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THE REGIONAL COUNCIL

caring about you & your environment

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R. Following

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P 0 Box 11-646
Wellington

Submitter's name: MASTA MAINTENANCE SERVICES (NZ) LTD

Submitter's address: 5 CORNISH ST - PETONE.
PO BOX 38-900
WELLINGTON MAIL CENTRE.

Telephone: 04-5870253

The provisions of the proposed policy I wish to comment on are:

My submission is that:

SAME AS EXISTING POLICY.

Decision requested:

I wish to be heard in support of my submission: YES ☑ **NO** ☐ **(tickone)**

Signed: .....

Dated: 24/03/01.....

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File B/20/4/1
30 April 2001.

Submission on Proposed Resource Management Charging Policy

To; **Consents Management**
Wellington Regional Coucil
P 0 Box 11646
Wellington.

Submitter's name: **Murray Kennedy**
Strategy ad Assets Manager
Water Group
Wellington Regional Council

Submitter's Address: **Wellington Regional Coucil**
P 0 Box 11646
Wellington.

Telephone: **384 5708 ex 8504**

The -Provisions of the Proposed Policy I wish to Comment on are:

The calculation of State of the Environment Charges.

My Submission is that:

1. Waiwhetu Artesian Aquifer

In Table 3.3. of the Policy Document, the SOE Cost Factor is derived by dividing the cost due to consent holders of $45,116 by the amount of water extracted from the catchment. The latter figure as been taken as **1118 l/sec**, which is understood to be the consented daily average aquifer take. However, the Water Group of the WRC holds a consent to take up to **1331 L/sec**, and is currently being charged on that basis. That is, the method of calculating the SOE Charge does not appear to be consistent with the method of applying the charge.

2. Surface Water Abstraction

The calculation of the SOE Cost Factor for the Hutt, Wainuiomata ad Orongorongo catchrnents (among others) is set out in Table 2.3 of the Policy Document. In each case the factor has been derived by dividing the Cost Due To Consent Holders by the amount of water currently abstracted from the catchment.

The consents to take water from these catchments held by the Water Group of the WRC are existing use rights which expire on 1 October 2001. The Water Group currently has before the Environment Division consent applications for new consents to take water from these catchments and associated subcatchments. To provide flexibility in the management of the available resources and treatment plant, the new

consents have proposed maximum abstraction flows significantly greater than those which currently exist.

If the new SOE charges are fixed as proposed, then the outcome will be that the Environment Division will recoup significantly more than the amount it currently assesses as being due to consent holders. The table below sets out what the charges would be if paid at the currently proposed rates on the currently proposed maximum abstraction rates, and compares these with the Costs Due to Consent Holders as set out in Table 2.3 of the Policy Document.

Analysis of Proposed new Consent Charges					
	Quantity l/sec		**Proposed SOE Charge**		**SOE Cost Due to Consent Holders (Table 2.3)**
	Existing	**Proposed**	**Rate $**	**Amount $**	
Wainui River	316	700	9.02	6,314	
Lower George Creek	0	175	9.02	1,579	
Upper George Creek	0	120	9.02	1,082	
Total Wainui Catchment	**316**	**995**		**8,975**	**2,850**
Orongorongo River	263	700	8.10	5,670	
Big Huia Creek	0	232	8.10	1,879	
Little Huia Creek	0	50	8.10	405	
Telephone Creek	0	50	8.10	405	
Total Orongorongo Catchment	**263**	**1,032**		**8,359**	**2,130**
Hutt River	1,159	1,735	2.05	**3,557**	**2,405**
Totals				**20,891**	**7,385**

Decision Requested:

1. Waiwhetu Artesian Aquifer

That the method of calculating charges should be consistent with the method of applying the charges. **Either** the calculation of SOE Cost Factors should be based on consented instantaneous maximum flows, **or** the calculation of SOE charges to consent holders should be based on rolling average daily takes.

2. Surface Water Abstraction

That the calculation of should take account of major new resource consent applications already submitted, and in the final stages of processing. Alternatively that a mechanism should be incorporated in the scale of charges for making

3

adjustments to the SOE Cost Factors when significant changes occur to the amount of water consented to be taken.

I wish to be heard in support of my submission.

Signed _____

Murray Kennedy
Strategy and Assets Manager
Water Group
Wellington Regional Council

Date 1/5/2001

3

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: CITIZENS WATCH - MAX SHIERLAW C/-

Submitter's address: 4 CLEMATIS GROVE, MAUNGARAKI, LOWER HUTT.

Telephone: (04) 5778080

The provisions of the proposed policy I wish to comment on are:
THE INCREASED CHARGE OUT RATE AND INCREASED APPLICATION CHARGES.

My submission is that:
THE COUNCIL SHOULD NOT BE PASSING SUCH LARGE INCREASES ONTO THE COMMUNITY. THEY ARE ANTI-BUSINESS AND A DISINCENTIVE TO INVEST IN THE REGION. THE RESOURCE MANAGEMENT FUNCTIONS SHOULD BE CONTRACTED OUT IN ORDER TO INTRODUCE COMPETITION AND KEEP CHARGES AT AN ACCEPTABLE LEVEL.

Decision requested:
THAT THE CHARGE OUT RATES AND APPLICATION CHARGES BE MAINTAINED AT THEIR PRESENT LEVELS.

I wish to be heard in support of my submission: YES ☑ **NO** ☐ **(tick one)**

Signed: M Shierlaw

Dated: 7/APRIL/2001

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Farming House, 123 Queen St
P 0 Box 945, Palmerston North
New Zealand
Tel (06) 357 4026
Fax (06) 3579997
Freephone: 0800 FARMING
(0800 327 646)
Email:
centralregion@fedfarm.org.nz

FEDERATED
FARMERS
OF NEW ZEALAND (INC)

CENTRAL REGION

Incorporating the provinces of:
Ruapehu, Wanganui, Manawatu/Rangitikei, Tararua, Hawke's Bay, Nelson, Marlborough, West Coast, Wairarapa, Golden Bay

WELLINGTON REGIONAL COUNCIL

MANAGEMENT CHARGING POLICY (Proposed)

Federated Farmers thank the Wellington Regional Council for the opportunity to comment on the above policy.

We are astounded by some of the increases in fees charged that are proposed. There appears to be a 16-18 % increase in most categories with some fees doubling, some tripling and in one instance the fee for a certificate to say you don't need a resource consent actually increasing a whopping 430 % !

We obviously realise that the charges for all activities must be realistic so that the general ratepayer is not helping to pay the cost for people who are actually doing something that in most cases contributes to New Zealand's GDP but to ask them to pay a higher price than the cost of inflation is to our mind a gross imposition of the use of power that a non contestable structure has established.

Although we are allowed to make submission on the proposed new charges there is no way we can see if these charges are in fact comparable to what is being paid for similar work in the private sector. Somewhere there needs to be a contestable process brought in to compare charges allotted to activities in the local government sector and similar activities outside it.

We consider that it is complete nonsense for a Regional Council to be setting the price of inflation.

We commend the practice of some other Regional Councils who charge differing hourly rates for various categories of staff doing the task i.e. Canterbury $45-80 per hour, Taranaki $38 - 87 per hour, Otago $45 - 66 per hour. This is just a few examples of Councils that do not charge a flat rate.

We are pleased to see there have been some reductions in fees to be charged i.e. in the customer service charge, one off gravel extraction, small water takes and sorry no more. Our main concern is therefore the lack of contestability, the lack of knowing how long a consent is liable to take to process and therefore not able to accurately determine before hand the reporting an investigating time that is likely to be taken.

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We accept that if we use the environment then the cost of that use should be born by the user. We do question however if some of the charges imposed should more correctly go towards the "state of the environment" monitoring basket so that the knowledge gained from that monitoring is used by Council in its' overall regional monitoring function.

On page 24 the reduction in the customer service charge is explained and we are sure the 100 % of single resource consent holders will welcome this $10 annual reduction but for those beavers who are working away and require more consents for their activities it is an added cost that tends to penalise their initiative i.e. they have to pay $35 for each consent.

We agree with the extra penalty of $70 per hour of travel to those who are not complying with the terms of their resource consent as that is reasonable charge for an unreasonable action. We also heartily endorse the giving of advice on improvement that can be made so as to make the activity comply with the terms of the consent because after all if the consents officer cannot do that how on earth can anyone else who hasn't that expertise?

As mentioned earlier we do not consider that even in stressed catchments that the users should be charged for the full cost of monitoring because the monitoring must be done as a continuing basis whether there is abstraction taking place or not. Admittedly the extractors benefit more than the general population but the general population benefit also from the results of that monitoring as do the other users of that resource who don't pay a state environment monitoring charge for their use of the resource i.e. fish and game and adventure tourism.

Joe Taylor
Policy Advisor
Federated Farmers

06 372 3494.

18 April 2001

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P. Bullock

19 April 2001

Wellington Regional Council
P O Box 11646
Wellington

Fax: 04 385 6960

Dear Sir

Wellington Regional Council
Management Charging Policy (proposed)

Federated Farmers thanks the Wellington Regional Council for the opportunity to further comment on the above Policy.

Federated Farmers would like Council to understand and take seriously the effects that high rates of cost increases have on those business' that have no option but to accept international prices for the goods and services (tradable sector) that they produce.

To do this it will be necessary to study **two** graphs that show in as simple way as possible how inflationary pressures can over time have on the New Zealand currency value and. tradable sector profitability.

Graph 1: Nominal TWI and Relative Consumer Prices (inflation differential)
Shows two indices over the TWI measures the value of the **NZ** Dollar against that of our main trading partners. The other compares the New Zealand inflation rate against that of our main **trading** partners. This indice trends down when New Zealand inflation exceeds that of our main trading partners. You will note that they have tended to follow one another over time and a range of different monetary policies.

Graph 2: Tradables and Non-Tradables Inflation
Show an inflation differential between the tradable and non-tradable sectors of the economy. Because these two sectors are approximately the same Size the actual CPI is about half way between. As the two outside indices approximate the outputs of their respective sectors and the other at least some of the imputes, it is obvious the non-tradable sector is becoming more profitable at the expense of the tradable.

The question Councillors should ask themselves is "What effect is this **having** on the New Zealand economy right now, as local body charges are a significant part **of** the non-tradable figures ?" Federated Farmers believes the issue of rapid price increases on resource users, as is being proposed in the Wellington Regional Council review of its charging policy is symptomatic of inflationary pressures that is adversely effecting the economic well-being of the ordinary New Zealander. It is therefore incumbent on Council to be aware of the impact their decisions will have on us all.

Joe Taylor
Policy Advisor

John Carrard

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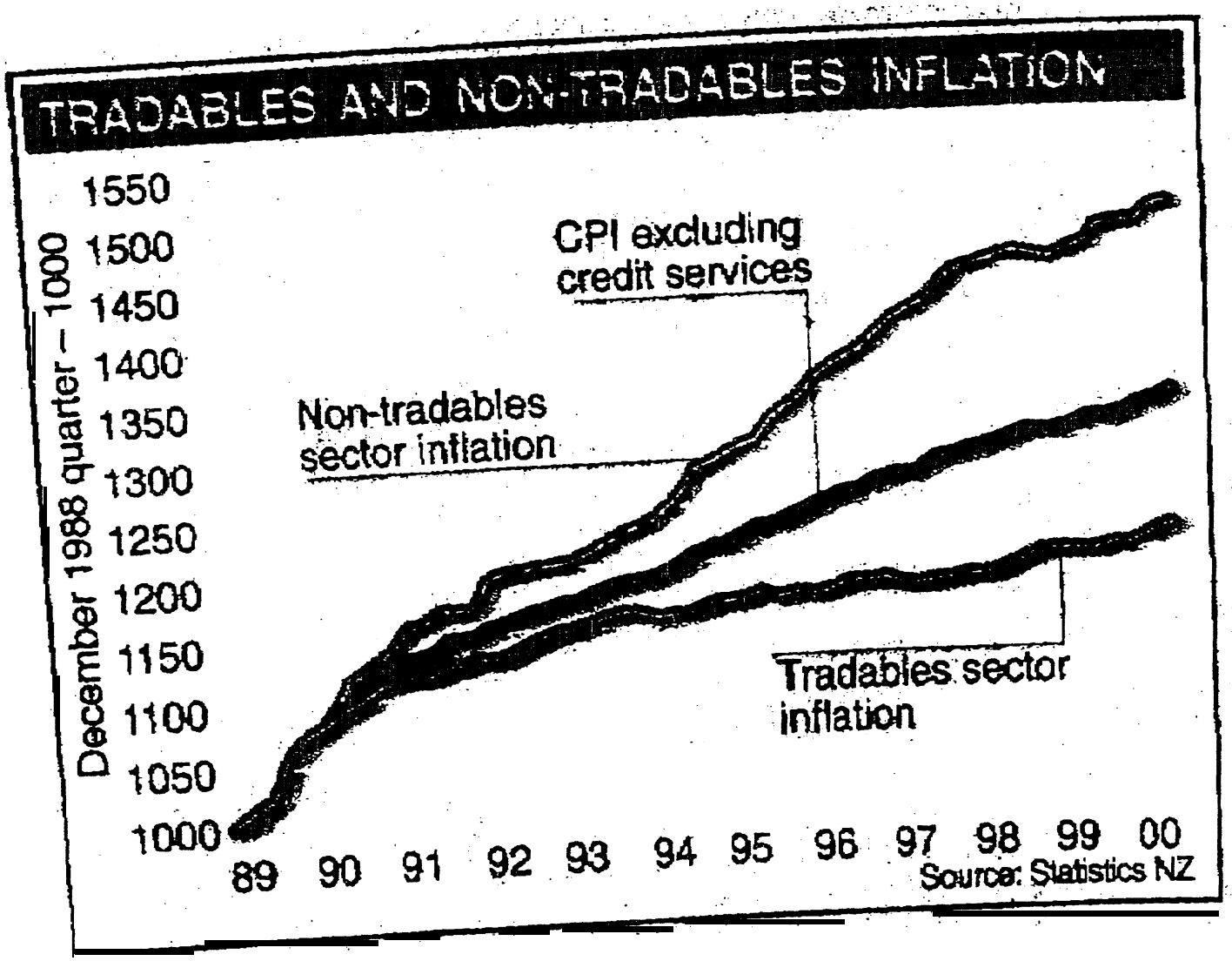
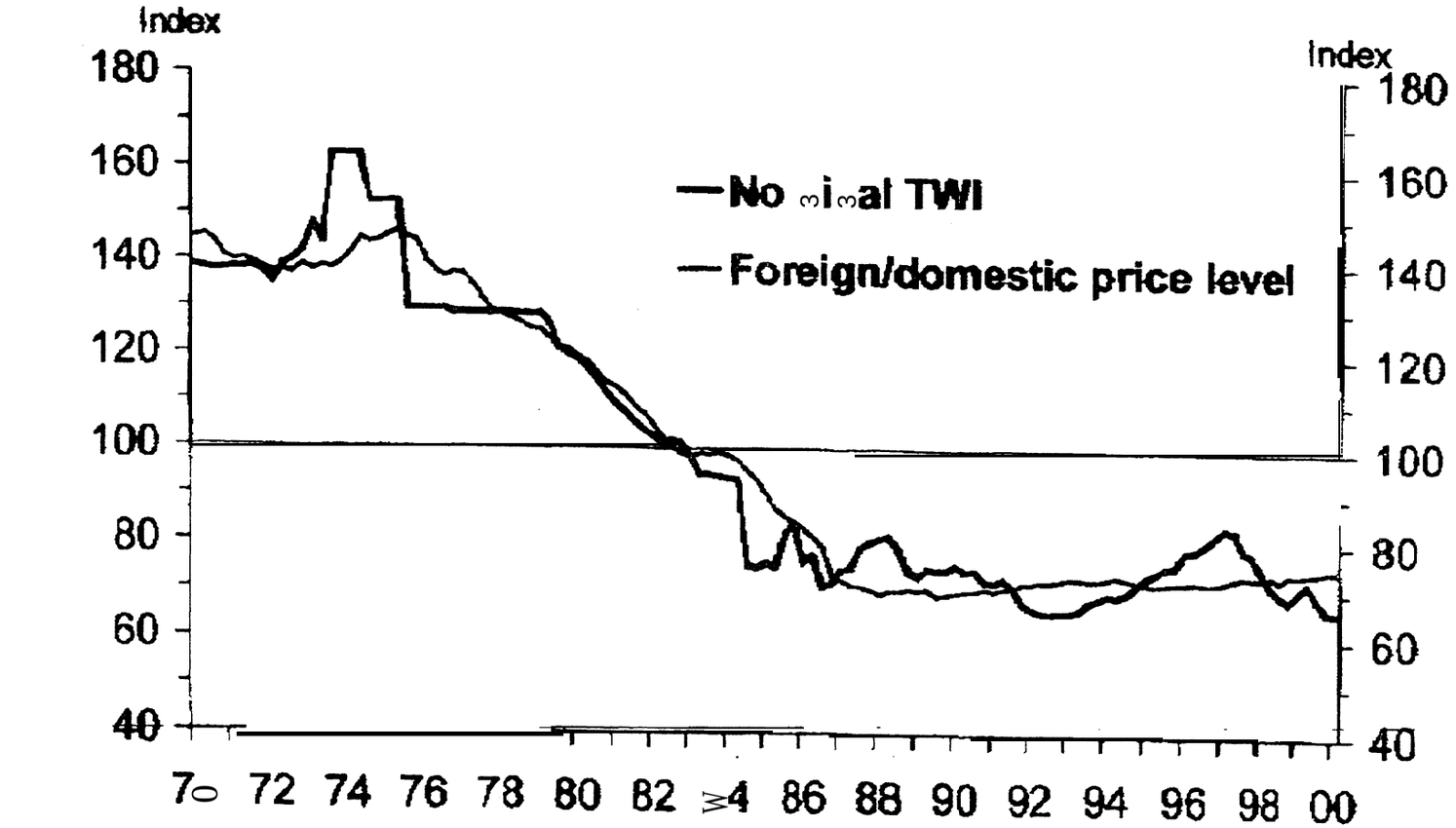


Nominal TWI and Relative Consumer Prices
(1970 - March 2000 average equals 100)



Reserve Bank of New Zealand

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CPI - Non tradeable excluding interest		
1990		
	Q1	7.4
	Q2	9.0
	Q3	6.8
	Q4	6.3
1991		
	Q1	6.5
	Q2	4.5
	Q3	3.9
	Q4	3.1
1992		
	Q1	3.5
	Q2	3.2
	Q3	2.7
	Q4	2.8
1993		
	Q1	1.0
	Q2	1.3
	Q3	1.9
	Q4	2.2
1994		
	Q1	2.8
	Q2	3.3
	Q3	4.4
	Q4	4.6
1995		
	Q1	4.8
	Q2	4.2
	Q3	3.8
	Q4	3.8
1996		
	Q1	4.4
	Q2	4.9
	Q3	4.1
	Q4	4.4
1997		
	Q1	3.7
	Q2	3.4
	Q3	3.8
	Q4	3.7
1998		
	Q1	3.2
	Q2	2.7
	Q3	1.8
	Q4	0.6
1999		
	Q1	0.4
	Q2	1.0
	Q3	1.6
	Q4	2.1
2000		
	Q1	2.6
	Q2	2.1

148.3

CPI - Tradeable Prices		
1990		
	Q1	7.4
	Q2	7.1
	Q3	3.8
	Q4	3.8
1991		
	Q1	3.4
	Q2	2.0
	Q3	2.2
	Q4	1.2
1992		
	Q1	1.0
	Q2	1.6
	Q3	1.6
	Q4	1.9
1993		
	Q1	2.1
	Q2	2.1
	Q3	1.6
	Q4	1.2
1994		
	Q1	0.6
	Q2	0.3
	Q3	0.1
	Q4	0.6
1995		
	Q1	1.0
	Q2	1.6
	Q3	0.8
	Q4	0.6
1996		
	Q1	0.4
	Q2	0.3
	Q3	0.9
	Q4	0.8
1997		
	Q1	0.5
	Q2	-0.1
	Q3	0.0
	Q4	-0.1
1998		
	Q1	0.4
	Q2	0.8
	Q3	1.5
	Q4	1.3
1999		
	Q1	1.6
	Q2	1.3
	Q3	0.4
	Q4	0.5
2000		
	Q1	0.9
	Q2	2.0

11.2

73.2

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Te Awaiti Station
50 Garden Road
Northland
Wellington
Tel & Fax 644 475 9687

The Chairman,
WRC,
Box 11 646,
Wellington.

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WRC PROPOSKD RESOURCE MANAGEMENT CHARGING POLICY

Dear Sir,

The fundamental decisions have already been made in the Funding Policy, where they attract less scrutiny from resource users :

1 Consents processing is to be funded by 90% user pays and by 10% general rates.

2 Environmental monitoring is to be funded by 50% user pays and 50% general rates,

Equally the cast of resource consents will be dictated by the Policies of the WRC dictating the numberof applications and level of processing required for resource consents.

Accordingly I would ask that the principles in this Submission be considered when setting the next Funding Policy and in the general business of the Council,

THE PHILOSOPHY OF THE COUNCIL 1.2

The Council manages the community's resources. No individual owns our rivers, aquifers, air, and coastal waters.... the regional community

This generalisation is untrue for many remote Farmers and Landowners. Ownership includes the right to exclude others (including the public). If the public is excluded they cannot be adversely effected, The jurisdiction of Councils under the RMA is limited to effects (eg ss2, 5, 30 and 63). Note that S36(a)(b)(c)(d) RMA restricts the ability of a Council to charge to the "carrying out of its functions"

Reverse sensitivity is the concept that the public will be more effected and have a greater capacity to object if they are entitled to live or visit in the vicinity of an activity. A pig farm 5km from neighbours will have no adverse effects on them. A remote coastal permit benefitting from oceanic dispersion on an open coast will have no effects on neighbours.

The principle is well established in many decisions from the Environment Court. Examples are :

M'Queen v Waikato DC A054/1994
WIAL v WCC W102/1997
Millark Properties & Lewis v Perpetual Trust; Mainzeal Property and Construction; Auckland CC A 30/98
Boon DR v Marlborough DC W032/1998
Boswell KF V Gisborne DC A023/1998

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The principle is already recognised in the 1997 Charging Policy in the lower charges for unstressed water catchmenta. The philosophy of the Act dictates that it must be extended. 2

.....

The Act has brought many changes to the philosophy and practice of resource management. One of these is an emphasis on the beneficiary pays principle; those who benefit from the use of natural and physical resources are now expected to pay the full costs of that use.

Even if they already own them ? The reference to the user pays principle is deliberately selective.

To be consistent the charges should be subjected to a full cost benefit analysis in terms of s32 RMA.

The philosophy of user pays is a product of public choice theory, the application of economic principles to legal situations. It is based on the writings of John Locke, philosopher to the Bill of Rights 1689. It is an economic and logical nonsense for property rights not to be recognised.

Cast benefit anaysis require costs to landowners to be considered as well as benefits (as has been factored into the Biosecurity Act). The philosophy of John Locke and public choice theory require those costs to be compensated!

The question ta be asked of the Charging Policy and the Funding Policy underpinning it is :
Who benefits and who pays ? That requires compensation.

THE PHILOSOPHY OF FARMERS AND RATEPAYERS : PRIVATE PROPERTY LLM PAPER "TAKINGS : A RETURN TO PRINCIPLE"

I have emailed a copy of the paper to Ms Bullock. I would ask that it be treated as part of this submission.

The paper concludes that: :

1 At common law full compensation was always paid for all takings, including regulatory takings. In La Compagnie Sucriere [1995] discussed at page 28 of my paper, the Privy Council declared that compensation should be ordered if "the regulation went too far".

2 New Zealand has a written constitution grounded in property rights and the [full] philosophy of John Locke.

I ask that the established principle of respect for property rights should be written into the Introduction and reaffirmed throughout the Charging Policy reducing charges where there are no effects on others of proscribed activities.

Magna Carta 1297 (Imperial Laws Application Act) :
No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs...We will sell to no man, we will not deny or defer to any man either Justice or Right.

FEE INCREASES AHEAD OF THE RATE OF INFLATION WITH NO ALLOWANCE FOR EFFICIENCY

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The proposed increase in the hourly rate from $60 plus GST to **$70** plus GST is well ahead of inflation for the period. The Policy does not provide any explanation for the huge increase.

AN EXAMPLE : OWAHANGA STATION A MAORI INCORPORATION

Owahanga Station were informed last year that they had to **pay** $10,125 (3 notified coastal permits) up front (and additional-fees to follow) before their aquaculture application then lodged could be "officially received" and processed. Aquaculture on 18km of blue water titlehas been frustrated.

AN EXAMPLE : TE AWAITI STATION

The Station is charged $196.88 each year for the Aquaculture Pond **despite the** requirement for coastal permits to discharge water complying with the quality standards of the Third Schedule being removed from the WRC Coastal Plan. The Station this year (ending 31 3 2001) will pay $6089 pa in rates to the WRC, but has received no direct benefits (other than maps) from the Regional Councilfor over 15 years.

The Resource Monitoring Section of the WRC Wairarapa Division established a Flood monitoring station on 600m2 of Ruamahanga Farm (farmed by Te Awaiti Station) and other equipment: without prior permission. They have trespassed!

I would be grateful for the Committee's help :

1 to fairly resolve the Ruamahanga issues on the basis of the principle of "equality before the law" applying all the principles of the Charging Policy.

2 abolish annual charges charges for the Aquaculture Pond for the future and waive them *for* the past.

I wish to appear in support of this submission.

DTS Riddiford *20* 4 01

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MASTERTON DISTRICT COUN

SERVING THE COMMUNITY

MASTERTON
DX PA 89022
Tel: (06) 378-9666
Fax: (06) 378-8400

SUBMISSION ON THE PR-OPOSED RESOURCE MANAGEMENT CHARGING POLICY : FEBRUARY 2001

The Wellington Regional Council recently invited submissions on its Proposed Resource Management Charging Policy : February 2001. The document describes the charges the Council requires for a range of resource management services.

The Proposed Charging Policy has been developed in accordance with the obligations of Section 36 of the Resource Management Act 1991 and the Local Government Amendment Act (No. 3) 1996.

The Master-ton District Council is concerned to ensure that the impact of the proposed charging regime on itself is equitable, at the same time as ensuring that the interests of the wider community are adequately protected. Given which the Council raises the following issue as the basis for the Regional Council to reconsider a significant aspect of the Proposed Charging Policy:

Within Section 1: Introduction and Section 2: Principles the Proposed Charging Policy draws reference to the obligations of both the RMA and the LGA (No. 3) as the basis on which the charges have been developed. The RMA has the effect of defining the philosophy by which charges must be developed, whereas the LGA (No. 3) requires an explicit analysis and definition of the funding mechanism that shall actually be applied to the charging regime.

The Proposed Charging Policy is however "silent" on the explicit analysis undertaken by the Wellington Regional Council to derive the Funding Policy which shall apply to Consents Management and Monitoring the State of the Environment. The lack of detail in so far as information derived from the Wellington Regional Council Funding Policy (adopted 15 June 2000) leaves any consumer of the service covered by the Proposed Charging Policy in unnecessary and unreasonable doubt as to the framework within which the specific charges have been set.

> *This concern would be met if Sections I and 2 were edited to include the specific detail of the Wellington Regional Council Funding Policy as adopted in June 2000, and also defining the specific charges which the particular policy provisions apply to.*
>
> *The District Council also requests justzjkation as to how the ultimate 100% levels of charging have been set and more specifically what provisions have been made for confirming the reasonableness of such charging.*

The Master-ton District Council does wish to be heard in support of its submission, and would appreciate the opportunity for further informal dialogue at officer level on this matter.

Wes ten Hove
CHIEF EXECUTIVE OFFICER
April 2001

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WAIRARAPA
right on balance

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Te Whata o Papauma

Aohanga Incorporation

Corporate Pastoral Farmers •

Registered Office • 12 Ward Street
Dannevirke
Telephone (06) 374-7059
Fax (06) 374-7057

Mr R. Furlong
Manager Resource Management
Wellington Regional Council

21st April 2001

SUBMISSION TO **THE**
PROPOSED RESOURCE MANAGEMENT CHARGING POLICY

My name is George Ngatiamu Matthews
I am the Secretary of Owahanga Incorporation. (Aohanga)

Aohanga Station is a Maori Incorporation on the North Wairarapa Coast, East of Pongaroa. It represents the land interests of 1070 Maori shareholders and at 16,008 acres in size is the unsold Reserve Land of the 180,000 acre Castle point Block, sold to the Crown in 1858.
Since the time of Kupe (950AD) the owners have enjoyed the undisturbed use and occupation of the Coastline, its Fisheries and outlying Reefs.
The Bluewater title of the Owners has never been acquired or confiscated by the Crown.
The owners object to the actions and Philosophies of the Wellington Regional council in ignoring their rote as Tangata Whenua under the Treaty of Waitangi and the RMA. and contemptuously usurping their Kaitiaki role.
The Councils Role is to facilitate Resource use not to hinder or usurp roles.
We objet to the present charging levels and urge Council to reduce them in order that we as property owner-8 are able to effectively utilise our own resources in 8 way that benefits ourselves and in turn the Community in which we live.
I wish to appear in support of this Submission, if possible

George Matthews
Secretary Aohanga Incorporation

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THE REGIONAL COUNCIL

caring about you & your environment

Submission 'on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

06 378 2146

Submitter's Name: J+P Hedley

Submitter's Address: Pihautea
RD1 Featherston 5952

Telephone:
06 3088449 Ph/Fax

The provisions of the proposed policy I wish to comment on are:

My Submission is that:
There is no justification for any of the increased charges - for example Discharge to land. Council should look at ways of reducing these costs which may mean contracting some or all of the work out.
Some of the large increases in the State of the Environment charges look more like the Council's attempt of stopping these activities in certain locations

Decision Requested:
That charges be reduced.

I wish to be heard in support of my submission: YES ☑ NO ☐ (tick one)

Signed: P Hedley

Date: 20/4/01

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THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

Submitter's Name: JAMES A BICKNELL

Submitter's Address: Box 67 GREYTOWN

Telephone: 06 3049 436 025 445 701

The provisions of the proposed policy I wish to comment on are:

THE INCREASE IN SOE CHARGES WHICH IN MY CASE WILL RISE FROM $617 TO $2229

My Submission is that:

SUCH CHARGES ARE EXCESSIVE PARTICULARLY IN VIEW THAT MY FARM IS IN A FLOODWAY AND HAS BEEN SUBJECT TO EXTENSIVE DAMAGE OVER THE LAST 10 YEARS.

Decision Requested:

I wish to be heard in support of my submission: **YES** ☑ **NO** ☐ **(tick one)**

Signed: J A Bicknell

Date: 19th April 2001

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THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

Submitter's Name: A.J. BARTON

Submitter's Address: ONGAHA RD1 FEATHERSTON

Telephone:

The provisions of the proposed policy I wish to comment on are:

INCREASED RESOURCE CONSENT AND S.O.E. CHARGES.

My Submission is that:

SOME CHARGE INCREASES ARE EXORBITANT AND CANNOT BE JUSTIFIED.

Decision Requested: CHARGES TO BE HELD OR REDUCED. COUNCIL SEEK WAYS TO CUT COSTS AND BECOME MORE EFFICIENT.

I wish to be heard in support of my submission: **YES** ☑ **NO** ☐ **(tick one)**

Signed: A.J. Barton

Date: 21/03/01

11

R. Forlong

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: WHITBY COASTAL ESTATES LTD

Submitter's address: c/o T.C.B., Box 13 142, Johnsonville.

Telephone: 04 234 7440

The provisions of the proposed policy I wish to comment on are:
Charge Out Rate.
All Charge out rates.

My submission is that:
No reason has been given for the need to increase charges. The principle should be "How can we reduce compliance costs, give better value for money than we do now" rather than unexplained, ~~and~~ expensive or forever increasing government costs.

Decision requested:
Charges not increased, preferably reduced.

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: ..... DAVID BRADFORD

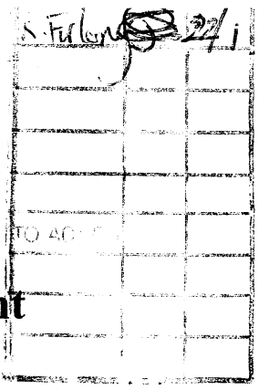
Dated: 23/3/01

05030

12

THE REGIONAL COUNCIL

caring about you & your environment



Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: EDWARD COBB.

Submitter's address: 365 GORGE ROAD
R. D.
OTAKI

Telephone:

The provisions of the proposed policy I wish to comment on are:

CHARGE OUT RATE.

My submission is that: THE PROPOSED INCREASE IN THE CHARGE OUT RATE. IS DAYLIGHT ROBBERY. MANY PEOPLE CAN NOT PASS THESE COSTS ON. AS AN OWNER OPERATOR. IN THE FARMING INDUSTRY I WOULD LOVE TO CHARGE OUT MY TIME AT EVEN HALF YOUR PROPOSED RATE.

Decision requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: .....

Dated: 16-3-01

64924

13

THE REGIONAL COUNCIL

caring about you & your environment

K 41314

RForlong 23/3

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: BRITANNIA SEA SCOUT GROUP

Submitter's address: C/O J. ROGER, KERSWILL
30 ARIKI RD
HATAITAI
WELLINGTON

Telephone: 04 - 386-2417

The provisions of the proposed policy I wish to comment on are:

My submission is that:

Resource Consent fees be greatly reduced to a token fee for orginisations like Sea Scout groups as we are trying to help the community.

Decision requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: J K Kennell

Dated: 20-3-01

649.59

14

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: MR F.A. FALCONER

Submitter's address: 12 Nikau Grove Lower Hutt.

Telephone: 5694035

The provisions of the proposed policy I wish to comment on are:

Swing Moorings.

My submission is that: Could you please explain how you justify the charge of $140-00 to Send one Invoice per year.!

Decision requested: Please Justify.

I wish to be heard in support of my submission: YES ☐ **NO** ☑ **(tick one)**

Signed: F.A. Falconer

Dated: 20/3/2001

64954

15

THE REGIONAL COUNCIL

caring about you &your environment

R. Forlong 23/3
P. Bullock

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: GERARD McLAUGHLAN.

Submitter's address: 519 MANGHONE SOUTH ROAD
NAIKANAE

Telephone: 04-293-4572

The provisions of the proposed policy I wish to comment on are: THERE SHOULD BE ONE CHARGE WHEN APPLYING FOR CONSENT, AND NOT BEING CHARGED EVERY TIME AN OFFICER ARRIVES ON SITE OR PROPERTY.

My submission is that:

Decision requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: .....

Dated: 20/3/01

64953

16

R. Farlong

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: J. LIDDELL

Submitter's address: Box 57057 MANA

Telephone: 04 233 4881

The provisions of the proposed policy I wish to comment on are:

Increase in hourly rate

My submission is that: on the basis of the current charge rate being correct when instigated then the inflation rate cannot sustain an increase of 16.66% when the true rate is only 30% of this proposed increase

Decision requested: That the rate be increased by the true rate of inflation, or the current accepted cost of living increase over this period, whichever is the lesser.

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: .....

Dated: 20/3/01.

6477)

17

MONROE SPRINGS
Hutt Park Road, P.O.Box 36038, Lower Hutt, New Zealand
Telephone: (64 4) 568 4039. Facsimile:(64 4) 568 7553 E-mail:
Manufacturers and exporters of leaf and coil springs for motor vehicles

TENNECO
Automotive

fax

To: Consents Management
Company: Wellington Regional Council
Fax Number: 385 6960
Date: 10 April, 2001
From: David Ronald
Number of Pages including this Cover Page: 2

RE: **CONSENT** CHARGING POLICY SUBMISSION

With the inclusion of the Environmental Charge for air, and depending on the interpretation for SOE category table 6.2, means the annul fee has raised from between 3 to 6.5 fold this I don't feel is justified considering the following:

- The amount of air pollutants from this plant is a quarter that of 97.
- With the down turn of local business and some local plants closing the amount of pollutant being pumped into the air has significantly reduced.
- There is NOT a smog problem developing in the Hutt Valley, if this was Christchurch then this change might be fair.

Regards, D Ronald

MONROE

65803

2/

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy .

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: Monroe Springs

Submitter's address: Hutt Park Rd
Seaview

Telephone: 568 4039 F# 5687553

The provisions of the proposed policy I wish to comment on are:

Environmental Charge for air

My submission is that;

Refer to fax

Decision requested:

Reduction in proposed fee increase

I wish to be heard in support of my submission: YES NO ☑ **(tick one)**

Signed: David Ronald

Dated: 10/4/01

18

K.Torlong

Westpac Chq for $50.61 from L.J. Holmes Sent to accounts
Sent.
10399

THE REGIONAL COUNCIL

caring *about you & your environment*

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: Larry Holmes

Submitter's address: 223 [illegible] Rd.

Telephone: 025 303 496

The provisions of the proposed policy I wish to comment on are:

I believe proposed council charges are sound and reasonable in most instances. Individuals / Companies make profit and must pay their dues for services

My submission is that: provided by council.

However recreational users pay mooring charges (Browns Bay - but me myself pay [illegible] rates x3). My boat floats in Browns Bay "just yes" but provides visual pleasure for many I'm sure. We can only allow a little for [illegible] stuff these days.

Decision requested:

Kind Regards
Larry Holmes

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: Larry Holmes

Dated: 9/4/01

65948

19

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: **Consents Management**
Wellington Regional Council
P O Box 11-646
Wellington

Submitter's name: Mark Ambrose.

Submitter's address:

Telephone:

The provisions of the proposed policy I wish to comment on are:

My submission is that:

NOT TO increase consent charges for notified coastal activity to keep it at $3000 for 2001.
to keep coastal permit charges at 1997 levels -
TO slightly increase code of Contract of compliance but not to increase them by 366%?!!
hourly rate to be kept at $60. Not $70.

Decision requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: .....

Dated: 10.4.01

17040

20

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P 0 Box 41
Masterton

Submitter's Name: BRUCE PATRICK.

Submitter's Address: R.D4 BUCHANANS Rd MASTERTON.

Telephone: 063727890.

The provisions of the proposed policy I wish to comment on are:
CHARGE OUT RATE Customer Service Charge.
Compliance Monitoring Charge.

My Submission is that:
CHARGE OUT RATE: Nothing to benchmark against. RATE to high. No competition. Taking into account proposed 4% rate increase a 17% increase in charge out rate I consider outrageous.

Customer Service charge This charge I think should be standard fee no matter how many consents are held as it is a Computer service fee.

Compliance Monitoring charge This ~~charge~~ service should be able to be carried out by suitable qualified independant people therefore providing competition.

Decision Requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ **(tick one)**

Signed: B Patrick

Date: 10/4/01

21

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

Submitter's Name: K H & A J Sage

Submitter's Address: 179 Park Rd CTN

Telephone: 06 3797475

The provisions of the proposed policy I wish to comment on are:

My Submission is that: I can hire a Digger & Driver for $60 per hour so how can it Be Justified a person with no machine cost is worth $75 + GST if needed to be audited for Lack of Efficiency. as do half of the changes Listed as most of them are just white collar £6rimes I feel the Public Relationship of Reg Council is far Bdow that of the I.R.D. & that is not very good

Decision Requested:

I wish to be heard in support of my submission: YES ☐ NO ☑ **(tick one)**

Signed: K H Sage

Date: 2/4/01

22

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

Submitter's Name: Elaine Gooding

Submitter's Address: Western Lake Road
Featherston

Telephone: 06 3089090

The provisions of the proposed policy I wish to comment on are: Proposed charges to charge out.

My Submission is that: Resource Management is becoming such a burden to farmers that by increasing costs you are adding to the burden of obtaining consents and with encouraging a don't want to know attitude in farmers we are the first to realise we need to look after our enviroment & rescources. Otherwise we will not have them. With regulations and costs you are making it ~~so~~ often impossible for us as farmers to comply through correct procedures

Decision Requested:

I wish to be heard in support of my submission: **YES** ☐ **NO** ☑ **(tick one)**

Signed: E Gooding

Date: 26.03.01

23

THE REGIONAL COUNCIL

caring about you & your environment

Submission on Proposed Resource Management Charging Policy

To: Consents & Compliance Section
Wellington Regional Council
P O Box 41
Masterton

Submitter's Name: M. F. WALL

Submitter's Address: PAPAKOWHAI FARM
RD 1
FEATHERSTON.

Telephone: 06 30 88 486

The provisions of the proposed policy I wish to comment on are:

State of the environment, charges
To take surface water

My Submission is that:

Charges to take surface water in the catchment of the Otakura river should not be raised for the section of the Otakura between Lake Wairarapa and the confluence of Dock Creek.

This section of the Otakura river is not stressed by low summer water flows as Dock creek has very reliable summer water flows.

As this section of the Otakura river is not stressed by low summer flows, it does not require monitoring therefore charges should not be raised

Decision Requested: That charges to take surface water from the Otakura river between Lake Wairarapa and Dock Creek not be raised.

I wish to be heard in support of my submission: YES ☐ NO ☑ (tick one)

Signed: M. Wall

Date: 27/3/01

DAN RIDDIFORD (DTS)

TAKINGS: A RETURN TO PRINCIPLE

LLM RESEARCH PAPER (LAWS 509)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1999

DTS Riddiford
50 Garden Road,
Northland
Wellington
Ph/Fax 04 475 9687
Email:
dan.riddiford@paradise.net.nz

Table of Contents

TAKINGS:' A RETURN TO PRINCIPLE?

Private property and public law: when the state takes, who benefits and who pays?

I INTRODUCTION

Examples of uncompensated takings

The Government proposed in 1997 under the Maori Reserved Land Act to alter the property rights of statutory lessees by changing the review terms and removing the right of perpetual renewal. Farmers claimed a capital loss of $59m. There was fierce political opposition. A by election was pending. Eventually $67m in compensation was paid.

The Government under the Fisheries Act proposes that fishers should exchange the property right under fishing permit to catch 100% of Schedule 4 fish for quota to only 80% of the Schedule 4 fish on the argument that the quota property right is superior to a fishing permit. The Primary Production Select Committee has deferred a decision until after the election.

The Government and agencies often exceed statutory time limits for processing of applications under the Resource Management Act and other legislation.[2] These are uncompensated takings of the citizen's time and opportunities.

The Government in 1993 under the Customs Regulations removed the rights of Landowners to export native timber. Although no right to compensation was conceded, some ex gratia "adjustment assistance" has now been paid.

The Historic Places Trust in 1994 first asked the South Wairarapa District Council for a plan change to make discretionary all land use within 200m of "suspected" historic Maori sites/waahi tapu. Valuable opportunities to diversify into aquaculture or rural residential subdivision will be taken from the Farmer. No compensation is proposed.

The 1999 proposed plan for the Banks Peninsular 2 District declares over 90% of some farms to be "Significant Natural Areas" (SNAs) in which all activities including vegetation removal are discretionary. No compensation is proposed.

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[1] "Takings" is a term from United States jurisprudence originating in Magna Carta to describe all State interference with private property. In England and New Zealand the term "compulsory acquisition" is more frequent. In Canada the term "expropriation" is used since the word is common to both French and English.

[2] July 1999 survey of local authorities by Mfe finding that 22% of all resource consent applications are not processed within the statutory time limits, despite Councils being able to arbitrarily declare when an application is "officially received". The accuracy of Council response is not audited. Council requests for additional information under s92(4) RMA are often used to justify delay.

The Threat to Property Rights

Since Magna Carta 1215 and earlier the English Common Law has required that compensation be paid for all takings. That has always been an essential check on the power of the Executive. From guaranteed property rights, the concept of prompt due process of law and individual liberties have progressively developed. In recent times the importance of property rights in the constitution has been forgotten as the power of the Parliamentary Executive has grown. As the power of the Executive, (the Crown) in Parliament has grown, Parliament has neglected its historic function as guarantor of individual liberties and property rights.

This paper reviews the authorities for the inherent right of the citizen to compensation for all takings. The influence of Magna Carta[3] in the Magna Carta legislation, the Petition and Bill of Rights, the Common Law (the Ancient Constitution) and modern caselaw is discussed. Section 21 of the New Zealand Bill of Rights 1990, giving domestic effect to international law, is considered as a further authority for the constitutional protection of property rights. The paper then examines current practice and statutory provision for compensation and contrasts the full compensation generally paid under the Public Works Act for land with inadequate provision for other property.

The conclusion is that at common law full compensation was always paid and that all statute law should provide for compensation, unless there are sound policy reasons to deny compensation. The citizen's right to compensation is a constitutional convention. The right can extend to regulatory takings.

More fundamentally this paper concludes that New Zealand already has a written constitution grounded in property rights and the philosophy of John Locke. This was the orthodox view until the positivists (such as Austin and AV Dicey) writing last century. Discussion of the full constitutional ramifications lies outside the ambit of this paper.

II THE ENGLISH RULES BASED ON MAGNA CARTA

A THE CONSTITUTIONAL AUTHORITY FOR COMPENSATION IS MAGNA CARTA

Courts at the highest level and writers throughout the Commonwealth have consistently recognised Magna Carta as the constitutional authority that full compensation should always be paid for all takings by the Crown whether of land or intangible property.[4]

> Baragwanath in Cooper v *Attorney General*[5] stated: Our constitutional safeguard for property rights is that of Ch 29 of Magna Car-ta: "No Freeman shall be taken or imprisoned, or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed ; nor will we not pass upon him, nor [condemn,(1)][6] but by the lawful judgement of his peers, or by the Law of the Land." 4 [We will sell to no man, we will not deny or defer to any man either Justice or Right] (Imperial Laws Application Act 1988, s 3(1) and First Schedule)[7]

In *Russel v Minister* of *Lands*[8] a full bench of four Judges of the New Zealand Supreme Court declared in 1898 through Pennefather J:

> It has even been suggested that, although the Legislature provides for full compensation, yet the Compensation Court should award a smaller amount in the case of lands taken for settlement, as otherwise the bargain would not be a profitable one for the Government. To do so would be to violate the fundamental provision of Magna Carta "No

---

[4] Writers include:
Matthew Parris Sir John Fortescue Sir Edward Coke Selden
Edmund Burke Stubbs Sir Winston Churchill: History *of the* English Speaking Peoples Vol 1 Cassell 1956 202 "And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights or liberties of the subject it is to this doctrine that appeal has again and again been made, and never, as yet, without success."
Courts include:
Canada *Calder v* Attorney-Genera/ *of British Columbia*
34 DLR (3d) 145 (SC) per Judson J at 173 lines 31-36
"the expropriation of private rights by the Government under the prerogative necessitates the payment of compensation... Only express words...in an enactment would authorise a taking without compensation" and 203 line 28 refers to Magna Carta Australia *Ex parte Walsh* and Johnson [1925] CLR 36 HCA per Isaacs J at 79 lines 5-34

[5] Cooper v Attorney General [1996] 3NZLR 480 BaragwanathJ

[6] Chapter 29 in the 1225 reissue of Magna Carta resulted from the consolidation of Chapters 39 and 40 in the original 1215 charter. The word [condemn1] is footnoted in the Statutes of the Realm (the official statutes mentioned in the First Schedule to the 1988 Imperial Laws Application Act) to record that "the latin word mittemus while literally translated as send or deal with, is usually rendered as above". It has connotations of "target" or "set out to destroy". For that reason certain torts against public officials such as the tort of misfeasance in public office have a requirement of malice. (As to malice see Todd (ed) "The Law of Torts in New Zealand" Brookers Ltd 1997 at 1015)
That raises the issue as to whether private remedies in tort are merely the Courts practical recognition of the inherent rights of the individual to protection of his person and property guaranteed by the Magna Carta legislation.
A further question is whether mittemus authorises a remedy in tort with compensation for injurious affection or metaphysical taking in the sense of *Cockburn* v *Minister of* Works [1984] 2 NZLR 466 CA

[7] Chapter 29 was cited in abbreviated form in Cooper. For convenience it is now set out in full, including the words in square brackets.

[8] *Russel* v *Minister of Lands* (1898) 17 NZLR 241 at 250

> freeman shall be disseised of his tenement except by the law of the land."

Blackstone in the "Commentaries on the Laws of England"[9] (first published in 1765) wrote:

> The third absolute right inherent in every Englishman, is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land
>
> ....
>
> Upon this principle the Great Charter has declared that no freeman shall be disseised, or divested, of his freehold or of his liberties, or free customs, but by the judgement of his peers, or by the law of the land
>
> ....
>
> So great moreover is the regard for private property, that . ..If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without the consent of the owner of the land
>
> ....
>
> the legislature alone can . ..compel the individual to acquiesce . ..Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained . ..even this is an exercise of power, which the legislature indulges with caution, and which nothing but the legislature can perform.
>
> ....
>
> in vain would these rights be declared...if the constitution provided no other method to secure their enjoyment . . . These are:
>
> 1. Parliament . . .
> 2. [Strict] limitation of the royal prerogative . . .
> 3. Applying to the courts of justice for redress . . .

"Magna Carta" or more accurately the Magna Cat-ta legislation has been reissued on innumerable occasions since 1215 generally on the accession of a new monarch. The right to rule was always known to be conditional on the guarantee of the fundamental freedoms and liberties. The freedoms and liberties were reserved fundamental rights in the individual, his person, his liberty, property and customs.

The first Magna Carta signed on June 15, 1215 in a marshy field at Runnymede was a peace treaty between the Crown and a broad alliance of rebels.

[9] "Commentaries on the Laws of England" Vol 1 121-123 3ed RM Kerr London J Murray 1862. The influence of Locke is clear.

The Crown had been militarily defeated, when the City of London opened its gates to the Barons, so denying John the ability to raise cash for his mercenaries from the London merchants. The previously arbitrary authority of the Norman Kings was limited by the guarantees of liberties to the Church (article I), the Barons and Freemen (arts 2-12,14-54), the City of London (art 13), the Welsh (art 56-58) and the Scots (art 59). The Crown's obligation to respect the liberties and freedoms guaranteed by Magna Car-ta was immediately understood to mean that the Crown and Subject alike were under the Rule of Law. That accorded with the mediaeval concept that since everyone was subject to God they should equally be subject to the law sanctioned by God.

The peoples" of England had by cession and conquest regained part of their sovereignty in the form of the guarantees of their freedoms and liberties. That interpretation cannot be denied in view of art 61, providing that the elected Council of 25 barons were free to distress and distrain against the lands, castles and possessions of the Crown if the King had not remedied any breach after 40 days notice.

Contrary to popular misconception the Barons mentioned in Magna Carta were not necessarily nobles, but merely military leaders." Unusually for the age Article 60 provided that the benefit of the customs and liberties would extend to all freemen. All the "liberties, rights and concessions" in Magna Car-ta were granted "for ever" [12] ("in perpetuum" in the original Latin text). The obligations were also to be "observed in good faith and without evil intent" (bona fide et sine malo ingenio). It is interesting to compare the language with Richardson J in *Attorney General v New Zealand Maori Council* [13] 772 years later.

B THE TREATY OF WAITANGI 1840 REAFFIRMS MAGNA CARTA

The Treaty is at the same time a reaffirmation of Magna Carta and the authority under which the Maori people acceded to British sovereignty grounded in Magna Carta. The Third Article states that the Queen "extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects". Those rights were Magna Carta rights. Henry and William Williams in translating the Treaty to Maori, were influenced by Magna Carta since the Bill of Rights 1689 was still recent history and a part of English popular culture.[14]

---

[10] There were many peoples in England under Norman French rule each with their distinct languages, traditions and legal systems. These included the various Celts, the Jutes, the Kents, the Angles, the Saxons and the free Scandinavian settlers along the East Coast. All welcomed Magna Car-ta as a Crown promise to respect their particular customs. The concern is strikingly similiar to contemporary Maori concern for preservation of taonga and biculturalism.

Compare n 25 Prof Brookfield: the legitimation of power.

[11] F Maitland "The Constitutional History of England" 1 ed 1963 Cambridge Univ Press 65 line 20 states that "it would seem that at this time the title baron covered all the military tenants in chief of the crown"

[12] The phrase is discussed by JC Holt in "The Roots of Liberty" Edit Sandoz Univ of Missouri Press 1993 34 line 18 to 35. Line 27 "...a grant in perpetuity was unusual between laymen..... repetition of the phrase reflected a determination that there was to be no going back, a feeling that these were once and for all concessions which at last put a wide range matters to rights."

[13] *Attorney General v New Zealand* Maori Council [1987] NZLR 641 CA Richardson J at 673 line 48 "For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return gave certain guarantees. That basis for the compact requires each party to act reasonably and in good faith towards each other."

[14] The Dictionary of New Zealand Biography on Henry Williams Volume 1 (594 line 27) mirrors general historical and political opinion in stating "...his Maori version of the treaty was not a literal translation from the English draft and did not convey clearly the cession of sovereignty."

A legitimate interpretation of the Maori version of the Treaty is that the promises of the Second Article given to the Chiefs and their hapu ("ki nga hapu") were also extended to all the people of New Zealand of whatever race ("-ki nga tangata katoa o Nu Tirani").[15] That accords with Magna Carta and modern concepts of the equality of everyone under the law.[16]

C MAGNA CARTA PART OF THE FUNDAMENTAL LAW IN NEW ZEALAND

Magna Carta has always been an official part of the law of New Zealand. The principle of full inheritance [17] was affirmed in the English Laws Act 1858.

> 1. The laws of England as existing on the [14 day of January, 1840] shall, as far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

The 1854 and 1908 English Laws Acts were in similar language. The proviso "so far as applicable to the circumstances of New Zealand" left doubt as to which of the Imperial statutes applied.

The 1879 Revision of Statutes Act resulted in the publication in 1881 under the authority of the New Zealand Government of "A Selection of the Imperial Acts of Parliament apparently in force in New Zealand...." This included Magna 8 Carta 1297, the Petition of Right 1627 and the Bill of Rights 1 689.[18]

The Imperial Laws Application Act 1988 removed all doubt. Section 3 declared that all Imperial enactment's in the First Schedule are "part of the laws of New Zealand", while enactment's not listed are excluded. Extracts from the Magna Carta legislation (and the Petition of Right and Bill of Rights 1688) are listed as

---

Such opinion is unfair in that it does not consider the political and social context of key words such as "sovereignty" and "land". I find support for this view in

1 Dr PG M'Hugh "The Historiography of New Zealand's Constitutional History" 344 at 363-367 published in essays on the Constitution ed PA Joseph. Brooker's 1995

2 Dr R Epstein "Indigenous People's Rights and the Treaty of Waitangi" a lecture given at the Institute of Policy Studies and the Stout Centre VUW on 25 March 1999

"...legal archaeology....was indeed a strong Lockean document, which is the more congenial because Lockeans did not think that title started with the Crown and worked its way down to the people through feudal conveyances. People like Hobson and the missionaries may not have been sophisticated, but at least they were reasonably familiar with current political ideas."

[15] The linguistic issues are important since the Court of Appeal in the New *Zealand* Council v *Attorney* General cases placed great importance on them. Eg [1987] 1 NZLR 641
Cooke P at 660-668 esp 662 line 28 to 663 line 44
Richardson J 671 line 24 to 672 line 32
Bisson J 713 line 5 to 715 line 26
See also
"Waitangi Maori & Pakeha Perspectives of the Treaty of Waitangi" Ed IH Kawharu esp Bruce Biggs at 300
"Constitutional and Administrative Law in New Zealand" PA Joseph Law Book Company.

[16] 1948 Universal Declaration of Human Rights Arts 2,7,21
to which NZ is a State Signatory.

[17] *Constitutional and Administrative Law* in New Zealand PA Joseph The Law Book Company 1993 Sydney at 13 line 18.

[18] Section III was omitted from the reprint of the Bill of Rights 1688. This omission is later discussed at III B.
In their preface to the 1881 reprint at iv the Commissioners remark that "the omission of any such enactment is not equivalent to an authoritative affirmation that it is not in force or applicable."

"Constitutional Enactment's". Clearly Parliament passes legislation to have effect and it is hard to perceive the useful purpose of a reaffirmation of the Magna Carta legislation if it is to have no constitutional effect in the interpretation and administration of the law.

> Section 5 of the Imperial Laws Application Act stated: After the commencement of this Act, the common law of England (including the principles and rules of equity) so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

That proviso preserves the great body of Judge made caselaw ultimately founded on Magna Cat-ta principles determined by the House of Lords and Privy Council.[19]

D THE FIDUCIARY DUTIES OF THE CROWN FROM MAGNA CARTA

Fiduciary duty is the concept drawn from the law of equity that those exercising authority should behave with the utmost good faith to everyone vulnerable to an abuse of that authority. It is similar to the trustee/beneficiary relationship.

Magna Carta 30 EDWARD, I. AD 1275 (First Schedule of the Imperial Laws Application Act 1988) is the Parliamentary authority for fiduciary duty (and the equality of all under the law.)

> FIRST the King willeth and commandeth, That the Peace of Holy Church and of the Land, be well kept and maintained in all points, and that common Right be done to all, as well Poor as Rich, without respect of Persons.
>
> The belief in Crown benevolence, now expressed as the fiduciary duty is of ancient origin and can be traced to the laws of the Anglo Saxons.[20]

Traditionally in the context of takings fiduciary duty includes all the courtesies and good faith required of the Crown in persuading Landowners to voluntarily leave their land. It necessarily includes the desirability to negotiate in good faith to reach a voluntary bargain in preference to litigation or other measures of State coercion.[21]

---

[19] The history of the Imperial legislation in New Zealand is described in Law Commission Report No 1 "Imperial Legislation in force in New Zealand" and the Commentary in RS Volume 30 reprinting at 1 Nov 1994 all the Imperial Legislation recognised by the New Zealand Government as remaining in force.

[20] *Ancient Laws and Institutes of England* Vol 1 1840 Commissions of the Public Records of the Kingdom

[21] The sole purchaser "friendly negotiation" test originating in *G/ass v /n/and Revenue* [191 5] *SC 449* and *Raja Vyricherla Narayana Gajapafiraju v The Revenue Divisional Officer Vizagapafam* [1939] AC 302 JC, 318 line 3 was applied in *Turner v Minister of Public Instruction [I* 956] *95* CLR 245, *Tawharanui Farm Ltd v Auckland Regional Authority [I* 976] 2NZLR 230,235 and discussed and affirmed in *Jacobsen Holdings* v *Drexel* [1986] 1 NZLR 324 CA Cooke P 328 Ins 8-12, 329 Ins4,50, Somers J 334 Ins 15-20, Casey J 335 line 39 and then remitted to the HC [1987] 2 NZLR 52 Pritchard J 54 Ins23-40
Also S18(d) P Works Act 1981 requires good faith negotiation.

The fiduciary duty was described by Richardson J in NZ Maori Council v Attorney General[22] in the context of the State-Owned Enterprise Act 1986 as requiring good faith and reasonable behaviour.

Since the acquisition of limited sovereignty by the Crown under the various reissues of Magna Carta and under the Treaty of Waitangi are essentially the same, similar fiduciary duties should apply.

22 New Zealand Maori Council v Attorney General Above n13

III THE PETITION OF RIGHT 1627 AND BILL OF RIGHTS 1689[23] THE DECLARATION OF RIGHTS 1689

The Bill of Rights (Act) 1689 was Parliament's response to the Petition of Right 1627 formally accepted by Charles 1 in the Round Parliament and then by subsequent action repudiated. That repudiation lead to the English Civil War. Both the Petition of Right and Bill of Rights 1689 remain part of the law of New Zealand under the First Schedule to the Imperial Laws Application Act 1988. Together they are commonly said to be the authority for the Supremacy of Parliament as law of the land. The history of both is plainly told by Winston Churchill *"A History of the English Speaking Peoples"*[24]

For England at the time the Declaration of Rights 13 February 1689 was more important since the Lords, Commons and Monarch assembled together while it was read and then the Crown was formally offered to William and Mary. The Declaration was a constitutional instrument.

A PARLIAMENT IS SUBJECT TO THE LAW

The claimed supremacy of Parliament

Parliament is not "supreme",[25] since its authority is limited by the fundamental liberties of the person, of property and of prompt due process reaffirmed by the Bill of Rights 1689. Parliament took power in the self proclaimed "Glorious Revolution" conditional upon those liberties, which have never been removed by a later revolution or broad consultation of the people.[26] The right to full compensation for all takings in the Westminster model of democracy is and always has been the most effective check to the inevitably despotic power of the State. It has often been overlooked by political commentators arguing for limited government.[27]

Fitzgerald v Muldoon[28]

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23 Commonly year numbered 1688,but in fact passed in 1689

24 "A History of the English Speaking Peoples" Cassell and Company 1956 Volume II 119-327.

25 Contrary to the views of AV Dicey "An Introduction to the Study of the Law of the Constitution" 10 ed 1975 Macmillan Press. Dicey's view of the Petition of Right and the Bill of Rights is expressed in a footnote at 200:
"The Petition of Right, and the Bill of Rights, as also the American Declarations of Rights, contain . ..proclamations of general principles . . . ..judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that....nearly every, clause...negatives some distinct claim made on behalf of the prerogative....." Dicey does however concede the role of interpretation. Dicey's views are now untenable in the UK following the UK accession to the EEC. See R v Secretary of State for Transport ex p Factor-tame [1988] 1 ALL ER 735

26 The requirement for "common consent" to a new constitution was satisfied for the new South African constitution by widespread consultation from 1993 to 1996. Compare with the minimal consultation (10 submissions received) when the NZ Constitution Act 1986 was passed.

Fundamental legal rights can also develop by peaceful acquiescence. This was argued in the context of Moana Jackson's radical claims for Maori sovereignty by Professor Brookfield "Parliament, the Treaty, and Freedom- Millenial Hopes and Speculations" "The Legitimation of Imposed Power"
44-49 in "Essays on the Constitution" ed PA Joseph Brookers 1995. Respect for custom is consistent with Magna Car-ta. The question remains however as to what period of time must elapse before a "prescriptive" constitutional custom can be recognised.

27 eg Sir Geoffrey Palmer
"Unbridled Power" 1 ed 1979 and 2 ed 1987
"Bridled Power: New Zealand Government under MMP"
3ed 1997 Geoffrey and Matthew Palmer All NZ Oxford Univ Press.

28 Fitzgerald v Muldoon [1976] 2 NZLR 615 Wild CJ
The restrictions on parliamentary law making are further discussed by David M'Gee in The Legislative Process and the Courts 84-

Chief Justice Wild in 1976 in Fitzgerald v *Muldoon* confirmed that the Executive in Parliament was subject to the law and the Bill of Rights 1689. He declared that Mr Muldoon had breached the Bill of Rights 1689 ("the pretended power to suspend the law") by announcing that contributions to Government Superannuation should cease before Parliament had changed the law. By direct analogy Parliament must be subject to all the provisions of the Bill of Rights including the omitted Section III guaranteeing all the liberties of property and the individual.

Reaffirmation of the rights and liberties of the subject from Magna Carta

The Petition of Right and the Bill of Rights are written in such blunt language that they make no sense unless they are recognised as reserved fundamental law binding the Crown Executive in Parliament to comply with Magna Cat-ta and accepted by the Crown as fundamental law.

1. The Petition recites 250 Edwl c29 1297 (identical to Hen.3 M.C.c.29) in Section 3 and 280 Edw III in Section 4. It also refers to "the laws" and "customs" of "this realm" (section 2 and 7) and "the Great Charter and the laws of the land" (section 7).
2. The preambles to the Petition of Right and Bill of Rights dictate a purposive interpretation premised on Magna Carta.

The preamble to the Petition of Right reads:

> . The Petition . . . . ..concerning divers Rights and Liberties of the Subjects, with the King's Majesty's Royal Answer thereunto in full Parliament.[29]

The First Preamble to the Bill of Rights reads:

> An Act declaring the rights and liberties of the subject, and settling the succession of the Crown.

The further preambles read (Underlining added):

> AND WHEREAS . ..in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted...
>
> AND THEY DO CLAIM, DEMAND, AND INSIST UPON all and singular the premises, as their undoubted rights and liberties

The word "establishment" shows a clear intent to found a new political order guaranteeing ancient rights and liberties.

The conditional tender of the Crown to William and Mary

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111 in Essays on the Constitution ed PA Joseph Brooker's 1995. M'Gee's discussion was expressly approved by the Court of Appeal in Shaw v Shaw CA 218/97 at 5 line 6 "Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements."

Also Prebble v TVNZ 3 [1993]3NZLR CA and [1994]3NZLR 1 JC

29 The first preamble to the Petition of Rights 1627 is recorded in the Statutes of the Realm, but was excluded from the 1881 reprint and hence Law Commission Report no 1 and RS 30 (Reprinted Statutes) reprinted at 1 November 1994.

Parliament had seized power in the Glorious Revolution and months later offered the Crown to William and Mary conditional upon the guarantee of ancient liberties. The Bill of Rights expressly records

> The Tender of the Crown" was made conditionally:
> [in the] intire confidence that His said Hignesse the Prince of Orange will perfect the deliverance so farr advanced by him, and will preserve them from the violation of their rights . ..and from all other attempts upon their religion, rights, and liberties...

The tender of the Crown conditional upon the guarantee of the ancient Magna Carta rights was a traditional pattern given added political significance by the writings of John Locke (1632-l 704) on the Social Contract. John Locke's principle work "An Essay concerning Human Understanding" was finally published in 1690.

No takings except by the unequivocal direction of Parliament

The Petition of Right and Bill of Rights are the direct constitutional authority for the insistence of the Courts that the fundamental rights of the citizen are only to be taken at the unequivocal direction of Parliament with a strong presumption of compensation. Magna Carta from 1215 had confirmed that the Crown could only take from the citizen on payment of compensation or by law of the land. The Bill of Rights confirmed in addition that only Parliament could authorise taxation. The insistence in all the cases (some later examined) that property can only be taken by the unequivocal direction of Parliament are based upon the taxation provisions in the Petition of Right 1627 and the Bill of Rights 1689.

> **The Petition of Right 1627**
> Reciting that by (25) 34 Edw.l st.4 c.1, by authority of Parliament holden 25 Edw.3, and by other laws of this realm, the King's subjects should not be taxed but by consent in Parliament.
>
> **The Bill of Rights 1689**
> Levying money-That levying money for or to the use of the Crowne by pretence of pereogative without grant of Parlyament for longer time or in other manner than the same is or shall be granted is illegal

B THE OMISSION OF SECTION lll OF THE BILL OF RIGHTS.

Compensation must always be paid for reserved fundamental rights since parliamentary sovereignty is subject to them.

The Bill of Rights 1689 (as recorded in Statutes of the Realm) comprises three sections of equal importance:

Section I declares the Rights and Liberties of the Subject. Section II outlaws the Crown prerogative to suspend the application of statutes by "Dispensation by Non obstante"

Section III preserves all previous charters, grants or Pardons, (including the issues of Magna Carta) Technically Magna Carta 1215 is a Charter and Grant and is more fundamental than a statute.

Section III states:

> Provided that noe Charter or Grant or Pardon granted before [23 October 1689] shall be any wayes impeached or invalidated by this Act but that the same shall be and remaine of the same force and effect in Law and noe other then as if this Act had never beene made.

The importance of the Third Section in preserving Magna Carta can be assessed from the Debates in the House of Commons and the House of Lords.[30]

Sir Robert Howard, a member of both Treby's and Somer's Rights Committees of the House of Commons considering the form of the Bill of Rights stated:

> "Rights of the people had been confirmed by early Kings both before and after the Norman line began. Accordingly, the people have always had the same title to their liberties and properties that England's Kings have unto their Crowns. The several Charters of the people's rights, most particularly Magna Carta, were not grants from the King, but recognition's by the King of rights that had been reserved or that appertained unto us by common law and immemorial custom".

However disregarding this proud history and the special status of Magna Carta as a Charter the Law Commission in its first report "Imperial Legislation in Force in New Zealand" stated "Section III, a savings provision, is omitted as spent". On the basis of this misinformation, the NZ Parliament in the 1988 reaffirmation of the Magna Carta legislation, excluded Section III. The Rights and Liberties of the Subject can never be "omitted as spent."

Section 29 of the Evidence Act 1908, amended in 1998 states however:

> (1) Every copy...of any Imperial enactment . ..being a copy purported to be printed . ..under the authority of the New Zealand Government shall...be deemed - To be a correct copy of that Act of Parliament

30 Journals of the Houses of Lords and Commons 10:126
Cobbett debates

> (2) Every copy of any Imperial enactment . ..being a copy purporting to be printed . ..by the Queen's ...printer...shall...be deemed -
> a) To be a correct copy of that enactment

Statutes of the Realm containing the missing preambles and Section 111 are acknowledged by the New Zealand Parliament as authentic. The omitted Section Ill remains part of the statute law of New Zealand along with the other Imperial legislation.

At the least Section III gives rise to the strongest presumptions of interpretation in favour of compensation. It can however be strongly argued that since Parliament's authority originates from the Bill of Rights 1689, Parliament would be acting unconstitutionally and ultra vires if passing Acts confiscating private property without properly providing for compensation. It would equally be beyond Parliament's powers to repeal Section III without very wide constitutional consultation and in practical poltical terms a referendum.

IV THE COMMON LAW METHOD: THE REFINEMENT OF MAGNA CARTA PRINCIPLES THROUGH THE JUDICIAL POWER OF INTERPRETATION

How existing rights and the right to compensation have been maintained in the Common Law

Section 5 of the Imperial Laws Application Act 1988[31] states that the common law of England (including the principles and rules of equity) shall continue to be part of the laws of New Zealand. It is expressly preserved by Section 28 of the New Zealand Bill of Rights:

> **28 Other rights and freedoms not affected** An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

The term "common law" defies ready definition, since Judges for generations have preferred that the principles of the Common Law generally derived from the Magna Carta legislation remain elastic, so that the black letter of statute can be more efficiently interpreted to accord with the changing needs of society and morality. Significantly the Concise Oxford Dictionary defines the common law as "law derived from custom and judicial precedent rather than statutes". This is not a definition of the term, but only an explanation of its origin.

Judicial freedom to interprete the law is usefully 15 described as a convention by Justice Baragwanath in *Cooper v Attorney General*[32] (later discussed). That freedom as a matter of constitutional convention is partly codified in the Evidence Act 1908 and the Acts Interpretation Act 1924.

> Section 28 of the Evidence Act
> **28 Judicial notice of Acts of Parliament.** Judicial notice shall be taken by all Courts and persons acting judicially of all Acts of Parliament.[33]
>
> An example of the Conventions from the Interpretation Act 1999

31 Given in full above at IIC and discussed n18

32 Cooper v Attorney General [1996] NZLR 480 VF 30

33 The convenient belief common among Planners that the Resource Management Act is a "pure statutory regime" is untenable in view of Section 28 of the Evidence Act. The writer encountered this in questions from the bench in WRC v DTS Riddiford ENF 172/95, involving the jurisdictional extent of the coastal marine area. Later the tapes of evidence were first stated to be "destroyed" and then following an Ombudsman enquiry merely "mislaid." The Minister of Courts was however unable to help in their production. Magna Carta had been argued.

Recent cases from the Environment Court indicate a rethinking of property rights:

1 The concept of "reverse sensitivity"
eg Wairoa Coolstores v Western Bay of Plenty DC A01611998
Millark Properties v Perpetual Trust A30/98

2 Decisions on S85 of the RMA
Steven v Christchurch City Council C38/98
Deegan v Southland District Council Cl 1 0/98

> Section 17 **Effect of repeal generally –**
> (1) The repeal of an enactment does not affect –
> (b) An existing right, interest . . . title....

Sections 20 and 20A of the previous Acts interpretation Act were in similiar terms. The wording is similiar to Section III of the Bill of Rights Act 1689. The word "right" in Section 17 echoes Magna Carta.[34]

The Law Commission paper on the Acts Interpretation Act 1924[35] comments that "The provisions, contained in Sections 20 and 20A, conform with the common law presumption that new statutes do not have retroactive operation". Magna Carta is the origin of that presumption.

The "Ancient Constitution" of the Common Law facilitated Judicial Freedom of Interpretation toward fundamental moral precept and the duty to compensate

Magna Car-ta and its reaffirmations since 1215 reflect community opinion on fundamental moral and political principle. Those basic principles have been refined by Judges to become established common law precedent. Refined precedent has often reemerged in statutory codifications or reform measures.[36] The process continues today with the New Zealand Bill of Rights Act 1990.[37]

J.G.A. Pocock in *The Ancient Constitution and the Feudal Law*[38] a historiographic study examined the fierce controversy in the 1600's between the common lawyers asserting that the constitution was "immemorial"[39] and the few professional historians addressing history critically.

The common lawyers defended the "Ancient Constitution", despite it being a legal fiction, as a means of allowing the hard letter of Parliamentary statute and the law to be ameliorated by reference to ancient moral precept.

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34 Colonial Sugar Refining v Melbourne Harbour Trust Commissioners [1927] AC 343 The Privy Council applied the equivalent provision to S17 Interpretation Act 1999 for the State of Victoria and the principle that a statute should not be held to take away rights of property without compensation and ruled that the clear words of Statute could not remove property rights obtained by limitation.

Followed by the House of Lords in Hartnell v Minister of Housing [1964] AC 1134 holding that uncompensated controls on a caravan site should be cut back due to existing use rights.

35 Law Commission Paper NZLC PP1 "Legislation and its Interpretation The Acts Interpretation Act 1924 and Related Legislation" 23 lines 34-35 and generally 15-31

36 Ch 20 of Magna Carta 1215 is an example:
"A free man shall not be ammerced for a trivial offence,
except in accordance with the degree of the offence; and for a serious offence he shall be ammerced according to its gravity, saving his livelihood.." "Ammerced" is fined or charged costs.

37 David A Strauss in Common Law Constitutional Interpretation Univ of Chicago Law Review Vol 63 No 3 Summer 1996 877-935 describes the same common law process of interpretation for the American Constitution. He first explains at 879 that American constitutional debate divides between "textualism" (literalism) and "originalism" (the founders'intentions). He then states that "common law constitutional interpretation" has two components "traditionalist" (follow precedent always) and "conventionalist" (follow precedent to avoid unproductive controversy). He concludes that the common law approach based on precedent and convention is the reason that the constitutions of England and the United States are similiar.

38 J.G.A. Pocock "The Ancient Constitution and the Feudal Law" led Camb Univ Press 1957 and reissue 1987 with retrospect

39 "Time immemorial" meant to before 1189 the beginning of the reign of Richard I. This is reflected in the law of prescription (adverse occupation) part of the law of New Zealand under the Prescription Act 1832.

The Roots of Liberty[40] describes the profound influence of Chief Justice Sir John Fortescue (c 13851479) on the Common Law. Fortescue acknowledged that the law of nature was universal, as taught by Aristotle and Thomas Aquinas and argued that the laws and customs of England were very ancient. He explained that all human law is "law of nature, customs, or statutes, which are also called constitutions [constituciones]" Chief Justice Coke was influenced by Aristotle and Thomas Aquinas through Sir John Fortescue. Coke acknowledged that Fortescue's *De Laudibus Legum Angliae* was of such "weight and worthiness" that it should be "written in letters of gold".

John Locke (1632-1704) filled the philosophical void left after the idea of the Ancient Constitution fell into disrepute. All his major works were first published in England in 1689 after the arrival of William of Orange. His concept of the Social Contract clearly influenced the formal tender of the Crown to William and Mary conditional upon the guarantee of all the liberties of the Ancient Constitution. After that the legal fiction of the Ancient Constitution was unnecessary.

Lord Cooke in promoting the concept of *Fundamentals*[41] "some statement of accepted ideals rather more contemporary and comprehensive than Magna Carta or the 1689 Bill of Rights...for a unifying expression of values accepted by the whole community" is working in the time honoured method of the Common Law and the Ancient Constitution.

Economics now influences Judicial decisions.[42] Inevitably John Locke will have a further influence through public choice theory (the application of economic ideas to legislative and judicial decisions). John Locke is a major influence on Professor Richard Epstein of Chicago University, a leading advocate of public choice theory and the important role of the 4th Amendment takings clause in the American Constitution. [43]

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40 The Roots of Liberty Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law n 12 above esp Introduction by Sandoz at 10.

41 Fundamentals Sir Robin Cooke NZLJ May 1998 158 at 159 1 col line 45. See also
The Suggested Revolution Against the Crown now Lord Cooke of Thorndon 28-40 in Essays on the Constitution edit PA Joseph Brookers 1995

42 Cooper 484 lines 8-9 refers to the American Business Law Journal discussing the economic and philosophical debate over Lucas v South Carolina Coastal Council.

43 RA Epstein Takings Private Property and the Power of Eminent Domain Harvard Univ Press 1985
Simple Rules for a Complex World Harvard Univ Press 1995

v THE ENGLISH RULES CASELAW

The English Rules are the substantial body of Judge made caselaw from the House of Lords and Privy Council governing the law of takings and compensation, whenever statutory provision is imprecise or inadequate. Since there are strong constitutional presumptions of interpretation in favour of the citizen the influence of Judges has remained stronger and the body of caselaw more universal than in other areas of the law. The often unspoken influence of Magna Carta and the general political utility of property rights as argued by John Locke are clear factors in the more significant decisions.[44]

This section examines the leading decisions (obliquely mentioning Magna Carta) affirming the constitutional presumption that full compensation must always be paid in the absence of an unequivocal direction from Parliament. The concomitant obligation on the Crown is expressed in a 1993 Crown Law opinion:

> There are many types of rights taken away by the State that give rise to compensation and unless there are good policy reasons for not paying compensation it should be provided for?[45]

A CENTRAL CONTROL BOARD V CANNON BREWERY

The dictum of Lord Atkinson in *Central Control Board (Liquor Traffic) v* Cannon Brewery *Limited* (7979) *HL* [46] is often repeated. The Board had taken under statutory powers the fee simple of licensed premises. The underlinings throughout this paper are added:

> . ..the principle recognised as a canon of construction by many authorities . ..is . ..that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.

I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to a sum ex gratia, it cannot be so confined.

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44 Burmah Oil v Lord Advocate [1965] AC 75 IVD below Viscount Radcliffe 117 C to 118 D quotes John Locke.

45 Crown Law Opinion on Fishing Permits MAF 042/143

46 Central Control Board (Liquor Traffic) v Cannon Brewery [1919] AC 744 Recent examples of the Courts' insistence on "unequivocal intention to take property" can be seen in Mabo v State of Queensland (2) [1992] 107 ALR 192 HCA Brennan J In 42 Toohey J 152 In 35-153 In4 (refers to Cannon), Te Runanganui o Te Ika Whenua Inc Society v Attorney-General 2 NZLR 20 CA 25 Ins 9-25 Yanner v Eaton www.austlii.edu.au/au/
/cases/cth/highct/1999/53 paras 34,35 106-I 18
Justice Barker stated as obiter in Falkner v Gisborne District [1995] NZLR 622 at 633 line 12 that the Resource Management Act in terms of Cannon Brewery "contains no such unequivocal intention" to remove the right to compensation.

> The dictum of Lord Atkinson was supported by Lord Parmoor [47]: It is not necessary in a case of this character to base the decision on any presumption in favour of construing an Act of Parliament so as to give compensation where property is compulsorily acquired for public purposes, but the presumption is too well established to be open to doubt or question. The prerogative of the Crown was referred to in argument, but it is contrary to a principle enshrined in our law at least since the date of Magna Cat-ta, to suggest that an executive body, such as the Central Control Board, can claim, under the prerogative, to confiscate, for the benefit of the Crown, the private property of subjects

> Lord Wren bury [48]:
> The power to take compulsorily raises by implication a right to payment, and that right is neither conferred by, nor governed by, nor in any way affected by the Proclamation and later [49]:

> The true effect of the legislation is that existing rights of compensation are left untouched and that new provision is made for compensation ex gratia.

B ATTORNEY GENERAL V DE KEYSER'S ROYAL HOTEL

A year later the House of Lords in *Attorney General v De Keyser's Royal Hotel* [50] considered a similiar wartime taking of a hotel under the Defence of the Realm Regulations.
The Crown had argued in part that it was entitled to take the Hotel under the War Prerogative.

Lord Dunedin records that the "Master of the Rolls in his judgement" had searched the court records as to whether past practice had been to pay compensation and notes:

> He has divided the time occupied by the search into three periods-the first prior to 1788, then from 1788 to 1798, and the third subsequent to 1798. The first period contained instances of the acquiral of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorise the taking of lands, and make provision for the assessment of compensation, the statutes being of a local

47 Cannon Brewery Lord Parmoor 760 lines 23-33
48 Cannon Brewery Lord Wrenbury 763 lines 24-26
49 Cannon Brewery Lord Wrenbury 764 line 11
50 Attorney General v De Keyser's Royal Hotel Limited [1920] AC 508

> and not a general character, dealing with the particular lands proposed to be taken. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation?'

There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. [52]

> Similarly Lord Atkinson stated I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the nature of the searches made by the Crown it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative. [53]

None of the Judgements mentioned *Cannon Brewery* but all emphasised "the well established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment". (Lord Parmoor).[54]

> Similarly Lord Atkinson:
> The recognised rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a citizen without compensation. Bowen LJ in *London and North Western Ry. Co v Evans [1893] 1 Ch 16,28* said "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is compulsorily taken from him. Parliament in its omnipotence can, of course override this ordinary principle....but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose."[55]

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51 De Keyser Lord Dunedin 524 lines 20-34
52 De Keyser Lord Dunedin 525 lines l-3
53 De Keyser Lord Atkinson 538 lines 31-33
Similiarly
Lord Moulton 552 line 30 to 553 line 2
Lord Sumner 562 line 33 and all 563
Lord Parmoor 573 line 25-29
54 De Keyser Lord Parmoor 576 line 15-19
55 De Keyser Lord Atkinson 542 lines 19-32
Similiarly
Lord Dunedin 529 line 35
Lord Sumner 559 line 22-29

The House of Lords in *Bank Voor Handel En Scheepvaart v Adrninisfrafor of Hungarian Property [1954]* [56] extended to enemy aliens the duty to compensate for all takings under the war prerogative and expressed its understanding of De *Keyser:* From that decision it appears clear that:

> there was never a prerogative to confiscate the property of a subject in time of war . ..Further, if the royal prerogative in the days of it's full vigour did not extend to confiscation of a subject's property in time of war, I am not prepared to assume that the legislature intended to confer a statutory power to confiscate a subject's property in 1939. Such a power would have to be very clearly shown by the language of the statute and never to be presumed.

C BURMAH OIL V LORD ADVOCATE[57]

The Crown duty to compensate when taking under the war prerogative was again considered by the House of Lords in 1964 in *Burrnah Oil v Lord Advocate.* This was an extreme case. Oil wells, buildings, plant and machinery in Burma were destroyed in 1942 to deny them to the invading Japanese. Assets in Rangoon were destroyed the day before the Japanese arrived. All five Judges approved De *Keyser* and agreed that the Crown was under a general duty to compensate. All of the Judges agreed that there was an exception for battlefield damage[58] and two of the Judges, Lords Radcliffe and Hodson considered that in the circumstances the battlefield exception precluded compensation for the destruction of Burmah Oil's assets in the face of an advancing enemy.

Despite the exigencies of war the cases reveal a clear obligation to compensate in the absence of statutory provision and a willingness to interpret statute to ensure compensation[59]

The preroga tive

Dicta in *Burmah Oil* on the nature of the prerogative assist in understanding Crown takings (of land, property or other rights), when there is no "statutory provision". They evidence the strong constitutional obligation to pay compensation. Lord Reid defined the prerogative as "really a relic of a past age, not lost by disuse, but only available for a case not covered by statute." [60]

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56 Bank Voor Handel En Scheepvaart v Administrators of Hungarian Property [1954] 584 at 637,638 (638 line 11 ,12 and 21-26)

57 Burmah Oil v Lord Advocate [1965] AC 75 HL ECS Wade and AW Bradley Constitutional Law 10 ed 1985 remarks that Burmah Oil "established that where private property was taken under the prerogative, the owner was entitled at common law to compensation from the Crown; but the [UK] War Damage Act 1965 retrospectively provided that no person shall be entitled at common law to receive compensation in respect of damage to or destruction of property caused by lawful acts of the Crown during war". Burmah Oil remains good authority that at common law the Crown is obliged to fully compensate for all takings.

58 Burmah Oil exception for battlefield damage following Vattel Lord Ratcliffe 130
Lord Hodson 142 A
Lord Pearce 162 F

59 De Keyser and Burmah Oil were followed in Nissan v Attorney General [1968] 286 1 QB 286 Eng CA

60 Burmah Oil per Lord Reid 101 C at lines 17-19

Lord Radcliffe repeated an extract from John Locke's "True End of Civil Government"" and commented that

> The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer existing law- but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.[62]

Lord Pearce made the point that the King was always subject to the rule of law and so unable to take anything except by their ordinary consent or common consent in Parliament and even then subject to the duty to compensate:

> Bracton's theory that the Crown was subject to the rule of law has, after some vicissitudes in Stuart times, prevailed . ..And even in Stuart times, Crooke J in his dissenting judgement in Hampden's case in 1637, after referring to Magna Carta said: "Fortescue Chief justice[63] setteth down what the law of England is in that kind . . . He cannot take anything from them, without their ordinary consent; their common consent it is in Parliament . ..Show me any book of law against this, that the king shall take no man's goods, but he shall pay for it, though it be for his own provision;[64]

An interesting question arises as to whether a Plaintiff should draft his pleadings on the basis of seeking full compensation in terms of the common law and the Crown Prerogative as a way of avoiding the increasingly restrictive payouts available under modern clauses of statutory provision for compensation. Would Judges in terms of the canon of liberal construction prescribed in Cannon Brewery and the other authorities be inclined to then read down the modern statutory provision to permit common law compensation or find that the plaintiff had more than one avenue for compensatory redress? [65] In that case their action would be founded directly on Magna Carta.[66]

Recent New Zealand decisions (not on property takings) argued on Magna Carta such as *Shaw* v Commissioner of *Inland* Revenue [67] and The Queen v *Richard John Cresser* [68] 24 have shown the Courts reluctant to have Magna Carta

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61 Burmah Oil Lord Radcliffe 117D-118B

62 Burmah Oil Viscount Radcliffe 118 B,C lines 1 l-l 6

63 Sir John Fortescue (c1385-1479) discussed above at IIIC3 17

64 Burmah Oil Lord Pearce 147 line 37 to 148 line 18

65 See further discussion on the prerogative in Wade and Bradley n 56 extracted in Chen and Palmer at 260 and on the Royal Prerogative Halsbury's Laws of England Vol 8 (2) paras 367-381

66 Consider Canada Sisters of Charity of Rockingham v The King [1922] AC JC 315 at 322 lines 7-8 "Compensation claims are statutory and depend on statutory provisions". The words are dicta. Presumably statutory provision in Sisters of Charity was sufficiently comprehensive to have abridged the common law right to compensation.

Consider Australia Newcrest Mining (WA) Ltd v The Commonwealth of Australia 147 ALR 42 (HCA) discussed by K Ryan "Compensation for Removal of Property Rights in Australia" (December 1997) 5 Resource Management News 17. In Newcrest Kirby J 149 line l-5 discounted the clear words of the Australian Constitution and stated that "Historically, its roots may be traced as far as Magna Cat-ta 1215, Art 52..."

Consider USA RA Epstein Takings (n41) 42 line 27 "The rights of action...should be considered not as a matter of legislative grace, but as constitutionally mandated under the takings clause. The conclusion may appear radical, but it is supported not only in principle but also by a diverse range of authority...Armstrong v United States 364 US 40 (1960)".

67 Shaw v Commissioner of Inland Revenue CA 218/97 Richardson P Henry J Blanchard J

68 The Queen v Richard John Cresser CA 39/98 per Blanchard J

argued on a regular basis, but careful to ensure that it is respected and not forgotten.

D BELFAST CORPORATION V O.D. CARS HL: REGULATORY TAKINGS[69]

The Respondents owned land on which for many years they had operated a service garage. Their application to erect shops on the street frontage and factories in the rear was declined by Belfast Corporation on the basis that it did not comply with the zoning of the site as shops limited to a height of 25ft in the front and residential use in the rear.

They claimed compensation under the Government of Ireland Act 1920 which stated that the Parliament of Northern Ireland could not make laws which would "take property without compensation". The House of Lords decided against the Respondents on the narrow ground of statutory interpretation that planning rights to build could not be described as "property" in terms of the Government of Ireland Act 1920.

The importance of the case lies in the dicta (unnecessary to the issue in hand) supporting the *Cannon Brewery* [70] line of authority and emphasising that in an appropriate case a regulatory taking would be treated as a confiscatory taking obliging the authority to compensate. A regulatory taking of property destroys or limits the use rights as distinct from the occupancy rights.

> Lord Radcliffe: [71]
> A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in it's place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rules of statutory interpretation devised by the courts which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or importing an intention to give compensation and machinery for assessing it into any Act of Parliament that did not purposively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual libertv. It would be a mistake to look on it as representing any conflict between

69 Belfast Corporation v O.D. Cars [1960] AC 490 HL(NI)
70 Belfast Corporation v OD Cars Viscount Simonds 517 line 39 to 518 line 3
71 Lord Radcliffe 523 lines 7 to 33

> the legislature and the courts. The principle was...common to both.

The words last underlined reflect the belief that the requirement for compensation is a constitutional convention binding on both the Courts and the Legislature. The words “machinery for assessing it” suggests that the role of the Court is to make up for Parliament’s omission in not providing statutory compensation. The concept of convention is a major feature of *Cooper v Attorney General* (discussed at IVE)

Lord Radcliffe continues:

> Side by side with this, however...came the great movement for the regulation of life in cities and towns in the interests of public health andamenity.. ."police powers".[72] . ..interference with rights of development and user...was not [generally] treated as a “taking” of property.[73]

Lord Radcliffe hints at a possible distinction between “police” functions and amenity values:

> When town planning came in eo nomine in 1909 the emphasis had shifted from considerations of public health to the wider and more debatable ground of public amenity.[74]
>
> I do not imply by what I have said that I regard it as out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a “taking” of the land affected for the benefit of the public.[75]

72 Lord Radcliffe 523 26-33. Mr Paul Cassin in “Compensation: An Examination of the Law” Working Paper 14 prepared for the Ministry for the Environment November 1988 cites this later passage at 21, but surprisingly does not put it in context, by reporting the earlier passage. The report extending to 106 pages is defective in that it confines itself to statutory provisions and does not discuss the common law presumption of compensation or the economic and utilitarian arguments for compensation. The report leaves the misleading impression that in terms of OD Cars there would never at Common Law be compensation for a regulatory taking.

73 Lord Radcliffe 524 line 36

74 Lord Radcliffe 524 lines 26-33

75 Lord Radcliffe 525 lines 27-31

Viscount Simmonds

Lord Radcliffe's last remark as to regulatory taking so extreme as to warrant compensation is echoed in the judgement of Viscount Simmonds.

> .... the distinction that may exist between measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be confiscatory . . .[76]

Earlier he had quoted and approved the dictum of Holmes J of the United States Supreme *Court* in *Pennsylvania Coal Co v Mahon* [77] that "The general rule . ..is. that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

Compensation for regulatory ta kings

Regulatory takings under the Fifth Amendment of the United States Constitution have generated a huge and expanding jurisprudence in the United States.

> No person shall be . ..deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[78]

The Commonwealth approach has been more restrained. Compensation for regulatory taking has been awarded throughout the Commonwealth.

In *Manitoba Fisheries v The Queen* [79] the Supreme Court of Canada ordered compensation to a fish company which had been forced to close by the creation of a statutory monopoly fish export business. The Court considered that the goodwill of the business was property, which could be compensated.

Turners & Growers Exports v *CJ Moyle*[80] was factually similiar. The 4 exporters were to lose their licences to export kiwifruit on formation of the New Zealand Kiwifruit Marketing Board in 1989. The 1953 Primary Products Marketing Act barred claims. The new regulations made no provision for compensation. M'Geghan J introduced "machinery" for compensation by finding that "as a matter of procedural fairness before the Minister recommended Regulations to the Governor General in Council opportunity should have been given to the exporters to make representations as to compensation."[81]

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76 Lord Radcliffe 520 lines 2-5

77 Pensylvania Coal Co v Mahon (1922) 260 US 393,417 quoted by Viscount Simmonds at 51 lines 19-22

78 See discussion in Should the RMA Include a Takings Regime? Kathleen Ryan NZJEL Vol 2 1998 63 69-73

Lucas v So Carolina Coastal Council(l992) 505 US 1003, 112 S Ct 2886 and discussion in the American Business Law Journal 1995 Vol 33 153 Lucas v South Carolina Coastal Council, discussing the influence of Richard Epstein's Takings: Private Property and the Power of Eminent Domain (1985) Harvard Univ Press. Cooper n99 484 referred to Lucas and the American Business Law article.

See generally Laurence H Tribe Chapter 9 587-628 American Constitutional Law 2 ed 1988 Foundation Press
George Skouras Takings Law and the Supreme Court 1998 Amazon
Robert Meltz The Takings Issue 1999 Amazon.

79 Manitoba Fisheries Limited v The Queen [1979] 1 SCR 101

80 Turners & Growers Exports Limited v CJ Moyle CP 720/88 M'Geghan J

81 Turners & Growers Exports Limited v CJ Moyle CP 720/88 at 67 lines 14-18

M'Geghan J (conscious that his decision would conflict with the clear will of Parliament) stated that "relief in review proceedings is discretionary" giving him a choice between (i) making orders (ii) refusal of relief or (iii) adjournment pending legislative solution as in *Fitzgerald v Muldoon*. He decided that "the Minister should [now] receive representations from the applicants on compensation matters, giving such representations a fair hearing". [82] After the judgement Sir Wallace Rowling was appointed by the Labour Government to negotiate compensation, which was duly paid.[83]

In *Newcrest Mining (WA) Ltd v The Commonwealth of Australia*[84] regulatory taking of Newcrest's mining leases occurred through the combined effect of the National Parks...Act 1987 (Commonwealth) outlawing the recovery of minerals in Kakadu National Park and expressly providing that no compensation was to be paid and proclamations extending the Park's area to include the mining leases. A majority of the High Court of Australia found that under the Australian constitution there was an obligation to compensate for takings despite the clear letter of statute (the National...Parks Act). The minority felt they were bound by the precedent of *Teori Tau v Commonwealth [85] a previous decision of the High Court denying "just compensation" under the constitution for Federal Government taking of minerals in Papua New Guinea.*

The judgement of Kirby J is notable for it's reference to Magna Carta 7275 [86] and the statement that "Where the Constitution is ambiguous, this court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights".[87] He then refers to Australia's obligations to compensate under Article 77 of the Universal Declaration and traverses international law.[88]

The Queen v Tener [1985] SC *Can*[89] is factually similiar to *Newcrest.* The Crown refused to renew a park use permit preventing the Appellant from exploring or using their mineral claims. The Supreme Court of Canada ruled that compensation under the Park Act should be paid for the regulatory taking. It expressly followed De *Keyser.*[90]

La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius [91] involved Government amendment to the long-term sharecropping contracts for sugarcane on the Island of Mauritius. The same issues arose as with the statutory lessees under the New Zealand Maori Reserved Land Act, except that it was the Landlords who objected.

The Privy Council found against the Landlords on the facts and approved the dictum of Holmes J in *Pennsylvania Coal Co v Mahon [92] that "if regulation goes too*

82 Turners & Growers Exports Limited 72 lines 25-27
83 MAF 0421143 para 24 6 lines 27-30
84 Newcrest Mining (WA) Ltd v The Commonwealth of Australia (1997) 147 ALR 42 (HCA) 42
85 Teori Tau v Commonwealth (1969) 119 CLR 564
86 Newcrest Kirby J 149 lines I-2
87 Newcrest 147 lines 21-25
88 Newcrest 148 lines 25-27 and generally 147 line 21-32
89 The Queen v Tener [I 985] 1 SCR 533 17DLR (4th) 1
90 Attorney-General v De Keyser's Royal Hotel [1920] AC 508
91 La Compagnie Sucriere de Bel Ombre Ltee and Others v Government of Mauritius [1995] 3 LRC 494 per Lord Woolf
92 Pennsylvania Coal Co v Mahon (1922) US 393 at 415-416

far it will be recognised as a taking" [93] *and stated following Sporrong v Sweden* [94] a European Court case that:

> on an issue of this nature...[it]...will extend to the national court a substantial margin of appreciation. Similarly...[it would respect] the national legislature's judgement as to what is in the public interest when implementing social and economic policies unless that judgement is manifestly without foundation.. .[95]

> and added that there may be substantial deprivation of property.. .if because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of individuals..[96]

> and approved the statement of the Mauritius Supreme Court that . ..although there may not be deprivation as such, nevertheless the restrictions and controls are such as to be disproportionate to the aims which may be legitimately achieved.. .as to leave the property a valueless shell.. . .a "constructive deprivation"[97]

. Despite the provisions of Section 85(1) of the Resource Management Act that "(I) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act," Justice Barker in *Falkner v Gisborne District Council*[98] stated

> It was . . . submitted for the residents that an intention to take away property without giving a legal right to compensation is not to be imputed to the legislature unless that intention is expressed in clear and unambiguous terms *. ..Cannon Brewery..* .The Act contains no such unequivocal intention (Underlining added)

Compensation may be available under the Resource Management Act. It is significant that neither Magna Carta or *Simpson v Attorney Genera/ [Baigent's case]* **(later discussed VIE** 39) were argued in *Falkner.* Despite the decision in *Falkner*, none of the offending sea protection works have been removed by the Council since the case. In June 1999 the Gisborne Council at it's own expense did some maintenance on the works at the south end of the beach. [99] That suggests that the Gisborne Council recognises that compensation may be payable.

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93 Compagnie Sucriere de Bel Ombre 502 h-i
94 Sporrong v Sweden [1982] EHRR 35 at 50
95 Compagnie Sucriere de Bel Ombre 503 d-e
96 Compagnie Sucriere de Bel Ombre 504 i-505 a
97 *Compagnie Sucriere de Bel Ombre* 505i-506a
98 *Falkner* v Gisborne DC [1995] NZRMA 462,478 lines 22-26
99 *Anecdotal from one of the residents funding the case.*

E COOPER V ATTORNEY GENERAL [1996] [100]

In *Cooper* Justice Baragwanath faced an extreme claim by representative fishermen asking the court to overrule an unequivocal direction from Parliament that they should receive no extra quota. Parliament had reversed the benefit for them of an earlier Court of Appeal decision in *Jenssen v Director-Genera/ of Fisheries* [101] by passing Section 28ZGA of the Fisheries Act imposing a condition precedent that the fishers must already be a holder of the relevant fishing permit. The decision record's extracts from Hansard that the fisheries could not be sustained if quota were issued for the additional "30,000 tonnes of quota . ..with a current market value of $85 million". [102] The fishermen had argued on the authority of Cooke J by way of dicta in four cases that Parliament could not remove their deep common law rights, principally of access to the courts (the "Rule in *Chester v Ba teson").* [103]

1 The conventions

Justice Baragwanath addresses the issue immediately:

> The settled rule of law that the Courts will give effect to an Act of Parliament according to its terms provides the answer to these cases. They also illustrate why both Parliament and the Courts observe, and must clearly be seen to observe, the conventions whose acceptance in New Zealand has substantially avoided the constitutional friction that is a feature of the arrangements of other societies. [104]

Justice Baragwanath's deliberate use of the word "conventions" with constitutional overtones is significant. It suggests in context that the presumption that full compensation should be paid for every taking unless Parliament uses unequivocal language is a part of the constitution. The approach to constitutional convention adopted by Justice Baragwanath in *Cooper* was approved by the Court of Appeal in *Shaw v* Shaw. [105] The word "convention" is defined in the Concise Oxford Dictionary as "general agreement" and "customary practice". [106] The word implies Magna Cat-ta 31 and respect for established customs and rights. [107]

It remains to be seen how hard the New Zealand Judiciary will fight to defend the Conventions. What other relevant principles can be drawn from the case?

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[100] Cooper v *Attorney* General [I 996] 3 NZLR 480

[101] Jenssen v *Attorney General* CA 313/91 16 September 1992 Wellington

[102] *Cooper* 491 line 32

[103] *Chester v Bateson (1920) 1* KB 829

104 Cooper v Attorney General 483 lines 7-9 See also 485

105 Shaw v Shaw unrep CA 218/97 Richardson P Henry J. Blanchard J at paras 14 and 17

106 Concise Oxford Dictionary 292 9 ed 1995 Clarendon Press Oxford.

107 G Marshall Constitutional Conventions 1984 Oxford Univ Press 9 line line 14 ". ..the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyranical way."

Consider Cooke P in Prebble v TVNZ [1993] 3NZLR 513 at 517 lines 35-40 "...the conventions applying to the relationship between the Courts and Parliament. The legislative, executive and judicial arms of the state do not intrude into the spheres of one another except when that is essential to the proper performance of a constitutional role. There is a principle of mutual restraint."

2 The Court's power of interpretation

The usual New Zealand and English approach to constitutional issues is to confine the Court's role to interpretation of statute and avoid direct conflict with unequivocal direction from Parliament. That approach has been continued in Sections 5 and 6 of the New Zealand Bill of Rights Act 1990 directing that interpretation consistent with the Bill of Rights is to be preferred. Justice Baragwanath:

> There is no basis under the guise of construction to avoid the obvious intent of the measure . ..The sole issue, in every realistically conceivable case, is not of Parliament's jurisdiction but of construction." [108]

But note however the phrase "realistically conceivable case".

3 Intervention in extreme cases

After considering the dicta of Cooke J in *Tay/or v New Zealand Poultry Board* [109] *and extra-judicial writings in "Fundamentals" Justice Baragwanath stated (the underlining is added):*

> Cooke J [delivering the majority judgement] does not however suggest that property rights conferred on a citizen by statute mav not be taken awav by another statute; nor in my view is such a proposition arguable.
> Nor, properly construed, does the amendment:
> "...take away the rights of citizens to resort to the ordinary Courts of law for determination of their rights" in the sense Cooke J had in mind because despite the language in which the amendment is expressed the dominant purpose is to
> extinguish the rights: not just bar a remedy I am accordingly relieved from venturing into what happily remains in New Zealand an extra-judicial debate, as to whether in any circumstances the judiciary could or should impose limits on the exercise of Parliament's legislative authority to remove more fundamental rights."'
>
> Again
> Whether in New Zealand a bill of attainder would fall into Cooke J proscribed category is fortunately unlikely to be tested; it is inconceivable that our Parliament would infringe the rule of law so as to destroy any right that is truly fundamental."'

Certain property rights not conferred by statute, such as land rights, may not be removable on the statutory whim of Parliament or perhaps only on payment of

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108 Cooper 496 lines 1 O-l 8
109 Taylor v New Zealand Poultry Board [1984] 1 NZLR 394
110 Cooper 484 lines 36-50
111 Cooper 498 lines 17-l 9

full compensation. The first phrase underlined above implies this. Since Justice Baragwanath (also President of the Law Commission) is aware of the debate over Magna Catfa and the Bill of Rights 1689, it is probable that he is aware that the Sovereignty of Parliament conceded by the Bill of Rights 7689 is conditional upon the fundamental liberties and rights affirmed in the preambles and in the omitted third section.

This conclusion is reinforced by the reference to a bill of attainder in the next quotation. [112] *Historically a bill of attainder was the forfeiture of land and civil rights as a result of a sentence of death for treason or felony. Arbitrary confiscation of land without full compensation would obviously fall into the Cooke J proscribed category.*

Use of the phrase "conferred on a citizen by statute" suggests a possible distinction between property rights of recent possession and those possessed for a long time. It is also consistent with a distinction between fundamental rights guaranteed by section III of the Bill of Rights 7689 and rights of recent creation.

4 Sustainability of the fishery

Sustainability of the fishery and the impact upon the property rights of existing quota holders are an important public policy factor. In searching for the intention of the Legislature Baragwanath J was influenced by sustainability and protection of the rights of existing property (quota) holders) He quotes with approval the remark of the Labour party Spokesman on Fisheries[113] repeated by the Attorney General[114] . . . . ..an unrestricted right to challenge past decisions almost inevitably will result in an allocation of additional quota and permits to an extent that will adversely impact on not only the fishery itself but also on existing quota and permit holders.

The remarks on sustainability are important since both the Fisheries Act 1996 and the Resource Management Act 1991 declare sustainable management as their purposes. [115]
Sustainability may be argued in the future as a policy ground to deny compensation.

Property rights protected by the Magna Carta guarantees of prompt due process [116] and compensation however best ensure environmental commitment. A

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112 Cooper 498 lines 17-19
Attainder is generally discussed at 497 line 1 to 498 line 20
113 Cooper Mr G Kelly 492 lines 46-49
114 Cooper 495 lines 46-49
115 Fisheries Act 1998 Section (1)
"The purpose of this Act is to promote the utilisation of fisheries resources while ensuring sustainability"
Section 5 (1) Resource Management Act 1991
"The purpose of this Act is to promote the sustainable management of natural and physical resources"
116 First Schedule Imperial Laws Application Act 1988
250 Edw III AD 1351
280 Edw III AD 1354
420 Edw III AD 1368

common misconception is that Magna Carta property rights are absolute and thus out of touch with the needs of modern society. However Magna Carta rights are all subject to law and through the law the needs of neighbours represented by the State. They are not libertarian. A modern view of Common Law Magna Carta rights was eloquently expressed in *Ex Walsh and Johnson* [117] by Isaacs J in the High Court of Australia:

> . ..certain fundamental principles which form the base of the social structure of every British community....Magna Car-ta. Chap 29 . . .recognises three basic principles, namely:
> (1) . ..every free man has an inherent right to his life, liberty, property and citizenship
> (2) his individual rights must always yield to the necessities of the general welfare at the will of the State
> (3) the law of the land is the only mode by which the State can so declare its will . ..The first corollary . . .an initial presumption in favour of liberty The second corollary is that the Courts themselves see that this obligation is strictly . ..fulfilled before they hold that liberty is lawfully restrained.

5 The Rule in Chester v Bateson

The rule in *Chester v Bateson* [118] is a convention that Parliament is presumed never to intend in statute that citizens should not have their rights determined in Court. It can be traced back to Magna Cat-ta and the Bill of Rights 1689. [119] It is significant that Baragwanath J treated the right to resort to the courts as more fundamental than property rights.

He emphasised that the true intent of the Statute was not to "...take away the rights of citizens to resort to the ordinary Courts of law for determination of their rights", but to remove quota rights.[120]

Early in his judgement [121] he approved *New Zealand Drivers' Association v Road Carriers* [122] where the full Court of Appeal had stated:

> . ..we wish to underline the importance of the rule in Chester v Bateson. Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

Magna Car-ta had been argued in *Chester v Bateson* the rule is worth remembering in view of an increasing government preference for arbitration as a

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117 Ex parte Walsh and Johnson In Re Yates [1925] CLR 79 lines 5-34 HCA per Isaacs J.
118 Chester v Bateson 1 KB [1920] 829
119 Bill of Rights 1688 Ecclesiastical courts illegal- That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.
120 Cooper 495 lines 15,16 and lines 37-39
121 Cooper 484 lines 23-265
122 New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374 CA at 398

means to settle compensation disputes. S162A of the Biosecurity Act is an example. Arbitration avoids publicity and precedent unfavourable to the Crown, but impoverishes the caselaw.

VI THE NEW ZEALAND BILL OF RIGHTS ACT 1990

The Bill of Rights Act 1990 contains no express guarantee of property rights. This is curious in view of the fact that most individual liberties historically developed from property rights.[123] The probable reason lies in political concerns over inclusion of the Treaty of Waitangi and earlier proposals that the Bill should give the Judiciary the power to strike down legislation as unconstitutional.[124] An equally valid explanation could be that the rights are so deeply engrained in the common law that it would be both difficult and unwise to attempt to codify them.

Can protection of property be implied from the Bill of Rights 1990 as passed by Parliament?

A SECTION 28 OTHER RIGHTS AND FREEDOMS NOT AFFECTED

Section 28 of the Bill of Rights 1990

> Other rights and freedoms not affected- An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

This section preserves the Rights and Liberties of the Subject guaranteed by the Bill of Rights 1689 and the Magna Cat-ta legislation and preserved in the Common Law. At the very least they are available as aids in interpretation. They will influence how "reasonable" in Section 21 of the New Zealand Bill of Rights 1990 should be interpreted.[125]

B INTERNATIONAL COVENANTS TO WHICH NEW ZEALAND IS A STATE SIGNATORY

Article 12 Universal Declaration of Human Rights 1947

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation....

Article 17 Universal Declaration of Human Rights 1947

> 1 Everyone has the right to own property alone as well as in association with others.
> 2 No one shall be arbitrarily deprived of his property.

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123 F. Maitland "The Constitutional History of England" Cambridge Univ Press 1 ed at 23.

124 Lord Cooke of Thorndon in the preface to Property and the Constitution ed Janet M'Clean first page line 27 states it was "because of a fear of generating disputes."

125 Chapter 6 The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation 108-147 in Property and the Constitution ed Janet M'Lean Hart Publishing 1999 investigates whether property should be protected in formal constitutions. 117-129 Andre der Walt relates the determination of the Supreme Court of India to interprete the Indian Constitution to require the payment of full compensation defying unambiguous constitutional amendments from Parliament.

Significantly Section 21 of the New Zealand Bill of Rights has added "property" to the wording of Article 12. It is reasonable to assume that Parliament intended to protect all (Art 12 and Art 17) property interests in the one provision." Unreasonable" has been substituted for "arbitrary".

C SECTION 21 OF THE BILL OF RIGHTS 1990

Section 21 [126] of the New Zealand Bill of Rights 1990:

> **Unreasonable search and seizure -** Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

It is clear from the Parliamentary White Paper and the Interim Report of the Justice and Law Reform Select Committee that the intention of the Committee was to protect the privacy of the individual and to reaffirm a deeply established body of English and American caselaw against unreasonable Government search stemming from the "great" case of *Entick* v *Carrington (1765).*[127]

Section 21 should not be narrowly restricted to privacy or law enforcement "search and seizure" in the *Entick* v *Carrington* sense, since those values will ultimately be undermined if property does not receive constitutional protection. Those values are an aspect of the general constitutional convention of property protection. This paper examines *Entick* v *Carrington* and *Attorney General v* Simpson *[Baigent's case]* to show that the broad interpretation of Section 21 to protect property generally is unavoidable and desirable.

The issue will arise sooner rather than later since the Crown's liability in tort is well hedged with statutory immunities, while the new "independent cause of action against the Crown" (M'Kay J in Attorney General v Simpson [128]) is clear of procedural immunity. For this reason Section 21 was argued by Sir Geoffrey Palmer in 1997 on behalf of the statutory lessees [129] and is a feature of the High Court proceedings filed by the Schedule 4 fishers scaled back to 80% of quota.[130]

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126 None of the articles on Section 21 of the Bill of Rights Act consider "reasonableness" in terms of the established common law and conventions.
The Scope of s 21 of the New Zealand Bill of Rights Act 1990: Does it provide a general guarantee of property rights? NZLJ Feb 1996 58. Andrew Butler presents the arguments on both sides. As an argument favouring a broad scope for Section 21 he points to the need for the Bill of Rights to receive the broad interpretation mandated by the Court of Appeal. Crown Colony of Hong Kong [1991] 1 NZLR 429 (CA) and Noort v MOT;Curran v Police [1990-92] 1 NZBORR 97, 139, 141 (Cooke P). As arguments against he traverses the modern contextual background of the provision. He personally concludes that "the Courts should favour a narrow scope for the provision", but gives no reasons for this opinion.
See also Search and Seizure: An update on s21 of the Bill of Rights Scott Optican [1996] NZLR 215

127 A Bill of Rights for New Zealand A White Paper
1985 103-l 07 uses the phrase "great 18th century case of Entick v Carrington" at para 10.145

128 Simpson v Attorney General [1994] 3 NZLR 667. The majority confirmed that the new public law remedy against the Crown was not fettered by statutory immunity. See n 143.

129 Sir Geoffrey Palmer Submissions on the Maori Reserved Land Amendment Act 1997 paras 201-204 at 63-65

130 Sanford v Attorney General CP /99 Para 40.3 annexed to Submission 6 8 99 of Mr Tim Castle Barrister to the Primary Production Select Committee. Discussed later at VIIIB 44.

D ENTICK v CARRINGTON[131]

Lord Camden stated the principle:

> If it is law, it will be found in our books. If it is not to be found there, it is not law. The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes...wherein every man by common consent gives up that right, for the sake of justice and the general good.[132]

Lord Camden is expressing the general principle of property guaranteed by the Magna Carta and the Bill of Rights 1689 in terms that echo John Locke and Blackstone. Property can only be taken "for the general good" "by positive law" and "by common consent".[133]

Cannon Brewery, De *Keyser, Burmah* Oil and Cooper
Perpetuate the established tradition of the common law in searching for the unequivocal language of the positive law, before accepting there must be an uncompensated taking.

Lord Camden continues:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[134]

The law of tort lies at the heart of the law of takings on the basis of the maxim *ubi* jus *ibi remedium*, meaning where there is a right, there must also be a remedy.

Again Lord Camden continues:

> If he admits the fact, he is bound to shew by way of justification that some positive law empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgement.[135]

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131 Entick v Carrington 19 St Tr (1765) 1030
132 Entick v Carrington 1067 lines 3-l 7
133 Entick v Carrington "Common consent" refers to Parliament and echoes John Locke's thinking that an elected Parliament was the contractual means by which the citizen could express his will.
134 Entick v Carrington 1067 lines 17-25
135 Entick v Carrington 1067 lines 25-35

This is the traditional common law evidential presumption in favour of the subject, reflected in *Cannon* Brewery and the later authorities. It follows from the Magna Carta conviction that inherent in every (wo)man are (her)his person, liberty, property and customs.

Entick v *Carrington* ruled that compensation of L300 should be paid for the temporary entry on private property for just four hours and the removal of private papers. There is no logical basis for the view that the permanent occupation and confiscation of private land would not warrant payment of similiar or greater compensation.

> Lord Camden founds his decision on Magna Carta:
> . ..I could have wished that upon this occasion the revolution had not been considered as the only basis of our liberty. The Revolution restored this constitution to it's first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security.[136]
> [It is part of] the ancient immemorable law of the land [137]

These phrases resonate the ideas of the Ancient Constitution earlier discussed in Section **IV B**

E -ATTORNEY GENERAL V SIMPSON [BAIGENT'S CASE] [1994] CA

Each stage in the reasoning of the Court of Appeal in *Attorney-General v Simpson*[138] in developing a new public law remedy in damages for breach of the Bill of Rights equally apply to the argument that Section 21 should be acknowledged to protect all property rights. Within the framework of Bill of Rights jurisprudence the classic *Cannon Brewery* presumptions of construction would be available to expand the horizons of what was "unreasonable". Uncompensated confiscation or any taking lacking the Magna Carta protections of prompt due process [139] would be "unreasonable".

In 1991 a party of police officers made a warranted search of Mrs Baigent's home looking for drugs. The police had obtained wrong information from the local Energy Board the Second Defendant. It was alleged that when PC Drummond was informed that the address was wrong and the search illegal he had responded "We often get it wrong, but while we are here we will have a look around anyway".

Allegations in tort of negligence in procuring the search warrant, trespass by entering and remaining without lawful justification and abuse of process/misfeasance in office were resisted by claims of Crown statutory immunity.

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136 Entick v Carrington 1067 bottom -1068 line 7
137 Entick v Carrington 1068 line 37
138 Attorney General v Simpson [Baigent's case] [1994] 3 NZLR 667; (1994) 1 HRNZ 42 CA.
139 280 Edw 111 1354 250 Edw. Stat.5 c 4-10 1351
Anno 420 Edward, 111. A.D. 1368

The Court of Appeal found that there was a new cause of action not in tort, but in public law against the State and that the statutory immunity provided in Section 6(5) of the Crown Proceedings Act and elsewhere did not apply. The Court found that monetary compensation was the appropriate remedy for an innocent person ("somewhat less than $70,000" was indicated by Cooke P). Gault J dissented and argued that the remedy should be in tort rather than creating a new public law remedy. To this end he stated that leave should be granted to recast the allegations in tort to be outside the immunities.

The decision of Cooke P contains elements common to all the majority judgements:

> 1 In previous Bill of Rights cases I have tried to emphasise the importance of a straightforward and generous approach to the provisions of the Act....MOT v Noort; Police v Curran.[140]
>
> 2 By it's Long Title the Act is:"(a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" [and (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights][141]
>
> 3 [Article 2 of the International Covenant on Civil and Political Rights 1966 provides that Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity
>
> (b) . . .to develop the possibilities of judicial remedy.
>
> (c) . ..to ensure that the competent authorities shall enforce such remedies when granted].[142]
>
> 4 . ..international authority...that the redress of breaches of affirmed human rights is a field of it's own. Compensation awarded against the State for such breaches by State servants, agents or instrumentalities is a public law remedy and not a vicarious liability for tort. Thus in Maharaj v A-G of Trinidad and Tobago [1979] JC . ..cases to similiar effect . ..in judgment of Hardie Boys J.[143]

Attorney General v Simpson [Baigent's case]

140 1 Cooke P 676 In 1-5 Casey J 690 In 35-47 Compare Hardie Boys J 703 1-25 "a rights centred approach"

141 2 Cooke P 676 In 34 Casey J 692 In 11-14
Hardie Boys 699 In 15-22 M'Kay J 717 In 46-55

142 3 Cooke P 676 In 34 Casey J 690 In 56 - 691 In 10
Hardie Boys J 699 In 28-37
M'Kay J 718 In 4-12

143 4 Cooke P 677 In 26-35 Casey J 692 In l-37
Hardie Boys J 699 In 37 and following

At 699 In 50 he quotes from Valasquez Rodriguez

"It is a principle of international law, which jurisprudence has considered "even a general principle of law", that every violation of an

Crown Immunity does not apply to the Public Law Remedy

5 Section 3 of the New Zealand Act . .."otherwise specially provides" within the meaning of s5(k) of the Acts Interpretation Act 1924...[and] applies to acts done by the Courts.[144]

[Section 5(k) of the Acts Interpretation Act 1924 provides that "No . . .Act shall in any manner affect the rights of [Her Majesty..] . ..unless it is stated therein that [Her Majesty] shall be bound thereby].

F LAW COMMISSION REPORT 37: CROWN LIABILITY AND JUDICIAL LIABILITY AND JUDICIAL IMMUNITY A RESPONSE TO BAIGENT'S CASE AND HARVEY V DERRICK

The Law Commission report on Crown Liability was published in 1997 and clearly reflects the thinking of the Judiciary through the Commission's President Justice Baragwanath, who decided *Cooper.* The Law Commission provides the Judiciary with the opportunity to influence the formation of new legislation. The report (inter alia) recommends:

1 No legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act held to be available in *Baigent's* case.[145]

2 Parliament should also not intervene to codify the principles, which would best be developed by the Judiciary.[146]

3 Under Section 3(a) of the Bill of Rights the Crown should be liable for all breaches of the Executive eg Government Departments.[147]

4 Under Section 3(b) the Crown should be liable for the acts of persons performing "public functions" to the extent that it was a party to the relevant conduct.[148]

5 There should be a systematic review of existing legislation conferring immunity on Crown Agencies not enjoyed by citizens. These immunities should be kept to the minimum.[149]

6 The present immunity from suit of High Court Judges should be extended to District Court Judges.[150]

The Law Commission Report suggests that the Judiciary recognise that the new Bill of Rights action (not a tort) may develop as a useful judicial check on the power of the Executive if Parliament does not intervene.

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international obligation which results in harm creates a duty to make adequate reparation [by] compensation."
M'Kay J 718 In 36

144 5 Cooke P 676 In 38-42 Casey J 691 In 56
Hardie Boys 701 In 28-40
M'Kay J 718 In 40-50

145 Law Commission Report 37 "Crown Liability and Judicial Immunity A response to Baigent's case and Harvey v Derrick"at at 2 para 4

146 Law Commission Report 37 at 25 line 4 para 4

147 Law Commission Report 37 at 2

148 Law Commission Report 37 para 4 at 2

149 Law Commission Report 37 para 4 at 2

150 Law Commission Report 37 para 4 at 2

VII STATUTORY PROVISION IN NEW ZEALAND FOR LAND: THE PUBLIC WORKS ACT 1981

The law of compensation for takings of land in New Zealand has been settled for many years. The English Rules caselaw from the House of Lords and Privy Council has shaped the Public Works Act 1981 and its daily administration.

The pattern of statutory provision in England falling into three periods, described by Lord Dunedin in *De Keyser*[151] was also true for New Zealand.

Lord Dunedin described a second period with a series of statutes of a local character authorising the taking of lands and assessment of compensation for particular works. In New Zealand that period ended in 1876 on the passing of the Public Works Act. The Schedule to the Public Works Act of 1876 lists 3 pages of specific legislation repealed.

The third period in England began with the (UK) Land Clauses Consolidated Act 1845 and successive legislation not directed to the acquisition of particular lands. Similarly general provision commenced in New Zealand with the Public Works Act 1876.

The practical work of valuation for Public Works purposes is typically completed by Valuers familiar only with the small text "Land Compensation" by Squire L Speedy and the two Casebooks published by the New Zealand Valuers Institute. (M'Veagh and Babe Land Valuation Case Book and Land Valuation Cases 1965-l 992).

Issues not resolved by negotiation can be referred to the Land Valuation Court, a division of the District Court. There are further rights of appeal to the Administrative Division of the High Court.

The Government has been reluctant to extend the settled regime of the Land Valuation Tribunal and the English Rules to property, which is not land.[152] In terms of the constitution all takings should however be equally compensated, irrespective of their nature. It appears that the Government considers that the English Rules are too generous to the citizen.[153] The only logical distinction between land and other forms of property is that the Landowner has the sole occupation to the exclusion of all others (as well as use rights) and so is in a stronger tactical position

151 Attorney General v De Keyser's Royal Hotel [1920] AC 508 Lord Dunedin 524 lines 20-34 discussed above VB 19.

152 Access to the Land Valuation Tribunal was reluctantly conceded to the statutory lessess under the Maori Reserved Lands Act 1997.

It has never been proposed for the Schedule 4 Fishers losing 20% of their fishing rights.

It is only available under the Resource Management Act 1991 under s197 (heritage orders) and s237H by s124 of the Resource Management Amendment Act 1993 (esplanade strips).

It was proposed by officials, but rejected for S162A of the Biosecurity Act 1997 introducing compensation.

153 Whangarei District Council v FP Snow AP 3/96 HC Cartwright J. The District Council and Valuer General argued whether compensation of 50% x $10,800 land value paid to Mr Snow a subdividing Farmer compelled to lose an esplanade strip along a river was excessive, after first paying Mr Snow. Mr Snow of course did not appear in Court. In his absence the Court declared that he should only have been paid 33%

than the State. At a theoretical level moreover land rights are reserved fundamental rights to which Parliamentary supremacy is subject.[154]

154 Janet M'Lean in Property as Power and Resistance Chap 1 of Property and the Constitution Hart Pub 1999 discusses the Roman law distinction between Imperium public government and Dominium the power of ownership. Possession of land inevitably creates elements of imperium in the landowner.

VIII STATUTORY PROVISION IN NEW ZEALANR FURTHER EXAMPLES

Lord Dunedin in De Keyser [155] stated that there was a "universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708." The examples given below however demonstrate that:

1 Where there is no political pressure statutory provision invariably cuts back or excludes the compensation that would be payable at common law. In this respect many of the compensation provisions are functionally similar to Manufacturers' warranties, which belie their names and are intended to remove rights available under Consumer Protection legislation.
2 Official advice is rarely based on the legitimacy of property rights (inherent in the individual) and never on the Magna Cat-ta based common law duty to compensate. The Bill of Rights 1990 is never mentioned. Policy is driven by fiscal expediency.
3 Some policy advice on pragmatic grounds accepts however that compensation is an inevitable expectation and encourages useful cooperation by individuals. The amendment to the Biosecurity Act 1997 is a good example of this.

A STATUTORY LESSEES UNDER THE MAORI RESERVED LAND ACT

The National lead Administration proposed by statute to remove the right of perpetual renewal and reduce the review term of the statutory leases from 21 years to 7 years. The lessees represented by Sir Geoffrey Palmer argued for compensation on the basis of Blackstone, Crown Law opinion on fishing permits MAF 042/143, Section 21 of the New Zealand Bill of Rights Act, international law and legitimate expectation.[156]

A tractor convoy travelled to Wellington. In the face of that pressure and a pending by election the Maori Reserved Land Amendment Act 1997 as passed provided compensation to the lessees and solatium payments to both Lessors and Lessees "as if the Act had not been enacted."[157] Compensation for loss to the market value of the lessee's interest could be decided by the Land Valuation Tribunal.

155 Attorney General v De Keyser's Royal Hotel Limited [1920] AC 508 Lord Dunedin 524 lines 20-34
156 Submission to the Parliamentary Select Committee
157 A Guide to the Maori Reserved Land Amendment Act 1997 Pub Te Puni Kokiri 13

B FISHERIES ACT

Sections 28 OF to 28 00 of the Fisheries Act provide a compensation regime to accommodate the Treaty of Waitangi Fisheries Settlement Act 1992 requiring 20% of new fish quota to automatically pass to the Maori. Government assurances were given to Fishers at the time of the "Sealord deal" that they would not be prejudiced.

The Bill before Parliament proposes to grant quota property rights to 80% of the Schedule 4 (non quota) species in exchange for their present right under fishing permits to catch 100% of these species. No compensation is proposed.

22 representative fishers have now filed High Court proceedings through Chapman Tripp.[158] Interestingly Sealord Products Ltd and Moana Fisheries Ltd, both Maori companies are among the plaintiffs. Claim is made on the basis of:

1 Assurances (para 26) given to the Industry at the time, affirmed by subsequent actions (para 32) and relied upon by the Industry (para 35).

2 A Crown fiduciary obligation (para 36) "in settling, and in implementing the settlement of, claims brought by Maori as a consequence of breaches by the Crown of the Treaty of Waitangi".

- not to mislead or deceive third parties
- to act honourably and in good faith
- to act in a manner consistent with the principles and spirit of the Treaty of Waitangi when dealing with the rights and interests of third parties potentially affected by a proposed settlement, one such principle being that "it is out of keeping with the spirit of the Treaty of Waitangi that the resolution of one injustice should be seen to create another".

3 The "compulsor[y] acquisition proposal", is contrary to assurances, in breach of fiduciary obligation and contrary to section 21 of the New Zealand Bill of Rights 1990.

Declarations are sought that

- in the absence of express legislation to the contrary, the Crown has an obligation to act in a manner consistent with the assurances
- fiduciary obligation
- the Crown's compulsory acquisition proposal would amount to an unreasonable seizure of the plaintiff's property contrary to Section 21 of the New Zealand Bill of Rights Act 1990.

158 A copy of the proceedings is annexed to the submission of 6 8 99 of Barrister Mr Tim Castle to the Primary Production Select Committee.

C TIMBER

In 1990 the Customs Regulations were changed to prohibit the export of native timber. Logging native timber was made uneconomic. Although no right to compensation was conceded, limited ex gratia adjustment assistance was paid to Forest Owners and Contractors, who could show evidence of contractual commitments. The total paid of $30 million has preserved 1.3 million hectares of privately owned native forest from logging.[159] A relatively small amount of "compensation" has proved to be an effective policy tool. In 1993 the Forest Amendment Act outlawed the unsustainable logging of native forest.[160]

D RESOURCE MANAGEMENT ACT

Failure to provide statutory compensation in the Resource Management Act has destroyed the credibility of the Act and with it Landowner support for many of its purposes.[161] The proposed reforms do not address the structural imbalance, caused by the lack of a compensation provision. Section 32 cost benefit analysis does not work as intended.'[162] Instead the National Administration has directed DOC to withdraw from all environmental advocacy except where the DOC estate (e.g. a National Park) is directly involved.[163]

Compensation a dirty word for some in the environmental movement is now being repackaged as "economic incentives". Guy Salmon writing in Maruia Pacific:[164]

> Rural demands for compensation have arisen, ironically, because of the Government's own fiscal meanness about incentives for nature conservation. For many years, Maruia has been pressing for financial incentives to encourage landowners to implement voluntary protection and management of native forest.

Federated Farmers have asked that the present heritage provisions Sections 187-198 of the Resource Management Act be used to protect on farm amenity values. These require Councils to acquire heritage sites if they are to be

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159 Mr Mike Jebson Ministry of Forestry

160 Adjustment assistance is also to be paid under the Forest amendment Bill 1999 (clause 26) to the owners of "South Island Landless Natives" land (SILNA) following their successful High Court action CP140/97 9/6/99 to challenge the export ban under the Customs Regulations affecting them. Wild J declared the Regulations to be repugnant to the SILNA exemption in S67A Forests Act 1949.

161 Federated Farmers eg Federation letter of 30 June 1998 to the Minister for the Environment objecting to the need for the "organisation to have to commit a minimum of $700,000 of staff costs each year to help protect farmers from the excesses of the district and regional planning processes."

162 Analysis of submissions on Proposals for Amendment to the Resource Management Act for the Minister for the Environment March 1999 Mfe

See discussion in Think Piece Owen M'Shane 30-40 and critiques by R Nixon 7 Ken Tremaine 5-7 Guy Salmon 6th section unnumbered urging economic incentives.

Report of the Minister for the Environments Reference Group Sept 1998 Appendix Philip Donnelly "Rationale for Introducing Compensation for Land Use Controls" l-l 9.

163 A senior DOC Planning Officer to the writer.

164 Maruia Pacific Nov 98 at 5 col 2 lines 3-11, 35-41 and 12-l 3 See also on economic incentives Maruia Pacific June 1998 8 col 2 In 29-33 and 9 col 3 In 6

preserved.[165] The principle of equality before the law dictates that Rural Landowners should receive equal treatment to Urban Landowners regulated in the use of heritage or historic sites.[166]

165 Federated Farmers'
-Submission to the Ministry for the Environment on Land Use Control under the Resource Management Act 30 June 1998
-Submission to Ministry for the Environment on Proposals for Amendment to the Resource Management Act 1991 29 Jan 1999
-Federated Farmers Presentation to the Government Agriculture Caucus 27 May 1999.

166 Universal Declaration of Human Rights Arts 2 and 21(2) to which New Zealand is a State Signatory

IX CONCLUSIONS

A CONCLUSIONS ON THE LAW

There is in New Zealand a Common Law duty for the Crown to compensate, whenever it takes an individual or property right. At the margin this has in recent times been expressed as the fiduciary duty of the Crown to the subject and the concomitant duty to consider all legitimate expectations. This duty is part of New Zealand's written Constitution expressed in the Magna Carta and Bill of Rights legislation.

The duty to compensate extends to regulatory takings. The dictum of Holmes J in *Pennsylvania Coal Co v Mahon* [167] 47 that "if regulation goes too far it will be recognised as a taking" has been approved by the House of Lords in Belfast *Corporation v OD Cars* [168] and the Privy Council?'

The test for excess regulation has been described by the Privy Council as "constructive deprivation" when by "lack of any provision for compensation [statutory restrictions] do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected". [170] The philosophy can be traced to John Locke. On many occasions a remedy in judicial review might also be available since such regulation may lack a public purpose. Regulation under the Resource Management Act as delegated legislation is especially subject to this caselaw.

It is inevitable that Section 21 of the New Zealand Bill of Rights 1990 "unreasonable search and seizure" will be recognised as the constitutional authority for compensation, since "unreasonableness" will be interpreted in the light of Common Law conventions for compensation. The cause of action is attractive, because statutory immunity does not apply. It is uncertain whether the Court of Appeal will extend its ruling in *Attorney Genera/ v Simpson* that immunity clauses will not protect the Crown to unequivocal directions from Parliament not to compensate.

Taking in terms of Magna Carta 1297 includes all acquisition, tort or exercise of statutory powers harming the rights or property of the subject. It can include indirect effect without gain to the Crown. [171]

The concept of property is broad. Historically in terms of Magna Carta 1215 or 1297 it includes "Liberties" and "free customs". Property as a bundle of compensatable rights includes:

(1) use rights
(2) exclusion rights

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167 Pennsylvania Coal Co v Mahon (1922) 260 US 393,417.
168 Belfast Corporation v OD Cars [I 960] AC 490 519 In1 9
169 Sucriere de Bel Ombre v Mauritius Government [1995] 3 LRC 507 AT 502 h-i.
170 Sucriere de Bel Ombre v Mauritius Government [1995] 3 LRC 494 505 a. See also Newcrest 133 30-35.
171 See 27 and n 79 Manitoba Fisheries v The Queen [1979] 1 SCR 101, 1 IO-I 18 Taking includes depriving without gain to the Crown. Compensation may be paid for partial takings.

(3) rights of free disposition [172] The High Court of Australia recently in *Yanner (1999)* [173] drew upon the work of Professor Gray and described property as "a legal relationship with a thing" and "legally endorsed concentration of power over things and resources".

B RECOMMENDATIONS FOR PARLIAMENTARY REFORM

Property rights legally protected by the Bill of Rights 1689 and philosophically justified by John Locke are the primary constitutional defence of the liberties delivered by the Westminster Model of democracy. Recent statutory reform such as the Resource Management Act and the Fisheries Act has been heavily influenced by public choice economic theory. The promised efficiency gains from rationally assessing costs and benefits will not be fully realised until Community attitudes toward property rights change.[174] It is Parliament's responsibility to achieve that by ensuring that full compensation is readily obtained whenever takings occur.
The cost of compensation now payable is a fraction of the transaction cost in excessive regulation.

Community attitudes toward property rights are more important than specific changes in the law. The following proposals for changes to statute will assist that:

(1) The NZ Bill of Rights should be amended to clearly protect property rights so that all uncompensated takings and Crown immunities will in future have to be reported to Parliament by the Attorney General in terms of S7 of the NZ Bill of Rights.

(2) Parliamentary Standing Orders should be amended to require all legislation to be scrutinised for takings of private property interests and unjustified immunities. The onus should always be on the Crown to clearly and publicly justify a failure to compensate. That would bring Executive practice in Parliament into line with the existing conventions and New Zealand's international obligations.

(3) The Resource Management Act should be amended to expressly provide for compensation. Compensation should be paid, when resource consent is refused and there are no significant effects on others. The test of "significant effects" would accord with existing caselaw on notification in terms of Section 94 of the Act.

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172 Takings RA Epstein n78 74-92 discusses this generally. The potentiality" in the English Rules.
Inland Revenue Commissioners v Clay [I 914] 3KB 466.
172 Yanner v Eaton n46 para 17 line 2 para 18 line 4
See also matrimonial cases National Provincial Bank v Ainsworth [1965] 1175 per Lord Wilberforce at 1247 and
Z v Z [1997] 2 NZLR 258 CA full bench where property included non assignable interests, but not future earning capacity.
ACTV v Commonwealth of Australia (1992) 108 ALR 577
Ex parte Menaling Station Pty Ltd (1982) CLR 327
"transferrability is not an essential element of the concept." right of free disposition is described as "Adjoining owner potentiality" in the English Rules.
Inland Revenue Commissioners v Clay [1914] 3KB 466.
173 Yanner v Eaton n46 para 17 line 2 para 18 line 4
See also matrimonial cases National Provincial Bank v Ainsworth [1965] 1175 per Lord Wilberforce at 1247 and
Z v Z [1997] 2 NZLR 258 CA full bench where property included non assignable interests, but not future earning capacity.
ACTV v Commonwealth of Australia (1992) 108 ALR 577
Ex parte Menaling Station Pty Ltd (1982) CLR 327
"transferrability is not an essential element of the concept."
174 A Regulatory Responsibility Act and Regulatory Impact Statements [CO (98)5 12 May 1998] recently proposed by the Hon Mr J Luxton Minister of Commerce would be unnecessary if all takings were promptly recognised and compensated.

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"The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protections of the rights to which they are entitled. " - A.G. Nova Scotia and A.G. Canada, 1951 S.C.R. 31 at p. 34.

PREFACE

One of the most important aspects of Canada's Constitution (in distinction to its Constitution Acts) is its pronouncement (within the English Bill of Rights, 1689) "That the levying of money for or to the use of the crown, by pretense of prerogative, without grant of parliament, for longer, or in other manner than the same is or shall be granted, is illegal". Bowles v. Bank of England [1913] 1 Ch. 57 affirmed that provision — as well as similar provisions within Magna Carta (1225), Statutum de Tallagio non Concedendo (1297) and Petition of Right (1628) — when Justice Parker stated: "By the statute 1 W. & M. , usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions".

A review of the events that surrounded passage of the GST legislation will show that there is no Act of Parliament requiring the payment of a Goods and Services Tax in Canada for the body which enacted the GST legislation, although in part composed of MPs sitting in the House of Commons, was not Parliament. - D.S.D.

INTRODUCTION

In Reference re Bill C-62, the Alberta Government asked a number of questions seeking a pronouncement on the constitutionality of the GST. The Attorney General of Ontario joined the process as an intervenor and attempted to question the validity of the rules by which the Mulroney Government brought the GST into being, but, in the process of doing so, the courts informed them that they had failed to abide by the rules governing judicial references. Thus, as the rules governing Ontario's conduct were the same rules governing the conduct of the courts, Ontario's failure to abide by the rules precluded the courts from addressing Ontario's concerns. The courts felt that the constraints of rules were paramount.

Rules define the laws that give rise to lawful societies. Without established rules there can be no law.

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When reading the words of the Alberta Court of Appeal in this reference two things are perfectly clear: that the Court was asking the Attorney General of Ontario to correct the procedural flaws inherent to their participation in the case (a task as simple as initiating another reference to the Courts so that they would not be constrined by the parameters of the questions asked by Alberta) and to forego the incorrect assertion that a breach of procedural constraints by Parliament makes subsequent enactments unconstitutional, ultra virus (the Court even provided the correct diction for the argument by asserting that a breach of procedure simply results in a nullity). - D.S.D.

ONE PAGE TEASER - IF YOU DON'T LIKE THE GST - ORDER THIS MATERIAL NOW

ON THE SUBJECT OF THE REFERENCE RE BILL C-62 AND WITH REGARDS TO STANDING ORDERS 57 AND 78(3) OF THE HOUSE OF COMMONS.

THE FACTS (as set out in the Attorney General of Ontario's Factum to the Supreme Court of Canada).

- 11. The GST Act was introduced into the House of Commons as Bill C-62 on January 24, 1990.
- 12. Despite the complex nature of the Bill, which contains several hundred sections, debate on it was kept to a minimum and it was steered through the House of Commons in rapid stages. Those stages were as follows:
- 13. First reading took place on 24 January, 1990, without debate.
- 14. Second reading, debate in principle, took place from 29 to 31 January and 5 to 7 February. On 7 February, after only 7 ½ hours of actual debate, the government invoked closure to end debate and send the Bill to Committee.
- 15. The Standing Committee on Finance reviewed the Bill during February and March 19990. After about 30 hours of consideration, the Chair of the Committee took unprecedented steps to conclude the Committee's work and send the Bill back to the Commons.
- 16. The Committee reported to the House of Commons on March 30. The government then unilaterally imposed, through time allocation rules, a limit of one day each for the report and third reading stages. Pursuant to this schedule, Bill C-62 was debated on April 9 and 10, then passed by the government majority in the House.
- 17. During this process Members of the Opposition challenged the government's conduct in using closure and time allocation to cut off debate at every stage of the Bill's passage. Their points of order and privilege were dismissed by the Speaker.
- 18. In his challenge to the use of closure on second reading, Mr. Nelson Riis argued that the closure rule violated s. 18 of the Constitution Act, 1867. On this point, the Speaker ruled: "That may or may not be, but the authorities for many, many years back make it quite clear that I cannot rule on a legal or a constitutional issue".
- 19. The GST Act was passed by the House of Commons as Bill C-62 on 10 April, 1990.

(3)

Article 1

NZ/AUST/CAN TAX ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

IS THIS THE END OF INCOME TAX?

New Zealand and Australia are facing what could escalate into their biggest constitutional crisis ever – an income tax revolt by ordinary taxpayers with the potential to bring down the current system of government.

Already two thousand New Zealanders and a similar number of Australians are understood to have joined the movement, and organisers are expecting thousands more as news of their activities spreads. Ian Wishart continues his special investigation.

The New Zealand tax inspector shook his head and blinked at the American grinning at him across the table. "What do you mean 'it's chickens!'?," he sputtered. "What the hell have chickens got to do with it?"

The American just smiled. "Well, you show me in the New Zealand Income Tax Act where it says that chickens are not a legal form of income. And seeing as my client didn't earn any chickens last year, he doesn't owe you any tax."

It's an amusing diversion, and tax litigator Eddie Kahn (pron: Cain) has used it on a number of occasions with tax officials around the world. "It's the same in the US," he explains later, "because they don't legally define income there either. What's really funny about it is the agent will look at you in a state of shock, saying 'no, it's not chickens', and I say 'well how do you know it's not chickens: you didn't define it.' You see, when they say 'no it's not', then they are obligated to show you what it actually is. And they can't, because it isn't defined."

It's an approach the NZ and Australian tax offices have never seen before: a drag-em-out-knock-em-down fistfight with revenue authorities forcing them to prove that ordinary citizens are covered by existing tax legislation.

While it might sound Alice in Wonderland or Don Quixote in nature, the process appears to be working. For Kahn, his Australasian research began two years ago when he was asked by a group of New Zealanders to help them research the tax laws. The group ensconced themselves in the comfortable surrounds of the Auckland University Law Library, and it wasn't long before Kahn had his first taste of Kiwi bureaucracy.

"This librarian came over to us and asked if we were students. I said no and to

Id her why we were there, and she said we'd have to leave. 'Is this a publicly-funded research facility?' I asked her, and she said it was. 'Well, we're the public. These people with me pay your wages, and we're not leaving'."

What's interesting is that while the American was standing up for them, many of the New Zealanders accompanying him had already begun packing up, automatically following the bureaucrat's orders.

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Naturally, the librarian went away to her supervisor who duly heard the same story, only this time Kahn added: “If you can show me your legal authority to exclude members of the public from this publicly-funded library, then we’ll leave.” The library couldn’t, so the group spent several days there in the end.

What they were looking for was the “big bang” of income tax: when did it begin and what powers did the legislation give the government?

For the first few decades of European settlement in New Zealand, there was no income tax. Colonial governments survived, like other countries, on Customs duties on imports, as well as revenue from land sales to settlers.

But there was growing resentment among working classes to wealthy landowners coming in and buying up huge tracts of land for the equivalent of six dollars an acre, leaving smaller would-be farmers squabbling over the lower quality land that was left. What hurt the most was that while the land was cheap to buy, speculators had purchased such large quantities that they couldn’t afford to make the land productive, so the land went up for sale – but at prices that working people could not afford.

Sensing a political opportunity, former Governor George Grey stood for election as Premier in 1877 on a platform of introducing a land tax – not because the colonial government needed more money, but because he believed the land tax would encourage people holding the largest amounts of land to break up their properties and sell land to settlers at more reasonable prices.

“Large areas of land, held often by absentees, lay idle and impoverished for lack of capital,” reported scholars J B Condliffe and W Airey in A Short History Of New Zealand, first published in 1925.

Grey’s land tax was duly introduced on undeveloped land, but property-owners found ingenious ways of fooling the government and avoiding the tax. It wasn’t until “one man, one vote” was introduced that the ordinary workers were able to elect a government more capable of legislating against the wealthy landowners.

In 1891, Premier John Ballance passed New Zealand’s first ever income tax, incorporated in the new Land and Income Tax of that year, and directed primarily at land values and corporate activity. The next revision of that Act appears to have been in 1908, and Eddie Kahn interprets the 1908 Act as implying the tax is “voluntary”.

“Most Gracious Sovereign,” the Act begins, “we, your most dutiful and loyal subjects, the House of Representatives in New Zealand in Parliament, assembled, towards raising the necessary supplies to defray Your Majesty’s public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned, and do therefore most humbly beseech Your Majesty that it may be enacted.”

So at this point in time, 1908, New Zealand obviously has the rudiments of a land and income tax – freely and voluntarily gifted to King Edward VII. The rate of tax was one penny in the pound for land value, and sixpence in the pound for income – about three cents in the dollar.

By getting the citizens to voluntarily agree to provide three cents in every dollar to pay for government services, the government gained a foot in the door. Naturally,

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having been given an inch they took a mile and taxes in New Zealand rose as high as 98 cents in the dollar under the Muldoon government's penal rates in years to follow.

Is it possible that New Zealanders can legally opt out of the tax system using the same freedoms available to American citizens? Kahn and New Zealander Andrew Carstensen believe they can. To that end, Carstensen wrote a letter under the Official Information Act to the Inland Revenue Department in early 1998, asking them to define what 'income' is. The disturbing result was written proof that the IRD doesn't know exactly what income is, or isn't willing to say.

"There is no definition of 'income' in the current Income Tax Act," the IRD's national policy manager, Margaret Cotton, wrote back.

The reason appears to be that successive governments since 1908 have been anxious to cast their tax net as widely as possible, opting for deliberate ambiguity in defining key terms in the tax legislation.

"When you fill out your tax return, it tells you to list your income," explains Carstensen. "Well what's income? They won't tell you what income is, they let you decide what you think income is and when you've made that decision yourself, you dob yourself in, basically."

By filing a tax return, he says, you are voluntarily telling the IRD you accept their jurisdiction over you. There is no longer a technical question as to whether you are a taxpayer. All that remains to be determined is how much. You have entered a contract with the Government.

Every Act of Parliament carries an "interpretation" section that spells out the meanings of key words and terms in the Act. In the Revenue Acts, most definitions are prefaced by the word "means". However, certain crucial words are not given an exact meaning. Take the definition for "person":

"Person: Includes [our emphasis] a company and a local or public authority; and also includes an unincorporated body of persons."

At no point does the Income Tax Act specify that the term 'Person" includes a "natural person", which is legal terminology for an actual living and breathing person. Nor does the Act even define "natural person" although it does define "natural gas". This is despite the fact that the phrase "natural person" is specifically referred to in the Income Tax Act under the definition "foreign entity".

It would have been extremely easy for the drafters of New Zealand's tax law to simply say:

"Person: means a natural person, and also includes a company etc."

Why wasn't it done that way? Why doesn't the definition of "person" in the Income Tax Act specifically include "natural persons"? And does this mean that ordinary members of the public can legally stop paying tax on the grounds that the legislation is unclear and therefore void?

Curiously, and probably not coincidentally, nor do the tax codes of Canada or Australia use the word "means" to define a person: both countries use "includes". Neither do those countries define a "person" as specifically including a natural person.

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An innocent oversight by one legal hack in the Crown Law Office in Wellington while drafting legislation could be explained as a simple mistake, but when three developed nations all have the same definitions for person, with no mention of human beings, one could start to wonder. Surely, argue tax researchers, if those governments had the power to compel all humans to pay tax on their income – in the publicly understood sense of the word – then they would have plainly outlined this in the statutes.

Indeed, it is a requirement in New Zealand at least that where a Government moves to alter an existing common law right, that such alterations must explicitly be contained in legislation. If the Government intended to remove a natural person's right to contract out their labour for a sum of money, surely it would be explicitly spelt out in the Income Tax Act.

Contrast the vague definition of "person" with the very precise definition of "natural gas" in the New Zealand Income Tax Act:

"Natural gas: means the gaseous mixtures of petroleum, in a stabilised form, which remain after the separation of crude oil or condensate from the wellstream in the production facilities and which have not been subjected to further processing."

Nice to know the IRD can be so exact about what natural gas is, and yet fail to include natural persons in the definition of who is liable for tax. Nor does the Acts Interpretation Act – which tells courts how to interpret legislation – shed any light on the person issue.

Just as the US Internal Revenue Service managed to fool a hundred million Americans into paying tax by playing legal word games with them, Kahn argues the NZ IRD's inability to define "income" or "person" is a deliberate act aimed at undermining New Zealanders' common law rights not to pay tax on ordinary employment earnings by heavying people into the tax system under colour of law.

"By using the word 'includes' rather than the word 'means', they don't define it at all. When you press them on the issue – does this include anything else other than what was specifically listed? – They can't show you that there's anything else.

"What we've got is that the IRD has been no more successful in answering our questions than the IRS has, which are: What tax am I liable for? What form am I required to file it on? They can't answer the questions! You know, in America I have over two thousand clients at ARLS, and they've never been able to answer the question one time for any of the clients.

"What it really boils down to, if you go look at the original Act, 1908, it's not even a tax, it's a contribution by companies to pay the public expenses of His Majesty. That's all it was for. It was freely and voluntarily given. That's not a tax, that's a contribution."

On the battleground of legal technicalities, one of Kahn's weapons of choice against the NZ IRD is what he claims is the department's failure to officially "gazette" the requirement for taxpayers to file tax returns.

"If they're required to file a form at all, it must be published in the Gazette, there must be a volume date and page number that this public obligation exists and the public has to have public notice of it. It's never been published, so obviously there's no requirement.

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"If somebody doesn't file a form, they'll get a letter saying 'why didn't you file?', and the answer is 'I didn't know there was an obligation to file. If there is it must be published in the Gazette. Please give me the volume date and page number and I'll be happy to do it'."

In an OIA request, Carstensen asked the IRD to provide a list of all their tax forms, "and the IR3 and IR5 [tax return] files were not on that list".

But it's the practical, not the theory that will determine whether Kahn and his American legal advisors can cause the IRD lasting damage. They're already claiming victory with a New Zealand taxpayer, Jeanette Harper of Tauranga.

On April 6, 1998, the IRD wrote to Harper telling her she owed the New Zealand Government $286.13 in unpaid tax. She wrote back, under the Privacy Act 1993, demanding to know "What particular tax am I, Jeanette Elizabeth Harper, a human being, liable for, and what particular form am I required to file for that tax?

"Please send to the requester copies of documents that evidence the liability, if any, as a human being, and also the evidence that links this liability to the particular form required to be filled out. I am a law abiding citizen and as such only require the specific facts as requested. I specifically request no opinions be given."

The IRD's Glenn Harris, in the Tauranga office, replied:

"As a person who is a New Zealand resident you are liable to Income Tax on all your income, in this instance wages, interest and rent. 'Person' is defined in Section OB1 of the Income Tax Act. I am aware that it is your understanding this definition includes just 'a company and a local or public authority; and also includes an unincorporated body of persons...' but with respect, the definition also includes the word 'Person'. Person has the natural and ordinary meaning of the word."

The bombardment on the IRD continued, however.

"It is a cardinal rule of statutory interpretation that a word cannot be used to define itself," wrote Harper on advice. "That is to say, you cannot use the term 'person' to define the word 'person'. I'm sorry, but with respect, this makes no sense.

"This is also in direct contrast to the written response from Margaret E. Cotton, National Advisor, Operations Policy, on behalf of the Commissioner of Inland Revenue."

Jeanette Harper was roasting the IRD on its own spit, using a legal opinion she'd obtained from the IRD head office under the Official Information Act. In it, Cotton repeated the definition of 'person' contained in the Act, then added: "There is no other legislative reference which alters that definition."

Asked in the same OIA request whether the term "human being" was included in the definition of "person" contained in the Act, Cotton replied:

"Inland Revenue does not hold any information which evidences that the term 'Human Being' is included in the definition of the term 'person' in the current Income Tax Act."

"I am a human being," Harper wrote to the IRD investigator. "However, for the specific purposes of the Income Tax Act 1994, I do not fall within the definition of the term 'person'."

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There were some further shots fired, but that's the essence of it. Ultimately, Harper did not file a tax return this year, and instead wrote in to say she did not believe she had earned any 'income' as defined by the Act, and therefore was not required to file a tax return.

The IRD accepted her letter and refunded a $50 late filing penalty charge.

Harper's status as New Zealand's highest profile non-taxpayer (except perhaps for people associated with Fay Richwhite & Co) is no accident. Her son is accountant Andrew Carstensen, the head of New Zealand Rights Litigators – an offshoot of Eddie Kahn's American Rights Litigators.

"Basically the issue is quite simple, people have to get into the mindset: they are either natural persons born with human rights, or they are inferior serfs still subject to the Crown's orders and taxes."

After more than 60 letters and OIA or Privacy Act requests of the IRD, Carstensen believes he has evidence the income tax in New Zealand is voluntary, and he believes the IRD is writhing under the pressure.

"What I've found over time is that if you ask them a question they'll give you a straight answer, somewhere in the letter, and then they'll spend the rest of the letter saying what they've just said is not right."

Case in point? Take this letter from the IRD's Margaret Cotton to Carstensen under the OIA.

"In [your request] you have asked for copies of the delegation authority order of notice for 'human beings' to keep Income Tax records.

"There is no legislative reference in the Inland Revenue Acts which specifically require 'human beings' to keep income tax records. The legislation requires taxpayers and persons to keep income tax records.

"As a taxpayer is a person and persons are in common parlance human beings, human beings are required to keep income tax records."

So in one paragraph there is no requirement for human beings to keep tax records, but in the next the IRD says there is.

New Zealand Rights Litigators then fired off a series of OIA requests to the IRD that make fascinating reading. In the first, they asked if it was compulsory for an individual to have a tax file number.

On 20 September 1999, the IRD's David Belchamber wrote back on behalf of the Commissioner:

"There is no provision in either that [the Income Tax] Act or the Tax Administration Act 1994 that makes it compulsory for taxpayers to have a tax file number."

You heard it right: there is no law requiring you to have an IRD number. Carstensen, Eddie Kahn and others believe this provides a major clue as to the voluntary nature of income tax. Kahn argues that if the Government had a lawful right to tax natural persons, it would have made tax numbers compulsory. Instead, you are given a choice: you can comply, or not.

But the Government, like the US Government, has a card up its sleeve. Knowing that it has complete control over companies, the IRD has told companies that where a worker chooses to exercise their legal right not to provide a tax file number, the company is required by law to deduct a flat rate tax of 45% from whatever that worker receives. The tax is imposed on the company's wage expenditure, not on the employee.

Those who "voluntarily" accept the IRD number will face tax deductions as low as 19.5% as a reward.

A similar "voluntary" carrot and stick approach was adopted by the Australian Government ten years ago in its ill-fated bid to introduce a "voluntary" national ID card. Australians were told the card was not compulsory for natural persons, but that businesses or banks who traded with a cardless person would face fines of up to $20,000.

With the controversial new NZ driver's licences, applicants are asked to sign consent forms allowing the Government to use their information. If the licences are compulsory, critics argue, why does the Government need your permission? In the US and Canada, researchers have discovered that drivers licences – like income tax – are voluntary for natural persons, but that if you register a vehicle or apply for a licence you are effectively entering a contract with the government giving them the power from that moment on to punish you for breaching the rules of the contract.

But back to the IRD. In a second letter, the tax department said that although it was not compulsory for anyone to have an IRD number, failure to provide one meant the person concerned would not be permitted to file a tax return or claim back any overpayment of tax.

So here are two important points: you are not required by law to have a tax number. If you do not provide one, you cannot file a tax return either. Now comes the triple whammy:

"You have asked if you can give up an IRD number and close your account if you wish," wrote the IRD's David Belchamber.

"I can advise that IRD numbers are normally issued for life. However, the number can be closed off if it is no longer required."

In other words, even if you have an IRD number you can return it and close your account with the tax department. Does this sound like the essence of a compulsory tax system, or do the rules only apply to those who choose to become taxpayers?

There is a big difference, however, between the United States and New Zealand, and the growing tax revolt in New Zealand, Australia and Canada is raising public awareness of that difference to a potentially dangerous level. What happens, argues Carstensen, when it dawns on New Zealanders that legally they really are still feudal serfs who must pay a tithe to the Crown? What happens when they realise that Americans have managed to gain a whole raft of rights that Kiwis and Aussies do not have?

"If you look at the Book of Genesis, chapter 47," says Carstensen, "you see one of history's first recorded instances of income tax. It tells how the people sold their souls into slavery for the Egyptian Pharaoh. The Pharaoh at the time said 'OK then, I

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will take one fifth of everything you earn from now onwards, now that you are my slaves, and you can have four fifths to provide food, clothing and shelter'.

"We're actually worse off in New Zealand now, where the Government is taking nearly 40% of what we the people are earning, than the Hebrew slaves in Egypt were. In fact, we're twice as badly off."

At the turn of the century in Britain, according to contemporary encyclopaedia reports, the average income tax across all families was six shillings a week, but a person of moderate to small means paid "little in taxes, and, indeed, he can if he chooses escape direct taxation altogether." The rich were "very heavily taxed indeed – often to the extent of a third of his income."

US tax litigator Lynne Meredith calls the new drive to redefine Government taxation powers "a new, financial, War of Independence", which may not be far from the truth.

Constitutional experts in New Zealand claim the Crown has absolute control in this country because there is no written constitution guaranteeing the individual sovereignty of NZ citizens.

"The Government doesn't want it that way, because adopting a Constitution as the fundamental law of the nation could remove a Government's right to introduce reforms or policy initiatives that were in conflict with the Constitution," remarked one constitutional lawyer privately.

"At the moment, the Government has all the power. If these tax protesters are successful, all that will happen is the Government will pass new statutory law to negate it. New Zealanders only have the rights that the Crown allows them to have."

Andrew Carstensen doesn't think the Government would have the courage to publicly slap its citizens in the face and risk a domestic political crisis.

"My feeling is that they won't change it. If they do, then they're admitting that previously a natural person did not have to pay tax and they could be faced with refund claims. Kiwis have a choice. They have the right to be free or the right to be enslaved. But people genuinely don't realise they have a choice."

And critics argue that it really is a choice. Canadian tax researcher Eldon Warman, heading a movement called "De-Tax Canada", says people often ask why the Government won't simply close the loophole by changing the law. He doesn't believe they can.

"If they could have written the [Canadian] Income Tax Act so as to include natural persons, it would never have been written that way in the beginning or rewritten that way in subsequent amendments. The Government wouldn't have had to resort to manipulating contract law and to implementing other elaborate means to play upon the legalese ignorance of the Canadian people.

"But, further, the basis of this detax system is the fact that the Government cannot make statutes, rules or regulations requiring a natural person to either make, or not to make, a contract. It would be an interference in the property right."

But there is another issue: what happens if so many New Zealanders refuse to pay tax that it causes a Government crisis anyway? With public opinion of the IRD at an

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all time low, and many New Zealanders angry at the department's apparent inability to collect hundreds of millions of dollars from tax dodging big business, some officials are admitting privately there is a real risk that the tax system and the Government could be crippled by large numbers of people opting to use cheap tax haven and trust solutions to keep their income and assets out of reach, the same way the big boys do.

Eddie Kahn says it's a wake-up call.

"I think that New Zealanders need to take control of their Government, and theway you do that is by telling your MPs: 'no'.

"You have to get into this mentality: 'I pay your salary. You're there for my benefit, not yours. If you're not benefiting me, then I don't want you there'.

"You are really in control, as long as you exercise control. If you don't exercise it the politicians will assume it for themselves."

Carstensen expects the New Zealand Government to wheel in friendly constitutional lawyers to try to play down or rubbish the existence of a problem – "but then, you'd expect them to do that, wouldn't you. To do anything else would be admitting they have no legal right to govern, and no right to levy taxes. The Government, through the news media, has to try and convince the public that there is no crisis and no power vacuum."

A decade ago, the citizens of California brought their Government to its knees in a tax strike. Ultimately, New Zealanders, Australians and Canadians are yet to test their powers, but the knowledge that the US Internal Revenue Service is allowing Americans to opt out of the tax system is likely to put incredible pressure on the former British colonies and the constitutional void appearing to surround them.

Article supplied by Ian Wishart,
Investigate, the international news magazine

Article 2

US TAX ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

A CONSTITUTIONAL TIMEBOMB:

WHY PAYING TAX MAY NOT BE COMPULSORY

Imagine the public uprising there would be if New Zealanders woke up tomorrow to learn that all the personal income taxes paid by them this century were actually a voluntary "gift" to the Crown – that there is not, and has never been, a legal requirement for them to pay income tax.

Well that's exactly the news American citizens are coming to terms with and, as Ian Wishart reports, New Zealand and Australia may be next in a constitutional legal fight that threatens to bring the Republican debate in NZ two decades closer.

A couple of Jehovah's Witnesses knocked on the door of an American woman recently, and told her they had good news: "There are only two certainties in life," one told her, "death and taxes. And what's fantastic is that if you follow our beliefs, you won't die."

"That's great!" the woman quipped, "because if you follow my beliefs you won't have to pay taxes either."

It could be apocryphal, but Lynne Meredith swears it's true as she sips on a tropical cocktail beside an azure hotel swimming pool on a dazzling Fiji afternoon. Whether she managed to convert Jehovah's helpers isn't clear, but her impact on the US tax system cannot be ignored. A veteran tax activist and litigator, Meredith claims to have helped tens of thousands of Americans "opt out" of the US tax system. Legally. These are people who no longer pay taxes – ever – and who hold letters from the US Internal Revenue Service confirming their employers are to deduct nothing from their wages ever again.

"I turned the tables and sent the IRS very aggressive letters and threatened to sue them for fraud and extortion under the colour of law," John Hoffman wrote to Meredith. "Eight weeks later I received a refund cheque for 100% of the funds they were illegally withholding.

"Based upon my success for 1992, I submitted a request for a refund of all previously paid taxes for 1993, 1994, 1995 and 1996. Sure enough, back came FULL refunds *plus interest!"*

And Hoffman's letter is just one of many.

How can it be that citizens of the most powerful country on earth can simply tell the feared IRS: "I no longer wish to pay taxes. Leave me alone."?

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To New Zealanders who've recently witnessed the damning inquiry into a local IRD that has forced parents and their children to commit suicide over tax problems, the concept of citizens telling their government to "get lost" seems foreign.

"I equate the IRS to the Wizard of Oz," she says. "He's out there making these loud and scary noises and frightening everyone, and they find he's this peeny little guy behind this wall."

If the sartorial, bearded elegance of law partners from New Zealand megafirm Russell McVeagh is what you expect from a tax warrior, then the brash and brassy Lynne Meredith is clearly a surprise. Nonetheless, she has arguably saved Americans more in taxes, legally, than New Zealand lawfirms have ever saved any of their clients by any means.

Even more significantly, Meredith is muscling in on New Zealand's tax advisory work, claiming more than two thousand New Zealanders have joined her client list, and some haven't paid tax now since 1993.

Her journey began, naturally enough, with a tax problem.

"I have been an entrepreneur for over 22 years," she writes at the end of her first book, *Vultures in Eagle's Clothing.* "My quest for knowledge about the IRS began out of fear. I was a single mother of three children and when April 15th came every year, regardless of what the IRS said I owed them there was nothing left in the bank account.

"I found it strange that although my business was allowed to deduct for the expenses of its existence, I as an individual could not. There was no deduction for the rent, the food, the electricity, the phone bill, the child care, the Pampers.

"The bottom line was, on April 15th, faced with the decision of feeding my kids or paying the income tax, I chose to provide for the needs of my family."

In short, Meredith stopped filing tax returns, and stopped paying withholding tax. It should have been a one way ticket to prosecution. Instead, it was a learning curve.

CITIZENS' RIGHTS

The first step to understanding the very serious legal issues that allow Americans (and possibly New Zealanders) to lawfully refuse to pay income tax, comes in the first instance from a study of the US Constitution.

New Zealand, of course, doesn't have a written constitution and New Zealand and Australian citizens are still "subjects" of the Crown. The legal implications of that will shortly become clear.

Anxious to discover what her own legal position would be when the Revenue finally came calling, Lynne Meredith consulted legal advisors and the statute books. What they came up with in the US Constitution – the founding document of the American states – was a discovery that the "United States of America" is not the same as the "united States of America" referred to in the Declaration of Independence and the Constitution.

Following the War of Independence, England's King George III ceded full sovereignty to the American people, in the first instance. It was the American people, exercising

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their sovereignty, who then adopted the Constitution laying down the rules by which any future Government must work.

“We have a unique political system there where the people are the sovereign, and the government is the servant, and because the Constitution is the supreme law of the land, any law contrary to it is null and void,” Meredith explains.

To ensure that the federal government remained a servant of the people, US lawmakers granted the official, United States Government (note the capital ‘U’), only limited powers. The US Government would have exclusive sovereignty only over *territories* that were not states of the Union in their own right. This includes, for example, Guam, Puerto Rico, American Samoa and Washington DC, but the federal government has no jurisdictional power over the individual states like California or Nebraska.

An interesting illustration of this in action is that New Zealand has bilateral treaties directly with some individual US states like California, rather than with the US Government as a whole. Under New Zealand’s family law codes, California is treated as a sovereign country on an equal footing with Australia. Facts like these, however, are not known to most New Zealanders or even Americans.

What the original states of the Union anticipated was that they would be the masters of the federal government: the latter would do their bidding in foreign policy and securing new territories and lands for settlers.

In regard to legislative control over the states, the federal government was empowered to create legislation, but only if it complied with the US Constitution.

And that’s where it becomes tricky.

In order to preserve the people’s newly-won freedoms, the Constitution guaranteed citizens certain inalienable rights, including the right to enjoy the “fruits of one’s labour” unhindered by Government interference. The battle for independence had, after all, been fought over the issue of tax.

Accordingly, any future Government could only tax citizens “by apportionment”, which meant every person paid the same amount regardless of income.

Apportionment of the income tax burden was what the drafters of the Constitution saw as the only fair method of distribution, and is the opposite of graduated income tax.

“Apportionment means that if my tax liability is $500 a year,” says Meredith, “you each pay $500 a year as well because the idea is that each person is entitled to receive the same services from the government, so why should one person pay more?”

Rather than try to implement apportioned taxes, virtually all US revenue collection up until the middle of this century came from “privilege” taxes on alcohol and tobacco.

Another such taxable “privilege” was doing business through a corporate entity like a limited liability company. Such companies owed their existence to Government legislation, and so could be taxed. The only other form of taxation allowed for in the

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Constitution was for the purpose of "raising armies", and even then the tax was limited to a maximum period of two years.

But the power to impose income tax was extremely limited, and the Supreme Court has previously ruled that income tax is totally voluntary.

In McCulloch v the State of Maryland, the court held "all subjects over which the sovereign power of the state extends [ie, corporations or other statutory entities] are objects of taxation but those over which it does not extend are, upon *the soundest principle,* exempt from taxation.

"This proposition may almost be pronounced as self-evident. The sovereignty of a state extends to everything which exists by its own authority or exists by its permission."

As natural-born humans do not exist because of the authority or permission of the state, they are not subject to income taxation.

Within those *territories* it controls, however, the federal US Government has complete power to impose whatever laws or taxes it chooses: the US Supreme Court has ruled that people living in those territories do not have the constitutional protections enjoyed by citizens of the other 50 states.

"The laws of Congress in respect to those matters do not extend into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government," ruled the US Supreme Court in Caha v US.

Ballentine's Law Dictionary sums up the settled law on the issue, defining "territory" as: "A geographical region over which a nation exercises sovereignty, but whose inhabitants do not enjoy political, social or legal parity with the inhabitants of other regions which are constitutional components of the nation. With respect to the United States, for example, Guam or the Virgin Islands as opposed to New York, California or Texas."

It may seem like word games, but Americans are cutting themselves free of the US tax system precisely because of what attorneys are describing as "word art". It all comes down to the legal definition of particular words used in statutes, as opposed to their popular public usage. While the Internal Revenue Code applies to all "United States citizens", the question arises: who is a US citizen?

Most people, especially the public and the news media, had not bothered themselves with legal niceties like that, and simply considered themselves as US citizens by virtue of living in a US state. That's why they've paid their taxes compliantly for the past five decades.

But in the legal stratosphere of the US Supreme Court, very technical battles had earlier been fought on these very definitions, What was the United States?, for example.

In 1901, during the Downes v Bidwell court case, Justice Harlan warned of the dangers of not giving constitutional protection to residents of the territories.

"The idea prevails with some...that we have in this country substantially two national governments; one to be maintained under the Constitution, with all of its

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restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to.

"I take leave to say that, if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

"It will be an evil day for American liberty if the theory of a Government outside the supreme law of the land finds lodgement in our constitutional jurisprudence. No higher duty rests on this court than to exert its full authority to prevent all violation of the principles of the Constitution."

In 1945, the Supreme Court issued what it said would be its last ever definition of the term "United States", in the court case Hooven and Allison Co v Evatt. Their analysis, summarised by writer George Bancroft, was "Our Union in its *foreign relations* presents itself with all its states and territories as one and indivisible, a garment without a seam; But *at home* we are separate sovereign states of the union. Within the limits of the states the government of the United States has no powers but those that have been delegated to it."

Why is this relevant to income tax? Because the IRS is a federal agency, and federal agencies have limited jurisdiction over the states of America.

US Government law enforcement officers, for example, can take criminal proceedings against citizens of the 50 states in only five areas: espionage, sabotage, interference with the mails, destruction of federal property or frauds on the federal government.

Income tax in the US was applied only briefly in the 150 years leading up to World War II, usually as a result of being struck down each time by the Supreme Court. In order to get around the problem, the US Congress passed the 16th Amendment to the Constitution to allow for graduated income tax, but the move failed. The Amendment ruled :

"The congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states."

However, the amendment did not contain any clause repealing the original Constitution clauses limiting the federal government's tax powers. In addition, US courts had already defined the word 'income" as meaning profits and gains, separated from capital. In numerous cases, they ruled that a worker's labour for money was his capital, and the taxable gain would come if he then took that money and invested it for a profit.

Significantly, the US Supreme Court has said of the 16th in Peck v Lowe:

"The 16th Amendment does not extend the power of taxation to new or excepted subjects."

And in Stanton v Baltic Mining Co:

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"The 16th Amendment conferred no new power of taxation but simply prohibited the income tax from being taken out of the category of indirect taxation to which it inherently belonged ."

Of course, the US Government *did* have the power to levy an income tax to pay for military action, provided such compulsory tax only lasted for two years. They introduced a nationwide income tax in 1942 to pay for the war effort, promoted in cinemas around the country in a Donald Duck cartoon featuring the Disney character paying income tax for the good of the nation, Although the tax was quietly repealed when its two years were up on May 29, 1944, nobody bothered to tell the public. After all, the war was still on and the D-Day invasion hadn't even begun. Uncle Sam needed dollars, and people in the habit of paying tax kept on paying and have done ever since. Only those who invoked their constitutional rights have managed to legally avoid it.

The power of the US Constitution over the IRS can be found in the IRS *Handbook For Special Agents,* which informs tax inspectors trying to seize a taxpayers books and records that the taxpayer "may decline to submit them for inspection on constitutional grounds". The legal basis for any American refusing to hand over documents to the IRS is the Fifth Amendment right not to self-incriminate.

As the US Supreme Court noted in the 1969 case US v Dickerson, "Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents...who would believe the ironic truth, that the cooperative taxpayer fares much worse. than the individual who relies upon his constitutional rights?"

In New Zealand and Australia, there is no constitutional right against self incrimination, only a common law one, and it appears to cover only personal testimony, not documentation. In fact, New Zealand's Serious Fraud Office Act goes a step further: it gives the SFO the power to compel witnesses to self-incriminate *and* produce documents for inspection.

At a constitutional level, however, Lynne Meredith's assault on the IRS was heating up. The Internal Revenue Code, and its implementing legislation, states in section 26 that income tax is imposed "on the income of every individual who is a citizen or resident of the United States."

That may sound like a simple, all encompassing definition, but it is not.

Meredith argued, successfully as it turned out, that the Supreme Court's legal definition of the United States meant "citizen or resident" could only apply to someone who lived in Washington DC or one of the territories that the federal government had jurisdiction over. The court's definition of citizen was "every person born or naturalised in the United States *and subject to its [the US Government's] jurisdiction.* "

Remember, the term "United States" has already previously been defined by the Supreme Court to refer to the federal government and its territories.

Federal government employees are also liable for income tax, because their employment as "public servants" is considered to be a taxable "privilege" under the Constitution.

But if income tax is mandatory only for people who are US Government "citizens" or employees, where do people living in the 50 states fit in? The US Internal Revenue

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Code describes them as “non-resident aliens” because they live in sovereign states outside of federal jurisdiction. The “aliens” are not liable for tax, says the IRS Code, unless they are doing business with the US Government or with an entity situated inside the territorial limits of US Government jurisdiction.

As further corroboration of the US tax duality, even New Zealand’s Income Tax Act 1994 notes the special position of the “United States of America, excluding its possessions and territories” – a subtle distinction few casual observers would have understood.

THE TRAP IS SET

It is easy to see how millions of American taxpayers became confused and voluntarily paid taxes they were not liable for. Faced with a law saying US citizens must pay tax, how many would deny being US citizens? How many would have the expert legal knowledge required to know the difference? And how many would describe themselves on an official government form as “a non-resident alien”, and then face fearful nights worrying if Immigration officials would try to arrest them?

The US Supreme Court noted the problem in US v Minker: “Because of what appears to be a lawful command on the surface, many citizens, because of respect for the law, are cunningly coerced into waiving their rights due to ignorance.”

It is what is known in legal terms as acting “in colour of law”, which means an act or request that appears to be lawful because of the status of the person making it, but which ‘is not. A legal game of “Simon Says”, if you like, where the public are the losers.

But why didn’t the US Government come clean and educate the public? Because it needed their tax money. It needed people to believe they were obligated to pay income tax.

How did the US Government get away with it? Because US courts have ruled “All persons are presumed to know the law. If any person acts under any unconstitutional statute, he does so at his own peril. He must take the consequences.”

“The presumption,” says Meredith, “is that a government agent always acts within the law.

“The United States Government legally creates legislation, which may be unconstitutional for the 50 states, under the authority and guise of legislating for the citizens and residents of the territories and possessions ‘belonging to’ the United States, over which the United States has exclusive authority.

“Such federal legislation is made applicable only to the citizens born and residing in territories, possessions, instrumentalities and enclaves under the exclusive jurisdiction of the United States.

“These ‘individuals’ are called ‘US citizens’ or ‘citizens of the United States, subject to its jurisdiction’ in such legislation. The average American, of course, believes he or she is such a citizen (because it was never disclosed to them that our Congress legislates for two different types of citizens).

“Because that American has respect for the law, he or she voluntarily consents to obey this legislation that is contrary to the Constitution.”

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Although people did not realise it, the tax codes were based on contract law. By inadvertently volunteering to join the tax system by applying for a number or accepting a deduction from their wages, Americans were legally deemed to have accepted the contract with the Government, complete with its penalty provisions if the terms of the contract – tax payment – were not met.

But if you thought that kind of government subterfuge was big enough on its own, Meredith and her researchers discovered even more when they examined the federal court system. Remember that the public are presumed to know the law, and that a person who voluntarily consents to something unconstitutional must wear the consequences. So what extra trick does the federal government have up its sleeve?

Meredith found out when she noticed the federal courts always have a US flag in the room, fringed with yellow braid around the edges. What could possibly be significant in that? In short: everything.

The US Government's 34 Opin Atty Gen, which lists legal opinions from the Attorney General's office, notes that "there is no statutory authority for the 'yellow fringe' around the flag. The use of such a fringe is prescribed in current **Army Regulations** No. 260-10. The yellow-fringed flag is, therefore, a military flag."

Curious, Meredith dug deeper – only to discover the federal court system is based in military law, under the aegis of **US Code Title 18 s7: Admiralty Jurisdiction is applicable to the following areas:**

"The High Seas; Any American ship; Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."

"It is an elementary rule of pleading," US courts have already ruled, "that a plea to the jurisdiction is...a tacit admission that the court has a right to judge in the case, and is a waiver to all exceptions to the jurisdiction."

In other words, if as a Californian resident you get taken to a federal court over an IRS tax bill, you are giving the court carte blanche to treat you as a 'US citizen' unless you challenge the court's jurisdiction to hear the case.

"If you've ever left a federal court feeling that you have been to a Court-Martial rather than a court of law, this is the reason," says Meredith. "Don't be deceived by the pretty yellow fringe, it is your warning that you have submitted yourself to the 'rule of the master' and are under the jurisdiction of that flag. If you enter a court room and enter a plea in the presence of a military flag, you have acquiesced (consented without protest) to federal military jurisdiction. It is your warning that you are leaving the majority of your fundamental rights, as protected by the Constitution, at the door."

A similar situation exists in Canada, where tax researchers have also discovered Admiralty Law is at the heart of Canadian federal courts, primarily because of its status as a former colonial outpost of Britain.

The majority of Lynne Meredith's client victories over the IRS have come in direct correspondence with the agency itself. A simple letter from the taxpayer, telling the IRS they are not a US citizen as defined by the Supreme Court, do not do business with the US Government and are not a federal employee, is usually sufficient to have all taxes refunded – even for previous years – which can result in six figure returns to ordinary Americans.

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The challenges to IRS income tax have become so widespread that the IRS now provides a standard letter to all its branches [see box] informing people they are no longer required to file tax returns or pay tax.

You'd think someone who's personally sold 150,000 Americans on the concept of no longer paying income tax would be on an IRS "most wanted" list, but she's only ever had one run-in with the US Internal Revenue Service, the result – she says – of a big mouth.

"For the first six years after I wrote the book, I hadn't heard anything from the IRS. And I made this statement at a seminar that I had never heard from them – not so much as a postcard – and then a week later 40 agents showed up at my door, illegally seized my books and my records and broke into my safe and took my gold and my silver and everything that I'd accumulated.

"However, within two days I challenged their position and I had all my property back again. That was a year and a half ago and I haven't heard a word from them again."

Not content to let sleeping vultures roost, Meredith has filed a $110 million dollar lawsuit against the IRS for wrongful search and seizure. As for the IRS, it has conceded on record that more than 35 *million* Americans are no longer paying income tax.

Is it simply the power of the Constitution, or does it spring from the English Common Law that is central to not only the US but also New Zealand and Australia's legal systems? That's the constitutional timebomb that's now ticking under the two Commonwealth governments, and it's a no-win situation for them for reasons that will become obvious.

Article supplied by Ian Wishart,
Investigate, the international news magazine

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Article 3

CONSTITUTION ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

Is New Zealand's Government and court system unlawful?

It could be the most fundamental New Zealand issue of the century: if a group of Australian lawyers and researchers is correct, the Treaty of Waitangi ceased to be valid on January 10, 1920, and the New Zealand Government does not, lawfully, exist. In an even bigger potential crisis – nor do the laws. As Ian Wishart reports, even New Zealand constitutional lawyers can't rule out the possibility they may be rig ht.

If it sounds like the Coalition Government's worst nightmare multiplied by a factor of ten, you'd be right. Every three years for more than a century, New Zealanders have gone to the polls to elect governments believing, for lack of any reason not to believe, that this was how democracy worked. You elect a government, they make your life hell, you vote them out again.

We were told, as a nation, that the Government's powers derived from our status as a constitutional monarchy. But now, important new legal research is threatening to turn our perception of who we are, as a nation, on its head.

The establishment view of constitutional law is that New Zealand, lacking a written constitution, is a country where the Government holds the ultimate power to make laws and regulations.

Just how entrenched that establishment view is, can be demonstrated in a current debate in New Zealand legal and judicial circles about the powers of the Courts to rein in bad Government. Lord Cooke of the Privy Council, formerly New Zealand's Chief Appeal Court judge, has suggested the Courts do have some power to control the Government. He argues that if the New Zealand Government re-introduced slavery, for example, that the Courts could strike it down.

Unfortunately for those who believe the judiciary is a check on Government power, Lord Cooke is a lone voice in New Zealand's legal community. Other judges and lawyers have indicated they have a constitutional duty to uphold legislation passed by the Government, however damaging that law might be.

Even so, there is evidence from Australia that the mainstream legal and judicial view may be totally wrong – not because the Courts have special powers to ignore legislation, but because New Zealand and Australia's governments are not lawfully constituted.

Leading academics and judges in Australia are lending their support to research showing that both countries failed to constitutionally validate their legal sovereignty when they became independent from Britain early this century.

If it sounds impossible that the laws of New Zealand and Australia are invalid, read on.

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The Australian Government has based its current lawmaking powers on the Australian Constitution Act of 1900. That Act was passed by the British Parliament while Australia was still a Dominion.

The important fact to remember is this: the Australian Constitution is a British law.

New Zealand was granted Dominion status in 1907.The title Dominion meant nothing significant, in British law and legislation the term was synonymous with colony. It wasn't until January 10, 1920, however that Australia became a sovereign nation in its own right when both Australia and New Zealand became foundation members of the League of Nations – the forerunner to the United Nations.

Membership of the League of Nations was restricted only to sovereign countries, and Article XX of the Covenant of the League of Nations required the extinguishment of any colonial laws applying to a member state pre-Sovereignty.

That meant the Constitution Acts in New Zealand and Australia passed prior to independence became legally void under international law. It was a condition of membership of the League of Nations and later the United Nations. But no new constitutions were ever forthcoming in either country.

It continues to be a founding principle of the United Nations charter that the laws of one state cannot be used in another unless ratified by a mutual treaty, so while the Australian Government has relied on a colonial act passed by the British in 1900, Britain has said otherwise, saying the Australian Constitution Act (UK) is null and void.

"No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," wrote British officials responding to an information request.

For decades, Australians have obeyed federal laws seemingly passed with full legal authority on a raft of issues from law and order to taxation. In all cases the Australian Government has claimed its powers from the 1900 Constitution Act.

That fundamental reliance took a knock however, when the United Nations' International Law Commission ruled that Australia could not rely on Section 61 of its Constitution to provide the power to enter into international treaties, because the Constitution was a British law, not an Australian one. Instead, said the UN, Australia needed to look to its membership of the League of Nations in 1920 as providing proof of its sovereignty.

An Australian group calling itself the Institute of Taxation Research has used that ruling and others to mount a serious challenge to the constitutional authority of the Australian Government, saying that if the Constitution Act did not give the Government power to sign international treaties because it was void, nor could it be used as the basis for domestic law.

In 1992, the Australian High Court held that:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.

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"In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government."

In other words, the Australian Constitution does not establish the sovereignty of Australians or their government.

That ruling has been enough for the Institute of Taxation Research to hit the Australian Tax Office right between the eyes, point blank. In what began as a Freedom of Information request to the ATO, the group pointed out:

"For the Constitution to make the transition in status to that of a 'supreme law' as mentioned by [Chief Justice] Mason, mere opinion is not enough.

"Some legally recognisable instrument is required such as a Memorandum of Transfer from the UK Government, or the record of a referendum in which the Australian people have given informed consent to the new arrangements, or some other form of document recognisable under international law.

"Since the AT0 is claiming this has occurred would their counsel, who as a practising barrister must know of this document and where it can be found, please produce it. In the presence of such documentary evidence I would be quite happy to acknowledge the continued existence of the constitution and the laws deriving from it."

Despite the request, the AT0 could not produce any documentation proving its lawful authority to levy tax on Australian citizens.

"Firstly it was asked to present us evidence of the documents setting up the ATO," explains ITR spokesman Ian Henke from the organisation's Melbourne headquarters. "We've finally got a document that says 'the documents do not exist' signed by Erin Holland, Deputy Commissioner, on behalf of the Commissioner."

That letter was sent on 27 October 1999.

"There are several issues here," says Henke. "We also searched the Commonwealth Gazette, and there was no evidence at all of the AT0 having been gazetted into existence. Finally in a court on the 20th of October, counsel for the AT0 finally admitted that it wasn't."

It is ITR, a group of lawyers, the occasional judge, business executives and researchers, that is making all the running on the issue, and it's an issue whose repercussions will be felt not just in Canberra, but Wellington and Ottawa too.

"The point is, under international law once you get a change in sovereignty then there is a break in legal continuity. The best example we can give you is Hong Kong. June 1997. On 30 June there was still British police, British law, British taxes, British Army, British Queen and so on. On the 1st of July, one minute past midnight, all of those things still existed – but they no longer had authority in Hong Kong."

In the United States, the transference of sovereignty from the King of England to the American people was also marked by a break in legal continuity – the War of Independence – followed by the establishment of the Constitution.

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The Australian Government, allegedly realising its difficult constitutional position, passed the Australia Act in 1986 to repeal a range of Imperial laws and shore up its status. New Zealand, in the same boat as Australia, did likewise with the Imperial Laws Application Act of 1988. However ITR argues that both Acts are also void, as it is impossible under international law and the UN Charter for one nation to pass legislation repealing the laws of another nation.

So could there really be a major constitutional crisis facing New Zealand? Or is it a technical "tilting at windmills" that will lead nowhere?

New Zealand's Constitution, like Australia's, arose from Westminster in 1852 to provide authority for the colonial administration to govern on Queen Victoria's behalf. New Zealand was accorded "Dominion" status in 1907 and was therefore still a British colony when the Land and Income Tax of 1908 was passed. Like Australia, NZ signed the League of Nations Covenant in 1920 and, like Australia and Canada, was given legal separation from Britain in 1931 with the Statute of Westminster. However, New Zealand chose not to ratify the 1931 Statute, falsely believing that it could still function as a British colony despite having signed the League of Nations Covenant.

This was despite this speech from British Prime Minister Lloyd George at the Imperial Conference of 1921:

"In recognition of their service and achievements during the war, the British Dominions have now been accepted fully into the comity of the nations of the whole world. They are signatories to the Treaty of Versailles and all other treaties of peace.

"They are members of the Assembly of the League of Nations, and their representatives have already attended meetings of the League. In other words, they have achieved full national status and they now stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth.

"If there are any means by which that status can be rendered even more clear to their own communities and to the world at large, we shall be glad to have them put fo rwa rd. "

The last paragraph should have sent clear signals to New Zealand that a change of constitutional status had taken place, whether the New Zealand government liked it or not. Colonies could not sign treaties, only sovereigns could.

But it wasn't until after World War II, and the formation of the United Nations in 1947, that New Zealand formally severed its colonial ties from Britain by ratifying the 1931 Statute of Westminster in a ceremony on November 25, 1947. Britain then drafted a new Constitution for New Zealand, again passed in Westminster, authorising its colony to change any provisions of the old 1852 colonial constitution.

Except, as the Australian Government has already learnt at great cost, no laws passed by Britain are valid in New Zealand or Australia, nor have they been since 1920.

The British confirmation to Australia that "No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," could equally be applied to the 1947 New Zealand Constitution Act passed in Britain for use in New Zealand.

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"What principle of international law lets the parliament of one sovereign country amend the law of another sovereign country? It doesn't," argues Henke.

One to disagree, however, is University of Canterbury constitutional expert Philip Joseph, who says the gentle devolution of power from Westminster to the three colonies of Canada, Australia and New Zealand was legally effective, even if not as definitive as more traditional transfers of sovereignty.

Joseph believes international law, as set out in treaties signed by Australia and New Zealand, does not define how a nation must deal with sovereignty issues at a domestic level.

"Unlike all the other more newly emerged Commonwealth countries which have become sovereign, these three old colonies acquired full powers of legal continuity through an ongoing gift of legal powers from Westminster to the countries concerned ."

This, of course, puts Joseph somewhat at odds with Henke and others who take a more fundamentalist view of constitutional law, and even Joseph admits that his views – shared by other mainstream constitutional lawyers in New Zealand – may be wrong at the end of the day. The reason for that is that it places an enormous amount of faith in Britain's legal ability to devolve power that way. Ninety-nine percent of countries have achieved independence either by physical revolution or by declaration of independence. The fact that only the three Dominions didn't, and are now facing major constitutional challenges, illustrates how the "gentle" way may in fact have failed miserably to deliver lawful government.

"It never properly tells us when we exactly became an independent sovereign nation, and insofar as we trace our powers through this continuity line back to Westminster yes, it is a problem," says Joseph.

The question of whether New Zealand's Government has been passing laws since 1920 without pure Constitutional authority to do so now lies open for legal debate and challenge, raising issues about the possible illegality of major policy decisions like state-asset sales or Waitangi Treaty settlements, not to mention the tax laws. The problem is even more volatile, as an unconstitutional parliamentary system would mean New Zealand has an unconstitutional court system, bringing more headaches over whether any New Zealand court has jurisdiction to hear such a case.

Some lawyers suggest the New Zealand Government had the power, during the transfer of sovereignty, to ratify by legislation the earlier colonial constitution as remaining in force.

"If you wanted to argue the case," says Victoria University constitutional law expert Tony Angelo, "you'd say that on that date, 1920, when the cut off comes, that there has been an implicit affirmation or re-affirmation of certain rules as the laws of this 'newly independent state'."

Ian Henke doesn't buy that argument for a second.

He points out that in the recent Australian referendum on becoming a republic, the voters were asked to vote on a specific question that would also have provided a break in legal continuity. And they were asked to ratify it because there was no legal authority for the government to simply rubber-stamp it.

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"We, the Australian people, commit ourselves to this constitution," was the referendum issue.

"By **61%** to 39%, the people of Australia said 'no'," says Henke. "so they can't just 'ratify' it. The people said no."

But doesn't a government have the lawful authority, while it is becoming independent, to simply ignore its population and say 'We know what's best because we're the Government'?

"Of course not, because 'lawful authority' in independence, comes from the people. It's the only place lawful authority can come from."

Canterbury University's Philip Joseph agrees, saying the Government cannot claim a constitutional mandate simply because it was voted in during an election.

"That's too mechanistic in a sense. You've actually got to go back to the fundamentals: what gives them the right to be there to begin with, to actually put policies to the people?"

At a point during the interview, Philip Joseph acknowledges that what is being challenged is not whether an individual statute is constitutional or not – which has been ruled on many times in the past – but a much bigger challenge: if the entire system has not been lawfully constituted, no national court can possibly adjudicate on it.

"I take your point on what you are saying," says Joseph, "and at this point you do step beyond the 'safe' parameters of constitutional analysis. You are actually asking now: what are the bases of a people, of a state, of a constitution."

The ramifications are huge. After all, you are asking lawyers who you may seek advice from to accept that their admission to the Bar and expensive law degree may not be valid.

Mainstream constitutional thought in this country has always been that sovereignty did not come in a definable moment as it has in other nations, but that the slow legal transition from Britain to New Zealand over a period of decades was lawful. To ask lawyers, judges and politicians to accept that the core of their constitutional beliefs and their power base is wrong in law is like asking the Titanic to stop on a dime. It is still a foreign concept in New Zealand legal thought that "the people" hold sovereignty in anything other than name only.

The New Zealand and Australian people, when independence from Britain came in 1920, were never asked by their Governments what laws they wished their new nations to operate under. Yet only the people can be sovereign, not the Government.

"Every country in the world has a constitution which is its law," stresses Henke. "The key about your constitution, and the key about our constitution, is that they are Acts of the British Westminster Parliament. They have never been passed by the domestic parliaments down here. They are not the will of these peoples."

In essence, he argues, the moves by Australia, New Zealand and Canada to simply continue their existing government systems without asking the citizens of the new nations for their views, were akin to building a skyscraper without getting a building permit or planning permission. Sovereignty, whether the governments realised it or

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not, had not passed from Britain to the former colonial governments, but instead had passed directly into the hands of the people by virtue of the international covenants that all three countries signed. Yet the governments acted as if they now had the power.

There are still lawyers who argue that international law has no domestic force. Again, the lawyers at ITR vehemently disagree.

“Certainly, in the early part of the century, sovereign states’ rights were the only thing that was important. There was no such thing as individual human rights,” says Henke.

The reason for this was simple. Until World War I, the world was essentially a collection of imperial powers – many of them controlled by monarchs with absolute, divine right of kings, power. Sovereignty rested with the monarchs, and was exercised via their governments. But the first world war brought that state of affairs to an end, destroying the Austro-Hungarian empire, Prussian aspirations and the Ottoman empire of Turkey that had once stretched from India to Spain.

From the wreckage of the war, new nations emerged where the people were suddenly free – sovereigns in their own right. The idea of absolute government sovereignty died in the trenches of the war, and this is the background that led to the League of Nations being formed – a group of free countries, each respecting the others’ sovereignty and their citizens rights to shake off colonial shackles.

“Now probably the major development of the last half of the 20th century has been the swap from the emphasis on sovereign states’ rights, to individual human rights. At this point in history, that’s the dominant shift that’s occurred,” opines Henke. "

In Europe – and this is the problem that the people in Australasia have – human rights, the 1966 Covenant, the 1947 Universal Declaration, and the European Covenant on Human Rights, are all by treaty part of European law and are binding on all of the parties to the European Union, including England. "

So human rights are now binding, under international law and international agreement, on the United Kingdom. Yet we have governments in Australia who claim they operate on the basis of British law, namely our Constitutions, but at the same time want to not be bound by the sections relating to human rights, "

In fact, the remarkable thing is that two countries [Aust & NZ] whose governments speak so loudly about other people’s abuse of human rights are very careful to avoid having human rights, of the international variety which are universal, being applied to their citizens.”

Henke says the bizarre situation has arisen where Australia has sworn to uphold the international declarations on human rights, but where Australian courts have ruled the declarations do not apply domestically.

New Zealand too, is guilty of the same action by virtue of Government policy. According to Philip Joseph, the New Zealand Government, like Australia, has not allowed our domestic law to automatically recognise international law even if NZ is a signatory to it. "

There is this dichotomy between the international legal order and our national legal order. It is still one of the foundation principles of our constitutional law that an

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international treaty which we sign and ratify – does not become part of our domestic legal system unless it is specifically incorporated by an Act of Parliament."

Which, as Henke argues, makes it a lot easier for two constitutionally unlawful governments to continue in power, without giving their subjects any rights of appeal under normal international legal channels. "

We actually had a judge say on the weekend, in discussion with a QC, that he didn't give a damn whether individuals were hurt – his job was to uphold 'the system' – the system as opposed to the law. "

Now that's the second judge we've heard say that. Justice Haine of the Australian High Court said this back in December of 1998. His job was to 'uphold the system'. I was in court when he uttered it."

But ITR admits there's another problem: if, as the evidence now strongly suggests, the Australian Constitution is invalid and the government has no powers to pass laws or enforce them, then the Australian courts also lack jurisdiction to hear such arguments.

By failing to consult their citizens – their new bosses – about what kind of system of government they wanted from 1920 onwards, and simply assuming that the laws that existed the day before were still legal, Henke's researchers believe the Governments acted illegally.

When ' America gained sovereign nation status, the new Constitution expressly provided that British common law precedent would continue to form the basis of American law, except where it was inconsistent with the principles of the Constitution. In this way, Americans ensured that they still had access to a code of laws.

But New Zealanders and Australians were not asked if they wanted British common law dating from the Magna Carta to continue as their legal basis. And without that permission, it is constitutionally possible that the New Zealand courts have no power to draw legal precedent from colonial times or earlier. In effect, there is a solid argument that virtually no laws exist in New Zealand, and that even the 1688 Bill of Rights protecting MPs from being sued may have no effect, as ITR points out. "

The only constitutional authority for British legal precedent is the authority on which the British courts rest: the legal authority of the British people as expressed through the British parliament. Now that lawful authority does not apply in Australia. It doesn't apply in New Zealand. "

So all of the court decisions made in relation to that, unless we choose voluntarily and explicitly to take it into our laws, is no more valid for us than laws used in France, the United States or China."

Again, looked at objectively, there is no constitutional reason that British colonial law should have any more force in New Zealand, than Ottoman law from last century should have any force in modern Turkey or Egypt.

The only way this legal crisis could be dealt with is for the New Zealand Government to seek a mandate from the voters to be granted temporary emergency powers whilst a new Constitution is drafted for public approval.

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Unlike Hong Kong, freedom downunder was not marked by a break in legal continuity while one side relinquished power and the other took command. Instead the former colonial governments did not understand the constitutional issues facing them.

As New Zealand constitutional law expert Tony Angelo, of Victoria University, points out, sovereignty up until that time had normally been transferred only at the point of a gun, usually after agitation. In contrast, British colonial citizens were loyal and not actively seeking independence. "

The British constitutional pattern, particularly for the old Commonwealth, was normally an evolutionary rather than revolutionary process, so the idea that there is a specific date before which you are 'dependent' and after which you are 'independent', as I understand it, was not part of British constitutional thinking. "

It is certainly a feature of some constitutional systems in continental Europe. In other words, if you wanted independence from France, everything would stop and start on a given date."

As you saw earlier, Britain had told Australia and New Zealand on many occasions that they were now fully independent, but it appears the colonials were not listening.

In Resolution 9 of the Imperial Conference of 1917, the colonies were told "there is a necessity to alter the constitutional arrangements of the empire. The conference feels it must put on record that such rearrangements will be on the basis of equality of nationhood."

Australia's Prime Minister Hughes tried, in 1921, to draft a new Constitution for Australia to reflect the new nationhood. But his plans were torpedoed by British-owned commercial interests lobbying politicians against it. Hughes was voted out soon afterward, and the idea of a new Australian Constitution never arose until the Republican Referendum last year.

New Zealand politicians were even more backward, failing to realise they were legally independent for 27 years, and failing to implement a Constitution right up to the present day. Although the Lange government did pass the 1986 Constitution Act, it was an Act of Parliament not a people's constitution. It is also strongly arguable that the Constitution Act is void because the Government had no sovereign power delegated to it by the New Zealand people.

Leading British constitutional law expert, Professor D P O'Connell, a recognised international expert, says transfers of sovereignty must be marked by a break in legal continuity. But the former Dominions, thinking stability was the most important factor, ignored the need to re-codify the laws and constitutional basis of the government. "

There is a law called the Law of State Succession," says Henke, "which is basically the mechanics by which those breaks are overcome to ensure that you don't end up with total chaos. But nothing was ever done. "

All they've done is ignored the existence of the break and run a PR job on the people telling them everything is fine, deliberately made sure they never told them the truth, and just let it run from there."

The issue is so grave, that even New Zealand constitutional law expert, Victoria University's Tony Angelo, doubts that New Zealand courts would have any powers to

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even hear legal argument if their jurisdiction was challenged. He cites the case of Simpson v Attorney General, a New Zealand case from the 1950s where Simpson alleged the Government was unconstitutional because he discovered the electoral writs had not been issued within the timeframe required for the election. "

The court said 'well, this is all very fine, but we're not in a position to re-establish a parliament. We can say yes, everything's invalid because the process wasn't followed as it should have been, but we're not in a position to re-start the machine'. "

The judges said 'actually, if what you say is true, none of us have been lawfully appointed and therefore we can't validly decide your case'." To get around the problem, the court opted for a novel solution, ruling that the word "must" in the Act could also mean "may". Whether the verdict was legally correct was irrelevant, as Philip Joseph points out. "

They managed to find a way around that, because it would have brought the system crashing down on its head, otherwise. That was a pragmatic response to a pressing constitutional challenge."

It is issues like this, Joseph concedes, that demonstrate how the sovereignty of the people of New Zealand has arguably been usurped by Parliament and by the Courts. Both institutions will attest to the constitutionality of the other if either faces a challenge, whilst the people must accept their verdicts or actions. "

That is an argument that you could put, but ultimately if you test it in the courts you won't succeed, I can tell you that, because our Court of Appeal would simply say 'we can trace our authorities back'."

As for the arguments by other New Zealand constitutional experts that the Government's power to make statute law overrides everything else, Henke's attitude is "prove it". "

The question is: where does it get its power from? A very simple question. Every Government has to get its power based on something. It can't be based on the divine right of kings, because that ended when they chopped Charles' head off. The current Royal Family will be sovereigns only if they obey the specific requirements of English statutory law. "

Now try and think about this one: the courts have tried to push the idea that it's like dual citizenship – you can have the Queen of New Zealand and the Queen of the United Kingdom. But if you have dual citizenship you can surrender either one without affecting the other. "

However in this case it's an a priori requirement that to be Queen of New Zealand, somebody must already be the Queen of the United Kingdom. They could not abdicate as Queen of the United Kingdom and remain Queen of New Zealand, so trying to separate the British authority component is an impossibility. You can't do it."

Which raises an even more dramatic possibility, according to Tony Angelo:

"May we still be a colony? I mean, the person of our sovereign is in the UK. Our final court of appeal is in the UK. We have not localised those two things. Internationally we would say we are independent and we have a Queen of New Zealand who is different from the Queen of England, and the Privy Council advises the Queen of New

Zealand not the Queen of England, but that is a total mystery – it is an act of faith to accept that."

"He could be absolutely right," says Henke. "That's one of the possibilities – that we are all still colonies of Britain and not independent. Now if that is so, then every one of the treaties we have signed, and in Australia's case that's about 4000, are null and void. And we're all British citizens again, except that British law says we're not, so we become stateless people.

"As you can see, it's a fascinating series of twists. And we did not believe when we started out that we would find anything like this."

The problem now facing citizens of New Zealand, Australia and Canada is how to regain constitutional control of their governments.

The only previous attempt at drafting anything close to a real constitution in New Zealand was Sir Geoffrey Palmer's Bill of Rights, which codified a number of basic rights but said "notwithstanding" those rights, nothing in the Bill could remove the Government's statutory powers.

Ian Henke says attempts to draw up lists of rights are futile.

"Look, the issue is very simple. Once you become a sovereign nation, all of the rights belong to the people. And they delegate to a parliament and a government so much of their rights as are necessary to keep government going. And that's all. Anything that is not so delegated remains the rights of the people.

"In other words, you don't have to draft a Bill of Rights to say what rights the people have got. All you have to draft, in any decent democracy, is a Constitution that says which of the rights, belonging to the people, the government is allowed to exercise."

So New Zealand's new Constitution could say, "We the people retain all rights, but we delegate the following powers to the Government..."

Allowing for the fact that future Governments could face some unforeseen problem and require extra power, Henke suggests that the Government should be forced to ask its citizens, via binding referenda, to vote on constitutional amendments if necessary. Such a constitution could even provide for the Government to be allowed to exercise emergency powers, for a maximum of six weeks, in order to deal with an unexpected crisis. The time limit allows enough time for the issue to be put to the vote. "

The Government doesn't need all our rights to do things. It only needs some. So the Government must have no rights over the freedom of individuals, and so you just never give it to them. Then, in order to enforce something, the Government has got to prove that what they're trying to enforce falls under the context of what they have been granted by the Constitution.

"It puts the onus of proof on the Government to prove that they are acting lawfully, rather than as it currently exists where individuals must prove that the Government is acting unlawfully."

Angelo believes the recent push by New Zealanders for more control over their governments is driven by a subconscious realisation that we've been flying blind, in a constitutional sense.

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"We have only one protection, and that is the semi-entrenched requirement of elections every three years. Intuitively, why people have consistently said 'we'll keep the term short' is, I think, because they've realised that it is their only hold on the system. Because logically you'd look for a four or five year term, but if you look at those referenda the populace consistently say 'no, don't change it'.

"The Ombudsman came out of that desire for greater control, Official Information came out of that, MMP came out of that, but the basic issue is not being addressed and that is because it is not part of the Anglo-Saxon constitutional tradition to do things this way.

"The fact is that now we're probably the only nation that thinks like that, Britain is now so caught up with the European Union that even if it hasn't set its own constitution it is falling within other people's structures. It seems we're closest to the 'pure model'.

"But until you can get some popular groundswell, no politician is going to run with it,"

In Australia, however, it's a different story. The Institute of Taxation Research is playing hardball with the Australian Government.

"An application for the appointment of an International Criminal Tribunal has been submitted to the UN, for Australia. We have forwarded copies to every single country who has a delegation to the UN. No country has returned the document to us.

"Copies went to the Secretary-General as well as the Security Council. A number of countries have offered active support in bringing the matter to a head. It is currently being worked through by the [UN] Human Rights Commission. It is currently being worked on by a number of the other countries who were signatories to the treaties that gave Australia and New Zealand their independence. They have indicated to us that as signatories to those treaties they are duty bound to push the matter before the International Court.

"We are, despite what the politicians here are saying, moving down the track to a declaration by the International Court that this current government is nothing but an illegal offshoot of the United Kingdom Government.

"Even the UK Government is saying now 'It's not us! It's them. We've given them the legislation saying they're independent. If these people are doing it it's them, they're doing it wrong. We're actually asking the International Court, amongst other things, to have the United Kingdom repeal the Constitution Act, just to strike it right out so there can be no pretence any longer that it still exists."

What Investigate expected when we began this research was to find strong and forceful legal opinion that this constitutional timebomb claim was wrong – that it was merely the ramblings of a few cranks. Instead, of all the leading New Zealand constitutional lawyers we spoke to, both on and off the record, one comment sums them up:

"It is very problematic, and there is no clear answer to these questions you are posing."

That such an admission carries with it the possibility that our courts are invalid, our government has no constitutional right to pass laws, that the Waitangi Treaty

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became null and void on 10 January 1920 when we signed the League of Nations Covenant, that the new drivers licence laws are invalid – pick any issue you like – all of this means New Zealand faces some very serious decisions in the very near future.

This question is likely to get a major airing when constitutional experts meet in Parliament's Legislative Chamber in April to debate whether New Zealand needs a written constitution, At this point, one might be tempted to say the question is not "whether", but "when".

Article supplied by Ian Wishart,
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When reading the words of the Alberta Court of Appeal in this reference two things are perfectly clear: that the Court was asking the Attorney General of Ontario to correct the procedural flaws inherent to their participation in the case (a task as simple as initiating another reference to the Courts so that they would not be constrined by the parameters of the questions asked by Alberta) and to forego the incorrect assertion that a breach of procedural constraints by Parliament makes subsequent enactments unconstitutional, ultra virus (the Court even provided the correct diction for the argument by asserting that a breach of procedure simply results in a nullity). - D.S.D.

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ON THE SUBJECT OF THE REFERENCE RE BILL C-62 AND WITH REGARDS TO STANDING ORDERS 57 AND 78(3) OF THE HOUSE OF COMMONS.

THE FACTS (as set out in the Attorney General of Ontario's Factum to the Supreme Court of Canada).

- 11. The GST Act was introduced into the House of Commons as Bill C-62 on January 24, 1990.
- 12. Despite the complex nature of the Bill, which contains several hundred sections, debate on it was kept to a minimum and it was steered through the House of Commons in rapid stages. Those stages were as follows:
- 13. First reading took place on 24 January, 1990, without debate.
- 14. Second reading, debate in principle, took place from 29 to 31 January and 5 to 7 February. On 7 February, after only 7 ½ hours of actual debate, the government invoked closure to end debate and send the Bill to Committee.
- 15. The Standing Committee on Finance reviewed the Bill during February and March 19990. After about 30 hours of consideration, the Chair of the Committee took unprecedented steps to conclude the Committee's work and send the Bill back to the Commons.
- 16. The Committee reported to the House of Commons on March 30. The government then unilaterally imposed, through time allocation rules, a limit of one day each for the report and third reading stages. Pursuant to this schedule, Bill C-62 was debated on April 9 and 10, then passed by the government majority in the House.
- 17. During this process Members of the Opposition challenged the government's conduct in using closure and time allocation to cut off debate at every stage of the Bill's passage. Their points of order and privilege were dismissed by the Speaker.
- 18. In his challenge to the use of closure on second reading, Mr. Nelson Riis argued that the closure rule violated s. 18 of the Constitution Act, 1867. On this point, the Speaker ruled: "That may or may not be, but the authorities for many, many years back make it quite clear that I cannot rule on a legal or a constitutional issue".
- 19. The GST Act was passed by the House of Commons as Bill C-62 on 10 April, 1990.