

NEW ZEALAND BUSINESS ROUNDTABLE

Submission on the New Zealand Bill of Rights (Private
Property Rights) Amendment Bill

12 August 2005

1 Introduction

- 1.1 This submission on the New Zealand Bill of Rights (Private Property Rights) Amendment Bill ('Bill') is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the NZBR is to contribute to the development of sound public policies that reflect overall New Zealand interests.
- 1.2 The NZBR agrees with the statements in the introductory note to the Bill about the importance of security in private property rights and the need for compensation when rights in private property are taken. Many of our submissions on government regulations over the years have stressed the need for governments to take a more circumspect and principled approach to altering private property rights. The NZBR's proposal for a Regulatory Responsibility Act for New Zealand reflected this concern.¹ The principle of compensation for the taking of private property, broadly defined, was a key part of this proposal.

2 The key measures

- 2.1 Clause 4 of the Bill reads as follows:

Private Property Rights

11A Right to own property

Everyone has the right to own property, whether alone or in association with others.

11B Right not to be arbitrarily deprived of property

No person is to be deprived of the use or enjoyment of that person's property without just compensation.

There is no other substantive clause in the Bill.

3 Discussion of proposed section 11A

- 3.1 The right to own property obtained by legitimate means in New Zealand is not in dispute. To this extent 11A is a formality. We note that this does not remove all risks of misinterpretation. In particular, the right to own property should not be interpreted to mean that this is an entitlement (a so-called positive right). Those who do not

¹ See Bryce Wilkinson (2001) *Constraining Government Regulation*, New Zealand Business Roundtable, Wellington.

currently own property have not necessarily been deprived of a right or have a claim to it that others have a duty to fulfil.

4 Discussion of proposed section 11B

4.1 Section 11B protects a person's property rights by requiring that they are not taken arbitrarily and that just compensation should be paid when *use* or *enjoyment* rights are taken. We concur with this provision; in our view such protections are essential for a civil society, economic prosperity and a healthy democracy.

4.2 However, we consider that the section could be improved. In particular it should:

- (1) require just compensation to be paid whenever *any* rights in legitimately acquired property are taken by state acquisition;
- (2) explicitly impose a *due process* requirement – as in the Fifth and Fourteenth Amendments to the US Constitution. For example, the Fifth Amendment reads:

... nor shall any person ... be deprived of ... property, without due process of law.

- (3) require that private property should not be taken except for a very good (non-political) reason. One possible approach would be to limit takings to public use cases for which compensation would be due, as in the Fifth Amendment to the US Constitution:

... nor shall private property be taken for public use without just compensation; and

- (4) clearly protect private property, or private *interests* in property more generally, including customary rights and rights to property held in common ownership (as distinct from Crown ownership).

4.3 In respect of (1), our concern here is that the words "use or enjoyment" may be too limiting; for example they might allow restrictions on the right to transfer property to be imposed without

just compensation. Armen Alchian, an eminent property rights economist, defines property and private property as follows:²

A property right is the exclusive authority to determine how a resource is used, whether that resource is owned by government or by individuals.

Private property rights include two other attributes in addition to determining the use of a resource. One is the exclusive right to the services of the resource [eg the rent]. [The other] includes the right to delegate, rent, or sell any portion of the rights by exchange or gift at whatever price the owner determines (provided someone is willing to pay that price).

It is the right to transfer private interests in private property to another person that seems to be inadequately protected by the current version of section 11B. As drafted, it would appear, for example, to allow parliament to pass a law limiting the sale of private property only to the Crown, without having to pay compensation for the loss in value.

Note in this respect that past legislation has commonly used the broad concepts of "injurious affection" and "damage" to trigger the compensation requirement. Examples include the Public Works Act 1981, the Town and Country Planning Act 1977 and the Soil Conservation and Rivers Control Act 1941.³ Such concepts are much broader than the concepts of "use or enjoyment".

Currently the Legislation Advisory Committee guidelines simply state that property will not be expropriated without full compensation.

- 4.4 In respect of (2), we note that the Fourth Amendment to the US Constitution and section 21 of the New Zealand Bill of Rights Act 1990 prohibit "unreasonable searches and seizures of persons, houses, and effects", and that section 21 also addresses the issue of unreasonable seizures and searches. However, a broader 'due process' requirement would be desirable.
- 4.5 In respect of (3), we consider that it is also important that governments should not take private rights in property except for an

² 'Property Rights', Armen A Alchian, *The Concise Encyclopaedia of Economics*, at <http://www.econlib.org/library/Enc/PropertyRights.html>

³ *Constraining Government Regulation*, *op cit*, pp 158-159.

essential public use. Public use needs to be defined narrowly, limiting it to key government facilities, such as certain military facilities, infrastructure that is open to all (such as public roads), and certain cases of holdout.⁴ The original version of the Public Works Act 1981 restricted takings to "essential" works. Although this term is open to interpretation, it may be more precise than the contending concepts of "public work" or "public use". In any case we consider that section 11B should not leave the matter entirely open, as it does with the present drafting.

- 4.6 In respect of (4), we consider that governments should not be able to take individuals' customary rights, or rights in respect of land owned in common by a community, without proper process, good reason and just compensation. Our concern here is that the reference in section 11B to a "person's property" might be capable of being read so as to exclude these wider rights.

5 Ramifications

- 5.1 We have considered whether there were good reasons why the proposed clauses were not included in the New Zealand Bill of Rights Act 1990. The omission was deliberate since John Fogarty QC strongly advocated the inclusion of protection for property rights, as did other submissions to the select committee considering the Bill.⁵ The reasons for rejecting these arguments appear to have been primarily political.⁶ In our view they do not constitute a valid reason for seeking to restrain governments from taking private property rights for no good public purpose and without adequate compensation. Accordingly, we see no evidence of a sound reason for not including the proposed clauses.

⁴ For a succinct recent discussion of these cases, see University of Chicago professor Richard Epstein's discussion of the recent *Kelo v New London* decision by the US Supreme Court in 'Supreme Folly', *Wall Street Journal*, 27 June 2005. (A copy can be found at <http://www-rcf.usc.edu/~pgordon/blog/2005/06/urban-renewal.html>.)

⁵ Refer to the 11 May 2005 Hansard record of Gordon Copeland's comments on moving the first reading of the current Bill.

⁶ Dan Riddiford, *Takings: A Return to Principle*, LLM Research Paper (Laws 509), Victoria University of Wellington, 1999, p 35, refers to concerns about handing too much power to the judiciary and the difficulties of codifying common law rights. He cites Lord Cooke of Thorndon who attributes the omission to "a fear of generating disputes".

5.2 Including protection for property rights in the Bill of Rights Act could create tensions with other legislation (for example the Resource Management Act).⁷ This could create uncertainty for the community in general, and for the business community in particular, as to which provisions would apply. Section 4 of the Bill of Rights Act specifies that where a provision in this Act is inconsistent with other statutory provisions, the latter will prevail unless there are other reasons for determining otherwise. However, this formulation leaves open the question of what other reasons a court might determine are applicable. In our view, it would improve the quality of legislation, and of decision making in the community, if all major statutory arrangements in relation to the taking of property were made consistent with the provisions in this Bill (as amended).

6 Concluding comments

6.1 The NZBR strongly supports the objectives of the Bill. We do not see that the Bill is necessarily the best way of pursuing those objectives – a Regulatory Responsibility Act would be an alternative approach, for example. However, we have no hesitation in supporting the inclusion of provisions to better protect private property rights in the New Zealand Bill of Rights Act.

6.2 The NZBR supports the Bill as currently worded. However, we consider that it could be improved. In particular, we suggest that consideration should be given to:

- ensuring that the wording makes it clear that compensation is due in respect of *any* injurious affection to private property rights, including customary rights;
- specifying that takings must follow due process and be compensated; and
- limiting takings to essential works, or perhaps a narrowly defined public use.

⁷ For example, the heading to section 85 of the RMA states that compensation is not payable in respect of controls on land.

- reviewing other relevant legislation to ensure provisions relating to property rights are made consistent with the New Zealand Bill of Rights Act as amended by the Bill.