Submission on the Freshwater and Biodiversity Strategies

Dear Sir,

28 9 19

General

I farm bees and livestock at Te Awaiti Station [redacted] ha on the [redacted] of Martinborough (aerial photo attached). In 2012 and 2013 I planted [redacted] of eucalypt forest under AGS and can report that agroforestry under eucalypts works and sheep and cattle grazed in these the Ram Hill Forest Block emerge in much better condition before the area was afforested. I wish under 1 BT to plant more areas to carbon sequestering forest, but will be frustrated by the impracticable Rules introduced by GW asked to execute the political dirty work for Mfe. For example all Landowners are prohibited from removing more than 2 hectares of vegetation including gorse in a year irrespective of the size or nature of their farms. I attach a copy of my individual appeal to the Environment Court to explain the absurdity inspired by Mfe.

I have also pursued a legal career since 1977. In 1999 I wrote an LLM paper attached (Google Riddiford and Takings) to investigate the presumption of compensation protecting all property rights including rights of use and enjoyment I described:

(1) Magna Carta as the authority for compensation
(2) The presumption of compensation required the payment of compensation and or “reading down” ie administering and interpreting favorably existing property rights
(3) a “taking” occurred whenever there was a substantial deprivation of property rights
(4) compensatable “regulatory takings” occurred whenever a use or enjoyment right was taken
(5) the presumption of compensation applied in RMA cases.

These principles were affirmed in words more eloquent by the Supreme Court in Waitakere City Council v Estate Homes Ltd [NZSC] 112 an RMA case. The obiter dicta from paragraph 43 are especially important. Under the Official Information Act could you please advise how often each of the words: “property rights” “Magna Carta” and “Waitakere” were mentioned in documents created before publication of the Freshwater Strategy and or the Biodiversity Strategy and then forward to me by email and hardcopy the relevant extracts.

I would be grateful if you could treat this submission as equally applicable to the pending Biodiversity Strategy, since I fear that it will reflect the same difficulties and failure to grapple with the fundamental problem … a failure to understand that all policy in democratic society requires the consent of the governed if it is to work and that free consent should sometimes be obtained by the presumption that compensation should be paid.
John Locke the philosopher to the Bill of Rights debate 1690 addressed the problem of unlimited power and developed the concepts of public and private property, common property, user pays, common taxation and others on which modern economics is based. Mfe policies must be assessed in the light of modern economic thinking:
Who benefits and who pays and
The Ends never justify the Means

Specific

All Farmers agree with the objectives of the Freshwater and Biodiversity Strategies. The Means adopted however has understandably generated militant opposition.

Opposition is generated by the undemocratic process adopted by Mfe and failure to acknowledge that compensation such as substantial subsidies for fencing and planting will be necessary to achieve Farmer free consent and continuing initiative to fix the issues. Why punish the Farmers of the Wairarapa, when their unregulated hard work has statistically caused a huge improvement in the waterways?

Consultation

The present process fails the natural justice tests for consultation prescribed in Wellington Airport v Air New Zealand [1993] 1 NZLR and affirmed in the NZ Bill of Rights 1990. This part of the fiduciary duty promised NZ under Magna Carta 1990 (Imperial Laws Application Act 1990) I have received no reply or acknowledgement to my letter of 19 9 19 below. As an urgent official information request could you please advise how many copies of Draft National Policy Statement for Freshwater Management • Proposed National Environmental Standards for Freshwater • Draft Stock Exclusion Section 360 Regulations were printed and how many still remain undistributed. How can Farmers be expected to consult on the policies without hardcopy documents, given that many do not have printing facilities and internet the same quality as Government Departments.

Spring is a seasonally very busy time of year for all Farmers. We at Te Awaiti face the beginning of docking, drenching lamb shifting and weaning with our sheep and the ramping up of the bee season. Why should we as Farmers have to sacrifice income to protect our property rights at this seasonally busy time of year? Specifically this afternoon a Saturday in order to address the uncosted dreams of Mfe I am ignoring the need to draft two staff contracts, drafting a hive placement contract, perusal of the 1BT planting contract, contracts with Arborgen the tree nursery and Pat Carroll the planter, the demands of the NZANAFPMP and my looming PAYE and GST Returns and a raft of other matters. It is little wonder that many Farmers are feeling the stress. That will impact on farm reinvestment decisions The Mfe choice of Spring for consultation breaches the principle of audi alterem partem

27Right to justice

- (1)Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

It is absurd that I must now submit on the basis of limited information from Mfe

Set out below is a copy of my unanswered First Submission/Official Information request

-------- Forwarded Message --------

**Subject:** Mfe freshwater consultation
**Date:** Thu, 19 Sep 2019 21:26:31 +1200
**From:**
**To:** submissionsinfo@mfe.govt.nz <submissionsinfo@mfe.govt.nz>, policy@mfe.govt.nz

The Manager, Mfe Policy,
Wellington

Good Evening,

Please remember that some of us do not enjoy a high standard of internet or fullscale printing facilities making the download of documents difficult. Under the Official Information Act please send to me at DTS Riddiford, Ruamahanga Farm, Martinborough RD3 hardcopy of the documents below plus a memory stick or similair of the documents (I have used the alternative address of Ruamahanga Farm to ensure that I receive the documents prior to consultation on Thursday.

Please treat this as an interim submission until I read the documents. I oppose the proposed controls on the basis of what I read in the media because (1) in extensive hill country grazed by sheep high nitrate levels do not exist and (2) the controls are legally unenforceable because they amount to a confiscation of private rights (Google Riddiford and Takings and then read the decision of the Supreme Court in Waitakere City Council v Estate Homes Ltd 2NZLR [2007] at para 43

Instead may I suggest policies of cooperation involving 100% subsidies of fencing recognising that the inkind contribution of farmers will be the loss of grazing land and access to livestock water and need to reticulate livestock water or create dams for stockwater

**Effects based approach please rather than one size fits all**

If effects were measured at the boundary intensive Farmers would be free to innovate and extensive Farmers such as Te Awaiti Station would be left in peace.

We at Te Awaiti Station have never used nitrogenous fertilizer and operate at low average stocking levels. All our waterways flow directly to the sea where oceanic dispersion rapidly dilutes the theoretical problem. However if improbably our mainly ephemeral waterways were to be loaded with N and P that would create a positive effect at sea by way of an increase in the volume of seaweeds (both macroalgae and floating microalgae) and a consequent increase in fishlife.

I am intrigued by the idea that the Coastal Marine Area should be fenced off given the fact of oceanic dispersion and the high climatic costs of such fencing, before even considering the blight of such fencing on the landscape.
I do not accept that Statute may require Coastal Farmers to obtain a Plan, costing as much as $7500 according to the media, only to be told that we were causing no problem.

**Restrictions on intensification are a moratorium on innovation**

“The right to regulate is not a right to confiscate” *Virgo* Privy Council

The one year Aquaculture Moratorium extended to three years and then indefinitely by a mass of restrictive Rules resulted in the export of export earnings from NZ to Australia for all time as NZ Aquaculturalists ruled off their NZ investments and borrowed from the Australian Banks to redeploy in Australia. Will the same happen with innovative livestock Farmers?

**The lack of robust economic analysis**

I was shocked at the public consultation at the Carterton Events Centre to learn that Treasury had not been asked to undertake any economic analysis.

Has Mfe not considered the emotional distress of their proposals on Farmers and the consequent chilling of innovation and reinvestment?

“Who benefits and who pays?” Individual costs should be paid from “common taxation. That is the constitutional imperative inherited from the philosophy of John Locke and his scholarly forbears. Would the residents of the Kapiti Coast agree to pay all the costs of the Main Highway North just because they lived alongside the road rather than the obviously public costs being paid from common taxation?

Why pick on riparian and coastal Farmers?

Yours Faithfully
TAKINGS: A RETURN TO PRINCIPLE

LLM RESEARCH PAPER (LAWS 509)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1999
The Threat to Property Rights

Examples of uncompensated takings

The Threat to Property Rights

II THE ENGLISH RULES BASED ON MAGNA CARTA

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3. Magna Carta part of the Fundamental Law in New Zealand

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1. International covenants to which New Zealand is a state signatory

2. Section 21 of the Bill of Rights 1990

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5. Law Commission Report 37: Crown liability and Judicial Liability and Judicial Immunity a response to Baigent’s case and Harvey v Derrick


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1. Fisheries Act

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TAKINGS: 1 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.

\(^3\) "Magna Carta" is used throughout these paper as a general term for all the Magna Carta legislation and Magna Carta principles refined in the Common Law.
THE ENGLISH RULES BASED ON MAGNA CARTA

1. 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 General5 stated: Our constitutional safeguard for property rights is that of Ch 29 of Magna Carta: "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 Lands8 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 freeman shall be disseised of his tenement except by the law of the land."

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5 "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."

6 Courts include:
Canada Calder v Attorney-General of British Columbia 34 DLR (3d) 145 (SC) per Judson J at 173 lines 31-36

7 "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

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

9 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 Court’s 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 injuries affection or metaphysical taking in the sense of Cockburn v Minister of Works [1984] 2 NZLR 486 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
Blackstone in the "Commentaries on the Laws of England" (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 Carta 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. 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
TAKINGS: A RETURN TO PRINCIPLE

London merchants. The previously arbitrary authority of the Norman Kings was limited by the guarantees of liberties to the Church (article 1), 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 Carta 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\(^\text{10}\) 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,\(^\text{11}\) 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 Carta were granted "for ever"\(^\text{12}\) ("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\(^\text{13}\) 772 years later.

2. 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.\(^\text{14}\)

\(^{10}\) 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 Carta as a Crown promise to respect their particular customs. The concern is strikingly similar to contemporary Maori concern for preservation of taonga and biculturalism.

\(^{11}\) 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." 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 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
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 hapū") were also extended to all the people of New Zealand of whatever race ("-ki nga tangata katoa o Nu Tirani"). That accords with Magna Carta and modern concepts of the equality of everyone under the law.

3. 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 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 Carta 1297, the Petition of Right 1627 and the Bill of Rights 1689.

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 "Constitutional Enactments". 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 Carta principles determined by the House of Lords and Privy Council.19

4. 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 3o 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

The fiduciary duty was described by Richardson J in NZ Maori Council v Attorney General22 in the context of the State-Owned Enterprise Act 1986 as requiring good faith and reasonable behaviour.

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


Also S18(d) P Works Act 1981 requires good faith negotiation.

22 New Zealand Maori Council v Attorney General Above n13
TAKINGS: A RETURN TO PRINCIPLE

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.
1. THE PETITION OF RIGHT 1627 AND BILL OF RIGHTS 1689
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" 4

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", 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. 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.

Fitzgerald v Muldoon

Commonly year numbered 1688, but in fact passed in 1689
144-48 in "Essays on the Constitution" ed PA Joseph Brookers 1995. Respect for custom is consistent with Magna Carta. The question remains however as to what period of time must elapse before a "prescriptive" constitutional custom can be recognised.
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24
25
26
27
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 Carta and accepted by the Crown as fundamental law.

1. The Petition recites 25o Edw I c29 1297 (identical to Hen.3 M.C.c.29) in Section 3 and 28o 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.

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
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 far 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 (1632-1704) 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.1 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 Parliament for longer time or in other manner than the same is or shall be granted is illegal

1. THE OMISSION OF SECTION III 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 ways 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 beeene 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 III 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 political terms a referendum.
2. 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 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 interpret the law is usefully described as a convention by Justice Baragwanath in Cooper v Attorney General (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


An example of the Conventions from the Interpretation Act 1999

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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 AO16/1998
2 Millark Properties v Perpetual Trust A30/98
2 Decisions on S85 of the RMA
2 Steven v Christchurch City Council C38/98
2 Deegan v Southland District Council C110/98
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 similar terms. The wording is similar 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 192435 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 Carta 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 Law38 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.

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.


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


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\textsuperscript{40} describes the profound influence of Chief Justice Sir John Fortescue (c 1385-1479) 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 \textit{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 \textit{Fundamentals}\textsuperscript{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.\textsuperscript{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. \textsuperscript{43}
3. 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.  

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. 

A CENTRAL CONTROL BOARD V CANNON BREWERY

The dictum of Lord Atkinson in *Central Control Board (Liquor Traffic) v Cannon Brewery Limited* (1919) 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.

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 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.

Lord Wrenbury 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.

1. 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 similar 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 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

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
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.  

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.

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).

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.”

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51 De Keyser Lord Dunedin 524 lines 20-34  
52 De Keyser Lord Dunedin 525 lines 1-3  
53 De Keyser Lord Atkinson 538 lines 31-33  
54 De Keyser Lord Parmoor 576 line 15-19  
55 De Keyser Lord Paromoor 576 line 15-19  

Similarly

Lord Moulton 552 line 30 to 553 line 2  
Lord Sumner 562 line 33 and all 563  
Lord Paromoor 573 line 25-29  

Similarly

Lord Dunedin 529 line 35  
Lord Sumner 559 line 22-29
TAKINGS: A RETURN TO PRINCIPLE

The House of Lords in Bank Voor Handel En Scheepvaart v Administrator 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.

2. BURMAH OIL V LORD ADVOCATE57

The Crown duty to compensate when taking under the war prerogative was again considered by the House of Lords in 1964 in Burmah 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 prerogative

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

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 Radcliffe 130
59 Lord Hodgson 142 A
Lord Pearce 162 F
60 De Keyser and Burmah Oil were followed in Nissan v Attorney General [1968] 286 1 QB 286 Eng CA
Burmah Oil per Lord Reid 101C 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.

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 setheth 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;"  

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? In that case their action would be founded directly on Magna Carta.

Recent New Zealand decisions (not on property takings) argued on Magna Carta such as Shaw v Commissioner of Inland Revenue and The Queen v Richard John Cresser 24 have shown the Courts reluctant to have Magna Carta
argued on a regular basis, but careful to ensure that it is respected and not forgotten.

3. 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 its 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 liberty. It would be a mistake to look on it as representing any conflict between

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\(^{69}\) 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 and amenity..."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

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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
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 ..."

Earlier he had quoted and approved the dictum of Holmes J of the United States Supreme Court in *Pennsylvania Coal Co v Mahon* 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 takings**

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.

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

In *Manitoba Fisheries v The Queen* 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* was factually similar. 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."
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 Australia84 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 1215.86 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 17 of the Universal Declaration and traverses international law.88

The Queen v Tener [1985] SC Can89 is factually similar 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 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 Mahon92 that "if regulation goes too
far it will be recognised as a taking" and stated following Sporrong v Sweden 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...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..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"

Despite the provisions of Section 85(1) of the Resource Management Act that "(1) 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 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 General [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. That suggests that the Gisborne Council recognises that compensation may be payable.

Compagnie Sucriere de Bel Ombre 502 h-i  
Sporrong v Sweden [1982] EHRR 35 at 50  
Compagnie Sucriere de Bel Ombre 503 d-e  
Compagnie Sucriere de Bel Ombre 504 i-505 a  
Compagnie Sucriere de Bel Ombre 505i-506a  
Falkner v Gisborne DC [1995] NZRMA 462,478 lines 22-26  
Anecdotal from one of the residents funding the case.
4. 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-General of Fisheries 101 by passing Section 28ZGA of the Fisheries Act imposing a condition precedent that the fishermen 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 Bateson"). 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 Carta 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?

100 Cooper v Attorney General [1996] 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
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 tyrannical 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 Taylor 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 may not be taken away 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. 110

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. 111

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...
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 Carta and the Bill of Rights 1689, it is probable that he is aware that the Sovereignty of Parliament conceded by the Bill of Rights 1689 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. 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 1689 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 repeatedly by the Attorney General......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. 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 and compensation however best ensure environmental commitment. A common misconception is that Magna Carta property rights are absolute and thus

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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
25o Edw III AD 1351
28o Edw III AD 1354
42o Edw III AD 1368
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 Carta. 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 Carta 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 Carta had been argued in *Chester v Bateson* the rule is worth remembering in view of an increasing government preference for arbitration as a means to settle compensation disputes. S162A of the Biosecurity Act is an

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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
example. Arbitration avoids publicity and precedent unfavourable to the Crown, but impoverishes the caselaw.
4. 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.\(^\text{123}\) 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.\(^\text{124}\) 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 Carta 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.\(^\text{125}\)

1. 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.

\(^\text{124}\) 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."
\(^\text{125}\) Chapter 6 The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation 108-147 in Property and the Constitution ed Janet M'CLean 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".

### 2. SECTION 21 OF THE BILL OF RIGHTS 1990

Section 21 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*) is clear of procedural immunity. For this reason Section 21 was argued by Sir Geoffrey Palmer in 1997 on behalf of the statutory lessees 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.

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

128 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.
3. **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.\(^{135}\)
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 similar 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 its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security.\(^\text{136}\)
[It is part of] the ancient immemorable law of the land.\(^\text{137}\)

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

### 4. ATTORNEY GENERAL V SIMPSON [BAIGENT’S CASE] [1994] CA

Each stage in the reasoning of the Court of Appeal in Attorney-General v Simpson\(^\text{138}\) 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\(^\text{139}\) 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.

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 its 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 its 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.\(^{143}\)

\(^{140}\) Attorney General v Simpson [Baigent's case]
1. Cooke P 676 In 1-5  Casey J 690 In 35-47 Compare Hardie Boys J 703 1-25 "a rights centred approach"
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
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
4. Cooke P 677 In 26-35  Casey J 692 In 1-37
   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 international obligation which results in harm creates a duty to make adequate reparation [by] compensation."
M'Kay J 718 In 36
Crown Immunity does not apply to the Public Law Remedy

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.\textsuperscript{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].

5. 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 \textit{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 \textit{Baigent's case}.\textsuperscript{145}
2. Parliament should also not intervene to codify the principles, which would best be developed by the Judiciary.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{149}
6. The present immunity from suit of High Court Judges should be extended to District Court Judges.\textsuperscript{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.

\begin{footnotes}
\item[144] Cooke P 676 In 38-42 Casey J 691 In 56
Hardie Boys 701 In 28-40
M'Kay J 718 In 40-50

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

\item[146] Law Commission Report 37 at 25 line 4 para 4

\item[147] Law Commission Report 37 at 2

\item[148] Law Commission Report 37 para 4 at 2

\item[149] Law Commission Report 37 para 4 at 2

\item[150] Law Commission Report 37 para 4 at 2
\end{footnotes}
TAKINGS: A RETURN TO PRINCIPLE

5. 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* 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 1965-1992).

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

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152 Access to the Land Valuation Tribunal was reluctantly conceded to the statutory lessees under the Maori Reserved Lands Act 1997. It has never been proposed for the Schedule 4 Fishers losing 20% of their fishing rights.

153 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).

154 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%

155 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.
6. STATUTORY PROVISION IN NEW ZEALAND FURTHER EXAMPLES

Lord Dunedin in De Keyser 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 Carta 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.

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." Compensation for loss to the market value of the lessee's interest could be decided by the Land Valuation Tribunal.
1. FISHERIES ACT

Sections 28 OF to 28 OO 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.\textsuperscript{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

\textsuperscript{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.
unreasonable seizure of the plaintiff's property contrary to Section 21 of the New Zealand Bill of Rights Act 1990.
2. 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. 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.

3. 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. 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. 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.

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

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 preserved. The principle of equality before the law dictates that Rural

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159 Mr Mike Jebson Ministry of Forestry
160 Adjustement 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.
163 A senior DOC Planning Officer to the writer.
164 See also on economic incentives
165 Maruia Pacific June 1998 8 col 2 ln 29-33 and 9 col 3 In 6
166 Federated Farmers'
Landowners should receive equal treatment to Urban Landowners regulated in the use of heritage or historic sites.\textsuperscript{166}
7. 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 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 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". 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 General 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.

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

167 Pennsylvania Coal Co v Mahon (1922) 260 US 393, 417.
168 Belfast Corporation v OD Cars [1960] AC 490 519 ln19
170 See 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, 110-118 Taking includes depriving without gain to the Crown. Compensation may be paid for partial takings.
1. 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. 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

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173 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.
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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IN THE SUPREME COURT OF NEW ZEALAND

BETWEEN

WAITAKERE CITY COUNCIL
Appellant

AND

ESTATE HOMES LIMITED
Respondent

Hearing: 11 and 12 July 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: M E Casey and R B Enright for Appellant
          D J Neutze and N D Wright for Respondent

Judgment: 19 December 2006

JUDGMENT OF THE COURT

A The appeal is allowed. The judgment of the Court of Appeal is set aside. The appeal is referred back to the Environment Court to be determined in accordance with this judgment.

B Estate Homes must pay the Council costs in the sum of $10,000 plus reasonable disbursements. Costs in the other Courts are to be fixed by those Courts.

REASONS

(Given by McGrath J)
Introduction

This appeal raises issues concerning requirements for new public facilities that are sometimes imposed by planning consent authorities when granting consent to the subdivision of land. At times local authorities treat the consent process as an opportunity to secure the construction by developers of additional infrastructure that will serve future community needs, even though it may go beyond what is required to serve the immediate needs of the development concerned. The present case involves the Waitakere City Council’s requirement that a developer design, form and construct, as part of its subdivision, an arterial road over its land along the path of a longstanding designation. The Council accepted that it should compensate the developer to the extent that the requirement involved additional road width and more land for road reserve than would otherwise have been required in the subdivision. Differences, however, arose between the Council and the developer concerning the basis on which such compensation should be assessed and paid. These differences have given rise to this litigation.
In September 1999 Estate Homes Limited purchased a 3.1 hectare block of land in Waitakere City for the purposes of subdivision and medium density residential development. The land had a frontage to its south onto Ranui Station Road, which runs east to west. Since 1989 the land had been subject to the designation of an arterial road, the course of which ran through the land from Ranui Station Road in the south to the point where the road entered adjoining private land to the north. The road eventually linked up further north with Marinich Drive. The purpose of the designation was to provide for the extension of Marinich Drive so that eventually it would become a district arterial road running from Ranui Station Road in the south through to Swanson Road in the north.

It was clear at all times to Estate Homes that in planning its subdivision of the property it would have to take account of the designation.

The Council has never had plans to give effect to the designation by itself building an arterial road. It anticipated that the land alongside the designated road, up to where it joined Marinich Drive, would eventually be subdivided by developers. At all times the Council has envisaged that, as the adjacent land was subdivided, developers would be required to complete the sections of the arterial road that fronted onto their subdivided land, until the arterial road was complete.

A director of Estate Homes, Mr O’Halloran, had discussions with Council officers concerning subdivision of the land prior to acquiring it and seeking subdivision consent. He gave evidence in the Environment Court that he was told that it was the Council’s normal practice to require applicants for subdivision consent to undertake the construction of designated roads at the time when the Council gave consent to subdivision of the adjacent land. He said he was also told that the Council’s policy was to pay compensation to the developer for road construction to the extent that it was not necessary for the development. He took this to be an assurance that Estate Homes would be paid for any roading not required by the subdivision. In response to what he had been told, he structured the application
and layout of associated roading in a manner that met the Council officers’ indication of their requirements.

[6] On 25 February 2000 consultants employed by Estate Homes applied on its behalf for subdivision and land use consents under s 88 of the Resource Management Act 1991. It was a premise of the application that Estate Homes would construct all roads in the subdivision, including that shown as Lot 71 in its subdivisional plan, which comprised the portion of the designated road that Estate Homes would form as an arterial road. Mr Cuthers, a traffic engineer with the Council, gave evidence concerning the functions of different types of major roads in a hierarchy provided for in the Council’s Code of Practice for Infrastructure and Land Development. District arterial roads come below strategic arterial and regional arterial roads. They cater mainly for traffic between major nodes or suburbs of the city, and carry a high proportion of through traffic. Collector roads collect traffic from local roads and distribute traffic from arterial roads. They also act as local main roads supplementary to the primary network. The main function of local roads is to give access to abutting land. They have limited, if any, through traffic. Carriageway and road reserve width varies for each type of road.

[7] The application addressed the question of compensation as follows:

**Compensation**

Our client has requested compensation for the construction of the arterial road for:

- Additional road reserve width from 17m to 23m (180 x 6 = 1080m²); and
- Additional carriageway width from 8m to 13m (184 x 5 = 920m²)

[8] The Council did not require notification of Estate Homes’ application and on 26 June 2000 it consented to it, subject to a number of conditions. These included condition (2)(o) which, together with a relevant note concerning compensation, provided:

(o) Design, form and completely construct the proposed new roads (Lots 71-75) in accordance to the Code of Practice for City Infrastructure and Land Development to the satisfaction of the Council. Notes:
(vi) Compensation for the extra 2m width of carriageway will be paid by Council when the arterial road, (Lot 71) is vested in Council as legal road. Provide an estimate of this cost for approval prior to construction of the road to enable funds to be budgeted.

[9] Note (vi) indicated that the Council would pay compensation for the cost of construction of 2 metres of the 13 metre width of carriageway for the district arterial road, rather than for 5 metres of “additional carriageway” width as Estate Homes had requested. This indicated the Council’s willingness to pay costs of construction of the arterial road to the extent that they were additional to the cost of construction of a collector road rather than a local road. No reference was made in the consent to Estate Homes’ request for compensation for additional road reserve width of 6 metres, again reflecting the difference between arterial and local road standard.

[10] Estate Homes gave notice of its objection to the Council’s decision and subsequently, on 2 April 2002, it appealed to the Environment Court against a number of conditions imposed in the grant of consent including that in condition 2(o)(vi). Prior to the Environment Court hearing, Estate Homes and the Council agreed, and the Environment Court ordered by consent under s 116 of the Resource Management Act, that the subdivision consent should become operative. Estate Homes was then able to and did proceed with the subdivision works, including those for the section of arterial road. It had completed those works by the time the Environment Court heard its appeal in late August 2003. By that time all issues raised in the appeal, other than the adequacy of the compensation specified in condition 2(o)(vi), had been resolved between the Council and Estate Homes, and the appeal proceeded solely against the provision that note (vi) to the condition made for compensation.

Environment Court decision

[11] In its notice of appeal Estate Homes contended that the Council had wrongly required it to vest in the Council that part of its land which fell within the designated area, and to pay the cost of what was a public work. We are satisfied that Estate Homes sufficiently indicated in its notice of appeal that it wished to seek compensation for the entire cost of forming the arterial road and for the full value of
the land which would become road reserve. At the commencement of the hearing of the appeal in the Environment Court, the Council submitted that it was not open to Estate Homes to seek compensation on that basis, and that it should be confined in its appeal to what it had originally sought in its consent application. This submission was rejected by the Environment Court for two reasons. First, the Court took the view that Estate Homes’ statement concerning requested compensation did not go to the substance of its application for consent and, being incidental, should not confine the scope of its appeal. Secondly, the Council had made plain to Estate Homes, before it lodged its application, that there was no prospect of the Council granting it a subdivision consent unless the application was made in terms that met the Council’s wishes concerning the construction of the road. The Environment Court decided it would be “repugnant to equity” in those circumstances to allow the Council to rely on the wording of Estate Homes’ application for consent as restricting what it could seek on appeal. The appeal hearing in the Environment Court accordingly proceeded on the basis that Estate Homes was able to seek compensation for the entire cost of the arterial road and the value of all land in Lot 71, which would be vested in the Council as arterial road.

[12] In its reserved judgment on the appeal,¹ the Environment Court observed that the designated arterial road was being developed in a piecemeal fashion as and when affected pieces of adjacent land were developed, and that it might be many years before it became a continuous road. The judgment said that Estate Homes’ main argument for further compensation was that there was no causative link between the proposed subdivision and the Council’s requirement for construction of a road on Lot 71. Accordingly, Estate Homes had argued that it should be compensated for the cost of all the land forming the road and for all construction costs. Alternatively, if the Environment Court were to find that a road was required by the subdivision, Estate Homes sought compensation for land value and construction costs in excess of those for the standard of road that was required. In the Court’s view, the subdivision did not give rise to the need for any road in Lot 71.

¹ Decision A153/2003, 16 September 2003, Judge C J Thompson, Commissioners P A Catchpole and R M Priest.
The Environment Court also said that condition 2(o)(vi) had been imposed by the Council under its powers to require payment by a developer of a fair and reasonable contribution to the cost of forming a new road which was required by new or increased traffic, attributable to the subdivision, and to take land for the purposes of forming such a new road. In its view, for condition 2(o)(vi) to be valid, such new or increased traffic not only had to be attributable to the subdivision, but also had to be the reason for the new road. As well, the condition imposed by the Council had to fairly and reasonably relate to the development. The Court decided that these requirements were not satisfied in the present case. Its judgment concluded:

Insofar as its decision of 26 June 2000, granting the appellant Land Use and Subdivision consents, required the appellant to form and construct a road on Lot 71 of the plan of subdivision without compensation for the whole cost of formation and construction, and for the value of the land on which it was constructed, the respondent acted unlawfully.

The Environment Court left it to the parties to resolve the amount of compensation to be paid to Estate Homes by agreement or, if necessary, in a separate civil proceeding.

**Appeals to High Court and Court of Appeal**

The Council appealed to the High Court against the Environment Court’s decision on questions of law. The High Court’s judgment was then the subject of a further appeal by Estate Homes to the Court of Appeal. The substantive legal issues in both appeals centred around the statutory source and the scope of the Council’s power to impose the condition concerning roading within the subdivision and whether the particular condition had been lawfully imposed. It was common ground that Estate Homes, as promoter of the subdivision, was effectively required by the Council’s officers to provide roading of a higher standard than was necessary to service the immediate needs of the subdivision. Indeed Council witnesses accepted that an application for consent which did not provide for an arterial road would

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2 The Environment Court decided that the source of these powers was ss 321A and 322 of the Local Government Act 1974. Although ss 321A and 322 were repealed by the Resource Management Act 1991, recourse to them was available under s 407 of that Act.
inevitably have been declined. The parties were in dispute, however, over what entitlement to compensation Estate Homes had in these circumstances.

[16] In the High Court, Venning J allowed the Council’s appeal.3 He held that the Council’s roading requirements were made under the power to impose conditions concerning “services or works” conferred by s 108(2) of the Resource Management Act rather than under the power to require financial contributions under s 321A of the Local Government Act, as the Environment Court had decided. Venning J found that the condition was valid but, because an additional strip of 2 metres of land was required for the arterial road, the Council was required to pay compensation for that land under s 322(2)(a) of the Local Government Act.

[17] Estate Homes appealed, with leave, to the Court of Appeal against the High Court judgment. A majority of the Court of Appeal, Baragwanath and Goddard JJ, allowed the appeal.4 Chambers J dissented and it is convenient to outline his reasons first. Chambers J agreed with the High Court Judge that condition 2(o)(vi) had been imposed under s 108(2)(c) of the Resource Management Act, rather than under s 321A or s 322 of the Local Government Act. It followed, according to Chambers J, that there was no right to statutory compensation. No taking of land was involved as, on deposit of the plan, the road would automatically vest in the Council. Compensation became an issue because of an administrative law challenge to the reasonableness of what the Council proposed to pay Estate Homes for the additional works it would be required to undertake in constructing the arterial road. This came down to whether, absent the designation, a subdivision of the kind applied for by Estate Homes would have required a collector road, as the Council had decided, or a local road, as Estate Homes submitted. Chambers J would have referred this question back to the Environment Court for decision rather than have it decided in the High Court.

[18] The majority of the Court of Appeal took a completely different approach to Estate Homes’ right to be compensated. Baragwanath and Goddard JJ decided that they should ascertain the meaning and application of the relevant statutory

3 Waitakere City Council v Estate Homes Ltd [2005] NZRMA 128.
4 Estate Homes Ltd v Waitakere City Council [2006] 2 NZLR 619.
provisions by reference to the principle, having effect as a rule of statutory interpretation, that where there was a taking of private property under legislative authority, there was a presumption that the legislation would be read as providing for compensation. The majority decided that in the circumstances there had been a taking.

[19] Applying this approach, the majority felt able to read s 322(2) of the Local Government Act as a provision unqualified by its immediate context. It was an independent source of authority for taking of land for the purposes of forming a new road. So read, s 322(2) empowered the Council to acquire Lot 71 for the purposes of forming the arterial road, subject to the requirement for compensation in accordance with s 247F, which invoked provisions of the Public Works Act 1981. The fact that Estate Homes had made in its application to the Council only a limited claim to be compensated was not an impediment to its right to claim full compensation on appeal. The basis on which compensation was to be paid was referred back to the Environment Court for decision. The majority accordingly rejected the view of Chambers J that, when read in its context, s 322(2) gave a power to take land only where the Council itself was to perform the work involved.

Issues in this Court

[20] This Court has given the Council leave to appeal against the Court of Appeal’s judgment.5 The main issues in the appeal are conveniently summarised in the grounds approved by this Court:

(1) Whether compensation should be assessed as if the land had been taken by the Council, or as an ingredient of a condition imposed on the granting of a resource consent, or otherwise; and with what consequential effect.

(2) Whether condition 2(o)(vi) satisfied the requirements of the Newbury test.6

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5 [2006] NZSC 22.

6 The *Newbury* test is a reference to common law requirements that planning consent conditions must be imposed for the purposes of the Resource Management Act 1991, fairly and reasonably relate to the permitted development and not be unreasonable. They were expressed in this way in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.
(3) Whether the formation and vesting of Marinich Drive constituted “services or works” under s 108(2)(c) of the Resource Management Act 1991.

(4) Whether the High Court was empowered under Rule 718A to determine the nature of the road which, but for the designation, would have been appropriate; or whether it should have referred that matter back to the Environment Court.

The scope of the Environment Court’s jurisdiction

Permitting an increase in the amount of compensation claimed

[21] Estate Homes had prepared its application to the Council on the premise that it would construct an arterial road along the route shown in the designation. The application recorded that it had requested from the Council compensation in the amount of the extra costs associated with a road of that kind. Estate Homes’ application also indicated that it considered costs associated with a local road rather than a collector road were the appropriate comparison. The extra costs sought comprised the difference between the cost of constructing a local road, with a carriageway width of 8 metres, and that incurred in constructing the arterial road, with a 13 metre carriageway. Estate Homes had also requested compensation in its application for the additional width of road reserve it would provide, which would be 23 metres for the arterial road compared with 17 metres for a local road. Although compensation for additional land was not addressed in the Council decision, the Council subsequently accepted that compensation had been requested for the value of the additional strip of land, and that this should form part of the compensation package.

[22] In granting its consent to the subdivision application, the Council stipulated in condition 2(o) that the proposed new roads should be constituted in accordance with the relevant Code of Practice and to the satisfaction of the Council. It addressed the request for compensation in its note (vi) which effectively said that compensation for construction costs of an extra 2 metres width of carriageway would be paid by the Council. This indicated that the Council would pay compensation based on the difference between construction costs for an arterial road and a collector road. Estate Homes, of course, had sought to be reimbursed a greater sum based on the difference
in costs of constructing a local road. The second point of difference was whether the extra strip of land required for road reserve would also be the subject of compensation. As indicated, the Council eventually accepted that there should be compensation for taking additional land but based on additional requirements for a collector road.

[23] The majority of the Court of Appeal decided that it had been open to the Environment Court to vary conditions of consent to the subdivision, even if this resulted in conditions about compensation more favourable to the applicant than those it had originally sought, as long as no prejudice arose to other affected parties, such as the Council, or to the public. Subject only to these considerations, the original consent application could properly be amended in the course of the hearing of an appeal concerning the validity of the Council’s original condition.

[24] Before us Mr Neutze, for Estate Homes, argued that a further factor supporting the Court of Appeal’s decision on this point was that the hearing was “de novo”. He reminded us that the Court of Appeal had seen the applicant’s statement concerning the compensation it was seeking as incidental to the application for consent. The Court had also decided that it would be unfair to Estate Homes not to let it claim full compensation on appeal, when the form of its application had been heavily influenced by what Council officers had indicated would be acceptable.

[25] Mr Neutze further argued that there were sound policy reasons favouring a flexible approach to the terms of applications for consent at the appeal stage. The Environment Court could, and should, reasonably accommodate changing requirements of the parties in relation to proposed developments. Counsel said that this would not lead to the subject matter of an appeal “mutating” into something that was quite different to what was before the consent authority. He supported his submission by reference to the Court of Appeal’s decision in *Body Corporate 97010 v Auckland City Council.*

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* [2000] 3 NZLR 513.
Estate Homes’ application for resource consent was made under s 88 of the Resource Management Act. Under s 88(2), applications for consent must be made in the prescribed form and manner and must include an assessment of environmental effects. There is provision for the local authority to treat as incomplete and return an application which does not include an adequate assessment of effects, or information required by regulation. Under ss 93 and 94 of the Act, a consent authority must give public notification of the application unless satisfied that those adverse effects will be minor. The Council decided not to notify Estate Homes’ application in this case. Its decision granting consent records that it considered the application under ss 104 and 108 of the Act, which respectively stipulate matters for consideration in granting consent and provide for conditions that may be imposed.

The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has “the same power, duty, and discretion” in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.

These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be “de novo”, meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal.8 The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.

We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do

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not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision to the extent that it is in issue on appeal.\footnote{Body Corporate 97010 at p 525.} Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal.\footnote{Coutts Cars Ltd v Baguley [2002] 2 NZLR 533 at para [4] (CA) Gault J.} In the planning context, the decision of the local authority will almost always be relevant because of the authority’s general knowledge of the local context in which the issues arise.\footnote{Section 290A, which was enacted by s 106 of the Resource Management Amendment Act 2005, now requires the Environment Court in determining an appeal to have regard to the decision that is the subject of appeal.}

[30] The approach that must be followed where it is said that a tribunal has allowed an application on a different basis to that on which it was originally made is consistent with this principle. As the Court of Appeal has recently said:\footnote{Shell New Zealand Ltd v Porirua City Council (CA 57/05, 19 May 2005) at para [7] per Anderson P.}

We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

[31] In the present case we are satisfied that Estate Homes should, on appeal, have been constrained by what it had recorded in its application to the Council as the basis on which it sought compensation if it was to construct an arterial road. The Council, as respondent in the Environment Court, was prejudiced by the course that was taken concerning the amount of compensation that could be sought for the arterial road. In stating in its consent decision the basis on which it was prepared to pay compensation, the Council exposed itself to an appeal to the Environment Court on the ground that its intended provision of compensation was insufficient to make its requirement of construction of the road to an arterial standard a reasonable one. The
risk that the Council assumed was that the Environment Court would decide that additional compensation on the basis originally sought by Estate Homes was necessary for the condition to meet common law requirements which limit the generality of broadly expressed powers to impose conditions. But the Council did not thereby put itself at risk of the amount of compensation becoming at large before the Environment Court. The Council was entitled to assume that the maximum payment that the Court might determine to be necessary to make the condition reasonable would be no greater than one set on the basis reflected in Estate Homes’ application for consent.

[32] The Environment Court should also have recognised that local authorities are in general not subject to the jurisdiction of the Environment Court in relation to their functions as a roading authority. These functions include determining when they will fund work on designated roads.13 While the Council had a policy of having developers build designated arterial roads running through their land at the time of its development, it might have wished to reconsider the application of the policy to this particular subdivision if an appeal against its terms of consent were to put the Council at risk of having to pay the total costs associated with the arterial road.

[33] For these reasons we are satisfied that the Environment Court should not have permitted Estate Homes to present its appeal on a basis departing so significantly from the compensation that it was seeking at the time of its original application. The decision to do so made the issues considered on appeal substantially different from those raised in the application and addressed by the Council.

[34] The Council consented to an application by Estate Homes, under s 116 of the Resource Management Act, for the subdivision consent to commence prior to the hearing of the appeal. At that stage the Council did not complain that its consent had been granted on a false premise. We do not, however, accept the Council thereby

compromised its right to object to Estate Homes proceeding at the appeal hearing on a wider basis than advanced in its original application. We shall return to the significance of s 116 on another point later in these reasons.

[35] When, on appeal to the Environment Court, an applicant seeks to have an application granted on a materially different basis from that put forward to the Council, considerable care is required before the Environment Court permits the matter to proceed on that different basis. Not every alteration in approach would require an applicant to make a fresh application to the Council, rather than to proceed by way of appeal. It is a question of degree. Furthermore, as the majority of the Court of Appeal recognised, the question of any prejudice to other parties, and the general public, is always relevant. Where, as in the present case, the Environment Court came to be considering the matter on a materially different basis from that to which the Council exposed itself, the matter could proceed on the wider basis only with the Council’s consent and then only if the Court was satisfied that other persons and the public were not prejudiced. In the present case, the Council had good reason to oppose the wider basis for the appeal and the matter should not have proceeded in those terms at all. In consequence, the decision of the Environment Court was on a materially different basis which prejudiced the Council and cannot stand.

[36] We accordingly uphold the threshold argument of the Council and will consider its appeal on the basis that the matter truly at issue before the Environment Court should have been simply the question of whether the appropriate compensation was to be based on a local road or a collector road.

*Permitting a challenge to the Council’s actions before application submitted*

[37] By allowing Estate Homes to present its appeal on a broader basis, the Environment Court also allowed the appellate proceeding to develop into a challenge to the lawfulness of the earlier actions of the Council officers, who had sought to persuade Estate Homes to submit an application for subdivision that accommodated the designated arterial road and provided for Estate Homes to build it. The appeal thereby became a collateral challenge to the validity of administrative action
involving the proposed exercise by the Council of a statutory power to refuse any application for consent which did not provide in this way for the arterial road on the subdivided land. The Council did not in the end exercise its power, because Estate Homes submitted its application in terms of what it understood to be the requirements if it were to be approved.

[38] There are difficulties in what occurred. The appeal to the Environment Court was an inappropriate proceeding in which to bring a challenge to administrative actions that did not form part of the Council’s decision-making process in respect of the application which was actually submitted. Any challenge to the lawfulness of the prior actions of Council officers should have been brought by way of judicial review in the High Court, thereby meeting the requirement that “the right remedy is sought by the right person in the right proceedings”.14 The appellate authority of the Environment Court under s 290 of the Resource Management Act was confined to the decision against which Estate Homes was appealing, and the Environment Court did not have authority to go behind the application which was the subject of that decision in order to determine the appeal.15 In the present case the proceedings in the Environment Court were the wrong proceedings. That Court did not have statutory jurisdiction to determine the lawfulness of the prior actions of Council officials because its appellate jurisdiction was confined to the Council’s decision on the application. The Environment Court, accordingly, could not go behind the application in hearing and deciding the appeal, let alone decide the appeal on a basis more favourable to Estate Homes than it had sought in its application.

[39] New Zealand law has largely avoided jurisdictional complexities in relation to the manner in which administrative action can be challenged.16 But the authority of the Environment Court to decide collateral matters depends on whether the issues are squarely raised by the proceeding that is directly before it. In the present case the

15 The bar under s 296 of the Resource Management Act to bringing judicial review proceedings until the right of appeal to the Environment Court is exercised, and the appeal determined, does not apply to a challenge to irregularities in actions of Council officials prior to the submission of an application for planning consent: Kirkland v Dunedin City Council [2002] 1 NZLR 184 at para [22] (CA).
evidence concerning the prior discussions with Council officers was relevant in the appeal only to the extent that it threw light on the nature of the condition imposed concerning the arterial road.

The Council’s requirement for an arterial road

[40] Condition 2(o) of the Council’s consent is expressed as a requirement which Estate Homes had to meet to the satisfaction of the Council before it was entitled to a certificate of compliance with the consent for the subdivision enabling deposit of the subdivisional plan.17 On its terms, the condition requires that the roads proposed in the application, including the arterial road shown in Lot 71, are to be designed, formed and constructed in accordance with the Council’s Code of Practice. There is, however, undisputed evidence concerning the advice given to Mr O’Halloran by Council officers concerning the nature of the subdivision and the framing of the application for consent. Read in that context, it is clear that Estate Homes made provision for the arterial road in its subdivision because it was informed that the Council would require that amenity to be provided or it would not consent to the proposed subdivision. In those circumstances, it is not appropriate to treat the condition simply as a stipulation of the standards to be met in relation to roading provided for in the application.

[41] This should not be taken as endorsing the approach taken by Estate Homes in the present case. It will usually be preferable for an applicant for a subdivision consent to apply for that consent in terms that the applicant considers suitable. If the Council then grants the consent on conditions, and the applicant wishes to take issue with those conditions, the appeal process can be invoked. Matters will become needlessly complicated if, as in the present case, an applicant attempts to challenge conditions of consent on the basis of what it would have applied for, had it not been concerned to comply with stipulations stated by Council officers. While the problem of delay may tempt applicants to act in a strategic way in order to expedite the process, this will not provide a justification for seeking to re-open the terms of the consent application at the appeal stage.

The reality in the present case is that the application was expressed in terms that reflected a Council policy of requiring developers to provide for and build an arterial road along the path of the designated road running through their properties. In this context condition 2(o) is to be read as a requirement that Estate Homes construct the road shown on Lot 71 of its plan to arterial road standards, making appropriate provision from its land for road reserve. The note concerning compensation incorporates the Council’s recognition that its requirement of an arterial road for that subdivision, without Council compensation for the additional element in construction costs, would breach common law requirements of reasonableness. In stipulating, as it did in the note, that it would pay compensation for “the extra 2m of carriageway”, the Council sought to bring the condition within those requirements by making it reasonable.

**Was there a taking?**

Before addressing the various statutory provisions identified as providing authority for the Council’s requirement that Estate Homes construct an arterial road on Lot 71, it is necessary to consider the approach taken in the Court of Appeal to interpretation of the legislation. As indicated, the majority identified what it saw as two conflicting principles which needed to be reconciled in interpreting the legislation. The first was a general principle of statutory interpretation that:

\[18\] Subject to inconsistent legislation and compliance with the general law it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes.

[44] The other principle, reflected in resource management legislation, was that land development required “principled, systematic and sensitive controls” without any expectation of or right to compensation.\[19\] Following an extensive discussion in their reasons, taking both principles into account, the majority proceeded to construe the statutory provisions in light of the presumption of compensation for public taking.

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\[18\] At para [128].  
\[19\] At para [136].
New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta which requires that no one “shall be dispossessed of his freehold … but by … the law of the land”. One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid. It was no doubt in this spirit that the majority of the Court of Appeal invoked s 322(2) of the Local Government Act, which is a provision which authorises the taking of land subject to compensation in stipulated circumstances.

The common law presumption of interpretation applies, however, only if there is actually a taking. It is necessary in the present appeal accordingly to inquire whether the Council’s requirement, as a condition of its subdivision consent, that Estate Homes construct an arterial road over Lot 71 of its subdivision and cause the land to be vested in the Council as road reserve amounts to a taking.

In general, where permission to develop land is refused, with the consequence that it is greatly reduced in value, the courts have not applied the statutory presumption and have treated what has happened as a form of regulation rather than a taking of property. This explains why New Zealand planning legislation restricts, without compensation, the right to develop land and requires

20 Chapter 29 of Magna Carta, which remains part of New Zealand law under s 3(1) and the First Schedule of the Imperial Laws Application Act 1988.
approval of all subdivisions. The legislation, of course, also enables landowners to apply for consent to subdivide, which they may obtain if they comply with conditions that are lawfully imposed in accordance with purposes for which the consent authority was entrusted with the relevant discretion.

[48] If a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, no expropriation or taking will be involved and the common law presumption of interpretation will not apply to the empowering legislation. If a condition is unlawfully imposed, for example for a purpose outside of those for which power to impose conditions of subdivision consent is given, that will not convert a regulatory requirement into a taking of property. The remedy for the landowner is to seek invalidation of the condition in the courts or, if the legislation permits, the substitution of a different outcome on appeal.

[49] Consistent with the view that conditions of consent to subdivision of land do not amount to a taking is the characterisation by the Court of Appeal of the scheme of the Water and Soil Conservation Act 1967. The Court has said that the Act did not deprive landowners whose applications for water rights were refused of anything: it simply denied them privileges. It followed, in the Court of Appeal’s view, that there could be no claim to an expectation of compensation in consequence of the refusal.

[50] The Court of Appeal held in Waitakere City Council v Khouri that compensation was not payable in respect of the vesting of any road in a council under s 316 of the Local Government Act. That was, of course, a different question from that in the present case, which deals with the compensation payable by the Council for any extra width of road required by it to comply with what it calls its “connectivity” policy.

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24 Auckland Acclimatisation Society Inc v Sutton Holdings Ltd [1985] 2 NZLR 94.
Professor Stoebuck, writing in relation to the constitutional position in the United States, observes that a distinguishing characteristic of eminent domain transfer is that it involves the transfer of rights which “may be compelled over the transferor’s immediate, personal protest”. The notion is that there is a forced acquisition of a landowner’s rights under a power belonging to the state which allows the landowner no choice. In our view, that absence of choice must be present in a taking of property before the principle of statutory interpretation applied by the Court of Appeal in this case can be invoked.

Such absence of choice is a far cry from the facts of the present case, where the provision of roading to be vested in the Council was part of the terms on which consent to subdivision was given. If the requirements were unacceptable, Estate Homes was not required to transfer its land. On the general principles we have discussed, the requirements placed on it by condition 2(o)(vi) accordingly do not amount to a taking of its land. This was recognised by the High Court of Australia in *Lloyd v Robinson* where, speaking of giving approval to subdivisions conditional on the applicant giving up land for purposes including roads, the Court referred to the presumption of interpretation and said:

> Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: … If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first.

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27 (1962) 107 CLR 142 at p 154.
[53] From time to time developers will consider that requirements have been imposed by a consent authority, in approving a proposed subdivision, which are excessive and subject the developer to unfair pressure to submit to them because of the economic imperative of acting promptly on the consent. The risks to developers associated with challenges to the requirements by way of appeal, including those associated with delays, may be significant and we are not unsympathetic to the problems they face with regulatory processes. These circumstances, however, provide no sound basis for reading legislative stipulations of the powers of consent authorities as involving takings of property, for which the presumption is that there is provision for compensation. The owner of the land has recourse to judicial remedies, which include challenging the lawfulness of requirements imposed and, where the statute permits it, a fresh assessment of the merits of the requirement on appeal. If the landowner does not wish to take advantage himself of these procedures, then, as the High Court of Australia observed in *Lloyd v Robinson*, “the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions”.

[54] For these reasons we are satisfied that, in imposing the condition concerning the arterial road, the Council was not taking property so as to be required to pay compensation. The legislative provisions are to be construed without regard to that principle of interpretation.

**The statutory basis for the arterial road requirement**

[55] The Environment Court concluded that, insofar as the condition related to construction of the arterial road, s 321A of the Local Government Act applied and, insofar as the condition concerned vesting of land for road reserve in the Council, the applicable provision was s 322(2). Section 321A(1)(a) provides for a Council, as a condition of approval of a scheme plan, to require the owner of land to pay a reasonable contribution towards the cost of forming new roads required because of new or increased traffic owing to a subdivision. The difficulty with its application, however, is that the present case involved no requirement for a payment to the

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28 At p 154.
Council by Estate Homes. Nor did it require dedication of a strip of road for any purpose in terms of s 321A(1)(b). Section 321A simply does not apply.

Section 322(1) of the Local Government Act is concerned with situations where the Council agrees with the owner of land that, instead of the owner making provision for new roads and doing the necessary work, the Council itself will construct roads in a subdivision in return for the owner transferring land to the Council. Councils are also given power by s 322(2)(a) to take, purchase or otherwise acquire land for forming a new road. As previously noted, when they do so provisions for compensation in the Local Government Act will apply. Sections 247F and 247G provide for such compensation to be assessed under the Public Works Act.

We accept, as the majority of the Court of Appeal and Venning J concluded, that s 322(2) is a source of statutory authority for the taking of land that covers wider ground than the narrow circumstances provided for in s 322(1). The context in which s 322(2)(a) appears is, however, important and indicates that the power which it confers only covers situations in which formation, diversion or upgrading work is to be undertaken by the Council. If the Council wishes to take land for any purpose in that context, s 322 gives the necessary power. But in the present case, where the applicant itself was to do the works, and the land would vest in the Council by operation of law on deposit of the plan, on its terms s 322 has no application. The contrary view of the Court of Appeal majority was of course based on its conclusion that there had been a taking of land, which invoked a presumption that there would be compensation. We have rejected the view that the presumption applies and we do not accept that s 322 has any application.

In his judgment in the High Court, Venning J concluded that the condition was one requiring Estate Homes to perform “works” and was authorised by s 108(2)(c) of the Resource Management Act, which is the successor provision to s 321A. In the Court of Appeal, Chambers J agreed with this analysis.

A statutory power to impose conditions on the grant of a planning consent is provided for in s 108 of the Resource Management Act. Insofar as it is relevant, s 108 provides:
108 **Conditions of resource consents**

(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any one or more of the following conditions:

...  

(c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

[60] The majority of the Court of Appeal did not accept that the phrase “services or works” was apt to cover construction of roading which was not reasonably required as a consequence of the subdivision, but which would serve regional purposes. On the terms of s 108(2)(c), however, the question of whether a condition requiring roading be constructed to a stipulated standard is in the nature of a requirement to provide “services or works” should be determined by reference to whether the roading provided for under the subdivision plan, which forms part of the consent application, fits with the phrase “services or works”. In our view, plainly it does. The language of s 108(1)(c) accordingly directly empowers imposition of a condition requiring that the roading stipulated in the application be carried out as a condition of the consent, and provides the statutory authority for the Council’s requirements concerning the arterial road.

**Was the Council’s requirement lawful?**

[61] In imposing the requirement that Estate Homes design, form and construct an arterial road along the course of the designated road, the Council was acting under s 108(2)(c). In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside of the purposes of the empowering legislation, however desirable it may
be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.\footnote{5}

[62] The Environment Court decided that Estate Homes’ subdivision could have been designed to operate perfectly well without road along the Marinich Drive axis. The Court added that, while the road might be used because it was there, it could not be said that subdivision-generated traffic had caused the need to construct that road. The Court was, however, proceeding on the basis that s 321A applied, which was common ground at the hearing.

[63] Venning J, on appeal, correctly decided that s 108(2)(c) was the empowering provision rather than s 321A. He did not accept that administrative law principles required that there be a cause and effect link between the subdivision and a condition such as the arterial road requirement. It was sufficient that Estate Homes had chosen to incorporate a road along the designated path in its application. In these circumstances, requiring Estate Homes to construct an arterial road and contribute an extra 2 metres of land was a condition that fairly and reasonably related to the development plan and the subdivision and was also a reasonable requirement. What was not relevant was that a hypothetical subdivision could have been designed to operate effectively without construction of Marinich Drive.

[64] The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision.\footnote{161} We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

\footnote{5}{Footnote 5 above: see also Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554 at p 572 (CA).}
\footnote{161}{At para [161].}
In Tesco Stores Ltd v Secretary of State for the Environment\textsuperscript{31} the House of Lords considered the United States’ approach concerning when the imposition of a planning condition amounts to an unreasonable exercise of planning power. Under that approach, which has been developed in the context of the eminent domain provision in the Fifth Amendment, United States courts apply a “rational nexus” test.\textsuperscript{32} This requires a planning authority imposing a condition which obliges a contribution to infrastructure to demonstrate that the development will cause a need for new public facilities.\textsuperscript{33} The House of Lords rejected that standard as appropriate for judicial review of planning conditions because it would necessarily involve an investigation of the merits of planning decisions. Lord Hoffmann said:\textsuperscript{34}

No English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference.

In New Zealand, the planning system interpolates a right of appeal on the merits to specialist tribunals, but this does not diminish the force of Lord Hoffmann’s dictum as a reminder of the distinction between whether a consideration is material to a decision and the weight to be given to it. We consider that the application of common law principles to New Zealand’s statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development.\textsuperscript{35} This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not for example relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

\textsuperscript{31} [1995] 1 WLR 759.
\textsuperscript{32} The test was laid down by the Supreme Court of the United States in Nollan v California Coastal Commission 483 US 825 (1987).
\textsuperscript{33} As well, the authority must show that the contribution required is proportionate to that need and will be used to provide the facilities.
\textsuperscript{34} At pp 781 – 782.
It was for the Environment Court, in the exercise of its appellate role, to decide whether the conditions were appropriate. In addition to the matters mentioned, the Court was required to take into account the policy of the Council as reflected in its plan. As Venning J emphasised, Estate Homes chose to apply for subdivision consent incorporating a road along the path of the designation. The Council’s requirement that it be constructed to the standard of an arterial road cannot be said in these circumstances to lack the necessary degree of relationship to the subdivision proposed. It is beside the point that approval for the subdivision could have been sought with a different roading format which did not include a road along the designated path. The requirement to construct an arterial road clearly related to the subdivision for which Estate Homes was prepared to, and did, seek consent.

That leaves the question of whether the requirement was reasonable. From the Council’s point of view, it presumably made economic sense for it to have the road constructed to the standard required for an arterial road in the course of the development, with all land required for road reserve vested in the Council, so that it did not later have to acquire further land and widen the road to arterial standard. Whether it was reasonable to impose that preference on Estate Homes comes down to whether the basis the Council proposed for compensation for the road and required land was reasonable. Its proposal was to reimburse the additional costs of construction over and above those for a collector road. Subsequently it has agreed to pay for the extra strip of land required for the road reserve of an arterial road on the same basis. Estate Homes argues that to make the Council’s requirement reasonable it should have based its proposal on cost and land requirements for a local road.

Reference of appeal back to Environment Court

Mr Casey, on behalf of the Council, urged us to resolve this issue, as

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36 We have been advised that the Council has paid and Estate Homes has accepted, without prejudice pending the determination of this appeal, compensation for additional construction costs and the value of an extra 3 metre strip of land. The payments have been calculated on the basis that a collector road is the appropriate comparator.
Venning J was prepared to do in the High Court, by acting under r 718A of the High Court Rules. That rule gives the High Court power to make any decision it thinks should have been made. Alternatively, the Court may direct the decision-maker to reconsider the matter.

[70] In order to decide that it was appropriate to decide outstanding issues in this Court, we would need to be satisfied that they would not turn on questions of specialist judgement concerning facts which the legislature contemplated would be determined on appeal from a local authority by an expert tribunal. That is not the case here. Specifically, we are not satisfied that the question of whether a collector road or a local road was the appropriate basis for assessing the extra costs associated with an arterial road turns solely on Council documents concerning the thresholds set for individual types of road. In our view the ultimate questions may well turn on planning judgement. Accordingly, we propose to refer the question of what compensation would make the Council’s requirement to construct an arterial road reasonable at common law to the Environment Court for determination.

[71] The appeal is accordingly referred back, under s 26 of the Supreme Court Act 2003, to the Environment Court for determination.

**Approach to be taken in determining the appeal**

[72] Under s 290 of the Resource Management Act, the Environment Court has the same powers, duties and discretions as did the Council in respect of its decision granting consent. The Court will be able to confirm, amend or cancel the condition which is in issue in the appeal if it concludes that is appropriate. This Court has, however, decided that the requirement to build an arterial road was authorised under s 108(2)(c) of the Resource Management Act and that the requirement was sufficiently related to the subdivision for which consent was sought to meet common law requirements. The remaining important question for the Environment Court, and the reason why the matter is referred back to it, will be the determination of whether it was reasonable for the Council to impose the condition on the proposed basis for payment towards costs of the road.
On the argument we have heard, that will turn on whether, in the absence of a designation, it would have been appropriate for the road shown as Lot 71 of the subdivision plan to be built to the standard of a collector road or a local road. Other ways in which Estate Homes could have organised the subdivision, so as not to include a road on Lot 71, will not be relevant. We have concluded that this specific decision is a matter of planning judgement which is appropriately taken by the specialist appellate Court whose members, of course, have already heard evidence that was directed to the central issue.

At all stages the focus of the successive appeals has been on the condition’s requirement for construction of an arterial road, including the proposed compensation. The Council was not, of course, required to address compensation in a note to its condition in relation to road building. It could have addressed compensation by agreement with Estate Homes. It chose instead to stipulate the basis for compensating Estate Homes in a note to the condition it was imposing requiring an arterial road. The note was thereby incorporated in both the condition and the Council’s decision. As a result it forms part of what may be addressed by the Environment Court in the appeal under s 290.

We are conscious of the fact that the road has now been built by Estate Homes. We state first, however, what the position would have been if that had not occurred, as that will be the normal situation. If the Environment Court decides that the Council’s basis for compensation was unsound and the condition was unreasonable, in the normal course it would be able to invalidate the condition. It should then allow the Council to decide whether it wishes to maintain its requirement for an arterial road. If it does, the Council could agree to substitution by the Environment Court of a condition requiring additional compensation sufficient to make the requirement reasonable. If, however, the Council is unwilling to accept the additional financial burden, the Court would have to address other options for determining the appeal. In general it is not for the Court to decide what financial allocations are to be made for particular roads from a local authority’s planning budget. The Council’s discretion in this must be respected when considering remedies. For that reason, in a normal case it will usually not be open to the
The present case, however, is exceptional. The road has been built by Estate Homes and the Council has obtained what it sought to achieve in imposing the condition. That followed the Environment Court’s order under s 116 that the consent should commence, despite the outstanding appeal. That order was made on Estate Homes’ application but with the consent of the Council, which was expressed to be subject to condition 2(o)(vi). Mr Casey submitted that if the condition were found to breach administrative law requirements, this Court should not require the Council to meet any additional costs of roading found to be payable to make the requirement of an arterial road reasonable. He rightly emphasised, and we have already recognised, that it is not part of the Environment Court’s general role to supervise the Council’s decisions on the allocation of roading funds. Mr Casey also emphasised that Estate Homes had been prepared to build the arterial road knowing that it might not be paid more than what the Council had decided was appropriate. On the other hand, as Mr Neutze argued, the Council consented to the application for an order that the consent commence, knowing that this would lead to the road being constructed, as it desired, and fully aware that the Council would still face an appeal over the appropriateness of the condition in relation to compensation for Estate Homes.

We have concluded that in this case the Council’s commitment to pay compensation formed part of the consent decision of the Court. It is therefore part of what the Council can “confirm, amend or cancel” under its statutory powers. The Council is no longer able to abandon its requirement for an arterial road. It has achieved that result through a process involving a Court order to which it consented. Whatever the Council meant by making its consent subject to the condition, it did not give a clear indication that its consent to the works being undertaken was on the basis that it would not have to meet extra costs if the Environment Court found its proposal for compensation was inadequate. In those circumstances we do not consider the Council is now able to raise its right to determine roading expenditure as a factor that should preclude the Environment Court from exercising its statutory jurisdiction to amend the condition, if it decides that it is unreasonable, so that there
is an increase in the sum that the Council is presently committed to pay towards the cost of the road. Within the limits of what was sought in the original application, the Environment Court will, in these circumstances, have jurisdiction to amend the condition accordingly if it finds that compensation on the basis of note (vi) to condition 2(o) is unreasonable. The Court should indicate what adjustments would have to be made to the condition to make it reasonable, covering the basis of compensation for additional costs of construction and for any additional land required for an arterial road.

**Conclusion**

[78] There is an obvious alternative to the approach taken by the Council in this case of using the statutory planning consent process to secure construction of additional infrastructure to meet the long term needs of the city. It would be open, although not necessarily as advantageous to local authorities, for them to proceed by way of side agreements with developers to undertake certain work, and provide where necessary additional land, for an agreed amount of compensation. Such side agreements could be reached prior to consent decisions being taken by the local authorities. This approach would dispense with the need for councils to impose conditions requiring additional services and works, while at the same time committing themselves to payments for the additional element.

[79] In proceeding in the way that the Council did in this case, local authorities take the risk that their requirements are invalid, in terms of administrative law standards, if the compensation stipulated in the conditions that impose the infrastructure requirements is inadequate. If local authorities choose to proceed in this manner, they also leave themselves open to challenges on appeal concerning the adequacy of additional payments they offer. If, as well, they co-operate in allowing development works to proceed, while the reasonableness of their requirements for extra infrastructure remains in issue in an appeal, local authorities risk being required to pay what the Environment Court decides is appropriate for the completed infrastructure they wanted to have done within the limits of what was sought in a developer’s application. This is what has happened in the present case.
[80] Developers do not of course have to reach agreements with local authorities and have rights of appeal against conditions they impose in their capacity as consent authorities. The decisions developers take will, however, no doubt continue to be strongly influenced by economic considerations, including the cost of delay in proceeding with developments. In the end, developers will always have to decide which way of proceeding best serves their interests overall.

Result

[81] For the reasons given, the appeal is allowed. The judgment of the Court of Appeal is set aside. In its place there will be an order referring the appeal back to the Environment Court to be determined in accordance with this judgment.

[82] The Council has been partially successful in this appeal and is entitled to costs in the sum of $10,000 plus reasonable disbursements. Costs in the other Courts are to be fixed by those Courts.

Solicitors:
Kensington Swan, Auckland for Appellant
Brookfields, Auckland for Respondent
BEFORE THE ENVIRONMENT COURT
AT WELLINGTON.

Env-2019-WGN-


AND

IN THE MATTER of an appeal pursuant to clause 14(1) of the First Schedule of the Act in relation to the Proposed Natural Resources Plan for the Wellington Region

BETWEEN DANIEL THOMAS SPENCER RIDDIFORD

Appellant

AND WELLINGTON REGIONAL COUNCIL

Respondent

NOTICE OF APPEAL

Mr DTS Riddiford,
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Martinborough RD2
Tel 06 307 8850
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Service should be both hardcopy (because of limited internet) and Email (since rural mail can take 5-6 days to arrive)
1. Daniel Thomas Spencer Riddiford generally agree with and now formally apply to be a s274 party to the appeals filed by Beef and Lamb NZ and Federated Farmers of New Zealand.

2. Daniel Thomas Spencer Riddiford appeals against a decision of the Wellington Regional Council (WRC) on the following proposed plan:

**Proposed Natural Resources Plan for the Wellington Region**

3. The Appellant made a submission and spoke to that submission in person at hearings before Wellington Regional Council Hearing Commissioners in respect of the proposed plan.

4. The Appellant is not a trade competitor for the purposes of Section 308D of the Resource Management Act 1991 (Act).

5. The Appellant received notice of the decision referred to in this appeal on or after 31 July 2019 by rural mail.

6. The decision was made by the Respondent.
The Appellant is willing to participate in mediation.

The parts of the decision that the Appellant is appealing are:
.a The role of property rights *Waitakere v Estate Homes* [2007] SC

.b Rural Landuse Provisions (including definitions) relating to livestock access to waterbodies, farm earthworks, and vegetation clearance

.c Provisions relating to the claimed significance of the Oterei River and its management

**Reasons for appeal**

The Appellants reasons for appeal are generally that:

a **Carbon sequestering forest** In respect of Earthworks and Vegetation the Rules obstruct the planting of carbon sequestering forest, Government Policy under the Climate Change Act 2008 and the proposed Zero Carbon Bill.

b **Subsidiarity** is the concept derived from John Locke and earlier philosophers that all decision making should be devolved to the minimum competent units in society. It is the foundation of our legal system derived from Magna Carta and the foundation of modern economic thinking. For example the Farmer is obviously the best person by virtue of local knowledge to know when a paddock of pasture should be maintenance scrub cut to sustain or improve the pasture or converted to forest.

c **Delegation delegatus non potest delegare** The Councillors had no power to delegate their power to create subordinate regulation without knowing and approving the full detail of the final plan after it was passed by the Officers Or considering the Rules of Natural Justice in respect of affected Ratepayer Farmers. Excessive delegation to the Officers is anti democratic and avoids the accountability of elected Councillors to their ratepayers.
Waitakere City Council v Estate Homes Limited [2007]2NZLR 149

Supreme Court

The Respondent has no power to pass broad Rules which effect a non compensated regulatory taking of any of the property rights in land of ratepayers.

[45] New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta which requires that no one “shall be dispossessed of his freehold … but by … the law of the land”.20 One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid.2

The Appellants further reasons for appeal include as noted by FFNZ that:

a. Decision Report 3 (para 3.32) notes expert evidence from Council that there is no compelling evidence of wholesale degradation of freshwater quality through the region. The evidence from Council further shows that “there is a high level of confidence that a majority of sites have improving trends over the past decade for most variables (and) there is strong evidence of overall water quality improvement at the regional level over the past decade”. Acknowledging this context, FFNZ seeks less onerous rules for certain activities.

b. Decision Report 1 (para 5.12) acknowledges the importance of farming activities to both the regional and national economy and an intent to simplify the rules applying to farming practices.

Without limiting the generality of the above, the specific reasons for the appeal and the relief sought with respect to each provision are set out in the table attached at Schedule 1 and in the Appellant’s submissions.

The Appellant also seeks the following further relief (in addition to the matters set out above and in Schedule 1):

a. other relief to give effect to the concerns raised in this appeal and the Appellants submissions
b. any consequential amendment as to detail or substance throughout the Plan to give effect to these appeal points; and

c. costs

13 The Appellant attaches the following documents to this notice by way of a covering letter:

a. copy of his submissions

b. a list of names and addresses of persons to be served with a copy of this notice.

______________________________
Daniel Thomas Spencer Riddiford

18 September 2019

Address for service of appellant:

Mr DTS Riddiford,
Te Awaiti Station,
Martinborough RD2
Tel 06 307 8850
Email danriddiford@teawaitistation.co.nz
Service should be both hardcopy (because of limited internet) and Email (since rural mail can take 5-6 days to arrive)
Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the appellant’s submission or the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.

The copy of this notice served on you does not attach a copy of any other documents necessary for the adequate understanding of the appeal (of which there were none), or a list of names and addresses of persons to be served with a copy of this notice. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.
SCHEDULE 1

Interpretation 2-1 How to use this Plan p14
Add new second paragraph starting as line 4
The provisions of this plan must be interpreted along with existing statutes and caselaw. In Waitakere City Council v Estate Homes [2007] 2 NZLR a Resource Management decision, the Supreme Court reminded New Zealand of Chapter 13 of Magna Carta 1225 which requires that “no one shall be dispossessed…but by….the law of the land”

Reasons:
1 As stated at para 1 of my Submission dated 25 5 17 “I encourage the Council to pursue a Cooperative Model of governance based on Land Management Officers (Conservators) and Soil Plans rather than a Coercive Model based on Enforcement Officers….I seek a specific reference in the Plan to Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149 Supreme Court.” The philosophy of Magna Carta, Bill of Rights 1689 and John Locke on which modern economics is based is a philosophy of cooperation between the State and the Individual based on mutual respect.

Definition “Earthworks” p23 Decisions Version – Part 1
Add as not included (d)(vii) Roads on farms greater than 20ha
Add as not included (d)(vii) Dams for livestock water on farms greater than 20ha

Reasons:
The PRNP already adopts 20 hectares as the threshold for other Rules such as for permitted on farm rubbish dumps.

Definition of vegetation clearance p38 Decisions Version Part 1 Add
Vegetation clearance does not include…….
(.c) any vegetation clearance removing or killing transitional scrub species gorse, manuka, kanuka and tauhinu

Rule 97 Rule 98 Livestock Access to water Amend to This Rule shall not apply to Coastal land adjoining the Coastal Marine area or where surface water bodies flow directly into the sea or to sheep grazing
Reasons:
1 There are no significant adverse effects on water from sheep or cattle on extensive land.
2 The cost of fencing along the Coast and each water body would be disproportionately expensive and amount to a compensatable substantial deprivation of property rights (80km @$20,000 per km = $1.6m) and trigger the presumption of compensation for a substantial deprivation of a property right..
Sheep only approach water to drink

Existing stock crossing points are wider than 20m because of the habits of Station livestock.

Rule 97(d) (v) in limiting livestock to cross water crossings twice a month are impracticable, because livestock grazing rotations require the shifting of livestock every three days. Three day rotations are required because of the growth habits of ryegrass and clover to recover quickly, by drawing on 3 day root reserves.

Rule 99 Earthworks Amend to On properties larger than 20 ha for the purpose of forestry or farming earthworks up to 5000m² per contiguous area shall be a permitted use, provided the following conditions are met:

(i) soil or debris from earthworks is not placed where it can enter a surface waterbody or the coastal marine area, and

(ii) earthworks will not create or contribute to instability or subsidence of a slope or another land surface at or beyond the boundary of the property where the earthworks occurs, and

(b) work areas are stabilised within six months after the completion of the earthworks.

(c) any earthworks shall not, after the zone of reasonable mixing—Result in any of the following effects in receiving waters

(i) the production of conspicuous oil or grease films, scums of foams, or floatable or suspended materials, or

(ii) any conspicuous change in colour or visual clarity, or

(iii) any emission of objectionable odour, or

(iv) the rendering of fresh water unsuitable for consumption by animals, or

(v) any significant effect on aquatic life and

(e) earthworks shall not occur within 1m of a surface body except for activities permitted under Rule 114 and 115

Reasons:

1 Roadworks are a fact of life on hill country and when cut into the rock lying close to the surface at Te Awaiti Station require little maintenance

2 At Te Awaiti Station the Ring Road passes 1m above the Oterei River at “Lambton Quay” due to the unavoidable geology. Compliance with a 5m separation distance would require an unwise excavation of the toe of the hill slope likely to cause a slip.

Rule 100 Vegetation clearance on erosion prone land

On properties larger than 20 ha for the purpose of forestry or farming vegetation clearance and the associated discharge of sediment into water
or onto land on erosion prone land is a permitted activity, provided the following conditions are met:

(a) any soil or debris from the vegetation clearance is not placed where it can enter a surface water body or the coastal marine area, and

(b) any soil disturbances associated with the vegetation clearance shall not alter the zone of reasonable mixing, Result in any of the following effects in receiving waters

(i) the production of conspicuous oil or grease films, scums of foams, or floatable or suspended materials, or

(ii) any conspicuous change in colour or visual clarity, or

(iii) any emission of objectionable adour

(iv) the rendering of fresh water unsuitable for consumption by animals

(v) Any significant effect on aquatic life

(c) Vegetation clearance shall not occur within 5m of a surface water body except at water crossings and culverts

Reasons:
1. Scrub removal especially of gorse on a regular cycle is essential to maintain good quality grass on hill country

2. The Court of Appeal decision in Mackenzie District Council v Electricorp [1992] 3 NZLR 41 shows that the fiduciary principle applies to the relationship between Councils and landowning ratepayers, who must be treated rateably equal. The fiduciary principle of rateable equality is breached if a large landowner is treated as identically the same as a smaller landowner and limited to clearing only 2 ha of vegetation per property in any year

Rule 101 Earthworks and vegetation clearance –controlled activity

The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water from earthworks not permitted by Rule 99 or vegetation clearance on erosion prone land that is not permitted by Rule R100 is a controlled activity with a maximum charge in Council fees of $300

Reasons:
1. A power to regulate is not a power to confiscate [Privy Council]

2. Fees over $50,000 as occurred in Bayley’s case 20 years ago where the Environment Court followed a Rule in the Gisborne District and declined permission to clear a paddock of kanuka create an atmosphere of non cooperation between Councils and Farmers
Oterei River  References to the Decisions Version Part 2
Pages 448, 456, 481, 556, 563 should be deleted in the absence of specific evidence of claimed values.

Definitions Natural Wetland and Significant Natural Wetland shall not include the mouth or bed of the Oterei River

Reasons:
1  The closeness of the hills at Te Awaiti Stationhead limits the number of holding paddocks. This is made worse by the difficulty in having fences terminate to sea. The area at the mouth of the Oterei River has always been grazed by Station livestock and horses and remains part of the Crown Grant title of my Great Grandfather EJ Riddiford. Over 10 years ago the SWDC approved our rebuilding a cattlestop on the public road to retain these animals close to the Stationhead.
3  All native trees on both sides of the river mouth have been privately planted
Submission on the Freshwater and Biodiversity Strategies

Dear Sir,

28 9 19

General

I farm bees and livestock at Te Awaiti Station  on the of Martinborugh (aerial photo attached). In 2012 and 2013 I planted ha of eucalypt forest under AGS and can report that agroforestry under eucalypts works and sheep and cattle grazed in these the Ram Hill Forest Block emerge in much better condition before the area was afforested. I wish under 1 BT to plant more areas to carbon sequestering forest, but will be frustrated by the impracticable Rules introduced by GW tasked to execute the political dirty work for Mfe. For example all Landowners are prohibited from removing more than 2 hectares of vegetation including gorse in a year irrespective of the size or nature of their farms. I attach a copy of my individual appeal to the Environment Court to explain the absurdity inspired by Mfe.

I have also pursued a legal career since 1977. In 1999 I wrote an LLM paper attached (Google Riddiford and Takings) to investigate the presumption of compensation protecting all property rights including rights of use and enjoyment I described:

1) Magna Carta as the authority for compensation
2) The presumption of compensation required the payment of compensation and or “reading down “ ie administering and interpreting favorably existing property rights
3) a “taking” occurred whenever there was a substantial deprivation of property rights
4) compensatable “regulatory takings” occurred whenever a use or enjoyment was taken
5) the presumption of compensation applied in RMA cases.

These principles were affirmed in words more eloquent by the Supreme Court in Waitakere City Council v Estate Homes Ltd [NZSC] 112 an RMA case. The obiter dicta from paragraph 43 are especially important. Under the Official Information Act could you please advise how often each of the words: “property rights” “Magna Carta” and “Waitakere” were mentioned in documents created before publication of the Freshwater Strategy and or the Biodiversity Strategy and then forward to me by email and hardcopy the relevant extracts.

I would be grateful if you could treat this submission as equally applicable to the pending Biodiversity Strategy, since I fear that it will reflect the same difficulties and failure to grapple with the fundamental problem …a failure to understand that all policy in democratic society requires the consent of the governed if it is to work and that free
consent should sometimes be obtained by the presumption that compensation should be paid.
John Locke the philosopher to the Bill of Rights debate 1690 addressed the problem of
unlimited power and developed the concepts of public and private property, common
property, user pays, common taxation and others on which modern economics is based.
Mfe policies must be assessed in the light of modern economic thinking:
Who benefits and who pays and
The Ends never justify the Means

Specific

All Farmers agree with the objectives of the Freshwater and Biodiversity Strategies.
The Means adopted however has understandably generated militant opposition.

Opposition is generated by the undemocratic process adopted by Mfe and failure to
acknowledge that compensation such as substantial subsidies for fencing and planting
will be necessary to achieve Farmer free consent and continuing initiative to fix the
issues. Why punish the Farmers of the Wairarapa, when their unregulated hard work
has statistically caused a huge improvement in the waterways?

Consultation

The present process fails the natural justice tests for consultation prescribed in
Wellington Airport v Air New Zealand [1993] 1 NZLR and affirmed in the NZ Bill of
Rights 1990 This part of the fiduciary duty promised NZ under Magna Carta 1990
(Imperial Laws Application Act 1990) I have received no reply or acknowledgement
to my letter of 19 9 19 below. As an urgent official information request could you please
advise how many copies of Draft National Policy Statement for Freshwater Management
Proposed National Environmental Standards for Freshwater Draft Stock Exclusion
Section 360 Regulations were printed and how many still remain undistributed. How can
Farmers be expected to consult on the policies without hardcopy documents, given that
many do not have printing facilities and internet the same quality as Government
Departments.

Spring is a seasonally very busy time of year for all Farmers. We at Te Awaiti face the
beginning of docking, drenching lamb shifting and weaning with our sheep and the
ramping up of the bee season. Why should we as Farmers have to sacrifice income to
protect our property rights at this seasonally busy time of year? Specifically this
afternoon a Saturday in order to address the uncusted dreams of Mfe I am ignoring the
need to draft two staff contracts, drafting a hive placement contract, perusal of the IBT
planting contract, contracts with Arborgen the tree nursery and Pat Carroll the planter,
the demands of the NZANAFPMP and my looming PAYE and GST Returns and a raft of
other matters. It is little wonder that many Farmers are feeling the stress. That will
impact on farm reinvestment decisions The Mfe choice of Spring for consultation
breaches the principle of audi alteram partem
27 Right to justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

It is absurd that I must now submit on the basis of limited information from Mfe

Set out below is a copy of my unanswered First Submission/Official Information request

-------- Forwarded Message --------

Subject: Mfe freshwater consultation

Date: Thu, 19 Sep 2019 21:26:31 +1200

From:    
To: submissionsinfo@mfe.govt.nz <submissionsinfo@mfe.govt.nz>,
policy@mfe.govt.nz

The Manager, Mfe Policy, Wellington 19 9 19

Good Evening,

Please remember that some of us do not enjoy a high standard of internet or fullscale printing facilities making the download of documents difficult. Under the Official Information Act please send to me at DTS Riddiford, Ruamahanga Farm, Martinborough RD3 hardcopy of the documents below plus a memory stick or similar of the documents (I have used the alternative address of Ruamahanga Farm to ensure that I receive the documents prior to consultation on Thursday.

Please treat this as an interim submission until I read the documents. I oppose the proposed controls on the basis of what I read in the media because (1) in extensive hill country grazed by sheep high nitrate levels do not exist and (2) the controls are legally unenforceable because they amount to a confiscation of private rights (Google Riddiford and Takings and then read the decision of the Supreme Court in Waitakere City Council v Estate Homes Ltd 2NZLR [2007] at para 43

Instead may I suggest policies of cooperation involving 100% subsidies of fencing recognising that the inkind contribution of farmers will be the loss of grazing land and access to livestock water and need to reticulate livestock water or create dams for stockwater

Effects based approach please rather than one size fits all
If effects were measured at the boundary intensive Farmers would be free to innovate and extensive Farmers such as Te Awaiti Station would be left in peace.

We at Te Awaiti Station have never used nitrogenous fertilizer and operate at low average stocking levels. All our waterways flow directly to the sea where oceanic dispersion rapidly dilutes the theoretical problem. However if improbably our mainly
ephemeral waterways were to be loaded with N and P that would create a positive effect at sea by way of an increase in the volume of seaweeds (both macroalgae and floating microalgae) and a consequent increase in fishlife.

I am intrigued by the idea that the Coastal Marine Area should be fenced off given the fact of oceanic dispersion and the high climatic costs of such fencing, before even considering the blight of such fencing on the landscape. I do not accept that Statute may require Coastal Farmers to obtain a Plan, costing as much as $7500 according to the media, only to be told that we were causing no problem.

**Restrictions on intensification are a moratorium on innovation**

“The right to regulate is not a right to confiscate *Virgo* Privy Council

The one year Aquaculture Moratorium extended to three years and then indefinitely by a mass of restrictive Rules resulted in the export of export earnings from NZ to Australia for all time as NZ Aquaculturalists ruled off their NZ investments and borrowed from the Australian Banks to redeploy in Australia. Will the same happen with innovative livestock Farmers?

**The lack of robust economic analysis**

I was shocked at the public consultation at the Carterton Events Centre to learn that Treasury had not been asked to undertake any economic analysis.

Has Mfe not considered the emotional distress of their proposals on Farmers and the consequent chilling of innovation and reinvestment?

“Who benefits and who pays?” Individual costs should be paid from “common taxation. That is the constitutional imperative inherited from the philosophy of John Locke and his scholarly forbears. Would the residents of the Kapiti Coast agree to pay all the costs of the Main Highway North just because they lived alongside the road rather than the obviously public costs being paid from common taxation?

Why pick on riparian and coastal Farmers?

Yours Faithfully
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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. 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 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.

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.

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\(^3\) "Magna Carta" is used throughout these paper as a general term for all the Magna Carta legislation and Magna Carta principles refined in the Common Law.
II THE ENGLISH RULES BASED ON MAGNA CARTA

1. 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 General5 stated: Our constitutional safeguard for property rights is that of Ch 29 of Magna Carta: "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 Lands8 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

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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 Court's 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 dispossessed of his tenement except by the law of the land."

Blackstone in the "Commentaries on the Laws of England" (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 dispossessed, 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 Carta 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. 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 1), 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 Carta 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 restrain 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 Carta were granted "for ever" ("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 772 years later.

2. 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

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 Carta as a Crown promise to respect their particular customs. The concern is strikingly similar 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."
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.\(^{14}\)

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.\(^{16}\)

### 3. 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...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."

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\(^{14}\) 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."

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

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.
of Parliament apparently in force in New Zealand...." This included Magna 8 Carta 1297, the Petition of Right 1627 and the Bill of Rights 1689.\footnote{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 "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 Carta principles determined by the House of Lords and Privy Council.\footnote{19}

4. 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 3o 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.
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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

The fiduciary duty was described by Richardson J in NZ Maori Council v Attorney General22 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.

20 Ancient Laws and Institutes of England Vol 1 1840 Commissions of the Public Records of the Kingdom
22 Also S18(d) P Works Act 1981 requires good faith negotiation.
23 New Zealand Maori Council v Attorney General Above n13
1. THE PETITION OF RIGHT 1627 AND BILL OF RIGHTS 1689\textsuperscript{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"\textsuperscript{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",\textsuperscript{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.\textsuperscript{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.\textsuperscript{27}

\textsuperscript{23} Commonly year numbered 1688, but in fact passed in 1689
\textsuperscript{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 Factortame [1988] 1 ALL ER 735
\textsuperscript{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.
\textsuperscript{27} 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- Millennial 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 Carta. The question remains however as to what period of time must elapse before a "prescriptive" constitutional custom can be recognised.
\textsuperscript{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.
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 Carta and accepted by the Crown as fundamental law.

1. The Petition recites 25o Edw I c29 1297 (identical to Hen.3 M.C.c.29) in Section 3 and 28o 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.

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

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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 84-111 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.
The word "establishment" shows a clear intent to found a new political order guaranteeing ancient rights and liberties.

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The conditional tender of the Crown to William and Mary

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 (1632-1704) on the Social Contract. John Locke's principle work "An Essay concerning Human Understanding" was finally published in 1690.

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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.

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The Petition of Right 1627

Reciting that by (25) 34 Edw.1 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.

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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
1. THE OMISSION OF SECTION III 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

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

(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 III 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 political terms a referendum.
2. 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


\(^{31}\) 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 AO16/1998
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 C110/98
An example of the Conventions from the Interpretation Act 1999

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 similar terms. The wording is similar to Section III of the Bill of Rights Act 1689. The word "right" in Section 17 echoes Magna Carta.  

The Law Commission paper on the Acts Interpretation Act 1924 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 Carta 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. The process continues today with the New Zealand Bill of Rights Act 1990.

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

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.


Ch 20 of Magna Carta 1215 is an example:

"A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood." "Amerced" is fined or charged costs.

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 similar.


"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.

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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.

*The Roots of Liberty* describes the profound influence of Chief Justice Sir John Fortescue (c 1385-1479) 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* “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. 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.
3. 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 (1919)* 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


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: 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 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.

Lord Wrenbury:
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:

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.

1. ATTORNEY GENERAL V DE KEYSER’S ROYAL HOTEL

A year later the House of Lords in Attorney General v De Keyser’s Royal Hotel considered a similar 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 acquirer of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference...
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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 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.$^{51}$

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

\[\text{References:}\]

51 De Keyser Lord Dunedin 524 lines 20-34
52 De Keyser Lord Dunedin 525 lines 1-3
53 De Keyser Lord Atkinson 538 lines 31-33

Similarly

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
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."  

The House of Lords in Bank Voor Handel En Scheepvaart v Administrator of Hungarian Property [1954]  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 its 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.

2. BURMAH OIL V LORD ADVOCATE

The Crown duty to compensate when taking under the war prerogative was again considered by the House of Lords in 1964 in Burmah 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 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.

55 De Keyser Lord Atkinson 542 lines 19-32  
Similarly Lord Dunedin 529 line 35  
Lord Sumner 559 line 22-29  

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
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The prerogative

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

Lord Radcliffe repeated an extract from John Locke's "True End of Civil Government" 61 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 53 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

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60 Burmah Oil per Lord Reid 101C at lines 17-19
61 Burmah Oil Lord Radcliffe 117D-118B
62 Burmah Oil Viscount Radcliffe 118 B,C lines 11-16
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

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TAKINGS: A RETURN TO PRINCIPLE

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

3. BELFAST CORPORATION V O.D. CARS HL: REGULATORY TAKINGS69

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 its place.

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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
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

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 1-5 discounted the clear words of the Australian Constitution and stated that "Historically, its roots may be traced as far as Magna Carta 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)".

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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 liberty. It would be a mistake to look on it as representing any conflict between 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 and amenity..."police powers"...interference with rights of development and user...was not [generally] treated as a "taking" of property.

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.

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,

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
though not in form, it amounted to a "taking" of the land affected for the benefit of the public.\footnote{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 takings**

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 similar. 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.®

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 Australia84 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 1215 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 17 of the Universal Declaration and traverses international law.88

The Queen v Tener [1985] SC Can89 is factually similar 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

81 Turners & Growers Exports Limited v CJ Moyle CP 720/88 at 67 lines 14-18
82 Turners & Growers Exports Limited 72 lines 25-27
83 MAF 042/143 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 1-2
87 Newcrest 147 lines 21-25
88 Newcrest 148 lines 25-27 and generally 147 line 21-32
89 The Queen v Tener [1985] 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
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 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 "(1) 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)

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92 Pennsylvania Coal Co v Mahon (1922) US 393 at 415-416
93 Compagnie Sucriere de Bel Ombre 502 h-i
94 Sporrong v Sweden [1982] ECHR 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
Compensation may be available under the Resource Management Act. It is significant that neither Magna Carta or Simpson v Attorney General [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 its own expense did some maintenance on the works at the south end of the beach. That suggests that the Gisborne Council recognises that compensation may be payable.

4. 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-General 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 Bateson"). 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*. The word "convention" is defined in the Concise Oxford Dictionary as "general agreement" and "customary practice". The word implies Magna Carta and respect for established customs and rights.

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?

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."

But note however the phrase "realistically conceivable case".

3. **Intervention in extreme cases**

After considering the dicta of Cooke J in *Taylor v New Zealand Poultry Board* 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 may not be taken away 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

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105 Shaw v Shaw unrep CA 218/97 Richardson P Henry J. Blanchard J at paras 14 and 17
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 tyrannical way."
108 Cooper 496 lines 10-18
109 Taylor v New Zealand Poultry Board [1984] 1 NZLR 394

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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.¹¹⁰

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.¹¹¹

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 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 Carta and the Bill of Rights 1689, it is probable that he is aware that the Sovereignty of Parliament conceded by the Bill of Rights 1689 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 1689 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 Fisheries¹¹³ repeated by the Attorney General¹¹⁴
......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 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 Carta. 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 Carta and the Bill of Rights 1689. 119 It is

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 25o Edw III AD 1351 28o Edw III AD 1354 42o Edw III AD 1368  
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.
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 Carta had been argued in *Chester v Bateson* the rule is worth remembering in view of an increasing government preference for arbitration as a 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.
4. 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. 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. 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 Carta 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.

1. 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.

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."
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 interpret the Indian Constitution to require the payment of full compensation defying unambiguous constitutional amendments from Parliament.
TAKINGS: A RETURN TO PRINCIPLE

2 No one shall be arbitrarily deprived of his property.

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".

2. SECTION 21 OF THE BILL OF RIGHTS 1990

Section 21 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).

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*) is clear of procedural immunity. For this reason Section 21 was argued by Sir Geoffrey Palmer in 1997 on behalf of the statutory lessees and is a feature of the High Court proceedings filed by the Schedule 4 fishers scaled back to 80% of quota.

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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.

127 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.

128 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 NZBDRR 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.

129 See also *Search and Seizure: An update on s 21 of the Bill of Rights* Scott Optican [1996] NZLR 215


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 Sanford v Attorney General CP /99 Para 40.3 annexed to Submission 68 99 of Mr Tim Castle Barrister to the Primary Production
3. ENTICK V CARRINGTON\textsuperscript{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.\textsuperscript{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".\textsuperscript{133}

\textit{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.\textsuperscript{134}

The law of tort lies at the heart of the law of takings on the basis of the maxim \textit{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.\textsuperscript{135}

This is the traditional common law evidential presumption in favour of the subject, reflected in \textit{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.

\textit{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 similar 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.\textsuperscript{136} [It is part of] the ancient immemorable law of the land \textsuperscript{137}

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

4. \textbf{ATTORNEY GENERAL V SIMPSON [BAIGENT'S CASE] [1994] CA}

Each stage in the reasoning of the Court of Appeal in \textit{Attorney-General v Simpson}\textsuperscript{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 \textit{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 \textsuperscript{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.

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.  
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]
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.]

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TAKINGS: A RETURN TO PRINCIPLE

4 ...international authority...that the redress 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

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].

5. 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

¹⁴³ Cooke P 677 In 26-35 Casey J 692 In 1-37 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 international obligation which results in harm creates a duty to make adequate reparation [by] compensation."
MKay J 718 In 36

¹⁴⁴ Cooke P 676 In 38-42 Casey J 691 In 56 Hardie Boys 701 In 28-40 MKay 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 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

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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.\textsuperscript{149}

6. The present immunity from suit of High Court Judges should be extended to District Court Judges.\textsuperscript{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.
5. 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* 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 1965-1992).

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. 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. The only logical distinction between land and other forms of property is that the Landowner has the sole occupation to the

152 Access to the Land Valuation Tribunal was reluctantly conceded to the statutory lessess under the Maori Reserved Lands Act 1997.
153 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).
154 It was proposed by officials, but rejected for S162A of the Biosecurity Act 1997 introducing compensation.
155 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%
exclusion of all others (as well as use rights) and so is in a stronger tactical position than the State. At a theoretical level moreover land rights are reserved fundamental rights to which Parliamentary supremacy is subject.¹⁵⁴
6. STATUTORY PROVISION IN NEW ZEALAND FURTHER EXAMPLES

Lord Dunedin in De Keyser 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 Carta 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.

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." 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
TAKINGS: A RETURN TO PRINCIPLE

1. FISHERIES ACT

Sections 28 OF to 28 OO of the Fishery 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. 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 "compulsory 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

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158 A copy of the proceedings is annexed to the submission of 6899 of Barrister Mr Tim Castle to the Primary Production Select Committee.
TAKINGS: A RETURN TO PRINCIPLE

- 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.
2. 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. 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.

3. 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. 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. 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.

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

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 preserved.\textsuperscript{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.\textsuperscript{166}
7. 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* \(^\text{167}\) 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* \(^\text{168}\) and the Privy Council.\(^\text{169}\)

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”.\(^\text{170}\) 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 General 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.\(^\text{171}\)

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167 Pennsylvania Coal Co v Mahon (1922) 260 US 393, 417.
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, 110-118. Taking includes depriving without gain to the Crown. Compensation may be paid for partial takings.
TAKINGS: A RETURN TO PRINCIPLE

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
(3) rights of free disposition

The High Court of Australia recently in Yanner (1999) 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".

1. 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. 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.

172 Takings RA Epstein n78 74-92 discusses this generally. The potentiality* in the English Rules. Inland Revenue Commissioners v Clay [1914] 3KB 466.
    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.
    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."

173 A Regulatory Responsibility Act and Regulatory Impact Statements [CO (98)S 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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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.

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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BEFORE THE ENVIRONMENT COURT
AT WELLINGTON.

Env-2019-WGN-


AND

IN THE MATTER of an appeal pursuant to clause 14(1) of the First Schedule of the Act in relation to the Proposed Natural Resources Plan for the Wellington Region

BETWEEN

DANIEL THOMAS SPENCER RIDDIFORD

Appellant

AND

WELLINGTON REGIONAL COUNCIL

Respondent

NOTICE OF APPEAL

Mr DTS Riddiford,
Te Awaiti Station,
Martinborough RD2
Tel 06 307 8850
Email  danriddiford@teawaitistation.co.nz
Service should be both hardcopy (because of limited internet) and
Email (since rural mail can take 5-6 days to arrive)

FORM 7 NOTICE OF APPEAL TO ENVIRONMENT COURT
AGAINST DECISIONS ON THE PROPOSED NATURAL
RESOURCES PLAN FOR THE WELLINGTON REGION

To:   The Registrar

Environment Court

Wellington

1. Daniel Thomas Spencer Riddiford generally agree with
and
now formally apply to be a s274 party to the appeals filed by
Beef and Lamb NZ and Federated Farmers of New Zealand.

1. Daniel Thomas Spencer Riddiford appeals against a
decision
of the Wellington Regional Council (WRC) on the following
proposed plan:

Proposed Natural Resources Plan for the Wellington Region

2. The Appellant made a submission and spoke to that
submission in person at hearings before Wellington Regional
Council Hearing Commissioners in respect of the proposed
plan.

3. The Appellant is not a trade competitor for the purposes
of Section 308D of the Resource Management Act 1991
(Act).
4. The Appellant received notice of the decision referred to in this appeal on or after 31 July 2019 by rural mail.

6. The decision was made by the Respondent.

7. The Appellant is willing to participate in mediation.

8. The parts of the decision that the Appellant is appealing are:
   .a The role of property rights *Waitakere v Estate Homes* [2007] SC
   .b Rural Landuse Provisions (including definitions) relating to livestock access to waterbodies, farm earthworks, and vegetation clearance
   .c Provisions relating to the claimed significance of the Oterei River and its management

**Reasons for appeal**

9. The Appellants reasons for appeal are generally that:
   a **Carbon sequestering forest** In respect of Earthworks and Vegetation the Rules obstruct the planting of carbon sequestering forest, Government Policy under the Climate Change Act 2008 and the proposed Zero Carbon Bill.
   b **Subsidiarity** is the concept derived from John Locke and earlier philosophers that all decision making should be devolved to the minimum competent units in society. It is the foundation of our legal system derived from Magna Carta and the foundation of modern economic thinking. For example the Farmer is obviously the best person by virtue of local knowledge to know when a paddock of pasture should be maintenance scrub cut to sustain or improve the pasture or converted to forest.
   c **Delegation** *delegatus non potest delegare* The Councillors had no power to delegate their power to create subordinate regulation without knowing and approving the full detail of the final plan after it was passed by the Officers Or considering the Rules of Natural Justice in respect of affected Ratepayer Farmers. Excessive delegation to the Officers is anti
democratic and avoids the accountability of elected Councillors to their ratepayers.

d  **Waitakere City Council v Estate Homes Limited [2007]2NZLR 149**

Supreme Court The Respondent has no power to pass broad Rules which effect a non compensated regulatory taking of any of the property rights in land of ratepayers.

[45] New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta which requires that no one “shall be dispossessed of his freehold … but by … the law of the land”.20 One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid.2

10 The Appellants further reasons for appeal include as noted by FFNZ that:

a. Decision Report 3 (para 3.32) notes expert evidence from Council that there is no compelling evidence of wholesale degradation of freshwater quality through the region. The evidence from Council further shows that “there is a high level of confidence that a majority of sites have improving trends over the past decade for most variables (and) there is strong evidence of overall water quality improvement at the regional level over the past decade”. Acknowledging this context, FFNZ seeks less onerous rules for certain activities.

b. Decision Report 1 (para 5.12) acknowledges the importance of farming activities to both the regional and national economy and an intent to simplify the rules applying to farming practices.

11 Without limiting the generality of the above, the specific reasons for the appeal and the relief sought with respect to each provision are set out in the table attached at Schedule 1 and in the Appellant’s submissions.

12 The Appellant also seeks the following further relief (in addition to the matters set out above and in Schedule 1):

a. other relief to give effect to the concerns raised in this appeal and the Appellants submissions
b. any consequential amendment as to detail or substance throughout the Plan to give effect to these appeal points; and

c. costs

13 The Appellant attaches the following documents to this notice by way of a covering letter:

a. copy of his submissions

b. a list of names and addresses of persons to be served with a copy of this notice.

Daniel Thomas Spencer Riddiford

18 September 2019

Address for service of appellant:

Mr DTS Riddiford,
Te Awaiti Station,
Martinborough RD2
Tel 06 307 8850
Email danriddiford@teawaitistation.co.nz
Service should be both hardcopy (because of limited internet) and Email (since rural mail can take 5-6 days to arrive)
Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the appellant’s submission or the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.

The copy of this notice served on you does not attach a copy of any other documents necessary for the adequate understanding of the appeal (of which there were none), or a list of names and addresses of persons to be served with a copy of this notice. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.
Interpretation 2-1 How to use this Plan p14
Add new second paragraph starting as line 4
The provisions of this plan must be interpreted along with existing statutes and caselaw. In Waitakere City Council v Estate Homes [2007] 2 NZLR a Resource Management decision, the Supreme Court reminded New Zealand of Chapter 13 of Magna Carta 1225 which requires that “no one shall be dispossessed…but by….the law of the land”

Reasons:
1 As stated at para 1 of my Submission dated 25 5 17 “I encourage the Council to pursue a Cooperative Model of governance based on Land Management Officers (Conservators) and Soil Plans rather than a Coercive Model based on Enforcement Officers….I seek a specific reference in the Plan to Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149 Supreme Court.” The philosophy of Magna Carta, Bill of Rights 1689 and John Locke on which modern economics is based is a philosophy of cooperation between the State and the Individual based on mutual respect.

Definition “Earthworks” p23 Decisions Version – Part 1
Add as not included (d)(vii) Roads on farms greater than 20ha
Add as not included (d)(vii) Dams for livestock water on farms greater than 20ha

Reasons:
The PRNP already adopts 20 hectares as the threshold for other Rules such as for permitted on farm rubbish dumps.

Definition of vegetation clearance p38 Decisions Version Part 1 Add
Vegetation clearance does not include…….
(c) any vegetation clearance removing or killing transitional scrub species gorse, manuka, kanuka and tauhinu

Rule 97 Rule 98 Livestock Access to water Amend to This Rule shall not apply to Coastal land adjoining the Coastal Marine area or where surface water bodies flow directly into the sea or to sheep grazing
Reasons:
1 There are no significant adverse effects on water from sheep or cattle on extensive land.
2 The cost of fencing along the Coast and each water body would be disproportionately expensive and amount to a compensatable substantial deprivation of property rights (80km @$20,000 per km = $1-6m) and
trigger the presumption of compensation for a substantial deprivation of a property right.

3 Sheep only approach water to drink
4 Existing stock crossing points are wider than 20m because of the habits of Station livestock.
5 Rule 97(d) (v) in limiting livestock to cross water crossings twice a month are impracticable, because livestock grazing rotations require the shifting of livestock every three days. Three day rotations are required because of the growth habits of ryegrass and clover to recover quickly, by drawing on 3 day root reserves.

**Rule 99 Earthworks**

**Amend to**

*On properties larger than 20 ha for the purpose of forestry or farming earthworks up to 5000m² per contiguous area shall be a permitted use, provided the following conditions are met:*

(i) soil or debris from earthworks is not placed where it can enter a surface waterbody or the coastal marine area, and

(ii) earthworks will not create or contribute to instability or subsidence of a slope or another land surface at or beyond the boundary of the property where the earthworks occurs, and

(b) work areas are stabilised within six months after the completion of the earthworks.

(c) any earthworks shall not, after the zone of reasonable mixing—Result in any of the following effects in receiving waters

(i) the production of conspicuous oil or grease films, scums of foams, or floatable or suspended materials, or

(ii) any conspicuous change in colour or visual clarity, or

(iii) any emission of objectionable odour, or

(iv) the rendering of fresh water unsuitable for consumption by animals, or

(v) any significant effect on aquatic life and

(e) earthworks shall not occur within 1m of a surface body except for activities permitted under Rule 114 and 115

Reasons:

1 Roadworks are a fact of life on hill country and when cut into the rock lying close to the surface at Te Awaiti Station require little maintenance

2 At Te Awaiti Station the Ring Road passes 1m above the Oterei River at “Lambton Quay” due to the unavoidable geology. Compliance with a 5m separation distance would require an unwise excavation of the toe of the hill slope likely to cause a slip.
Rule 100 Vegetation clearance on erosion prone land

On properties larger than 20 ha for the purpose of forestry or farming vegetation clearance and the associated discharge of sediment into water or onto land on erosion prone land is a permitted activity, provided the following conditions are met:

(a) any soil or debris from the vegetation clearance is not placed where it can enter a surface water body or the coastal marine area, and

(b) any soil disturbances associated with the vegetation clearance shall not alter the zone of reasonable mixing, Result in any of the following effects in receiving waters

(i) the production of conspicuous oil or grease films, scums of foams, or floatable or suspended materials, or

(ii) any conspicuous change in colour or visual clarity, or

(iii) any emission of objectionable odour

(iv) the rendering of fresh water unsuitable for consumption by animals

(v) Any significant effect on aquatic life

(c) Vegetation clearance shall not occur within 5m of a surface water body except at water crossings and culverts

Reasons:

1 Scrub removal especially of gorse on a regular cycle is essential to maintain good quality grass on hill country

2 The Court of Appeal decision in Mackenzie District Council v Electricorp [1992] 3 NZLR 41 shows that the fiduciary principle applies to the relationship between Councils and landowning ratepayers, who must be treated rateably equal. The fiduciary principle of rateable equality is breached if a large landowner is treated as identically the same as a smaller landowner and limited to clearing only 2 ha of vegetation per property in any year

Rule 101 Earthworks and vegetation clearance – controlled activity

The use of land, and the associated discharge of sediment into water or onto or into land where it may enter water from earthworks not permitted by Rule 99 or vegetation clearance on erosion prone land that is not permitted by Rule R100 is a controlled activity with a maximum charge in Council fees of $300

Reasons:
1 A power to regulate is not a power to confiscate [Privy Council]
2 Fees over $50,000 as occurred in Bayley’s case 20 years ago where the Environment Court followed a Rule in the Gisborne District and declined permission to clear a paddock of kanuka create an atmosphere of non cooperation between Councils and Farmers

Oterei River References to the Decisions Version Part 2 Pages 448, 456, 481, 556, 563 should be deleted in the absence of specific evidence of claimed values.

Definitions Natural Wetland and Significant Natural Wetland shall not include the mouth or bed of the Oterei River

Reasons:
1 The closeness of the hills at Te Awaiti Stationhead limits the number of holding paddocks. This is made worse by the difficulty in having fences terminate to sea. The area at the mouth of the Oterei River has always been grazed by Station livestock and horses and remains part of the Crown Grant title of my Great Grandfather EJ Riddiford. Over 10 years ago the SWDC approved our rebuilding a cattlestop on the public road to retain these animals close to the Stationhead.
3 All native trees on both sides of the river mouth have been privately planted