NEW ZEALAND BUSINESS ROUNDTABLE

SUBMISSION ON THE PRELIMINARY REPORT OF THE MINISTERIAL ADVISORY COMMITTEE: *BIO-WHAT*?

JUNE 2000

SUBMISSION ON THE PRELIMINARY REPORT OF THE MINISTERIAL ADVISORY COMMITTEE: '*BIO-WHAT?*'

Summary

- This submission on the February 2000 preliminary report of the Ministerial Advisory Committee (*Bio-What?*) 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 organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

- *Bio-What?* is an offshoot of the New Zealand Biodiversity Strategy. Our submission of April 1999 criticised the draft Biodiversity Strategy for failing to apply standard procedures of public policy analysis to its proposals. Any sound public policy proposals should: (1) clearly state the problem in a way that establishes the need for government action; (2) establish an objective that does not pre-justify the proposed effects; (3) set out feasible options for achieving the desired objective; and (4) assess the costs and benefits of the proposed measures and their alternatives.

- Judging by the February 2000 version of the New Zealand Biodiversity Strategy, its authors are impervious to such criticisms. This version fails to clarify what the problems are that require additional government intervention. It does not even make it clear whether the objective is to increase human welfare or, more chillingly, to halt whatever is meant by biodiversity decline regardless of the cost to human welfare.

- Section 2 of this submission finds that the public policy analysis in *Bio-What?* is similarly deficient. Specifically, we find that *Bio-What?* fails to:

  – establish the precise nature of any problem with respect to private land;

  – consider whether any problems reflect a failure of existing regulations or a market failure;

  – establish a public policy objective in respect of these problems that does not pre-justify its proposals;

  – identify alternative means of achieving this objective; or

  – establish that the benefits from its proposals exceed the costs to a greater degree than would alternative arrangements.

- To the degree that there really is a widespread loss of indigenous species caused by the loss of habitat on private land, the problem cries out for a systematic assessment of two alternative regimes. One regime would be based on the common law or, where the power of eminent domain is invoked, the Public Works Act. Those who wish to preserve habitat would purchase it from its owner at a price that, at least in principle, fully compensated the owner for the taking. The other regime treats habitat loss as a harm that can be regulated without compensation using the state's police powers. *Bio-What?* fails to make such a systematic assessment. The absence of such an assessment reduces its case for the latter regime to mere advocacy.

- Section 3 of this submission motivates the case for considering the alternative regime based on secure private property rights protected by the common law with the power of eminent domain and full compensation in cases of necessity or where problems of hold-up or public goods issues arise. Under this regime, those wishing to preserve natural habitats could join together to purchase them for this purpose. A 'free rider' case for public funding could be considered on its merits, but it would not provide a justification for taking without compensation.

- Section 3 also analyses *Bio-What?'s* dismissive approach to the Crown's obligation to protect property rights and to conform with the rule of law, as distinct from the rule of those commanding a political majority. *Bio-What?* seriously misrepresents the centuries-long tradition under English law of compensation when land is taken under eminent domain. It fails entirely to consider the threat to the stability and cohesiveness of society that arises where ruling parties take legitimately acquired private property as they see fit without compensation.

- All constitutional government is based on accepting limits to the use of government power. In our view, *Bio-What?*'s disregard for hard-won conventions under the English constitution that preserve individual freedoms and protect legitimate private property rights is inherently revolutionary in the worst senses of that term. It is also polarising and destabilising. Having said this, we acknowledge that *Bio-What?*'s approach must be seen in the context of a more general malaise in this area.

- In our conclusion in section 4 we submit that the regulatory approach that *Bio-What?* advocates, as distinct from analyses, is deeply inimical to economic development, the rule of law, liberty, human welfare, and social cohesiveness.

- *Bio-What?*'s proposals could even worsen environmental outcomes. First, by contributing to a less prosperous future, they will make preservation less affordable. Second, they will also create perverse environmental incentives while weakening private incentives to control pests and weeds in order to preserve otherwise privately valuable indigenous resources.

- In our view, *Bio-What?* will fail to reduce mistrust between landowners and environmental advocacy groups, including government departments. Its proposals for a national accord and a national policy statement should be rejected pending a competent public policy analysis of the issues that it raises.

1 Introduction

1.1 This submission on the February 2000 preliminary report of the Ministerial Advisory Committee (*Bio-What?*) 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 organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 The NZBR shares the widespread concern about the need for government action in respect of environmental issues arising from pests and other problems involving Crown land. We are also sympathetic to the potential role for government action in respect of some, but not all, environmental problems not involving Crown land. *Bio-What?* looks at ways of sustaining indigenous biodiversity on all land other than that held and managed by the Crown for conservation purposes. It proposes that a national goal be established for this purpose. This goal would be derived from a national accord followed, *inter alia*, by a national policy statement under the Resource Management Act 1991. This would define roles and establish a methodology for local government to follow. *Bio-What?*'s proposed national goal would aim to maintain and restore natural habitats and ecosystems, apparently across New Zealand.

1.3 *Bio-What?* responds in part to the release of the draft New Zealand Biodiversity Strategy in January 1999. Our submission in April 1999 criticised that draft extensively from a public policy perspective. Any sound public policy proposals should: (1) clearly state the problem in a way that establishes the need for government action; (2) establish an objective that does not pre-justify the proposed effects; (3) set out feasible options for achieving the desired objective; and (4) assess the costs and benefits of the proposed measures and their alternatives. Neither the January 1999 nor the February 2000 version of the New Zealand Biodiversity Strategy make it clear what the problems are that require additional government intervention. It is not even clear if the objective of the proposed strategy is to increase human welfare or to halt some measures of biodiversity decline – regardless of the cost to human welfare.

1.4 Section 2 assesses *Bio-What?* against the four steps set out in the previous paragraph. Section 3 comments on the likely adverse implications of the proposals in *Bio-What?* for private land owners, the security of property rights, the rule of law and New Zealand's future prosperity. Section 4 presents some concluding observations.

2. Problem identification and analysis

2.1 ***Problem identification*** We are unable to find in *Bio-What?* a coherent statement of the nature of the biodiversity problem in respect of private land. Section 1 "The Biodiversity Challenge" in *Bio-What?* volunteers that there is a 'biodiversity challenge' wherever there is change. It asserts that *change* represents a threat and an opportunity to biodiversity, however defined or

measured. The definition of biodiversity it provides in its glossary of terms is so broad as to appear to encompass any conceivable change to anything on land or sea from a water-filled tree hole[1] upwards. If the problem is change itself, all human exploitation of land or sea-based resources would appear to be problematic from *Bio-What*'s perspective.

2.2 To this point the discussion in section 1 appears to establish that there is a problem regardless of whether biodiversity, however defined and measured, is increasing or decreasing. However, a couple of paragraphs later the problem appears to shift to one of an alleged *decline* in biodiversity. This raises three questions: (1) how is biodiversity measured; (2) why does a decline matter; and (3) if a decline is undesirable, why is there a need for government action?

2.3 Section 1 provides no answers to questions (1) or (3). If one species is saved at the expense of the extinction of another, has biodiversity declined or not? *Bio-What*? simply assumes the unmeasurable can be measured. The document gives one clue to a possible answer to question (2). This is the assertion that something called "our sustainability performance" is in decline because of a decline in biodiversity. "Sustainability performance" is not defined in the text or in *Bio-What?*'s glossary of terms. *Bio-What?* provides no actual examples that would point to a pending decline in our "sustainability performance". Readers are left to reason for themselves how a decline in water-filled tree holes, rotting logs, or whatever, on private land contribute to a worrisome decline in our "sustainability performance".

2.4 This shift in focus from concern about the threat to biodiversity from *change* itself to one of a *decline* in biodiversity is material. When these two goals are in conflict, which should prevail? For example, policies to introduce exotic species, export indigenous species and develop new species, perhaps by bio-genetic means, might be desirable under the second goal, but not the first.

2.5 The nature of the biodiversity problem becomes even less clear towards the end of Section 1 when readers are informed that biodiversity in *Bio-What?* particularly refers to New Zealand's natural heritage. This is a surprise because *Bio-What?*'s definition of biodiversity (see above) made no distinction whatsoever between native and introduced organisms. Nor is the concept of natural heritage defined in the text or in *Bio-What?*'s glossary of terms. Nor does *Bio-What?* attempt to draw any link between a posited decline in natural heritage and in "sustainability performance". Moreover, there is obviously a risk that policies to arrest a decline in natural heritage will reduce biodiversity overall. *Bio-What?* simply ignores such difficulties. At a more practical level, Section 1 of *Bio-What?* provides no real world examples that illustrate a biodiversity problem in respect of natural heritage on private land.

2.6 To summarise, section 1 in *Bio-What?* appears to argue that the problem is that something called New Zealand's sustainability performance is in decline

---

[1] The water-filled tree hole example is not an exaggeration. It is taken directly from the definition of biodiversity in *Bio-What?*'s glossary.

because something called its natural heritage is in decline. It makes no attempt to put any real world content around either of these assertions or to relate them to any measure of human welfare. *Bio-What?* appears to propose to place costs on humans for no offsetting benefits for humans. Given that resources are scarce, how can priorities be determined if there are no human benefits to balance costs?

2.7 Section 2, "Importance of Biodiversity – A Diversity of Values", deepens these confusions. It makes no reference whatsoever to the concept of a decline in New Zealand's natural heritage or our "sustainability performance". Instead it focuses initially on the problem of the extinction of species. However, it makes no attempt to relate any of these problems to private land. *Bio-What?* does not discuss obvious ways of preserving species such as zoos, national parks and genetic banks.

2.8 Section 2 of *Bio-What?* does consider question 2 from paragraph 2.2 above. However, in doing so, it immediately replaces the problem of extinction by an alleged problem of *ecosystem modification*. It makes no attempt to establish that modifications to ecosystem management on private land will usefully impact on extinction issues in many cases, or even in any cases. Moreover, it is not obvious what the potential, problems referred to in the remainder of Section 2 – such as pollution tourism, water quality, soil erosion, and waste disposal and control – have to do with an alleged decline in biodiversity. Moreover, public good issues in these areas have long been the subject of government intervention. *Bio-What?* makes no attempt to identify failures in respect of existing government interventions in these areas. Nor does it explain how any such failures are better handled under the generic 'biodiversity' label rather than on a case-by-case basis.

2.9 Sections 1 and 2 of *Bio-What?* thereby give the impression that the term biodiversity is little more than a mantra whose purpose is to establish extensive government control of all land-based and sea-based change regardless of all public good considerations or of the implications for human welfare or the environment.

2.10 Not content with the ambiguities and imprecision in sections 1 and 2, subsequent sections of *Bio-What?* appear to identify other potential problems. One is the need to meet international obligations under the Convention on Biological Diversity. Another is the evident confusion amongst local governments and private managers about what is meant by the 'biodiversity challenge' or even as to whether any particular actions add to or detract from the goal of 'sustaining biodiversity'.[2]

2.11 In the NZBR's view, any confusion amongst local authorities and regulators about what is meant by 'sustaining biodiversity' is entirely understandable. Local authorities can be expected to concern themselves with concrete, familiar community problems of a public good nature such as those relating to water quality, pollution, flood control, pest control and disputes over land use

---

[2] Refer, for example, to page 13.

between competing interests. *Bio-What?* makes no attempt to demonstrate that any deficiencies in current arrangements with respect to private lands in such dimensions give rise to problems relating to extinction of species, natural heritage or 'sustainability performance'.

2.12 Our consultant attempted to clarify the nature of the biodiversity problem in relation to private land further with an official in the Ministry for the Environment. He was told that pest and weeds were a widely recognised problem on private (and public) land. Some of these pests and weeds were a threat to native species and fauna. Of course, some pests, like possums, can also be a threat to farm production. The NZBR is entirely sympathetic to the view that important public good issues arise in some of these cases. *The Dominion* recently stated the problem in the following terms:

> Seventy million possums are relentlessly killing our native forests, eating the chicks of native birds in their nests and spreading bovine tuberculosis to dairy herds. When serious mosquito-borne diseases become established here, the possums may be host. The Conservation Department reported three years ago that 35 percent of the North Island's at-risk tree cover had collapsed or was showing significant changes in its composition. In the South Island the estimate was 15 percent.

2.13 But in our view it should be obvious that such issues must be discussed and analysed on a case-by-case basis. After all, the feasible range of actions depends on characteristics that may be unique to each class of predator. Nor is the fundamental problem necessarily with private land management. To the contrary, private property owners may have a stronger incentive to maintain the quality of a stand of native trees, either for conservation or for production, than the government.

2.14 *Bio-What?*'s failure to analyse the public good issues raised by specific pest and weed concerns in relation to private land suggests that its concern with this issue is derivative rather than fundamental.[3] Its primary concern appears to be to maintain and restore "natural habitats and ecosystems" on private land regardless of any issues to do with pests and weeds, or even of human welfare. *Bio-What?* simply assumes that what is a natural state is well defined. This is obviously not the case when the environment is changing naturally.

2.15 A focus on preserving the status quo without regard to the benefits as perceived by individuals or to the costs imposed on individuals is profoundly anti-development. If this philosophy had prevailed during the last century, New Zealand would never have been able to achieve the prosperity it was enjoying by the 1950s.[4] Nor does it seem likely that such a philosophy is compatible with future prosperity. Ongoing world change and the continued

---

3 Refer, for example, to pages 64-65.

4 Guy Salmon, *National Business Review*, 27 November 1998, "Blanket Compo Hurts Incentive Regime: Pioneers' property rights won't work for next century's problems", argues that "the old exploitative rights of the last century" have already been taken without compensation.

need for New Zealanders to find world markets for their land- and sea-based products indicate that marked changes in land use will be required during the next century if New Zealanders are to continue to prosper. Moreover, it is clear from the environmental contrasts between poorer and richer nations that it is the latter that can better afford a cleaner and more desirable environment. *Bio-What?* fails to even consider the possibility that its goal of greater preservation of the natural environment might be better achieved by a pro-development strategy based on secure and well-defined property rights and the proper analysis of public good issues on a case-by-case basis.

2.16 To the degree that there really is a widespread loss of indigenous species caused by the loss of habitat on private land, the problem cries out for a systematic assessment of two alternative regimes. One regime would be based on the common law or, where the power of eminent domain is invoked, the Public Works Act. Those who wish to preserve habitat would purchase it from its owner at a price that, at least in principle, fully compensated the owner for the taking. The other regime treats habitat loss as a harm that can be regulated without compensation using the state's police powers. *Bio-What?* fails to make such a systematic assessment. The absence of such an assessment reduces its case for the latter regime to mere advocacy.

2.17 The essential problem here is that *Bio-What?* fails to make any systematic assessment of the issues that might motivate a case for additional government intervention in private land. It fails to take seriously the problem that attenuating property rights by increasing the rights held in common over private land might actually accentuate the problems it seeks to avoid. It is widely recognised, amongst economists at least, that valuable species may be more threatened by extinction if they are owned in common rather than privately. This is the problem of the 'tragedy of the commons'. *Bio-What?* also fails to consider the possibility that incentives to preserve valuable features on private land may be reduced if the Crown subsidises the preservation of less valuable features on public land. Subsidies for public supply can be thought of as a tax on private supply.

2.18 ***Statement of public policy objective*** A conventional public policy analysis would identify a specific public good problem. Typically this would take the form of a case that a particular good (eg clean water) will be under-supplied in the absence of government intervention because of the costs of enforcing private property rights in clean water. The public policy objective would then be to seek a policy that would equate the marginal social cost of supplying clean water with the marginal benefit summed over all users.[5] Note that this would be the marginal benefit to people – sentient human beings – not to something abstract like 'the environment'.

2.19 In contrast, the abstract and impersonal policy objective of "halting biodiversity decline" has extreme implications. This is because it implies that the cost to humans from the pursuit of this objective is irrelevant. While such

---

[5] Note that this formulation avoids the all too common extreme objectives of (absolute) safety, cleanliness or environmental purity.

absolutist objectives are very common in government,[6] their lack of respect of individual freedom and their lack of a cost-benefit balance makes them unsound. Since they deny any analytical basis for determining priorities they politicise all decisions. Rent-seeking, waste and periods of budgetary instability must follow.

2.20 ***Consideration of alternatives and evaluation of costs and benefits*** *Bio-What?*'s first recommendation is that the government promulgate a national goal for biodiversity. This goal would be, *inter alia*, to maintain and restore a full range of remaining natural habitats and ecosystems in a healthily functioning state, enhance critically scarce habitats and sustain more modified ecosystems in production and urban environments. This goal exemplifies *Bio-What?*'s systematic failure to provide any basis for determining priorities. Limits to the pursuit of this goal are envisaged through the scope of the interpretations to be put on the various terms. *Bio-What?* explains that the focus of its suggested interpretations is to "provide guidance on defining national biodiversity outcomes that are *significant* to New Zealand".[7] *Bio-What?* does consider on page 32 the alternative goal of protecting *all* natural habitat beyond certain dimensions. The difference between these options obviously depends on what is regarded as 'significant' in practice. *Bio-What?* would make this a political decision. However, political decisions are often driven by votes rather than necessarily by the national interest.

2.21 The recommendation is curious in that the discussion of the problem in sections 1 and 2 of *Bio-What?* fails to link concerns about threatened species to the prevalence of native habitats on private lands. Nor do sections 1 and 2 make any case that the modification of any ecosystem on private land in compliance with existing laws would cause any problems. Even more curiously, the national goal makes no reference to threatened species or to "sustainability performance". Nor does the discussion of this goal identify any threatened species that might be saved by its pursuit. *Bio-What?* does not discuss the relationship between private property rights, the tragedy of the commons and threatened species. It does not consider what might impede private initiatives to preserve threatened species. The alternative approaches that might arise from such a discussion are overlooked entirely. Finally, *Bio-What?* does not explain why, if protecting the status quo in relation to the natural heritage is a good thing, restoring it even more fully would not be even better.

2.22 It is hard to avoid the conclusion that the driving motivation for *Bio-What?* is a desire to stifle land-based human development in relation to the natural environment.[8]

---

6 The objectives of safer roads, greater workplace safety, safer food and cleaner water are similarly extreme unless they are simultaneously qualified by the need to balance benefits and costs.

7 See page 31, right hand column.

8 The article "Should the Government endorse the right to destroy biodiversity" in *Ecologic*, March 2000, illustrates this type of thinking outside government. This article

2.23 *Bio-What?*'s failure to recognise the need to balance benefits and costs means that it never considers the possibility that its proposed measures could reduce human welfare. Its preference for a national planning approach means that it also fails to respect differences between individuals as to what should be preserved at what cost. Instead it adopts the central planning view that preserving threatened species is a common project to which all must conform. Those with 'revisionist' views must learn new ways or be coerced if necessary.[9] This can only be divisive and endanger liberty and prosperity and thereby people's ability to preserve what they value. *Bio-What?* acknowledges the likelihood of perverse outcomes from its proposed central planning approach but fails to consider the alternative of allowing individuals with common preferences to determine for themselves which species or ecosystems they wish to preserve with their scarce resources and how best to achieve those goals. It thereby provides no basis for deciding where to intervene and where not to intervene in private arrangements.

2.24 At heart *Bio-What?* is anti-development. It sees humans and economic development, including private conservation development and change, as the problem not the solution. It is not interested in discussing the cost to human welfare of its proposals. But it is far from indifferent to the distribution of those costs. To the contrary, it seeks to impose them disproportionately on a political minority – existing landowners.

2.25 *Bio-What?* appears to attempt to obscure its anti-development agenda by bringing within the scope of the definition of biodiversity many unrelated issues. It is hard to see, for example, what the concept of biodiversity can add to any analysis of the public good issues relating to the supply of water for reticulation or irrigation. To the contrary, the attempt to do so is all too likely to lead to the very confusion in local government that *Bio-What?* uses to justify ever more government intervention.

3 Conservation, private property rights and compensation

3.1 A system of private property rights determines who has the right to the income from a property, who has the right to determine to what use the property is put and who has the right to sell the property. Those who want to conserve natural features on the property can do so if they own the use rights to a property. Alternatively, owners may have use rights that allow them to destroy natural native features by adopting a different land use. Owners of land have traditionally enjoyed very substantial use rights in respect of private land. This is reflected in the development of North Island farming and plantation forestry from native bush.

---

attacks *Bio-What?* for not going further along the path that this submission is opposing.

9 Thus, Guy Salmon, in the *National Business Review* article cited in footnote 4, wrote: "The challenge for the farming community is to accept that staying in business means exercising today's sustainable property rights, not dreaming about the old exploitative rights of last century".

3.2 A system of private property gives those with the rights to sell land an incentive to preserve and enhance the value of the land. Since the value of a piece of land will depend on the value derived from its future use, existing owners of private land are personally confronted with the wealth implications for current and future generations of land use decisions. Because these wealth implications depend on the perceptions of other potential buyers as to the most valuable use, this system forces private owners to be sensitive to the views of other potential owners about what the most valuable use might be.

3.3 As long as property rights are transferable, the inevitable differences between individuals as to which land use will provide the greatest future benefits can be resolved by decentralised voluntary processes – ie competitive bidding. The successful bidder compensates the outgoing landowner for relinquishing the right to determine the land use through the price paid for the right to do so instead. In the absence of coercion, the voluntary nature of this transaction provides a *prima facie* case that the benefits to the new owner exceed the cost the outgoing owner incurs in relinquishing ownership rights. Moreover, the outgoing owner has an incentive to provide other individuals who might enter a higher bid with the opportunity to do so. Under a private property system no owner is an island unto himself or herself. All are forced to take into account the cost to other potential bidders of their land use decisions.

3.4 Voluntary arrangements of this type encourage people to express their true preferences in the amounts they offer to pay, or refuse to accept. For example, a refusal to accept a good offer exposes the would-be seller to the risk that the buyer will go away entirely. Because no party is coerced, the system respects the rights and preferences of each party. No government presumes to determine whose preferences should take priority.

3.5 The incentive to take into account the preferences of those who disagree may be weaker, if it exists at all, under communal ownership.[10] Problems of a 'tragedy of the commons' nature arise where property rights are not well-defined, or not transferable, or where it is unclear who can determine the land use or derive the income from it. In all these cases those who make the land use decisions do not thereby forgo the benefits that different decisions would have conferred on others. They will therefore be tempted to conserve or develop where the benefits to themselves are less than the costs to others and vice versa.

3.6 To illustrate these points, consider the implications of differences of opinion as to the value of a historic, geological or ecological feature on a piece of land that will be sacrificed to development if not preserved. Under a private property rights system, those who wish to conserve those features would simply buy the right to preserve that land use. One option would be to buy the land

---

[10] It is obviously true that it is the ability to back one's views with money that determines the outcome between law-abiding people under a private property system. But the limits here are determined by the limits to an individual's ability to persuade others to come on board rather than by the limits imposed by that individual's personal wealth.

outright, put a protective covenant on it, and resell the title subject to this covenant.[11]

3.7 Commonly individuals must join together to obtain the funds to purchase a valuable piece of land. They will form a vehicle appropriate to their purpose, be it a trust, partnership, company or whatever. They are likely to invite outside 'arms-length' investors, commonly the providers of mortgage finance. Their willingness to do this will be influenced by the supply of government land – for example, parts of the Department of Conservation estate with valuable ecological features – at below cost.

3.8 A purchasing group is particularly likely to be collective in nature where its proposed use of the land has a public good or club good aspect to it. For example, it may be of use as an open-access nature reserve, or for a public road or golf course. Such a group might appeal quite widely for funding members. Depending on the precedents and probabilities, it may also approach government for funding in full or in part. In principle, such approaches present the government with an impossible valuation problem – ascertaining true preferences. In practice, governments must balance principles, valuation problems and votes. Votes determine which party forms a government.

3.9 Whatever the government's funding decision, there is no case to this point for the use of the government's coercive powers to force the rightful owner to sell, or to agree to conserve or destroy the feature. An owner who refuses to sell at the purchasing group's price thereby signals that his or her value is greater than the alternative use value.

3.10 *Bio-What?* fails to acknowledge that individuals might put different values on conservation. It fails even to acknowledge the possibility that the money put on the table by those wanting to conserve an asset might reflect the value they put on the preservation of that asset. We suspect that its authors simply assume unquestioningly that conservation values are understated in voluntary exchanges. Whether they would defend this view on the basis of intrinsic values, an animistic philosophy, or an alleged free-rider problem is left for the reader to infer. Naturally this omission invites readers with different views to assume that the authors of *Bio-What?* have simply been captured by special interests who want their preferences to prevail at the expense of others. This suspicion can only be heightened by *Bio-What?*'s unexamined leap from a proposition that might motivate some government funding for preservation purposes on public good grounds to a presumption that mandatory purchase or regulation without compensation is justified. This brings us to the issue of the use and misuse of the Crown's coercive powers.

3.11 Governments and individuals can validly use the coercive powers of the state to enforce laws and uphold property rights. Such powers are commonly called police powers. For example, tort processes under common law allow the state's police powers to be harnessed by plaintiffs who can establish that the defendant has harmed their persons or property. Under common law, no

---

11 *Bio-What?* recognises the possibility of protective covenants on page 65.

neighbour has the right to pollute another neighbour's property. It is the rightful owner of the property, not the invader, who is entitled to compensation for damages when the state's police powers are exercised.

3.12 This presumption in favour of government intervention must be explicitly justified on a case-by-case basis since many problems can be resolved by direct negotiations between the parties concerned. Well-defined property rights can greatly facilitate this process by reducing the range for dispute. Court actions can clarify disputes about who has what rights. Such clarifications clear the way for more productive private negotiations that aim to resolve conflicts by mutual agreement. Some solutions may involve the voluntary reassignment of property rights. Others may involve formal or informal contractual agreements. Usually any solution will involve give and take so that both parties gain. Disputes about the value of preserving an asset, for example, can be resolved by private negotiation. Those who want the asset to be preserved can offer to buy it from the rightful owner or to pay the rightful owner to put a covenant on the asset designed to achieve this purpose. If the owner rejects their highest offer, the rebuttable presumption must be that the value to the owner from preserving flexibility in the use of the asset exceeds the value to those who wish to preserve it. Tort actions also allow property rights to be enforced by private actions. Tort remedies apply, for example, to the case of pollution from a neighbour's land. A *potential* case for government action arises where private remedies are notably problematic. For example, tort actions may be ineffectual where the victim of pollution cannot prove which polluter caused the damage. This problem of 'non-point source pollution' illustrates the more general point that some environmental issues raise problems of a public good nature that open up the possibility that specific government action may improve outcomes.

3.13 There is no case that the harm caused to an unsuccessful (conservationist) bidder's interests by an owner's legitimate refusal to sell is a harm under common law. If it were a legally recognised harm we would not have a private property right system that included the right to choose to sell or not to sell. A private property right system that lacked this attribute would be unable to assign property to those who could put it to the best use. This would be a serious deficiency.

3.14 It has long been generally accepted that governments may be justified in forcing a landowner to sell his or her land in cases of essential public works. Sections 22 to 27 of the Public Works Act 1981 provide explicitly that only land required for essential works may be compulsorily taken.[12] Section 2 of this Act lists what works qualify as essential. The list includes:

> (l) The creation of reserves of wildlife habitats for the protection of rare, endangered, or threatened species of flora or fauna:–and includes any specific work that has been declared to be an essential work under section 3 of this Act.

---

12 The Public Works Amendment Act (No 2) 1987 deleted the term 'essential' work and replaced it throughout by 'public work'. It also deleted references to 'essential works' in the Town and Country Planning Act 1977.

3.15 Part V of the Act is devoted to compensation. Section 60 explicitly acknowledges the right to compensation as follows:

> **60. Basic entitlement to compensation**–(1) Where under this Act any land –
>
> (a) Is acquired or taken for any essential work; or
>
> (b) Suffers any injurious affection resulting from the taking of any other land of the owner for any essential work; or
>
> (c) Suffers any damage from the exercise (whether proper or improper and whether normal or excessive) of–
>
> (i) Any power under this Act; or
>
> (ii) Any power which relates to a public work and is contained in any other Act –
>
> and no other provision is made under this or any other Act for compensation for that acquisition, taking, injurious affection, or damage, the owner of that land shall be entitled to full compensation from the Minister or local authority as the case may be, for such acquisition, taking, injurious affection, or damage.

3.16 Part VII of the Town and Country Planning Act 1977 similarly confirms the right to 'full' compensation for the injurious affects on any land or estate caused by provisions in district schemes and controls on development in the absence of the scheme. Section 126 reads as follows:

> 126. Persons injuriously affected may claim compensation–(1) Every person having any estate or interest in any land taken for any purpose authorised by section 81 of this Act or otherwise for the purposes of an operative district scheme, or in any land, buildings, or other improvement injuriously affected by the operation of any such scheme or of any refusal or prohibition under Part II of this Act, shall, subject to the provisions of this section, be entitled to full compensation for all loss thereby sustained by him.
>
> (2) Except as otherwise provided in this Act, claims for compensation under this section shall be made and determined in accordance with [the Public Works Act 1981] in respect of land taken under this Act, or in respect of damage done from the exercise of any powers conferred by this Act.

3.17 Section 145 of the Soil Conservation and Rivers Control Act 1941 similarly acknowledges the right to compensation:

> 145. Compensation for injury or damage–(1) Every person having any estate or interest in any land taken by any Board for any of the purposes of this Act or injuriously affected thereby, or damaged or injuriously affected by the construction of any works by any Board, or suffering any damage or injurious affection from the exercise by any Board of any other power conferred on it (not being a power conferred by [or under section 149 or paragraphs (b), (e), (f), and (g) of subsection (1) of section 150] of this Act), shall be entitled to full compensation for the same from the Board.

3.18 Such provisions for compensation have an obvious equity rationale and reflect a long tradition under English law. The staunch opposition in the English system to the seizure of property without any conviction for wrongdoing is evident moving back in time to the Bills of Rights of 1688 and 1689, the Petition of Right 1628, Magna Carta and beyond. This influence is also evident in the United States. The Americans took their common law from England and added a written constitution. The fifth amendment to the United States Constitution dictates that private property should not be taken for public use "without just compensation".

3.19 The case for compensation also has an efficiency rationale. First, if owners of private land are not compensated for the injurious affects of public actions on the value of that land, their incentives to preserve or enhance the value of the land are obviously potentially adversely affected.[13] Second, claims about the magnitude of public good benefits are likely to be less exaggerated the more the costs of providing those goods fall on those making the claims rather than on those whose property is being taken. Third, in our view, optimal tax arguments favour funding publicly funded public goods from broad-based taxes at a low average rate levied on those who consume those goods. Funding public goods from those landowners who are unlucky enough to own land when the tax to fund those goods is impounded in land values does not pass such a test.

3.20 In respect of the point about public choice theory, those making land use decisions about politically controlled land do not generally bear the financial consequences of their decisions. Their objectives are likely to be politically determined rather than value-determined. Moreover, in political environments, classes of voters have an incentive to hide their true preferences

---

[13] There is a counter-argument that compensation could lead to over-investment on land that might be taken. However, zoning arrangements, easements and other advance notices of the potential for public works that limit the possibility of compensation must go some way to offset this concern. In addition, it is impractical for the authorities to 'fully' compensate for the intangible inconveniences of forced disposition or perhaps for some of the tangible costs.

because they do not have to back their stated preferences with their own money. Moreover, political futures are determined by future votes, not future values. As a consequence, land is less likely to be put to its most highly valued use when decision-making is politicised.[14]

3.21 Well-protected property rights are essential for prosperity – as the experience of third world countries notable for the absence of the rule of law and well-protected private property rights suggests. There is also a cogent argument that a sound system of private property rights is essential for democracy. The natural inclination of those who control the coercive powers of the state is to use those powers to take private property in an unprincipled manner for the benefit of themselves and their supporters. If successful, their natural inclination will also be to seek ways of securing their tenure against the possibility that their victims might one day be able to turn the table on them.

3.22 This fundamentally anti-democratic dynamic can only polarise and factionalise society. The commonly encountered view that any taking of private property is lawful as long as parliament has passed the law is fundamentally misguided for these reasons. Democracy can surely only endure if the powers of a majority, and therefore of a government, against a minority are limited.

3.23 *Bio-What*? discusses the issue of private property rights, particularly on pages 16-17, 19-20 (Box 7 Property Rights – Continual Evolution), 36-37 (Box 10 – Property Rights and the RMA), 47 and 50. The issue is not mentioned in the Executive Summary.

3.24 *Bio-What?* opens up the discussion of the issue of private property rights on pages 16-17. This discussion sets out two contrasting views. The first is essentially a relativistic and ahistoric view that there are no set boundaries for property rights or duties. Apparently, according to this view, if 'society' determines that someone's exercise of a pre-existing right would be a "public 'bad' " then that person should not be compensated for the removal of that right. *Bio-What?* does not suggest that pre-existing or common law property rights are at all important in relation to those 'public bads'. Holders of this view apparently believe that it would be justifiable to pass a law that uses the Crown's police powers to deprive landowners of those rights without compensation. By this argument, if a parliamentary majority rules that it is a 'public bad' for a minority to own private land, that minority should not be compensated for having all or some of their rights taken. Those of this view apparently call on the 'polluter-pays' slogan or equity principle in their support. The view appears to ignore the inequity in the 'might is right' principle embodied in this approach.[15]

---

14 Richard Epstein explicitly discusses the case based on public choice theory for compensation in relation to habitat issues on pages 100-101 in *Principles for a Free Society*, Perseus Books, 1998. A copy of this extract is attached.

15 In the absence of a benchmark for determining what is a harm, there are no limits to the tyranny of a majority. Anything is a harm that a majority determines is a harm, be it the colour of a minority's skin, their religion, their work habits, their customs, their speech or their property. In contrast, only a benchmark that respects the pre-existing

3.25 *Bio-What?*'s second and contrasting view is an extreme one. It is that an "unfettered ability to use land is integral to property ownership". According to *Bio-What?*, holders of this view argue that the only way this can change is if there is an explicit contractual arrangement between the individual and the agent (or community) to whom the right is transferred. This argument clearly denies the validity of the Crown's power of eminent domain through the centuries. *Bio-What?* then attributes to this anonymous extreme group, and only this group, the eminently reasonable opinion that if retaining habitat is a public good, landowners should be recompensed. *Bio-What?* fails to even note, let alone rebut, the efficiency rationale for this conclusion. Instead, *Bio-What?* mentions only the 'beneficiary-pays' slogan or principle in its defence.[16]

3.26 *Bio-What?* cites no evidence that any group actually holds either of these two views. Nor does it explain why these are the only two views worthy of record. The fact that it notes that neither of the views does justice to the complexities of the issues involved makes its omission of any reference to, let alone discussion of, sophisticated treatments of property right issues even more puzzling.

3.27 These omissions are a further source of puzzlement in that *Bio-What?*, instead of explaining why these views do not do justice to the issue, immediately turns to the concern that the community is being polarised by their "differences rather than their commonalities". If one group really does take the view that existing property rights can be expropriated by a political majority, endless divisiveness, conflict and struggles for political power must be expected. Legitimacy in property rights is hard to establish. Polices that destabilise them by force could lead to decades or centuries of strife.

3.28 *Bio-What?*'s most detailed discussion of property right issues is contained in its Box 7. Revealingly, the concepts of the rule of law and secure property rights are never even mentioned. To the contrary, the opening sentence motivates the idea that property rights should properly be regarded as malleable by observing that "none of our legal regimes is immutable". Revolutionaries and defenders of liberty can surely agree with this unsettling and ambiguous observation. Which side does *Bio-What?* take? The following analysis of

---

freedom and property rights of minorities is consistent with the rule of law and stable government. Reflecting such considerations, Richard Epstein has stressed the importance of a narrow conception of actionable harms, based perhaps on common law determinations as to what constitutes a harm. See, for example, his discussion on the proper scope for the exercise of the police power on pp 132-134 in *Simple Rules for a Complex World*, Harvard University Press, 1995 and his concluding comment on p 52 in *Natural Resource Law: Property Rights and Takings*, New Zealand Business Roundtable, September 1999.

16 The confusions that are introduced when equity principles such as 'beneficiary pays' and 'polluter pays' principles are used to address efficiency issues have been discussed at some length in recent years in a New Zealand context. See, for example, *Regulation of the Food and Beverage Industry* by Credit Suisse First Boston, July 1998, Submission on Cost Recovery of Passenger and Craft Border Clearance Services, New Zealand Business Roundtable, November 1998, and Submission on Fisheries Amendment Bill by Capital Economics Limited, 16 April 1999.

specific sections (cited in italics) in *Bio-What?*'s Box 7 suggests that it is the former:

> *"While the Magna Carta confirmed the broad rights of the citizenry, it also clearly recognised the concept of eminent domain - that the Crown may legally effect a taking of private property in the public interest subject to the due process of the law".*

Comment We are not aware of any basis for denying or debating the existence of the power of eminent domain under English law. The need for it is the basis of the longstanding provisions for mandatory takings of land with full compensation in the Public Works Acts that are found in jurisdictions, like New Zealand's, that are based on English law. *Bio-What?* seems to confuse the issue of eminent domain with the issues of compensation for takings and of police power. It fails to draw a distinction between the use of the police power to seize land from someone whose title to it was proven to be defective (for which no compensation need be given) and its seizure under eminent domain (for which compensation is necessary). The superficial reference in *Bio-What?* to Magna Carta in this section also contrives to give the impression that the Crown could take land with impunity by arbitrarily altering the laws to suit itself. However, the common law was not under the control of the king or parliament. *Bio-What?* fails entirely to consider the implications of this point.

"The notion that 'fee simple' title somehow insulates the holder from Crown 'interference', though commonly expressed is, and always has been, incorrect … Holding land in fee simple does not limit the Crown's ability to take land. Nor does the Magna Carta require the owner of the land to be compensated for the loss of the land."

Comment This is astonishingly unbalanced. Contrast the impression it gives of the impotence of the individual against the Crown with that conveyed by Edmund Burke in the following famous passage:

> 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 storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement.

Bio-What? is simply ignoring the fact that the English constitution is based on the rule of law. It seeks to deny that a democracy requires that the individual be protected against the arbitrary power of the state.

"More importantly, however, in contemporary society Parliament can enact legislation authorising the taking of land. This statutory power is always invoked where land is today compulsorily acquired. Therefore, arguments about Magna Carta are not directly relevant."

Comment Again the power of eminent domain does not imply the right or even the desirability of taking without compensation. Magna Carta clearly

secured land against the wilful and arbitrary use of police power by a king. *Bio-What?* fails to acknowledge the enduring problem of the need to curb the ability of those in power to abuse their power at the expense of property owners. By failing to acknowledge landowners' legitimate concerns in this respect, *BioWhat?* can surely only aggravate the polarisation in the community about these issues. What is required is a balanced and well-informed discussion of the competing points of view and some principled conclusions.

"Legal relations exist between people. Hence it is generally held that a social contract, which defines the rights and duties of landowners, is necessary prior to the creation of private property rights."

Comment Given that Magna Carta is known as 'The Great Charter' and so is aguably the closest thing in the English constitution to a social contract, *Bio-What?*'s simultaneous dismissal of Magna Carta and its endorsement of the concept of a social contract is paradoxical. More importantly, *Bio-What?* cites no authority whatsoever for the sweeping assertion in the second sentence. In any case the assertion is surely profoundly wrong in some very important respects. The concept of a social contract that predates a system of private property rights is an ahistorical philosophical abstraction. No nation ever experienced a 'state of nature' in which a social contract was drawn up with the unanimous support of all citizens, whether or not as 'impartial spectators' or behind a 'veil of ignorance'. To the contrary, private property rights and the rule of law can only exist where those who stand against tyranny have been able to force rulers to agree that they can only exercise limited powers. The essence of the rule of law is that those who wield power are themselves obliged to conform with rules and laws.[17] As with Magna Carta, the English Bill of Rights and the American Constitution, this constraint on rulers arises from the application of countervailing power, perhaps through revolution or civil war.

Only the naive think that rulers will voluntarily limit their powers except through force. The doctrine of unlimited parliamentary power that *Bio-What?* implicitly endorses by omission would permit any majority to enslave, or otherwise disenfranchise, any minority simply by following due parliamentary processes.

"There are other examples in New Zealand resource management legislation where restrictions were applied generally without compensation."

Comment The discussion of compensation issues in Box 7 is outrageously unbalanced. None of the examples cited prior to this sentence identifies legislation that applies restrictions without compensation. Worse, Box 7 fails entirely to identify the many major and longstanding statutes that explicitly

---

17 See, for example, chapter 2, "Emergence of a Rule of Law" in Paul Johnson, *The Tree of Liberty*, The Blackstone Commentaries, No 2 Series (ed Amanda J Owens), The Locke Institute, 1998, pp v-ix, 1-92. In chapter 6 Johnson argues that social contract theory is indispensable as part of the process of securing a rule of law but is of no use in explaining how we come to have a rule of law.

provide for compensation. We have already cited by way of example sections 60 of the Public Works Act 1981, 126 of the Town and Country Planning Act 1977 and 145 of the Soil Conservation and Rivers Control Act 1941.

Nor does legislation of this vintage embody the idea that the Crown can take land at will as long as it pays compensation. To the contrary, the Public Works Act 1981 embodied the idea that the power of eminent domain must only be used sparingly. This had two dimensions. The first was was that compulsory acquisition could only be resorted to when voluntary acquisition had been tried and failed. The second was that compulsory acquisition could only be justified for essential works. Essential works included the creation of reserves or wildlife habitats for the protection of rare, endangered or threatened species of flora or fauna. Furthermore, even section 85 of the Resource Management Act 1991 that denies compensation in important cases also explicitly denies local authorities the ability to impose 'unfair and unreasonable' burdens.

This lack of balance is all the more puzzling if not damning in that the Ministry for the Environment commissioned a report "Property rights and Environmental Regulation under the Resource Management Act 1991" by Philip Joseph, Associate Professor of Law at the University of Canterbury. This report extensively documents the close relationship between the power of eminent domain and the right to compensation. Dated December 1999, it stated that: "Although the origins of the right remain obscure, and while there may be various methods of assessing and redressing a property-owner's loss, the right to compensation is a universal or international constitutional norm."

"In these cases no compensation was paid as the adjustments to property rights were aimed at achieving sustainability."

Comment An alternative possibility is that no compensation was paid because at that time those environmentalists who wished to exploit landowners had enough political power to achieve this goal. The material in Box 7 simply refuses to take seriously information or possibilities that do not support its view that it is benign for the state to take private property without compensation.

3.29 None of the above disputes *Bio-What?*'s contention that the Crown's liability to pay compensation for takings has been eroded by legislation in more recent times, notably by the Resource Management Act 1991 and arguably by the removal of the concept of essential works from the Public Works Act 1981. What is in dispute is the issue of whether this erosion is enhancing or impairing human welfare. *Bio-What?* is so much into advocacy that it fails entirely to address this question. By ignoring opposing deeply held views, *Bio-What?* is surely likely to further polarise the community over these issues.

3.30 Having completely failed to identify any reasons for regarding the sanctity of property rights as being important, *Bio-What?* nevertheless concludes on pages 47 and 50 that the importance of private property rights should be acknowledged and that the law should not place an unfair or unreasonable burden on the owners of property. Given the absence of any discussion in *Bio-What?* of any principles for limiting what might be regarded as an unfair or unreasonable burden, this conclusion can only be regarded as patronising.

4 Concluding comments

4.1 In our view *Bio-What?* does landowners and the wider public a major disservice. It appears to be based on a view of humanity that is deeply antagonistic to human development and human welfare. Far from seeing human prosperity as providing the wherewithal to fund costly solutions to preservation problems, it sees the process of economic development, modification and change that generates and sustains prosperity as the cause of preservation problems. Far from recognising that a system of well-defined private property rights is critical to avoiding many of the environmental problems associated with 'the tragedy of the commons', it seeks a major expansion in the commons in respect of rights to native habitats and ecosystems. Far from acknowledging the importance of security in legitimate property rights and the constitutional need to limit the ability of a predatory political majority to destabilise the community by plundering the property or freedoms of political minorities, *Bio-What?* ignores entirely the importance of the rule of law.

4.2 In our view, *Biowhat?*'s shortcomings result in part because it fails to see private property rights as a system that reduces conflict and social divisiveness by defining the terms under which people who have different values can respect each other's differences, retain their independence, yet come together and transact for mutual benefit. Instead it seeks the utopia of national accords and national goals that can only be achieved by overriding the views and preferences of those with opposing views and values. It acknowledges that governments do not have the information necessary to fufil the role for them that it advocates, but it sees this as correctable by ever more government spending. *Bio-What?* thereby indulges in the central planning fallacies exposed

by Hayek and von Mises over half a century ago. No amount of investment in information can resolve the problem that preferences are individualistic and subjective. Social cohesion and civil society can only be undermined if governments do not seek to limit the areas in which they are prepared to override the preferences of those with dissenting views.

4.3 Sadly, *Bio-What?*'s treatment of the fruits of the struggle of a thousand years of English history between the freedom of the individual to enjoy private property and individual freedoms against the might of the Crown is dismissive and trivial. *Bio-What?* unarguably condones and in Box 7 clearly promotes instead the revolutionary and ahistorical view that the Crown's ability to take private property without compensation is, and should be, unfettered. It acknowledges no limits under English constitutional arrangements to the power of parliament to enslave the individual by taking that individual's property rights without compensation. *Bio-What?*'s confusion between the power of eminent domain and the assumption of the right to take without compensation is breathtakingly careless. It can only polarise and exacerbate the very distrust between landholders and environmentalists that motivates its call for an accord.[18]

4.4 *Bio-What?*'s indifference to critical constitutional issues is mirrored in its uncritical recycling of divisive presumptions concerning Maori. It asserts that Maori hold 'special values' with respect to biodiversity without discussing any other group's values or establishing why all Maori are the same or what its authority is for making this claim.[19] It refers to the Crown as a Treaty partner of Maori and reaffirms the Crown's commitment to Treaty principles.[20] It proposes an accord with Maori that would provide them with property right protections that it does not propose be extended to non-Maori. *Bio-What?* thereby rejects the concept that the law should treat all citizens equally.

4.5 *Bio-What?*'s failure to make a public policy case for the measures it is advocating is particularly disappointing in the light of our earlier submission.

---

18 See, for example, chapter 7, page 46.
19 First column, page 46.
20 Sections 2 and 3 on page 49.

This failure adds to the many signals the business community is receiving that submissions are a waste of time if they do not suit the official agenda.

4.6 It is hard to avoid the conclusion that the ideas driving *Bio-What?*, and the biodiversity strategy, reflect capture by environmental interest groups who desire to impose on a political minority – landowners – the costs of policies that suit perceived environmental interests. The underlying ideology appears to be extreme: exploitation is bad, preservation is good regardless of the costs or benefits of either. Conflicts with reality are pragmatically swept aside into a political debate about what elements of biodiversity are 'significant'.

4.7 In contrast, a principled approach would seek to identify what the issues are that warrant government intervention in relation to private land. We can only presume that the authors of the views in *Bio-What?* interpret the failure of conservationists to raise the funds necessary to achieve their objectives from like-minded supporters as justification for government action on public good grounds. But this rationale would only provide a case for government funding of voluntary transactions.

4.8 It is difficult to see what public policy argument there might be for forcing landowners to relinquish property rights that they might freely relinquish under voluntary exchange. Hold-out is one possibility, but this would only justify coercion where voluntary exchange at a price that reflects the public good component has failed. This is not what *Bio-What?* has in mind. Another possibility is that the authors of *Bio-What?* have no sense of the importance of legitimately allocated property rights as the benchmark for determining what constitutes a harm that might warrant invoking the state's police power. But the idea that a political majority can rightly take legitimate property rights simply by redefining what constitutes a harm is deeply revolutionary, polarising and destabilising.

4.9 In our view, *Bio-What?* has provided no public policy analysis that justifies its proposed national accords or national policy statement. The confusion it notes about biodiversity issues at local government level point to fundamental problems with the biodiversity mantra. The correct approach would be to rigorously analyse the component real-world problems and identify in each

case what are the deficiencies of existing arrangements. In our view, no other approach will do.