

Submission

By

Business|NZ

to the

Justice and Electoral Select Committee

on the

**New Zealand Bill of Rights (Private
Property Rights) Amendment Bill**

August 2005

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

**NEW ZEALAND BILL OF RIGHTS (PRIVATE PROPERTY RIGHTS)
AMENDMENT BILL
SUBMISSION BY BUSINESS NEW ZEALAND¹**

1.0 Introduction

- 1.1 Business New Zealand welcomes the opportunity to make a submission on the New Zealand Bill of Rights (Private Property Rights) Amendment Bill (“the Bill”).
- 1.2 Private property rights are a fundamental pillar of a market economy. Without reasonable security from confiscation by the state or others, the incentives on individuals and business to invest and build up assets are severely weakened. Business New Zealand therefore strongly supports the statements in the introductory note to the Bill in respect to the importance of security of private property rights and that compensation should be paid when rights are taken.
- 1.3 The power to take (even with appropriate compensation) should be used as a last resort, backed up with a high threshold test; that the taking is necessary for an essential public good. In the absence of a high threshold test and adequate compensation, the incentives on individuals and groups to lobby government to confiscate property rights will increase as those lobbying do not bear the costs of such outcomes but may often share in the benefits.
- 1.4 The inclusion of property rights within the Bill of Rights raises other issues which are discussed below.

2.0 RECOMMENDATIONS

Business New Zealand recommends that the Bill proceed.

3.0 General Discussion

- 3.1 Despite strong support for the objective of the Bill, Business New Zealand has a number of concerns with aspects of the Bill which are briefly discussed below. However, Business New Zealand wishes to first make some general points in respect to property rights.

¹ Background information on Business New Zealand is attached as Appendix 1.

- 3.2 *“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. [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).

Thus, the three basic elements of private property are (1) exclusivity of rights to the choice of use of a resource, (2) exclusivity of rights to the services of a resource, and (3) rights to exchange the resource at mutually agreeable terms”²

- 3.3 There is still much debate in respect to where the boundaries are in respect to property rights. At the one extreme, property rights can generally be considered reasonably clear in respect to, as an example, private title over land and buildings. At a second level property rights can also be assigned by government in respect to resources such as “fishing quota” where there is generally considered to be a reasonable degree of security over those rights or, if changes are made, current holders of quotas have reasonable certainty that they will be compensated for cut-backs in their allocated takes. At the other extreme, government, or their delegated authorities give “rights” to particular people to do certain things or use particular resources, sometimes with significant restrictions. For example, water permits are issued to users for periods of up to 35 years (maximum provided for under the Resource Management Act) but with the ability of the assigning authorities to modify/change those permits during their tenure if new information comes to hand. The point here is that some “property rights” are reasonably certain and enduring, others are far from certain.

- 3.4 Compensation for regulatory takings is a case in point. An excellent paper by Kevin Guerin from the Treasury³ discusses some of these boundary issues in more detail. For example in respect to general taxation:

“Some cases of government appropriation of private property are ordinarily not treated as requiring compensation. The single strongest example is general taxation. This is in theory a taking, as private property is compulsorily acquired. The empowerment of parliamentary representatives to levy such impositions for public benefit, and the fact that both the burden and the benefits are spread across all members of the public effectively providing in-kind compensation, mean however that it is generally accepted. In addition, to compensate other than in kind losses which arose through taxation would create an absurd circular effect and render government impossible.” (p.9)

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

³ Kevin Guerin, “Protection against Government Takings: Compensation for Regulation?”, New Zealand Treasury Working Paper 02/18 (September 2002)

3.5 Guerin goes on to state:

“Deregulation is not normally considered a taking, although regulation can be...” (p.9)

“There is, however, a wide range of government actions where a boundary line is much harder to draw (whether in theory here, or in legal terms by the courts)”. (p.9)

- 3.6 The point Business New Zealand wishes to stress is the problem of clearly defining what is and what is not a private property right (at the margins). This is particularly an issue in cases where property rights are not clearly outlined. Debates and cases before the Courts in respect to water use “rights” are good examples of these. Despite these difficulties, this should not stop New Zealanders supporting the general objective of this Bill. However, what it does show is the need for property rights to be more clearly defined over resources where there exists significant uncertainty to date – water permits being a particularly good current example where “rights” appear to have significantly different meaning to users and regulators and ultimately, the Courts. Clearly defined property rights are important for efficient resource utilisation.⁴
- 3.7 There have been a number of instances where legislation has been enacted since the Bill of Rights was introduced which impact on the ability of adversely affected parties to seek compensation for loss of property rights. For example, under Section 85 of the Resource Management Act compensation is not payable in respect of changes to controls on land use.
- 3.8 In this respect, if this Bill proceeds, it is hard to see how the Bill will override existing legislation such as the RMA which legitimises the taking of property rights without compensation. This raises the issue of whether all future legislation will have to be consistent with the Bill of Rights and, if so, what status will apply to existing legislation, which allows for the removal of property rights without compensation.
- 3.9 If the Bill proceeds then it might well be necessary to revisit existing legislation to ensure that provisions are not inconsistent with a general requirement for compensation when private property rights are taken away.

⁴ Bryce Wilkinson, a director of Capital Economics Ltd, has also written a very useful paper on this issue: “Compensation for Regulatory Takings: Issuers of Process, Equity and Efficiency”

4.0 Specific Comments on the Bill

Clause 4: 11A Right to own property

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

- 4.1 While the right to own property by legitimate means is fundamental, clause 11A could be interpreted as implying that everyone has a right to own property irrespective of how they acquired that property i.e. it does not differentiate between legal and illegal acquisition. The right to own property is not a welfare right in the sense that people are entitled to a property irrespective of their means of legally acquiring it. It may be beneficial that clause 4 (11A) be amended to take account of this point.

Clause 4 11B Right to 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

- 4.2 Nowhere in this clause is there any constraint on the ability of the Government (or other third parties) from acquiring a person's property provided adequate compensation is paid.
- 4.3 As stated earlier, takings (even where adequate compensation is made) should be restricted to essential works (or a similar definition) to avoid the ability of government to buy land or other property rights provided adequate compensation is made.
- 4.4 It is noted that the original version of the Public Works Act 1981 restricted taking to "essential works". This was subsequently repealed in 1987, principally on the grounds that it created a number of definitional difficulties. However, as Wilkinson states, *"....it is not obvious that the current criteria of 'fair, sound and reasonably necessary' are better. They certainly look more permissive."*⁵
- 4.5 While "essential works" and other definitions might well be open to various interpretations, it is important that significant constraints are placed on the ability of government to "deprive" a person of the use or enjoyment of a person's property even with adequate compensation.

⁵ ibid

- 4.6 Business New Zealand considers that there should be a restriction on the ability or scope for taking private property, even if adequate compensation is made. Clause 4 (11A) could be amended to include wording to the effect that only the taking of private property which is essential for the public good should be allowed for, and providing of course that adequate compensation is also paid.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 57-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

The health of the economy also determines the ability of a nation to deliver on the social and environmental outcomes desired by all. First class social services and a clean and healthy environment are possible only in prosperous, first world economies.