NEW ZEALAND BUSINESS ROUNDTABLE

SUBMISSION ON *REVIEW OF THE PUBLIC WORKS ACT: ISSUES AND OPTIONS*

PUBLIC DISCUSSION PAPER DECEMBER 2000

MAY 2001

REVIEW OF THE PUBLIC WORKS ACT

Executive Summary

- This submission on *Review of the Public Works Act: Issues and Options* (Public Discussion Paper, December 2000) is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the NZBR is to contribute to the development of sound public policies that reflect overall New Zealand interests.

- In general we consider the discussion paper is competent and sound. Our main criticism is its failure to highlight in chapter 5 the need to avoid imposing changes to offer back and related conditions that would have retrospective effect.

- Much of our submission concerns the criteria for determining principled limits to the legal right of access to the power of compulsory acquisition (or eminent domain). Our analysis leads us to suggest that the power of eminent domain over private property should only be exercisable where hold-out presents a material threat to the supply of goods or services that are essential to current or future levels of consumer welfare. This can only reflect the absence of alternative means of supply.

- A positive list of these cases might focus on the major network utilities and works of a public good nature involving the control and use of surface water. Where there is only one source of flat land it could also apply to an airport. Beyond such a short list, the power could be extended on a case by case basis by special acts of parliament. Our analysis favours a public interest test rather than a public works test.

- Where private property rights are taken using the power of eminent domain, compensation should in principle leave the owners of the taken rights at least as well off as if their property rights had been left

intact. Moreover, in general they should be better off since a profitable project should allow all parties to a forced exchange to gain.

- In principle, compensation payments should be funded by the people or entities who would have funded them if the exchanges had been voluntary.

- Where a private firm currently has an ongoing legal right of access to the power of eminent domain, that right should not be exercised without compensation.

- Variations to outright sale – such as those involving a right of first refusal or offer back – should be accompanied by compensatory reductions from the amount that would be paid by way of compensation for outright purchase.

- An acquirer using the power of eminent domain to achieve a specified purpose should be obliged to accept restrictions on future uses not related to that purpose that the seller might impose in order to protect the ongoing flexibility of use of the seller's remaining property, but the amount paid in compensation would be adjustable accordingly.

- We suggest that variations in the rules that accommodate variations in land ownership types can be accommodated without reference to race or ethnicity. We argue that there should be no Treaty of Waitangi clause in the Public Works Act, nor any other distinctions based on race or ethnicity.

- We begin each of sections 3-5 with responses to questions posed in the submission booklet that accompanied the discussion paper.

1. Introduction

1.1 This submission on the *Review of the Public Works Act: Issues and Options* (Public Discussion Paper, December 2000) (the 'discussion paper') is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the NZBR is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 In our view, the discussion paper generally lays out the issues for determination in a commendable manner. Our main criticism is its failure to highlight in chapter 5 the need to avoid imposing changes to offer back and related conditions that would have retrospective effect. With this exception, we direct our comments to the issues that are canvassed in the discussion document.

1.3 A major purpose of our submission is to examine the definition of a public work and how far the powers of a revised act might reach.[1] In section 2 we put forward a framework for addressing the underlying issue of principled limits to the exercise of the power of eminent domain. Sections 3, 4 and 5 apply this framework to the issues raised in chapters 3, 4 and 5 respectively of the discussion paper. Section 6 applies it to the issues raised in sections 6.1 and 7 of the discussion paper in relation to Maori.

2. Framework for the exercise of the power of eminent domain[2]

2.1 Economic theory recognises that high transaction costs can prevent individuals from consummating exchanges through voluntary processes that would make every party to a transaction better off. The power of eminent domain – the forced taking of private property for public use with just compensation, in

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1 Refer to pp 13 and 21 (section 3.4) of the discussion document.

2 For a major and influential discussion, see Richard Epstein, *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press, 1985, pp vii-362.

North American parlance – can provide for those transactions to proceed for the benefit of all those who are party to them.[3]

2.2 As the discussion paper recognises at the end of section 3.2.2, the issue of the proper limits to the scope of this power arises from the risk of its abuse. Factions will seek to use it to benefit themselves at the expense of others rather than for mutual advantage. The public policy task is to find arrangements that will allow the power of eminent domain to be exercised for mutual advantage rather than for factional abuse.

2.3 The weight of opinion on the need for restraint and compensation in order to curb the potential for the abuse of this power was summarised in 1965 by Viscount Radcliffe in *Burmah Oil Co (Burma Trading) v Lord Advocate*:

> If the civilian writers are consulted … there is not much room for dispute about their general view. The sovereign power in a state has the power of eminent domain over the property of subjects, but may exercise its power only for the public welfare or advantage or in case of necessity … The power covers use, acquisition and destruction. If it is exercised, compensation to the person dispossessed is manifest equity, since it is not fair that one citizen should be required against his will to make a disproportionate sacrifice to the common wealth.[4]

2.4 High transaction costs situations are associated with the problems arising from information costs, externalities, public goods, free riders, monopoly and hold-out. Many of these categories overlap. We understand that the power of the Crown to purchase property by voluntary negotiation for public works is not at issue. The issue under examination is when recourse to compulsory acquisition is warranted.

2.5 Under a system of voluntary exchange, landowners could normally be presumed to be willing to sell land voluntarily if the price they were offered exceeded the value of the land to them if the sale did not proceed. Indeed, a manager, director or trustee could have a fiduciary obligation to shareholders, investors, or trustees to accept, or recommend the acceptance of, a

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3 Those who are not parties to the transaction (eg competitors, or owners of other plots of land) may be made better off or worse off, as is the case with voluntary transactions generally.

4 Cited by Rowan-Robinson and Brand in Jeremy Rowan-Robinson and C Brand (1995), *Compulsory Purchase and Compensation*, Sweet and Maxwell.

commercially profitable offer. As long as the (constitutional) principle is accepted that the power of eminent domain should only be used to facilitate mutually advantageous transactions, it is valid to ask why natural self-interest and fiduciary responsibilities do not combine to make recourse to it unnecessary.

2.6 The answer is that a mutually advantageous land sale may fail to proceed for many reasons. One possibility is that the landowner holds out for an even higher price, misjudging what the prospective buyer is willing to pay. In itself this is a normal commercial negotiating situation. In general, no recourse to the power of compulsory acquisition should be contemplated. Even the prospect of access to this power will lend itself to tactical use or abuse.

2.7 Another possibility is that unusually high costs of negotiating make the sale too difficult to complete. Perhaps the landowner faces severe information and coordination difficulties arising from a complex ownership structure. Another possibility is that the costs of negotiating with the owners of too many plots of land or too many people who can oppose a resource consent are prohibitive. A related possibility is that negotiations are made too difficult because property rights are ill-defined.

2.8 Yet another possibility arises from failings in human nature. A transaction might fail because of feuds, malice, spite, paranoia or incompetence. Where refusing to sell (or provide access) would cause great inconvenience to the community, perverse anti-social motivations might also come into play. Such failings are less likely to occur in a professionally governed corporate or trustee ownership situation.

2.9 Another possibility, in what does not purport to be an exhaustive list, is that high transaction costs inhibit investments that will be vulnerable to later hold-out. For example, it might be beyond the ability of either the buyer or the seller to overcome the problem of courts that do not have a good reputation for enforcing contracts. (Of course, the ideal solution here would be to have courts that better respect the rule of law rather than to expand the scope of compulsory acquisition.)

2.10 In normal situations the failure to consummate a mutually beneficial transaction should be treated as a learning experience, rather than an occasion

for government intervention. People will always be fallible and it is human to learn by trial and error processes.

2.11 The most plausible argument for making an exception to this rule occurs where a failure to sell at a favourable price would cause serious material harm to the community at large. One useful measure of community welfare is the sum of producer and consumer surplus. This can be thought of as the benefit the consumers of a product or service and those who have invested in its production jointly derive in excess of the real resource costs incurred in its production. (These costs include the cost of capital.)

2.12 Where the market for the end product is competitive, the price of any product or service to a consumer cannot by affected by the failure of any one producer to obtain a particular plot of land or property. The price achieved for the sale of a plot of land for a supermarket will simply affect the distribution of the producer surplus between private parties. In a competitive industry it cannot affect the prices paid by supermarket customers or consumer welfare. Nor does it alter the resource costs of the construction and operation of a supermarket. No obvious public policy problem of a producer and consumer surplus nature arises.

2.13 This analysis suggests that the power of eminent domain should not be available to those involved in purely private negotiations in competitive markets. No issue of a substantial threat to community welfare arises from any refusal to sell land to someone operating in such a market.

2.14 By the same argument, the power of eminent domain should not be available for government activities that could be provided competitively. Arguably, this includes schools, hospitals, libraries (which compete with private book sellers or lenders) and swimming pools.

2.15 This analysis directs attention to cases where the entire supply of a good or service that is material for community welfare depends on access to specific parcels of land (or property more generally). The focus on these two criteria markedly restricts the range of public goods and of private goods and services to which the power of eminent domain might apply. Access to specific items of land for major network utilities, including the road network, and for the

control and use of surface water provide obvious potential cases. Where flat land is in short supply, land for an airport may be another case.

2.16 The major network utilities provide households at large with services that can be deemed to add materially to community welfare as defined. Investments in such utilities may be highly irreversible. Hold-out could prevent those investments either by stopping the original construction of the network or by deterring investment because of the risk of post-investment hold-out in respect of renewals of easement rights or negotiations for alterations to those rights.

2.17 This analysis supports recourse to the power of eminent domain for dominant suppliers of capacity in the major network utilities and for those who have invested irreversibly on the basis of a secure legal right to access the power of eminent domain. The issue of how far it should be available to competitors of incumbents who currently enjoy this right of access and are already ensuring that essential community wants are met is more difficult. We return to this question in sections 3.7 and 4.1.

2.18 Where a firm has invested irreversibly on the basis of a legal right to ongoing access to the power of eminent domain, the taking of that right without compensation would be a serious matter. This would be so even if it were motivated by the belief that an industry had become sufficiently competitive as to no longer justify its continuing access to this power. Such an action could signal to the world that the political risks of making further investments in New Zealand's network utilities were very high. It would be preferable to negotiate by mutual agreement the withdrawal of the privilege from the firms that enjoy it.

2.19 Nothing in the discussion to this point creates a case for anything less than full compensation for private property taken under the power of eminent domain.[5] To the contrary, the argument that the power should be exercised where transaction costs prevent voluntary exchanges that make all parties better off suggests that any compensation should aim to make the recipient better off than if the transaction did not occur. In principle, compensation payments

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5 Full compensation requires compensation in principle for any value that the individual was enjoying above market value.

should be funded by the people or entities who would have funded them if the exchanges had been voluntary.

2.20 In the language used in the discussion paper, this analysis leads us to support a public interest test rather than a public works test for determining when the power of compulsory acquisition should be available.[6] Expressed differently, we suggest that its availability should be based on the nature of the work – its importance for community welfare and its vulnerability to hold-out – rather than on whether the work is being done by central or local government.

2.21 To limit the scope for the abuse of this power, we suggest that there should be high threshold based on essentiality. For example, a positive list approach could itemise the major network industries (including roads) and works relating to surface water and, perhaps, airports. Beyond this, access to this power could require a specific act of parliament, case by case.

2.22 The approach outlined, involving full or more-than-full compensation, precludes the use of the power of eminent domain under the Public Works Act for the purpose of redistributing wealth. This reflects its basis in the concept of facilitating mutually beneficial voluntary exchanges. In the context of the review of the Public Works Act, we believe that this restriction is efficient. The priority should be to facilitate projects that create overall surpluses in the sense that they allow all parties to the acquisition to be better off.

2.23 The concept just proposed – that the Crown should be considered as an individual, treating with an individual for an exchange based on mutual advantage when it exercises the power of eminent domain – has an ancient pedigree. The following extract from Blackstone's famous commentaries on the laws of England around 1765 illustrates this point:

> So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. 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 consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow

6 Refer, for example, to the discussion paper at the bottom of page 21.

> any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? 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. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[7]

3. Definition of a public work and access to the provisions of the Public Works Act: Chapter 3

3.1 In response to the questions posed in chapter 3, in our view:

- governments should retain a compulsory acquisition mechanism for essential services that are privately provided where investors have already invested on this basis or where monopoly and hold-out issues arise that are a material threat to community welfare, as reflected in the sum of producer and consumer surplus;

- public works for the purposes of accessing the power of eminent domain should be narrowly defined – incorporating a concept of essentiality (non-substitutability and materiality) – in order to prevent the abuse of this power (see paragraph 3.2);

- the ability of the Crown or local authorities to compulsorily acquire land should be limited, *inter alia*, by this essentiality test;

- the Crown and local authorities should not be permitted to access this power for any activity they are authorised to undertake;

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7 William Blackstone, '*Commentaries on the Laws of England*' (1765-1769), Book 1, Chapter 1.

- only the Crown and local authorities should be able to exercise the power of eminent domain, but they should be able to do so on behalf of private parties where monopolistic aspects would otherwise put consumer welfare significantly at risk (see paragraph 3.2.); and

- voluntary exchange ('market forces') should be the norm.

3.2 As discussed in section 2, we suggest that the power of eminent domain should not be made available to entities engaged in competitive activities where its use cannot alter the real resource costs of producers and prices to end users. Given that even a corner dairy has some ability to raise price, it is vital that the discretion to exercise this power be restrained. To elaborate on the discussion in section 2, one option might be to restrict its use amongst private firms to those that already have a legal right to its use and to firms that the Commerce Commission has determined have significant market power if (i) their sales contribute materially to household welfare, directly or indirectly, and (ii) they can establish that they are vulnerable to hold-out that could materially affect end-user prices or real resource costs in production. Arguably, local authorities should not be delegated the discretion to determine for themselves what private activities give rise to significant monopoly concerns. Perhaps the Commerce Commission and Treasury could be made responsible for providing a positive list and reviewing that list from time to time. Exceptions to this approach could be covered by special acts of parliament.

3.3 In respect of central and local government-authorised activities, we suggest that the power of eminent domain only be available in respect of works that satisfy the public interest test and are clearly vulnerable to hold-out.

3.4 These remarks reflect our view that the 1981 definition of essentiality was too broad and unprincipled. Schools, hospitals and police stations can normally be built on a wide range of locations. Issues of hold-out and public good problems do not normally arise. The lack of any discernible principle for limiting the application of the power of eminent domain laid the way open to broadening the list until it became meaningless.

3.5 Nothing in the above should be read as limiting the ability of the public to exercise common law rights in respect of terms of access to other people's property. The role of the government in enforcing such rights is a police power role, not an eminent domain role.

3.6 As noted in section 2, where a firm has invested irreversibly on the basis that it can access the power of eminent domain if necessary to protect the value of its sunk investments, it would be unconscionable for a government to arbitrarily remove that access without compensation. To do so could be to put the entire value of the firm's sunk capital at risk. Such an action would give a very negative signal to all investors in activities subject to hold-out. Network industries would be a case in point.

3.7 Competitors of a dominant incumbent firm in a network industry undoubtedly make irreversible network decisions. Their incentive to do so in the absence of access to the power of eminent domain will be reduced if it is too costly, or impossible, given court decisions to negotiate effective contractual protection against the risk of hold-out in respect of sunk investments. There is an obvious tension between a public policy desire to see a monopoly facing competitive disciplines and a desire to limit the use of the power of eminent domain to situations where its use is essential. The more effective is monopoly regulation, the weaker the argument that facilitating competition is essential for community welfare. This dilemma may illustrate the importance of a legal system that can be relied upon to enforce contracts in relation to easements. A compromise option might be to allow a competitor of a dominant incumbent that enjoys the right of access to the power of eminent domain a limited right of access. For example, it could be limited to its use to obtain the easements it requires in order to establish its initial network operation. As an industry grows more competitive it would become more desirable to negotiate the elimination of access to the power of eminent domain rather than extend it to more and more competing firms.

4. Acquisition and compensation

4.1 In response to the questions posed in chapter 4, in our view:

- negotiated purchases and joint ventures are realistic alternatives to purchasing freehold for a public work, but we suggest that no power of eminent domain be available in such cases (see paragraph 4.2);

- judicial review of processes rather than prescriptive legislation should provide the critical mechanism for ensuring that a government agency has properly protected taxpayer or ratepayer interests;

- compulsory acquisition of land should be limited to specially defined situations (perhaps public works that provide essential public goods, such as flood control, and major network utilities where hold-out is likely to be a major obstacle to investment). Work that is outside those definitions should be subject to specific acts of parliament rather than to agency discretion;

- the justification for compulsorily acquiring land for an essential public work does not depend on the status or significance of that land. Those factors could well affect the price to be paid as compensation, but that is a different issue (see paragraph 4.3);

- cases of lineal development raise the issue of high transaction costs arising from the large number of affected parties. Consumer surpluses could be affected by major delays to a capital work of an essential nature. We suggest that rights of appeal should not be abridged, but that there could be a process for fast-tracking these cases and assigning costs against those who effectively relitigate the issue;

- like any pre-existing property right, existing powers of compulsory acquisition available to network utility operators should not be removed except by mutual consent;

- a developer who is competing with a Commerce Commission-regulated dominant incumbent would arguably fail to establish that competition is essential to the public welfare since the regulated incumbent is already satisfying such wants. An application to force a dominant incumbent to share land would be likely to fail for the same reason. Section 36 of the Commerce Act should apply here in any case. However, the argument may have more chance of success where there is a need for additional capacity in the industry and hold-out could reduce producer and consumer surplus. Compromise positions might be defensible with each case being determined on its merits and time- or case-limited;

- the desirability of certainty in the allocation of property rights suggests that it would be better for the Crown to transfer freehold ownership to a requiring authority outright rather than incur the complexities and uncertainties of a lease;

- landowners should be entitled to compensation for injurious affection from a public work if they would have had such a claim under the common law had it been a private work;

- landowners should not be entitled to compensation for costs incurred in considering an unsolicited offer to purchase by voluntary exchange. If, however, they can demonstrate an injurious affection from a 'shadow of compulsion' to a court's satisfaction – for example to the market value of the land – compensation for this loss would be in order, and it should be timely where financial stress could otherwise result (see paragraph 4.5); and

- the principle of full compensation implies that compensation should be paid at above market value where a landowner was not a voluntary seller at market value independently of the residence issue. The amount should certainly be material as in the Australian 10 percent and Canadian 15 percent precedents cited at the bottom of page 32.

4.2 The power to compulsorily acquire the entire property right largely eliminates the hold-out problem. This is because it gives the acquirer two options for

achieving an essential easement in the public interest – voluntary negotiation with the existing owner, or outright purchase with subsequent resale subject to the desired easements. The counter argument is that this is a draconian remedy if all that is justified under the power of eminent domain is to ensure the right of access for maintenance purposes. Why not simply provide for the power of eminent domain to be only available for specific purposes? Just to ask the question is to invite several consequential questions. Who would determine which specific purposes and what are the risks that they would get it wrong? What about subsequent changes in circumstances that might warrant variations? How accurately can independent valuers value partial takings compared to their ability to value outright sale? Might their errors in respect of partial takings be systematic, creating the potential for abuse? Simplicity favours our suggestion in the first bullet point above. We agree that by itself this is not decisive. Another way of reducing the risk of the abuse of the power of eminent domain in respect of partial takings might be to permit reverse condemnation in the form of outright sale, perhaps just at the assessed market value for a willing buyer and a willing seller. This would provide land owners with some protection against errors in the valuation of easements. Again, we stress that any changes to current arrangements should not have retrospective effect.

4.3 Amongst the principles proposed in section 4.3.1 of page 28 of the discussion paper, we are attracted to the following:

- land should not be compulsorily acquired if this can be avoided;
- land should only be compulsorily acquired for a public work or purpose in exceptional circumstances and as a last resort in the national interest; and
- where it is considered essential to acquire the freehold, landowners should have the right to have the question determined by an appropriate independent person or body.

4.4 Even so, such formulations fail to provide principles that could assist courts to determine what circumstances are exceptional or essential. As argued in sections 2 and 3, we suggest that the concept of a material effect on the real

resource costs of producers or prices to end users (ie to community welfare viewed as the sum of producer and consumer surpluses) could fill this gap.

4.5 It is important that compensation covers the loss of option value in land. Land that is 'under the shadow' of compulsion may be materially reduced in value for this reason. This could affect its ability to sustain debt and rule out development options. Conceivably bankruptcy could follow, perhaps even before the land is compulsorily acquired.[8] Timeliness of compensation could be critical for avoiding financial hardship and serious emotional distress. We suggest that the Act be amended to provide that evidence of loss in option value could justify timely compensation prior to the actual taking. Allowing the landowner the right to claim immediate compensation for the loss of an option value would force the acquiring authority to be more specific about the timetable for compulsory acquisition since the amount of compensation for the loss of development flexibility may depend on that timetable.

5. Disposal of public works land

5.1 In response to the questions posed in chapter 5, in our view:

- as a matter of principle, no changes with retrospective effect should be made to existing arrangements except by mutual agreement or advantage. This also applies to Maori land;

- the principle of full compensation at market value (or above where the landowner was not a willing seller at market value) implies outright sale. Outright sale also allows greatest certainty about the allocation of property rights; and

- sellers should be able to negotiate for the inclusion of a buy-back provision, right of first refusal, or for outright sale, but the purchaser should also be able to simultaneously negotiate a variation in the acquisition price.

5.2 Given the risks that public authorities will fail to price optimally any variations to the standard compulsory acquisition contract, it is desirable for taxpayers or ratepayers to have a means of holding the authorities to account for the quality

of the processes they use to price such variations. This is not necessary where the purchaser is a private company.

5.3 We suggest that someone acquiring land compulsorily should be required to accept any conditions imposed by the seller in relation to the subsequent use of that land, subject to adjustments to the purchase price. Where, for example, a corridor of land is purchased for a specific purpose that is not detrimental to its existing use, greater inconvenience and cost for the original landowner could ensue if the land thus acquired were subsequently redeployed for a conflicting use. The price required to fully compensate the landowner for the loss of the original corridor will depend on expectations about its future use. Concerns about future use provide another reason why an existing owner might not be a willing seller at an assessed market value for an unconditional sale.

6. Treaty of Waitangi provisions and issues specific to Maori

6.1 The rule of law requires that all are equal under the law. The rule of law is fundamental to constitutional government. Legislation that makes distinctions based on race is not consistent with the rule of law.

6.2 In our view, the inclusion of a Treaty of Waitangi clause in the Public Works Act would undermine the rule of law and respect for the law. The points of distinction would fuel racial resentment. The more governments legislate for distinctions based on race, the more vulnerable racial minorities become to swings in majority opinion about race. This is unhealthy. Minorities need to be protected from majority rule by respect for constitutionalism and the rule of law. In a study commissioned by the NZBR, political philosopher Kenneth Minogue spelt out the dangers to social stability in New Zealand from going down this contrary path.[9]

6.3 We acknowledge that equality under the law does not mean that laws that are the same for all affect all equally. In particular, where ownership is dispersed and fragmented a given deadline for responding to notices of purchase is more

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8 Refer to *Straight Furrow*, 13 March 2001, p 28.

9 Kenneth Minogue, *Waitangi: Morality and Reality*, New Zealand Business Roundtable, 1998.

onerous than where ownership is concentrated and coordinated. However, provisions can be made for variations in the timetable to accommodate such differences regardless of race.

6.4 The concept of compensation that we have outlined above would encompass social, spiritual and cultural values regardless of race or ethnicity. Similarly, the case we have made for limitations to the exercise of the power of eminent domain applies regardless of race or ethnicity. We suggest that any limitations deemed to be appropriate for aboriginal lands should be applicable to all lands. Again the issue of variations to the standard terms for outright purchase under compulsory acquisition should be 'priced' by adjustments to the amount paid in compensation, otherwise the variations are not mutually advantageous.

6.5 We recognise that Maori land is a legal category of property that is distinct from general land. Legislation that is specific to Maori land can apply without regard to the race or ethnicity of existing owners of Maori land. Again we stress the importance of respect for avoiding measures that have retrospective effect except by mutual consent.

6.6 We acknowledge that in respect of fragmented and dispersed ownership the issue of overly high transaction costs arises – and therefore the possibility for the mutually advantageous exercise of the power of eminent domain. We stress the desirability of requiring that any such imposed changes make all parties, owners, taxpayers and ratepayers better off in equitable proportions without regard to race or ethnicity.

6.7 In our view the Public Works Act should not be used as an instrument of forced redistribution. This should remain the domain of transparent social policies that are closely scrutinised by parliament and explicitly adopted for this purpose.