



**NEW ZEALAND INSTITUTE FOR THE STUDY  
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# Protection of Private Property Rights and Just Compensation

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# Outline

- Eminent Domain = the power of government to take property whether or not compensation is paid.
- A requirement for just compensation for the taking of ownership rights is not the same thing as compensation for the taking of property rights.
- Protection of property rights = a human right.
- New Zealand lags behind all other members of the OECD in providing constitutional protections for property rights.
  - Protection of property rights should be in the Bill of Rights.
- Some examples



# Origins: Intellectual and Practical

- US approach to property and compensation
  - Definition of property rights.
  - Literature on deregulatory takings.
- Examples of government action that appeared to us to be takings of property rights, (but limited constitutional support for claims for compensation).
- The subtlety of the property rights issues associated with some Treaty claims and the Waitangi Tribunal.



# Property Rights and Ownership

- Property rights: “Uses of resources that are available to holders of rights”.
  - “Ownership”: approximated by a bundle of particular rights but property rights are better viewed as a different concept.
- In New Zealand the Public Works Act protects public confiscation of ownership (of the fee simple) but what is the constitutional basis for the protection of property rights?



# Property Rights and Ownership

- A wide variety of actions by government confiscate property rights without removing ownership. For example:
  - Constraints on the uses of an asset
  - Changes in specific regulations that raise costs and/or lower income.
  - Requirements that third parties be provided with access to an asset.
  - Constraints on the ability to sell an asset to the highest bidder (based on considerations such as future use, nationality etc)



# Economic Efficiency of Just Compensation

- Officials consider the true cost of actions.
- Absence of compensation results in
  - Over-use of eminent domain.
  - Lower levels of investment in assets.
- Confiscation is a type of (inefficient) specific tax.
- Limits the ability of politically powerful groups to persuade government to take the property of others.



# Some Examples



# Valuation of High Country Leases

- Established valuation methodology for setting rents paid by pastoral farmers did not include “intrinsic values” eg views of iconic landscape.
- Leases require farmers to undertake pastoral farming + range of activities to protect the environment.
- Government instructs valuers to change the valuation basis – many rents now in excess of 100% of net farm income
- Government offers to take land and concessions on public access in lieu of rent.





# Maori Property Rights

- Crown pre-emption was used to acquire Maori land at below market values, because the resale of this land provided colonial governments with revenue.
  - Use of monopsony power to take property without just compensation.
- Foreshore and Seabed Act 2004: vesting in the Crown full ownership of the public foreshore and seabed.
  - An alternative (negotiated) path would almost certainly have required the payment of compensation.



# Petroleum Rights

- Common law provides landowners with rights over assets above and below their land.
- NZ has a long history of uncompensated compensation of private rights in natural resources: use of water in lakes and streams to generate electricity, gold and silver, coal, geothermal energy,
- Petroleum Act 1937 – appeal to economic and security interests, and need to promote exploration = private rights confiscated.



# Pre-1990 Forests under Kyoto

- Under the NZ Emissions Trading Scheme, Pre-1990 forest owners who harvest their forest and do not replant must purchase tradable emissions permits.
- Owners of forests planted after 1 Jan. 1990 can elect not to participate in the ETS.
- The taking arises from the government taking ownership of the sequestered carbon in privately-owned trees planted before 1990.



# Auckland International Airport

- 2007: Confiscation of the right to sell to some potential buyers (the CPPIB).
- Value of AIP reduced by \$300 million following the announcement.
- Cost to the economy is much higher:
  - Deterrence of investment in assets that might be considered by the government to be strategic, and
  - Demonstration that NZ does not have a framework that allows claims for compensation.



# Uncompensated Takings by Regulators

- Devolution lowers the cost of private interest lobbying for confiscation of rights.
  - Regulation of network infrastructure businesses
  - RMA and district plans: the makers of district plans are devolved the ability to administer uncompensated changes to property rights – eg “landscape protection areas”
- Government funding of groups that lobby for confiscation of property rights
  - eg public access to private land



# Some Propositions

- Property rights are complex, but so are all the issues that courts need to consider.
- The “public interest” does not justify uncompensated taking of rights.
- Protection of some rights could be enhanced by merit reviews of regulatory decisions, controls on local government decisions etc
  - But not all possible confiscations can be foreseen, so a framework for claims is required.
- Not all of our examples may require compensation: but there should be a framework for assessing the merits of their claims.



# Conclusion

- NZ protects ownership but does not protect property rights to the same extent.
- NZ has a history of uncompensated confiscation of rights, particularly where populist views support national interest arguments for confiscation.
- Improved economic performance will require greater protection of rights.
- The Bill of Rights would be a good place to start with an explicit recognition of the requirement for just compensation for takings of property rights.

