

Submission by



to the

Transport and Infrastructure Committee

on the

Public Works (Critical Infrastructure) Amendment Bill

June 2025

PUBLIC WORKS (CRITICAL INFRASTRUCTURE) AMENDMENT BILL SUBMISSION BY BUSINESSNZ¹

1.0 EXECUTIVE SUMMARY

- 1.1 BusinessNZ welcomes the opportunity to make a submission on the Public Works (Critical Infrastructure) Amendment Bill ("the Bill").
- 1.2 BusinessNZ supports the Bill proceeding.
- 1.3 BusinessNZ notes that the objective of the Bill is to streamline the land acquisition process under the Public Works Act 1981 (the PWA) for critical infrastructure projects listed in *new Schedule 2A* in *Schedule 2 of the Bill*.
- 1.4 BusinessNZ understands that this Bill is necessary to ensure that a narrow range of projects listed in Schedule 2 of the Fast-track Approvals Act and roads of National Significance (Rons) can be progressed under urgency.
- 1.5 Compulsory acquisition of land represents one of the most significant intrusions on property rights. It is important that such powers are used with care and effective safeguards are in place to ensure affected parties receive full compensation for any reduction in the use of their property.
- 1.6 It is also important that much-needed infrastructure can be developed in a timely manner while at the same time adequately upholding the rights of existing property owners to use their property as they see fit, provided they also respect the rights of others to similar enjoyment of their property. Where property is taken in the public interest then there needs to be the presumption that adequate and full compensation is paid to the affected parties. However, speedy resolution of disputes is required so decisions are not dragged out through long and costly litigation through the Courts.
- 1.7 Notwithstanding BusinessNZ's broad support for the Bill, there are two particular issues which require further consideration:
 - There is justification for increasing the amount of compensation for property taken under the Public Works Act beyond that provided in the Bill, given reduced rights for appeal through the Courts and the fact that some

¹ Background information on BusinessNZ is attached as Appendix 1.

individuals will have attachment to property which arguably well exceeds the market value in some cases.

- Secondly, a separate stand-alone Regulatory Takings Act be considered given the scope for regulatory takings extends well beyond the physical taking of private land as currently applies under the Public Works Act 1981.²

1.7 Given the diversity of BusinessNZ membership, some members and sectors will have specific issues they wish to comment on in more detail. Therefore, we have encouraged individual members and sector representatives to make their own submissions raising those issues specific to their areas of interest.

² BusinessNZ notes that Section 64 of the Public Works Act 1981 (see below) covers issues surrounding injurious affection for public works but not necessarily restrictions on the use of property (such as Significant Natural Areas) as outlined later in this submission. This ideally needs to be clarified to ensure it covers both.

"64. Compensation for injurious affection to be assessed by reference to whole work

Where land is taken or acquired from any person for the purpose of constructing any public work which is to be situated partly on that land and partly on other land, compensation for injurious affection of the land retained by that person shall be assessed by reference to the effect of the whole of the public work on the land so retained and not only to the part situated on the land taken or acquired from that person."

RECOMMENDATIONS:

BusinessNZ **recommends** that the Bill proceeds.

Without prejudice to the above recommendation:

BusinessNZ **recommends** that:

the proposed caps on compensation outlined in the Bill be removed.

BusinessNZ **recommends** that:

consideration be given to increasing the amount of compensation provided to landowners where property is taken under the PWA for infrastructure in the public interest, to more adequately take account of the costs, uncertainty and disruption of having one's property compulsorily acquired.

BusinessNZ **recommends** that:

a separate stand-alone Regulatory Takings Act be considered given the scope for regulatory takings extends well beyond the physical taking of private land as currently applies under the Public Works Act 1981.

SECTION 1: GENERAL DISCUSSION

2.0 Compensation where property is compulsorily acquired

- 2.1 It is important that much-needed infrastructure can be developed in a timely manner while at the same time property owners' rights to use their property as they see fit can be upheld. Where property is taken in the public interest then there needs to be the presumption that full compensation is offered to affected parties. However, speedy resolution of disputes is required so decisions are not dragged out in long and costly litigation through the Courts.
- 2.2 This will necessarily involve trade-offs and a balancing act in ensuring affected property owners receive fair compensation for their loss while being mindful of the impact on taxpayers and the cost of future infrastructure developments.
- 2.3 Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.
- 2.4 More generous compensation than currently provided for under the PWA (and the Bill) is required to better reflect the attachment some landowners may have to their existing properties which may not necessarily be reflected in normal market prices.
- 2.5 It is noted that the Bill introduces two new bonus payments on top of the usual 100% land value. First, a recognition payment equal to 5% of land value (capped at \$292,000) is payable to any owner whose land is acquired (whether voluntarily or compulsorily) in a critical project. Second, an incentive (premium) payment of 15% of value (capped at \$150,000, with a \$5,000 minimum) is offered to owners who negotiate and transfer early in the process.
- 2.6 These proposed caps are problematic given that they fail to take into account the premium that may be acceptable in an isolated rural area compared to highly sought after areas with high land values e.g. Central Auckland.
- 2.7 It is also understood that some jurisdictions overseas can offer well above the market value when a property is compulsorily acquired in the public interest.

"In a system of voluntary exchange, compensation takes the form of an agreed price between an uncoerced buyer and an uncoerced seller. This

element of consent implies that the exchange is mutually beneficial. How any surplus between the seller's willingness to sell and the buyer's willingness to pay is shared is a matter for negotiation.

Just compensation might require more than the payment of market value. Prices are determined at the margin and most property owners are not willing sellers (or buyers) at today's market prices. The Public Works Act 1981 recognises the need to compensate above market value through provisions that allow for relocation assistance and a modest solatium in the case of residences that are taken. Epstein notes that in the United States some state statutes set compensation at 150 percent of market value. On the other hand, governments have a responsibility to taxpayers not to pay too much. Epstein suggests that a reasonable option might be to pay a fixed proportion, say 10 or 20 percent, above market value without accepting individual evidence on the matter...."³

- 2.8 BusinessNZ considers that significantly increasing the amount of compensation provided to affected landowners could help overcome what some might consider to be reduced rights for appeal against decisions of the Minister or local authority.

BusinessNZ **recommends** that:

the proposed caps on compensation outlined in the Bill be removed.

BusinessNZ **recommends** that:

consideration be given to increasing the amount of compensation provided to landowners where property is taken under the PWA for infrastructure in the public interest, to more adequately take account of the costs, uncertainty and disruption of having one's property compulsorily acquired.

2.9 Compensation for Regulatory Takings

- 2.10 While the taking of private property in the public interest is generally already covered under the Public Works Act 1981, there is often little, or no compensation provided for when the Government restricts the ability of businesses to utilise their land and/or buildings as they consider appropriate (restrictions on the use of private land in the public interest).

³ Wilkinson, Bryce (2008), *A Primer on Property Rights, Takings and Compensation* prepared for BusinessNZ, Federated Farmers of NZ, the NZ Business Roundtable and the NZ Chambers of Commerce (p.25).

- 2.11 There are a number of instances over recent years where the Government of the day has seriously impacted on the ability of businesses to operate in an efficient manner without actually confiscating their property per se. Probably the most prominent of these regulatory takings was the case of the general Covid lockdown in March 2020 (and a number of subsequent national and regional lockdowns thereafter). While it could be argued that the Government provided some form of relief for businesses in the form of wage subsidies and grants to try to keep employees attached to the labour market, many businesses also felt that they could have operated in a relatively low-risk way but were prohibited from doing so and faced significant economic losses.
- 2.12 Other examples of significant regulatory takings include the decision to require earthquake-prone buildings to be upgraded to a certain percentage of the building code within a certain time frame, with some limited exemptions. Again, the Government did not directly confiscate property but seriously impacted the ability of many businesses to operate.
- 2.13 To be fair to the current Government, they have initiated a review of earthquake legislation, seeking to ensure that it is fit for purpose and takes adequate account of actual risks to property and human life.
- 2.14 Another significant example of regulatory takings is the case of restrictions on land use, where previous Governments tightened controls on the usage of land and in some cases restricted stock numbers and required the provision of buffer areas. Other examples can also be readily identified such as Significant Natural Areas (SNAs) where local government have locked up or restricted the use of privately owned land without any form of compensation.
- 2.15 The above examples indicate why it is necessary to not only consider the taking of property but also restrictions on the use of property in respect to compensation.
- 2.16 There is no allowance in the Resource Management Act (RMA), other than in some specific instances, for the payment of compensation in recompense for regulatory takings (or for a reduction in private property rights), in the public interest. This is a substantial flaw in the RMA and serves (and will continue to serve) to depress necessary economic activity.
- 2.17 The persistent and ongoing departure from the principles of consent to the diminution of private interests in the name of the public interest and the provision of compensation when this occurs, have created an enduring and

deep-seated dissatisfaction among the business community with the way the RMA is implemented.

- 2.18 Regulatory takings should not be legislatively condoned. Instead, as noted above, BusinessNZ believes that core to the issue of property rights, where regulatory takings are contemplated, is the acknowledgement of the right to compensation. As a general principle, property rights should not be diminished without compensation. This is a long-held view.
- 2.19 It should be noted that more latterly, compensation for regulatory takings (restricting use of property in the public interest) is being considered by the Government as part of Resource Management Act reforms to ensure fair treatment of landowners and maintain a balance between public and private interests. While details have yet to be worked through as to the extent of how regulatory takings will be considered, the point is that it is being considered.
- 2.20 It should be noted that the Expert Advisory Group's *Blueprint for resource management reform – A better planning and resource management system 2025* (March 2025) notes that compensation for regulatory takings should be considered in some cases, but this blueprint did not include any detail:
- "Both Acts will be based on the enjoyment of property rights and require justification reports if departing from approaches to regulation standardised at the national level. Compensation may happen for regulatory takings in some circumstances."*
- 2.21 From what BusinessNZ can glean from the report, the proposed focus on regulatory takings would be very narrowly defined with compensation only possibly payable where local authorities introduced standards over and above national minimums. In BusinessNZ's view this is nonsensical as a regulatory taking should not matter whether it is a result of national decision making or local decision making.
- 2.22 There is a need to ensure incentives on local government (and central government) to not unnecessarily restrict activity on private land in the so-called public interest without adequate compensation upfront, so the public (taxpayers and ratepayers) are aware of the costs and benefits upfront, thus providing for more rational decision making in respect to the taking or diminution of property.
- 2.23 Bryce Wilkinson's publication, *A Primer on Property Rights, Takings and Compensation*, makes the point that requiring compensation for regulatory

takings would help crystallise some of the costs and benefits of regulatory proposals:

"The lack of a requirement to pay compensation for regulatory takings puts at risk all the benefits a community might obtain from a secure system of property rights.

Establishing a clear rule to pay compensation for regulatory takings, as in the case of physical takings of possession, would improve environmental policy, land use and political accountability.

*To further improve the incentive to balance benefits and costs, compensation would ideally be paid by those who seek to benefit from the taking, which may not mean by taxpayers at large. Whether compensation should be paid in cash or in kind in a particular case depends on matters of law, principle and practicality."*⁴

International precedents for compensation for regulatory takings

2.24 Several jurisdictions provide compensation for regulatory takings:

- United States: The Fifth Amendment of the U.S. Constitution includes the "Takings Clause," which mandates compensation when government actions result in a significant deprivation of property value.
- Canada: While compensation for regulatory takings is not explicitly mandated, courts have recognised the principle of "constructive expropriation," where landowners may be entitled to compensation if government actions deprive them of reasonable use of their land.
- Australia: Some states, such as Queensland, have provisions allowing compensation for landowners affected by planning regulations that significantly reduce property value.

BusinessNZ **recommends** that:

a separate stand-alone Regulatory Takings Act be considered given the scope for regulatory takings extends well beyond the physical taking of private land as currently applies under the Public Works Act 1981.

⁴ Ibid. p.xii.

Appendix One - Background information on BusinessNZ



The BusinessNZ Network is New Zealand's largest business organisation, representing:

- Business groups EMA, Business Central, Business Canterbury, and Business South
- BusinessNZ policy and advocacy services
- Major Companies Group of New Zealand's largest businesses
- Gold Group of medium-sized businesses
- Affiliated Industries Group of national industry associations
- ExportNZ representing New Zealand exporting enterprises
- ManufacturingNZ representing New Zealand manufacturing enterprises
- Sustainable Business Council of enterprises leading sustainable business practice
- BusinessNZ Energy Council of enterprises leading sustainable energy production and use
- Buy NZ Made - country of origin licensing organisation for NZ-made products, NZ-grown ingredients, and NZ-coded software services

The BusinessNZ Network is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

The BusinessNZ Network contributes to Government, tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and Business at OECD (BIAC).

