Submission

by

THE NEW ZEALAND INITIATIVE

to Transport and Infrastructure Committee

on the

Public Works (Critical Infrastructure) Amendment Bill

13 June 2025

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1. INTRODUCTION AND SUMMARY

1.1 This submission on the Public Works (Critical Infrastructure) Amendment Bill[1] is made by The New Zealand Initiative (the Initiative), a Wellington-based think tank supported primarily by major New Zealand businesses. In combination, our members employ more than 150,000 people.

1.2 The Initiative undertakes research that contributes to developing sound public policies in New Zealand. We advocate for the creation of a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.

1.3 The Initiative's members span the breadth of the New Zealand economy; efficient infrastructure development is critical for economic growth and business competitiveness. The views expressed in this submission are those of the authors rather than the New Zealand Initiative's members.

1.4 New Zealand faces a significant infrastructure deficit. The Public Works (Critical Infrastructure) Amendment Bill aims to accelerate land acquisition for nationally important projects by streamlining the compulsory acquisition process.

1.5 The New Zealand Initiative supports the Bill's objective of faster infrastructure delivery. However, compulsory acquisition represents one of the most significant intrusions on property rights. Such powers must be exercised as a last resort, follow due process and provide full compensation.

1.6 The New Zealand Initiative submits that the Bill should proceed, subject to the following recommendations:

- Provide compensation to a flat percentage above market value without arbitrary caps
- Provide for an independent panel appointed by the Chief Justice, rather than Ministers, to review submissions
- Create a stronger presumption through clearer permissive criteria and greater transparency in favour of recourse to less intrusive opt-out processes
- Retain limited appeal rights to the High Court on errors of law, breaches of natural justice, or failure to observe mandatory considerations
- Enhance transparency through published cost-benefit analysis for all accelerated takings
- Provide a sunset clause for these amendments and consider requiring a further review after the three-year review.

2. THE CASE FOR INFRASTRUCTURE ACCELERATION

2.1 New Zealand's infrastructure challenges are well-documented. Transport congestion costs Auckland alone are an estimated $1.39 billion annually. Housing supply

[1] See Public Works (Critical Infrastructure) Amendment Bill 149-1 (2025), Government Bill – New Zealand Legislation

constraints have driven affordability to unacceptable levels. Water infrastructure is in poor shape.

2.2 Improvements take too long to be approved and cost too much. The need for urgency now is the result of decades of neglect in these respects. When that urgent need is over, the need for fast-track provisions should lapse.

2.3 Undue processing delays imposes real costs on businesses and households through:

- Lost productivity from congestion and poor connectivity
- Higher housing costs from constrained land supply
- Reduced export competitiveness from inadequate transport links
- Foregone economic opportunities from project delays

2.4 The manifest need to expedite badly-needed projects justifies temporary fast-track measures. The Bill creates a fast-track regime for projects listed in Schedule 2A. This includes those already approved under the Fast-track Approvals Act 2024 and the projects that are designated Roads of National Significance.

2.5 Efficient infrastructure delivery mechanisms enhance productivity growth. Well-defined property rights facilitate prosperity through trade, specialisation, and efficient price discovery.[2]

3. THE IMPORTANCE OF PROPERTY RIGHTS

3.1 Infrastructure can and should be built while respecting private property rights. Well-defined and enforced property rights form the foundation of a prospering market economy.

3.2 The 2024 report on the International Property Rights Index cites Arthur Lee (1775) as pointing out that the right to property is the guardian of every other liberty. On the same page it cites Aristotle (330 BC), Locke (1669), Hegel (1821), and John Sturt Mill.[3] Figure 1 below replicates one of the charts in this publication. The average income per capita for counties in the highest quintile for well-protected property rights was 19 times higher than the average for the bottom quintile. The countries with the highest scores for property rights accounted for 60% of the world's GDP but had just 16% of the world's population.[4] The same report finds that countries with a high score for property rights also scored highly for scoring systems relating to non-economic social progress, dynamism, and attractiveness to talent.[5] New Zealand was ranked 6th highest in the 2024 index, along with four other countries, including Australia.

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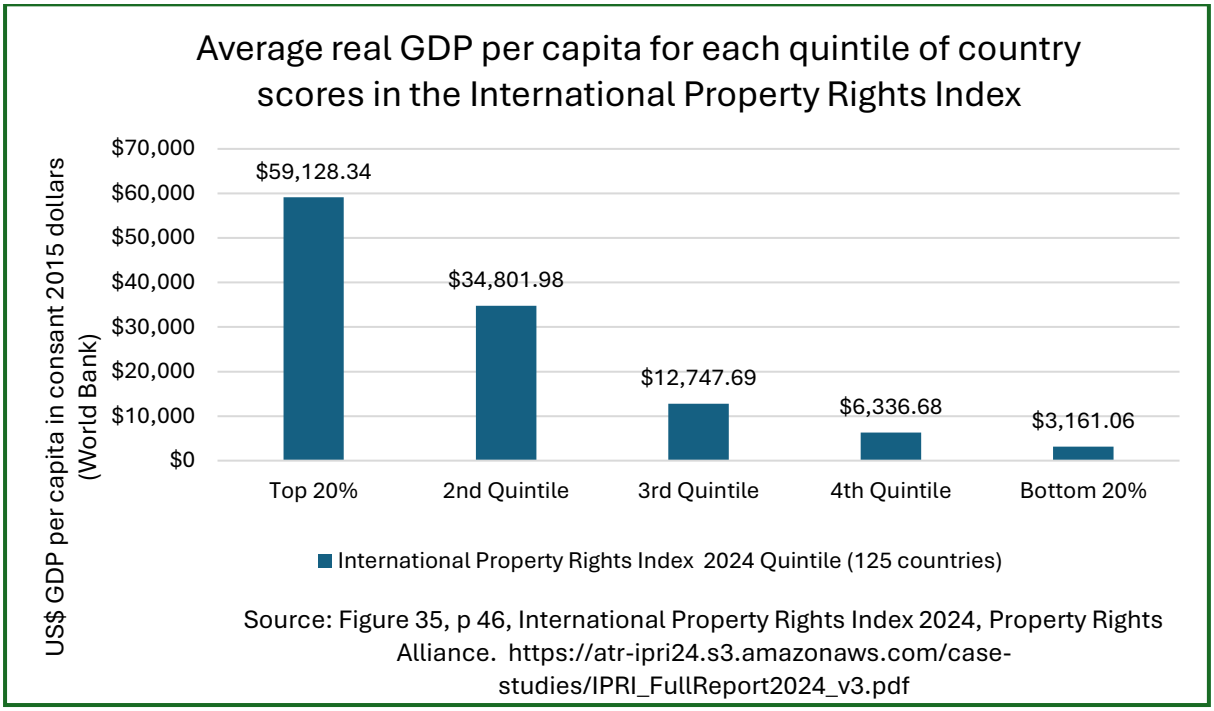
2 Bryce Wilkinson, *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, 2008), pp. 10-11.

3 International Property Rights Index 2024, Property Rights Alliance, p 5. https://atr-ipri24.s3.amazonaws.com/case-studies/IPRI_FullReport2024_v3.pdf

4 Ibid, 7,

5 Ibid, p 43, particularly figure 32.

Figure 1: The average income for countries in the top quintile for property rights protection in the 2014 index was 19 times higher than the average for counties in the bottom quintile



3.3 Compulsory acquisition undermines a system of property rights if it is not seen to be principled and justified. Where possible, as it generally is, acquisition for infrastructure should be by uncoerced consent. That means paying a price at which the owner is willing to sell. Such a price obviously leaves the willing owner no worse off than he or she would be otherwise.[6] And this 'no worse than before' principle should also guide the compensation paid for forced takings.

This power to take without consent should be used sparingly and only when:

- The public benefit is clear and substantial
- No reasonable voluntary alternative exists
- Fair due process is followed, and
- Full compensation is paid

3.4 New Zealand's favourable property rights tradition based on English common law fundamentals have served us well with respect to taking of land. More broadly, property rights are recognised internationally as fundamental human rights, protected in documents ranging from Magna Carta to the UN Universal Declaration of Human Rights (Article 17).[7]

3.5 The Bill does commendably balance pressing infrastructure needs with property protection. This submission suggests some refinements to the proposed balance.

[6] Refer for example to LINZ BRF 25-118 Briefing three – Public Works Act Review: Policy decisions on compensation, 29 October 2024, p 4, paragraph 1.

[7] Bryce Wilkinson, *A Primer on Property Rights, Takings and Compensation* (New Zealand Business Roundtable, 2008), p 16.

4. ANALYSIS OF KEY PROVISIONS

Compensation framework

4.1 The Bill introduces two new payment categories beyond market value:

- A 5% "recognition payment" for all compulsory acquisitions (capped at $92,000)
- A 15% "premium payment" for early voluntary agreement (capped at $150,000)

4.2 This provision acknowledges that market value alone fails to capture subjective loss – the sentimental value of a family farm, the disruption to established businesses, or the cultural significance of ancestral land. As the primer notes, "Just compensation might require more than the payment of market value" because "most property owners are not willing sellers (or buyers) at today's market prices."[8]

4.3 The proposed compensation levels are material. Leading US legal expert Richard Epstein has suggested 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.[9]

4.4 The monetary caps are problematic. A $150,000 premium might be meaningful in rural Southland but represents a much lower fraction of land value in Auckland. This looks unfair.

4.5 The Bill excludes certain Māori land from the fast-track process. This provision in part acknowledges the challenges of reaching agreement concerning collectively-owned land where the cultural resistance to sale at any price is particularly high.

Written Submission Process

4.6 The Bill's most controversial change eliminates Environment Court appeals. Instead, complainants will be able to make a written submission to the Minister or local authority – the very party seeking to take the land.

4.7 This conflict of hats will undermine confidence in the proposed process. Distrust can breed. The decision-maker sits in judgment of their own cause, violating the fundamental principle of *nemo judex in causa sua*. This invidious situation is not good for either party.

4.8 The written submission process has other confidence-reducing aspects:

- No oral hearings. Landowners cannot present their case directly
- No cross-examination. This prevents testing of the Crown's evidence
- Information asymmetry. The government has superior resources
- No independent scrutiny of the decision-making process

4.9 Independent review of submissions opposing a compulsory acquisition decision would help. Even expedited processes in comparable jurisdictions maintain some form of neutral arbitration.

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8 Wilkinson, p. 25.

9 Richard Epstein, cited in Wilkinson, p. 25.

Opt-Out Provisions

4.10 Section 39AAE allows agencies to opt out of the fast-track process where the standard process would be preferable considering time frames and costs. This flexibility is welcome and aligns with principles of subsidiarity and institutional choice.

4.11 However, the provision lacks a clear presumption in favour of the less coercive route where such a route is a real option. The Bill could be amended to specify factors that strengthen this presumption. Relevant factors could include criteria such as:

- Project complexity and stakeholder numbers
- Availability of voluntary purchase options
- Environmental or cultural sensitivity, and
- Whether fast-tracking would genuinely save time

4.12 All decisions not to opt-out contrary to written submissions and the conclusions if any of commissioned independent reviews should be publicly notified in order to guard against excessive recourse to fast-track takings.

Transitional Arrangements

4.13 We read Part 2 of Schedule 1AA as providing that eligible mandatory land acquisitions not already underway will transition to the new regime. Those for which notice of mandatory acquisition under the existing rules has already been served can continue as they were. If this is correct, that seems appropriate.

Review Mechanisms

4.14 The Bill includes a three-year review requirement in section 39AAP. While welcome, this timeframe may be insufficient to assess the regime's full impact. Major infrastructure projects often take longer than three years from initiation to land acquisition. The uncertainty about the full impact after three years should not allow the Bill to be extended indefinitely. Particularly given that the fast-track measures themselves are expected to be temporary.

4.15 The review mechanisms should be strengthened by:

- Including a sunset clause of perhaps 5 years requiring positive parliamentary action to continue the regime
- Requiring public consultation as part of the review process
- Mandating review of compensation adequacy and process fairness

5. SPECIFIC RECOMMENDATIONS

Recommendation 1: Enhance Compensation

The Committee should amend the Bill to:

- Replace the tiered compensation structure with a flat percentage premium on market value for all compulsory acquisitions

- Failing that, have suitably higher dollar caps for Auckland in particular. Index all dollar amounts to CPI with five-yearly reviews

Recommendation 2: Establish Independent Review

Enhance the written submission process with:

- An independent panel appointed by the Chief Justice to review submissions
- Oral hearings available for significant takings (over $1 million value)
- Rights to legal representation with costs support for landowners
- Publication of all submissions, responses, and decisions
- Limited appeals to the High Court on errors of law, breaches of natural justice, or failure to consider mandatory considerations

Recommendation 3: Presumption in favour of Opt-Out Provisions

Amend section 39AAE to:

- Specify criteria for when opt-out is appropriate, including project characteristics and availability of alternatives
- Require public notification of negative opt-out decisions with supporting reasons
- Protect agencies from ministerial direction to use fast-track when they recommend standard process

Recommendation 4: Mandate Transparency

Require the responsible Minister to table in Parliament before any taking:

- A cost-benefit summary prepared by officials
- Certification that no practicable voluntary alternative exists
- Disclosure of any official advice recommending against the taking, and
- Publication of all compensation settlements (anonymised) to build market knowledge

Recommendation 5: Strengthen Review and Sunset

Enhance section 39AAP by:

- Adding a sunset clause after five years unless renewed by parliamentary resolution
- Including specific review criteria focused on process fairness and compensation adequacy
- Requiring the review to examine options for compensating regulatory takings

6. BROADER CONTEXT: REGULATORY TAKINGS

6.1 Physical acquisition is just one way government takes property value. Regulations that zone land, impose heritage restrictions, or create setbacks can destroy value just as effectively.

6.2 A farmer whose land is designated as a Significant Natural Area loses development rights but receives no compensation. A building owner forced to earthquake-strengthen at massive cost receives nothing. This asymmetry encourages over-regulation.

6.3 The 2008 primer on property rights recommended a principled approach: for example, where regulation reduces a property value materially, the issue of compensation should be addressed. This would force regulators to internalise costs they currently impose on others, consistent with economic principles that have proven successful in the physical takings context.

6.4 While beyond this Bill's scope, the Regulatory Standards Bill may help address this issue.

7. CONCLUSION

7.1 The Public Works (Critical Infrastructure) Amendment Bill addresses a real problem – New Zealand's infrastructure deficit – with a targeted solution. The Initiative supports this objective.

7.2 However, accelerated compulsory acquisition powers demand the highest safeguards. Our recommendations would strengthen the Bill by ensuring fairer compensation, maintaining judicial oversight through independent review, enhancing procedural fairness, and requiring transparency. These principles align with those outlined in the 2008 primer on property rights, which documented the fundamental importance for prosperity, liberty, and social cohesion of respect for private property rights. As that primer notes, "Well-defined and enforced property rights provide the basis for the sense of self, peaceful cooperative coexistence, liberty, prosperity and conservation."[10]

7.3 In recommending a sunset clause for these measures, we are not saying that the existing Public Works Act is optimal looking forward. The RMA replacement bills will contain takings measures that may warrant amendments to the Public Works Act along the way. This submission is open to this possibility.

7.4 With these amendments, the Bill can accelerate vital infrastructure while upholding the property rights that underpin our prosperity. The two goals are not mutually exclusive. Indeed, the opt-out provisions demonstrate that flexibility and choice can coexist with expedited processes.

7.5 We thank the Committee for considering our submission and request the opportunity to appear in support of it.

[10] Wilkinson, p. 10.