

Public Access and Private Property: Law and Custom on New Zealand's beaches

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I. INTRODUCTION

On the colonisation of Aotearoa, New Zealand in 1840 a set of instructions was issued on behalf of Queen Victoria to the new Governor Hobson. The instructions required the Governor to direct the surveyor-general to report what particular lands might be proper to reserve “as places fit to be set apart for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants”.² This instruction, hidden in a royally sized forty-third paragraph, inspired what have been described as “urban myths”:³ an “ideal”⁴ of public access to the coast, river and lakeside, well known in New Zealand as the “Queen’s Chain”. The imagined freedom to walk along the coast from the northern most tip of the North Island to the southern most tip of the South, with only a ferry ride across the strait to slow you down, has gathered such symbolic weight that the Queen’s Chain is sometimes viewed as integral to New Zealand culture and identity.

Yet, when in 2004 the Labour Government proposed legislation to provide a footway of five metres along waterways of “significant access value” in rural areas, the initiative was met with resistance from property owners, particularly in the farming community. The footway failed to gain sufficient public support and the proposal was abandoned in 2005.

¹ Work in progress — please do not cite without prior permission, and please forgive unfinished aspects of referencing in particular. Any comments would be gratefully received, k.sanders@auckland.ac.nz.

² Colonisation of New Zealand: Extract from the Queen’s Instructions of 5 December 1840, cited in B.E. Hayes *The Law on Public Access Along Water Margins* (Ministry of Agriculture and Forestry, August 2003) at 50.

³ Land Access Ministerial Reference Group, *Walking Access in the New Zealand Outdoors* (August 2003) at 6.

⁴ Hayes, above note 2, at 48.

In 2008, following further public consultation, a Walking Access Commission was established.⁵ The Commission is tasked with the coordination of walking access in New Zealand. In its first years of operation, the Commission has published a National Walking Access Strategy and an Outdoor Access Code, which provides guidance to land managers and those seeking recreational access, including specific guidance about access in accordance with tikanga Māori.⁶ The Commission is working on mapping existing public access routes and also allocates grants from an Enhanced Access Fund to promote walking access.⁷ Opinion on the Commission's potential to protect recreational walking access is divided.⁸

It is, however, easy to find common ground in the public access debate; most would acknowledge a public interest in recreational access to the coast and waterways. But the debate about how this interest should be reflected in New Zealand law has, at times, been fraught. The discussion has been dominated by sharply opposed views – one favouring the protection of private property rights, the other arguing access to the coast is part of a Kiwi “birthright”. Little attention has been given to property traditions that might respond to both interests.

⁵ See Walking Access Act 2008. The Commission is a Crown Agent under the Crown Entities Act 2004. A Crown agent has the least autonomy of the bodies established under the Crown Entities Act 2004. The responsible Minister may, at any time and entirely at his or her discretion, remove a member of a Crown agent from office, and may direct the entity to give effect to a government policy: Crown Entities Act 2004, ss 36 and 103.

⁶ Tikanga Māori is often described as Māori custom law. It is the values, principles and practices governing Māori communities. See *The New Zealand Walking Access Commission National Strategy 2010- 2035* and *New Zealand Outdoor Access Code 2010* (30 June 2010).

⁷ In 2010 the Enhanced Access Fund allocated funding of \$224 766 to a number of different projects, see Walking Access Commission “Commission makes access grants” (press release, 19 July 2010): <www.walkingaccess.govt.nz>. The Commission also has regionally-based advisers who are available to assist resolution of access disputes.

⁸ See, e.g. Alan Macmillan “Editorial” *Newsletter of Public Access New Zealand*, No. 16. (January 2010) <www.coranz.org.nz/current_issues> and Laura Basham “‘Toothless’ Walking Access Commission under fire” *The Nelson Mail* (New Zealand, 21 October 2009). Under the Walking Access Act 2008, s 80, a formal assessment of the efficacy of the Commission model is required after a period of 10 years.

Support for greater public access to the coast has also become associated with criticism of the decision of the New Zealand Court of Appeal in *Ngati Apa v Attorney-General*.⁹ Some media and political commentary on the *Ngati Apa* case encouraged the view that legal recognition of Māori customary interests in the foreshore and seabed would lead to the loss of public beach access. The issue of public access in the foreshore and seabed debate has however been described “as something of a red herring”; “a comparatively minor aspect of a much bigger issue”.¹⁰ Nonetheless, public access rhetoric played a key part in the passage of the Foreshore and Seabed Act 2004, which pre-empted considered debate about how a plurality of interests in the coastal marine area might be recognised. Neither has association with the issue of ownership of foreshore and seabed served the debate on public access well. As Richard Boast states: “If there is indeed a public “right of access” to the coast, some serious consideration of what such a right might involve and how it should influence law and policy would be very welcome. Principled public discussion along these lines has been sadly absent”.¹¹

This paper aims to explore the debate about public recreational access and its implications for understandings of the relationship between private property and the public interest. Debates around public access provide an important – albeit largely unrealised – opportunity to consider differences regarding the social obligations of property owners more thoughtfully. I take as a starting point the view that property is socially constructed and its boundaries continually renegotiated. Political theory plays a key role in determining the content and the limits of property but the nature of the resource itself, the way in which it is used, and by whom, is also significant. I argue that past patterns of accommodating public or limited group access to privately held property can inform modern

⁹ [2003] 3 NZLR 643 (CA).

¹⁰ Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 6.

¹¹ *Ibid.*

solutions. In particular, the paper examines New Zealand's historic provision of coastal reserves – the famed Queen's Chain – informal access arrangements and the law of custom. I argue customary patterns of property use give important signals about the nature of coastal resources, and emphasise the flexible relationship between social and political goals and property rules.

A. The limits of this paper

To begin with some spatial orientation - this paper takes as its starting point customary traditions relating to the Queen's Chain, that land which borders on the foreshore of the lakes and the sea, and runs along large rivers, and, in particular, the beach or "dry sand" area. Patterns of custom developed around the Queen's Chain lead to consideration of broader issues about access to public land across private land and access onto private land for recreational purposes generally. These issues were considered in the consultation and policy making process and are now within the purview of the Walking Access Commission. The latter part of the paper seeks to relate themes developed in the context of the Queen's Chain to these wider issues of public recreational access.

This paper seeks to focus on wider public access issues, without detailed consideration of proposals relating to the foreshore and seabed. As stated above, whilst public access issues loomed large in the public debate about *Ngati Apa*, in truth, it seems unlikely that the finding that Māori Land Court had jurisdiction to determine customary interests in the foreshore and seabed would have had much impact on public beach access.¹² Indeed foreshore and seabed areas held privately otherwise than in customary title attracted little attention prior to *Ngati Apa* and have apparently remained outside public scrutiny. Private ownership of

¹² During negotiations for reform of the Foreshore and Seabed Act 2004, Government and many iwi and hapū groups have been careful to emphasise that public recreational access is not at stake. Public access rights to the "common marine and coastal area" would be preserved in the proposed legislation see cl 27 'Rights of Access', Marine and Coastal Area Takutai Moana Bill 2010 (201-1).

the beach itself and, perhaps most importantly, of the land adjoining the beach has a much greater impact on recreational access.

The foreshore is also, of course, different from the Queen's Chain. The foreshore is defined as that land below mean high water mark while the Queen's Chain is traditionally described as the dry land bordering on the high water mark.¹³ To separate wet sand from dry might appear absurd, particularly from the perspective of tikanga Māori, which considers the coast a taonga as an indivisible whole, but such is the common law penchant for carefully dividing and apportioning property interests. In addressing the Queen's Chain, I do not suggest that these invisible "lines in the sand" are an inevitable or necessarily desirable means of regulating coastal space; only that, as property interests have been acquired since colonisation within this structure, they are an appropriate starting point.

Equally, I acknowledge that the mana of hapū and iwi and their role as kaitiaki is not confined to spatial limits prescribed by the common law. The issues driving debate about the foreshore and seabed relate to the wider coastal area, its ecosystem and resources as well as to underlying questions of governance. Tikanga Māori has its own systems of regulating resources and balancing the needs of multiple users, which are markedly different from those introduced by colonisation both in their philosophy and in their implementation.¹⁴

¹³ The foreshore is generally defined at common law as the land between the mean high and low tide marks while "the beach" is defined by Megarry V-C in *Tito v Waddell* (No 2) [1977] Ch 106 at 267 as "all that lies to the landward of high-water mark and is in apparent continuity with the beach at high-water mark". Under the Foreshore and Seabed Act 2004, the "foreshore and seabed" means the marine area that is bounded by the line of mean high water springs and by the outer limits of the territorial sea. It includes also the beds of rivers that are part of the coastal marine area under the Resource Management Act 1991.

¹⁴ For example, the New Zealand Outdoor Access Code 2010 notes at page 14 that haere pokanoa (unauthorised wandering) may cause cultural offence and that recreational access seekers must seek permission and take advice on wāhi tapu (sacred places) and compliance with local prohibitions on taking resources (rāhui), as well as other Māori sites, customs and practices.

The focus of this paper is not the interrelationship of tikanga Māori and common law property systems – this would be a paper in its own right. The coexistence of indigenous and colonial systems of law does however challenge legal analytical frameworks. Most significant here, is that iwi and hapū do not sit easily in the schema of public and private I address. Many private landowners adopt rules from tikanga to govern recreational access to their property. But hapū and iwi may also be considered governing or regulatory bodies, which, like local or regional councils may own or manage waterfront property. In this way, they are also rule-makers and facilitators of access, either by the public or by more limited groups such as hapū or iwi members. Given the trend toward co-management, it is likely that this “public regarding” role of hapū and iwi will continue. The lens of the traditional common law public and private divide is however a limited tool.¹⁵ The essential constitutive principle of hapū and iwi - whakapapa or kinship – is, in my view, best considered in its own epistemological context. Dedicated consideration of the interaction of tikanga Māori and the New Zealand legal system might seek to establish new, more appropriate frameworks for analysis. But by focusing on the common law doctrine of custom, this paper remains squarely within a common law framework.

II. RECREATIONAL WALKING ACCESS – CUSTOM UNDER PRESSURE

The policy process that culminated in the establishment of the Walking Access Commission began in 2003 with the creation of the Land Access Ministerial Group. The Ministerial Group received public submissions and consulted informally with relevant interest groups. When the Ministerial Group provided a report of its work, its starting point was that a social convention supports public expectations of recreational access. The report begins:¹⁶

Social conventions are customs and practices that mould and are moulded by societal values. These conventions guide communities on what is acceptable

¹⁵ This is true both in the context of tikanga Māori, and more generally at common law.

¹⁶ Land Access Ministerial Reference Group, above note 3, at 5.

and beneficial to the people within them. In the context of public access to land or water, the convention has been that people who want reasonable access must be granted it after obtaining the consent of the landowner (whether government or private). This convention is more important for informal arrangements for access rather than the legal rights conferred on the public by legislation.

The expression of social convention as giving rise to a claim of right to public access is what makes this argument distinctive; a theme that continues across a number of submissions to the Ministerial Group. For example, one submitter argues: “it is a foundation principle of the Kiwi identity that these natural resources should be reasonably and responsibly available to all as of right”.¹⁷ Similar claims of long and reasonable practice giving rise to entitlement are familiar to many legal systems; this is custom as a source of law. For John Salmond, “[c]ustom is to society what law is to the state”: a realisation or embodiment of a just principle in a uniformity of practice.¹⁸

This paper relates the claim to public recreational access to the English common law doctrine which recognizes custom as a valid source of law. I make this connection using the example of access to water and the Queen’s Chain: I establish the test for recognition of custom; examine the place of the sea in English custom; and finally consider the development of the mythology of the Queen’s Chain in New Zealand.

A. Custom as a source of law

British custom is traditionally local or particular, limited by place, subject matter, or community. Prior to the late 16th century in England, local customs, *lex loci*,

¹⁷ Land Access Ministerial Reference Group, *Analysis of Written Submissions on the Report Walking Access in the New Zealand Outdoors* (Wellington, Ministry of Agriculture and Forestry, 2004) at 28.

¹⁸ John W. Salmond, *Jurisprudence* (5th ed. Stevens and Haynes 1916) at 119.

were prevalent and their jurisdictions were multiple and overlapping. Reformers began a process of centralisation to establish a system of precedent for uniform application; this was the common law, the law of custom that applied to all.¹⁹

Particular customs remained an important source of law, but one which relied upon the common law for its recognition. The common law defines the limits of custom. The *Case of Tanistry* set out the test for recognition of custom, in this case the Irish brehon law of succession, in 1608:²⁰

a custom, in the intendment of law, is such a usage as hath obtained the force of law, and is in truth a binding law to such particular place, persons or things as it concerns ... [B]ut it is jus non scriptum, and made by the people only of such place, where the custom runs ... custom is a reasonable act, re-iterated, multiplied, and continued by the people time out of mind. And this is the definition of custom, which hath the virtue and force of a law.

Coke was more detailed in his description of the elements necessary to establish custom as a valid source of law. For the common law to recognise custom, he wrote, there must be usage from time out of mind, which is continual and peaceable without lawful interruption; the custom must not be unreasonable; it must be according to common right; on good consideration; compulsory, that is

¹⁹ Fuller describes the deep projection of the roots of the common law into human interaction and for this reason acknowledges that its historical appellation as a form of customary law is apt: Lon L. Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1 at 26.

²⁰ *Case of Tanistry* (1608) Dav. 28, 33; 80 ER 516, 520 from the translation, A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland 78 (Davies translation, 1762) cited in Shaunnagh Dorsett "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and The Case of Tanistry", (2002) 26 Melb. U. L. Rev. 32 at 39.

those who use a custom must feel it obligatory and not merely optional;²¹ certain, and beneficial to those who allege it.²²

Coke's test for the recognition of custom has been enduring, though streamlined over time.²³ Salmond, writing in the early 20th century, no longer requires that the custom be proved without interruption, nor is good consideration required. Glosses are added to Coke's requirements. First, Salmond distinguishes local custom, which must have existed from time immemorial, from other generalised customs, such as those of the law merchant, for which there may be no such requirement (though Salmond acknowledges conflicting precedent on this point).²⁴ He argues a measure of authority derived from the generality of the custom removes the need to rely upon length of observance.²⁵ Second, though all custom must conform to statute law, only modern custom must be consistent with the common law.²⁶ In cases of immemorial usage, "the common law will yield".²⁷

The criterion of immemoriality, that the custom has been practiced "time out of mind" was traditionally pinpointed at 1189, being the beginning of the reign of

²¹ See also C.K. Allen, *Law in the Making* (The Legal Classics Library, 1992) at 92 and 102, who argues legal custom's obligatory sanction distinguishes it from habit and other social customs and, at 97, adds a further requirement to the test for custom: that the custom be notorious. Custom may not be applied against someone who does not know of its existence. But cf. David J. Bederman who argues an actual sense of legal obligation was never required by English law, it was sufficient that the custom being claimed was of right: David J. Bederman "The Curious Resurrection of Custom: Beach Access and Judicial Takings" 96 Colum. L. Rev. 1375 at 1392.

²² Sir Edward Coke, *Institutes I*, c 6, s 138 and *The Compleat Copyholder: Being a Learned Discourse of the Antiquity and Nature of Manors and Copyholds, with all Things thereunto Incident*, s. 33 (1719) (1630) cited in Dorsett, above note 20, at 41.

²³ The most significant restatement of Coke's test for the doctrine of custom in the United States was that of Blackstone who required that custom be immemorial, continuous, peaceable (that is it is generally acquiesced in, having its origins in consent), certain, consistent with other customs, compulsory, and reasonable. See Bederman, above note 21, Part IA 1383 -1398 and Gregory M. Duhl "Property and Custom: Allocating Space in Public Places" (2006) 79 Temp. L. Rev. 199 at 207.

²⁴ Salmond, above note 18, at 150, esp. n. 2.

²⁵ Salmond, above note 18, at 149.

²⁶ Salmond, above note 18, at 152.

²⁷ Salmond, above note 18, at 147-148.

Richard I. This requirement would seem to preclude any application of the common law doctrine of custom to a relatively modern practice. Modern judicial approaches to the law of custom have, however, substantially modified this requirement. In the recent case of *R v. Oxfordshire County Council and Others Ex Parte Sunningwell Parish Council*²⁸ the House of Lords considered whether villagers had acquired a right to use the glebe²⁹ for recreation. Lord Hoffmann directed the local council to register the glebe as a village green, finding its use for sports and pastimes, whether modern or ancient, established a common right. The House noted that in 1795 in *Fitch v. Rawling*³⁰ Justice Buller recognised a custom to play cricket on a village green as having existed since the time of Richard I although, Lord Hoffmann said, “the game itself was unknown at the time and would have been unlawful for some centuries thereafter”.³¹ The law’s approach to the requirement that custom be immemorial is therefore a fiction, which responds to something more than time.

B. English seaside custom

At common law, the sea and foreshore were an important common resource, providing a valuable food source and navigation route. The Romans held the foreshore subject to *jus publicum*, a public right, jurisprudence which found its way to England in the writings of Bracton. At common law, the seabed and soil of the foreshore were vested in the Crown but the public had rights of passage or navigation on the sea,³² including the right to moor, to ground and unload.³³

²⁸ [1999] UKHL 28; [1999] 3 WLR 160 (24 June 1999).

²⁹ A “glebe” is land belonging to a parish, the income from which was used to support the local church.

³⁰ (1795) 2 H.BI. 393 (Buller J).

³¹ [1999] 3 WLR 160 at 172. The House of Lords cites the case of *Mercer v Denne* [1904] 2 Ch 534 (*affd* [1905] 2 Ch 538 (CA)) in which the Court found a customary right to dry fishing nets on coastal land. Andrea Loux notes that the land upon which the fishers’ nets were dried did not exist in 1189, but had recently accreted: see Andrea C. Loux “The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century” (1993) 79 Cornell L. Rev. 183.

³² John Hassan *The Seaside, Health and the Environment in England and Wales since 1800* (Ashgate, Burlington, 2003) at 12. On ownership of the foreshore and seabed: 49(2) *Halsbury’s Laws of England* “Water” para. 55. On all aspects of the history of water law see Joshua Getzler

Localised customary rights to use the foreshore, or rights akin to easements over the foreshore or adjacent land limited to particular groups, might also be founded in long usage. For example, the right of local fishermen to dry their nets on ‘waste’ or unoccupied ground at the water’s edge was among those recognised by the English courts.³⁴

But, at the time of Queen Victoria’s instruction to New Zealand’s Governor in 1840, public perception of the sea and its value was changing. With the growth of the middle class and the opening of the railways, a visit to the seaside became accessible to more Britons.³⁵ In addition to its traditional role as food source and public highway, the sea came to be associated with recreation.

Bathing in the sea is no ancient common law custom but is considered to have first become popular among the upper classes in the 18th century when long traditions of ‘taking the waters’ at spa towns, prompted the development of ‘dipping’ one’s body in sea water for the purposes of medical therapy.³⁶ A belief in the vital properties of sea water (which might be bathed in or imbibed) appears in the writings of 17th century physicians but did not become widely popular until the 18th century.³⁷ Members of the Royal Family were among the trendsetters and their patronage became essential to the success of coastal spas.

A History of Water Rights at Common Law (Oxford University Press, Oxford, 2004), and, chapter 4, in particular, on Hale and Blackstone and doctrines of land and water use, at 179 on public law rights in rivers as highways.

³³ *Blundell v Catterall* 5 B. & Ald. 267; 49(2) *Halsbury’s Laws of England* “Water” para. 56.

³⁴ *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538 (CA).

³⁵ See Hassan, above note 32 at 36. Also Lena Lenček and Gideon Bosker *The Beach. The History of Paradise on Earth* (Viking Penguin, New York, 1998) at 71.

³⁶ John Travis presents a different view of the development of sea bathing arguing that it developed from the practices of the working classes as well as the elite. He cites early evidence of working people visiting the Lancashire coast to bathe in the sea before bathing became popular among the gentry. Travis argues the shoreline was traditionally a public space, which the middle and upper classes attempted to appropriate for the exclusive use of the socially acceptable: John Travis “Continuity and Change in English Sea-Bathing 1730-1900: A Case of Swimming with the Tide” in Stephen Fisher (ed) *Recreation and the Sea* (University of Exeter Press, Exeter, 1997) at 8-9 and 17.

³⁷ Hassan, above note 32 at 16.

Sea bathing was, however, a serious business. Though it was not uncommon in the 18th century for men to bathe nude,³⁸ bathing machines were employed to protect women's modesty. These horse drawn contraptions, a small hut on wheels, allowed an assistant or "dipper" to plunge the patient into the bracing sea³⁹ (bathing suits were yet to become popular as it was thought the medicinal benefits of sea water were best received direct to the skin). In their heyday, the machines were ubiquitous. In the novel *Persuasion*, Jane Austen, through her heroine Anne Elliot, describes Lyme as a "pleasant little bay, which in the season is animated with bathing machines and company".⁴⁰

It was such a machine that sparked a claim to the beach as a public commons. In *Blundell v Catterall*⁴¹ a local bathing machine operator, threatened with an action in trespass, claimed a common law right to bathe on the sea shore and to cross it on foot, and with horses and carriages, for that purpose. By analogy with public rights of passage on the sea, the defendant claimed the beach as a public commons. The outcome was a defeat for the rights of bathers. The judges of the majority found there was no general common law right to bathe in the sea, or to cross the seashore on foot, or with machines.

There was, however, a lone champion of the public's right to access the beach: Justice Best wrote a rousing dissent concluding that "[t]he universal practice of England shews the right of way over the sea-shore to be a common-law right".⁴² Drawing on the works of Hale and Bracton, Best J found the sea to be the "great highway of the world" common to all; though parts of the foreshore may be

³⁸ Even King George III bathed naked, see Lenček and Bosker above note 35 at 84.

³⁹ For an evocative description of the bathing machine and "sea bathing as a form of therapy and penance" see Lenček and Bosker above note 35 at 70-71; 84-85.

⁴⁰ Jane Austen, *Persuasion* (Lancer Books, 1968) (1818) at 133.

⁴¹ *Blundell v Catterall* 5 B. & Ald 268; 106 E.R. 1190. For commentary on the decision in *Blundell v Catterall* see Michael Taggart *Private Property and Abuse of Rights in Victorian England: the story of Edward Pickles and the Bradford water supply* (Oxford University Press, Oxford, 2002) at 112-113 and, on property and water, chapter 5 generally.

⁴² *Blundell v Catterall* 5 B. & Ald 268; 106 E.R. 1190 at 1194.

appropriated to private use, “the greatest part was left open as a common highway between the sea and the land”.⁴³ Justice Best dismissed the suggestion of the Chief Justice that private property owners would likely provide reasonable access and refrain from suits against the “smallest injury”, or that such private actions would be caught by the law’s checks on “frivolous and vexatious suits”.⁴⁴ The dissenting Judge was less trusting of the lords’ indulgence than the majority, finding that “free access to the sea is a privilege too important to Englishmen to be left dependent on the interest or caprice of any description of persons”. “Public advantage”, particularly the promotion of public health,⁴⁵ supported the common right, which Justice Best asserted was as “beneficial to the public as that of fishing”.⁴⁶

The judges of the majority did however acknowledge that the absence of a general right to bathe did not necessarily exclude establishment of specific customary rights⁴⁷ though Chief Justice Abbott described bathing as “comparatively modern” and bathing machines also “of comparatively modern invention”.⁴⁸ One is left with the feeling that the plight of a bathing machine operator made an unfortunate test case for English bathers. Bathing machines had a far greater impact on the beach environment than those walking or bathing alone: the carts left tracks and the horses, trails of manure. The Chief Justice found the defendant was not a recreational beachgoer but a man seeking profit on manorial land, whose business of transporting large horse-drawn bathing carts to the sea threatened to interfere with established customary practices on the foreshore and beach such as rights of passage and the placement of nets.⁴⁹

⁴³ Ibid, at 1193.

⁴⁴ Ibid, at 1207.

⁴⁵ Ibid, at 1194; 1196.

⁴⁶ Ibid, at 1196.

⁴⁷ Bayley J, see Ibid, at 1203; Holroyd J was least generous, admitting that where such a custom does exist in relation to the seashore it “may perhaps be good” at 1201.

⁴⁸ Ibid, at 1205.

⁴⁹ Ibid, at 1206 – 1207.

Thus though no public right to bathe was established in England, the view that the beach was a public commons was not without supporters.⁵⁰ Even the majority in *Blundell v Catterall* acknowledged that rights to bathe might be established in specific locations where evidence of custom was adduced. So, at the colonisation of New Zealand in 1840, a little less than twenty years after the decision in *Blundell*, the question of public rights to use England's beaches was still being debated. If anything, the issue is likely to have become more significant during that period as the beginning of Victoria's reign coincided with the rush of the middle class to the English beaches. The association of the beach with excitement, escape and exoticism was now well established.

C. The mythology of the Queen's Chain

It is easy to imagine that, in 1840, the advisers of Queen Victoria instructing New Zealand's Governor would have been mindful of the English debates about public recreational access. And, given the direction that the surveyor-general report what lands might be reserved "for the recreation and amusement of the inhabitants of any town or village, or for promoting the health of such inhabitants",⁵¹ it is not an unlikely inference that some officials shared Justice Best's view that access to the sea was to the public advantage.

However, the greater mystery of the Queen's Chain is its evolution from this broad colonial instruction to a powerful modern New Zealand ideal of public access to the water. The idea that some lands should be reserved for public recreation is unremarkable but, with the development of a popular expectation

⁵⁰ See also *Llandudno Urban District Council v Woods* [1899] 2 Ch 705 in which a Rev Woods sought to establish a right to give sermons on the foreshore, given it was a public highway. The action failed, the Court applying *Blundell v Catterall* but the Judge stressed that the action pertained only to foreshore (and gave a clear hint as to where the Reverend might assemble his congregation) at 708:

Between the foot of the promenade and the commencement of the foreshore is a strip about which I know nothing. The defendant has sometimes delivered addresses from this strip. But this action in no way relates to this strip.

⁵¹ Colonisation of New Zealand: Extract from the Queen's Instructions of 5 December 1840, cited in Hayes above note 2, at 50.

that all beaches be available for public use, local customary patterns emerged. These patterns emerge through informal customary support, as well as more formal measures that promoted public access to the beach.

The first practical expression of the Queen's Chain came prior to the Governor's formal instructions in 1840 in the New Zealand Land Bill, drafted in New South Wales in late 1839. By this stage, Letters Patent had been issued annexing "any territory which is or may be acquired" in New Zealand to New South Wales.⁵² The status of lands allegedly purchased from Māori prior to the anticipated annexation of New Zealand as a British colony was an issue of concern. The New Zealand Land Bill was not of general application but addressed these lands claimed by early settlers. The claims were to be assessed by a Land Claims Commission and, if approved, could be perfected by a Crown grant. The New Zealand Land Bill excluded from the Crown grants assessed by the Commissioners any land "situated on the sea shore within 100 feet of high water". This measure of 100 feet was known as a "chain".⁵³

The New Zealand Land Bill was passed in New South Wales but later disallowed by the Crown as having been enacted in Australia after New Zealand had become an independent colony. Nonetheless, the New South Wales legislation continued in force until June 1841, when the New Zealand Legislative Council enacted an ordinance providing for land grants in identical terms.⁵⁴ The 1841 ordinance was again of narrow scope, applying only to the work of the Commissioners in assessing early land claims.

⁵² On this period, see DV Williams "The Annexation of New Zealand to New South Wales: What of the Treaty of Waitangi" [1985] 2 Aust. J of Law and Society 41.

⁵³ The name comes from the heavy metal chain of 100 links that was used by surveyors to measure property bounds. Where each link measures a foot, the measure is known as a 'Ramsden's Chain' or engineer's chain. The Ramsden Chain, which dates to the 18th century, was used by surveyors and civil engineers.

⁵⁴ New Zealand Legislative Council Ordinance, No. 2, (1841).

The following year, in 1842, the Legislative Council passed an ordinance removing the requirement of a 100 foot strip along the high water mark. The ordinance was disallowed by Her Majesty in 1843 and the requirement of a coastal reservation reinstated. The Land Claim Commission therefore continued to apply the reservation requirement, even in cases where the original deed between Māori and settler had expressed the purchase as bounded by the low water mark.⁵⁵ Thus though the Queen's Chain was applied to a limited category of land grants, which covered a small percentage of New Zealand's area only, the modern Queen's Chain has its origins in the earliest instruments of New Zealand colonial land law.⁵⁶

Had the requirement of the 100 foot reservation been applied consistently to other Crown land grants, modern New Zealanders' expectation of continuous coastal access may have been met. However, until 1892, neither the Crown, the New Zealand government or, in the period between 1854 and 1876, the provincial governments, legislated specifically for waterfront reservations in Crown land sales to settlers.⁵⁷ Given the absence of legislative support for the Queen's Chain until the end of the 19th century, outside the context of the Land Claims Commission, it is remarkable the principle of waterfront reservation survived. B. E. Hayes writes of the resilience of the concept:⁵⁸

The example of the decision by Her Majesty to preserve a margin along the coast was no doubt binding on the collective conscience of the Governors, and, later, the land-law administrators in central and provincial government.

⁵⁵ See Hayes above note 2, at 6, who gives the example of land purchased by the Catholic Bishop, Bishop Pompallier.

⁵⁶ This is true only with respect to coastal reservation. See Hayes, above note 2, at 7: "There is no evidence in the deeds or reports of the Commissioners of a reservation strip along rivers or streams."

⁵⁷ Hayes, above note 2, at 8.

⁵⁸ *Ibid*, at 9.

But, though Hayes argues the practice of reservation along the high water mark was applied to many Crown grants informally, the practice was never uniform. Local differences were heightened when, in 1854, general legislative powers, including the power to make land grants, were transferred to the newly created provinces.⁵⁹ These factors in part explain the significant gaps in the publicly owned Queen's Chain, which, in 2003, was estimated to cover only 70% of waterfront land.⁶⁰

The Land Act 1892 was the first statutory expression of the Queen's Chain in general national legislation. The Act, which applied to all sale or disposal of unsurveyed⁶¹ or Crown land, stated:⁶²

There shall be reserved from sale or other disposition a strip of land not less than sixty-six feet in width along all high-water lines of the sea, and of its bays, inlets or creeks, and along the margins of all lakes exceeding fifty acres in area, and along the banks of all rivers and streams of an average width exceeding thirty-three feet, and, in the discretion of the

⁵⁹ Ibid, at 2. In some provincial regulation, the purpose of recreation was included amongst the traditional purposes for which land might be set aside for the public. Regulation 5 of the Land Regulations 1856 for the province of Auckland read:

The Superintendent of the said province may, from time to time, and as to him it shall seem meet, reserve portion of the said land for public roads or other internal communications ... or for the inhabitants at any town or village or as the sites of public quays or landing places or on the sea coast or shores of navigable streams, or for any other purpose of convenience, health or enjoyment.

⁶⁰ See Land Access Ministerial Reference Group, above note 3, at 45. Much waterfront reservation land set aside prior to the advent of the ambulatory marginal strip has also been lost to erosion.

⁶¹ See s. 15 of the Land Act 1892, which enables the Governor to exclude reserve land on the seashore, the margin of lakes, or on river-banks at any time previous to the approval of the plan of the survey by the Chief Surveyor. The Crown was not required to pay compensation for the land reserved. See also comments of the Hon. Mr Buckley in the parliamentary debates, noting that the Crown had previously lost rights to the foreshore, a matter which had given rise to much litigation: (September 4 1891) NZPD at 236-237, 'The Land Bill'.

⁶² Section 110, Land Act 1892. The Queen's Chain, previously an engineer's chain measure of 100 feet, became a width of 66 feet under the Land Act 1892. A chain of 66 feet is known as the Gunter's chain or Surveyor's chain. It defines exactly a cricket pitch, and an acre can be marked by a measure of one chain wide by ten long.

Commissioner, along the bank of any river or stream of less width than thirty-three feet.

The passage of the Land Act 1892 also provides a snapshot of the growing role of the Queen's Chain within New Zealand's national mythology. The leading supporter of the bill was the Minister of Lands, Sir John McKenzie, nicknamed 'Honest Jock', who was described by historian Michael King as a "towering Gaelic speaking Highlander".⁶³ McKenzie was born in Scotland to a tenant farming family. After emigration in 1860, he began his life in New Zealand as a shepherd in the High Country of the South Island, before his rising fortune allowed him to enter politics. His early life in Scotland and memories of the Highland clearances left him with a "hatred of landlordism" and class exclusion.⁶⁴ During the parliamentary debates on the Land Act 1892, John McKenzie said:⁶⁵

I myself may mention that I have seen in the Highlands of Scotland the ground harrowed over during the night in order to hide the blood shed by the people who had been trying to defend their homes.

McKenzie's biographer Tom Brooking argues that 'Honest Jock' "wanted all New Zealanders to be able to fish the rivers, lakes and coasts and to enjoy unrestricted access to forests and mountains".⁶⁶ With the great estates of England and Scotland in mind, McKenzie argued that "nationally important scenery should not be allowed to fall into private hands and urged state protection of wildlife, vegetation and spectacular natural features".⁶⁷ As Minister of Lands, he oversaw the establishment of New Zealand's first national park – the Tongariro National Park – and the codification of the Queen's Chain, which

⁶³ Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 271.

⁶⁴ Tom Brooking "John McKenzie" *Dictionary of New Zealand Biography* (2006) <www.dnzb.govt.nz>

⁶⁵ (August 26 1891) NZPD at 80, 'The Land Bill'.

⁶⁶ Brooking, above note 64.

⁶⁷ Tom Brooking *Lands for the people?: the Highland Clearances and the Colonisation of New Zealand: a biography of John McKenzie* (University of Otago Press, Dunedin, 1996) at 179.

he viewed as providing access not only to recreational areas, but also to supplementary sources of food.⁶⁸ An egalitarian vision of New Zealand as a ‘Better Britain’, led by settlers like McKenzie, was at work in the mythology of the Queen’s Chain.⁶⁹

Rose notes the power of the story, which can persuade, preparing an audience for action.⁷⁰ The history of the Queen’s Chain is such a story, which unites the social values many New Zealanders associate with recreational access to the outdoors. As Michael King argues, many of the values New Zealanders hold dear were formed in the 19th century, among them the ideal of public access to the beaches and rivers.⁷¹ This commitment stemmed in part from the outside reference points of settlers, like Jock McKenzie, who believed in New Zealand as a young country, without a feudal past. The custom of the Queen’s Chain framed public access to the beach as a symbolic element of a much broader nation-building project.

Importantly, this project excluded as it spoke of inclusion – both King and Brooking note that, despite McKenzie’s formative memories of Scots pressed into famine, he was one of the major architects of Māori dispossession in the 19th century.⁷² As Rose notes, “[a]ny given property regime effectively privileges some speakers over others”⁷³ and in New Zealand’s history, the exclusion of tikanga

⁶⁸ McKenzie’s mother had died when he was a child, during one of the great famines of the Highlands: Brooking, above note 64.

⁶⁹ The phrase “Better Britain” is taken from the work of James Belich, *Paradise reforged: A history of the New Zealanders, From the 1880s to the Year 2000* (Penguin Press, Auckland, 2001). See also Paul McHugh “A History of Crown Sovereignty in New Zealand”, in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss. Uses of the Past – a New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) at 193; and Paul McHugh, “Tales of Constitutional Origin and Crown Sovereignty in New Zealand” (2002) 52 U. Toronto L. J. 69. See also King, above note 63, at 175-176, 509.

⁷⁰ Carol M. Rose “Introduction: Property and Language, or, The Ghost of the Fifth Panel” 18 Yale J. L. & Human. 1 at 11.

⁷¹ King, above note 63, at 509.

⁷² See King, above note 63, at 172; Brooking, above note 64.

⁷³ Rose, above note 70, at 6.

Māori has been systemic.⁷⁴ Neither does the myth of the Queen’s Chain take into account the special status of Māori land. Notably, during the process of the conversion of Māori customary title to Māori freehold land, the Native Land Court had no power to grant title to anyone other than the customary owners. Therefore, had the Crown wished to establish reserves at the waterfront, it would have had to take the land from Māori, rather than reserve it at the time of grant.⁷⁵ The Queen’s Chain principle has never therefore applied to Māori land.⁷⁶

D. The present status of the Queen’s Chain

Over the next century, the Queen’s Chain had several statutory guises, though the triggers that had prompted reservation of waterfront land in the 19th and early 20th century - survey and sale of Crown land – became less common.⁷⁷ The Land Act 1892 remained in force until its repeal by the Land Act 1948, which preserved the principle of waterfront reservation upon sale or disposition of Crown land, providing for a 20m strip along the seashore, and lakes and rivers of a requisite size.⁷⁸ Later statutory instruments provided for reserves where private land was

⁷⁴ For discussion of the privileging of Pākehā (European) property systems over Māori see e.g. Stuart Banner, “Two Properties, One Land: Law and Space in Nineteenth Century New Zealand” 24 *Law & Soc. Inquiry* 807 (1999); “Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand” 34 *Law & Soc’y Rev.* 47 (2000) and David V. Williams ‘*Te Kooti Tango Whenua*’ *The Native Land Court 1864-1909*, (Huia Publishers, Wellington, 1999) for detail of the legislative measures in the 19th and early 20th century facilitating alienation of Māori land.

⁷⁵ See Hayes, above note 2, at 29.

⁷⁶ Māori land remains in a category of its own and is governed by separate legislation, the *Te Ture Whenua Māori Act 1993*, which provides, not for esplanade reserves as does the *Resource Management Act 1991*, but for “Māori reservation for the common use and benefit of the people of New Zealand”: s 303(3), *Te Ture Whenua Māori Act 1993*. See also Huhana Smith, “No Queen’s Chain” *Mana te marae atea*, February/March 2002, reprinted in Hayes, above note 2, at 49.

⁷⁷ Also, after land has been brought under the *Land Transfer Act*, no prescriptive easement may be acquired over it. Prescriptive easements acquired prior to the servient land coming under the Act are fully preserved by s 62(b) *Land Transfer Act 1952*. Section 296(1) of the *Property Law Act 2007* prevents easements being accrued by prescription after 31 December 2007. Section 365(2)(k) of the *Property Law Act 2007* repealed the *Prescription Act (UK) 1832*. Issues as to the acquisition of easements by prescription are now therefore rare: see Hinde, Campbell and Twist *Principles of Real Property Law* (LexisNexis, Wellington, 2007) para 16.062.

⁷⁸ *Land Act 1948*, s. 58, which was repealed by the *Conservation Law Reform Act 1990*.

approved for subdivision.⁷⁹ In the late 1980s, privatisation and the sale of the Crown estate to State-owned Enterprises prompted further refinement of “marginal strips”, including the creation of an “ambulatory marginal strip” which, as it was not fixed by survey but moved with the high water mark, reduced the cost of survey and sale of Crown land.⁸⁰ Legislation also responded to changing views of the value of waterfront reserves, recognising some lands where public access was not the primary purpose under the Conservation Act 1987.⁸¹

The Resource Management Act 1991 now governs the reservation of waterfront land. Among the “matters of national importance” set out by the Act, which all persons exercising power under the legislation must provide for, is:⁸²

- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers...

The Act continues to impose requirements of “esplanade strips” where subdivision is approved under the District Plan.⁸³ The basis upon which these strips are established is described in s 229 of the Act, which details a series of conservation principles, a public access right, and a recreational use right.⁸⁴ The Act provides a flexible set of tools for the facilitation of public access: compensation must be paid if the council wishes to expand its statutory entitlements to esplanade strips;⁸⁵ easements may be negotiated over private

⁷⁹ Land Subdivision in Counties Act 1946; Counties Amendment Act 1961; Local Government Act 1974 (amended 1978). In each statute the requirement that marginal strips be reserved depended upon the size of the subdivision. Where land was subdivided into larger allotments, the requirements did not apply.

⁸⁰ See Conservation Act 1987, s. 24; repealed by s. 15 of the Conservation Law Reform Act 1990, which set out the rules regarding marginal strips in Part IVA. Note that the law of waterfront reserves is complicated by the early practice of marking the reserves as public roads. Roads are governed by separate law and are not considered under the “marginal strip” legislation see Hayes, above note 2, at 23.

⁸¹ Conservation Act 1987, s. 24; Conservation Law Reform Act 1990, s. 24(c).

⁸² Resource Management Act 1991, s. 6(d).

⁸³ Resource Management Act 1991, s. 230 (amended 1993).

⁸⁴ Section 229 was inserted by the Resource Management Amendment Act 1993.

⁸⁵ Resource Management Act 1991, ss. 237E – 237G.

land to provide public access to the water;⁸⁶ and all esplanade strips are ambulatory, deemed to shift with the water boundary.⁸⁷

E. The custom of recreational access

The Queen's Chain is today, as Hayes suggests, not a legal entity but a cobbled together collection of public lands, with varying histories and legal status.⁸⁸ Roads, marginal strips and reserves have over time reflected the aim of public access to waterfront property but none provides the consistent and continuous access that defines the Queen's Chain in New Zealand's public imagination. Though modern mechanisms for access more closely reflect the aims of public access and conservation, and provide a solution to the problem of erosion, the present statutory scheme cannot address the central issue: many private landowners have full riparian rights.

Yet the Ministerial Group in their report on Outdoors Walking Access stated that public submissions demonstrate an expectation of free access to the beach, rivers and lakesides; the popular belief is that the Queen's Chain provides public access to all waterways in New Zealand as of right. This reveals a disjunct between public expectation and the formal legal status of waterfront land; a gap which is filled by social practices that place informal obligations on private landowners.

At common law in order to establish a customary right, participants in the customary practice must feel a sense of social obligation. Therefore if the custom of the Queen's Chain is to be distinguished from elective social habits or traditions, recreational access practices must carry a certain weight of obligation on both property owners and land users. The nature of social obligation giving

⁸⁶ Ibid, s. 237B.

⁸⁷ Ibid, s. 233.

⁸⁸ Hayes, above note 2, at 48.

rise to custom is well-canvassed in the literature discussing social norms. Whilst there is no agreed definition of ‘social norm’, as a starting point one may distinguish norms from mere regularities on the basis that violation of a norm may be accompanied by a sanction.⁸⁹ In the context of a small community, the sanction for breach of a social norm may be as apparently innocuous as negative gossip.⁹⁰

The difficulty in assessing whether social practices have the relevant obligatory quality is compounded by the very nature of social norms, which Lon Fuller noted perceptively:⁹¹

the anticipations which most firmly direct our actions toward others are often precisely those that do not rise to consciousness. Such anticipations are like the rules of grammar that we observe in practice without having occasion to articulate them until they have been conspicuously violated.

It is fortunate, in this respect, that New Zealand’s social practice regarding recreational access is, as the Ministerial Group concludes, “under increasing stress”⁹² as there are sufficient examples of the violation of social norms and a negative response or sanction to allow a reasonable sense of what the ‘rules’ might be.

The Ministerial Group sets out the obligation upon the property owner in this way: “the convention has been that people who want reasonable access must be granted it after obtaining the consent of the landowner (whether government or

⁸⁹ Daniel Nazer “The Tragicomedy of the Surfers’ Commons” (2004) 9 Deakin L. Rev. 655 at 662 in a vivid case study of the norms of surfing communities. See also Gregory M. Duhl “Property and Custom: Allocating Space in Public Places” (2006) 79 Temp. L. Rev. 199, at 235-6 who discusses Amartya Sen.

⁹⁰ As Robert Ellickson argues in his study of Shasta County ranchers, community members may therefore act contrary to their apparent self-interest in order to avoid social opprobrium: *Order Without Law. How Neighbors Settle Disputes* (Harvard University Press, Cambridge, 1991) at 56-57; 143; 183.

⁹¹ Lon L. Fuller “Human Interaction and the Law” (1969) 14 Am. J. Juris. 1 at 24.

⁹² Land Access Ministerial Reference Group, above note 3, at 5.

private)".⁹³ The Ministerial Group uses the language of both obligation and consent: "reasonable access must be granted", but only "after obtaining the consent of the landowner". This suggests that the norm is that the request for consent is solely an opportunity for the landowner to assess its reasonableness, if there is no appropriate reason to decline access, the landowner must grant it, or risk social sanction. And, given that the Group states that the continuing connection between landowners and recreational visitors "can involve several generations of a family recreating in a particular location over time", it is likely that breach of access norms would be accompanied by social censure.⁹⁴ Indeed the submissions support the view that landowners who refuse reasonable requests for access are the exception, 'rogues' or, in Robert Ellickson's terms "deviants".⁹⁵

Tensions arising from breach of recreational access norms appear exacerbated as restrictions on public access become more frequent.⁹⁶ Though the Ministerial Group's report notes that there are many reasons for increasing divergence from the norm, these reasons tend to cluster around the tension the Group identifies between the custom of public access and the "rise of the property rights ethos".⁹⁷ Submitters, fearful of the perceived strengthening of property rights, at times seemed to shadow box an ill-defined spectre of private property. One individual

⁹³ Ibid.

⁹⁴ Land Access Ministerial Reference Group, above note 17 at 14.

⁹⁵ See Ellickson, above note 90, at 56. One submitter could recall only "2 occasions when access has been refused onto private land", provided the request was genuine and the people "responsible": Land Access Ministerial Reference Group, above note 17 at 14.

⁹⁶ Land Access Ministerial Reference Group, above note 17, at 13-17. It would be wrong to conclude on the basis of the Group's anecdotal evidence that landowners' values are indeed changing to prefer private property rights at the expense of the public recreational access. There are many different reasons why the 'property rights ethos' may be on the rise. See, e.g., Harold Demsetz "Toward a Theory of Property Rights" (1967) 57 Am. Econ. Rev. Pap. & Proc. 347-358 who argues that new property rights will emerge when the interacting persons wish to adapt to new possibilities made available by the changing costs and benefits associated with a resource. The Ministerial Group is attentive to evidence of this kind of change to rural activity in New Zealand. It notes that more intensive land use, together with the commercialisation of many recreational activities, has led some landowners to close access ways to public land or prevent recreational use of their private land. Land Access Ministerial Reference Group, above note 3, at 9.

⁹⁷ Land Access Ministerial Reference Group, above note 3, at v.

urged the Group to “reject any notion of ‘property rights’ which assumes title to the public domain”. And if, as one submitter argued, “the concept of free access is the cornerstone of what New Zealand is all about”,⁹⁸ others were clear that there was something foreign about the ‘property rights ethos’. One submitter felt Federated Farmers’ opposition to the findings of the report misrepresented the views of most members: “The current attitude [of FF] is hard-line denial of any problem, demand for commercialisation, talk of property rights etc. All this sounds like right wing America”.⁹⁹ The disappointed Associate Minister for Rural Affairs, Jim Sutton, blamed the lack of support for the Government’s statutory proposal on a “new hardness, a new selfishness about society at the moment ... that doesn't really care much about community interests”. The *New Zealand Herald* stated that Sutton said it was fashionable to take an extremist view in favour of private property rights at the expense of the protection of public rights.¹⁰⁰

There was however some measured argument in support of private property rights. In an editorial in *The Capital Letter*, Jack Hodder, whilst recognising the difficulty of the task set for the Outdoor Access Walking Panel, questioned whether strong property rights would also be acknowledged as “part of the heritage of New Zealanders”.¹⁰¹ Indeed, his question alludes to the perhaps little acknowledged tradition of private property in New Zealand. The Queen’s Chain has, in part, always been a fiction. There has never been agreement about egalitarianism - what it means, or what role it should play in the balance between public and private property rights. Private property is indeed central to the common law tradition New Zealand has adopted.

⁹⁸ Land Access Ministerial Reference Group, above note 17, at 14.

⁹⁹ Land Access Ministerial Reference Group, above note 17, at 12.

¹⁰⁰ Ruth Berry “Retreat on public access to farmland” *The New Zealand Herald*, (New Zealand, June 29, 2005).

¹⁰¹ Jack Hodder “Editorial” *The Capital Letter* (Wellington, 25 April, 2006) at 1.

III WHEN DOES CUSTOM GOVERN A RESOURCE AND WHY? THE LIMITED AND PUBLIC COMMONS

There are two arguments that might be made, taking into account the tradition of the Queen's Chain, and its relationship with the doctrine of custom. The first is to place beach access squarely within the law of custom and argue private property along the coast is indeed subject to rights of public access. This may seem a bold move, but it is one that courts in some states in the United States have made (though not without criticism).¹⁰² The second approach is to consider the pattern of customary practice built around the coast, and question how these practices should inform modern understandings of the problems of recreational access. This is the route I take.

The literature examining resources used or held in common focuses on an important question – who may access this resource? This question is also relevant when property is governed for example, a statutory scheme, but it has a special place in the law of custom, which frequently facilitates access to a particular resource, either by a limited group or by the public generally. In this regard, I am going to consider property subject to a limited commons, that is accessible by a defined and limited group only; second, property subject to a public commons;¹⁰³ and third, in which of these categories New Zealand's traditions of public recreational access should be placed.

¹⁰² Oregon has perhaps been most active in this regard: see *Thornton v Hay* 254 Or. 584, 586 (1969), in which the Supreme Court of Oregon held that Oregon's beaches were subject to public rights of access based on custom. Also *McDonald v Halvorson* 780 P.2d 714, and for the view of the Supreme Court of the United States, see *Stevens v City of Cannon Beach* 510 US 1207; 127 L. Ed. 2d 679. For statutory protection of public access in Oregon, see the 'Beach Bill' Or. Rev. Stat. § 390.610 (1967). There is a raft of literature addressing the use of custom to provide public access to beaches. See, e.g., Steven W. Bender "Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches" 77 Or. L. Rev. 913; also Bederman, above note 21; and Joseph Sax "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970) 68 Mich. L. Rev. 471.

¹⁰³ The literature varies in its approach to these categories. For example, a public commons is often discussed interchangeably with "open access" property. I use the term public commons to highlight that property held subject to a principle of public commons, whilst accessible by all may nonetheless be governed by rules of use.

A. Limited commons

Traditions of both limited and public commons are evident in common law. Particular and localised custom often governed resources accessible by a defined group only. The writing of historian E. P. Thompson focuses on the 18th century when rural pre-industrial customary practices were threatened by enclosure. Prior to enclosure, customary rights to use manorial resources enabled English agrarian communities to eke out subsistence. The rights of gleaning, the collection of crops left in the field after harvest; turbarry, the digging out of peat for fuel; estover, the cutting of wood; and pannage, the right to turn out domestic pigs into the forest, were among the common rights, which were managed by parish communities.¹⁰⁴ While custom maintained the traditional rural community, the community controlled access to resources, managed conflict, and excluded outsiders.

This careful monitoring aimed to prevent what Garrett Hardin famously coined “The Tragedy of the Commons”: the depletion of a resource which no single user has sufficient incentive to conserve. Hardin argues that “individuals locked into the logic of the commons are free only to bring on universal ruin”: no user has an incentive to restrict their personal use and conserve the common resource for the future as no one trusts their neighbour to do the same.¹⁰⁵ Each user is trapped in the prisoners’ dilemma: a strategy which rationally maximises her individual interests will likely result in collective ruin.¹⁰⁶ The inevitable tragic outcome is the total depletion of the resource.

The work of Thompson and others qualify Hardin’s tragic narrative. For example, James M. Acheson, writing about the lobster gangs of Maine, describes the

¹⁰⁴ As Thompson recounts, some of these common rights survived enclosure, largely due to the tenacity of custom communities: E. P. Thompson *Customs in Common* (The Merlin Press, London, 1991). See Getzler, above note 32 at 167-169 on Blackstone and the right of common.

¹⁰⁵ Garrett Hardin “The Tragedy of the Commons” (1968) 162 *Science* 1243.

¹⁰⁶ Elinor Ostrom *Governing The Commons: the Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990) at 3.

aggressive management and protection of lobster fishing rights by tightly knit “gangs” of fishermen and argues that where the commonly held resource is available to a limited group only, Hardin’s conclusion is inaccurate. Where communal property is controlled exclusively by an identifiable group, a category I call the limited commons, there is great incentive to sustain the resource and protect it from outsiders.¹⁰⁷

The success of limited commons in maintaining scarce resources stems from the ability of custom to exclude and draw boundaries. Though many supporters of custom credit values of loyalty and respect with the success of governance by social norms, these positive communitarian values may be limited to members of the custom community.¹⁰⁸ Thompson describes the communal economy as parochial and exclusive. He uses the metaphor of a circling sky to illustrate the “bounded, circular, jealously possessive consciousness of the parish”. Those who belonged to a customary community would close ranks to defend their rights against the people of the next parish.¹⁰⁹ This process of excluding strangers and outsiders may be shaming and distasteful,¹¹⁰ or violent, as Nazer’s description of surfer localism,¹¹¹ and Acheson’s account of the lobster gangs of Maine¹¹² remind us.

¹⁰⁷ James M. Acheson *The Lobster Gangs of Maine* (University Press of New England, Lebanon, 1988).

¹⁰⁸ See, e.g., Duhl above note 23 at 229-230, 238, who describes the allocation of space among the University lunch carts.

¹⁰⁹ Thompson, above note 104, at 179 and 184.

¹¹⁰ Thompson, above note 104, at 8-9 esp., gives examples of the shaming rituals of custom that protected marital roles and the norms of sexual conduct in the 18th century. He describes the ritual divorces or “wife sales” and rough music, which served to “impose the sanctions of force, ridicule, shame, intimidation” on those stepping outside the bounds of behaviour deemed appropriate.

¹¹¹ See Nazer, above note 89 at 670 and 679 – 681; 694 - 700 for discussion of the tragic element of the surfers’ commons.

¹¹² Acheson, above note 107.

B. Public commons

But what of the public commons, open to all comers? Is the claim to public recreational access to the beach, lakes and rivers weakened by Hardin's argument that resources subject to rights in common cannot be managed sustainably? Carol Rose's paper 'The Comedy of the Commons' examines the values underlying the development of public commons in particular.¹¹³ Rose argues that the story of the commons need not end in tragedy as public rights will attach to resources which attain their highest value when held in common. Like Thompson, Rose looks to the changes in English society in the 18th century, when many hoped the growth of commerce would provide opportunity for greater social interaction and exchange. Rose argues that fear of private monopolisation of public passage prompted the establishment of common rights on roads, canals and navigable rivers.¹¹⁴ The movement of goods, people and information supported the developing needs of commerce by providing means of internal communication and exchange. In turn, commerce was thought to enhance the sociability of members of an otherwise atomized society.¹¹⁵ The location of community at this wide level stands in opposition to the parochial nature of agrarian custom. Rose distinguishes finite resources from roads, rivers and canals. This property will achieve its greatest value where use is open to the public as the free movement of travellers and traders facilitates commerce, and commerce enables fruitful interaction between strangers. In contrast to those customs reliant on keeping strangers out, custom surrounding rights of passage is valuable because it assists socialisation through commerce, which invites strangers in.

¹¹³ Carol Rose, "The Comedy of the Commons: Custom, Commerce and Inherently Public Property" 53 U. Chi. L. Rev. 711.

¹¹⁴ *Ibid.* at 753.

¹¹⁵ *Ibid.* at 723.

Rose's thesis develops to focus on other resources the value of which is maximised by non-exclusive, public use.¹¹⁶ Here she examines customs facilitating traditional recreation: maypole dances; horse races; cricket matches, and the village fair.¹¹⁷ Recreational users face similar risks of holdout and private monopoly as those seeking passage across private land,¹¹⁸ and similar economies of scale apply. Recreation, like commerce, is a classic case of "the more the merrier":¹¹⁹ as the crowd increases so too do the opportunities for social interaction.

Thus the literature suggests successfully managed common property will fall into one of two categories: the limited commons, where a restricted group manages a resource and works to exclude outsiders, or the public commons where, although there is likely to be regulation of the behaviour of access seekers, the resource will be open to the public. This distinction suggests scarce or finite resources will develop as limited commons while resources, the value of which is maximised by public usage, will be managed as public commons.

C. Placing New Zealand's recreational traditions – what do we learn about the resource from custom?

The placement of the custom of New Zealand recreational access in this scheme is problematic. Beaches are ultimately a finite resource, which might suggest a limited commons.¹²⁰ But, the history of the development of the Queen's Chain

¹¹⁶ Ibid at 769-770

¹¹⁷ Ibid. at 741 and, e.g., *Fitch v Rawling* 2 H. Black 393 (cricket); *Mounsey v Ismay* 1 Hurl & Colt 729 (horse races taking place at a particular place at a particular time of year); *Hall v Nottingham* 1 Ex D 1 (1875) (maypole dancing) and *Hammerton v Honey* 24 W.R. 603 (Ch. 1876) (village green).

¹¹⁸ Though in this case, argues Rose, the risk arises because of community attachment to place: "the community's custom signals its emotional investment in a place ... to everyone – including the property's owner..." see above note 113, at 759.

¹¹⁹ Ibid, at 768.

¹²⁰ It may be that a change in perception of the nature of beaches and other natural resources has led to exclusion of recreational access seekers i.e. that what once seemed abundant, now appears scarce. See Boast above note 10 at 5.

ideal, and its rhetoric, is almost defiantly public. The aspiration is that recreational access in New Zealand should be available to all. Submissions to the Ministerial Reference Group demonstrate that this ideal remains powerful; McKenzie's rhetoric of opportunity and "the good life" continues to be used. Also, the patterns to which the Queen's Chain responds are very much those associated with the public commons at English common law. The sea, so important for transport, and subject to common rights of passage, later develops as a site of recreation. In the tradition of the fetes, fairs and village greens that Rose describes, the social value of the beach is maximised when many share it. If asked, "Who may access the resource governed by custom?" The answer for New Zealand beaches, whether a popular fiction or nostalgic ideal, is "everyone".¹²¹

What then are the implications of this customary pattern? Whilst custom was once the dominant means of governing people's relationships with resources, this is no longer the case. Custom is a residual category of legal obligation. The role it plays is greater in Britain, but in New Zealand common law custom (distinct from tikanga Māori, which is also sometimes described as customary law) is marginal. There are, I think, good reasons for this. Customary systems rely upon community knowledge of social norms. It may be difficult for newcomers to find out what the rules are; and still more difficult to oppose or change the rules. Statutes establish legitimacy through democratic elections and transparent law-making processes.

Nonetheless, custom sometimes captures the gap between what the letter of the law is, and what we think it is or would wish it to be. It contributes to an understanding of why some consider public recreational access a right, when it is

¹²¹ An alternative approach is to ask: "To whom do property rights in the resource attach?" For limited commons, the answer would be "the governing group". Turning to the right to beach access, I would answer "the New Zealand public". See Ciriacy-Wantrup and Bishop "Common Property" as a Concept in Natural Resource Policy" (1975) 15 Nat. Resources J. 713 cited in Ostrom, above note 106, at 48, n. 23.

not, strictly speaking. Arguably, it expresses the relationships between resources and people that are not codified, or may never be. One might therefore suggest that custom is spontaneous, creative and responsive and some of the literature in the field of law and economics values custom and social norms for this reason; as Ellickson writes, order without law (formally speaking) is not only possible, but a reality for some communities.

However, the common law doctrine of custom appeals not to innovation and the spontaneous emergence of norms, but to longevity of practice and reasonableness. Two things can be drawn from this focus. First, a simple point is that the sky has not fallen on the bridleways and rights of way of England: public and private rights in land can coexist over many generations. I will return to this in the final section. Second, patterns of custom provide insights about which resources are valuable and why.

To consider first the patterns of custom, that is, to which resources does custom attach? Here we return to my earlier note that the criterion of immemoriality - the idea of a practice continuing “time out of mind” - is not strictly applied. Something more than time is at work. My view is that “time immemorial” captures the pattern of relationships between resources and communities that custom values and protects. So, for example, cricket is a game of relatively recent origin but it has been protected by custom because custom has, as Rose argues, traditionally identified recreational activities which create and support opportunities for social interaction. The Queen’s Chain may not therefore provide a footway across the length of the country’s coastline but the tradition does give valuable information about the way in which the coastal resource is valued.

Custom not only reflects the social value of the resource, but it signals that, in order to protect this social value, private monopoly over the resource must be resisted. To illustrate, imagine the public has continuous access along a stretch

of coastline, whether by generous private landowners or by public land. A single landowner purchases property that had been used informally by members of the public as part of the coastal path. The new owner decides to exclude public access. If the property owner excludes, he or she “locks” the benefit that would arise from an unbroken coastal path.¹²² A similar example might be that of a rural landowner who owns property adjoining public waterfront land. A decision to exclude prevents the public from enjoying the adjacent beach. Similar problems arise in the contexts of roads, pipelines and so on where the decision of a single property owner may have far-reaching impact. Public commons, whether governed by custom or by modern legal mechanisms, therefore develop where the resource is prone to problems arising from too many property rights. By contrast, limited access or private property regimes assist where, as Hardin describes, too few property rights can be disastrous.

Arguably, then, custom develops to protect public interests where the use of the resource in common serves a special, valuable social goal and where individual property owners would otherwise have the ability to remove that benefit. These customary property rules (as others) are therefore replete with political, economic and social judgement about how resources should best be used. This becomes clear if one considers the lone “hold-out” property owner. He or she would not cause concern if a different judgement were made about the most appropriate use of the beach resource. If one took as a starting point the premise that the freedom of individual property owners to deal as they choose with their property should be maximised, one might well argue we should respect this individual’s own decision about how the land is best used. It is only by placing the property

¹²² See Michael A. Heller “The Boundaries of Private Property” 108 Yale LJ 1163 at 1209 for discussion of the case of *Nollan v Californian Coastal Commission* 483 US 825 (1987) in which Nollan was required to cede an easement to allow the public to pass along his private beach. The state was ordered to pay compensation for the exercise of its power of eminent domain, the easement therefore being conceptualized as a “legal thing” in itself. Heller describes the problem as one of fragmentation giving rise to a tragedy of the anticommons i.e. a tragedy of the anticommons occurs when property is fragmented and multiple owners cannot productively manage a resource because of, for example, bargaining failures.

owner's choice to exclude in the context of social norms about public recreational access that *one* understanding of the consequences of that action (that reflected in the ideal of the Queen's Chain) becomes clear.

IV PUBLIC ACCESS AND PRIVATE PROPERTY

It is these opposing discourses – the ideal of public recreational access and the protection of private property rights – that demonstrate the continuing significance of this debate. Questions about public access remain important because they reflect broader tensions in New Zealand's approach to the limits of private property. Property is socially constructed and constantly calibrated to accommodate different visions of how public and private interests should interact. What is sometimes missing from the public access debate in New Zealand is an acknowledgment that the balance between public and private is not fixed, but is constantly renegotiated. It may well be that further discussion of the concepts of property underlying the public access debate will not resolve the differences (it would be surprising if it did, given that the accommodation of public and private in property is an age-old chestnut) but teasing out the implications of different ideas of property is, in my view, intrinsically valuable.

Most people think about property as the object or thing owned. This is a natural response given that we are understandably concerned to hold on to material things we value. Law, on the other hand, thinks of property as a legal relationship between an owner or owners and the thing owned. Property is therefore not only the thing - your land, your car or your pen - but also the rules that govern your relationship with it. And, given that the rules governing relationships with our things are usually determined by government, the very idea of private property is something of a misnomer – government creates an environment or structure in which you may enter into property relationships in accordance with certain rules

and processes.¹²³ The relationship between you and your property is a relationship created and regulated by law.

In this context, the dichotomy between public and private in property becomes more difficult to sustain. One can readily conceive of property as existing, not in the corners of ‘public’ and ‘private’ like two boxers prepping for a fight, but, as described by Kevin Gray and Susan Francis Gray, with ideas of ‘public’ and ‘private’ operating “not dichotomously, but continuously across a spectrum in which adjacent connotations shade easily into one another”.¹²⁴ Public commons governed by custom are therefore but one example of a variety of different rules and mechanisms through which public interest and private property may be accommodated. Customary practices, the traditions of public recreational access in New Zealand arguably among them, demonstrate this flexible relationship between social goals and property.

This view can be tested against the original proposal that legislation be passed to create a footway of five metres along all waterways of significant access value - what did the landowner stand to lose by this measure? In many ways this example presents the very best argument available to an advocate of the protection of private property rights because the landowner would lose his or her ability to exclude the public from that area of the land subject to a five-metre footway. The right to exclude is considered by many to be at the very heart of private property rights.¹²⁵

¹²³ See Joseph William Singer and Jack M. Beerman “The Social Origins of Property” (1993) 6 Canadian J of L. and Juris. 217 at 218 for the view that “property rights exist in varied forms which are socially and politically constructed for human purposes”.

¹²⁴ Kevin Gray and Susan Francis Gray “Private Property and Public Propriety” in Janet McLean (ed.) *Property and the Constitution* (Hart Publishing, Oxford, 1999) at 11. For discussion of “Absolutism in Property” see Michael Taggart above note 41 at 143 and the Epilogue, on the relationship between private and public in property law.

¹²⁵ David L. Callies and J. David Breemer “The Right to Exclude Others From Private Property: A Fundamental Constitutional Right” 3 (2000) Wash. U. J.L. Policy 39.

Nonetheless, custom demonstrates rich traditions that preserve private property subject to public interests. “Time out of mind” private property has accommodated public access without losing its status as private property. Returning to the key point that the property relationship is socially constructed, custom reminds us that the hallmarks of private property – exclusion, monopoly - are not fixed or predetermined but contestable elements. Blackstone may have famously characterised property as “that sole and despotic dominion” exercised “in total exclusion of the right of any other individual in the universe”¹²⁶ but his writings recognised a host of other restrictions on sole dominion.¹²⁷ Carol Rose suggests it might therefore “be best to conclude that for Blackstone, the Exclusivity Axiom was in a sense a trope, a rhetorical figure describing an extreme or ideal type rather than reality”.¹²⁸ The relationship between the ability to exclude, or indeed any element of “privateness”, and private property therefore owes something to property myth, just as the Queen’s Chain does. In this sense, we can characterise public and private in the law of property as two archetypes, rather than faithful reflections of the prosaic (and messy) reality of property regulation.

It would be trite to argue that the boundaries of property are political not predetermined, were it not for arguments that appear to assume the contrary. The draft Regulatory Reform Bill recently proposed by a dedicated taskforce would provide that legislation should “not take or impair ... property without consent of the owner” unless necessary in the public interest and accompanied by “full compensation”.¹²⁹ Judges would be tasked with issuing a declaration of incompatibility if legislation failed to comply with this principle.¹³⁰

¹²⁶ William Blackstone *Commentaries on the Laws of England*, Vol. 2 (Clarendon Press, Oxford, 1766) at 2.

¹²⁷ See generally Carol Rose “Canons of Property Talk, or, Blackstone’s Anxiety” 108 Yale LJ 601 esp. at 603.

¹²⁸ *Ibid*, at 604.

¹²⁹ See clause 7(1)(c) of the draft Regulatory Responsibility Bill in *Report of the Regulatory Responsibility Taskforce* (September 2009) at 45-47. Also, the draft Bill’s predecessor:

There may well be a good case for New Zealand providing constitutional protection for individuals whose property is acquired compulsorily by the state: my point is only that thoughtful discussion of the concept of property animating that principle is desirable.¹³¹ Takings jurisprudence is notoriously challenging. The proper approach to identifying when an individual has been deprived of a property right so as to give rise to a right to compensation is much debated. A clause that provides that impairment of property gives rise to compensation begs the question of what is owned and what is lost. The Bill appears to suggest that one has a right to hold property free from regulation, such that any restriction must therefore remove something to which the individual was entitled. Absent from this perspective is an understanding of the role of regulation in creating and supporting the property relationship. As Singer and Beerman argue, current property distribution is itself a product of social action and government policy making.¹³²

To return to Blackstone, cited by the Regulatory Reform Taskforce in support of the draft Bill. In the part of the passage relied upon by the Taskforce, Blackstone

Regulatory Responsibility Bill 2006 (71-1), cl 6(e). The Report of the Taskforce states at 47 that “where the degree of impairment is sufficiently serious it will amount to a taking”, and refers to Australian jurisprudence. However, given the draft clause refers to “impair” and “impairment” without more, it would be open to a court to adopt a plain meaning approach and decline to “read in” the suggested gloss.

¹³⁰ See clause 12 of the draft Regulatory Responsibility Bill in *Report of the Regulatory Responsibility Taskforce* (September 2009) at 60-64. For a critique of the Bill and reply see Richard Ekins “Regulatory Responsibility?” [2010] NZLJ 25; Bryce Wilkinson and Graham Scott “Regulatory responsibility: a response” [2010] NZLJ 47; Richard Ekins “Reckless lawmaking” [2010] NZLJ 127; and Chye-Ching Huang “Regulatory responsibility and the law” [2010] NZLJ 91.

¹³¹ I do not mean to suggest that in appropriate cases private property owners should not be compensated for the property compulsorily acquired. But the draft clause may be interpreted as requiring compensation for any regulation that *impairs* property (whether or not the impairment is severe; is borne by a particular owner or group of owners but not by others; or is such that much of the value of the property is lost etc.). Under the Public Works Act 1981, land is defined to include any estate or interest in land. Therefore compulsory acquisition of an easement gives rise to an entitlement to be paid compensation under the Act: s 60.

¹³² Singer and Beerman above note 123. Arguments based on natural rights are particularly inapt where, as in the United States and New Zealand, the present system of property entitlement originates in colonial government policies, violent conquest and confiscation. On the unjust origins of property including conquest of Indian nations, and uncompensated labour of slaves and women see Joseph William Singer “Starting Property” [2002] 46 St. Louis ULJ 565.

states: “So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community”.¹³³ In a lesser-known passage, Blackstone discusses a range of cases in which entry onto another’s land will not be considered trespass. Among them, is “the hunting of ravenous beasts of prey, as badgers and foxes, in another man’s land because the destroying of such creatures is profitable to the public”. The exception is, however, a limited one and does not extend to digging the fox or badger “out of his earth”, this being unlawful.¹³⁴ Insight into modern problems of the accommodation of the public interest may arguably best be found not by reliance on Blackstonian absolutism, but by parsing the distinction between the hunting of a badger on another’s land, and digging out the same. It is, in my view, through these specific understandings that the relationship between public and private in property may best be analysed and compromises sensitive to context reached. In this respect, customary patterns of recreational access are an important resource when modern solutions to the problem of walking access are proposed.

It may be that custom is no longer the appropriate vehicle through which to provide recreational access, and given the evidence of the breakdown in customary practices this seems likely. Indeed, the status quo, or the point at which the story of walking access in New Zealand now stands, also supports an argument that property rules must be understood in the context of wider regulatory trends. Janet McLean argues that the trend in modern government is towards “persuasion, consultation and other informal methods of achieving their goals”; and that in this context, “the widespread use of powers of eminent domain to further majoritarian interests at the expense of a few or individual property–

¹³³ William Blackstone *Commentaries on the Laws of England*, Vol. 1 (Clarendon Press, Oxford, 1765) at 135 (the Taskforce cites pp 134-135).

¹³⁴ William Blackstone *Commentaries on the Laws of England*, Vol. 3 (Clarendon Press, Oxford, 1768) at 212-214.

holders seems unlikely”.¹³⁵ In this light, the abandonment of the proposal for an “across-the-board” footway of five metres, in favour of a quasi-independent body with power to conclude voluntary access arrangements and a significant coordination role might owe as much to modern approaches to government as to modern views on walking access. Provision for review of the operation and effectiveness of the Walking Access Act 2008 after a period of 10 years will provide an opportunity for assessment of the success of the Commission model.¹³⁶

The point I hope to make is that fixed notions of which rights private property must entail should not artificially constrain debates regarding the regulation of property. We might feel equivocal about whether public recreational access requires further protection – it does not follow that we should value the custom of the Queen’s Chain simply because it was once valued. My suggestion is more modest: customary practices help to test the more strident assertions of the absolute nature of private property rights. Historic accommodation of various different customary practices highlights the flexible relationship between social and political goals and property. The loss of some aspects or abilities that characterise private property, for example, the ability to exclude others, should not be used as a trump card in policy debates. There may be good reason to adjust the boundaries of private property based on the nature of the resource and on its perceived value. Decisions about the appropriate relationship between an individual and a resource are not limited by any boundary inherent in the idea of property itself, but are ultimately decisions about a community’s social, economic and political values.

¹³⁵ Janet McLean “Property as Power and Resistance” in Janet McLean (ed.) *Property and the Constitution* (Hart Publishing, Oxford, 1999) at 3.

¹³⁶ Section 80, Walking Access Act 2008.