Annex 2: Report of The Regulatory Responsibility Taskforce, pp. 45-47

4.55 Clause 7(1)(c) concerns the taking of property. It states the general rule that legislation should not take or impair property unless the taking or impairment is necessary in the public interest, full compensation is provided to the owner, and to the extent practicable that compensation is paid by the person or persons obtaining the benefit of the taking.

4.56 By "property" the Taskforce refers to all types of real and personal property, including intangible property. In legal terms, both real property and chattels are types of "property" for the purposes of the Bill. The concept of a legislative "taking or impairment" is described in more detail below.

4.57 Because New Zealand does not have a written constitution, there is no statutory protection against government takings of property other than land or any obligation to pay compensation. Many other nations have constitutionally enshrined a protection against taking of property, for example the United States[41] and Australia[42].An equivalent protection is contained in the European Convention on Human Rights.[43] Inclusion of a right to property in the New Zealand Bill of Rights Act 1990 was, however, considered and rejected.[44]

4.58 There is in New Zealand, as in other common law jurisdictions, a presumption that if the government takes private property then compensation will be paid. That presumption is a strong one and affects how judges interpret legislation; it may, however, be overridden by Parliament if sufficiently clear words are used to effect a taking of property. Judges will look sceptically at legislation which takes property, but ultimately Parliament is sovereign and its words must be given effect to. Other protections against the taking of property presently in force in New Zealand statute law include Magna Carta (still in force in New Zealand) and the Public Works Act 1981. These enactments only cover interests in land and not other types of property.[45]

4.59 The common law is organised around a respect for individual dignity and individual possession of property. It is a fundamental rule of the common law that

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[41]The "takings clause" is the last line in the fifth amendment to the Constitution of the United States. It states, "nor shall private property be taken for public use, without just compensation."

[42] Commonwealth of Australia Constitution Act, s 51(xxxi): property may only be acquired "on just terms".

[43] The European Convention on Human Rights (1950), Protocol 1: Enforcement of certain Rights and Freedoms not included in Section I of the Convention, art 1.

[44] As explained by Sir Geoffrey Palmer in his article Westco Lagan v A-G*: Reflections upon the judgment and rights to property* [2001] NZLJ 163

[45] In various cases it has been asserted that the protection of property afforded by Magna Carta 1297 is sufficiently broad to encompass types of property other than land, such as fisheries rights or forestry rights. The New Zealand Courts have consistently rejected this contention: see, eg, *Westco Lagan* v A-G [2001] 1 NZLR 40 (HC) and *Mihos* v A-G [2008] NZAR 177 (HC)

any taking of property in the public interest should be accompanied by payment of full compensation to the owner[46]. It is this principle (that taking must be followed by just compensation) which was enacted in the constitutions of the United States and Australia. And it is this concept which has the force of a non-binding interpretive "presumption" in New Zealand.

4.60 The common law presumption is sufficiently broad so as to protect real property and other types of property such as contractual rights. The Supreme Court of Canada has held that depriving a business of goodwill – and thus rendering its assets virtually useless – constitutes a taking of property which invokes the presumption of compensation.[47]

4.61 The LAC Guidelines contain a reference to the common law presumption and the authors of the Guidelines note that it applies in New Zealand. The Guidelines suggest that if property is being taken a drafter should consider whether or not compensation should be paid.

4.62 The Taskforce considers that a protection against takings akin to the common law presumption should be enshrined in the principles. Despite the directory wording in the LAC Guidelines, in the Taskforce's experience legislation is sometimes enacted which takes or impairs property rights without providing explicitly for compensation. Litigation can ensue.[48] Clause 7(c)(i) sets a threshold for the taking of any property, namely that the taking is in the public interest. This is intended to ensure that legislators do not use governmental power to take property for private benefit.[49] Clause 7(c)(ii) states the common law rule that if property is taken, full compensation be provided to the owner. Clause 7(c)(iii) contains a presumption that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment. This is to ensure a hard look is taken at any legislation which takes property from one person (or a small group of persons) to benefit another group of individuals.

4.63 The Taskforce has used the words "taking or impairment" in clause 7. The inclusion of "impairment" is intended to encompass regulatory actions which, while not amounting to a physical taking of property, severely impair an owner's enjoyment of his or her bundle of property rights. Where the degree of impairment is sufficiently serious it will amount to a taking: for example, the Freshwater Fish Farming Regulations 1983, Amendment No 3 which prohibited the sale or removal of live marron from a fish farm unless put in possession of a Crown employee. There was

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[46] The point is elegantly stated by Blackstone in Commentaries (1765), vol 1, 134-135.

[47] *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101.

[48] For example, *Cooper v A-G* [1996] 3 NZLR 480 (HC) and *Mihos v A-G* [2008] NZAR 177 (HC).

[49] For example, in the United States case of *Kelo v City of New London* 545 US 469 (2005), private property was taken by the government for use in a inner-city development to be owned by a private corporation.

only one licensed fish farm. The regulations were not a physical taking of marron but in effect destroyed their value by precluding trade in those crustaceans.[50] Such regulatory action should in principle be compensated as if it were a taking. There is a body of Australian case law on the meaning of "impairment" in this context.[51]

4.64 The requirement that "full compensation" be given for the taking or impairment of property is adopted from the compensation provisions of the Public Works Act 1981. That provision is well understood in New Zealand, and is to be preferred to the equivalent provisions found in the Australian and United States constitutions. The Taskforce recommends as a future project a detailed examination into the appropriateness of extending the provisions of the Public Works Act 1981 to provide compensation for takings and impairments of both real and personal property. Such an extension of the Public Works Act might well mirror the provisions contained in clause 7.

[50] See the complaint to the Regulations Review Committee by Koru Aquaculture Ltd (1993) AJHR I.16K at p 3.
[51] *British Medical Association v The Commonwealth* [1949] HCA 44, and that decision was commented on by Gaudron and Gummow JJ in Smith v ANL Ltd [2000] HCA 58 at [23].