



**NEW ZEALAND INSTITUTE FOR THE STUDY
OF COMPETITION AND REGULATION INC.**

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.

