

Property Rights, Regulatory Takings, and Compensation

Sleeping with elephants is a risky business. Australian car manufacturers learned this lesson again recently.

In October 2008, industry representatives negotiated a \$1.3 billion Green Car Innovation Fund with the Rudd Labor government. This would have provided \$1 in taxpayer money for every \$3 in investment from multinational car companies, with the aim of accelerating production of locally made hybrid cars.

Last February, barely two years later, with only \$400 million of the Fund spent, Julia Gillard's government pulled the pin on the scheme – by way of a media announcement, not even a call to the companies concerned.

On one level it is hard to feel much sympathy for the carmakers. The scheme was politically motivated – to win green votes – and was criticised by the Productivity Commission as not being in the national interest.

But the car companies themselves were foolish to go along with the plan. How often does an industry have to learn the lesson that what the government gives it can also take away?

The closure of the Fund was described by the industry as “treacherous”. Holden stated that its parent company General Motors was weighing up the risks of further long-term investment in Australia. Australian businesses are asking whether any carbon tax compensation deal will be any more secure than the Green Car Fund.

The Australian government was legally free to terminate the Fund just like any other subsidy programme. Nevertheless, erratic government policies have consequences for investment and jobs.

And where breaches of property rights and contracts are concerned, the damage to a country's reputation as a secure place for investment is much greater. New Zealand governments have often been cavalier in this regard.

A review of just the last decade or so throws up numerous cases in which property rights were compromised without compensation:

- the cancellation in 2000 of the 1994 West Coast Accord which provided for the sustainable harvesting of rimu. Westco Lagan, which had invested in significant sawmilling business on the basis of this accord, was left out of pocket and uncompensated;
- the National government's move to partially open up ACC to competition was repealed by its successor, leaving insurers which had raised large amounts of capital to enter the market with no prospects of new business;
- the 2004 Foreshore and Seabed Act which limited the jurisdiction of the Maori Land Court to hear customary rights claims;
- the forced unbundling of the local loop, which allowed Telecom's competitors the right to place equipment in its roadside cabinets (likened to giving a neighbouring farmer a right to use your milking shed), which shaved some \$3 billion off Telecom's share price.
- the initial proposal to allow public access to private land (with the possibility of stock loss through open gates and biosecurity risks) without the consent of the landowner;
- the operation of the Resource Management Act which can involve major regulatory takings of property (without triggering the compensation provisions of the Public Works Act); and
- the intervention in the bid by a Canadian pension fund for a shareholding in Auckland International Airport, which stymied the bid and cost shareholders some \$300 million. The Regulations Review Committee of Parliament upheld a complaint by the Business Roundtable and the Wellington Regional Chamber of Commerce that the intervention was in breach of Standing Orders. This action reverberated around the international investment world.

Regrettably, there is no end in sight to this damaging pattern of behaviour.

Recently the Labour Party has stated that it “reserved the right” if returned to office this year to overhaul both the government’s broadband legislation and government contracts with Telecom. There was no suggestion of negotiation over changes or compensation for losses.

The *Business Herald* has also reported that Labour may repeal legislation it had previously supported governing leases of Crown land to farmers. Labour is again threatening to reverse any move to open up ACC to competition.

The legal scholar Richard Epstein has written that “permanence and stability are the cardinal virtues of the legal rules that make private innovation and public progress possible ... a legal regime that embraces private property and freedom of contract is the only one that in practice can offer that permanence and stability.”

New Zealand is not a banana republic but it has taken too many steps in that direction. An ongoing pattern of takings without compensation will increase our sovereign risk premium and threaten our future prosperity.

The Regulatory Standards Bill currently before parliament is a modest initiative that would require the government to at least acknowledge and justify incursions against property rights and the rule of law. By casting sunlight on the worst excesses of cavalier regulation, it has the potential to cause future governments to pull back on confiscatory measures that deter investment and kill jobs.

Roger Kerr is the executive director of the New Zealand Business Roundtable. Check out his blog on www.nzbr.org.nz