

NEW ZEALAND BUSINESS ROUNDTABLE

Submission on *Walking Access in the New Zealand
Outdoors*

November 2003

WALKING ACCESS IN THE NEW ZEALAND OUTDOORS

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe.

William Blackstone (1765)¹

1. Overview

- 1.1 This submission on the Report by the Land Access Ministerial Reference Group, *Walking Access in the New Zealand Outdoors* (the report), is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms.² Its purpose is to contribute to the development of sound public policies that reflect overall New Zealand interests.
- 1.2 The thrust of the report is "to promote, encourage and where necessary direct better public access by foot to rivers, lakes, the coastline and our forest, mountains and countryside."³ The proposals centre on the provision of access per se rather than the ownership of land to provide public access.
- 1.3 This submission focuses on public access over private property. The business community has a vital interest in the issue. The proposals discussed in the report entail a substantial erosion of private property rights which is detrimental to prosperity. Land-based industries, such as farming and forestry, and tourism are directly affected.
- 1.4 The proposals would coerce private property owners to provide public access to their property, erode private property rights on an unprincipled basis and advance the interests of one group of New Zealanders at the expense of others, including taxpayers and

¹ Cited by Epstein, Richard A (1985), *Takings: Private Property and the Power of Eminent Domain*, Harvard University Press, Cambridge, p 22.

² Land Access Ministerial Reference Group (2003), *Walking Access in the New Zealand Outdoors*, Ministry of Agriculture and Forestry, Wellington.

³ *Ibid*, p iii.

ratepayers. They rest on inadequate information and poor analysis of the public policy issues involved.

- 1.5 The public can access vast areas of the country without encroaching on private property rights. Recreationalists are commonly granted permission to enter on private land provided that they act responsibly. We do not think that a persuasive case has been, or could be, made to acquire private property rights (other than through a genuinely voluntary transaction) to provide greater access to the outdoors for recreational purposes except, perhaps, in a small number of exceptional cases.
- 1.6 If private property rights are taken to provide greater access to the outdoors, just compensation should be paid to affected landowners. The requirement to pay compensation would oblige public authorities to weigh up the value of rights taken against the cost involved and thus provide an important protection against the use of property in low value activities.
- 1.7 The balance of this submission is presented in 4 sections. The next section (section 2) summarises the proposals contained in the report. Property rights are discussed in section 3. Section 4 examines other issues. Our main conclusions are presented in section 5.

2. The proposals

- 2.1 The adoption of a New Zealand access strategy is proposed in the report. The strategy is to be based on the following objectives:

- *To strengthen leadership and to provide direction for, and coordination of, access arrangements nationwide*

The establishment of a government access agency is proposed to further this objective.

- *To provide greater clarity and certainty of access by locating and publicising what is acceptable and where it may occur*

The provision of accurate information on the location and type of access available, and the drawing up of codes of conduct that will inform all parties (notably the public and landowners) of their responsibilities, are proposed.

- *To affirm the validity and embrace the ethos of the Queen's chain by providing mechanisms for its promotion and enhancement*

The level of access to rivers, lakes, the coastline and forests, mountains and countryside is to be increased by deeming rights of access over private land or declaring that certain land is subject to statutory trust provisions that provide public access rights.

- *To encourage negotiated solutions*

Proposals include using unformed roads to provide access or to provide a basis for negotiating alternative access with private landowners, requiring landowners to provide a marked access route or the creation of rights of way over private land. (These options have overtones of coercion despite being described as negotiated solutions.)

- *To find ways to improve current legislative provisions for access*

Among the proposals discussed is a suggestion that the Trespass Act be amended to decriminalise the offence of trespass and make it a misdemeanour and to provide a reasonable defence of undertaking a reasonable recreational activity. The making of consents under the Resource Management Act conditional on the provision of public access is also discussed.

3. Property rights

- 3.1 Property rights are at the heart of the access issue. The most important protection afforded to the individual by the law is the protection of his or her property. Property led to the emergence of

political and legal institutions that foster individual autonomy by limiting the power of the state. Property rights thereby protect citizens against expropriation by the government and powerful elites.⁴ They allow individuals to pursue their interests free from fear and unwarranted coercion. This protects the weak from the strong and the minority from the majority, promotes social cohesion by encouraging cooperation and helps to establish the conditions necessary for prosperity.

- 3.2 Democracy does not guarantee such protections and is not essential to achieve prosperity, contrary to what some people believe. A majority in a democratic government may exploit a minority, including racial or ethnic minorities. While democratic governments may provide secure private property rights, some undemocratic governments, such as that of Chile's Augusto Pinochet, have also upheld property rights. Similarly, democracy is not essential for prosperity. Hong Kong, under British rule, grew rapidly in the second half of the twentieth century.
- 3.3 Property rights arise from scarcity. In the absence of scarcity, each individual could achieve all his or her wants without constraining the level of satisfaction attainable by other people. Once scarcity is recognised, conflicts over the use of resources are unavoidable. They are resolved through competition. Competition for the use of resources cannot be eliminated. The forms and kinds of property rights sanctioned by society define and identify the kinds of competition that will take place.
- 3.4 Private property allows resources to be allocated through voluntary exchange. As such exchanges involve costs, they will only occur where there is mutual advantage to the parties involved. In the absence of force or the threat of force, mutual benefit between the parties creates a presumption that society as a whole is better off.

⁴ As William Pitt the elder put it in 1763: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the king of England cannot enter!"

The increase in wealth of the immediate parties will generally increase the opportunities for exchange available to other parties.

- 3.5 Well-defined and appropriately enforced property rights encourage individuals and firms to undertake wealth-generating activities with confidence. They discourage lobbying and other wasteful rent-seeking activities. Richard Epstein expressed the point succinctly when he wrote:

The ability to plan and to plant depends upon secure property rights that allow those who sow to reap.⁵

- 3.6 Ownership is a shorthand way of describing a particular bundle of rights to property. Private ownership of property encompasses the following rights:

- the exclusive right to use a resource or to decide how to use it. This includes the right to exclude other people from use of, or access to, the resource;
- the exclusive right to income generated by using the resource; and
- the exclusive right to transfer rights to the resource, which includes the right to enter into contracts.

- 3.7 The reference group reports that property rights can be viewed from two quite different perspectives. First, the view that "Property rights are not fixed: they fluctuate depending on prevailing economic conditions."⁶ Secondly, "There is an unfettered ability to use land, and the certainty that this provides is a cornerstone of a market economy."⁷ The reference group states that it did not "form a view about where its position fell on the continuum of views on property rights."⁸ This is the vital issue on which the group should have formed a principled view based on sound analysis and relevant legal and economic literature.

⁵ Epstein (1998), *op cit*, p 189.

⁶ Land Access Ministerial Reference Group (2003), *op cit*, p 31.

3.8 The vital importance of secure private property rights for prosperity is emphasised in contemporary economic literature.⁹ Mancur Olson concluded:

... that (if we leave aside a few special conditions that are not important in this context) only two general conditions are required for a market economy that generates economic success.¹⁰

These conditions are "secure and well-defined individual rights" and "the absence of predation of any kind".¹¹

3.9 Richard Roll and John Talbott found that more than 80 percent of the cross-country variation in wealth (gross national income per capita) can be explained by nine mutable influences. The most significant and consistent positive influences are strong property rights, political rights, civil liberties, press freedom and government expenditures. Roll and Talbott "conclude that countries can develop faster by enforcing strong property rights, fostering an independent judiciary, attacking corruption, dismantling burdensome regulation, allowing press freedom, and protecting political rights and civil liberties. These features define a healthy environment for economic activity."¹²

3.10 An erosion of property rights is inconsistent with the government's stated top priority which is to increase the rate of economic growth. The Speech from the Throne at the opening of the current parliament indicated that the government:

... sees its most important task as building the conditions for increasing New Zealand's long term sustainable rate of economic growth.¹³

⁷ *Ibid*, p 32.

⁸ *Ibid*, p 32.

⁹ See, for example, Landes, David (1998), *The Wealth and Poverty of Nations*, Basic Books, New York; North, Douglass C (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge; and Olson, Mancur (2000), *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships*, Basic Books, New York.

¹⁰ Olson (2000), *op cit*, p 195.

¹¹ *Ibid*, pp 195-196.

¹² Roll, Richard and Talbott, John (2001), 'Why Many Developing Countries Just Aren't', unpublished paper, University of California, Los Angeles.

¹³ Cartwright, Silvia (2002), Speech from the Throne, 27 August.

- 3.11 Private property rights are substantially reduced, if not abrogated, if the right to exclude others from access to, or use of, a resource is taken away. The importance of the right to exclude other people from one's property was emphasised by Blackstone in the quotation at the head of this submission.
- 3.12 The report overstates the extent to which property rights are be subject to change in the first and third sentences cited below, and thus mistakenly implies that they should be changed involuntarily in response to lobbying by those who seek access to private property for recreational purposes:

Because property rights are a societal construct – comprising social, economic and legal elements – they constantly change. The “bundle” of property rights attaches to land title but is not absolute, as it is subject to many legislative obligations. This “bundle” is not defined and is subject to constant renegotiation.¹⁴

- 3.13 Involuntary changes to private property rights (including threats to take property or to withhold resource consents if access is not granted) without valid cause and just compensation threaten prosperity and social cohesion. The report does not discuss the principles that should be applied in deciding whether private property rights should be taken in the public interest. This is a serious omission. Epstein and Wilkinson discuss the relevant issues.¹⁵
- 3.14 The report cites Guerin (at page 33) in support of its view that a restriction on the exercise of property rights "falls short of the taking of those rights". This view contrasts with that of Epstein, an eminent legal scholar, who observes that the key case in the United States is *Kaiser Aetna v United States* (1979) which was decided by its Supreme Court. According to Epstein:

It held that if there were private waters that were converted into common waters, there was a taking even if the owner was not excluded from the property that was once his. It has to be correct; after all, the alternative says that the

¹⁴ Land Access Ministerial Reference Group (2003), *op cit*, p 33.

¹⁵ Epstein, Richard A (1985), *op cit*, and Wilkinson, Bryce (2001), *Constraining Government Regulation*, New Zealand Business Roundtable, Wellington, section 6.

government can open my bedroom to the masses so long as it does not toss me out entirely ... Also there is a taking if the rights were once held in common and then further diluted. Thus take jointly held property, which is opened to the public, and the same rationale applies. A demotion from a 50 percent interest with a friend to a 1 percent interest with the world costs you 49 percent of the total; ditto for the partner.¹⁶

- 3.15 There are compelling grounds for the government to compensate individuals and firms if private property rights are appropriated. A power "to take without compensation is similar to the power to tax arbitrarily."¹⁷ A requirement to pay compensation requires the government to weigh up the costs and benefits of its proposals. The report equivocates on the payment of compensation.
- 3.16 The "property rights ethos" that is reported to "predominate" should be strengthened rather than weakened, as would be the case if the reference group's proposals were adopted. A principled approach to property rights is vital to the development of a sound public policy on access.

4. Other issues

- 4.1 The following issues are also raised by the proposals contained in the Document:
- The perceived demand for public access for recreational purposes is likely to be excessive from the perspective of the community as a whole because people and groups that lobby for it do not face the marginal social costs of the rights that they demand. The risk is that tightly focused groups may be able to obtain rights of access that they value by imposing costs on a minority of property owners who are poorly represented in the political process (for example through uncompensated takings), or by spreading them thinly over the majority of taxpayers or ratepayers who face excessive costs in representing their views (for example, if the Queen's chain is extended by public purchase

¹⁶ Personal communication, 26 August 2003. The *Kaiser Aetna* case is discussed by Epstein (1985), *op cit*, p 68-69.

¹⁷ Wilkinson (2001), *op cit*, p xiii.

of land). The absence of information on the real value to individuals of additional access to the outdoors, as expressed by their willingness to pay, makes it impossible for the reference group to accurately assess the preferences of the public. This problem is accentuated by information gaps noted in the report. The real preferences of individuals are only revealed when they voluntarily agree to exchange one good (for example money) for another (say, land).

- The cost of extending the Queen's chain and otherwise acquiring land for recreational purposes must be weighed against other priorities for private and public spending. Resources are scarce and tradeoffs are unavoidable. The question therefore is whether the social benefit from spending an additional dollar on extending the Queen's chain is greater than spending that dollar on, say, a hip operation, on relieving congestion on Auckland's roads or on private consumption. Substantial resources are available for recreation – the report notes that over 30 percent of land is in national parks and reserves. There is no indication of excess demand in the vast majority of recreational areas open to the public, despite their availability free of charge to users. In these circumstances, it is most unlikely that the general proposition that the Queen's chain should be completed could be justified on a cost and benefit basis, although a case for extending it in particular areas may be able to be made.
- The rights of all landowners should be respected. Thus the approach to private property rights discussed above applies equally to Maori land. If Maori land were taken, a new Treaty grievance would arise.
- The implications of the proposals for the Trespass Act do not appear to have been thought through. For example, what rights would a landowner have to order someone creating a nuisance off a property if they were deemed to be undertaking a “reasonable recreational activity”?

5. Conclusions

5.1 The Business Roundtable submits that:

- private property rights should be strengthened in the interests of promoting prosperity and social cohesion;
- private property owners should retain the right to exclude the public from their property. This right is central to the concept of private property;
- all proposals contained in the report that would reduce or abrogate private property rights should be rejected;
- if private property rights are taken to provide access, just compensation should be provided; and
- any proposed extensions to the Queen's chain should be justified on a cost and benefit basis.