

NEW ZEALAND BUSINESS ROUNDTABLE

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Submission on the Resource Management  
(Waitaki Catchment) Amendment Bill

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February 2004

## **Executive Summary**

- This submission on the Resource Management (Waitaki Catchment) Amendment Bill (the bill) 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.
- The NZBR recommends that the bill not proceed. We consider that if passed, it will have adverse implications for the government's prime goal of achieving and sustaining faster economic growth. Because it fails to recognise existing property rights, it undermines, rather than promotes incentives to invest in electricity generation and other capital-intensive uses of water. The bill is likely to reduce the confidence of domestic and international investors in the New Zealand economy.
- The NZBR supports the government's initiative to review water allocation issues through its nationwide Water Programme of Action. The proposed bill, however, is an ad hoc and backward step for water management in the Waitaki catchment. It could establish important and undesirable precedents for other catchments and for other natural resources.
- The bill promotes a central planning approach to water allocation and management that is out of line with best international practice and contrary to the direction Australia and other leading countries are taking with water reform.
- The bill is likely to create increased rather than reduced uncertainty and to delay rather than accelerate investment in renewables-based electricity generation.
- Reform of the Resource Management Act is a priority. However, such reform should be well considered and across-the-board, rather than rushed and piecemeal if the reforms are to achieve faster and environmentally sustainable economic growth.

## **1 Introduction**

- 1.1 This submission on the Resource Management (Waitaki Catchment) Amendment Bill (the bill) 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 Water quality and allocation issues were identified by the government in January 2003 as one of the four key sets of issues to be addressed under the government's project, *The Water Programme of Action*. We are pleased that the government has acknowledged the need to deal with water allocation.
- 1.3 It is disappointing, therefore, that an ad hoc approach is now being taken in the case of the Waitaki catchment in advance of the overall Water Programme. The case for special legislation is not compelling, and in our view the risks associated with such special legislation far outweigh any benefits.
- 1.4 This submission sets out our response to the bill. Section 2 outlines our general concerns with the Resource Management Act (RMA) and water allocation issues and notes the direction of reforms in other developed countries. Section 3 identifies and assesses the key proposals in the bill. Section 4 discusses the likely economic implications of proceeding with the bill in its current form. Section 5 presents our conclusions and recommendations.

## **2 Background**

- 2.1 The NZBR has long expressed concerns that are widely shared in the business community about the RMA. It is a cumbersome, time-consuming and costly piece of legislation that adds considerable uncertainty to business decision-making. It is a major impediment to the country's economic development.
- 2.2 The NZBR has also been at the forefront of calls for a move away from political and bureaucratic control of water allocation towards an approach based on clearly defined, secure and tradable water-use rights. Such an

approach was recommended in a 1995 report published by the Business Roundtable.<sup>1</sup>

- 2.3 Other countries are now pursuing water reforms based on market-oriented principles. In a recent overview of reforms in water markets in other countries, Dr Basil Sharp, associate professor in the Department of Economics of the University of Auckland, notes:

A key issue to emerge from this overview is that countries have turned their attention from water resource development to water resource allocation and water quality. The notion of water provision as a public good and welfare enhancing activity is being replaced by the concept of water as an economic good and input in economic activity. This change in emphasis has heralded in new and innovative institutional arrangements. The old "development model" centred on centralized decision-making, administrative regulation, and a new model based on decentralized allocation, economic instruments, and stakeholder participation is replacing bureaucratic allocation.<sup>2</sup>

- 2.4 Australia provides a good example of institutional reform laying the basis for a market-responsive water economy. The reforms being implemented (at the state level) in Australia include the establishment of clearly defined and tradeable volumetric entitlements, explicit provision of water for the environment (determined through consultative catchment-wide planning processes), and moves towards more streamlined regulatory schemes and institutional mechanisms (eg water exchanges) to facilitate water trading. Most importantly, the allocation of water is becoming less politicised as markets are developing and people are relying on commercial rather than political means for resolving problems of relative scarcity. A key measure of the success of the reforms is that in 2003, Victoria managed to get through its worst drought in 60 years without direct government intervention to ration water in regions outside of major cities where water markets are well established.

- 2.5 Similarly, institutional reform in Chile has established transferable water use rights, a registry of water rights, recognised user-based organisations, and an administratively enforced system of third-party protection.

- 2.6 The reasons for the move towards market-oriented approaches are well summarised in a recently published study by the New Zealand Business

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<sup>1</sup> CS First Boston New Zealand Limited, *Reform of the Water Industry*, New Zealand Business Roundtable, August 1995.

<sup>2</sup> Dr Basil Sharp, 'Water Markets and Reform', unpublished paper prepared for Meridian Energy, July 2003.

Council for Sustainable Development (NZBCSD).<sup>3</sup> The NZBCSD's report concludes that water markets have a key role to play in delivering sustainable solutions in New Zealand. The study notes that:

... water markets ... create an incentive on everyone to practice water conservation, since by reducing wastage or recycling their water and selling the entitlements they no longer need, they can earn money. The existing water permit system offers little or no financial reward for anyone to save water.

The study observes that water markets are used extensively overseas and have helped "keep economic growth from impacting on ecologic limits ... drive forward innovation in water use and ... have been found to have positive social effects."<sup>4</sup>

- 2.7 As explained below, the approach to water management adopted in the bill contrasts strongly with the direction advocated by the NZBR and the NZBCSD. The direction is also contrary to international best practice.

### **3 Overall assessment of the bill**

- 3.1 In our assessment, the bill represents poor public policy. Reasons for this conclusion are outlined below.

#### ***Problems with the current regime***

- 3.2 The problems the bill is intending to address are not clear and do not stand up to analysis. In particular, no convincing reason is given in the Regulatory Impact Statement supporting the bill for re-opening existing water consents on the Upper Waitaki. Issues relating to the scale and scope of the existing water consents on the Upper Waitaki are currently before the courts and due process should be followed. In the case of the Lower Waitaki, where there is considerable unallocated water, normal RMA processes should be adopted. While there are many problems with the RMA, these problems should be addressed on a generic rather than an ad hoc basis.

#### ***Lack of recognition of existing property rights***

- 3.3 Clearly defined and secure property rights are essential for a growing economy.<sup>5</sup> Economist Mancur Olson has concluded that (leaving aside a

<sup>3</sup> New Zealand Business Council for Sustainable Development, 'How Economic Incentives Motivate Sustainable Development', November 2003 ([www.nzbcscd.org.nz/economicincentives](http://www.nzbcscd.org.nz/economicincentives)).

<sup>4</sup> *Ibid*, p 8.

<sup>5</sup> For an overview of the subject, see a recent NZBR submission to the government, 'Walking Access in the New Zealand Outdoors', November 2003.

few special conditions that are not important in this context) only two general conditions are required for a market economy that generates economic success. These conditions are “secure and well-defined individual rights” and “the absence of predation of any kind”.<sup>6</sup>

- 3.4 The bill, however, does not protect existing property rights. It adopts a ‘blank sheet of paper’ approach to existing water consents on the Upper Waitaki. The proposed Waitaki Catchment Water Allocation Board is tasked with undertaking a comparative assessment of various uses for the available water, where available water includes water already allocated to existing consent holders.<sup>7</sup> Of the considerations to be taken into account by the Board when determining allocations, existing consents rank lowly. Further, new applications will be able to be granted despite the fact that those allocations will diminish existing rights.<sup>8</sup>
- 3.5 Under common law, existing water users’ rights are protected by the non-derogation principle. This principle holds that new consents shall not diminish existing consents. If the bill is passed, however, there is a significant risk that courts will be required to override the non-derogation principle and start with a ‘blank sheet of paper’ when considering applications for water consents on the Waitaki. The likely implications of such a treatment of existing property rights are discussed in section 4 below.

### ***Central planning philosophy***

- 3.6 The lack of regard for existing property rights is symptomatic of the central planning philosophy underlying the bill. The central body (a Board of Inquiry) that is set up by the bill is charged with:
- determining how much water is available in the Waitaki catchment;
  - identifying present and likely future categories of use; and
  - allocating the water among the different potential categories of use.

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<sup>6</sup> Cited in *ibid*, p 6.

<sup>7</sup> Existing consents on the Waitaki are primarily held by Meridian Energy for electricity generation. A small number of consents are held by farmers and others for irrigation, conservation, industrial and other purposes. Meridian’s consents are typically valid for 35 years and are not due to expire until 2025.

<sup>8</sup> The bill does not allow the Board to directly change consents. Rather, the Panel of Commissioners (that is also established by the bill) must follow the framework established by the Board and is specifically authorised to grant consents which will give effect to any reallocations that may be established by the Board. Note that existing consents will not need to be changed directly – new consents granted upstream of existing consents can directly impact on the effective use and therefore value of the existing consents without the documentation of the existing consent needing to change.

Allocation of the water is to be by *use* rather than by *user*.<sup>9</sup> Thus so much water is to be allocated to electricity, so much to irrigation, and so forth. A portion also can be put aside for future 'uses'.

- 3.7 Allocation on the basis of use presupposes that the government or Board has the ability to determine 'optimal' use. In practice, we know such central planning does not work. Central bodies have neither the information nor the incentives to determine optimum patterns of resource allocation. The minister of energy has noted New Zealand's track record with central planning in the energy sector as follows:

In New Zealand after decades of central government management ...  
(c)entral planning was deemed inefficient and unreliable.

Its failures, at different times, included over-capitalisation – the Clyde dam being a favourite example – under-investment leading to power shortages, as in the 1950s and 1973-74, and sudden price hikes such as the 60 percent rises in 1976 and 1979.<sup>10</sup>

- 3.8 In making its water allocation decisions, the board will be required to rely on the assessed "economic and social benefits and costs ... from a national perspective" (clause 42) of the alternatives. Presumably, such an assessment will be based on a national cost benefit analysis (CBA). Because CBA relies on forecasts of the future it is inherently subjective. Further, the conclusions reached can be quite sensitive to the assumptions that underlie the analysis. There will be a lot of debate to be had between 'experts', but at the end of the day experience in New Zealand and other countries suggests the decisions made are likely to be more politically than analytically or objectively driven.

### ***Precedent effects***

- 3.9 Having special legislation for one part of the country is unusual and generally not good practice. Separate legislation for a particular region invites special-interest lobbying and encourages parochial and unstable decision-making. It creates precedents that can have ramifications throughout the country. If this bill can be passed for the Waitaki catchment now, what is to stop similar legislation, overturning existing consents in other catchments, being introduced later? Indeed, might not further special

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<sup>9</sup> Clause 18(3)(c) permits the Board to provide for transferability of the water permits but it is not clear whether such transferability will in fact be allowed and to what extent. For example, it is not clear whether allocations will be able to be transferred between the different categories of use determined by the Board.

<sup>10</sup> Hon Pete Hodgson, 'Stand-by power generation is the way to safeguard our power supply', *National Business Review*, 14 May 2003.

legislation for the Waitaki (overturning the decisions arising from the current bill) be introduced in a few years time?

***Ongoing instability***

- 3.10 The bill permits uncertainty over water allocations to continue even after the proposed allocation Board's process is completed. The framework established by the Board may be reviewed by the regional councils within months of the Board completing its task.

***Political discretion***

- 3.11 The relationship between the Board and the minister provided for in the bill at worst exposes the Board to political interference and at best exposes the minister to accusations of political interference. Under clause 9, the minister can give directions on procedure to the Board and can specify any person who must be consulted by the Board when preparing the proposed framework. While any such directions must be published in the Gazette, the opportunity to give directions exposes the minister to charges that the government may be unduly favouring its own state-owned enterprise (Meridian Energy) or that it is requiring the Board to give greater weight to the views of particular groups 'handpicked' by the minister. Further, under clause 8(1), members of the Board "hold office at the pleasure of the Minister". The Commerce Commission, where only the Governor-General can terminate the appointment of a full member, may be a better model.

***Further delays in major projects***

- 3.12 Rather than 'fast-tracking' Meridian Energy's Project Aqua, as has been claimed by some, the bill is likely to result in considerable timing delays for applicants for water. We understand that Meridian estimates the bill will delay Project Aqua by a further 12 to 18 months. What is currently a two-step RMA process (consent hearing – Environment Court appeal) will become a four-step process (Water Allocation Board hearing – High Court appeal – Panel of Commissioner hearings – Environment Court appeal). This delay of 12 to 18 months will be over and above the time it would have already taken under the slow and cumbersome processes of the Resource Management Act.



## 4 Economic Impacts of the bill

4.1 The bill as drafted could have significant negative impacts on the economy. These impacts would be both direct and indirect.

4.2 The direct impacts of the bill would be to:

- reduce the national security of electricity supply, by setting up a process that could lead, through local and national political pressures, to the reallocation of water currently used for electricity generation on the Upper Waitaki.;
- increase electricity prices, as more expensive generation is required to be used to replace the electricity lost from the Upper Waitaki; and
- reduce the value of taxpayers' investment in Meridian Energy (by leading to under-utilisation of Meridian's assets on the Upper Waitaki).

4.3 The indirect effects of the bill could be even more significant. By failing to safeguard existing water access rights, the bill would:

- make investment in new hydro-based electricity generation less likely. How could any responsible board approve the investment of the hundreds of millions of dollars required for new hydro facilities like Project Aqua if it doesn't have confidence that there will be continued supplies of water to run the plant efficiently once it is in place?;
- make investment in other renewables-based generation less likely;
- make investment in irrigation less likely as farmers will be less certain about the security of their long-term water supplies;
- encourage more rent-seeking activity as individuals and businesses see that it is more profitable to cultivate the government to enhance private wealth;<sup>11</sup> and
- send negative signals to the international investment community about the risks of investing in New Zealand.

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<sup>11</sup> As American economist Jack Hirshleifer has put it, such rent seeking "actively directed at redistributing already developed resources from processors to new claimants is essentially nothing but social waste."

- 4.4 In addition the bill could have negative environmental impacts as the electricity shortfalls from any reduction in generation from the eight existing power stations on the Upper Waitaki and the uncertainty of Project Aqua proceeding are addressed by the alternative options of gas and/or coal generation.

## **5 Conclusions and recommendations**

- 5.1 Secure property rights are vital for economic prosperity. Without them, people will not invest. And without adequate and well-directed investment, the government will not achieve its goal of seeing New Zealand return to the top half of the OECD in terms of income per capita.
- 5.2 The proposals in the bill undermine existing property rights, increase the extent of central control of natural resources, and are likely to exacerbate the uncertainties and delays surrounding major resource-based investment decisions in the economy.
- 5.3 We submit that the bill should be withdrawn and issues relating to Waitaki water be considered within the context of the government's overall water reform programme.
- 5.4 If, despite the opposition of business, farmer and other groups, the government decides to progress the bill, the following changes at a minimum are needed if its serious adverse economic effects are to be reduced. The bill needs to include clear and unequivocal statements that:
- existing rights will be protected;
  - the allocation Board should serve to promote the national interest (having regard, but with no special weight to be given, to local or regional interests);
  - water access rights granted under the bill will be able to be transferred between 'categories' and between users;
  - clearly require the Board to recognise that the social and economic value of each category of use will vary from place to place and from project to project;
  - establish sound and transparent processes for the allocation Board;
  - and

- ensure this process does not have to be repeated in a few years' time when the framework is reviewed by the relevant regional council.