From: Ministerials
To: s 9(2)(a)
Subject: RE: OIA Request for 1999 Report by Philip Joseph
Date: Wednesday, 5 September 2018 5:56:00 PM
Attachments: Property rights and Environmental Regulation under the Resource Manageme....pdf

Kia ora s 9(2)( )

We are writing in response to your request under the Official Information Act (the Act) dated 7 August, for:

> *"Philip Joseph Property Rights and Environmental Regulation under the Resource Management Act 1991, commissioned by the Ministry for the Environment, December 1999."*

Please find attached the document you have requested.

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602. If you wish to discuss this decision with us, please feel free to contact me.

Nga mihi
Erin

Erin Cairns – Advisor, Executive Relations
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From: Ministerials
Sent: Tuesday, 4 September 2018 12:13 PM
To: s 9(2)(a)
Subject: RE: OIA Request for 1999 Report by Philip Joseph

Kia ora s 9(2)( )

Extension of Official Information Act Request: RMA Report

I refer to your request under the Official Information Act (the Act) dated 7 August, for:

> *"Philip Joseph Property Rights and Environmental Regulation under the Resource Management Act 1991, commissioned by the Ministry for the Environment, December 1999."*

We are required to advise you of our decision on your request no later than 20 working days after the day we received your request. In accordance with section 15A of the Act, we will be extending the deadline for response to **18 September.**

A response to your request cannot reasonably be made within the original time frame due to consultation requirements. We will endeavour to provide you with the information sooner if possible.

You have the right under section 28(3) of the OIA to seek an investigation and review by the Ombudsman of our decision to extend the time limit for responding to your request.

Nga mihi
Erin

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From: s 9(2)(a) [redacted]
Sent: Tuesday, 7 August 2018 11:40 AM
To: Ministerials <ministerials@mfe.govt.nz>
Subject: OIA Request for 1999 Report by Philip Joseph

Good Morning

I would like to make an Official Information Act request for a report commissioned by the Ministry.

I have been unable to locate a report: Philip Joseph *Property Rights and Environmental Regulation under the Resource Management Act 1991, c*ommissioned by the Ministry for the Environment, December 1999.

I am currently undertaking research for an LLB (Hons) dissertation on property rights and regulation, so access to this paper would be helpful.

Regards,

s 9(2)(a) [redacted]

Property rights and Environmental Regulation under the Resource Management Act 1991

Commissioned by the Ministry for the Environment, 1999.

Author: Philip Joseph, University of Canterbury

1 Introduction

1.1 The Ministry for the Environment has commissioned this report on the effect of environmental regulation on property rights. My instructions include reference to the Resource Management Act 1991 (the "RMA") and the United States 5th Amendment jurisprudence on the right to "just compensation" and the concept of a "regulatory taking" through planning or environmental controls.

1.2 The report is organised into two parts. Part I addresses the specific matters in my instructions reproduced in para 2.2. Part II is a summation of the relevant constitutional jurisprudence from the United States. Part II is descriptive only. The purpose was to encapsulate the United States position. Writers have variously characterised the United States law as a "muddle", "a bewildering mess" (J Krier, "The Takings-Puzzle" (1997) 38 *William and Mary Law Rev* 1143), and "contradictory" (K Ryan, "Should the RMA Include a Takings Regime?" (1998) 2 *New Zealand Journal of Environmental Law* 63). Where there is overlap between Parts I and II, cross citations are given to the relevant paragraph numbers.

1.3 The purpose of this report is: "[to] provide a solid legal foundation for any debate about the limits (if any) on the ability to impose restrictions under the Resource management Act 1991 on private property rights" (instructions, 14 October 1999).

2 Terms of Reference

2.1 By instructions dated 14 October 1999, the Ministry asks that I examine the legal principles that are involved when executive action inhibits or impedes rights of private property and to identify "common law restrictions (if any) in relation to the taking of private property and any common law rights to compensation". I am to critique two resource management articles which raise several of the property-rights issues examined in this report (see paras 3.1 – 3.8). These articles question the impact of environmental regulation under the RMA on the exchange and/or income rights of property-owners.

2.2 My instructions list the following matters for investigation:

(a) The Royal prerogative and right of eminent domain; and
(b) The Magna Carta and its relationship to matters in paragraph (a);
(c) The right of eminent domain and its relationship (if any) to the holding of land from the Crown (see Kirkpatrick's article p 278); and
(d) The relationship of the above to Parliament's powers to legislate and a discussion of the effects of statutes upon the common law and in particular the effects upon ability to take private property and the rights (if any) to compensation; and
(e) The Crown's powers to act under legislation and the relationship of those powers to powers to act under the Royal prerogatives; and

(f) The relationship of the above to the RMA (including section 85 and section 185) and delegated legislation under that Act.

2.3 I am asked also to outline the general principles developed by the American Courts under the "just compensation" clause of the 5th Amendment, and to identify the relevance of those principles to the debate over environmental regulation and property rights in New Zealand. I am to indicate those areas of the discussion that may require further investigation and report.

PART I

3 The Recent Literature

3.1 Two recent environmental law articles question the ability of the RMA to provide a sustainable resource management regime:

- David Kirkpatrick, "Property Rights – Do You Have Any?" (1997) 1 *New Zealand Journal of environmental Law* 267
- Kathleen Ryan, "Should the RMA Include a Takings Regime?" (1998) 2 *New Zealand Journal of Environmental Law* 63

3.2 Both writers question the efficacy of the RMA regime. They each accept the concept of sustainable resource management and the premise that property rights are bounded by legitimate environmental concerns. However, both writers argue that controlling the use of resources in land has an impact on the property rights in those resources, resulting in either depreciation in land value or reduction in income from the land. The bundle of rights that comprise the concept of private property ownership fall into two categories: "use" or "control" rights, and "exchange" or "income" rights. Kirkpatrick wrote (p 268): "[I]t is impossible to separate the control of the effects of the use of resources from the property rights in those resources." "[W]e cannot pretend," he wrote (p 297), "that use controls are separate from property rights." Ryan identified (p 89) the need to strike an "appropriate balance" between property rights and environmental values (see para 3.3). She observed (p 68) that the United States definition of property includes the right to "possess, use, and dispose of property" and that environmental controls on land use inevitably impact on rights of private property.

3.3 Ryan and Kirkpatrick argue for a changed environmental regulation regime. Their argument is essentially from an economic perspective. For Ryan (p 89), the "key question" was to what extent society should impose disproportionate burdens on particular individuals (landowners or users). A balance had to be struck between two countervailing interests: namely the importance of property rights in a society whose economic health is based on individual risk-taking, and the importance of environmental sustainability. The latter (environmental sustainability) invariably imposed limits on the former (rights of private property). Ryan wrote (p 89): "An appropriate balance between property rights and environmental values is essential to maintaining the life-supporting

capacity of the biosphere without diminishing individual property investment and risk-taking."

3.4 Ryan believed that the RMA failed to provide incentives for achieving the "appropriate balance". Environmental regulation under the RMA was a costless exercise. By discounting a compensatory takings regime (cf s 85(1) of the RMA), environmental regulators "over-consumed". Public choice theorists argue that, where any activity is costless to the beneficiary or person undertaking the activity, the beneficiary will always over-consume. A regulator (ie a beneficiary) that bears no cost will be able to appropriate the benefits while externalising the costs. Ryan wrote that environmental regulation aimed at preserving "amenity" values was particularly susceptible since amenity values are, by nature, difficult or impossible to quantify. This meant that the costs of land use controls might be quantified but not their benefits. Ryan believed (p 91) that district councils had "over-indulged" in land restrictions for preserving "subjective amenity values" and that this practice had resulted in inefficient land use and a diminution in land values.

3.5 Ryan discounted a district council's right of recourse to s 86(1) of the RMA, as providing any real incentive for councils to ensure that the benefits of regulation are greater than their costs. Under s 86 councils may acquire land by agreement under the Public Works Act 1981 in order to terminate or prevent non-complying or prohibited uses, or to facilitate uses in accordance with the objectives and policies of a district plan. For Ryan, this option provided little or no incentive to councils when the RMA allowed councils to "prevent the exercise of reasonable development by the 'free' option of zoning for land restrictions" (p 83). In her view, s 86 was "nugatory" (pp 87-88).

3.6 Ryan believed that compensatory takings legislation would improve the quality of environmental regulation. For her, a right to compensation for a regulatory taking would create "incentives for government to design rules more carefully and [would] maximise the environmental benefits of regulatory investments" (p 73 quoting E Elliott, "How Takings Legislation Could Improve Environmental Regulation" (1977) 38 *William and Mary Law Review* 1177, 1188 n 53). Ryan believed greater sensitivity to property rights achieves better regulation without sacrificing environmental goals. Introducing a significant threshold for compensatory takings would achieve two goals: it would define the levels of (respectively) tolerable and intolerable personal economic burden, and it would create an incentive for regulators to ensure that the benefits of regulation exceed the costs.

3.7 Kirkpatrick likewise identified an efficiency rationale for reforming the RMA. He pointed to the potential for inefficient or undesirable resource use where an environmental regime favours public rights over private rights (p 298). The "effects control" function of the RMA (control of the effects of the use of land) impacts on the exchange or income rights inherent in private property. He wrote (p 273): "My own view is that any practicable model of effects control must have regard to and be responsive to allocative or exchange issues, even to the extent of regulating the market for resources either to avoid, remedy, or mitigate certain effects or to redress any exchange imbalances ('market failure') on a policy basis." He observed (pp 280–281) that the control

functions and/or restrictions of the RMA or relevant plan do not grant the quid pro quo of compensation. There is only a limited right to seek relief where land is rendered incapable of reasonable use and an unfair and unreasonable burden is placed on the property-owner (see s 85 of the RMA). Under s 85, relief is limited to the deletion or modification of an offending provision of a district plan. The section does not allow the Environment Court to rewrite the plan so as to provide financial incentives and compensation to landowners whose development opportunities are restricted (see *Frieswijk v Auckland City Council*, Planning Tribunal, A 40/95, 26 April 1995, Judge Shepherd).

3.8 What did the two articles establish? Kirkpatrick's article did not articulate a clear case for reform of the RMA. He identified the potential for overly prescriptive regulation under the RMA but did not produce a clear blueprint or model for change. He ended with a heart-rending plea for altruistic rather than selfish responses to resource management issues. He coined the selfless principle "you should bear in mind the interests of others in the expectation that they will do the same", and expressed hope that this principle would guide reform of a "truly holistic resource management regime" (p 299).

3.9 Ryan's article argued more persuasively for a compensatory takings regime. Her article proposed a cost-benefit assessment of environmental regulation. On her analysis, one must first identify if the benefit of environmental regulation outweighs the cost. If it does, then let the cost lie where it should fall – with the public through publicly funded compensation.

3.10 The argument against externalising the cost of regulation is persuasive. Environmental regulation that involves no cost to councils and the public will inevitably produce inefficiencies. Not only property rights groups but also some lawyers practising environmental law believe that a liberal and generous reading of amenity values has permitted overly prescriptive district plans that erode economic values, for little or no observable benefit. The potential for externalising costs throws into relief the objectives of the RMA. During the third reading debate on the Bill (4 July 1991), the Minister for the Environment, Hon Simon Upton, observed that the previous law had encouraged intervention for a "host of environmental and socio-economic reasons". The Minister reflected that "[b]enefits will flow from there being fewer but more targeted interventions" and stressed the rights of property-owners against unwarranted interference. In the debates he said:

> "[P]eople can use their land for whatever purpose they like. The law should restrain the intentions of private land users only for clear reasons and through the use of tightly targeted controls that have minimum side effects . . . The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair."

4 Eminent Domain

4.1 Eminent domain (dominium eminens) denotes the right of a State or a sovereign power to the use of the property of its citizens for the common welfare. It gives to the State or sovereign power a right of compulsory acquisition of privately-held land, or interests in land, for public purposes. The right of compulsory acquisition is an historic one that is common to all developed legal systems. Today the right is almost entirely governed by statute and is made subject to statutory limitation or regulation. Most States couple the right of compulsory acquisition with the duty to pay just compensation, sometimes as a constitutional guarantee (see generally Frankel Paul, *Property Rights and Eminent Domain* (Transaction Books, New Brunswick (USA), 1987)).

4.2 A State or sovereign power may delegate the power of eminent domain to local units of government such as district or regional councils or municipal corporations. In the United States, it is established that the states may also delegate the power to private corporations (railway/ utilities companies etc) which provide public services or amenities (see Cunningham, Stoebuck and Whitman, *The Law of Property* (Hornbook Series, West Publishing Co, St Paul, Minnesota, 2nd ed, 1993), p 506). In New Zealand, the Public Works Act 1981 authorises either the Government or a local authority to acquire land for a Government work for a public purpose or for a local work for which the local authority has financial responsibility.

4.3 The concept of eminent domain has a developed jurisprudence in the United States owing to the constitutional guarantee of "just compensation" under the 5th Amendment. In the United States, the concept imports four elements: First, a "taking" must affect an interest in "property", such as the property-holder's fee simple or an easement, or a leaseholder's rights to possession and use. It may also include a nontrespassory taking that may result from a loss of riparian rights or air space rights, or where the Government or a local authority revokes a property-holder's access to an abutting road or street. Secondly, there must be a "taking", meaning an expropriation of the property-owner's interest. A "taking" may also include a "regulatory taking". Governments may "take" by regulation rather than by expropriation. Governmental regulations may destroy or severely diminish a property-owner's use and enjoyment of the land. Thirdly, a taking must be for a public purpose or for effecting a public use or work. Fourthly, eminent domain imports the right to just compensation. Many modern constitutions (including the United States Constitution) codify the right to compensation as a constitutional guarantee (see para 7.1). For discussion of these elements, see Cunningham, Stoebuck, and Whitman, op cit, pp 507-512.

4.4 Three rationales for the taking power have been advanced. Early Civil Law scholars argued that sovereign States had original and absolute ownership of property and that this estate (absolute dominium) was prior to any ownership interest acquired by citizens. A citizen's estate (or possession) derived from grants from the State and was held subject to an implied reservation that the State might resume its ownership and possession for the public good. A second rationale is that the taking power is a remnant of feudal tenures. This rationale holds eminent domain to be historically an aspect of the Royal prerogative that inhered in the concept of feudalism. A third rationale is that eminent domain is

simply an essential attribute of sovereign power. Government would be inconceivable without the power of the State to acquire privately-held land for public purposes. This rationale explicitly promotes public purposes over private interests.

5 Legal Basis and Scope of Eminent Domain

5.1 The New Zealand text writers on land law are diffident in their treatment of eminent domain. Hinde, McMorland and Sim, *Land Law* (Butterworths, Wellington, 1997), para 1.025 comment that: "In so far as powers of compulsory acquisition exist by virtue of the common law they depend upon the general prerogative rights of the Crown." They therefore conclude that these rights do not appear to be dependent upon or derived from the Crown's legal position under the doctrine of tenure. This suggests the third rationale identified in para 4.4 as the justification of the Crown's historical power of eminent domain.

5.2 The conclusion drawn by Hinde, McMorland and Sim may not withstand scrutiny since the doctrine of tenure is as much a matter of historical common law as the King's prerogative powers. Contrary to the opinion of those text writers, the better view is that the right of eminent domain was grounded in both the ancient prerogatives and the feudal tenures of the King. In Medieval times, neither the King's prerogatives nor his feudal tenures could be separated one from the other; each was inalienable to the concept of divine right. This view supports the second rationale identified in para 4.4, as the basis of eminent domain under the early Constitution. This rationale merges, in effect, the concept of sovereign power (the Royal prerogative) and the doctrine of tenure, and fits most closely the English constitutional experience. Since the radical or paramount ownership of all land remained with the King, the doctrine of tenure facilitated the prerogative power of eminent domain by which the King might extinguish a subject's estate and resume his or her land.

5.3 Today the power of the State to acquire privately-held land for public purposes is governed almost entirely by statute (see paras 6.1 - 6.6 for a residue of the eminent domain power). No exact period in English constitutional history can be identified as giving rise to the loss of the prerogative power of eminent domain. In exercising this power, English sovereigns had no obligation to pay compensation (save in limited circumstances regarding seizure of provisions for use of the Royal household) (see Dukeminier and Krier, *Property* (Aspen Law & Business, New York, 1998), p 1102). The prerogative power gradually fell into abeyance as the English Parliament interposed the legislative authority not only "to take" but also "to pay". The expectation of a statutory right to compensation for loss of the subject's property hardened into a binding rule of constitutional practice. By the early 17th century, Sir Edward Coke identified the legislative interference with private rights (inter alia of property) as testament of the authority of the English Parliament (Coke, *Fourth Institute*, p 36). By the mid-18th century, Blackstone spoke only of the legislative power to dispossess property-owners of their land. In 1765 he wrote (*Commentaries*, Vol 1, p 139, emphasis added): "All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, *and which nothing but the legislature can perform*."

5.4 In 1919, it was argued before the House of Lords that a Crown agency could invoke the Royal prerogative to confiscate the property of a subject, with or without ex gratia payment of compensation by the Crown (*Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744). Their Lordships were emphatic that the appellant's confiscation of the subject's property was carried out under the authority of an Act of Parliament that conferred full rights to compensation, and that no residue of prerogative power could authorise the agency's act. Lord Parmoor stated (p 760):

> "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 Carta, 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."

5.5 In *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744, Lord Parmoor held that the Crown's prerogative of eminent domain had fallen into desuetude (but cf paras 6.1 – 6.6). Once Parliament codified the power of eminent domain, the Crown could exercise only the statutory power, subject to the statutory obligation to make good the subject's loss. In *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, the House of Lords held that, where Parliament confers the same powers on the Crown as it possessed under its prerogative and subjects the exercise of those powers to some limitation or restriction, the Crown cannot fall back on its unregulated prerogative power and do that which statute has sought to regulate. "What use would there be in imposing limitations," asked Lord Dunedin (p 526), "if the Crown could at its pleasure disregard them and fall back on prerogative?". *Halsbury's Laws of England* (Butterworths, London, 4th ed, 1996), Vol 8(2), para 369 expressed the constitutional principle that:

> "Where, by statute, the Crown is empowered to do what it might previously have done by virtue of its prerogative it can no longer act under the prerogative, and must act under and subject to the conditions imposed by the statute; but the statute may expressly preserve the right to act under the prerogative."

5.6 In New Zealand, it is questionable whether the Crown exercised its prerogative power of eminent domain. From the outset of the Colony, the Crown was the sole source of title to all land (subject to the usufructuary rights of Maori under customary aboriginal title: see para 6.2) and the General Assembly early provided for the compulsory acquisition of land. Peter Salmond QC, *The Laws of New Zealand*, "Compulsory Acquisition and Compensation", para 1 wrote: "In New Zealand the right to take private land for public purposes has always been regarded as deriving from statute." In the United Kingdom the Lands Clauses Consolidation Act 1845 (UK) established the first general statutory code for the taking of private land and the procedure for determining compensation. The first such New Zealand statute was the Lands Clauses Consolidation Act 1863 which was modelled on its English counterpart. The law in New Zealand was consolidated under a succession of Public Works Acts of 1876, 1882, 1894, 1908, 1928 and 1981. The Public Works Act 1981 restricted the power of compulsory acquisition to cases where the public work involved was an "essential work" – a term defined by reference to numerous

specific activities. An amendment in 1987 replaced the term "essential work" with the term "public work", and amended the form of notice by changing the word "essential" to the words "reasonably necessary". The 1981 Act carries over full rights to compensation where land is taken for a public work. At least 10 other New Zealand statutes also confer powers of compulsory acquisition but these powers must be exercised in the manner provided by the Public Works Act 1981 (see Salmond, op cit, paras 7 and 22(n 4)).

5.7 The statutory power of eminent domain provides an overriding exception to the principle of indefeasibility under the land Transfer Act 1952. The pre-eminent statute is the Public Works Act 1981. The Local Government Act 1974 and the Historic Places Act 1993 are further statutes authorising compulsory acquisition. Kirkpatrick (op cit, pp 278-279) identified the ambit of eminent domain in New Zealand as being wholly statutory and expressed concern that the fringe of eminent domain was "increasingly unravelling" (p 278). Kirkpatrick was concerned to acknowledge the raft of statutes that authorise compulsory acquisition, rather than to attempt any exegesis of the law of eminent domain.

6 Residue of the Prerogative of Eminent Domain

6.1 *The Laws of New Zealand* observed that statutory powers of acquisition had superseded the Crown's historic prerogative of eminent domain (see para 5.6). However, a residue of the Crown's prerogative survives in two situations: first, in extinguishing customary aboriginal title at common law; and secondly, under emergency conditions in the defence of the realm.

6.2 Under the doctrine of eminent domain, the Crown by paramount force may acquire lesser interests in land than rights of full beneficial ownership. The common law doctrine of aboriginal title recognises Maori indigenous rights guaranteed at Waitangi. Article II of the Treaty of Waitangi guaranteed Maori the "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties". When Britain colonised native territories, aboriginal title placed a qualification or burden on the Crown's dominium – the paramount ownership of its territory. The Crown's estate was "qualified by a right of beneficial user [usufructuary rights] which may not assume definite forms analogous to estates" (*Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 403 (PC)). However, the Crown's territorial sovereignty guaranteed the Crown the pre-emptive right to acquire Maori lands and to extinguish Maori aboriginal title at common law (see Article II of the Treaty). The only question concerns the method of acquisition and extinguishment the Crown might employ. There are suggestions that unilateral abridgment by the Crown was possible only in a conquered or ceded colony. In *Nireaha Tamaki v Baker* (1901) NZPCC 371, the Privy Council left open the question whether aboriginal title in New Zealand could be extinguished under the prerogative, without the aid of validating legislation or the free consent of Maori (see further PA Joseph, *Constitutional and Administrative Law* (Law Book Company, Sydney, 1993), pp 26, 72-78). In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 24 the Court of Appeal thought that the Crown would be enjoined to pay "proper compensation" whenever it extinguished aboriginal title over Maori land (see para 7.9).

6.3 A residue of the Crown's prerogative survives also in wartime. In *The Case of the King's Prerogative in Saltpetre* (1606) 77 ER 1294, it was held that, while the King could not take the trees growing upon a subject's freehold, he could under the prerogative dig for saltpetre to make gunpowder for resisting invasion and defending the realm. At common law, any subject could come on to another's land and make bulwarks and trenches and erect fortifications in order to defend against invasion (see also *Warren v Smith, Magdalen College* (1615) 1 Roll Rep 151, 152). In *Hole v Barlow* (1858) 140 ER 1113, 1118 Willes J said:

> "So, every man has a right to the enjoyment of his land: but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases, private convenience must yield to public necessity."

6.4 In *Attorney-General v De Keyser's Hotel Ltd* [1920] AC 508, the House of Lords upheld the Crown's prerogative power to take a subject's property in time of war but held that the power could not be exercised where Parliament had regulated the matter by statute. In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 the House of Lords affirmed the existence of the prerogative power (where it had not been superseded by statute) and established that it also imported an obligation on the Crown to make reparations for the loss incurred (see paras 7.10 – 7.11).

6.5 There is a dearth of judicial authority to affirm the existence in New Zealand of the war prerogative. In the event of war, legislation is invariably passed to make explicit the power to take or requisition or to enter on property for defence purposes (see now s 10 of the Defence Act 1990). However, in the absence of legislation passed in advance of a declaration of war, there would be no reason to doubt the Crown's emergency prerogative in New Zealand. *Halsbury's Laws of England*, op cit, p 370 identified the complete and unqualified application of the Royal prerogative throughout the Commonwealth: "The prerogative is not confined to the British Islands, but extends to all parts of the Commonwealth of which the Queen is monarch as fully in all respects as to England, unless otherwise prescribed by United Kingdom or local [ie New Zealand] enactment." The Letters Patent of 1983 reconstituting the Office of Governor-General of New Zealand both confirmed and effected a full delegation of the Royal prerogative. Clause III of the Letters Patent empowers the Governor-General in the most extensive terms: "To exercise on Our behalf the executive authority of Our Realm of New Zealand."

6.6 There have been recent suggestions of a peacetime "sister prerogative" to the war prerogative. In *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1989] QB 26, 58 the English Court of Appeal identified the inherent right and duty of the Crown to maintain law and order. Purchas LJ (at 55) relied on a statement by Viscount Radcliffe in the *Burmah Oil* case [1965] AC 75, 115 where Radcliffe said that the outbreak of war was not the only circumstance in which the emergency prerogative might be invoked: "Riot, pestilence and conflagration might well be other circumstances …" A prerogative to deal with a peacetime emergency might, conceivably, authorise the Crown to take, requisition, or destroy property belonging to subjects. However, the existence of an emergency power in peacetime is highly

questionable and may be discounted. The *Northumbria* case draws on scant authority, is contrary to the modern constitutional practice of narrowing the Crown's inherent prerogatives, and has been criticised for creating unnecessary uncertainty in the law.

7 Eminent Domain and the Obligation to pay Compensation

7.1 The power of eminent domain imports the right to compensation. Although the origins of the right remain obscure, and while there may be various methods of assessing and redressing a property-owner's loss, the right to compensation is a universal or international constitutional norm. It is specifically recognised in the written constitutions of many countries, including the United States, Australia, Northern Ireland, the Federal Republic of Germany, and the French Declaration of the Rights of Man and the Citizen of 1789 and has been affirmed in all successive Constitutions of France. One study found that 83 per cent of the Constitutions surveyed referred to a right to own property, although not all of those included protection against expropriation (see Maarsereen and van der Tang, *Written Constitutions: A Computerized Comparative Study* (1978), p 114; N White, "Compensation for Lost Property Rights: Who Pays for Implementing Sustainable Development?", LLM Research Paper, Victoria University of Wellington, 1993, p 5). It is a notable omission from the New Zealand Bill of Rights Act 1990 that there is no guarantee of just compensation for the exercise of eminent domain. However, s 28 of the Bill of Rights provides that existing rights and freedoms shall not be abrogated or restricted by reason only that they are not included in the Bill of Rights.

7.2 None of the rationales advanced for the power of eminent domain (see para 4.4) explains the obligation to compensate. Each rationale presents a justification for the right to *take* but none accounts for the duty to *pay*. Dukeminier and Krier (op cit, p 1103) identify several contributing factors: including the moral imperative of the natural law view of eminent domain, the early practice of the English Parliament, and the influential views of Blackstone which held sway in both England and in America.

7.3 In neither the United Kingdom nor New Zealand is the right to compensation given any explicit constitutional recognition. However, the principle that the subject *ought* to be recompensed, where the benefit of expropriation is for the public as a whole, can be traced to the statutes of the English Parliament dating from the early 15th century (see para 7.5). By the mid-18th century, Blackstone maintained that the statutory right to compensation was a binding practice of the English Parliament (see para 7.6). Two hundred years after Blackstone, the House of Lords observed that in the United Kingdom both Parliament and the Courts had been scrupulous to uphold the principle that "title to property or the enjoyment of its possession was not to be compulsorily acquired … unless full compensation was afforded in its place" (*Belfast Corporation v O D Cars Ltd* [1960] AC 490, 523 per Lord Radcliffe). The Courts apply a presumption of statutory interpretation in the expectation of the right to statutory compensation. In *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 576 Lord Atkinson stated: "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 the citizen without compensation." In *Central Control Board (Liquor Traffic) v Cannon*

Brewery Ltd [1919] AC 744, Lord Atkinson said that a parliamentary intention to displace that rule would need to be expressed "in unequivocal terms".

7.4 In New Zealand, the Public Works Act 1981 represents an unqualified legislative endorsement of the right to compensation. This Act establishes a scheme under which the Government or a local authority may either negotiate to buy land for public works, or compulsorily acquire land subject to the payment of compensation. The Public Works Act 1981 consolidates a long list of "takings" statutes in New Zealand which have conferred rights to full compensation (see para 5.5).

7.5 In its earliest formulation, the King's prerogative was absolute and untrammelled. The obligation to compensate did not hedge the power of eminent domain. But from early feudal times, protections to the property-owner began to hedge the King's power. The Magna Carta 1215 proclaimed that: "No freeman shall be taken, or imprisoned, or be disseised of his Freehold … but by the lawful, Judgment of his Peers, or by the Law of the Land.". While this declaration did not explicitly grant "disseised" subjects the right to compensation, the payment of compensation became the expectation and acknowledged practice under statutes of the English Parliament. The constitutional principle evolved that not to make reparations for the exercise of eminent domain would offend the basic notion of fairness embodied in the concept of "law of the land"/ "due process of the law" (Magna Carta). The American writer, Frankel Paul (op cit, p 72), wrote that "[b]y tradition … land could be taken only by a parliamentary act accompanied by the payment of compensation." It is recorded that the Statutes of Sewers of 1427 were the earliest Acts of the English Parliament that authorised compulsory acquisition subject to the payment of compensation. Further examples of a statutory right to compensation were contained in statutes dating from 1514 and 1539 (WB Stoebuck, "A General Theory of Eminent Domain" (1972) 47 Washington L Rev 553, 562-64).

7.6 In 1765, Blackstone inveighed against the power of anyone but Parliament to dispossess subjects of their land (*Commentaries*, Vol 1, p 139). He observed that the English Parliament "indeed frequently does" pass statutes to expropriate property, but only "with caution", and with "a full indemnification and equivalent", or "a reasonable price", to compensate for the subject's loss (ibid). Blackstone's writings recorded the English practice and elevated the expectation of a statutory right to compensation into a parliamentary principle.

7.7 United States constitutional jurisprudence upholds the historical rationalisation of the Magna Carta, as importing the right to compensation for the exercise of eminent domain. The "due process" guarantee under the 5th and 14th Amendments had its origin in the Magna Carta. With the confirmation and restatement of Magna Carta in the Statute of Westminster (1354) 28 Edw III, c 3, the term "the law of the land" became "by due process of the law". The 5th Amendment to the United States Constitution also provides: "nor shall private property be taken for public use, without just compensation". Although this protection does not, of its own force, apply to the states, the Supreme Court decision in *Chicago, Burlington & Quincy Railroad Co v City of Chicago* 166 US 226 (1897) established that the "due process" clause of the 14th Amendment makes the federal guarantee of just compensation applicable also to the states. Substantive "due process"

required payment of "just compensation" whenever private property was "taken for public use". In later cases, the United States Courts have spoken of the "incorporation" of the 5th Amendment's "taking" clause into the 14th Amendment's "due process" clause.

7.8 The residue of the Crown's power to act under the Royal prerogative also imports the obligation to pay compensation. The residue of the Crown's power was examined in paras 6.1 – 6.6. This encompasses the power to extinguish customary aboriginal title, and the power to take or requisition property in wartime.

7.9 First, it appears that the Crown is under a common law (fiduciary) duty to compensate native peoples when it extinguishes aboriginal title at common law. In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 24 the Court of Appeal observed: "[T]here is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid." The Privy Council made similar observations in *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785, 788.

7.10 Secondly, in times of war the Crown bears an obligation to compensate where it takes or destroys a subject's property under the emergency power. As the *quid pro quo* of the Crown's emergency power, the Courts have insisted that the Crown compensate for the subject's loss. In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, the British authorities had ordered the destruction of a British-owned oil refinery to prevent it falling into the hands of the advancing Japanese army during the Second World War. The House of Lords (3:2) held that, where the Crown requisitions or destroys property under its emergency prerogative, it must also recompense the loss.

7.11 Although *Burmah Oil* established the Crown's common law obligation to redress the subject's loss, the British Parliament retrospectively overturned this right under the War Damage Act 1965 (UK). However, this statute has force of law only in the United Kingdom and does not affect the scope of the prerogative at common law. In *Nissan v Attorney-General* [1970] AC 179 the House of Lords endorsed the emergency prerogative and upheld the obligation on the Crown to make reparations in circumstances that fell beyond the scope of the War Damages Act 1965 (UK). In *Nissan* Lord Pearce (p 227) described the prerogative as a right "to take and pay".

8 Concept of a "Regulatory Taking"

8.1 At common law, landowners have no right to compensation for planning restrictions on the development of their land. In *Belfast Corporation v O D Cars Ltd* [1960] AC 490, the House of Lords distinguished between a "taking" which triggered a statutory right to compensation, and town planning restrictions which triggered no such entitlement. The New Zealand Courts have also held that an application for planning permission carries "no moral claim or expectation of compensation in the event of refusal" (*Auckland Acclimatisation Society (inc) v Commissioner of Crown Lands* [1985] 11 NZTPA 33, 37 (CA)). With the interposition of planning law, ownership of the land does not carry the right to alter its natural condition. In *Auckland Acclimatisation Society*, the grant of a

water right was viewed as a privilege, not a right (see also *Electricity Corporation of New Zealand Ltd v Manawatu-Wanganui Regional Council*, HC Wellington, AP 302/90, 3 June 1992, Jeffries J).

8.2 The property rights debate crystallises two questions: should the law recognise the concept of a "regulatory taking", and (if so) should a regulatory taking trigger statutory rights to compensation? Much literature in the United States is given to the concept of a "taking" (see Part II of this report). United States law recognises the concept of a regulatory taking. Whereas environmental or planning regulations will not trigger the right to compensation, a regulatory taking will. The issue that has vexed the United States Courts is at what point does land-use regulation diminish the use and enjoyment of land so as to constitute a de facto taking. For the Supreme Court, there is no satisfactory test for answering the question: "What amounts to a regulatory taking?" (see especially *Penn Central Transportation Co v City of New York* 438 US 104 (1978), 439 US 883 (1978)).

8.3 The RMA expressly excludes the concept of a regulatory taking. Section 85(1) reads: "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." This provision recognises (but excludes) the concept of a regulatory taking; a "deeming" provision deems something to be that which it is not. In *R v Norfolk County Council* (1891) 60 LJ QB 379, Cave J observed: "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be … [Only] for the purpose of the Act, it is [simply] deemed to be that thing." Viewed thus, s 85(1) acknowledges rather than answers the argument advanced on moral and comparative grounds, that a regulatory taking ought to import a right to compensation (cf the 5th Amendment jurisprudence in the United States).

8.4 Sections 85 and 185 of the RMA acknowledge, for limited purposes under the Act, the concept of a regulatory taking. These sections recognise that a district plan or a designation authorising a public work may prevent the reasonable use of an owner's land or estate in the land. Where a plan would impose an unfair and unreasonable burden on the owner, the owner may apply to the Environment Court to have the offending provision(s) modified, deleted, or replaced (s 85). Where a designated public work would frustrate rights of reasonable use, an owner may seek an order that the Government or local authority responsible for the public work acquire the land (or estate in the land) under the Public Works Act 1981, with rights to full compensation (s 185). The protection these sections afford property rights is limited. The scope of the sections is limited and cases under them are few (Kirkpatrick, p 281).

8.5 For property rights groups, the text and spirit of Magna Carta bolster the argument for a takings regime that grants the right to compensation. The concept of substantive "due process" in the United States imports the right, whether for an expropriation or a regulatory taking of property, independently of the express guarantee of "just compensation" under the 5th Amendment (see para 7.7).

8.6 The "due process" guarantee of the Magna Carta remains in force in New Zealand. The Magna Carta of 1215 was reissued and confirmed over 30 times between the reigns of Henry III and Henry IV. Chapter 29 of the reissue and confirmation of 1297, known as the Magna Carta of Edward I (1297), applies as law in New Zealand and is binding on the Crown and public authorities (see the First Schedule of the Imperial Laws Application Act 1988). The restatement of c 29 enacted in the Statute of Westminster (1354) 28 Edw III, c 3 replaced the expression "the land of the land" with "due process of the law", and likewise remains in force in New Zealand (see the Imperial Laws Application Act 1988).

9 Can Parliament Authorise a Non-compensatory "Taking"?

9.1 Is Parliament constrained by an overriding or implied common law obligation to provide compensation for compulsory acquisition of property? The short answer is "no". However, there are three qualifications.

9.2 First, the short answer "no" appeals directly to the legislative supremacy of Parliament. It does not address the argument advanced on grounds of equity, fairness, and liberty, that the State ought to provide protection for property rights through compensatory takings legislation. The constitutional jurisprudence of the international community ties the power of eminent domain to the obligation to compensate (see para 7.1). American jurisprudence, in particular, identifies rights of property ownership with the fundamental concept of liberty. The American Founding fathers were deeply imbued with the Lockean notion that the "right to acquire, possess, and enjoy property is the fundamental liberty upon which all other inherent rights of life and liberty depend" (Frankel Paul, op cit, p 3).

9.3 Secondly, neither does our short answer address the economic argument against externalising the costs of environmental regulation (see paras 3.4 – 3.10). Public choice theory holds that a beneficiary who bears no cost will over-consume. Some lawyers believe that local authorities indulge in excessively prescriptive district plans for preserving amenity values, with little or no tangible benefit. The articles by Kirkpatrick and Ryan (see paras 3.1 – 3.10) provide examples of what the authors considered was excessive environmental regulation.

9.4 Thirdly, our short answer does not anticipate arguments about overriding constitutional or common law limitations on Parliament's powers. The orthodox view is that Parliament's powers are as wide and untrammelled as those of the Westminster Parliament. The New Zealand Constitution Act 1852 (UK) established our Parliament and gifted it sovereign powers of legislation. When the Constitution Act 1986 revoked the 1852 Act, it declared that Parliament "continues to have full power to make laws" (s 15). However, in his former capacity as Judge and President of the Court of Appeal, Lord Cooke of Thorndon expressed anxiety about Parliament's power to override fundamental common law rights. His utterances caused a degree of introspection that opened the way for genuine debate about the scope of Parliament's powers.

9.5 Between 1979 and 1984, Cooke J raised the spectre that "[s]ome common law rights presumably lie so deep that even Parliament could not override them" (see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA)). Cooke J instanced the right to be free from torture (*Taylor's* case), the right of Parliament and not the executive to control the economy (*Brader v Ministry of Transport* [1981] 1 NZLR 73, 78), the right of access to the Courts for the determination of citizens' rights (*L v M* [1979] 2 NZLR 519, 527; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390), and the right of an office-holder to natural justice (*Fraser v State Services Commission* [1984] 1 NZLR 116, 121).

9.6 The United States 5th Amendment jurisprudence provides a framework for drawing a nexus between Magna Carta (qua a substantive concept) and Cooke P's common law rights dicta. In several recent decisions, Magna Carta has been used as a basis of constitutional challenge. However, in none of these decisions did the argument gain traction. In *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC), it was argued that provisions of a fisheries statute removed access to the Courts for the enforcement of legal rights, and were contrary to Magna Carta and invalid. Baragwanath J held that the object of the legislation was to extinguish the rights themselves, not remove a party's access to the Courts. In *Shaw v Commissioner of Inland Revenue* [1993] 3 NZLR 154 (CA), it was argued that the surcharge on national superannuation was a discriminatory tax contrary to Magna Carta ("common law right [was] not being done to all without respect of persons") and was in breach of fundamental common law right. The Court of Appeal affirmed the sovereignty of Parliament and rejected the argument. The Court of Appeal rejected a similar argument in *R v Cresser* CA 38/98, 21 May 1998 where the appellant unsuccessfully argued that provisions of the Misuse of Drugs Act 1975 were invalid for offending against the Magna Carta prohibition on arbitrary treatment of individuals by the State (see also *Van Resseghem v Police* CA 98/86 17 June 1986).

9.7 The debate over fundamental common law rights remains "theoretical" and "extra-judicial" (*Cooper* [1996] 3 NZLR 480, 484. In each of the above cases, the Court affirmed Parliament's sovereignty and rationalised Magna Carta as a formal "rule of law" concept, not a constitutional override. In *Cooper* Baragwanath J observed that we have no equivalent of the United States 5th Amendment and held that "the law of the land" as that term is used in c 29 of Magna Carta includes the statutes of Parliament (p 483). To date, no argument has been heard in the Courts that the spirit or text of Magna Carta establishes a common law right to compensation, or that the Magna Carta controls or limits Parliament's power to legislate for eminent domain or environmental regulation.

PART II

10 "Takings"/ "Regulatory Takings" in the United States

10.1 The United States Constitution does not expressly grant the power of eminent domain. However, the existence of the power has always been upheld as implicit in the exercise of sovereign power. The guarantee under the 5th Amendment of the right to just compensation for a "taking" does not grant the power, but rather confirms it (see *Kohl v United States* 91 US 367 (1875) per Justice Strong for the majority. See Paul, op cit, pp 72 et seq).

10.2 United States law recognises the concept of a "regulatory taking" for purposes of the 5th Amendment right to compensation. The Courts accept that property-owners may reasonably be expected to bear some reduction in the value of their property that might result from governmental regulation imposed in the public interest (the exercise of the "police power"). However, if the regulation goes "too far", it will be classified as a "regulatory taking" for which compensation will be payable (*Pennsylvania Coal v Mahon* 260 US 393 (1922), p 415). This type of taking is distinguished from a taking of property under the power of eminent domain.

11 The Federal "Due Process" and "Takings" Clauses

11.1 The Fifth Amendment to the United States Constitution contains two provisions that protect private property interests. The "due process" clause states that no person shall be "deprived of life, liberty or property without due process of law." The "takings clause" provides "nor shall private property be taken for public use, without just compensation".

11.2 The Fifth Amendment is a limitation upon the Federal Government (*Barron v City of Baltimore* 32 US (7 Pet) 243 (1833)). The 14th Amendment which was later added to the Constitution includes a further due process clause: "….. nor shall any State deprive any person of life, liberty or property without due process of law." The Supreme Court has held that this clause makes the federal guarantee of just compensation in the Fifth Amendment applicable also to the states (*Chicago, Burlington & Quincy Railroad Co. v City of Chicago* 166 US 226 (1897). It was held that substantive due process requires payment of just compensation whenever private property is taken for public use. However, nearly all of the state Constitutions expressly prohibit the taking of private property for public use without just compensation (Cunningham, Stoebuck, and Whitman, op cit, p 506).

12 Dual Heads of Action for a Regulatory Takings Claim

12.1 Both the due process and takings clauses provide avenues for redress against governmental regulation of private property. Where a property-owner brings an action contending that governmental regulation constitutes a regulatory taking, the cause of action is termed "inverse condemnation." The action is an attempt to force the Government to condemn the property and thereby be obliged to pay compensation. In the early years of this century, the Supreme Court frequently overturned economic regulations on "due process" grounds. This period of judicial laissez faire was referred to as the "Lochner" era after the Supreme Court decision in *Lochner v New York* 198 US 45 (1905). From the 1930s, the Supreme Court retreated from its former activist stance and claimants turned to the "takings" clause as the basis for a constitutional claim. This resulted in a confusion of jurisprudence that commentators contend has beleaguered the United States Courts to this day. One commentator (JD Bristow, "Eastern Enterprises v Apfel: Is the Court One Step Closer to Unravelling the Takings and Due Process Clauses?" (1999) *North Carolina Law Rev* 1525, 1525-26) observed that:

> "[T]he Court's regulatory takings analysis has developed into a substantive review of government regulation that has incorporated standards historically used in due process review. This borrowing of principles has confused the distinction between the Due Process and Takings Clause and has transformed the Court's regulatory takings analysis into a body of law that has proven to be confusing and unpredictable."

12.2 Challenges to land-use regulations in the United States Courts are commonplace on the ground that they deprive the landowner of property without "substantive due process" and/or that they amount to a taking of property for public use without just compensation. The basis of the action is often unclear, and the Courts generally do not distinguish between due process and takings arguments (see Cunningham et al, op cit, p 513).

13 The Due Process Guarantee

13.1 The principle that no person shall be deprived of life, liberty or property except by due process of law did not originate under American constitutional law but was contained in the Magna Carta as a confirmation of ancient English liberties (*Munn v People of State of Illinios* 94 US 113 (1876) and see c 19 of the Magna Carta 1215).

3.2 The cornerstone of due process is the prevention of abusive governmental power (*Weimer v Amen* 870 F.2d 1400 (8th Cir. 1989)). Due process clauses provide protection against invasion of fundamental rights. In *Immediato v Rye Neck School District* 73 F (3d) 454, 106 Ed Law Rep 84 (2d Cir. 1996), it was held that the term "fundamental rights" included those rights that are implicit in the concept of ordered liberty, or deeply rooted in the nation's history and tradition. *Lawton v Steele* 152 US 133 (1894) established a two-fold test of proportionality and rational connection to determine whether the regulations satisfy the due process requirements. The interests of the public must justify government interference and the means of the interference must be

reasonably necessary to achieve the desired public purpose, and must not be unduly oppressive on individuals.

13.3 The due process protection is two-fold: *procedural* and *substantive*. Procedural due process stresses the policies or procedures the Government or governmental agencies must observe when depriving someone of life, liberty or property. Substantive due process presupposes that there are certain rights encompassed within the term "liberty" that may not be infringed by governmental action, no matter what "process" is used (B Burnham, *Introduction to the Law and Legal System of the United States* (West Publishing Company, Minnesota, 1995)). This usage of due process amounts to an oxymoron. Substantive due process has less to do with "process" than with "substance." This guarantee of "liberty" protects personal liberties such as the right to privacy which includes the right to an abortion (*Roe v Wade* 410 US 113 (1973)). Substantive due process permits the judiciary to decide what governmental interference is "fundamentally unfair", "unreasonable", or "shocking" to the conscience of society (JV Calvi and S Coleman, *American Law and Legal Systems* (Prentice Hall, New Jersey, 3rd ed, 1997)). The doctrine of substantive due process has become an important source of fundamental rights implied into the Constitution.

14 The "Police Power"

14.1 The "police power" encompasses the power of the states to enact regulatory legislation to preserve and promote the welfare of its citizens. The power is exercised in matters concerning the peace, security, morals, health, and general welfare of the community. The power is an elastic one that is constantly evolving in accordance with societal expectations and change (*State v Ivey* 196 W Va 571 (1996)). The police power under the American constitutional system has been left to the states and is usually exercised by the legislative branch of the state government, although some regulation does occur at the federal level (*City of Newport v Iacobucci* 479 US 92 (1986)). While the police power is the least limitable of the Government's powers, the legislature may not, under the guise of regulating in the public interest, impose conditions that are unreasonable, arbitrary, or confiscatory (*Central Platte Natural Resources District v City of Fremont* 250 Neb 252 (1996)).

14.2 The limited power of the federal Government to regulate is derived from the various express delegations of power in the Federal Constitution. State governments, on the other hand, may regulate land-use by virtue of their inherent powers confirmed in the 10th Amendment to the Constitution. This provides that the powers not delegated to the United States, nor prohibited by it to the states, are reserved to the states respectively. State governments may validly delegate the police power and the power of eminent domain to units of local government.

14.3 Property of every kind is held subject to the police power, including contracts and rights in things tangible and intangible (*State ex rel Davis v Rose* 97 Fla. 710 (1929)). A property-owner's "bundle of rights" is subject to the police power. The Government has considerable latitude in regulating property rights in ways that may adversely affect property owners (*Hodel v Irving* 481 US 704 (1987)). The police power extends to the regulation of private land-use for the protection and conservation of natural resources.

14.4 Exercises of the police power and the power of eminent domain have both common and distinct elements. With eminent domain, property is expropriated and transferred to the Government to be enjoyed as its own. With the police power, governmental regulation may amount to a "taking" in the constitutional sense so that it must be paid for. However, a transfer of ownership does not effect a regulatory taking, as in the case of eminent domain. Rather, destroying reasonable rights of use of the property and/or significantly impairing its economic value perfect a regulatory taking.

15 The Libertarian Movement Towards Private Property Rights

15.1 In the United States, the libertarian reform movement towards private property rights is a reaction against the shift in basic cultural values that began several decades ago, as environmental, aesthetic, and historical concerns increased (see FP Hubbard, "Takings Reform and the Process of State Legislative Change in the Context of a National Movement" (1998) 50 SC Law Rev 93, p110). The libertarian movement advances two arguments:

- That the right to private property is essential to liberty, particularly where land is involved; and
- That this essential right has been, or will be, seriously eroded unless more restrictive limits on regulatory takings are adopted.

15.2 American constitutional jurisprudence has been deeply influenced by the writings of the English 17th century writer, John Locke, who insisted that governments are constructed by men for one reason only – to protect their rights of property. The American Founding Fathers embraced Locke's notion of the social contract, that government exists to protect peoples' inalienable rights and should be tolerated only so long as it acts as a rights protector. The American writer on eminent domain, Frankel Paul (op cit, 3) wrote: "In recent years these tenets [of limited government] have been battered by legislative encroachments and castigated by philosophers more favourable toward state power." Paul identified the police power and the power of eminent domain as threatening to the liberty of the American people.

16 Judicial Confusion over what Constitutes a Regulatory Taking

16.1 The Supreme Court has recognised that certain regulatory action, if it goes "too far", will constitute a regulatory taking of property. The difficulty is knowing where on the continuum to draw the line between governmental regulations and a regulatory taking. The Supreme Court has not defined what is meant by the notion "too far". In *Penn Central*, the Supreme Court conceded the lack of a universal or systematic test for identifying a regulatory taking (*Penn Central Transportation Co v City of New York* 438 US 104 (1978) at p123-24):

> "The question of what constitutes a 'taking' for the purposes of the 5th Amendment has proved to be a problem of considerable difficulty … [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances."

16.2 There appear to be three main reasons why the Supreme Court has failed to lay down a clear definition of what constitutes a regulatory taking (see eg Hubbard, op cit, p 98). First, the regulatory takings issue is complex because regulations affecting private-property use are extremely wide-ranging and diverse. Secondly, the regulatory takings issue requires a prior determination of what property rights are included in ownership and the writers lament that there is no general test to establish this. Thirdly, the "rule of five" holds that the majority of the Supreme Court must agree when applying constitutional limits such as the 5th Amendment, and this rule has seldom been met in regulatory takings cases.

16.3 S Miller, "Triple Ways to Take: The Evolution and Meaning of the Supreme Court's Three Regulatory Takings Standards" (1998) 71 Temp L Rev 243 identified three tests for determining whether a regulation under the police power amounts to a "taking". The first is termed the "statutory analysis" test. This involves an evaluation of the statute that imposes the regulations and does not pay particular regard to the effect of the regulation on the claimant's private property. It suffices that the claimant suffers some tangible loss. *Lochner v New York* 198 US 45 (1905) involved a statute that was intended to protect the health of bakers by prohibiting them from working more than ten hours per day and sixty hours per week. A bakery owner challenged the statute as an interference with the right of free contract and a violation of due process. The Supreme Court accepted that public health was a legitimate subject for state legislation but held that the statute in question lacked any direct relation to public health. The Court stated that the Act failed to promote public health and that it was neither a necessary nor warranted intrusion on the employer's freedom of contract.

16.4 The second test is cryptically referred to as the "categorical" test. This test refers to certain specific situations in which the Supreme Court has said that a regulatory taking invariably occurs. In *Nollan v California Coastal Commission* 483 US 825 (1987), a government agency granted landowners permission to rebuild their house on the condition that they grant the state a public easement across their property. The Court found that the easement did not further the purpose of requiring a building permit and held that it amounted to a taking. Since there was no nexus between the condition and the original purpose of the building restriction, the Court condemned the easement as an out and out plan of extortion.

16.5 Categorical takings will occur where any physical invasion occurs, or where the regulation denies all economically beneficial or productive use of the land (*Lucas v South Carolina Coastal Council* 112 SC 2886 (1992)). In *Dolan v City of Tigard* 512 US 374 (1994), the Supreme Court established that there must be some "rough proportionality" between the regulatory requirement and the impact on the private property. The Court also held (p 391) that the regulatory body must carry out "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development". In *Dolan*, the City of Tigard had granted Dolan's application to increase her shop and parking lot on the condition that she dedicate part of the property for a public greenway and cycle path.

16.6 The Supreme Court has applied the categorical test regardless of other mitigating factors in the case. However, a categorical taking may not always trigger the right to compensation. In *Mugler v Kansas* 123 US 623 (1887) the Supreme Court applied the public nuisance exception which holds that no taking occurs where a government regulation that is intended to control a public nuisance diminishes the value of private property. The State of Kansas passed a statute barring the manufacture and sale of alcohol. Mugler had operated a legal distillery before the passage of the statute and was convicted for continuing in his business. The Court upheld the statute notwithstanding that it had greatly diminished the value of Mugler's property. The due process guarantee of the 14th Amendment was not designed to interfere with the police power to promote public health. The Court held that the police powers of the state could not be burdened by the need to compensate property owners who are prevented from inflicting injury on the community by a noxious use of their property. The public nuisance exception was applied also in *Hadacheck v Sebastian* 239 US 394 (1915) where the Supreme Court upheld an ordinance prohibiting the manufacture of bricks in a designated part of the city in which the claimant owned a brick factory. The Court again held that private interests must yield to the police power to prohibit a public nuisance.

16.7 The third test is known as the "balancing" test. This test involves evaluating all of the factors in each case to determine the essential fairness of the regulation as it affects the plaintiff. In *Pennsylvania Coal* (op cit, p 416) Justice Holmes J noted that the takings issue is one "of degree and therefore [it] cannot be disposed of by general propositions". Justice Holmes described the balancing test as one of fairness and justice, to be applied as a matter of judgment and logic. The Court must weigh all relevant factors to determine whether the effect of the regulation imposes an undue burden on the landowner. Factors that will be evaluated include the property owner's reasonable investment-backed expectations, the preclusion of any other uses of the property, and the existence (if any) of self-created hardship on the part of the property owner.

17 Federal Legislative Reform

17.1 Under the terms of the Private Property Protection Act 1995 (HR 925, 104th Congress, 1st Session (1995)) the Federal Government is required to pay just compensation to property owners where a regulatory restriction limits an otherwise lawful use of their property, causing a reduction in the "fair market value" by 20% or more. The Regulatory Transition Act 1995 (219, 104th Congress, 1st Session, 1995) provides that regulations must satisfy cost-benefit and risk-assessment standards. The Act requires an evaluation of the costs caused by the loss of property rights which may result from the regulation.

18 State Legislative Reform

18.1 The states have enacted various legislative schemes to control regulatory takings. While the state statutes vary, they tend to include one or more of the following requirements:

- a requirement that regulators assess the impact of new rules on property owners before imposing regulations;
- new procedural requirements designed to simplify the process of determining whether a taking has occurred; and
- substantive changes that make it easier to identify a taking.

18.2 The state statutes vary in terms of their standards for mandating compensation. Several of the statutes define the right to compensation in terms of a loss above a prescribed percentage. However, most of the statutes include a public nuisance exception, prohibiting the payment of compensation where the regulation prohibits a public nuisance (see eg *Mugler v Kansas* 123 US 623 (1887); *Hadacheck v Sabastian* 239 US 394 (1915)).