



Protection of Private Property Rights and Just Compensation

An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand

Lewis Evans and Neil Quigley with Kevin Counsell

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New Zealand Institute
for the Study of Competition
and Regulation Inc
PO Box 600
Wellington 6140
New Zealand. Ph. +64 4 463 5562
Fax +64 4 463 5566
E-mail: iscr@vuw.ac.nz
Website: www.iscr.org.nz

1. Introduction

In the last decade politicians from across the political spectrum have talked about 'transforming' New Zealand from an economy focused on land-based industries to an economy focused on investment in technology-based and high-value-added industries by promoting investment in, and retaining New Zealand ownership of, businesses developed in New Zealand. In this paper we argue that the current approach to the protection of property rights in New Zealand runs contrary to this objective and to the more general objective of economic and social progress.

New Zealand is distinguished by having among the weakest protection of private rights in the OECD, a history of confiscation of private property rights, and a long-standing failure to recognise the protection of the basic human right of property rights.¹ The effect of this is to limit investment in resources and assets in New Zealand, increase the cost of contracting and the level of expenditure on lobbying of government (whether in order to protect property rights, or to promote private interests by having the government confiscate the rights of others), and reduce accountability in the management of resources – including natural resources and the environment.²

The economic performance of the New Zealand economy will be greatly enhanced when a government moves to fill that gap in the basic human rights enjoyed by all New Zealanders. It can do so by providing effective legal mechanisms for individuals to seek just compensation should any property rights owned by them be appropriated by the state.

In democratic societies there are tensions between the coercive and pre-emptive powers of the state and the rights and freedoms of individuals.

Democracy is in itself no guarantee of the protection of rights, because it is precisely when democratically elected governments make popular changes to legislation or policies which deprive a minority in that society of some right or freedom that the existence of constitutional safeguards enforceable by the courts rather than politicians or officials become most important. Bills of human rights, typically in concert with written constitutions, provide both statutory protection for the rights of individuals and limitations on the coercive power of the state. The United Nations' Universal Declaration of Human Rights states, in its preamble, that the recognition of human rights is 'the foundation of freedom, justice and peace in the world'.³ These rights include freedom of speech as well as the right to own property and the right for individuals' rights to be protected. This requires compensation whenever the state uses its powers to confiscate those rights.

In this paper we review the nature of property rights and the importance of requirements for just compensation when the state uses its powers to appropriate any of those rights. We briefly review the approach of OECD countries to enshrining these rights and contrast them with New Zealand's. We consider the case for the inclusion of property rights in the New Zealand Bill of Rights and analyse the objections that have been raised to this approach. We consider a number of examples of full or partial confiscation of rights and the effect of such confiscations on the investment environment in New Zealand. The examples are neither exhaustive nor fully representative but do illustrate the wide and (sometimes) subtle range of possible ways in which the power of the state can be used to confiscate rights in the absence of comprehensive constitutional or statutory requirements for just compensation.

1 In the Appendix we list the protections that are evident from a survey of OECD countries. We recognise that the form of a country's political and legal institutions and their implementation of the protections are critical features in determining the efficacy of any regime – and so this list is not a list of efficacy of protections.
2 Section 21 of the New Zealand Bill of Rights 1990 provides that 'Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.' But this falls far short of protection of privately held property rights from the state, as our examples will attest.
3 United Nations Universal Declaration of Human Rights 1948 (available at <http://www.un.org/Overview/rights.html>).

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2. Property Rights, Eminent Domain and the Efficiency of Compensation for Takings

Customary rights are property rights which result from a long series of habitual or customary actions and which have, by such repetition and by uninterrupted acquiescence, acquired the force of law within society.

Property rights are 'the socially acceptable uses to which the holder of such rights can put the scarce resources to which these rights refer'.⁴ From the perspective of economics, a property right provides the right to use resources for certain purposes, and the holder of a property right is the person or group with the ability to exercise the relevant rights.

There is no simple match between allocations of property rights and the concept of ownership as it is used in popular language. The concept of ownership as it is popularly used is associated with a bundle of property rights; in particular to occupy and use the property, to enjoy the income generated from the legally permitted uses of the property, to exclude others from using the property, and to transfer control of some or all of the property rights to other owners and for whatever consideration is available. In practice, however, it is the last of these rights that most clearly defines ownership, since ownership could be retained even where use and exclusion rights were transferred through a lease or impaired by government action.

Understanding of the breadth of the application of the term property rights has been assisted by the fact that the term 'intellectual property', and the associated wide recognition of the property rights in ideas and creative works, has entered popular language. There is, nonetheless, little recognition that there are property rights in:

- (i) the choice among all legal uses of the asset and the freedom from politically imposed constraints on these uses of the asset;
- (ii) the choice among all legal means of generating income from an asset, and the ability to retain all residual income generated by those uses;
- (iii) the freedom to exclude some or all third parties, and some or all uses which they might make of the asset; and
- (iv) the freedom to sell the asset to the highest bidder, or to otherwise enter into contracts to transfer and create legally permitted rights over the asset.

The breadth of these definitions, and the wide range of local and national government policies and decisions that may affect the value of rights so defined, is the basis for the proposition that legal protections are required for holders of all property rights, not just for the protection of rights associated with ownership.

Well defined, secure and properly enforced property rights ensure that economic agents have security in their ownership of property and in their ability to take decisions with respect to that property. These rights enhance the workings of the economic system by ensuring incentives are compatible with sustainable resource use and socially desirable outcomes. They also reduce the socially wasteful expenditure incurred in protecting property rights (through lobbying politicians for favourable policies and legislation) or in invoking extra-legal means of protecting and enforcing rights that are not recognised in law.

Most theories of the origins of property rights rest on the argument that these rights are shaped by the norms of society that facilitate low-cost coordination where there is scarcity, potential conflict and external effects of actions. They recognise that property rights are not static but evolve over time with changes in society, economy and technology;⁵ and that these rights are honed, iteratively over time, by court and legislative decisions. In particular, it is the independence of the courts in resolving disputes about the ownership of existing property rights, making rulings on compensation for the taking of these rights, and defining and allocating ownership of new property rights as they emerge from social or technical change that is particularly important for economic progress.

Customary rights are property rights which result from a long series of habitual or customary actions and which have, by such repetition and by uninterrupted acquiescence, acquired the force of law within society. Their legal place evolves under common law as decisions under that law shape and render more precise the extent and nature of the rights. This approach enables the progression of new rights as society, environmental conditions and technology evolve. The definition of customary rights utilised by the Ministry of Justice is a restrictive one although it reflects common usage of the term:⁶

Customary rights are rights that pre-date Crown sovereignty and have been exercised ever since. That means they were in existence at 1840 and have continued to be exercised from 1840 to the present day. Customary rights are recognised by the common law along a spectrum, with territorial rights (i.e. rights of exclusive use and occupation) at

⁴ For an overview of the economic literature on property rights, see: H Demsetz (1998) 'Property Rights' in *The New Palgrave Dictionary of Economics and the Law* Vol III pp144-155. Macmillan.

⁵ Certain of these theories explain the evolution of such rights as facilitating transactions and security in a way that enhances economic performance. For a taste of these arguments, see: Daniel Fitzpatrick (2006) 'Evolution and chaos in property rights systems: the Third World tragedy of contested access' *Yale Law Journal* 115(5) pp996-1048; and James Krier (2008) *The Evolution of Property Rights: A Synthetic Overview* University of Michigan Law & Economics Olin Working Paper 08-021 [and] University of Michigan Public Law Working Paper 131 (available at SSRN: <http://ssrn.com/abstract=1284424>) pp08-021.

⁶ Ministry of Justice (available at www.justice.govt.nz/foreshore/main3.html).

one end and non-territorial rights (i.e. rights of use) at the other.

From a perspective focused on social and economic progress, our view is that a broader definition of customary rights is to be preferred – one which admits changes in rights over time, as society and technology changes and as resources become scarce and the environment better understood. To avoid the connotation of customary rights being derived only from the customs of indigenous peoples, we use the term presumptive rights as a general term encapsulating this evolution of rights, much in the same way as would occur under common law and evolving statutory requirements.

Eminent domain is the power of government to take property regardless of whether compensation is paid. In most developed countries constitutional provisions or legal precedent create a requirement for just compensation to be provided to the owner of the rights.

Internationally, a large literature has considered the *economic efficiency of just compensation*⁷ and has focused on five complementary ways of thinking about this issue:

- (i) the absence of a requirement for just compensation will result in public officials failing to consider the true cost of the regulations, policies or legislation that they have the power to implement. Unless they are required to provide compensation for the rights impaired or taken, the only costs that they will consider are the political costs associated with confiscating the rights of some group in society; and if that group does not have substantial electoral clout the costs will be small.
- (ii) failure to provide compensation will result in over-use of the government's power of eminent domain, since compulsory acquisition of property will be cheaper than alternative means of achieving the desired outcome.
- (iii) the threat of acquisition by government without just compensation will result in owners of property investing in the development of their property at less than the optimal level, or seeking investment opportunities overseas. Either of these actions will be to the detriment of the economy as a whole.
- (iv) taking private property required for a public purpose without compensation is equivalent to funding that public purpose with a specific tax on a small number of individuals. Economists generally accept that such specific taxes have higher efficiency ('deadweight') losses than the

broader taxes that would be required to pay just compensation.

- (v) compulsory acquisition may be motivated by government responsiveness to the wishes of particular influential groups within society, and it may impose very high costs on a small number of individuals. Just compensation inhibits the ability of politically powerful groups within society to persuade the government to take the property and destroy the livelihood of groups with less political power.

Government confiscation of rights, or even the threat of confiscation, will be treated by owners of assets as a threat to investment returns. This can have significant adverse effects on the long-term efficiency of society:⁸

Suppose, now, that the property right regime is one in which, for political or other reasons, there is a significant chance of expropriation of property rights. Now the appropriate interest rate by which to discount future returns must be raised to account for the greater risk that when these returns come in someone else will have acquired rights to them without having fully compensated the present owner for the right to do so. Where instability in ownership is greater, rational behaviour dictates the neglect of long-run investment opportunities. The impact of this on the economic progress of a society can be dramatic.

In some cases, government taking of property rights can be in the public interest; but, where this is the case, compensation to the property right holder is the appropriate mechanism to reflect the value lost by the right holder.

Economists normally assume that 'just compensation' is the compensation sufficient to make a property owner indifferent between retaining ownership and receiving the compensation offered. In practice this point of indifference is most easily defined by the amount that the owner would have received for those rights in voluntary exchange.⁹ But the market value of the property in a voluntary exchange does not provide compensation for the compulsion associated with the purchase by government, and has resulted in some economists taking the view that compensation in excess of market value is justified in cases of compulsory acquisition.¹⁰

Historically, regulated firms commonly had the feature that they were required to provide certain services and were restricted in the activities

...government taking of property rights can be in the public interest...

7 For a summary, see: W A Fischel (1998) 'Eminent Domain and Just Compensation' in *The New Palgrave Dictionary of Economics and the Law* Vol. II pp34-43. Macmillan.

8 H Demsetz (1998) 'Property Rights' in *The New Palgrave Dictionary of Economics and the Law* Vol. III p154. Macmillan.

9 Richard A Epstein (1985) *Takings: Private Property and the Power of Eminent Domain* p182. Harvard University Press.

10 *ibid.* p4.

that they could undertake but in return were guaranteed agreed rates of return by the regulator. The international process of deregulation that has occurred in the past 25 years has spawned a large literature in economics and law relating to regulatory takings. The focus of this literature is on demonstrating that when firms make investments to provide services under a regulatory contract with government, breaches of the regulatory contract resulting from deregulation represent government takings from the owners of the regulated firm and require compensation.¹¹ This literature follows from the proposition that takings need not involve compulsory acquisition of physical property but can also occur where a government uses its regulatory powers to constrain or remove the firm's ability to generate income from its regulated activity.¹²

Governments seldom provide compensation for the devaluation of property rights created by burdensome but widely applicable regulation. But, where the burden of the regulation applies narrowly

(to a small number of people) by comparison with a much larger group of beneficiaries, and where the effect of the regulation is to create the opportunity for the government to take property, then compensation for the taking is required. For example, if the government were to require, as a condition for exemption from specific regulations that it is invoking, that the owner of property 'voluntarily' donate property to the government, then this is equivalent to a direct exercise of the government's power of eminent domain and requires that compensation be paid.¹³ Further, where a specific government decision or change in policy denies the owner of property the ability to make an economically viable use of that property in the use for which it was purchased, then this represents a de-facto taking that requires compensation.¹⁴

11 J G Sidak and D F Spulber (1998) *Deregulatory Takings and the Regulatory Contract*. Cambridge University Press.

12 William A Fischel (1995) *Regulatory Takings: Law, Economics, and Politics*. Harvard University Press.

13 Richard A Epstein (1993) referencing *Nollan v California Coastal Commission* 483 US 825 (1987) in *Bargaining with the State*. Princeton University Press.

14 Richard A Epstein (1998) referencing *Lucas v South Carolina District Council* 505 US 1003 (1992) in 'Takings' in *The New Palgrave Dictionary of Economics and the Law* Vol. III p567. Macmillan.

3. Property Rights as Human Rights

Property rights allow human beings to have autonomy of action over their own property: rights holders can put property to the uses they desire, provided such uses are socially acceptable; and they can reap the rewards from those uses without fear of unjustified and uncompensated expropriation of their property rights by government. For this reason, property rights are no different from other human rights – such as the right to life and liberty, and the rights to freedom of expression and equality before the law. The Universal Declaration of Human Rights explicitly recognises property as a human right where it states (Article 17):

(1) *Everyone has the right to own property alone as well as in association with others.*

(2) *No one shall be arbitrarily deprived of his property.*

Enforceable property rights are a requirement for freedom of social interaction, freedom in the ownership and use of property, justice in the way ownership rights are enforced, and orderly competition for resources. Thus property rights are themselves socially desirable, and this is augmented by their beneficial effects on economic performance. As economist Armen Alchian put it:¹⁵

Private property rights do not conflict with human rights. They are human rights. Private property rights are the rights of humans to use specified goods and to exchange them. Any restraint on private property rights shifts the balance of power from impersonal attributes toward personal attributes and toward behavior that political authorities approve. That is a fundamental reason for preference of a system of strong private property rights: private property rights protect individual liberty.

Our survey of the legislation specifying the human rights in the 30 OECD countries reveals that all but two – Australia and New Zealand – provide property rights protection explicitly. A number also explicitly state that expropriation of property rights is not permitted without compensation. (Such legislation is typically the country's constitution, but

in some cases is a separate piece of human rights legislation. See the Appendix for more detail.)

New Zealand stands out as among those having the weakest protection. While Australia has no specific human rights legislation or human rights specified in its constitution, the latter does specify, in section 51(xxxi), that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

While the meanings of some of the terms in this clause have been controversial in the Australian courts (such as whether or not an 'acquisition' has occurred),¹⁶ the clause nonetheless provides constitutional protection for takings of property rights.¹⁷

In Canada there is protection for takings of property rights at the federal level,¹⁸ and several provinces have enacted statutes with explicit provisions for the protection of property. In Alberta, section 2 of the 'Personal Property Bill of Rights' prevents the acquiring of property by the Crown 'unless a process is in place for the determination and payment of compensation for the acquiring of that title'. Article 6 of Quebec's Charter of Human Rights and Freedoms states that: 'Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.' Despite arguments that these provisions 'offer minimal protection',¹⁹ they nonetheless provide some explicit recognition of property rights in excess of the level of recognition provided in New Zealand.

...property rights are themselves socially desirable, and this is augmented by their beneficial effects on economic performance.

15 Armen Alchian (2007) 'Property Rights' in *The Concise Encyclopedia of Economics* Second Edition (available at <http://www.econlib.org/library/Enc/PropertyRights.html>).

16 For an analysis of the evolving situation in Australia, see: John Forbes (1995) 'Taking Without Paying: Interpreting Property Rights in Australia's Constitution' *Agenda* 2(3) pp313-320.

17 Also in Australia, the state of Victoria has a bill of rights in place which protects private property rights (s 19 Victoria Charter of Human Rights and Responsibilities Act 2006).

18 The Canadian Bill of Rights 1960 is a statute of significance although it is not supreme legislation. It provides:

Recognition and declaration of rights and freedoms

1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
 - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

19 Bryan Schwartz and Melanie Bueckert (2006) 'Regulatory Takings in Canada' *Washington University Global Studies Law Review* 5 pp477-491.

4. Anticipating the Effect of Treating Property Rights as Human Rights in New Zealand

Protection from the state's taking without compensation may be provided by common law, by a requirement of the constitution, or by specific legislation. For New Zealand, the absence of a constitution means that a natural location for this protection is its legislated Bill of Rights. The preamble to the New Zealand Bill of Rights Act 1990 (BORA) describes this legislation as being designed to 'affirm, protect, and promote human rights and fundamental freedoms in New Zealand'.

From the development of the legislation in the late 1980s to the present day there have been attempts to include property rights in the BORA. The latest of these was in 2005 when a private member's bill was put forward to provide for the inclusion of private property in the BORA. We use this bill, without analysis of it, as a basis for illustrating the issues involved. As we shall explain, the protections provided by BORA are not strong and other measures relating to institutional design should also be considered.

The bill proposed to insert two new sections in the BORA:²⁰

11A Right to own property

Everyone has the right to own property, whether alone or in association with others.

11B Right not to be arbitrarily deprived of property

No person is to be deprived of the use or enjoyment of that person's property without just compensation.

Although the amendment was defeated, it is informative to consider its likely effects.

In the absence of a constitution the effect of including property rights as a human right should be compared to common law protections. In short, common law provides that:

- there is a clear presumption against the imposition of a taking of a person's property without explicit statutory justification;²¹
- any statute providing for an expropriation of property rights is interpreted in favour of the owner;²² and

- interference of property without compensation should not occur unless legislative intention to not compensate is unequivocal.²³

Thus common law provides that there should be compensation for interference with property rights, but not that there is a 'right' to compensation unless explicitly authorised by statute.^{24,25} While New Zealand governments have seldom been content to allow common law to work its course, common law remains the basic legal framework within which property rights and takings in this country are considered.²⁶

Adding property rights to New Zealand human rights legislation (the BORA) would not create legislation that is 'supreme'. This is because the BORA, in section 4, ensures that it does not provide the basis for repealing or revoking a provision in another piece of legislation that is inconsistent with itself. The BORA does not limit the legislative programme, although it does require the legislature to report and explain whether proposed legislation is in accord with the BORA. Thus, the BORA does not preclude its elements being over-ridden in legislation. This is illustrated by the Electoral Finance Act 2007, which breached the BORA requirement of freedom of expression²⁷ and yet was passed into legislation. From the experience of the Electoral Finance Act, it is apparent that legislation which has potential to breach provisions of the BORA may be reported to the House where it may be considered that the legislation is more or less important than the BORA (see section 5²⁸ of the BORA.) This shows that the presence of the BORA does not preclude its elements being over-ridden in legislation. But it does raise consideration of provisions of the BORA in developing legislation.

For their part, the courts have implemented section 6 of the BORA. This requires that they seek an interpretation of legislation which is consistent with the BORA, where that is possible.²⁹

In sum, including property rights as an element of the BORA would guide court interpretations of legislation and promote greater public and legislative debate in connection with proposed bills that potentially involved takings of property rights.

20 <http://www.brookers.co.nz/bills/defeated/b052551.pdf>

21 F Bennion (2002) *Statutory Interpretation* p652ff. Butterworths. London.

22 *Chilton v Telford Development Corporation* [1987] 1 WLR 872

23 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 542.

24 Crown Law Office *Attorney General Advice: New Zealand Bill of Rights (Private Property Rights) Amendment Bill No 2.*

25 An example of statutory prohibition on compensation is given in section 7 of the Forests (West Coast Accord) Act 2000 [West Coast legislation], which states: 'No compensation is payable by the Crown to any person for any loss of damage arising from the enactment or operation of this part.'

26 See, for example: John Burrows, Jeremy Finn and Stephen Todd (2004) *Law of Contract in New Zealand* para 1.6 p9. LexisNexis. Wellington. Their argument is that much of common law in contract has been supplanted by legislation – including, in relation to the interwar years, '... legislation which interfered with existing contractual and property rights ...'.

27 For example, the Electoral Finance Act 2007 contains, among other restrictions, the following expenditure caps during the regulated period: section 98 provides for a cap of \$2.4 million on spending by a political party; section 78 a cap of \$20,000 on spending by an electoral candidate; and section 76 a cap of \$4,000 on spending by a registered campaigning third party. An early version of the Electoral Finance Bill had much lower caps.

28 The New Zealand Bill of Rights Act (1990) section 5 provides '... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

29 A Butler and P Butler (2006) *The New Zealand Bill of Rights Act: A Commentary* pp192-194. LexisNexis. Wellington.

The 2005 private member's bill was ultimately defeated. The Justice and Electoral Select Committee (which considered the bill) recommended it not be passed, on the grounds that:³⁰

- the definition of certain terms ('property', 'deprived', 'use and enjoyment') needed further work in order to be interpreted properly;
- the bill could complicate the legal interpretation of property rights, especially in relation to the Resource Management Act 1991; and
- the right to compensation could result in unintended costs incurred by government and local authorities.

In our view these reasons do not provide a credible basis for rejecting the proposed bill. The definition of terms specified in legislation invariably require interpretation as they are applied by the courts: after all, what does 'freedom of expression'

(section 14 of the BORA) mean? As the passing of the Electoral Finance Act illustrates, New Zealand is just now defining the meaning of these words. Furthermore, it is apparent from the Appendix that most other nations do not shrink from the requirement to provide such interpretations. The second and third reasons given are strongly suggestive of why property rights should in fact be included in the BORA. They imply that it is Parliament's view (again in contrast to that of many other countries) that more considered deliberation on takings issues by the legislature and courts would be too costly and constraining of state action to be contemplated. In the following sections we explain the substantial social and economic costs of this position.

Adding property rights to New Zealand human rights legislation (the BORA) would not create legislation that is 'supreme'.

³⁰ *The New Zealand Bill of Rights (Private Property Rights) Amendment Bill: Report of the Justice and Electoral Committee* (available at http://www.parliament.nz/NR/rdonlyres/0CC8C511-6CD3-4297-B626-471F4127546F/94022/DBSCH_SCR_3871_6331.pdf)

5. Examples of Takings in New Zealand

In this section we consider examples of takings in New Zealand. The examples are by no means exhaustive, but they do indicate that the takings issue:

- arises in a wide range of circumstances;
- may appear subtly, and without explicit recognition that a taking of property arises;
- need not involve ownership;
- need not involve natural resources;
- may involve institutions for which there is weak accountability; and
- is a contemporary one that rests on a long history of takings of property without just compensation in New Zealand.

5.1. Changes to Government Valuation Policy on Crown Pastoral Leases

A recent change in government policy relating to the basis for the valuation and determination of the rental for Crown pastoral leases has resulted in a taking of property rights held by the lessees.

Crown pastoral leases provide individuals with the right and obligation to undertake pastoral farming on high country land (leases normally being for 33 years with rights of renewal in perpetuity and rental payments under the lease being reviewed every 11 years). The leases are subject to the provisions of the Land Act 1948 and the Crown Pastoral Land Act 1998 (CPLA). When read in conjunction with those Acts, the leases both permit and restrict a number of activities: they allow pastoral farming within the maximum stocking rates specified; they include restrictive covenants that preclude the lessee from benefiting from any potential building, subdivision, commercial or industrial activity; and they restrict a wide range of activities relating to pastoral farming and the development of other business activities such as those relating to tourism. The leases impose obligations on the lessee – including the obligations to reside continuously on the land, to farm the land diligently and in a husband-like manner according to the rules of good husbandry, to refrain from committing waste in any way, to control and manage vegetation on the land, to keep the land free from wild animals, rabbits and other vermin, and to properly clean and clear from weeds and keep open all creeks, drains, ditches, and watercourses on the land. Thus, the obligations and restrictions on the lessee are substantial.

The rental rate on property value payable under the lease is fixed in legislation, so the rent payable varies with the value of the land (which is set every 11 years and is exclusive of improvements). In August 2003 the government adopted the objective that it should 'obtain a fair financial return ... on its high country assets', although this objective was not explicitly stated in the Land Act or the CPLA.³¹ This resulted in a review of rent setting for pastoral leases which began in 2005. A report commissioned by LINZ identified that amenity values were not included in the valuations used to set rents for pastoral leases and recommended against including these values on the grounds that their inclusion might undermine the financial viability of pastoral farming. However, LINZ advised – and the government accepted – that subsequent rent reviews should be based on valuations which reflected full market value, including amenity values, and that financial viability issues should be considered separately.

Concerns about the traditional valuation methodology arose in part from lobbying by interest groups such as the Federated Mountain Clubs and the Royal Forest and Bird Protection Society:

... that the Crown is receiving rental from lessees at a level that does not fairly reflect the value of the land or a lessee's rights under a pastoral lease. This view asserts that the right of exclusive access a lessee has to any amenity values is undervalued or ignored. Consequently, these stakeholders believe that the Crown when participating in tenure review is forced to pay a premium for land returned to full Crown ownership because the Crown's interest is undervalued and the lessee's interest is overvalued. In other words, there are concerns that lessees are unfairly benefiting from both concessionary rents and capitalising the benefits of lower than proper rents when parts of the leases are transferred back to the Crown pursuant to tenure review.³²

Consideration of the valuation methodology also arose from the development of new government policy on the high country, expressed in part in the CPLA and extended through the development of explicit government objectives for the South Island high country in 2003. These objectives included:

- (i) 'the protection of significant inherent values ... preferably by restoration of the land concerned

The effect of the inclusion of amenity values in the valuation base has been a substantial increase in the rents sought: on average, rents increased by 553% over the previous valuation date.

³¹ The government argued that this objective was complementary to, and not inconsistent with, the Land Act and CPLA – which appears to mean that it was an objective that could not be justified in terms of the explicit words in those Acts.

³² Preliminary Government Response to Report of the High Country Pastoral Leases Review (2006) para 7.

- to full Crown ownership and control';
- (ii) 'to secure public access to enjoyment of high country land'; and
- (iii) 'to obtain a fair financial return to the Crown on its high country land assets'.

Where 'obtaining a fair financial return' could be interpreted as increasing rents to levels that made pastoral farming uneconomic, this would clearly promote objectives (i) and (ii) above by making it necessary for many lessees to enter tenure review or to offer concessions on public access; and, in respect of tenure review, it held out the prospect that valuations of the lessee's interest to be purchased by the Crown would be lower.

The effect of the inclusion of amenity values in the valuation base has been a substantial increase in the rents sought: on average, rents increased by 553% over the previous valuation date.³³ The impact of the rent increases on the economic viability of pastoral farming was recognised by officials and the government while its new policy on valuation was being developed, and was assessed in the officials' report to Cabinet in the following terms:

*MAF advises that based on the average rental figure in the Report (\$10.42 per stock unit for reviews between 2002 and 2006), it is estimated that the typical high country property would struggle to generate sufficient funds to cover this cost. MAF's farm monitoring results show that South Island merino properties generated sufficient returns in only two of the past seven years to support this level of rental payment (2000 and 2001).*³⁴

The same report to Cabinet notes that while rents will become unaffordable for some pastoral lessees, they will be affordable for other lessees 'who hold their land for lifestyle reasons, and the pastoral farming activities undertaken on their lease is not relied on for financial viability'.³⁵ A large number of pastoral lessees whose farming operation was viable at the rents applying when they purchased their properties are now not financially viable; and they must sell some or all of their existing property rights to retain their leases.

Setting the rental at a level that requires best-practice husbandry on the part of the leaseholder to generate a reasonable return on their investment in pastoral farming activities is efficient because it penalises those who are inefficient. Setting the rent at a level that even best-practice pastoral farming cannot meet, and which therefore requires the lessee to subsidise pastoral farming and land management

obligations under the lease with income from other sources, is inefficient because it will:

- (i) encourage entry by those who can afford the subsidy rather than those who can most efficiently carry out the activities required by the lease; and
- (ii) provide pastoral lessees with incentives to increase output above stocking rates stipulated in the lease or to reduce expenditure on farm management activities, contrary to the long-term management of the vegetation on the land.

As officials noted in one piece of advice to government:

*Unaffordable rent would serve neither the Crown as landowner nor lessees as this would place sustainable land management and the pastoral farming industry at risk.*³⁶

It might be argued that efficient pastoral farmers may be encouraged to enter or continue as Crown pastoral lessees by the prospect of capital gains when they sell the lease. However, this seems unlikely for two reasons. First, prospects for future capital gains will be reduced by the fact that the Crown has shown its preference for public acquisition of high country land, and by the signal that the Crown is willing to introduce new policies which attempt to limit the capital gains available to the lessees. Second, this argument requires either that lessees be able to generate sufficient income to pay their normal living expenses, or that they have mechanisms which allow them to borrow the money for living expenses while not making repayments secured by future capital gains. Since future capital gains are uncertain, financial markets offer such finance only at extremely high interest rates.

The government introduced its new policy on the inclusion of amenity values in the valuations used to set the rents for pastoral leases in the full knowledge that this would have the effect of confiscating the net income from pastoral farming which previously accrued to lessees. The change in valuation procedures arose from a decision by, and use of the statutory power of, the Crown rather than from a process of negotiation or contractual agreement with lessees.³⁷ This represents a use of eminent domain to take the property rights of the lessee; and as such it should not be enforced without provision for compensation to the lessee, as it fundamentally alters the relationship established under the lease.

The link between low rental payments, restricted land use options, and requirements to invest in a range of activities which supported government

The link between low rental payments, restricted land use options, and requirements to invest in a range of activities which supported government policy for the high country is a key element of the terms of a Crown pastoral lease.

³³ For some lessees the rent increases reflect a move from 1.5% of valuation to 2.25% of valuation, in addition to increases in the LEI (land exclusive of improvements) valuation base.

³⁴ Minister for Land Information (2006) *A Sustainable Future for the South Island High Country: Pastoral Leases Valuation Reviews: Report Back* para 48.

³⁵ *ibid.* para 47.

³⁶ *Preliminary Government Response to Report of the High Country Pastoral Leases Review* (2006) para 30.

³⁷ Note that in our view consultation, and the receipt of expert advice, is quite different from negotiation. This is especially true in the current situation, where the Crown rejected both the expert advice that it received and the views put by the pastoral lessees.

... New Zealand's colonial governments used the monopsony power created by Crown pre-emption to acquire Māori land at prices substantially below its market value, thus confiscating a portion of the value of the land that the Crown acquired from Māori.

policy for the high country is a key element of the terms of a Crown pastoral lease.³⁸ Until the recent change in government policy on valuations, the lessees were entitled to assume that the policy of low rental payments would continue to support the requirements for activity, and the restrictions on activity, that were specified in their lease.

Allowing Crown pastoral lease valuations to be increased to reflect the highest and best use (effectively incorporating lifestyle valuations into the market for pastoral leases) is inefficient when the responses of the lessee are severely constrained. More-intensive pastoral farming is strictly circumscribed by requirements for permission to be obtained. But, unconstrained by regulation, lessees could respond to higher rents by erecting additional dwellings and making these available to individuals who place a high value on the amenity values of the high country, or by developing alternative intensive commercial uses that are more profitable than pastoral farming. Because these types of responses are ruled out under the terms of the lease, it is inefficient to include amenity values or otherwise require highest and best-use valuations as the basis for rental reviews without freeing the lessees from the constraints on the ways in which they may respond.

This example illustrates that a unilateral change to the government's policy on the valuation basis removes the financial viability of pastoral farming and is a confiscation of rights – just as much as compulsory acquisition of real property (such as land) is a confiscation of rights. In defending the increases in rents for pastoral land resulting from the inclusion of amenity values, the government has frequently claimed that it will offer rent reductions in return for concessions from landowners such as public access. The Crown's use of this provision to obtain concessions on access and other matters in return for remission of rent, or to push farmers into tenure review negotiations, involves a process of compulsion and thus is a removal of rights previously enjoyed by the pastoral lessee.

In our view this taking of the lessee's property right should be possible only if the lessee is compensated for the loss of income. This conclusion holds whether the taking is actually the destruction of the economic viability of the lessee's pastoral farming by the change in the rent, or whether it is the taking of public access rights or conservation land in exchange for remission of the new rental charges back to the level at which pastoral farming is viable.

5.2. Acquisition of Māori Land

It is well known that to facilitate pākeha settlement of New Zealand a large amount of Māori land was confiscated by the government, primarily during the 1860s; and there is widespread political and popular support for the processes put in place to provide compensation for the land acquired in this manner. It is, however, less well known that the primary mechanism through which Māori land was 'purchased' by the Crown also involved a substantial component of confiscation of property rights.³⁹

Māori land was acquired under Crown pre-emption; a basic plank of British imperial constitutional law. Pre-emption was based on the idea that only the Crown could extinguish native customary titles. Without the Crown first interposing and extinguishing native title in some lawful manner, there could be no private ownership by the non-indigenous settler population of New Zealand.

While Crown pre-emption had a constitutional rationale, the manner in which it was exercised created takings of property rights. Pre-emption created a monopsony which the colonial governments used to keep the prices paid for land at levels substantially below market value. The incentives for the colonial governments to act in this way arose because buying land from Māori owners served both as a mechanism through which the colonial government raised revenue (when the land was sold to settlers at much higher prices) and as the vehicle by which fuel was provided to the driving force of expansion in the colonial economy – intensive agricultural settlement and cultivation of land under European methods:

Pre-emptive purchase after 1847 was at least based on the notion that Māori had title to the whole country. [But] the purchase often bore little resemblance to ordinary sale contracts, and the amount of consideration paid by the Government was often merely nominal, bearing little relation to market price.⁴⁰

The result is described by Richard Boast as follows:

The Māori estate was definitely lost for the proverbial mess of pottage. Selling land to the Crown simply cannot have generated significant capital for reinvestment, or indeed generated for the overwhelming majority anything deserving the name capital at all (perhaps investment credit might be a better term). Māori might as well have given their North Island lands to the Government for nothing for all the economic difference

38 In the case of pastoral leases, officials noted in their initial advice to government on these issues that: 'Any review [of government objectives for the high country] would need to recognise the link between low nominal rentals and restricted land use options.'

39 This section is drawn primarily from Richard Boast (2008) *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* Victoria University Press, Wellington.

40 *ibid.* p29.

that it made. At the end of the day it made no real difference whether land was bought or was confiscated: [it] essentially amounted to the same thing, and grievance-settlement policies of the present day which give priority to confiscation claims would appear to be misconceived.⁴¹

As a basis for the purchase of Māori land, Crown pre-emption had sound constitutional foundations and did not need to be exercised in a way that was confiscatory of property rights. However, New Zealand's colonial governments used the monopsony power created by Crown pre-emption to acquire Māori land at prices substantially below its market value, thus confiscating a portion of the value of the land that the Crown acquired from Māori. This partial taking of property rights under Crown pre-emption not only creates a potential Treaty claim for compensation under the special provisions of the Treaty of Waitangi Act; it also illustrates the importance of having constitutional grounds (which would thus be available to all New Zealanders) for the protection of property rights and for redress when these rights are confiscated by government.

5.3. Nationalisation of Petroleum

Today landowners in New Zealand recognise that most minerals under the land for which they own the fee simple are the property of the Crown. However, it is not widely known that this allocation of ownership rights is a creature of statute rather than the common law and that it derives from a series of Acts which confiscated without compensation the property rights of landowners. Indeed, New Zealand governments have a long history of confiscating private property rights in key natural resources and vesting these in the Crown once their value becomes apparent.⁴² The primary examples of statutes vesting natural resources in the Crown are the Water Power Act 1903 section 3 (right to use water in lakes, falls, rivers etc for the purpose of generating or storing electricity); Petroleum Act 1937 (all petroleum); Atomic Energy Act 1945 (all uranium); Coal Act 1948 section 3 (all coal – but this provision was reversed in 1950); Geothermal Energy Act 1953 section 3 (right to tap, take, use and apply geothermal energy); Water and Soil Conservation Act 1967 section 21 (sole right to dam rivers or streams, or divert or take natural water, or discharge natural water or waste into natural water); Mining Act 1971 (all gold and silver).

In each case confiscation of private property rights was usually justified as a necessary response

to complex allocation and resource management problems. But on closer examination the claimed necessity for the extinction of private rights never proves to be credible, for two reasons:

- (i) allocation and management issues are unlikely to create an absolute requirement that private property rights in the resource be removed; and
- (ii) even if they did, compensation could be paid to owners of the private property rights confiscated.

By way of illustration, we examine the confiscation by the New Zealand government of private rights in petroleum.

By the 16th century the maxim 'cuius est solum eius est usque ad coelum et ad inferos' (to whom belongs the soil it is his, even to heaven and to the middle of the earth) had become accepted doctrine in English law and, in the absence of statutes overriding it, has been applied consistently by the New Zealand courts in determining the ownership of natural resources.⁴³ Also relevant to the ownership of petroleum is the common law doctrine of capture – which provides that an owner is unable to stop a neighbour draining from under that owner's property a resource which will flow to a point of low pressure, as long as the means of extraction remain on the property of the neighbour. As with other common law property rights, landowners could alienate rights to the petroleum under their land through agreements with oil companies which provided for the landowner to be paid royalties; and there were examples of such transfers of rights in New Zealand before the passing of the Petroleum Act.

Despite the passage of a number of statutes and regulations relating to the extraction of minerals from 1892 to 1926, the common law was left untouched: licensing regimes and royalties applied only to minerals extracted from Crown land, and the strategic significance of oil was recognised by giving the Crown a priority right of purchase in times of emergency as well as the capacity to take over the management of the entire operation of production in the event of war. A failed bill introduced in 1927 proposed giving the Crown the ability to provide mining rights on land without the consent of the owners of the fee simple; but the royalties from any viable discovery were to be payable to the owner(s) of the fee simple and so the property rights of the landowners who had petroleum underneath their land was recognised by this bill.

In 1937 the New Zealand government introduced and passed a bill that shifted the determination of

Despite the passage of a number of statutes and regulations relating to the extraction of minerals from 1892 to 1926, the common law was left untouched ...

⁴¹ *ibid.* p40.

⁴² Richard Boast (2005) *Foreshore and Seabed* p5. LexisNexis. Wellington. The most recent example of such actions by the New Zealand government, the Foreshore and Seabed Act 2004, is considered in a subsequent section of this paper.

⁴³ Our discussion of the ownership of petroleum and the Petroleum Act is drawn primarily from: Waitangi Tribunal (2003) *The Petroleum Report*. Legislation Direct. Wellington.

The FSA was controversial because the Crown had not exhausted all options to appeal *Ngati Apa* and because the Act made no provision for compensation (except where local authorities have suffered loss).

ownership of petroleum from the common law to statute; and it expropriated all petroleum resources in New Zealand to the Crown. The increasing importance of oil to run all forms of transportation (national and international) as well as the growing strategic threat from Japan and Germany caused the New Zealand government to focus on the need to increase investment by international oil companies in the discovery and extraction of New Zealand's oil reserves – and on the ability of those companies to deal with a single owner (the government) as being 'in the national interest'. Vesting of the royalties obtained in the owners of the fee simple was considered, was left open in the passage of the Act in 1937, and ultimately was rejected in 1938. Māori claims for rights to the royalties under the Treaty of Waitangi were rejected on the grounds that confiscation was being applied equally to Māori and pākeha land owners.

The appeal to economic and security interests found broad appeal within Parliament and around New Zealand, but there was no unanimity on whether confiscation was required to achieve the government's objectives. As the Waitangi Tribunal noted, 'Māori shared in the wider endorsement, and their challenge was not to the intent to nationalise the resource but to the failure to pay landowners compensation for their loss of property rights under the common law and the Treaty'.⁴⁴ The claim that Māori did not know of the location of petroleum or its potential value at the time of the signing of the Treaty of Waitangi is easily dismissed as a ground for confiscation: property rights are residual claims and thus do not need to explicitly anticipate every use in which the resource might be valuable. But the government could not, of course, easily accede to the claims of Māori without also recognising claims to compensation from all private land owners. Claiming technical difficulties in identifying appropriate beneficiaries and doubts about the boundaries of ownership (because oil was not fixed in its location below individual parcels of land), the government chose to pursue confiscation of private rights as the simplest and best solution.⁴⁵

The approach of the government in 1937 and 1938 was based on the position that, where the 'national interest' justified action and where the owners of the confiscated rights could be presumed to share in the national benefits of the policy, no compensation for the loss of private property rights need be paid. This position will, however, only be justified if it can be shown that those affected by the confiscation of the private rights will receive benefits roughly equivalent

in value to the share of the benefits that they would have otherwise received. In this case, of course, no such analysis was done. However, complex economic models are unlikely to be required to support the simple proposition that if petroleum were as strategically important (and thus as valuable) as the government's focus on the need for nationalisation suggested, then the private losses from confiscation would far exceed the share of national benefits which landowners obtained from the Act.

5.4. Foreshore and Seabed

One of the most contentious legislative provisions in recent New Zealand history is the Foreshore and Seabed Act 2004 (FSA). This legislation had its origins in:

- (i) a long history of controversy about property rights over the foreshore, fuelled by a confusing mixture of common law and statutory provisions with application to this territory;
- (ii) an increasing perception, as the intensity of interest in the various uses of the foreshore and seabed increased with growing population and changes in technology (such as those associated with marine aquaculture), that the 'coast' is a scarce resource; and
- (iii) the decision in *Attorney-General v Ngati Apa* [2003],⁴⁶ which confirmed that the Māori Land Court did have jurisdiction to issue titles to the foreshore and seabed.⁴⁷

The FSA was a response to *Ngati Apa* and to the prospect that the Māori Land Court might issue private titles to the foreshore and seabed. The response vested in the Crown the full legal and beneficial ownership of the public foreshore and seabed, effectively extinguishing native customary title to the foreshore. The FSA can also be interpreted as an abandonment of any claim by the Crown that the foreshore and seabed was vested in the Crown before November 2004, and thus that the decision of the Court of Appeal (that it was land over which Māori customary title had not been extinguished, and over which the Māori Land Court had power to make status and vesting orders) was correct. But the FSA (section 12) withdrew any power to consider foreshore and seabed issues that might have been conferred by the Court of Appeal in *Ngati Apa*.

The FSA was controversial because the Crown had not exhausted all options to appeal *Ngati Apa* and because the Act made no provision for compensation (except where local authorities have suffered loss). The approach of the Crown to any claim for compensation would be that, since the FSA

44 *ibid.* p29.

45 This is the justification for confiscation presented to the Waitangi Tribunal by Crown witness G R Hawke (*ibid.* p35).

46 3 NZLR 643.

47 See Richard Boast (2005) *Foreshore and Seabed*. LexisNexis. Wellington.

combines statutory extinguishment of common law rights with new procedures providing for recognition and enforcement of customary rights, compensation should not be considered. Whether recognition and enforcement of customary rights in the context of removal of any claim to ownership is sufficient to remove any equitable claim on compensation is unclear. But there can be little doubt that an alternative path, which attempted to achieve the government's policy objectives in a negotiated outcome with Māori, would have required that compensation be paid. Thus, in our view, the FSA must be interpreted as confiscating property rights without compensation. The fact that popular concern about public access to the foreshore assisted passage of the legislation makes it all the more clear why it is so important for any country to have constitutional provisions for just compensation enforceable by the courts in response to legislative takings.

5.5. Treatment of Pre-1990 Forests under the Kyoto Protocol

The treatment of 'pre-1990' forests under the New Zealand Emissions Trading Scheme (ETS) is a recent example of a regulatory taking. It has had a deleterious effect on economic efficiency which in this case includes adverse effects on the state of the environment.

The present situation is encapsulated in the September 2008 amendment to the Climate Change Response Act 2002 that provides for the ETS. The ETS, in broad terms, implements a system of tradable emissions permits (known as 'New Zealand Units' or NZUs) designed to reduce New Zealand's greenhouse gas emissions and meet its obligations under the Kyoto Protocol. The ETS makes the distinction, consistent with the Kyoto Protocol, between pre-1990 forests (which were planted on or before 31 December 1989) and post-1989 forests (planted after 31 December 1989). Pre-1990 forest owners who harvest their land and do not replant it or allow it to regenerate are required to purchase NZUs to cover the deforestation emissions from harvesting; these forest owners are also not eligible to earn any NZUs for carbon sequestration from their forests. By contrast, post-1989 forest owners can elect whether or not they wish to be a participant in the ETS in the first place – and, even when they do participate, they can earn NZUs for carbon sequestration from their forests and these can be used to offset the purchase of NZUs from deforestation emissions.

The taking arose immediately when the New Zealand government signed the Kyoto Protocol:

by doing this it agreed to terms of the Protocol and took ownership of sequestered carbon in New Zealand trees planted prior to 1 January 1990.⁴⁸ The Kyoto Protocol recognises private ownership of carbon sequestration only in forests planted since 1 January 1990; and, while the Protocol does allow some (capped) level of pre-1990 sequestration to be recognised,⁴⁹ the New Zealand government elected not to account for this.⁵⁰ By taking the rights to sequestered carbon, the government removed the benefit of carbon sequestration from tree owners and took the benefits and costs of carbon sequestration unto itself. Since that time the government has struggled to provide incentives for forest owners to manage their forests in a manner that reflects the value of current and prospective sequestered carbon. In consequence of this taking, there is almost certainly less sequestered carbon in New Zealand forests in 2009 than there would have been had the sequestered carbon remained in private hands.

The rationale for the 1990 break-point in the Kyoto Protocol is claimed to be attributable to a problem that arose with applying a 'net-net' approach to accounting for forest sinks.⁵¹ Under this approach, both the emissions target and the actual emissions themselves in CP1 (the first Kyoto commitment period, being 1/1/08-31/12/12) are calculated on a net basis whereby removals of greenhouse gases by forest sinks are subtracted from gross emissions to obtain net emissions. The 'logic problem'⁵² with such an approach is that a country may reduce its gross emissions in CP1 relative to its emissions target but (because the carbon uptake of forests slows over time) its removals may also fall in CP1 relative to removals in the emissions target – so that, on a net basis, its net emissions actually increase.

Notwithstanding that this net-net approach both represents the actual net carbon emissions that a country produces and provides incentives for investing in forestry (to ensure net emissions do decrease), an alternative was proposed. That alternative was a 'gross-net' approach, where the emissions target is based on gross emissions while CP1 emissions are calculated on a net basis. Thus, if gross emissions fall during CP1 relative to the target, net emissions will also fall for any non-zero CP1 removals. However, this created its own problem – the so-called 'gross-net emissions loophole'.⁵³ Since removals are only accounted for in calculating CP1 emissions, a country with a high volume of removals may easily achieve its emissions target even if gross emissions have increased. The effect of this is to

The rationale for the 1990 break-point in the Kyoto Protocol is claimed to be attributable to a problem that arose with applying a 'net-net' approach to accounting for forest sinks.

48 Article 3.3 of the Kyoto Protocol.
 49 Article 3.4 of the Kyoto Protocol. This allows a country to voluntarily elect which additional 'forest management' activities it wishes to account for (which can include pre-1990 forest removals), although this is subject to a country-specific cap.
 50 See New Zealand Government (2007) *Treatment of Pre-1990 Forests in the New Zealand Emissions Trading Scheme*. Briefing for the Climate Change Leadership Forum (available at [http://www.mfe.govt.nz/publications/climate/treatment-pre-1990-forest-nz-ets-dec07.pdf](http://www.mfe.govt.nz/publications/climate/treatment-pre-1990-forest-nz-ets-dec07/treatment-pre-1990-forest-nz-ets-dec07.pdf)).
 51 This information is based on: Murray Ward (2004) *Where to with LULUCF? First, How Did We Get to Here?* Global Climate Change Consultancy (available at <http://homepages.paradise.net.nz/murrayw3/documents/pdf/Where%20to%20with%20LULUCF.pdf>).
 52 *ibid.* p2.
 53 Ministry of Agriculture and Forestry (2001) *Forest Sinks and the Kyoto Protocol: An Information Document* (available at <http://www.maf.govt.nz/mafnet/rural-nz/sustainable-resource-use/climate/sinks/forestsinksrpt.pdf>).

While the treatment of pre-1990 forests attempts to internalise the social cost of deforestation ... it does not internalise the social benefit of carbon sequestration from planting and tree growth.

weaken the incentive to reduce gross emissions, since the target can instead be met by relying on removals in CP1 that are not otherwise accounted for in the target. It is estimated that allowing credit for emissions removals from all forest sinks would have weakened the effect of the emissions targets by 10%.⁵⁴

The approach established as a means of (partially) avoiding the gross-net emissions loophole was to allow credit on a net basis in CP1 for only some removals by forest sinks. The weakening effect would therefore be lessened to some extent. To achieve this, the arbitrary cut-off of 1990 was determined such that only the harvest of forests planted since 1990 counted towards CP1 sequestration removals.

Having signed the Kyoto Protocol, the New Zealand government could nonetheless have established different rules under the ETS than under the Protocol, by allocating the rights to carbon sequestration to forest owners but bearing the cost of the mismatch between New Zealand policy and the Kyoto Protocol itself (which would ultimately be borne by the broad population of New Zealand taxpayers). It could have established different rules under the ETS in one of two ways:

- exempting pre-1990 forests from the ETS altogether (in this sense the rights to carbon sequestration would be placed in the hands of forest owners, and they could voluntarily enter into agreements to trade those rights); or
- allocating pre-1990 forests carbon sequestration credits under the ETS to forest owners (so that the rights to carbon sequestration would still be placed in the hands of forest owners; but, under the ETS, the owners would have an obligation to surrender sufficient rights to cover deforestation emissions).

The government did not implement either of these approaches. Rather, it fixed consistency of the ETS with the Kyoto Protocol in such a way that rights to carbon sequestration are taken from forest owners. The stated rationales for this approach are:⁵⁵

- By exempting pre-1990 forests from the ETS altogether, the costs of deforestation under the Kyoto Protocol would be borne by the government and ultimately the taxpayer. In addition, it is argued that this approach would remove the incentives on pre-1990 forest owners to reduce deforestation, as there would no longer be a mandatory requirement for pre-1990 forest owners to hold carbon credits and surrender a sufficient number to cover their emissions from deforestation.

- With carbon sequestration credits being allocated under the ETS, pre-1990 forests will earn fewer sequestration credits than post-1989 forests (since trees have less ability to sequester carbon as they age). The government argued that this would create a significant carbon liability upon harvesting – which would force forest owners either to leave the trees in place in perpetuity or to manage the forest on a rolling selective-harvesting basis in order to limit the liability. Either way, the government argues, it locks forest owners into a lower-value commercial use.

Neither of these reasons stands scrutiny. The first presumes that there will be deforestation; but, under secure property rights, deforestation will be determined by the value of all uses of the land including carbon sequestration. It seems to presume an absence of value in carbon sequestration: that is, an absence of private and public instruments for carbon. Where such instruments exist (which they do internationally, independent of ETS⁵⁶), forest carbon sequestration would have value and would affect forest owners' incentives to plant and harvest. Further, there is the implication of classic taking: the social costs of deforestation should not be borne by society, but by a sub-group in society (and one that has invested in a long-lived productive asset).

The second reason, as given, is exactly why allocating the NZUs to existing forest owners would provide socially desirable incentives. It would have the effect of 'locking in' sequestered carbon in a way that its extent would be affected by the relative prices of carbon and other derived prices for land use.⁵⁷ This would particularly be the case if technologies for measuring sequestered carbon beyond harvest were developed. Under the ETS the same issue arises for pre-1990 and post-1989 forests: all forests mature at some stage. Moreover, to allocate no carbon credits for sequestration in pre-1990 forests increases the liability at harvest, and, as explained below, locks land into its existing use while at the same time limiting the incentives provided by carbon prices and property rights to carbon.

A further reason proposed for the taking of sequestered carbon by the government is that by signing the Kyoto Protocol the government was creating the value in the sequestered carbon and thus that it had some right to this value.⁵⁸ However, it is the role of government to govern in a way that promotes social and economic progress. In so doing it has the instruments of taxes, subsidies and regulations that it can utilise to manage externalities

⁵⁴ *ibid.* p8.

⁵⁵ New Zealand Government (2007) *Treatment of Pre-1990 Forests in the New Zealand Emissions Trading Scheme Briefing for the Climate Change Leadership Forum* (<http://www.mfe.govt.nz/publications/climate/treatment-pre-1990-forest-nz-ets-dec07/treatment-pre-1990-forest-nz-ets-dec07.pdf>).

⁵⁶ For example, see: Manuel Estrada, Esteve Corbera and Katrina Brown (2008) *How do regulated and voluntary carbon-offset schemes compare?* Tyndall Centre for Climate Change Research Working Paper 116. The authors describe 'voluntary carbon offset' transactions where the carbon sequestration from forestry has been (voluntarily) purchased by emitting firms to offset their carbon emissions. Some of these transactions occurred as early as 1989.

⁵⁷ The 'locking in' would be affected by the fact that the pre-1990 forests were close to maturity at the date of the ETS and thus had a low rate of carbon sequestration. It would also be affected by how long after harvest the reversion is required before the obligation to pay the tax is extinguished (under ETS this is 8 years).

⁵⁸ This discussion presumes that the price of sequestered carbon was created by New Zealand policies: this is difficult to argue.

and thereby foster this goal. There is no presumption that a policy which enhances social and economic welfare and which creates wealth for a subset of society should penalise the wealth of this sub-group (except by means of the existing tax system). To it put another way: if policies are to be materially guided by the benefit they provide the Crown, they will no longer have the purpose of enhancing social and economic welfare. The taking of sequestered carbon by the Crown has, as we explain below, distorted forest and land management such that it has provided less rather than more sequestered carbon in 2008 – which, accepting the carbon dioxide externality, means that this taking has engendered a real social cost.⁵⁹

The effect of the treatment of pre-1990 forests under the ETS is to impose a tax on forest owners who wish to deforest and who could otherwise sell their sequestered carbon. Considering only the case of deforestation, and assuming both a carbon price of \$25 per tonne of CO₂ emissions and 800 tonnes of CO₂ emissions from deforestation of one hectare of mature radiata pine forest, the amount of this tax for pre-1990 deforestation has been estimated at approximately \$20,000 per hectare of forest land deforested.^{60,61} While the government has proposed some compensation, this is negligible – a free allocation of NZUs to a maximum of 60 per hectare of pre-1990 forest,⁶² which provides for only 60 tonnes of carbon emissions from one hectare of deforestation (compared with the standard assumption of 800 tonnes of emissions per hectare of deforestation).

The cost of deforestation is unavoidable for pre-1990 forest owners who wish to deforest pre-1990 forest land at some point in the future, even if on another forest rotation. That is, even if pre-1990 forests are harvested and replanted, the replanted-forest land remains under the pre-1990 regime and thus any later deforestation remains subject to the purchase of NZUs. It is also difficult for forest owners to reduce the deforestation tax by replanting and then deforesting the immature trees: if a forest is replanted then deforested before the trees reach the age of eight years, the deemed amount of carbon stored in the trees will be that stored in the previously harvested crop, not in the immature crop.⁶³

The treatment of pre-1990 forests under the ETS amounts to a regulatory taking: it attenuates the property rights attending pre-1990 forests by devaluing any sequestered carbon options to forest owners and imposing a deforestation tax on forest

owners which would not have been contemplated at the time of purchase of the forest. To consider deforestation only: at the time a pre-1990 forest was purchased or planted, its value would have incorporated the value of the option to deforest and convert to an alternative (higher value) land use at some point in the future.⁶⁴ This option value would have included all the expected costs and benefits associated with deforestation.

The effect of this regulatory taking is to lock pre-1990-forest land into its existing use, by significantly increasing the cost of deforestation and conversion to a (potentially) higher-value land use. The result is that land is not allocated in an economically efficient manner: the flexibility of land use to shift to where it is most highly valued is lost.

In addition, the treatment of pre-1990 forest will not have the desired effect on net carbon emissions.⁶⁵ If the goal of an emissions policy were to reduce New Zealand's net carbon emissions into the foreseeable future, it would do this both by discouraging deforestation and by encouraging planting and tree growth (the latter being via forest management techniques). While the treatment of pre-1990 forests attempts to internalise the social cost of deforestation (albeit in a manner that severely attenuates property rights), it does not internalise the social benefit of carbon sequestration from planting and tree growth. Accordingly, while being locked into a pre-1990 forest land use, these forest owners will have diminished incentives for planting and for optimal forest management. Their incentives here reflect only the private benefits and not the social benefits that ownership in this case would confer. A further distortion to incentives arises from the transparent willingness of the government to attenuate the owners' rights with negligible compensation. The taking that has occurred in forestry raises the spectre of future takings, thereby raising the risk of long-lived investments and reducing incentives to invest in forestry and elsewhere.

5.6. Auckland International Airport Limited

In December 2007 the Canada Pension Plan Investment Board (CPPIB) made a partial takeover offer for a 40 percent shareholding in Auckland International Airport Limited (AIAL). In March 2008, as a result of the 'uncertainty and debate' surrounding the CPPIB offer,⁶⁶ the government announced an amendment to the Overseas Investment Regulations to add an additional factor to be taken into account in assessing whether an overseas person or entity

59 A parallel can be drawn with the New Zealand government's negotiation of reduced tariffs under a free trade agreement, or its negotiation of import quotas. In neither case is there an argument for consequently taxing exporters; and in both cases to put such a tax in place would provide incentives for socially and economically inefficient responses by exporters.

60 See also: MAF Policy (2006) *Sustainable Land Management and Climate Change: Options for a Plan of Action*. Ministry of Agriculture and Forestry. This estimates the tax at \$13,000 per hectare using a carbon price of \$15.92 per tonne.

61 If the carbon price is higher, this calculation will significantly underestimate the amount of the deforestation tax. See, for example: <http://www.carboncalcs.com/nz/kyotocosts.htm#>, which calculates the total value of the forest emissions liability. Assuming a carbon price of \$40 per tonne and carbon emissions of 734 tonnes per hectare of deforestation from a 28-year-old forest, it arrives at a deforestation tax for pre-1990 forests of approximately \$28,000 per hectare. While it reports the aggregate value of carbon taken from private owners of pre-1990 exotic forests (allowing 39 NZUs per hectare) to be approximately \$22 billion, at this price of carbon the market value would for various reasons be less – but it would nevertheless be very substantial.

62 The maximum free allocation of NZUs applies to pre-1990 forest land purchased before 31 October 2002. Pre-1990 forest land purchased after that time is allocated only 39 NZUs per hectare. Note that the ETS does not specify the exact number of NZUs freely allocated to pre-1990 forest land purchased before 31 October 2002, but rather specifies a formula for calculating this number. The commentary in the Climate Change (Emissions Trading and Renewable Preference) Bill as reported back from the Finance and Expenditure Select Committee in June 2008 notes (p.17) that the estimated allocation is 60 NZUs per hectare (commentary retrieved 17 December 2008 from http://www.parliament.nz/NR/rdonlyres/B4FA49FF-434E-4164-A3DE401ECA0FAFA1/94330/DBSCH_SCR_4086_60297.pdf).

63 37 Degrees South Limited and Cognitus Advisory Services Limited (2008) *Māori Impacts from the Emissions Trading Scheme: Detailed Analysis and Conclusions*. A paper prepared for the Ministry for the Environment (available at <http://www.mfe.govt.nz/publications/climate/maori-impacts-analysis-conclusions-jan08/index.html>).

64 In fact at the time of planting there is a long time to harvest and a great deal of uncertainty about the performance of the trees – such as their susceptibility to wind-blow and the evolution of substitute materials – and about their ultimate use. Even in 1988 there may have been some expectation of changes in tree value arising from carbon sequestration.

65 The deforestation tax was imposed from 1 January 2008 but was announced by the government well before this time. As a result, there was a rush to deforest prior to 1 January 2008 as a means of avoiding the tax. See, for example: Bruce Manley (2008) *2007 Deforestation Survey: Final Report* p.19, where the author states that 'Forest land-owners have responded by accelerating the level of deforestation in order to beat the 31 December 2007 deadline. Overall the level of deforestation (19,000 ha) in 2007 is well above the 13,000 ha in 2006 and the forecast of 13,000 ha for 2007 that was made at the end of 2006.'

66 Hon Dr Michael Cullen 'Strategic assets to be protected in national interest'. Media statement 3 March 2008 (available at <http://beehive.govt.nz/release/strategic+assets+be+protected+national+interest>).

can acquire 'sensitive land'. The new factor requires that consideration be given to 'whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land'.

The effect of the amendment was to lead to a sharp reduction in AIAL's share price, wiping an estimated \$300 million off the value of the company.⁶⁷ In response to this, the New Zealand Business Roundtable (NZBRT) and the Wellington Regional Chamber of Commerce (WRCC) submitted a joint complaint to the Regulations Review Committee in relation to the government amendments.⁶⁸ NZBRT and WRCC submitted that the regulation:

- trespasses unduly on personal rights and liberty;
- appears to make some unusual or unexpected use of power conferred by the statute under which it is made;
- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- contains matter more appropriate for parliamentary enactment; and
- is retrospective (even though this is not expressly authorised by the empowering statute).

The Regulations Review Committee upheld parts of the complaint but stopped short of disallowing the amended regulations.⁶⁹ The Committee agreed with the NZBRT and WRCC that the regulation constituted 'an unusual and unexpected use of the regulation-making power', that it was better suited to parliamentary enactment, and that 'the proliferation of clauses similar to this is cause for concern'.

In this case the confiscation was of the right to sell to interests outside New Zealand – a subset of the right to alienate the property. The private loss from the confiscation of this property right may be gauged by the loss in the market value of the company as a result of the announcement. However, the cost to the economy overall – as a result of increased uncertainty, deterrence of foreign investment, and the selling of assets to foreign investors before these assets become large enough to be viewed by the government as strategic – is likely to be very much higher.⁷⁰

What is striking about this policy is the absence of any formal analysis of the costs of the policy and the benefits actually likely to accrue from it. As in so many other confiscations of private rights in New Zealand, the reaction of the government was facilitated by the absence of statutory or constitutional protection of the

private property rights of shareholders in Auckland International Airport. If such protections did exist, we can speculate that the government would have been required to think more carefully about whether the benefits of the policy would really outweigh the private costs. This would have produced the benefit that the amendment to the Overseas Investment Regulations may not have come to pass; but, if it had, then the social and economic costs would have been reduced by the requirement to compensate those losing private rights in this and future similar government policy initiatives.⁷¹

5.7. Statutory Acts that Devolve the Ability to Take

A summary definition of regulation is that it is a taking by agencies authorised by Parliament under enabling Acts. It is widespread and there is not space in this review to do other than comment on it broadly. We comment particularly on regulatory taking by the Crown's agents (rather than directly by Parliament) under the Telecommunications Act 2001,⁷² the Commerce Act 1986, the Resource Management Act 1991 (RMA), and these Acts' amendments. The first two of the Acts devolve to the Commerce Commission, in its administration of the Telecommunications and Commerce Acts, the power to take property rights. The RMA is administered by regional and local bodies, who also have this devolved power.

The takings issue and associated costs promulgated by regulation have been analysed by Quigley (2005)⁷³ in relation to network access regulation. The transaction costs of activity under the RMA have been the subject of a number of enquiries and reports.⁷⁴ Here we focus on the ways in which these Acts facilitate takings of private property rights by interest groups and explain why the protection of property rights should have a stronger position in regulatory decisions under these Acts.

It is now textbook economics that interest groups demand regulation in order to better achieve their specific (private interest) goals; and that such pressure may arise from groups small in number but large in influence (concentrated interests) which are far from representative of society as a whole (the diffuse interest).⁷⁵ The devolution of statutory power to agencies to take property rights lowers the cost of actions by special interest groups, increases the range and scope of action of these groups, and generates a class of agents whose interests lie in the process itself. The total cost of decisions to modify property rights is composed of both direct costs

67 TVNZ 'Cullen defends investment rule change'. News story 6 March 2008 (available at <http://tvnz.co.nz/view/page/1320238/1618678>).

68 New Zealand Business Roundtable and Wellington Regional Chamber of Commerce. Letter to Regulations Review Committee dated 17 March 2008.

69 *Complaint regarding the Overseas Amendment Investment Regulations 2008*. Report of the Regulations Review Committee, September 2008.

70 The Regulation Review Committee's response to the NZBRT and WRCC submission included the argument that the regulation trespasses unduly on personal rights and freedoms. It agreed with the Treasury that a loss in share value does not amount to a taking and that share value fluctuation is 'something that shareholders simply have to accept'. This latter point is wrong: the drop in share price was predictable, given the government's change in the rules; and it was the effect of the taking, resulting from the loss of shareholders' rights to sell to overseas interests.

71 Commentators have suggested that the government treatment of railways has nationalised rail by, among other things, making a generous payment for the rolling stock at the exit of Toll Holdings (the Australian Company that held rail). See, for example: Brian Gaynor 'Government Toll buy a sad indictment' *The New Zealand Herald* 10 May 2008 (retrieved from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10509183); and C Moore 'It's hard to feel sorry for Toll' *stuff.co.nz* 3 April 2008 (retrieved from <http://www.stuff.co.nz/4462810a1865.html>). A comparison with the Auckland airport taking suggests that the New Zealand government is prepared to contemplate compensation for foreign New Zealand asset holders, but not for its own citizens. The same asymmetry has also appeared in Canadian government decisions as a result of international treaty obligations (see: Bryan Schwartz and Melanie Bueckert (2006) 'Regulatory Takings in Canada' *Washington University Global Studies Law Review* 5 p485).

72 The uncompensated taking that took place in telecommunications with the forced restructuring of Telecom New Zealand Limited in 2006 was not taking by agents administering the Telecommunications Act. Instead, it was an explicit government action implemented by changing the Telecommunications Act.

73 Neil Quigley (2003) 'Property Rights and Regulation' *Competition and Regulation Times* issue 12 (available at www.iscr.org.nz) pp1-2.

74 See Richard Hawke (2003) 'Courting the Environment' *Competition and Regulation Times* issues 10 and 12 (available at www.iscr.org.nz) pp pp8-9 and pp6-7.

75 See, for example: Dennis Mueller (2003) *Public Choice III*. Cambridge University Press.

Beneficial effects would include more predictable evolution of rights over time, lower transaction costs, and higher quality of investments.

and the larger indirect costs of delay and missed opportunities relating to investments of a wide variety of types. The costs of decisionmaking under the Commerce Act and the RMA each reflect the administrators of these Acts.

The Telecommunications, Commerce and Resource Management Acts and their administrative frameworks are all about administering constraints on private property rights. The administrators are part of the supply of regulation and cannot be entirely disinterested participants in the process. Indeed, the administrators may be regarded as a special interest group as well, through the views they develop and their commitment to their record on past decisions. Administrators hold dominant positions in geographically and functionally defined areas and thus are dominant in rights-determination activity that has:

- high costs and pay-offs for principal participants; and
- the potential for delay, obfuscation, manipulation, and even corruption.

Placing more weight on private property rights would limit the discretionary power of administrators of these Acts; it would also limit the influence of special interest groups in promulgating claims through these administrations which constrain or remove the property rights of others. Beneficial effects would include more predictable evolution of rights over time, lower transaction costs, and higher quality of investments. Where rights are not given much consideration, the discipline for administrators of these Acts is weak.⁷⁶

The RMA is particularly notable for the power that it provides for local body administrators to routinely set aside private property rights without compensation. Our contribution is limited to some examples which illustrate the point.

The RMA applies to occupied land in which property rights have evolved through use and presumption about options for use available to the landowner.⁷⁷ Thus many of those rights are not explicitly recognised by legislation. Even where social and economic change yields new uses of property and requires new rights to be created, these rights can be vested in the occupier of the property as they would under the rubric of common law or presumptive use.

The RMA is concerned with limiting adverse environmental effects of activities, where these effects must be evaluated in terms of society's (human) welfare and hence society's standards of value. There cannot be, for example, effects

that somehow transcend human assessment and valuation and for which there is some other standard not amenable to human assessment. Human assessment may in some cases place a very high value on the presence or absence of an effect, and society may develop rules of thumb on certain effects;⁷⁹ but these rules must be based upon valuation by human society nevertheless. In consequence, the existence of some externality associated with particular resource use does not transcend established systematic treatment of rights. In particular, it is not a prima facie case for confiscating without compensation the property rights that attend such use.

Consider an established resource use that is leading to some (adverse) externality – for example, pollution. Its occurrence in the past and the present, and the fact that it may occur in the future, is associated with current rights that permit this activity. The classification of the externality as a 'bad'⁸⁰ and its valuation are based on social values: its standing in these respects may change over time for the reasons given, but at any point in time these are judgement calls by society. If society deems the social cost to exceed the benefit of the resource use activity then it should inhibit that activity – but there is no presumption that this should be dealt with by extinguishing the rights to that activity without compensation. Conceptually at least, the compensation should leave the polluter as well off as it was without the prohibition of the activity. Indeed, if society deems it cannot afford such compensation then the benefits of the activity associated with pollution exceed the cost of it.⁸¹ Property rights thus deserve serious consideration in the application of Acts used to influence the management of natural resources and the environment.

An illustrative case occurred in 1997 when the then Banks Peninsula District Council (later to be amalgamated with the Christchurch City Council) introduced its Proposed District Plan.⁸² The plan included (among other things) provisions that reallocated approximately 50,000 hectares (out of a total 96,000 hectares) of rural land in Banks Peninsula as either landscape protection areas ('outstanding natural landscapes' – ONL) or coastal protection areas ('coastal natural character landscapes' – CNCL).

Not surprisingly, given the property rights taking that this represented, there was significant adverse public reaction. Faced with this reaction the Council introduced Variation 2 to the Proposed District Plan in 2002, which greatly reduced the ONL and CNCL allocation to 30,000 hectares.

76 This is an argument for merit reviews in the case of Commerce Act regulatory decisions. Administrators of the RMA have wide discretion but there are some limitations: see, for example, the Banks Peninsula District Council case discussed later in this section.

77 There is not space here to review examples of takings without compensation under the Commerce Act. But we do note that Australian price regulation is constrained to limit takings by the availability of merit reviews and the requirement that the regulator should not reduce the credit rating of a regulated firm below a given benchmark (Australian National Electricity Law section 7).

78 This does not mean that ownership rights have emerged, simply that rights have evolved with respect to all aspects of the resource.

79 For example, there may emerge a rule of thumb that says that water must be pure (to some standard).

80 The effects may even be irreversible.

81 There is no 'absolute standard of value' that provides a basis for the absolute prohibition of an activity (see footnote 77 and associated discussion in the text).

82 This information is taken from the Environment Court Decision No. C45/2008 (24 April 2008).

83 One particular difference is that, on ONL/CNCL land, buildings outside a cluster and forestry are 'non-complying' activities under the RMA; a resource consent is required for such activities and the Council may either decline the consent or grant it subject to conditions. On rural land, by contrast, buildings outside a cluster and forestry are 'restricted discretionary' activities; a resource consent is required for these activities but the Council's powers to decline it or impose conditions are restricted to matters it must specify in its proposed plan.

84 Taking by administrative agencies through imposed district plans that reflect the viewpoints of special interest groups which include the administrative agencies themselves has not been confined to the authority of the RMA. This is illustrated by the Porirua City Council's attempt in October 1991 to enact its proposed district scheme changes No. 6 (Porirua City) & No. 58 (Horokiwi Section) under the authority of the Town and Country Planning Act 1977. The substance of the changes was that certain farms would have their land included within an extended boundary of the Belmont Regional Park. This land was to be designated as part of the park and have farming use become a permitted departure (under undefined terms) from park use. Ironically, the proposal failed because it was deemed illegal under the RMA, which by then was in force.

85 Fish and Game New Zealand reports that 'Fish and Game New Zealand' is the collective brand name of the New Zealand Fish and Game Council and 12 regional Fish and Game Councils established in 1990 to represent the interests of anglers and hunters. It also reports that it provides coordination of the management, enhancement, and maintenance of sports fish and game pursuant to section 26B of the Conservation Act 1987. (<http://www.fishandgame.org.nz/Site/Features/FeaturesaboutFG.aspx>)

86 The NZ Fish and Game Council's Statement of Claim before the Wellington High Court (CIV-2008-485-2020) seeks, among other things, a declaratory judgment regarding the construction of pastoral leases that '... allow public access to the land contained in the leases provided such access does not interfere with the exclusive rights of pasturage'.

87 In this example a special interest group would appear to be using its statutory ability to tax (that is, every hunter and fisher must contribute funding irrespective of their preference) to further its particular interest. It is entitled to do this pursuant to section 26F of the Conservation Act.

88 These actions entail substantial costs, simply to preserve existing rights; and these costs are a factor in determining the nature of occupiers. It is noteworthy that regulatory institutions typically have substantial taxpayer-sourced budgets and that, under the RMA, rights holders have to fund decisions to do with the taking of these rights (RMA section 36).

89 Indeed, Fish and Game New Zealand seem to acknowledge this by the permission it gives to bird hunting preserves: there is no open access here nor should there be.

90 These issues are discussed in Lewis Evans and Neil Quigley (2004) 'Out to Pasture: Pastoral Leases in the 21st Century' *Competition and Regulation Times* issue 13 (available at www.iscr.org.nz) pp1-2; and in Lewis Evans and Neil Quigley (2005) 'Walking over Property Rights' *Competition and Regulation Times* issue 14 (available at www.iscr.org.nz) p8.

91 The fact that property rights are a widely accepted solution to the negative effects that open access has on socially desirable resource use poses questions as to the process and cost benefit of the state allocating its funds to this endeavour.

Nonetheless, there was still concern from the public with this proposal, and the Council entered into mediation with concerned parties. The result was a landscape study undertaken by independent consultants and released in 2007 which reduced the area of ONL and CNCL further still to 23,000 hectares. Despite this mediated agreement, the Council drastically altered its view and determined to increase the area of ONL and CNCL to 75,000 hectares – well in excess of even the original allocation proposed. The result was that the Proposed District Plan was appealed to the Environment Court.

The Council's unilateral decision to reallocate rural land to ONL and CNCL land, regardless of the amount of land reallocated, is a taking of rural landowners' property rights. The taking is a regulatory taking; and it arises because of differences in the treatment of forestry and non-clustered building in ONL and CNCL land, which will affect the use to which this land can be put and thus the value of the land.⁸³ However, there was no compensation offered to affected landowners as a result of this taking.

The Environment Court recognised this taking. It stated (at paragraph 86 of its decision) that: 'To make barns, forestry, dwellings and tracks non-complying activities over most of the Peninsula would lead to an immediate and serious impediment to existing farming activities and inevitably create arguments as to existing use rights.'

Nonetheless, there was little precedent or legislative basis for the Environment Court to rule against the taking. Rather, it found that the taking 'would constitute such a significant imposition upon the conduct of farming activities' and that it would be inconsistent with the 'Rural Zone' section of the Proposed District Plan which identified agricultural production as both a significant resource and one that needed to be managed sustainably.⁸⁴

We conclude this section about institutions with devolved power to take private property rights by considering the confounded objectives of a government entity that is charged with enforcement, regulatory policy and advocacy functions. Both the Department of Conservation and Fish and Game New Zealand, for example, have these multiple functions. Fish and Game New Zealand⁸⁵ implements game-bird and freshwater fishing regulations and associated specific taxes, is charged with designing these regulations, and advocates the notion that the New Zealand outdoors should be created a commons through the

availability of open public access. This is illustrated by its current challenge to the long-standing presumption that Crown pastoral leases provide the lessee with exclusive rights of occupation for the term of the lease – which is encapsulated in the claim that the public should have access as of right to land covered by pastoral leases.⁸⁶ The first point to make is that this example illustrates that in its activities Fish and Game New Zealand is advocating confiscation of rights which Crown pastoral lessees have long presumed that they held (albeit that this is to be determined by the courts). The second point is that, because Fish and Game is taxpayer funded, its actions illustrate the substantial asymmetry that may exist between rights holders and special interest groups who 'represent' popular causes that are supported by politicians:⁸⁷ the resources of the latter are very often vastly in excess of those of the rights holders.⁸⁸ The third point to make is that property rights are a solution to the problem of the commons created by open access. Overriding rights of exclusive occupation will create an outdoor commons that will itself require regulation and inhibit socially desirable multiple-use activities in a world of increasing scarcity.^{90,91}

The design of regulatory agencies – including such factors as separation of function, accountability mechanisms, and specification of powers that recognise property rights – would complement the inclusion of property rights as an element of the BORA and improve economic performance.

6. Conclusion

New Zealand has an extraordinary history of confiscation of property rights, particularly where populist views support national interest arguments for policies that confiscate private rights. The explicit or implicit application of eminent domain without compensation is an ongoing characteristic of contemporary New Zealand.

Although New Zealand has reasonable protections of property rights in the ownership of the fee simple in land where that land is required by government for public works, and although it has a process for addressing confiscation of Māori property rights, a statutory or constitutional protection of property rights defined in their broad (and correct) sense is absent. Thus, New Zealand has left open the potential for uncompensated confiscation of a vast range of property rights.

If protection of property rights were addressed directly in the BORA, as we have advocated, there would be deeper consideration of the role of property rights in both Parliament and the courts. However, it is a limited protection – and Parliament has considered and rejected it.

The role of property rights can be strengthened by making regulatory agencies more accountable and by requiring them to have greater consideration of property rights. Measures such as merit review of regulatory decisions, the separation of policy formation from the right to regulatory-activity income, and limiting state funding of special interest groups might improve surety of rights in New Zealand and enhance investment in its economy. Such measures would be particularly effective if there were a broadly based provision included in the BORA.

Compensation for confiscation of property rights is justified by the loss in economic efficiency that is associated with uncertainty about the potential for loss from confiscation. Dynamic efficiency is reduced by the uncertainty of investment returns that are associated with the potential for uncompensated confiscation.

Some of the more common justifications for confiscation of property rights that have been used in New Zealand in the past do not hold up under careful scrutiny. Confiscation is not justified by lack of clarity in property rights. This is because, should any such lack of clarity exist, it is the role of the courts to clarify those rights. The courts have a substantial common law tradition to draw on in doing so. Uncompensated confiscation is not justified by actions that are deemed by politicians to be 'in the public interest'. It is too easy for interest groups who benefit from government actions but bear none of those costs to create the appearance of a public benefit when none in fact exists. If there is a public interest, its value must be quantified against the loss to the private property rights that would be destroyed by the action. In the absence of this accounting, government will overuse its power of eminent domain and will engage in actions that impose net costs on society as a whole.

The point of protection of rights and court enforcement of those protections is precisely that some rights that need to be protected, and some forms of confiscation of those rights, cannot be foreseen at present. Our examples illustrate the extent to which government action can result in uncompensated confiscation of property rights. They also illustrate the actions which could be avoided if New Zealand recognised that a broadly based prohibition on uncompensated government taking or destruction of property rights is a human right that would improve the social and economic performance of the economy.

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Appendix I: Treatment of Property Rights as Human Rights in OECD Countries

Country	Human Rights Legislation	Acknowledgment of property rights?	Text in legislationCountry
Australia	No specific human rights legislation or human rights in the constitution	No	
Austria	Basic Law on the General Rights of Nationals 1867	Yes	Article 5: Property is inviolable. Expropriation against the will of the owner can only occur in cases and in the manner determined by law.
Belgium	Constitution of Belgium 1970	Yes	Article 16: No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by law, and in return for a fair compensation paid beforehand.
Canada	Constitution Act 1982	Yes	1. It is hereby recognised and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.
Czech Republic ⁹²	Charter of Fundamental Rights and Basic Freedoms 1992	Yes	Article 11 (1) Everyone has the right to own property. Each owner's property right shall have the same content and enjoy the same protection. Inheritance is guaranteed. ... (4) Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation.
Denmark	Constitutional Act of the Kingdom of Denmark 1953	Yes	Section 73: The right of property shall be inviolable. No person shall be ordered to cede his property except where required by the public weal. It can be done only as provided by Statute and against full compensation.
Finland	Constitution of Finland 1999	Yes	Section 15: (1) The property of everyone is protected. (2) Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.
France ⁹³	Declaration of the Rights of Man and Citizen 1789	Yes	Article 17: Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.

92 http://angl.concourt.cz/angl_verze/rights.php

93 <http://www.hrcr.org/docs/frenchdec.html>

Country	Human Rights Legislation	Acknowledgment of property rights?	Text in legislationCountry
Germany	Basic Law for the Federal Republic of Germany 1949	Yes	<p>Article 14:</p> <p>(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.</p> <p>...</p> <p>(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation ...</p>
Greece	The Constitution of Greece 2001	Yes	<p>Article 17:</p> <p>(1) Property stands under the protection of the State; the rights, however, derived therefrom, may not be exercised in a manner detrimental to the public interest.</p> <p>(2) No one shall be deprived of his property except for public benefit which must be duly proven, when and as specified by statute and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation.</p>
Hungary	Constitution of the Republic of Hungary 1949	Yes	<p>Article 13:</p> <p>(1) The Republic of Hungary guarantees the right to property.</p> <p>(2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation.</p>
Iceland ⁹⁴	Constitution of Iceland 1944	Yes	<p>Article 72:</p> <p>The right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by public interests. Such a measure shall be provided for by law, and full compensation shall be paid.</p>
Ireland	Constitution of Ireland 1937	Yes	<p>Article 43:</p> <p>(1.1) The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.</p>
Italy	Constitution of the Italian Republic 1947	Yes	<p>Article 42:</p> <p>(2) Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoyment [sic] and its limits, in order to ensure its social function and to make it accessible to all.</p> <p>(3) Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.</p>
Japan	Constitution of Japan 1946	Yes	<p>Article 29:</p> <p>(1) The right to own or to hold property is inviolable.</p> <p>(2) Property rights shall be defined by law, in conformity with the public welfare.</p> <p>(3) Private property may be taken for public use upon just compensation therefor [sic].</p>

94 <http://www.government.is/constitution>

Country	Human Rights Legislation	Acknowledgment of property rights?	Text in legislationCountry
South Korea	Constitution of South Korea 1948	Yes	<p>Article 23:</p> <p>(1) The right to property of all citizens is guaranteed. Its contents and limitations are determined by law.</p> <p>(2) The exercise of property rights shall conform to the public welfare.</p> <p>(3) Expropriation, use, or restriction of private property from public necessity and compensation therefore are governed by law. However, in such a case, just compensation must be paid.</p>
Luxembourg	Constitution of Luxembourg 1868	Yes	<p>Article 16:</p> <p>No one may be deprived of his property except on grounds of public interest in cases and in the manner laid down by the law and in consideration of prior and just compensation.</p>
Mexico	Political Constitution of the United Mexican States 1917	Yes	<p>Article 14:</p> <p>No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.</p> <p>Article 27:</p> <p>Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity.</p>
Netherlands	Constitution of the Netherlands 1983	Yes	<p>Article 14:</p> <p>(1) Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.</p>
New Zealand	Bill of Rights Act 1990	No	
Norway	Constitution of the Kingdom of Norway 1814	Yes	<p>Article 104:</p> <p>Land and goods may in no case be made subject to forfeiture.</p> <p>Article 105:</p> <p>If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.</p>
Poland	Constitution of the Republic of Poland 1997	Yes	<p>Article 21:</p> <p>(1) The Republic of Poland shall protect ownership and the right of succession.</p> <p>(2) Expropriation may be allowed solely for public purposes and for just compensation.</p> <p>Article 64:</p> <p>(1) Everyone shall have the right to ownership, other property rights and the right of succession.</p>
Portugal	Portuguese Constitution 1976	Yes	<p>Article 62:</p> <p>(1) Everyone is secured, in accordance with the Constitution, the right to private property and to its transfer during lifetime or by death.</p> <p>(2) The requisition of property or its expropriation for public purposes are carried out only on the strength of the law and only against the payment of fair compensation.</p>

Country	Human Rights Legislation	Acknowledgment of property rights?	Text in legislationCountry
Slovak Republic	Constitution of the Slovak Republic 1992	Yes	<p>Article 20:</p> <p>(1) Everyone has the right to own property. The ownership right of all owners has the same legal content and deserves the same protection. Inheritance of property is guaranteed.</p> <p>...</p> <p>(4) Expropriation or enforced restriction of the ownership right is admissible only to the extent that it is unavoidable and in the public interest, on the basis of law, and in return for adequate compensation.</p>
Spain	Constitution of Spain 1978	Yes	<p>Article 33:</p> <p>(1) The right to private property and inheritance is recognized.</p> <p>...</p> <p>(3) No one may be deprived of his property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law.</p>
Sweden	The Instrument of Government 1975	Yes	<p>Article 18:</p> <p>Every citizen whose property is requisitioned by means of an expropriation order or by any other such disposition shall be guaranteed compensation for his loss on the bases laid down in law.</p>
Switzerland	Swiss Federal Constitution 1999	Yes	<p>Article 26:</p> <p>(1) Property is guaranteed.</p> <p>(2) Expropriation and restrictions of ownership equivalent to expropriation are fully compensated.</p>
Turkey	Constitution of Turkey 1982	Yes	<p>Article 35:</p> <p>(1) Everyone has the right to own and inherit property.</p>
United Kingdom ⁹⁵	Human Rights Act 1998	Yes	<p>Schedule 1, Part II, Article 1:</p> <p>Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.</p>
United States	Fifth Amendment to the Constitution of the United States of America 1791	Yes	<p>Amendment V:</p> <p>No person shall ... be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.</p>

Source (unless otherwise noted): International Constitutional Law (<http://www.servat.unibe.ch/law/icl/index.html>).

⁹⁵ http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_3#sch1-pt2

Lewis Evans is a professor of economics at Victoria University of Wellington and a research principal of the New Zealand Institute for the Study of Competition and Regulation (NZISCR). His specialisations are the economics of organisations and of markets. He is a Distinguished Fellow of the NZ Economics Association; and in 1996 he was awarded the NZIER-Qantas economics award.

Neil Quigley is a professor of economics and the Deputy Vice-Chancellor (Research) at Victoria University of Wellington. His interests are in applied microeconomics; applied finance; and the economic analysis of contracts, property rights and governance.

Kevin Counsell is a consultant with NERA Economic Consulting. He specialises in competition and regulatory economics, and in natural resource economics. He has advised clients on the economic implications of mergers and acquisitions, anti-competitive practices, and regulatory interventions; and he has provided advice on the economics of water allocation and climate change. Kevin holds an MCA in economics with distinction from Victoria University of Wellington.