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### **Back to Basics on Property Rights**

Last week New Zealand's major business organisations released a new report designed to promote a wider understanding among New Zealanders of the importance of security of property rights.

*A Primer on Property Rights, Takings and Compensation*, written by Bryce Wilkinson of Capital Economics with an introduction by Richard Epstein, law professor at the University of Chicago, is a clear-headed look at what property rights are, where they come from and why they're important.

Business New Zealand, Federated Farmers, the New Zealand Business Roundtable, and the New Zealand Chambers of Commerce joined forces in commissioning the report because of their growing concerns about continuing ill-justified confiscations of private property rights, be they foresters' cutting rights, landowners' and developers' rights, investors' rights to the infrastructure they own and even their right to freely buy and sell shares.

New Zealand has a poor record in this area. The country is still divided because of Maori land confiscations almost 150 years ago. But such actions continue today, with the foreshore and seabed issue, the forced unbundling of Telecom and consequent massive loss of shareholder value, and the blocking of the sale of shares in Auckland International Airport Limited (AIAL).

The report adds weight to last week's ruling by the Regulations Review Committee of parliament regarding the way the government intervened in the Canadian bid for shares in AIAL. The Committee upheld the complaint of the Business Roundtable and the Wellington Regional Chamber of Commerce that the government's action breached rule of law principles and risked deterring investment and pushing up the cost of capital to the detriment of all New Zealanders.

An extraordinary aspect of the exercise – and an alarming one for shareholders in any potentially ‘strategic’ asset – was the Treasury’s role in it. Although the Treasury had initially advised the government against intervention, it subsequently advised the Committee that “no taking of property arises from the regulations” and led it to agree that “share value fluctuation due to authorised regulatory intervention is something that shareholders simply have to accept”.

This showed a lamentable understanding of the importance of upholding property rights and the rule of law. AIAL shareholders incurred significant losses as a result of the government’s intervention, and the costs of an action taken allegedly in the public interest should not have fallen entirely on this group without consideration of compensation.

Based on the arguments presented by the Treasury, parliament might as well take the compensation provisions out of the Public Works Act and simply declare that when land is taken under it, the loss in value “is something landowners simply have to accept”.

Tell that to farmers and other landowners who report a steady flow of new proposals to ‘protect’ some piece of private land in the guise of the national good, generally without any reference to the rights of the landowner or consideration of compensation.

One of the issues highlighted in the report and reflected in the AIAL case is that legislation impacting on private property rights is fundamentally incoherent. On the one hand we have the Public Works Act 1981 which sets out to ensure that citizens are secure in their property rights. It embodies the longstanding common-law position that the Crown should only take private land for an essential public work, and only if voluntary negotiations fail, in which case compensation should be paid.

On the other hand we have the New Zealand Bill of Rights Act 1990, which does not even acknowledge any right to the quiet enjoyment of one’s possessions, let alone to private property in general. Then there is the Resource Management Act 1991, which allows political majorities on

councils to dictate the use to which private land can be put without landowners' consent and without compensation.

The same issues arise in the case of regulatory takings such as proposals to 'protect' a piece of private land or heritage building, where a government may allow the owner to retain possession of the property but regulate it in such a way as to diminish its value or use, again without compensation.

In addition to evaluating the major current property rights statutes, the report includes proposals for introducing stronger disciplines on regulatory policy making in the form of a Regulatory Responsibility Act, and guidance on how governments should negotiate and handle the taking of property rights and how issues of compensation should be managed.

*A Primer on Property Rights* (which can be found at [www.nzbr.org.nz](http://www.nzbr.org.nz)) argues that clearly defined and respected property rights are the foundation of a peaceful, cohesive and prosperous society and, ultimately, the democratic system. Achieving recognition of this view and agreement on the proper role of the state in this area should be a high priority of any government. It is to be hoped the report will promote constructive debate on how this goal can be achieved.

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