown to view the cession of sovereignty as conferring both *imperium* (the right to govern and radical title) and *dominium* (absolute ownership) upon the Crown. In particular, sovereignty was seen as providing the basis for the application of the common law presumption of Crown ownership of the foreshore and seabed. However, article 2 of the Treaty acknowledges that aboriginal title (‘the full exclusive and undisturbed possession of [Māori] Lands ...’) operates as a qualification on the Crown’s radical title.<sup>65</sup> Accordingly, in *Attorney-General v Ngati Apa*<sup>66</sup> the Court of Appeal affirmed that the Crown’s radical title acquired on cession of sovereignty (*imperium*) was subject to the pre-existing rights of Māori. Sovereignty should not be conflated with absolute ownership (*dominium*) and the Crown’s radical title was qualified by Māori property interests even if they did not accord with traditional notions of property law.<sup>67</sup> Richard Boast states that the real significance of *Ngati Apa* is that the Court of Appeal determined that a very large area of land, composing the foreshore and seabed, long assumed to

60 Pound, R., *Jurisprudence*, West Publishing 1959, p. 150.

61 *Ibid.*, p. 192.

62 Kleinsasser, Z., “Regulatory and Physical Takings and the Public Trust Doctrine” (2005) *Boston College Environmental Affairs Law Review* 421 at 423–424.

63 Boast, *supra* note 58 at pp. 37–38 and 40–41.

64 *Malcolmson v O’Dea* [1863] 11 ALL ER 1155.

65 Joseph, P., *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed), Brookers 2007, p. 35. Salmond, J., *Jurisprudence* (6th ed), Sweet & Maxwell 1920, p. 495.

66 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

67 Joseph, *supra* note 65 at pp. 93–94.

belong to the Crown in *dominium* was at least potentially Māori customary land and capable of being Māori freehold land.<sup>68</sup>

Immediately following the release of the Court's decision, the government moved quickly to announce that public rights of access to the seabed and foreshore were not going to be compromised.<sup>69</sup> Most New Zealanders are familiar with the subsequent introduction of the Foreshore and Seabed 2004 Act ("FSA"). The principal sections of the FSA for the purposes of this paper are:

- Section 13(1) which vests 'the full and beneficial ownership of the public foreshore and seabed' in the Crown 'so that the public foreshore and seabed is held by the Crown as its absolute property';
- Section 7(2) which provides that '[e]very natural person has access rights in, on, over, or across the public foreshore and seabed'; and
- Section 8(1) which provides that '[e]very person has rights of navigation within the foreshore and seabed'.

The use of the term 'public property' in connection to the foreshore and seabed in New Zealand remains politically if not legally contentious.<sup>70</sup> What is clear is that the FSA vests *dominium* (absolute ownership) over the foreshore and seabed in the Crown. It follows that the Crown is entitled to grant private rights to the foreshore and seabed in return for a rental or charge. That entitlement is subject, however, to statutory rights of public access and navigation under the FSA, which has codified those common law rights. It is interesting, from a comparative law perspective, that the public trust doctrine in American jurisprudence arose from the same tenets of Roman law and English common law as those found in our own jurisdiction and which have been codified in the FSA.

The American public trust doctrine is a creature of both Roman law and English common law, concerning the nature of property rights in rivers, the sea and the seashore.<sup>71</sup> It is unsurprising then that it has its roots in litigation over the preservation of the public's interest in free navigation and fishing. The seminal public trust case in American law is the decision of the United States

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68 Boast, *supra* note 58 at p. 79.

69 *Ibid.*, p. 85.

70 A review of the FSA was provided for in the Confidence and Supply Agreement between the National Party and the Māori Party. A Ministerial Panel provided a written report to the Attorney-General on 30 June 2009 recommending that the FSA be repealed and new interim legislation enacted to provide for, among other things, the legal title to be held by the Crown in trust for those later determined as having the right to title. It is worth noting that the Panel's preferred outcome involved recognition and provision for both customary and public interests in the foreshore and seabed.

71 Sax, J., "The Public Trust Doctrine in Natural Resource Law: Effective judicial intervention", (1970) *Michigan Law Review* 471 at 475.

Supreme Court in *Illinois Central Railroad v Illinois*.<sup>72</sup> In this case, the Illinois legislature made an extensive grant of submerged lands to the Railroad.<sup>73</sup> Some years later, the legislature repented of its excessive generosity and brought an action to have the grant declared invalid. The Court held that title to the state's land under navigable waters could never be surrendered irrevocably to private interests. Despite the Constitution's strong recognition of individual property rights, the Court made it clear that there was a general public trust principle that applied to all states at all times.<sup>74</sup> The principle simply stated is that:<sup>75</sup>

When a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon *any* governmental conduct which is calculated *either* to relocate that resource to more restrictive uses or to subject public uses to the self-interest of private parties.

Since *Illinois Central*, courts and state legislatures have slowly expanded the public trust doctrine. While once limited to navigable and tidal waters, the doctrine has crept from beaches and rivers to lakes, tributaries, riparian banks, and now encompasses aquifers, marshes, wetlands, springs, and groundwater. The public trust doctrine also includes non-water natural resources and by the late twentieth century, courts had explicitly included such things as beach access and whole ecosystems under the doctrine's increasingly broad umbrella.<sup>76</sup>

In New Zealand, private rights to the foreshore and seabed frequently relate to use and occupation rather than ownership, and the foreshore and seabed is seldom alienated by the Crown.<sup>77</sup> Indeed, under the FSA there is a presumption against alienation of the Crown's ownership of the foreshore and seabed except in exceptional circumstances.<sup>78</sup> Nevertheless, it is clear in both the American and New Zealand jurisdictions that the foreshore and seabed can only be alienated in exceptional cases, and that the right of public access must be vigorously protected.

<sup>72</sup> *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892).

<sup>73</sup> The grant was more than one thousand acres comprising virtually the entire commercial waterfront of Chicago.

<sup>74</sup> Smith & Sweeny, *supra* note 59 at 307.

<sup>75</sup> Sax, *supra* note 71 at 490.

<sup>76</sup> Kleinsasser, *supra* note 62 at 425–426.

<sup>77</sup> Guerin, *supra* note 48 at p. 31.

<sup>78</sup> Section 14(1) of the FSA provides that: '[d]espite any enactment to the contrary, no part of the public foreshore and seabed may be alienated or otherwise disposed of'. Section 14(2) provides that 'subsection (1) does not prevent the alienation of any part of the public foreshore and seabed — (a) by a special Act of Parliament enacted after the commencement of this section; or (b) under section 355' of the RMA which provides for the vesting of reclaimed land.

## V. THE RIGHT OF PUBLIC ACCESS TO THE COASTAL MARINE AREA

The foreshore and seabed is defined under the RMA as the coastal marine area. As discussed in part II, the term coastal marine area is interpreted as meaning:<sup>79</sup>

[the foreshore, seabed, and coastal water, and the air space above the water]—

- (a) Of which the seaward boundary is the outer limits of the territorial sea;
- (b) Of which the landward boundary is the line of mean high water springs,

...

The sustainable management of the use of the coastal marine area under the RMA is guided by the principle of public access<sup>80</sup> and a general prohibition on (among other things) use and occupation unless expressly allowed in a plan or resource consent.<sup>81</sup> Section 6(d) of the RMA provides for ‘[t]he maintenance and enhancement of public access to and along the coastal marine area’ as a matter of national importance. Marine farming case law has made it clear that public access is not limited to the shoreline, it also extends to the public’s access and use of the sea.<sup>82</sup> The Court has gone so far as to say that any development which prevents free public access to the coastal marine area ‘amounts to an alienation of that public space and must be balanced against other relevant considerations’.<sup>83</sup>

In the decision, *In Tandem Marine Enhancement v Waikato Regional Council*, an application for resource consent to control access to 6.6 ha of water column (and to charge a licence fee to dive on a ship wreck) was considered as a matter of degree to be significant given that it would restrict ‘freedom of passage and enjoyment of the public at large’.<sup>84</sup> The Court agreed with opposing counsel’s view that the application represented an important departure from marine farming cases where the public may still gain access for fishing and other purposes without interfering with the activity itself.<sup>85</sup>

A pragmatic approach seems to be applied to public access where it comes to working ports and it is accepted practice not to require public access along wharves where ships are to berth or cargo is to be loaded or unloaded.<sup>86</sup> Some commentators have observed that the need for security of private property has

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79 Section 2 RMA.

80 Section 6(d) RMA.

81 Sections 12(1) and 12(2) RMA.

82 *Sanford (South Island) Ltd v Southland Regional Council* C 106/02 (EC).

83 *Thomas v Marlborough District Council* W 16/95 at 17 (PT).

84 *In Tandem Marine Enhancement v Waikato Regional Council* A 58/00 at 12 (EC).

85 *Ibid.*, 13.

86 Nolan, D. & Kirman, C., “The Coastal Environment” in Nolan, D., *Environmental and Resource Management Law* (3<sup>rd</sup> ed), LexisNexis 2005, p. 325.

been seen as a pragmatic reason for restricting public access. In support of this view they observe that most marinas and piers have security cards and are kept closed during certain hours.<sup>87</sup> However, it is important to note that the Courts have been careful to ensure that there is alternative public access to the coastal marine area where access is excluded.<sup>88</sup>

It would seem that there is a presumption in favour of public access to the coastal marine area under the RMA. The Environment Court supported this view in *Re Auckland Regional Council*,<sup>89</sup> where it held that there is a general thread in the RMA starting at section 6(d) and culminating with section 122(5) (which provides no coastal permit should be regarded as conferring occupation to the exclusion of other classes of persons)<sup>90</sup> that requires ‘a council to actively address its mind – not to whether public access should be permitted – but to whether it should be excluded’.<sup>91</sup>

The RMA generally has a neo-liberal approach to the use of private property, which enables activities that promote people’s well-being while creating an obligation to deal with the adverse effects on the environment of those activities. In keeping with this approach the RMA allows landowners to use their real property as they wish unless prevented by a rule in a plan.<sup>92</sup> In the coastal marine area, however, the approach of the RMA is decidedly more ‘command and contro’ in nature. Crown ownership and common property, as discussed, do not always sit comfortably alongside ideas of private ownership.

Section 12 of the RMA addresses this dichotomy by generally prohibiting all use and occupation of the coastal marine area unless permitted by a rule in a regional coastal plan or a coastal permit.<sup>93</sup> In *Golden Bay Marine Farmers v Tasman District Council*<sup>94</sup> the Environment Court held that the prohibition emphasises the significance of the coastal marine area to the environment and people of New Zealand and ‘provides a statutory presumption against wholesale use and development’.<sup>95</sup> Describing occupation under section 12 the Court went on to find that:<sup>96</sup>

Unlike the rest of the RMA, which is not specifically concerned with allocation issues, s 12 does provide for occupation of the coastal marine area. The effect

87 Ibid., p. 326.

88 *P W Investments v Auckland Regional Council*, A 79/05 at 8 (EC).

89 *Re Auckland Regional Council* A 109/00 (EC).

90 Section 122(5) of the RMA is discussed in more detail under chapter 3.

91 *Re Auckland Regional Council*, supra note 89 at 9 (EC).

92 Section 9 RMA.

93 Sections 12(1) and (2) RMA.

94 *Golden Bay Marine Farmers v Tasman District Council*, W 42/2001 (EC).

95 Ibid., 47.

96 Ibid.

of s 12(2)(a) is to provide that where a person requires exclusive occupation of space, then a consent is required, unless the occupation is otherwise allowed by the provisions in the plan. This results in a “licensing” type arrangement which provides the occupier of that space the right to exclude others within the terms of the consent. It effectively allocates to the user rights to whatever resource is sought for.

The Court’s description of occupation is important insofar as it signals the remaining issues to be dealt with in this chapter of the monograph. Those issues are that occupation of the coastal marine area:

- requires exclusive occupation of coastal space;
- results in a licence that confers private use rights on the licensee; and
- entails the allocation of coastal space.

The remainder of this chapter considers the following questions: (a) what constitutes exclusive occupation? and (b) does exclusive occupation confer private property rights on holders? There are two further questions that logically carry on from the first two questions. These are: (c) does the RMA have an allocative function? and (d) should the Crown and public be compensated for the conferral of private use rights in the coastal marine area? However, there is insufficient room to consider questions (c) and (d) in this chapter and they will need to be addressed at a later point in time.

## VI. OCCUPATION OF THE COASTAL MARINE AREA

The term ‘occupy’ has a rather lengthy definition under section 2 of the RMA. It can be abbreviated in simple terms as meaning the activity of occupying any part of the coastal marine area:

- (a) where the occupation is reasonably necessary for another activity; and
- (b) where it is to the exclusion of all or any class of persons ...; and
- (c) for a period of time and in a way that, but for ... this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons ...

It is not required for the purposes of this chapter to provide an exhaustive analysis of how the definition has been applied in the courts. It is relevant to note, however, that there are *three elements* to occupation.

The *first element* is that occupation must be reasonably necessary for another activity. In *Golden Bay Marine Farmers*, the Court observed that this requirement effectively separates the activity of occupying from the activity for which the

occupation is required. Turning its mind to marine farming, the Court held that the activity was aquaculture and that the occupation is by marine farming structures. 'It is self-evident that the occupation by marine structures of the coastal marine area is reasonably necessary for carrying on the activity of aquaculture'.<sup>97</sup> The first element has been criticised for being circular insofar as a person being in the coastal marine area for the reason of being there itself, and no other reason, would not be an occupier.<sup>98</sup> This fails to recognise the presumption against occupation of the coastal marine area and that occupation and activity are distinct legal concepts. Occupation does not arise of itself but for a reason. The first element simply questions whether the reason for the occupation is necessary.

The *second element* is that occupation involves the exclusion of other persons. In *Auckland City Council v Ports of Auckland Ltd*<sup>99</sup> the High Court considered whether a floating pontoon that moved up and down with the tide in a fixed range, fastened by retaining collars attached to piles fixed to the seabed, amounted to an exclusive occupation of the coastal marine area. The Court held that in reality there was an exclusive occupation of the airspace in which the floating pontoons moved with the tide.<sup>100</sup> The Court went on to hold that:<sup>101</sup>

It understates the position, as did the respondent in support of its cross-appeal on this point, to say its right is no more than to a priority of use. There can be no shared occupation of that airspace. The position can be likened to the area of movement of overhead telephone wires in *Telecom Auckland* (see para [78] above). The airspace through which the pontoons move is equally to be regarded as owned by the respondent during the term of currency of its s 384A permit.

The breadth of exclusive occupation and its relationship to the presumption of public access under section 6(d) of the RMA is an issue that has been hotly contested in the courts. In *Re Auckland Regional Council*, the council sought clarification on whether a coastal permit in respect of a jetty authorised the holder to exclude members of the public from using the jetty to gain access to, from and along the foreshore. The Environment Court identified the relevant sections of the Act as sections 6(d), 12 and 122(5). Sections 6(d) and 12 are discussed in part V of this chapter. Section 122(5) provides that:

Except to the extent—

(a) That the coastal permit expressly provides otherwise; and

<sup>97</sup> *Golden Bay*, supra note 94 at 49.

<sup>98</sup> *Re Lyttelton Marina Limited* C 104/98 (EC) at 14.

<sup>99</sup> *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (HC).

<sup>100</sup> The definition of coastal marine area under section 2 of the RMA includes 'the air space above the water'.

<sup>101</sup> *Auckland City Council*, supra note 99 at 633 per McGrath J (CA).

- (b) That is reasonably necessary to achieve the purpose of the coastal permit,—  
No coastal permit shall be regarded as—
- (c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or
- (d) Conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.

Section 122(5), as discussed above, is a part of the thread of the Act that presumes public access to the coastal marine area, insofar as exclusive occupation must be either expressly stated *or* reasonably necessary for the purpose of the permit.<sup>102</sup> The Environment Court found that a coastal permit authorising the construction of the jetty structure conferred on the applicant the legal exclusivity of the coastal marine area for the structure, reasoning that:<sup>103</sup>

It would be idle to suggest that the structure itself does not now exclusively occupy the specified parts of the coastal marine area to the exclusion of any other class of persons referred to in s122(5). Those other persons cannot interfere with the structure of the jetty or endeavour to build other structures in the space occupied by the jetty.

However, the Environment Court held that without express provision the coastal permit did not confer rights concerning the air space, over or below the structure or the area of water below the structure. Members of the public were therefore entitled to use the air space, land and water surrounding the jetty.<sup>104</sup>

On appeal the High Court upheld the decision adding that ‘the coastal marine area is held by the Crown on behalf of the people of New Zealand as is reflected in the New Zealand Coastal Policy Statement’.<sup>105</sup> The High Court went on to hold that all members of the public have a right to use the coastal marine area. The permit authorising the jetty imposed restrictions on the use and enjoyment of that area. The jetty remained the property of the permit holders, but that did not confer any additional rights not specified in the permit. The permit holders could use the jetty structure, not because they own it, but because along with

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102 It is noted here that the Court of Appeal read sections 122(5)(a) and (b) disjunctively rather than conjunctively. See, *Hume v Auckland Regional Council* CA262/01 at 8 to 10 per Tipping J (CA).

103 *Re Auckland Regional Council*, supra note 89 at 6.

104 *Ibid.*, 7.

105 *Hume v Auckland Regional Council* [2002] 3 NZLR 363 at 370 (HC). See also, *New Zealand Coastal Policy Statement 1994* at p. 3: ‘People and communities expect the lands of the Crown in the coastal marine area shall generally be available for free public use and enjoyment.’

all other members of the public they have a right to use the coastal marine area in which the jetty was constructed. That right applied equally to all members of the public:<sup>106</sup>

The right to erect a jetty and to occupy part of the coastal marine area in so doing, is a privilege conferred on the permit holders by the permit; it is a grant out of the Crown's ownership of the coastal marine area which it holds on behalf of all members of the public, and is limited by the express terms of the grant.

The High Court's decision was upheld in the Court of Appeal which added in respect of section 122(5) that the default position in the absence of express provision (or necessary implication) is that public use and access is permitted. The Court of Appeal did note, however, that the public use must not be such that it unreasonably impedes the jetty owner's use of the jetty to gain access to their property. 'The legislation is designed on the basis that public and private access will reasonably and peacefully co-exist.'<sup>107</sup>

The idea of what constitutes exclusive occupation has been further defined in two more recent decisions concerning liability for rates. In *Waahi Paraone Ltd v Far North District Council*,<sup>108</sup> the council sought to levy rates on a shop and residential accommodation built on piles over the coastal marine area. The appellant argued that it did not enjoy the degree of exclusive occupation of the property necessary to establish liability for rates. The Court held that the space occupied by the building was exclusively occupied despite the fact that the public had rights of access under the building. The appellant was therefore liable to pay rates.<sup>109</sup>

In *Marlborough District Council v Valuer General*,<sup>110</sup> the council sought a declaration that mussel farms authorised by coastal permits under the RMA were rateable land. The council argued that mussel farms were land because the coastal permit gives farmers exclusive occupation of the area occupied by the farm componentry on the seabed, water column and airspace above.<sup>111</sup> Referring to *Hume*, the Court observed that section 122(5) of the Act provides that coastal permits do not give exclusive occupation unless expressly stated in the permit, or it is a necessary implication of the grant.<sup>112</sup> In this case there was no express provision for exclusive occupation in the permits, nor was there a

106 Ibid., 370 – 371.

107 *Hume*, supra note 102 at 11 – 12 (CA).

108 *Waahi Paraone Ltd v Far North District Council* CIV 2003-488-203 (HC) per Hansen J.

109 Ibid., para. [34].

110 *Marlborough District Council v Valuer General* CIV-2006-485-933 per Young J.

111 Ibid., paras. [17] & [22].

112 Ibid., para. [49].

necessary implication that the exercise of the rights under the permits required the exclusion of the public.

The Court also distinguished the case from *Ports of Auckland* and *Waahi Paraone* noting that the mussel farm componentry displaced only a small amount of space and could be easily moved. The Court had noted earlier in its decision that permit areas are often shared with other users of the sea including fishermen. The marine farming industry encouraged fishing and provided information on how boats could safely tie up to the mussel farm to facilitate fishing.<sup>113</sup> In essence, beyond the farm componentry there was nothing to stop public use of, and access to, the coastal marine area.<sup>114</sup>

The *third element* of establishing occupation under the RMA is that the occupation is for a period of time that, but for the RMA, would otherwise require a lease or licence to give effect to the exclusion of other persons. In *Hume*, the High Court observed that there is an aspect of permanency inherent in the concept of occupation in contrast with a swimmer, who may occupy part of the coastal marine area transiently and impermanently.<sup>115</sup> Likewise in *Waahi Paraone* the High Court held that visiting a place by foot, swimming and mussel harvesting does not constitute occupation. They involve the exercise of the right of access.<sup>116</sup> And in *Hauraki District Council v Moulton*,<sup>117</sup> the Environment Court held that sailors exercising their public right of navigation would not be occupying the coastal marine area. However, where the duration of a mooring is lengthy, it goes beyond the incidental rights of navigation, the mooring is no longer protected by the common law right of navigation since it is no longer temporary.<sup>118</sup>

## VII. THE NATURE OF PRIVATE USE RIGHTS IN THE COASTAL MARINE AREA

Does exclusive occupation, or for that matter any other allocation of resources, under a resource consent confer a property right? In *Hume*, the High Court held that coastal permits do not grant property rights, ‘but an authority to occupy part of the coastal marine area for a limited purpose’.<sup>119</sup> This is *prima facie* a correct statement of the law. After all, section 122(1) of the RMA provides that ‘[a] resource consent is not real or personal property’. It would appear, however,

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113 *Ibid.*, para. [14].

114 *Ibid.*, para. [58].

115 *Hume*, supra note 105 at 365 (HC).

116 *Waahi*, supra note 108 at para. [34].

117 *Hauraki District Council v Moulton* C 38/97 (EC).

118 *Ibid.*, 12.

119 *Hume*, supra note 105 at 369 (HC).

‘notwithstanding the broad scope of section 122(1), the reality is that a resource consent is a type of property for some purposes and not for others’.<sup>120</sup>

In *Armstrong v Public Trust*,<sup>121</sup> the High Court considered the meaning of section 122(1) and related sections of the RMA. In this case coastal permits for a whitebait stand had been obtained by a father and son. Such whitebait stand permits confer a valuable right and on the death of his father the son claimed the permits as a survivor of a joint tenancy. *Black’s Law Dictionary* describes a joint tenancy as:<sup>122</sup>

Real or personal property held by two or more persons with a right of survivorship.

The Public Trust argued that under section 122(1) of the RMA the consent was neither real nor personal property. Furthermore, section 122(2)(a) of the RMA vested the father’s interest in the consent on his death in his personal representative (the father’s daughter). Accordingly, the doctrine of survivorship did not apply. The Court held in respect of section 122(1) that:<sup>123</sup>

It is not possible to interpret that subsection as saying that Parliament has set its face against the creation of property rights as incidental to holding consents under the RMA, for that proposition is confounded immediately by the remaining subsections of s 122.

The Court identified the remaining subsections of section 122 and the transfer provisions under sections 134 to 138A of the RMA as providing recognition of property rights subject to the statutory limitations contained therein. The Court went on to find that the Act carries within it an implicit recognition of the ordering of private affairs. A joint holder would not expect to be able to dispose of an interest in property on death because the interest would be extinguished. If the joint holders had an agreement to hold to a resource consent in common, however, then they would be able to dispose of that property in their will. This is because section 122(2)(a) allows the sole holder of a consent to dispose of the consent in their will. There was no reason that this would not apply to an interest held in common. However, in the absence of an interest held in common, the common law right of survivorship applied. The Court, therefore, held that it would ‘not find that legislature has ... intervened to displace the common law

120 Kirkpatrick, *supra* note 54 at p. 28.

121 *Armstrong v Public Trust* [2007] NZLR 859 per Fogarty J (HC).

122 Black, H.C. & Garner, B. A., *Black’s Law Dictionary* (8<sup>th</sup> ed) 2007 at p. 1253.

123 *Armstrong*, *supra* note 121 at 863 per Fogarty J (HC).

as to joint tenancy, by side wind, when pursuing control over the allocation of scarce resources'.<sup>124</sup>

*Armstrong* makes it clear that resource consents can confer property rights on the holder. This interpretation is not without criticism. Specifically, it has been argued that resource consents are statutory licences and not subject to common law principles or statutory rules pertaining to real and personal property. They are solely governed by the rules of the statutes that create them and other generic principles of law that do not require for their application a traditional real or personal property right.<sup>125</sup>

Nevertheless, when we consider the nature of resource consents conferring rights of allocation and use under the RMA, we find a number of characteristics that we would otherwise identify as belonging to Honoré's incidents of ownership, or the bundle of private property rights theory discussed in part III. These include (among others) the right to exclude, possess, use and transfer. The following discussion considers each of the aforementioned incidents of ownership in relation to the conferral of a right to occupy the coastal marine area. It is worth noting that it is not considered that coastal occupation confers full ownership, as not enough of the incidents of ownership are present to justify such a finding. Perhaps most conspicuous by its absence is the right of alienation. Nevertheless, it is argued that enough incidents of ownership are present to justify a finding of what Honoré would have described as a limited interest in property.

### 1. The 'Right to Exclude'

The 'right to exclude' is an owner's power to keep others out. It is traditionally protected by trespass law, which allows an owner to call the police to remove an uninvited person. Section 3(1) of the Trespass Act 1980 provides that everyone commits an offence 'who trespasses on any place and, after being warned to leave that place by an *occupier* of that place, neglects or refuses to do so'. Section 3(1) of the Act defines an occupier 'in relation to any place or land' as meaning 'any person in lawful occupation of that place or land ...'. Occupation of the coastal marine area under section 12 of the RMA would certainly constitute a lawful occupation for the purposes of the aforementioned Act. As discussed, coastal permits authorising occupation of the coastal marine area can confer on holders varying degrees of exclusivity. At the very least, a coastal permit to occupy excludes others from interfering with the space occupied by the structure.<sup>126</sup> At the other end of the spectrum, the permit can confer on the holder the right to

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124 *Ibid.*, 864.

125 Grinlinton, G., "The Nature of Property Rights in Resource Consents" (2007) 7 *Brookers Resource Management Bulletin* 37 at 39.

126 *Re Auckland Regional Council*, *supra* note 89 at 6.

exclude others from an area of the coastal marine area surrounding the structure.<sup>127</sup> The Courts have been reluctant, however, to allow applications to exclude others from large areas of the coastal marine area, as this has been viewed as contrary to the principle of public access.<sup>128</sup>

## 2. The 'Right of Possession'

The 'right of possession' is the right under which one may exercise control over something to the exclusion of all others.<sup>129</sup> Possession and the right to possess are extremely important in property law not only as the evidence of a claim to the property, but in order to found certain actions. This includes the right to bring an action in trespass, which is based on the right of possession rather than ownership.<sup>130</sup> The difference between the 'right of possession' and the 'right to exclude' is that the ability to exercise the latter depends on the existence of the former.<sup>131</sup> For example, in *Aoraki Water Trust v Meridian Energy Limited*,<sup>132</sup> Aoraki sought a declaration that water permits (resource consents) held by Meridian entitling it to the full allocation of water from Lake Tekapo did not operate as a legal constraint on the ability of the regional council to grant others consents in respect of the same water under the RMA. The High Court held that where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the RMA.<sup>133</sup>

The Court interpreted Aoraki's argument as follows:<sup>134</sup>

[A] water permit is a bare licence in that it does not pass an interest or transfer property in anything but only authorises the holder to act in a way that would

127 *Auckland City Council*, supra note 99 at 633.

128 *In Tandem*, supra note 84 at 10 and 13.

129 *Black's*, supra note 122 at p. 1201.

130 Farran, S. & Paterson, D., *South Pacific Property Law*, Cavendish 2004, p. 14.

131 See for example, the concept of exclusive possession in respect of the law of leases: 'Exclusive possession allows the occupier to use and enjoy the property to the exclusion of strangers. Even the reversioner is excluded except to the extent that a right of inspection and/or repair is expressly reserved by contract or statute. A tenant enjoys those fundamental, if temporary, rights of ownership that stem from exclusive possession for a defined period. Stipulated reservations stem from that premise. The reverse is true for a licensee. Lacking the right to exclusive possession, a licensee can merely enter upon and use the land to the extent that permission has been given. It is this reversal of starting point that provides the rationale for recognising an estate in the land, in the one case, and a mere personal right or permission to enter upon it, in the other.' *Fatac Ltd (in liq) v CIR* [2002] 3 NZLR 648 at 660 per Fisher J (CA).

132 *Aoraki Water Trust v Meridian Energy Limited*, [2005] 2 NZLR 268 per Chisholm and Harrison JJ (HC).

133 *Ibid.*, 282.

134 *Ibid.*, 274.

otherwise be unlawful, by expressly allowing it to take, use or divert water (s 14) ... In particular, a consent itself is neither real nor personal property (s 122) and therefore does not confer upon the holder any rights of ownership in the resource which remain with the Crown (s 354).

The High Court rejected Aoraki's argument on three property related grounds. Each relied on the finding that the water permits allocated to Meridian the 'right to use' the resource in question.<sup>135</sup>

### **3. The 'Right to Use'**

The 'right to use' is the right to enjoy the benefits of real property or personal property, whether the owner of the right has ownership of title or not. Where there is no ownership of title the right to use is called a usufruct, which is defined as a 'right to use and enjoy the fruits of another's property for a period without damaging or diminishing it'.<sup>136</sup>

Turning to the Court's three grounds for declining the declaration, Chisholm and Harrison JJ found: *First*, that the RMA provides a comprehensive statutory management regime for water allocation and use. The Court reasoned that if Aoraki's argument was taken to its logical conclusion, a council could grant an unlimited number of permits to a resource that had already been exclusively and fully allocated in a physical sense. '[T]his chaotic regime would be the antithesis of the management regime contemplated by the Act'.<sup>137</sup>

*Second*, Aoraki's argument was found to be contrary to the legal test for determining priority between competing applications. The priority or 'first come, first served' doctrine was developed to determine procedural priority between competing applications.<sup>138</sup> It was not developed to deal with priorities in terms of the allocation of the resource. Nevertheless, the High Court used the concept of procedural priority to justify proprietary priority, finding that:<sup>139</sup>

[T]he Court of Appeal's adoption of the first-come, first served approach where there is competition for the same resources would be pointless unless it meant that the first permit in time of grant had priority in terms of the right to use the resource.

*Third*, the Court found that Aoraki's argument overlooked the fact that a resource consent confers a right to use the subject resource. Indeed, the fact that Meridian's consents were of considerable value was seen as explicable only on

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135 There was a fourth public law ground based on the doctrine of legitimate expectation.

136 *Black's*, supra note 122 at p. 1580.

137 *Aoraki*, supra note 132.

138 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 (CA).

139 *Aoraki*, supra note 132 at 278.

the basis that such value derives from the holder's right to use the property in accordance with its permit. It followed that granting a permit to Aoraki would reduce Meridian's ability to make full use of the water thereby devaluing its grant. The Court held that:<sup>140</sup>

The principle of non-derogation from grant is applicable to all legal relationships which confer a right in property. Common law principles apply to the express provisions of a statute unless Parliament has clearly indicated a contrary intention (*R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 per Lord Browne-Wilkinson at pp 573 – 574). The maxim prevents one party from taking any steps, unless expressly authorised by the relevant instrument (whether statutory or contractual), to interfere with, diminish or derogate from the other's entitlement. Traditionally the principle applies to sales of land or leases but it governs all relationships. As Blanchard J observed in *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) at p. 469:

[24] . . . no one who has granted another a right of property, whether by sale, lease or otherwise, may thereafter do or permit something which is inconsistent with the grant and substantially interferes with the right of property which has been granted.

The Court held that the principle of non-derogation is based on an implied obligation on a grantor not to act in such a way as to injure property rights granted by the grantor to the grantee. It considered that Meridian must have assumed that the council would not take any steps during the term of the consents to interfere with, erode or destroy the valuable economic right which the grants had created. Granting Aoraki consent to the water 'would either frustrate or destroy the purpose for which Meridian's permits were granted'.<sup>141</sup>

It is important to note that the application of the principle of non-derogation is qualified in *Southern Alps Air v Queenstown Lakes District Council*<sup>142</sup> which was an appeal against an Environment Court decision that held that granting a resource consent to a new commercial jet boat operator would derogate from the rights of an existing operator. In particular, the Environment Court held that the existing operator, if required to cooperate with the new operator in the formulation of a safe operation plan, would suffer interference and labour under the obligations to engage in communications with the new operator. This would be to the detriment of the existing operator's customers because there would be less time to talk to them. The High Court held that the Environment Court was correct in characterising 'these impositions as affecting the use and enjoyment of

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140 Ibid., 279.

141 Ibid., 280.

142 *Southern Alps Air v Queenstown Lakes District Council* [2008] NZRMA 47 per Panckhurst J (HC).

the resource consent'. However, 'these impositions' were 'insufficient to infringe the non-derogation principle'.<sup>143</sup>

The High Court found that the Environment Court had approached the issue of non-derogation incorrectly in a number of respects. First and foremost, an incorrect legal test had been applied insofar as derogation only applies where there is a frustration of a previous grant. The relevant interference must be substantial. In the High Court's view, the substance of the right was not affected by the incursions that had been identified. Second, the required approach was to look at the rights conferred on the consent holder. In this case, the consent holder had not been granted exclusive use of the river in question. For a time, the first operator had enjoyed exclusivity but that was a matter of chance and circumstance. Third, the decision overlooked the fact that the existing operator was always likely to be subject to regulatory obligations related to safety. Finally, the approach of the Environment Court was contrary to section 104(3)(a) insofar as it seemed to accord weight to trade competition.<sup>144</sup>

#### 4. The 'Right to Transfer'

'Transfer' is the movement of property from one person or entity to another; or the passage of title to property from the owner to another person. *Black's Law Dictionary* states that the term embraces every method of disposing of or parting with property or an interest in property.<sup>145</sup> Likewise, in *ORD v Calan Healthcare Properties Ltd*,<sup>146</sup> the High Court observed that the *prima facie* meaning of the word transfer was to convey a title, right, or property by legal process.<sup>147</sup> The Crown, as discussed, is prevented from alienating the coastal marine area under section 14 of the FSA. Nevertheless, under section 135(1)(a) of the RMA the holder of a coastal permit 'may transfer the whole or any part of the holder's interest in the permit to any other person'. In *Armstrong*, the High Court held that coastal permits confer a limited property right on holders. Considering the limitation under section 122(1) the Court held that:<sup>148</sup>

s 122 falls, under the heading "Transfer of consents". The following sections fall under that heading:

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143 *Ibid.*, 57.

144 *Ibid.*

145 *Black's*, supra note 122 at p. 1535.

146 *ORD v Calan Healthcare Properties Ltd* (2003) 23 FRNZ 465 per Fisher J.

147 *Ibid.*, 468 per Fisher J: 'For legal purposes "transfer" is relevantly defined as "to make over (property, etc) to another; convey" (*Collins English Dictionary*, Collins 2001, meaning 3) and "To convey or make over (title, right, or property) by deed or legal process" (*Oxford English Dictionary* (2<sup>nd</sup> ed), Oxford University Press 1989, meaning 2).'

148 *Armstrong*, supra note 121 at 863 per Fogarty J (HC).

- 134. Land use and subdivision consents attach to land – . . .
- 135. Transferability of coastal permits – . . .
- 136. Transferability of water permits – . . .
- 137. Transferability of discharge permits – . . .
- 138. Surrender of consent – . . .
- 138A. Special provisions relating to coastal permits for dumping and incineration – . . .

Accordingly, the purpose of s 122(1) is to prevent other transfer of consents, except as provided for in this statute. Subsection (2) of s 122 can then be seen as providing some general qualifications. Paragraphs (a) and (b) deal with the involuntary transfer and para (c) and subs (3) allow the securitisation of consents. Such recognition of property rights is contained. *What Parliament has set its face against is the unfettered transfer of resource consents except where specifically provided.* [emphasis added]

Although the Court recognised a property interest in coastal permits conferring rights to allocation and use, it was clear that the right to transfer that interest is controlled by the RMA. As discussed above, the Court was signalling that property rights in resource consents are in fact recognised under the RMA. Those rights are limited, however, insofar as the normal laws of property rights do not necessarily apply. In this case the transfer of those rights is limited to the extent that such transfer is consistent with the sustainable allocation and use of scarce resources under the RMA.<sup>149</sup>

## 5. An Entitlement of a New Kind

It is important to bear in mind that the grant of rights to scarce resources in New Zealand is governed by the RMA. While coastal use rights do have some property characteristics,<sup>150</sup> it would be incorrect to try to label them as coming entirely within the property rights camp. A solely property-centred approach to the categorisation of coastal permits and, more specifically, rights to occupy the coastal marine area, fails to acknowledge that such rights have a statutory origin. They are rights that are both authorised and proscribed by the statutory regime under the RMA. To that extent, they are first and foremost subject to the sustainable management purpose of the RMA. Ongoing compliance with that statutory purpose by a coastal permit holder is a prerequisite to the continued right to use and enjoy a public resource to the exclusion of others.

However, the provisions of the RMA that give effect to its statutory purpose have little to say on the relationship between the holder of a coastal permit (or resource consent) and third parties. This may be because legislators and policy

<sup>149</sup> Ibid., 864.

<sup>150</sup> The most important being that they confer an interest in property.

makers who are concerned with environmental and natural resource matters do not think much about private law and commercial transactions.<sup>151</sup> Whatever the case, the courts have found it necessary to have recourse to the property characteristics of coastal permits. While acknowledging the statutory origin of coastal permits, these rulings have relied on those property characteristics to inform us on how the relationship between consent holders and third parties should be governed – a matter upon which the RMA is largely silent.

So if coastal permits are not purely statutory or property rights, what are they? It is suggested that they are something new, which might be considered, for academic purposes, a hybrid form of right that confers both statutory and property rights to a public resource.<sup>152</sup> It is accepted that there is some good argument against the reckless creation of new kinds of property.<sup>153</sup> It is not, however, the contention of this chapter that coastal permits are a new kind of property right. Rather, it is contended that coastal permits are a mixture of existing statutory and property rights, which in combination confer a new kind of entitlement. In this sense they are a new category of right as opposed to a new kind of right. This new category of right confers an entitlement to public property. That entitlement can be characterised as a right to use public property. It is not what Honoré would call a case of full ownership, as there are not enough incidents of ownership present to satisfy that definition. Rather, the entitlement to public property is what Honoré would call a limited interest in property. There are clear examples of such limited rights within the existing property law framework.

It is arguable, for example, that coastal permits are analogous to incorporeal or intangible property insofar as they are rights affecting land and a statutory interest that is capable of transfer.<sup>154</sup> This view is supported in *Aoraki Water Trust* where the High Court held that a resource consent confers a right to use

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151 Barton, B., “The Nature of Resource Consents: Statutory permits or property rights” in *Environmental Law: National Issues*, New Zealand Law Society Seminar Proceedings 2009, p. 70.

152 It should be noted that the notion of a hybrid right does not to overlook Hohfeld’s correlative duties. In this sense, occupation of the coastal marine area is subject to both statutory and private law duties respectively including such things as compliance and nuisance.

153 Barton, supra note 151 at pp. 73–74.

154 ‘Incorporeal hereditaments ... are not physical things at all, but rights affecting land which the common law treats as real property. In New Zealand the only incorporeal hereditaments of importance are easements, profits a prendre and rentcharges.’ See, Hinde, G. & McMorland, D., *Introduction to Land Law* (2<sup>nd</sup> ed), Butterworths 1986, p. 4. ‘Alternatively, the terms “tangible” and “intangible” may be used for things which are corporeal and incorporeal.’ See Farran, S. & Paterson, D., *South Pacific Property Law*, Cavendish 2004, p. 1. Incorporeal property is defined as ‘legal right in property having no physical existence’, for example patent rights. Intangible property is similarly defined as ‘property that lacks a physical existence’, for example stock options or business good will. See *Black’s*, supra note 122 at p. 1253.

the subject resource. ‘In that sense it has similarities with a *profit a prendre*.’<sup>155</sup> The Court also favorably cited *Harper v Ministry for Sea Fisheries*<sup>156</sup> where the Australian High Court found that statutory licensing systems are intended to deprive the general public of the right to unfettered exploitation of the Tasmanian abalone fisheries. What was in the public domain is converted to the exclusive controlled preserve of license holders. Describing the licenses as a privilege, the Court went on to find that:<sup>157</sup>

This privilege can be compared to a *profit a prendre*. In truth, however, it is *an entitlement of a new kind* created as part of a system for preserving a limited public natural resource ... [emphasis added]

The respective Courts’ comparison of the privilege accorded to a *profit a prendre* provides a starting point for consideration of statutory licences that confer rights to the use of resources. A *profit a prendre* confers a right to sever and take from the servient tenement to the grantee’s own use some part of the realty of that tenement which is capable of ownership.<sup>158</sup> In *Fitzgerald v Firbank*,<sup>159</sup> the plaintiffs had been leased ‘the exclusive right of fishing’ in a specified portion of a river. Identifying the right as a *profit a prendre* the Court held it was of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights.<sup>160</sup>

In New Zealand, the idea of a resource consent conferring a *profit a prendre* is debatable in respect of some resources such as water, because it is arguably not owned by the Crown.<sup>161</sup> But it is certainly less contentious, at least in a legal sense, when applied to the coastal marine area, the ownership of which is vested in the Crown.<sup>162</sup> However, while the concept of *profit a prendre* may provide some guidance as to the nature of the rights conferred under resource consents, we should not mistake a resource consent for a *profit a prendre*. A *profit a prendre* is the result of a private agreement between parties, and a resource consent is not the product of an agreement.<sup>163</sup> Furthermore, in the *Valuer General* decision the

155 *Aoraki*, supra note 132 at 279 per Chisholm and Harrison JJ (HC).

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

157 *Ibid.*, 325.

158 *Hinde & McMorland*, supra note 154 at p. 366: ‘Common types of profit in New Zealand are to cut and remove timber, or flax, and to remove parts of the soil such as gravel, clay, sand or stone.’

159 *Fitzgerald v Firbank* [1897] 2 Ch. 96, [1895–9] All E.R. 445 per Lindley J (CA).

160 *Ibid.*, 448.

161 *Grinlinton*, supra note 125.

162 Section 13(1) FSA.

163 *Marlborough*, supra note 110 at para. [88]: ‘Nor can a coastal permit be seen as an “agreement”. Such a permit is granted as a result of a judicial process applying facts to

High Court held in the case of coastal permits that exclusive occupation does not give rise to an interest in land. In the Court's view if a resource consent created an interest in land it would be real property and this, in the Court's view, would amount to an alienation prohibited under section 14 of the FSA.<sup>164</sup> It is interesting to note in passing here that according to at least three legal definitions, alienation requires the transfer of title.<sup>165</sup>

Nevertheless, in *Harper* the High Court was careful to point out that statutory licences are 'an entitlement of a new kind'. In *Aoraki*, the High Court recognised that the water permits were 'of considerable economic value'.<sup>166</sup> Likewise, in *Valuer General*, the High Court favourably cited an environment Court decision that said resource consents are 'primarily a bundle of economic rights'.<sup>167</sup> It seems reasonably clear that in *Harper* and *Aoraki*, as in the aforementioned decisions, the Courts have recognised the emergence of a new kind of right that is conferred under a statutory regime but which confers on the holder valuable interests in – and use of – publicly owned resources. While recognising that these are statutory rights, the courts have struggled to deal with the fact that there is scant statutory direction on how the economic interests in these resources should be dealt with. Not surprisingly, the Courts have sought to employ the laws of property as the lodestar for navigating this uncharted territory.

Private property rights can assist to characterise the nature and extent of rights to use resources allocated under the RMA. They need to be adapted, however, in order to recognise that rights to public resources are a privilege that carry with them a unique set of duties. This should not be seen as an insurmountable challenge. As one economist states:<sup>168</sup>

Property rights are not immutable. They appear, evolve and vanish in response to economic, societal and environmental pressures and do so within institutional frameworks which differ geographically and over time. The extent to which a rights structure offers advantages over alternatives eventually decides whether or not it survives.

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the law and reaching a conclusion, often in the face of competition between a number of parties.'

164 *Ibid.*, paras. [35] & [61].

165 See, *Black's*, supra note 122 at p. 80: '[A]ny transfer of real estate short of a conveyance of title is not an alienation of the estate.'; 'the transfer of title to real property, voluntarily and completely. It does not apply to interests other than title.'; 'Alienation is an act whereby one man transfers the property and possession of lands, tenements, or other things, to another. It is commonly applied to lands or tenements, as to alien (that is, to convey) land in fee, in mortmain.'

166 *Aoraki*, supra note 132 at 279 – 280.

167 *Marlborough*, supra note 110 at para. [41].

168 Guerin, supra note 48 at p. 10.

And so this chapter comes full circle to the point made in the opening paragraph of part III. Property rights are not a fixed concept. Rather, they have adapted and changed over time in response to new intellectual, social and economic forces. It seems that, as with the evolution of the bundle of rights approach to property in the 19<sup>th</sup> and 20<sup>th</sup> centuries, intangible property and social, political and economic change are the principal drivers behind the emergence of new categories of rights. The enactment of the RMA has resulted in a situation whereby environmental legislation confers rights to allocation and use of public resources that have the look and feel of private property rights. These rights are intangible insofar as they are creatures of statute. While they have economic value they do not create an interest in land. They are a response to social change insofar as we recognise that unchecked freedom in a commons brings ruin to all. Without a mechanism for determining who has rights to the resource we end up with a situation where each user will take as much of the resource as they can to make gains in the immediate term at the expense of the longer term.<sup>169</sup>

Recognising that resource consents confer valuable economic rights to use public resources is a starting point from which we can begin to determine the price that should be placed on that right.<sup>170</sup> If we are to confer private rights to the coastal marine area and, for that matter, any other public resource over which the Crown has ownership, then the Crown and by inference the public should be compensated for that loss of access.<sup>171</sup> Furthermore, the payment of rentals for the occupation of the coastal space could play an important role in ensuring that the limited spaces of the coastal marine area available for occupation are granted to users who value that space most.<sup>172</sup> These are issues of allocation which are beyond the scope of this chapter. Nevertheless, they raise important questions such as whether the RMA has an allocative function, whether the RMA creates a presumption that a rental should be paid for occupation and whether the First Schedule of the RMA is the most effective mechanism for determining price. These are questions that remain to be addressed.

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169 Hardin, G., "The Tragedy of the Commons" (1968) 162 *Science* 1243 at p. 1244.

170 Guerin, *supra* note 48 at p. 9.

171 Auckland Regional Council, *Section 32 Report: Coastal Occupation Charges*, 4 July 2007 at p. 4: 'Two key principles can be identified: firstly that private occupation of public space is a privilege not a right; and secondly that any person who obtains a private benefit from a public resource should be required to pay some form of "compensation" to recompense the public for that private use and loss of public space.'

172 Palmer, J., Crengle, H. & Sinner, J., *Implementation Failure: Resource rentals for the occupation of coastal space*, Ecologic Research Report No. 5, November 2005, p. 2.

## VIII. CONCLUSION

Private property rights can play a significant role in helping us to define the nature and extent of rights to occupy the coastal marine area under the RMA. If we are to use private property rights as a basis of interpretation, however, we need to acknowledge that such rights do not represent full ownership let alone absolute property rights. Absolute property rights in their true sense have not existed since at least the 18<sup>th</sup> century. Full ownership is not found in the context of statutory grants to public property because they do not confer all the incidents of ownership including, perhaps most importantly, the right of alienation. We supposedly live in an enlightened age where we are not defined by our relationship to property but rather our relationship to one another. Those relationships are composed of a bundle of rights which inform us as to the legal nature of relations between people in respect of things. Separation of property into these component parts enables us to identify those characteristics of coastal occupation rights that share a private property heritage and those that do not.

We must bear in mind, however, that the coastal marine area is held in Crown ownership and it is only through special legislation that title can be transferred into private ownership. The Crown holds the coastal marine area in a form of trust on behalf of all New Zealanders. Public rights to access the coastal marine area are recognised under both the FSA and RMA. The *laissez faire* approach to land use under the RMA is reversed in the coastal marine area and private occupation is prohibited unless allowed by a plan or a resource consent. It only seems to be in rare cases that the applicants are granted exclusive occupation of the seabed, water column, surface and airspace surrounding an activity or structure in the coastal marine area. Furthermore, it needs to be recognised that the RMA contains certain provisions on the extent to which resource consents are recognised as either real or personal property. These statutory restrictions provide a strong signal that occupation rights to the coastal marine area are conceived by a statutory parent.

It would be a mistake, however, to treat the rights conferred under resource consents as solely governed by public law. For that to be so, it would be necessary to ignore the fact that occupation rights have an economic value that arises quite independently of the statutory instruments from which they derive. The fact that the RMA is largely silent on these matters is signalled by the recourse that the courts have had to property law principles when dealing with consent holders and third parties. This is not to say that the RMA should not be amended to fill the gaps. But in filling those gaps legislators should not ignore a well-established body of law designed principally to govern the relations between people in respect of property. Property rights provide the framework through which we can possess, use and dispose of property. Such principles must comply with the sustainable management purpose of the RMA. But we need to take a serious

look at the property characteristics of resource consents before moving down a path that aims to govern legal relations between people in respect of property purely according to the principles of administrative law.

Occupation rights under the RMA bear some of the characteristics of property rights insofar as they include: the 'right to exclude' access to the public; the 'right to possession' against the claims of other parties; the 'right to non-derogation of use'; and the 'right to transfer' of the resource consent. There should be no fundamental contradiction between recognising these property characteristics and the management of scarce natural resources under the RMA. In this light, it is suggested that it is possible to conceive of occupation rights as a new entitlement, which might best be described as a hybrid right that confers both statutory and property rights to a public resource. That right has neither the full attributes of a statutory entitlement nor those of a property right. Its scope is not yet clear and further statutory guidance may be necessary, unless its nature and extent is to be defined by the Courts. Whatever the case, the emergence and redefinition of statutory and property rights into private rights to use public resources need simply be regarded as a response to a changing environment.