History of Public Works Acts in New Zealand, including compensation and offer-back provisions

Russell Davies

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Matters required to be dealt with in this paper are:

(i) acquisition procedure
(ii) compensation
(iii) offer back
(iv) private companies in respect of being able to acquire land for public work and dispose of surplus land that was originally acquired under public works legislation.

As each of these topics is related to a number of individual issues, they have been dealt with under sub-headings as follows:

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NOTE: References to departments

Nineteenth century legislation refers to a "Minister for Public Works" and a Public Works Department. The Public Works Act 1928 brought the Public Works Department and the Ministry of Works into a single unit, and at that stage the responsible Minister was known as the Minister of Works, while the head of the department was the Commissioner of Works.
The department was re-named the Ministry of Works and Development in 1973, with the Minister of Works and Development having responsibility for it.
The Ministry of Works and Development was abolished in 1988, and the Minister of Lands was made responsible for the Parts of the Act dealt with in this paper. The Department of Lands, under its acting chief executive, assumed responsibility until its abolition in 1990, after which the Department of Survey and Land Information. Under its chief executive, then administered the Act. In the legislation to restructure that department in 1996, the chief executive (as referred to in section 40) became "the chief executive of the department within the meaning of section 2 of the Survey Act

1986"—at present the chief executive of Land Information New Zealand. The Minister of Lands has remained responsible for acquisition and disposal since 1988.

Introduction

The history of Public Works Acts in New Zealand reflects the general history of the nation in many respects. Changes in technology, land ownership, and the development of towns and transport systems in the United Kingdom in the nineteenth century had a profound influence. In settling the country there was then a development of the idea of the Crown being the central authority for undertaking and owning public works, while colonial attitudes influenced the use of "waste lands".

Some developments have been politically driven, e.g. the acquisition of land for State housing, the transfer of Crown land assets to State-owned enterprises, and caution in recent decades regarding the compulsory acquisition of Maori land. Other changes reflect the particular needs of the time, e.g. when the main railways motorways were being constructed, middle line Proclamations were used to curb the rights of objection; this procedure was removed from the statute books when most main railways and motorways had been completed.

Regarding the detail of procedures, the property and legal sections of the Ministry of Works and its successors have had a big input in revising them over the years, having the experience as to what changes were needed to make the legislation workable.

The background to the development of public works legislation in the colony has been well documented by Cathy Marr in Public Works Takings of Maori Land[1].

Marr says that, until the Land Clauses Consolidation Act of 1845, there was no central body of legislation for the acquisition of land, and English principles required special acts for each taking.[2]

While there was still a need for special acts, the 1845 was able to standardise procedures where its provisions were deemed to be incorporated in the special act. The preamble expressed the purpose in these words:

> "Whereas it is expedient to comprise in One general Act sundry Provisions usually introduced into Acts of Parliament relevant to the Acquisition of Lands required for Undertakings and Works of a public Nature, and to the Compensation to be made under the same, and that as well for the Purpose of avoiding the Necessity of repeating such Provisions in each of the several Acts relating to such Undertaking as for ensuring greater Uniformity in the Provisions themselves…."

Thereafter promoters of projects such as the construction and operation of railways had a code for acquisition and compensation which did not need to be set out in their special acts.

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[1] Report for the Treaty of Waitangi Policy Unit. I have quoted at length from that report in the fourth part of this paper, dealing with the compulsory acquisition of land for private companies.
[2] Page 8

It is notable that the Land Clauses Consolidation Act does not use the words "compulsory acquisition", and the differences to be resolved are related to the amount of compensation.

This is in contrast to the legislation passed that same year for giving powers to the Provincial Governments entitled the Provincial Compulsory Land Taking Act 1863. Part of the reason for the passing of the latter Act was to validate laws already passed by some provincial legislatures—as the Preamble put it:

> WHEREAS the public interest require that land belonging to private individuals should from time to time be taken compulsorily for Works and Undertakings of a Public Nature
> And Whereas Acts or Ordinances have heretofore being passed by Provincial Legislatures authorising the taking of land for such purposes And Whereas doubts have been raised as to the validity of such laws and it is expedient to declare the same valid and to remove doubts as to the power of Provincial Legislatures to pass such laws for the future:

Section II accordingly validates those earlier acts, and section 3 empowers the Superintendent and Provincial Government to pass further laws of this nature. These were to be in accordance with standing Orders and rules made under this Act. There is no detailed procedure in this Act.

Principles affecting the taking of land

Magna Carta had restricted the prerogative power of the English king—

'No free man shall be…disseised of his freehold or liberties or free customs but… by the law of the land'

and Blackstone in his Commentaries in 1765 wrote of the need for legislative authority, and for "full indemnification and equivalent" of the land taken. The industrial revolution was the reason that the taking of private land for public works increased significantly in the eighteenth century; roads at that stage had not advanced far beyond those of Roman times, and there was more maintenance than extension.

Eventually it was the development of railway and canal transportation that was to lead to the many empowering acts which enabled land to be taken compulsorily, and the development of railways between cities, as opposed to the earlier localised railways, became a major factor, following George Stephenson's work on locomotives.

As in England, the nineteenth century New Zealand Government passed many acts or ordinances for specific projects. It was a system which made Parliament the arbiter on the question of what land would be taken for what purpose, and local authorities did not at first have their own powers to acquisition land compulsorily.

Marr[3] tells us that

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[3] op. cit. P.28

> The colony was also to be established on the principles of 'the utmost parsimony'. This meant projects would have to be prioritised in order to conserve expenditure. For example, provision for the prevention and punishment of crime was to take precedence over improvements in internal communications. The establishment of municipal and district governments was also to be promoted to conduct local affairs such as 'drainages, bye-roads, police, the erecting and repair of local prisons, court houses and the like.' Along with other advantages, this was also calculated to result in an 'efficient and frugal expenditure of public money'. It was of the utmost importance to have the 'innumerable petty details' of local government removed from the responsibility of the Governor, along with relieving the public treasury from the 'wasteful expenditure in which it must be involved, so long as it is burdened with the double charge of collecting local assessments, and of effecting local works.'[4]

Prior to the passing of the 1876 Act, legislation in the public works area was a comparatively piecemeal matter. Some acts were passed for specific works, and even the various Immigration and Public Works Acts failed to give a coherent system for dealing with public works. For example, Part III of the Immigration and Public Works Act 187 deals with powers to construct water supply to the gold fields, and Part IV empowers the Governor to acquire waste lands in the North Island.

Land Clauses Consolidation Act 1863

One act of a more substantial nature (consisting of 107 sections) which does warrant attention is the Land Clauses Consolidation Act 1863.[5] The long title "An Act to prescribe the mode in which Land shall be taken for Works and Undertakings of a Public nature". It was clearly modelled on the English Land Clauses Consolidation Act 1845, and operated in the same way, i.e. a special act empowered certain work, and incorporated the Land Clauses Consolidation Act. Sections 3 and 4 read as follows:

> III. This Act shall apply to every undertaking authorized by any Special Act which shall hereafter be passed and which shall authorize the purchase or taking of land for such undertaking and this Act shall be incorporated with such Special Act and all the clauses and provisions of this Act shall apply to the undertaking authorized….

Referring to the Otago Southern Trunk Railway Act 1866, for example, we find that the 1863 Act is incorporated for such purposes as compensation. Section 8 sets out which sections of the (English) Act of 1845 are to apply.

Like the subsequent Public Works Acts it contained the whole procedure of acquisition and compensation. Section 5 empowers the promoters of any undertaking

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[4] Despatch from Lord Russell to Governor Hobson, 9 December 1840, in IUP vol 3 public work 146-153S

[5] The statute book if that year shows a more than usual interest in the subject of compulsory acquisition. Apart from the Lands Clauses Consolidation Act and the notorious Land Settlements Act, there is the Provincial Compulsory Land Taking Act (enabling provincial legislatures to pass laws for this purpose) and several acts related to waste lands.

to reach agreement with the owners for purchase of land. Section 6 requires the service of a notice of intention on the owners of any land that they wish to purchase or take, and section 7 says that, if the amount of compensation cannot be settled within twenty-one days

> "the Amount of such Compensation shall be settled in the Manner hereinafter provided for settling Cases of disputed Compensation."

Under sections XXVII and XXVIII, where there was a dispute over compensation, the Sheriff was to summon a jury of twenty-four men to the Supreme Court, and from these a jury of twelve would hear the dispute.

This legislation reflected the enterprise of private bodies in the area of public works at the time. Bodies such as the Wellington Gas Company held powers under private acts

The Public Works Act 1876

The Public Works Act 1876 was intended to provide a central source of the law, and to give road boards more direct power. The Hon. Dr Pollen, speaking on the second reading, spoke of the great labour that the consolidation and re-working of legislation involved.[6] He continued:

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> The second part of the Bill comprises all the necessary provisions for the taking of land. The abolition of the provincial form of government has made it necessary that the local boards should have the necessary powers for taking local public works without having occasion, as they were obliged under the existing form of government, to refer to the Legislatures on every occasion. The process of taking is very much simplified by this Bill, whilst at the same it is surrounded with all the necessary checks to protect the rights of individuals whose lands may be affected by it, as well as to secure the public the power of obtaining all such lands as may be necessary for public purposes. The expenses also of obtaining this land are in many respects very much lessened. A very considerable proportion of the charges in the cost of obtaining land for public purposes is comprised in legal expenses. The number of conveyances that have to be made for little scraps of land upon a long line of railway, when the charges come to be added together make a very formidable item in the expenses. By a process which I am afraid may not commend itself to gentlemen of the legal profession, but which has at least the merit of simplicity and cheapness, this item of expenditure will, to a considerable extent, be eliminated for the future from such transactions.

Accordingly, a system where a large number of pieces of land would be taken from different owners for a major work such as a railway, was authorised by the Act. Such pieces of land would be shown on a map, and the Governor-General would sign a Proclamation taking the land.

Such a procedure is the opposite of a normally conveyance, in which it is the owner, not the person who is acquiring the land, who signs the document.

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[6] In contrast to the lengthy and enthusiastic speech given for the 1876 Bill, the introduction of the 1928 Bill by Sir Francis Bell, Leader of the Council, was extremely short: "Sir, this Bill is a pure consolidation. Honourable gentlemen will note that there is nothing new in it except that there has been incorporated the short Bill we passed earlier in the session."

Another aspect of the Act which drew some attention was the vesting of the soil of roads in the Crown. Dr Pollen said:

> The fifth part of the Bill contains provisions for the making of roads, and is a very important one—probably the most important of the whole. It proposes to settle a question about which differences have arisen as to the right in the soil of roads. The conditions of title to the soil of roads in this colony are very different, as honorable members are aware, from the prevailing conditions with respect to the ownership of that soil in Great Britain; and although is generally accepted as a rule that the soil of the public roads in this colony is vested in the Crown, all doubt is proposed to be removed by the 79th and 80th clauses of this Act, which declare finally that the soil of all roads is vested in the Crown.

PART 1: Acquisition

Acquisition of land under Public Works Acts

The history of Public Works Acts in New Zealand shows an increasing distinction between the taking of land compulsory and purchase by agreement, and the present Act shows a clear preference for reaching agreement so that the compulsory provisions do not need to be used.

The Public Works Act 1876 did not provide for acquiring land by agreement, and provision for "purchase" appeared in the 1908 Act. Agreement does away with the need for the notice of intention, notice of desire, objections and hearings.

Purpose for which land can be taken—public works, Government works, local works, essential works

Public works

At all times the powers to acquire land under a Public Works Act have been limited to land required for a public work. Sometimes this is a fiction, e.g. a State forest was *deemed* to be a public work and a resumption of land under the Treaty of Waitangi (State Enterprises) Act 1988) is effected *as if it were* a public work.

In section 2 of the Public Works Act 1876 the definition of "public work" said that it included "surveys, railways, tramways, roads, bridges, drains, harbours, docks, canals, waterworks, and mining works, electric telegraphs, lighthouses, buildings, and every undertaking of what kind soever, which the General Government or a County Council or a Road Board is authorised to undertake under this or any other Act or Ordinance of the General Assembly or of any Provincial Legislature for the time being in force."

The definition grew with subsequent Public Works Acts, until in the 1928, it occupied more than one page. Parts of the definition were added by subsequent amendments, and these included paragraph (g) added by section 29(2) of the Finance Act (No. 2)

1945—“Any work or undertaking which the Governor-General by Order in Council declares to be a public work for the purposes of this Act”

In the 1981 Act, a shorter definition was made possible by doing away with the list of specific works, and defining it as

> “every work which the Crown or any local authority is authorised to establish and continue, by or under this or any other Act; and includes any thing required directly or indirectly for any such work or use”.

Thus the authority for a particular purpose being a public work is now usually to be found in another Act such as the Transit New Zealand Act 1989 or the Local Government Act 1974, read together with this definition. Although there are many statutes in which a work is declared to be a public work for the purposes of the Public Works Act 1981, that is not essential.

The definition has been replaced by an amendment in 1987, which inserted a definition in three paragraphs. While paragraph (a) is based on the original definition, paragraphs (b) and (c) are specific to educational bodies and universities.

Public works are divided into the categories “Government work” and local work”

Government works

Works carried out by the central Government are referred to as “Government works”. In the original Public Works Act 1981 they were defined as works “constructed or intended to be constructed by or under the control of the Crown or any Minister of the Crown, or for the time being under the control of the Crown or any Minister of the Crown.”

The Conservation Reform Act 1990 amended this definition so as to add land held under Acts administered in the Department of Conservation, other than land to which section 9A of the Foreshore and Seabed Endowment Revesting Act 1991 applied. That part of the definition ends with the words “even where the purpose of holding or acquiring the land is to ensure that it remains in an undeveloped state”. It appears that these words were added as a matter of caution, although courts already acknowledged that “public work” did not necessarily imply that the land would be developed or built on in any way.

The addition of references to conservation land was to enable the Department of Conservation to acquire land under the Public Works Act 1981 where desirable.[7]

Amendments to empowering legislation by the State-owned Enterprises Act 1986 deprived the Crown and Ministers of the Crown of their right to undertake many works such as electricity generation. Accordingly they ceased to be public works for

[7] Historically the Department of Conservation had treated land under the Conservation Act 1987 as being outside the Public Works Act, under a separate code. The re-definition made it necessary for the disposal provisions of the two acts to be dealt with in a clearer way, especially with regard to section 40 of the Public Works Act 1981.

the purposes of the Public Works Act 1981, and State-owned enterprises could not acquire land for them under the Public Works Act 1981.

Legislation to allow for acquisition and disposal of land by Crown bodies and companies such as State-owned enterprises is dealt with in the fourth part of this paper.

Local works

In the Public Works Act 1876, the works which would now be termed "local works" were referred to as "district works" (under the control of a road board) and "county works" (under the control of a county council).

By the beginning of the twentieth century, the term "local work" was used in the Public Works Act to refer to works undertaken by territorial authorities and other local authorities. (The term "territorial authority", distinguishes county councils, district councils, borough councils, and city councils from regional councils and special purpose bodies such as gas boards and harbour boards. It was not used until the passing of the Local Government Act 1974.)

Historically there were important differences between types of territorial authorities prior to the passing of the Local Government Act 1974, which gave city and district councils essentially the same powers. Immediately before that legislation, Borough and City Councils were covered by the Municipal Corporations Act 1956, and County Councils by the Counties Act 1956.

Until the passing of the Counties Amendment Act 1972, there was a distinction between "roads" (which were the responsibility of the Crown or a County Council) and "streets" (constructed and owned by Borough or City Councils). County roads vested in the Crown, not County Councils.

"Local work" is defined in section 2 of the Public Works Act 1981 as "a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority".

This definition is somewhat circular, as a local authority is defined as including any "body, however designated, having authority, under any Act, to undertake the construction or execution of any public work".

In some cases, the status as a local authority derives from another act, and not the definition in section 2 of the Public Works Act 1981. For example, section 4(7) of the Fire Service Act says

> The New Zealand Fire Service Commission shall be deemed to be a local authority for the purposes of the Public Finance Act 1977, Part II of the Public Works Act 1981, [and] the Reserves Act 1977.[8]

[8] Restricting the Government work status to Part II of the Act has created some confusion, as disposal is effected under Part III. A number of legal opinions have been written on the question of whether land acquired by the Fire Service under a Public Works Act is subject to section 40 of the Public Works Act 1981, and the conclusions are by no means unanimous.

Essential and non-essential works under the Public Works Act 1981

A basic policy of the Public Works Act 1981 was to minimise the extent to which land could be acquired compulsorily. When the Act was originally enacted, until references to "essential works" were removed by the Public Works Amendment Act (No. 2) 1987, section 22 stated that land could not be acquired compulsorily unless the work for which it was required was an essential work.

The Government of the day had promised in its election manifesto that it would pass legislation to restrict compulsory acquisition to particular types of public work.

The response of the Ministry of Works and Development in its report to the Land and Agriculture Select Committee was to recognise that they were dealing with a matter to which the Government of the day was committed.

An "essential work" was defined in section 2 as a public work that was, or was required for, any of the listed purposes. Specified types of work included sewerage, hospitals, schools, roads and motorways, defence works, police stations and Post Office telecommunications installations.

The definition applied to work "that is, or is required for" any of those purposes. Thus something secondary such as a security area or car park required for one of the listed works in theory would itself be an essential work. In practice, departments did not lightly use the compulsory provisions to acquire land for essential works, because of the more stringent procedure.

Ministry of Works and Development files show that the proposal to restrict the acquisition of land in this way was not acceptable to local authorities. Submissions made by some of the city councils asked for the concept of "essential work" to be abolished, expanded to include a large number of additional items, or extended to include all works that local authorities were empowered to undertake.

The Labour Opposition of the day was not in favour of this restriction, being sympathetic to the wishes of local authorities to be able to carry out works such as libraries without being thwarted by uncooperative landowners. While the National Government sought to keep the list to the purpose that they had defined, in practice some further classes such as harbour works and reserves for endangered flora and fauna, were added before the Bill became law.

Criticism to the final list of essential works came from both the Opposition and public bodies, who considered the contents of the list to be arbitrary. A common example given was that life-saving facilities such as those needed by the Fire Service were not included, while harbour works had been expanded so as to include matters that would not be regarded as essential.

As the Government MP Mr Schultz said, on the second reading,

> "In effect the Bill retains the philosophy of a greater consideration of the rights of property owners. Although most local authorities, and some Government departments, sought relaxation, the Bill does not give it."

One recommendation made in the report of the Land and Agriculture Select Committee which was adopted was that a power be included for particular works to be declared to be essential works, and that eventuated as (the now repealed) section 3. Opposition members were scathing about this inclusion, Mr Caygill saying that an essential work would now be "anything I care to think of so long as I can persuade the Governor-General—that is, the Cabinet—to add it to the list. An essential work is a chameleon. It is a creature that changes its character according to the Government of the day."

The Minister of Works and Development, Mr Young, much preferred the restricted list of essential works with the exception in section 3—"If negotiations fail, there are provisions for land to be taken by Order in Council, but we believe that those provisions will be used sparingly."

In practice, section 3 turned out not to be the liberating channel foreseen in that comment. Parliamentary Counsel directed that any Order in Council prepared under that section was to be treated like legislation, drafted in that office and using the procedure used for making regulations. In fact no such Order in Council was ever made during the time that section 3 was in effect.

The restrictions in what could be taken compulsorily went along with amendments to the objection procedures. Under section 24(8), when there was an objection to a proposed taking, the Planning Tribunal was required to determine whether the taking was "fair, sound and essential for achieving the objectives of the Minister or local authority…."

When the "essential work" concept was abolished this subsection was repealed, and its present equivalent section 24(7)(d) now requires the Tribunal to consider whether, in its opinion, it would be fair, sound, and reasonably necessary" for the land to be taken.

There were repercussions for other procedures under the Act. For example, the taking of land for essential works was referred to in many of the compensation provisions. As the taking was restricted to land needed for an essential work, any land acquired for any such purpose was seen as possibly tainted with the threat of compulsion.

While the "essential works" concept was in force, section 52, under which land could be set apart for a new public work, was expressly subject to section 40. If the purpose to which the land was to be changed was an essential work, section 40 itself made it clear that the section did not apply, whereas an offer-back would be required before the land could be set apart for any other kind of public work.

The list of essential works was of necessity somewhat arbitrary, i.e. different persons would have varying views on was appropriate to include. Departments frequently made representations to the Ministry of Works and Development for additions to the

list. The Governor-General also had the power to declare specific works to be essential works, although that power was never used in practice.

In the end, largely because the government of the day had never supported the concept, the essential work concept was removed from the Act by the Public Works Amendment Act (No. 2) 1987. The remainder of this Act was largely concerned with giving the Ministry of Works and Development powers relating to commercial activities.

No great immediate increase in compulsory acquisitions was evident, as the Public Works Act 1981 already was framed in a way that encouraged the reaching of agreement with the owner. Thus the frequency of compulsory acquisitions still remained considerably less than under the Public Works Act 1928.

Procedure for compulsory acquisition

Historically, the acquisition of land for public works has been seen as unusual type of land transaction, calling for special steps and documents. In a normal transfer under the Land Transfer Act, agreement is reached between the owner and the purchaser, and the owner ("registered proprietor") executes a transfer of the land to the new owner.

In a Public Works Act acquisition, documents are signed by a Minister or the Governor-General. The Proclamation or declaration states that the land is taken or acquired, and although the Minister and Governor-General represent the Crown, they also sign Proclamations that vest land in local authorities, as they are the only people authorised to take this final step. Most legislation creating such procedures requires the giving of prior notice, and provides for the hearing of objections.

Concern for private rights has led to an increase of the number of steps required by the Minister or local authority, and to improved protection of rights in the objection process.

The first Public Works Act in 1876 set out a procedure that was similar in many respects to the procedure under the Public Works Act 1981.

Section 21 required that a map of the land required to be taken to be prepared. The map, together with the names of the owners to be affected so far they could be ascertained, was to be deposited in a place where the public could inspect it at all reasonable hours.

Section 22 required the Minister or County Council or Roads Board to cause a notice to be gazetted and twice publicly notified. It was to include a general description of the works proposed to be executed, stating where the map could be inspected, and to call on all persons affected within forty days to lodge any well-grounded objection with the Minister or local authority.

Under section 23 the Minister, County Council or Road Board was to serve a copy of the notice and description of the land on the owners and occupiers of the land so far as they could be ascertained.

Section 24 required the Minister, Council or Board to appoint a time and place for the hearing of objections, to be heard by the Minister, Council or Board (the Minister could appoint some other person to hear the objections.)

Land was taken under section 25 if
-no objection was made in the forty days or
- after the hearing of objections, the Minister, Council or Roads Board was of the opinion that it was expedient that the work be executed
"and that no private injury will be done thereby for which due compensation is not provided by this Act".

The Minister or local authority was then to lay before the Governor-General a memorial containing an accurate description of the lands to be taken, together with a map signed by the Surveyor-General or some certified surveyor as evidence of accuracy.

Note that, although this section reads as though no Minister was to be involved in the case of a local work, there is a constitutional convention that the Governor-General does not execute documents except on the advice of the relevant Minister.[9]
The Governor-General could then declare the land to be taken by a Proclamation duly gazetted and publicly notified. The land would thereupon vest in fee simple in the Crown, discharged from all mortgages, charges, claims, estates, or interests.

There is no mention of land vesting a County Council or Roads Board. Provisions for vesting land in local authorities was made in their legislation later.

Section 26 was a registration section, requiring a parchment copy of the Proclamation and the map to be registered at the District Land Registry Office. A Proclamation taking land that was not under the Land Transfer Act could also be lodged at the Registry, and the effect was to bring the land under that Act.

Section 27 allowed the owner to require the Minister or local authority to take a small piece of land severed by the work. Section 28 gave the occupier of land the right to require the Minister or local authority to take land occupied for as railway in accordance with section 135.

Notices required to be given

Notice of Intention
From the first Public Works Act, there has been a requirement for notice to be given before land is taken compulsorily. Consistently, the Acts require the notice to be gazetted, twice publicly notified (i.e. published in a newspaper), and served on the owners and occupiers of the land so far as they can be ascertained.

These notices have usually been referred to as "notices of intention [to take land]".

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[9] The Chief Justice acknowledged that this convention was well accepted in *Dannevirke Borough Council* v *Governor-General* [1981] NZLR 129.

Until 1981, a copy of the notice published in the Gazette and newspaper was served on the owners and occupiers. The Public Works Act 1981 prescribes in addition separate notice of intention for serving on owners and occupiers, and the wording to be used for this notice is set out in the First Schedule to the Act.

A notice of intention to take is important for giving the owner information—on both the details of the proposed taking and the rights to object that he or she has. This was illustrated by the case *Auckland Meat Company* v *Minister of Works* [1963] NZLR 120.

As the Crown had the right to acquire land for "better utilisation" under section 30 of the Finance Act (No. 2) 1945, the Ministry gave this as the purpose for which the land was to be taken. The High Court held that the notice did not really state the purpose for which the land was to be used certainly not to the extent of enabling an owner to make a "well-grounded objection", as the statute required.

It is perhaps with that case in mind that the First Schedule to the Public Works Act 1981 now that the notice shall state how the land is to be used, not just the type of public work for which it is to be taken. Thus the owner can discover whether the intention is to use the land for something essential to the work, or something ancillary such as staff amenities or car parking.

Another important aspect of the notice of intention is that the time during which it is in force is limited, which means that the Minister or local authority is obliged to act reasonably quickly to prevent the notice from losing its effect.

This time limit is not found in the early Public Works Acts, and first appears in the Public Works Act 1928 as a result of the Public Works Amendment Act 1952 enacting a new section 22(5). The effect of subsection (5) was that the notice of intention would cease to have effect, and be deemed not to have been given, unless a Proclamation taking the land was issued within one year of the gazetting of the notice.

The notice could be kept alive if it was confirmed within the one-year period, by serving confirming notices on persons who had an interest in the property.

Where the notice ceased to have effect, it was not to be repeated until at least one year after the first notice ceased to have effect.

The details of the time restriction were substantially revised in section 23(4)-(6) of the Public Works Act 1981. The basic effective life of the notice of intention remained one year, while the effectiveness of a notice confirmed by the Minister or local authority was a further two years. When any notice had ceased to have effect, it was not to be repeated until at least six months after its expiration.

Some changes were made during the currency of the Public Works Act 1928. In its original version, section 22 required the Minister or local authority to gazette and publicly notify a notice setting out certain information about the proposed taking, and calling on persons affected to set out any well-grounded objection to the proposed execution of the work or taking of the land.

A “well-grounded” objection did not include objections to the payment or the amount of compensation.

Amendments to section 22 by the Public Works Amendment Act sought to simplify matters for would-be objectors. It required a street address or some other readily identifiable description and removed the words “well-grounded”.

The first of these amendments enabled the reader to identify more easily the land that was to be affected. “The corner of Black Street and White Road” is much more meaningful than “Lot 5, DP 62537”.

The second change recognised that the question of whether the objection was well-grounded was a matter to be determined at the hearing. The earlier wording would allow a local authority to refuse a hearing on the basis that it considered that the objection was not well grounded.

Perhaps the three most radical changes made by the Public Works Act 1981 in the area of notices of intention were:

- The requirement for a notice of desire before issue of a notice of intention as required by section 18
- The prescribing of the wording to be used in a notice served on owners and occupiers (First Schedule); and
- The requirement for the notice of intention and the notice of desire to be registered against the title.

<u>Notice of desire to acquire land</u>
Section 18 requires the Minister or local authority before proceeding to take land under the Act to-
(a) Serve a notice of his or its desire to acquire the land on every person having an interest in the land; and
(b) Lodge a notice of desire to acquire the land with the District Land Registrar, who shall register it, without fee, against the certificate of title affected.

Paragraph (c) is a matter dealt with at the same time as (a)—the Minister or local authority invites the owner to sell the land, giving an estimation of compensation payable, based on a valuation by a registered valuer.

In practice, a notice of desire to take is not usually issued where there is a reasonable possibility of reaching agreement under section 17, as it may be seen as heavy handed, with a strong threat of compulsion. Nevertheless, a literal reading of the section would suggest that it was a requirement whenever land was required for public work.

Certainly the section was read in that sense by Chilwell J in *McNicholl* v *Auckland Regional Authority* (August 1986) High Court , Auckland A. No. 952/85. He claimed that the Mount Wellington Borough Council had not complied with these

requirements when they agreed to purchase land from the Auckland Regional Council.[10]

As with notices of intention, section 18(3) placed a limit on the effective life of a notice of desire. In relation to any person and his interest in the land, after a year it would be deemed to have been withdrawn, unless proceedings had been commenced to take the land, and notice of the commencement of those proceedings had been given to the person concerned.

Section 18(1)(d) required the Minister or local authority to make every endeavour to negotiate in good faith to reach an agreement for the acquisition of the land, and if such an agreement could be reached, the land could be purchased in accordance with sections 17 and 20. The minimum period after issue of the notice for proceeding to the first stage of compulsory acquisition was three months.

Subsection (7) provided some exceptions to these time lines. In the case of Maori freehold land, the Maori Land Court has six months in which to appoint an agent for the beneficial owners, whereas the three-month wait is not required if an owner who does not object to the taking has no power sell the land.

Objection rights
Section 22(1)(f) of the Public Works Act 1928 required the Minister or local authority to set a time and place for the hearing of the objection. The hearing would be by the Minister or some person appointed by him, or by the local authority. Thus the Minister (or local authority) may have been seen as "a judge in his (or its) own cause".

This was remedied by the Public Works Amendment Act 1973, which replaced section 22 of the Public Works Act 1981 with new sections 22 and 22A. Under section 22A, objections were now to be heard by the Town and Country Planning Appeal Board, whose jurisdiction was to conduct an inquiry and to report on the inquiry and make recommendations in respect of the inquiry.

In this amendment the "recommendation" of the Board was no more than that. The Minister or local authority could proceed to the next stage under section 23 "if after due consideration of the report and recommendations (if any) of the Appeal Board received under section 22A of this Act the Minister or local authority, as the case may

[10] The argument that had been made in this case was that the Mount Wellington Borough Council was entitled to acquire land from the Auckland Regional Council by agreement. Chilwell J said (public work 35-36) "No step in the procedure for compulsory acquisition was at any time taken taken by the Council in terms of section 22 et seq of the Act. It was contended in argument that section 17, the acquisition by agreement section, governed the purchase by the Council but there was no evidence of compliance with subsection (2) in that there was no declaration under section 20 and no recital in the memorandum of transfer that the land was being acquired for "the stated work". If section 17 applies the Council has the choice of those alternatives and, presumably, the memorandum of transfer submitted to the A.R.A. could be altered if the Council is able to state that the whole block is required for a stated public work…. More importantly, there was no formal compliance with section 18 which requires prior negotiations for the acquisition of land for essential works although some of the requirements of that section took place on an informal basis; in particular, there was no proof of compliance with subsection (1)(b) which required the Council to lodge with the District Land Registrar a notice of desire to acquire the block."

be, is of the opinion that the land should be used for the general purposes for which it is required…"

The Public Works Act 1981 provided a stricter regime for objections. In the case of a local authority the recommendation was to be binding. The Planning Tribunal was to inquire into the extent to which adequate consideration had been given to alternative sites, routes, or other methods of achieving the objectives of the Minister or local authority (section 24(7)).

The Tribunal was to prepare a report stating whether the proposed taking was fair, sound, and essential for achieving the objectives of the Minister or local authority, and was to make such recommendations as it considered proper (section 24(8)).

Subsection (10) said "The report and recommendation of the Planning Tribunal shall be binding on the local authority."

The changes here reflect the general policy of the Act, which appears to be that of discouraging the compulsory acquisition of land, and encouraging the reaching of agreements with land owners. The use of the word "essential" in subsection (8) is consistent with the policy of the Act that land could be taken only for "essential works".

The Public Works Amendment Act (No.2) 1987, while removing almost all references to "essential works", made the requirements about the hearing of objections more stringent. It replaced section 24(7) with a series of steps that the Tribunal was to take:

(a) Ascertain the objectives of the Minister or local authority, as the case may require:

(b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:

(c) In its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the Tribunal:

(d) Decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:

(e) Prepare a written report on the objection and on the Tribunal's findings:

(f) Submit the report and findings to the Minister or local authority, as the case may require:

The key paragraph in the decision making process here is (d). Although the question was no longer whether the taking was *essential*, the Tribunal nevertheless had to be satisfied that the taking was reasonably necessary, and that it was fair and sound.

These criteria are in the context of "achieving the objectives of the Minister or local authority", and the Tribunal does not have the power to question the merits of those

objectives. Thus if a local authority wishes to take land compulsorily for, say, a library, the Environment Court has no jurisdiction to decide whether the local authority was acting reasonably in setting this as a priority..

Under the 1987 amendment, subsection (10) was replaced with this new version:

> The report and findings of the Planning Tribunal shall be binding of the Minister, or, as the case may, the local authority.

In other words, the Tribunal now had binding power over the Crown as well as local authorities.

Restrictions on what could be taken

(a) Minerals
Section 19 of the Public Works Act 1928 excluded mines and minerals from land acquired for a public work. With retrospective effect, it declared that the Crown or local authority would not by virtue of taking the land acquire "any mines of coal or other minerals whatsoever under any land so taken, except only such parts thereof as are necessary for the proper and effectual construction, support, and maintenance of such works."

Similar words appear in some of the earliest Public Works Acts—in particular the Public Works Act 1908. Section 7 of the Public Works Amendment Act 1911 added a subsection to allow for a variation on this requirement where it had been agreed with the person from whom the land was acquired.

The wording of this section introduces an element of uncertainty into the question of what the Crown owned, as it would often be only after the acquisition that it would be determined which part of the land was to support the public work.

Subsection (9) allowed for the Proclamation to override this section if it expressed a contrary intention. A wording that was commonly used was "taking the entirety of land".

As a result of this section, the Crown is limited in what it can offer on sale of the land. Even the successor of the person from whom the land was acquired would receive the land without the minerals which were excluded, unless they had acquired the rights by reason of the will or intestacy of the person from whom the land was taken.

There is no equivalent to section 19 of the Public Works Act 1928 in the Public Works Act 1981.

Ironically, section 46 of the Public Works Act 1981, a provision that has its origins in section 119 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1917, allows the Crown to remove minerals from land held for a public work. The text was as follows:

> (1) The Governor-General may, by Order in Council, authorize the sale and removal of any timber, stone, mineral, metal, or other substance upon or under

any land vested in His Majesty for any public work: Provided that nothing herein shall limit the liability of His Majesty for any damage that may be caused by reason of the removal of such timber, stone, mineral, metal, or other substance, or shall authorize the removal of any metal or mineral under any land mentioned in this section except under the authority of a mining privilege under the Mining Act, 1908.

(2) The provisions of Part I of the Coal-mines Act, 1908 shall, as far as applicable, apply in any case where coal is removed under this section.

This is substantially similar to the present section, with the addition of minerals other than coal. Section 40 of the Public Works Act 1928 was similar in wording, with the main difference being the addition of a second subsection:

(1)The provisions of Parts I and II of the Coal Mines Act, 1925, shall, so far is applicable, shall, so far as applicable, shall apply in any case where coal is removed under the authority of this section.

The history of this section has been one of many changes, so that the actual minerals that could be removed have varied according to particular wording of the current Act. At present the relevant section is section 46 of the Public Works Act 1981, referring only to timber and coal. At one point (when the Coal Amendment Act amended section 40 of the Public Works Act 1928) the relevant section referred to minerals *other than* coal.

(b) Restrictions on taking land with buildings, burial grounds, etc: Section 18 of the Public Works Act 1928

From the early twentieth century until the passing of the Public Works Act 1981, there was a general prohibition on the taking of certain land for public works.[11] As expressed in the 1928 Act, the restriction was as follows:

"Except for the purposes of a railway or a motorway or for defence purposes, or for the purposes if any other work to be made under the authority of a special Act, nothing in this Act shall authorise….

(b) The taking of any land occupied by any building, yard, cemetery, burial ground, garden, orchard, or vineyard, or in bona fide occupation as an ornamental park or pleasure ground without the previous consent of the Governor-General in Council or the consent in writing of the owner first obtained."

Perhaps the most frequently occurring situation was where the land included a building. Out of caution, the section was interpreted strictly, so that a rough shed or the remains of house destroyed by fire were treated as being "buildings".

[11] A proviso to section 106 of the Native Lands Act 1873 said: "nothing herein contained shall authorize the takings of any lands which shall be occupied by any pahs, Native villages or cultivations, or by any buildings gardens orchards plantations burial or ornamental grounds…."

The Minister would recommend that the Governor-General sign an Order in Council consenting, after departmental officials had satisfied him that there was good reason to acquire the land, outweighing the statutory protection given to houses, cemeteries and other uses protected by the section.

Similar restrictions could be found in particular Acts. Section 21 of the Burial and Cremation Act 1964 prevented a local authority from alienating land which was held for a cemetery, and in some cases special legislation such as a Reserves and Other Lands Disposal Act was needed.

Similarly special legislation has been necessary from time to time when a portion of a national park is required for a public work. Section 11 of the National Parks Act 1980 stipulates that no part of a national park can be excluded from the park without a special Act. A Reserves and Lands Disposal Act is usually the medium for authorising the exclusion of the land, and this is frequently for the purpose of a public work.

What *can* be taken or acquired

Section 28 of the Public Works Act 1981: power to take particular estates or interests
Section 28 allows land to be acquired subject to other interests, or for an interest in land to be taken separately, e.g. a right of way to give access to a substation. It also allows existing encumbrances to be kept on the title, or for an interest such as a right of way to be created over the land for the benefit of the person from whom the land is being acquired, in the process of acquiring it.

It does not provide for the Crown to give anybody an interest such as a right of way easement over land held for a public work—that power is set out in section 48.

> The power conferred by this or any other Act to take or acquire land for a public work shall include the power
> (a) to acquire or to take and to hold the land subject to any estate, interest, easement, profit à prendre, covenant or encumbrance, whether for the time being subsisting or not.
> (b) To acquire or take and to hold separately—
> (i) any particular estate or interest in the land, whether for the time being subsisting separately or not; or
> (ii) any easement or profit à prendre over the land, whether for the time being subsisting or not.

This provision first appeared as section 62 of the Statutes Amendment Act 1962. Before that, the right to take interests which were less than the full fee simple would be set out in each section empowering the taking of land

It has been important to have such provisions in the Act as certain district land registrars, especially in the Nelson Land District, have tended to consider such powers very strictly.

Section 29 of the Public Works Act 1981 is in part negative and in part positive:

Where there is a power to acquire or to take any land for a public work under this or any other Act, that power, unless otherwise specially provided,

(a) shall not include the power to acquire or take any part of a road:
(b) shall include the power to acquire or take any land vested in any local authority, or land vested in trustees for any local or general public purpose.

This provision goes back at least to the 1908 Act. The prohibition in paragraph (a) on the taking of any part of road means that the road must first be legally stopped before it is dealt with. In practice, this is taken to imply that other dealings with road are also forbidden (e.g. setting it apart for another public work or declaring it to be Crown land), and a stopping would be done in those cases as well.

The power to take land from a local authority is one that the Crown has often used, mainly by agreement with the local authority. Occasionally one local authority has taken land compulsorily from another, e.g. a gas board taking an easement compulsorily over land of a territorial authority.

Sections 30 and 225 of the Public Works Act 1981: acquiring licences

Section 225, found in the miscellaneous provisions of the Act, allows the Crown to licences, rights, and authorities in the same manner that any of the Crown's subjects may, and it is worded in a wide manner as though it was not confined to the acquisition of such rights in connection with public works:

> **Licences and authorities may be held by the Crown**—It shall be lawful and shall be deemed always to have been lawful for the Crown to be granted or to acquire in any way and to hold, on the same terms and conditions as any of the Crown's subjects, any licence, permit, right, privilege or authority which can be granted by the Crown or by any Court or any public or local authority under any Act and which can be acquired or held by any of the Crown's subjects.

An example of a situation where this section was used was in connection with the acquisition of a hotel in Cromwell in the area that was to be flooded for hydroelectric works. The innkeeper's licence was paid for as a separate item in the compensation, and the Crown became the licensee.

The other section dealing with such matter is section 30, located in Part II, the acquisition part of Act:

> Where any land is taken or set apart for a public work, any subsisting licence, permit, right, privilege, or authority is respect of the land may be taken by the same or a subsequent Proclamation; and on and after a day to be named in the Proclamation the licence, permit, right, privilege or authority shall vest in the Crown, or the local authority, as the case may be, freed and discharged from all mortgagees, charges, claims, liens, bills of sale, and interests of any kind whatsoever. The provisions of this Act shall, so far as they are applicable and with the necessary modifications, apply in every such case as if the licence, permit, right, privilege, or authority were an interest in land.

The first version of what is now section 225 was in subsection (1) of section 34 of the Public Works Amendment Act 1948, and this was restricted to particular types of licences and other rights:

> (1) It shall be lawful and shall be deemed to have always been lawful for His Majesty the King to be granted or to acquire in any way and to hold on the same terms and conditions as any of His Majesty's subjects any licence, permit, right, privilege, or authority which can be granted by His Majesty or by any Court or by any public or local authority under the principal Act, the Licensing Act, 1908, the Cinematograph Films Act, 1928, the Board of Trade Act, 1919, the Counties Act, 1920, the Municipal Corporations Act, 1933, or the Industrial Efficiency Act, 1936, and which can be acquired or held by any of His Majesty's subjects.

Both in the 1948 Amendment and in the present Act, power is given to the Crown "to be granted or to acquire in any way" such licences. Thus the Crown has had since 1948 the right to apply for the right to run hotels—or indeed any other sort of licence, including licences required to run other sorts of shops and business. When the Hon. Mr Semple introduced the Bill containing both this section and section 18 (essentially the same in wording as section 30 of the present Act), it drew a bemused query from the Opposition:

> MR SEMPLE…. Clause 18 gives power to take any licence in respect of land which is being taken. In a number of instances business licences, as for example those under the Licensing Act, relate to the land on which the business is being conducted. Sometimes it is necessary for the Public Works Department to acquire land on which a building stands. If the building is an hotel we do not wish to acquire the licence, and the proprietor can get his licence removed to another place. We were held up at Pukaki for some time because of the licensed premises which we had to take over.
>
> MR GOOSMAN: Is the Government going into the hotel business?
>
> MR SEMPLE: I do not wish people to think that we are taking over other people's licences. We are not going into the hotel business. I would have much preferred had the hotel at Pukaki not been on the land that we acquired, because we had to shift the hotel and we had trouble with the licensee. I may mention that the Bill was referred to the Statutes Revision Committee, which thoroughly examined its provisions, and made certain amendments which were accepted by the Public Works Department, and now form part of the Bill. Clause 19 makes provision for the disposal of licences acquired under clause 18.

As well as the provisions in section 19 to deal with licences and other interests acquired pursuant to section 18, there was a second subsection in section 34 dealing with licences after acquisition:

> (2) Notwithstanding anything to the contrary contained or implied in this Act or in any of those Acts, every licence, permit, right, privilege, and

> authority held by His Majesty or the Minister or any person on behalf of His Majesty under any of those Acts shall, notwithstanding any express limitations therein as to its term, continue in full force and effect as if it had from time to time been renewed for the original term thereof until expressly surrendered or relinquished by or on behalf of His Majesty, or in the event of it being transferred until the expiry of the then current renewal, and every licence, permit, right, privilege and authority which expired before the commencement of this Act while it was held by His Majesty or the Minister or any person on behalf of His Majesty, is hereby revived.

Neither section 19 nor section 34(2) of the Public Works Amendment Act has been carried over into the 1981 Act.

While sections 30 and 225 of the Public Works Act 1981 (or section 18 and 34 of the Public Works Amendment Act 1948) have much in common. There are some important differences. The first relates to licences attaching to land which is being acquired for a public work, while the second gives an absolute power to the Crown to be granted a licence or acquire a licence, and this has no connection with the ownership of any land.

<u>Section 31: surface, subsoil or air space acquired separately</u>
Section 31 provides for Proclamations or declarations acquiring the surface, subsoil or airspace separately. This provision first appeared as section 7 of the Public Works Amendment Act 1911. It specifies that where the subsoil is excluded, there is no right to support from it.

Legislation for road legalisation

The present Part VIII (sections 113-120) of the Public Works Act 1981 provides a procedure related to roads, which is an alternative to the acquisition procedures in Part II. It is frequently used as a way to record on titles changes which have occurred as the result of a road widening or realignment, although it is available for legal creation or stopping of a substantial piece of road.

For a piece of land to be declared road the written consents of people who have a registered interest in the land, such as an owner or mortgagee, are required; for a road stopping, it is usual for the consent of the adjoining owner to be obtained.

The notice can then provide for stopped road to be vested in exchange for land declared to be road, and the Crown or local authority can take small areas severed by the road, usually to be vested in another person with adjoining land.

The procedure set out in Part VIII first appeared as section 12 of the Land Act 1924 Until the passing of the Public Works Act 1981 all the procedures were set out in a single section, which became longer and more complex with each re-enactment.

In its original form as a part of the Land Act, the Minister of Lands was responsible for the administration of the section, and remained so until the section was re-enacted as s 29 of the Public Works Amendment Act 1948.

The Attorney-General, the Hon. Mr Mason explained to the House, after the Bill had been through the Statutes Revision Committee:

> There have been some amendments made and they are largely a matter of detail, but I should just like to call attention to a few of them. The one that is the most voluminous is towards the end of the Bill and relates to the taking and closing of roads and streets. The reason that appears there is simply that the Land Act is being consolidated, and it was felt that these provisions which appeared in the Land Act more properly would go into the Public Works Act, and so it happens that they are set out here and so voluminously, but in all that there is no new law, merely the transference of provisions from one Act to another as an incident of the consolidation of the land laws…..and the result will be that it is easier to find the law in the place where one would naturally expect to see it.

The Public Works Act 1981 presented these procedures as Part VIII, with separate sections for declaring land to be road (the term "proclaiming" was now no longer appropriate, with the power being at Ministerial level, although it had continued to be used even when an amendment in 1965 gave the powers to the Minister of Works) road stopping, taking of severed areas, and the vesting of land.

These procedures continued to be the most frequently used in the Ministry of Works and Development. When the Ministry was abolished in 1988, the administration of other Parts of the Public Works Act 1981 dealing with roads, limited access roads, motorways and access ways and service lanes was transferred to the Ministry of Transport.

Part VIII was the exception, as it was an important part of the work done by Ministry staff, and could not be wholly divorced from other actions under section 20—in some cases both procedures were used for a single stretch of road. At the same time, it does seem anomalous that a Minister whose responsibility here is dealing primarily with the acquisition of land can actually give the land the status of road, access way, or service lane.

From time to time it is suggested that the administration of Part VIII could be left to local authorities themselves, in respect of roads controlled by them. The main argument that can be made for giving the powers and functions to a Government department is that it gives the opportunity to check that the consents are complete and correct. The district land registrar does not have that function as, under subsection (6):

> The publication in the Gazette of any notice purporting to be issued under this Part of the Act shall be conclusive evidence that all conditions precedent to the issue of the notice have been complied with, and no person shall be concerned to enquire whether any consent has been given or other condition attaching to the issue of the notice has been fulfilled.

Because of this, Land Information New Zealand becomes the last checking post in respect of documentation prior to a Part VIII, whether this is for the Crown or a local authority.

Acquisition pursuant to a middle line Proclamation

An important part of the history of Public Works Act acquisition is the provision of procedures to take land pursuant to a middle-line Proclamation. The system was used to deal with public works that were constructed in a continuous line such as motorways or transmission line. Unlike the present procedure, under which an objector would ask the Environment Court to consider whether alternative routes had been considered, the middle-line procedure did not allow for objections.

Section 18 of the Public Works Act 1928, which exempted land from compulsory acquisition when it had buildings, cemeteries, etc, did not apply to land required for motorways or railways. Land acquired for motorways under middle line procedures frequently involved the taking of private homes, as well as cemetery land (e.g. Symonds Street in Auckland and Bolton Street in Wellington).

The use of middle line Proclamations, originally for the creation of railway lines, was authorised from the first Public Works Act. Part VI of the Public Works Act 1876 authorised the Governor to issue a Proclamation defining the middle line of a railway, and the Minister was then to lodge such maps and plans as were necessary to explain the middle line Proclamation, in the Supreme Court.

The Proclamation would give the Minister authority, on 21 days' notice, to enter land and do what was necessary for the construction of a railway, "without being deemed to commit any trespass thereby".

The Minister was required within three years of the issue of the Proclamation to determine the final line of the railway that was required to be permanently taken for the railway.

The provisions of Part VI of the Public Works Act 1876 were continued in the Public Works Act 1882. The extent of the rights (or lack of rights) of the owner of land, can be seen in section 130(5) to (7) (which follow issue and lodging of the middle line Proclamation:

> (5) At any time either before or after issuing any Proclamation taking land for a railway, the Minister shall cause notice to be given to every owner or occupier of such land, so far as they can be ascertained, and in such notice shall state that the land therein described is taken or intended to be taken for a railway, and that claims for compensation in respect thereof must be sent to the Minister pursuant to the provisions of this Act. With such notice a plan of the land taken or intended to be taken shall be sent. The omission to send any such notice or plan shall not invalidate any Proclamation taking the same.
>
> (6) No Proclamation taking land shall be impeached or defeasible on any ground whatsoever.
>
> (7) If any person in possession of any land taken, purchased, held, or acquired for a railway refuses to give up possession, or hinders the Minister or any person appointed by him from taking or entering into possession, the Minister may issue his warrant to the Sheriff of the Sheriff's district within which the land is, to deliver possession of the same to the person appointed in the warrant to

> receive the same; and upon the receipt of the warrant the Sheriff shall deliver possession of any such lands accordingly.

The procedure in section 188 of the Public Works Act 1905 is substantially similar to this.

Section 128 said:

> So much of the twenty-second, twenty-third, twenty-fourth and twenty-fifth sections of this Act as relates to the giving notice to persons to make object to any works proposed to be executed, and to the hearing of such objections, shall not apply to a railway made under the authority of a special Act and of a Proclamation made under this Part of this Act.

In other words, this was a form of compulsory acquisition in which the owner of the land had no power to object to the Minister.

The middle line provisions were extended so as to apply to motorways by section 4(2) of the Public Works Amendment Act 1947:

> Where under the powers conferred upon him by this Act the Governor-General desires to construct a motor-way he may issue a Proclamation defining the middle-line of the motor-way or any part thereof, and in every such case the provisions of sections 216 and 217 of the principal Act shall, as far as they are applicable, and with the necessary modifications, apply in respect of the construction of the motor-way in like manner as if a railway were to be constructed.

This cross-reference to railway middle lines came through to the Public Works Act 1981 in section 139. Sections 36 to 39 were now the substantive provisions which authorised middle lines. It is notable that the power that was originally given to the Governor-General (to define a middle line by Proclamation) was now in the hands of the Minister of Works and Development (to define a middle line by notice in the Gazette). The compulsory taking of land was still carried by Proclamation signed by the Governor-General.

Speaking in the second reading of the Public Works Bill in 1981, the Minister of Works and Development Mr Friedlander said:

"Clause 36, relating to middle line notices, is to be amended by making it mandatory to designate land under the Town and country Planning Act before that land can be taken compulsorily. In the past, land that is subject to a middle line notice has been able to be taken without the right of objection. The proposed change will ensure that the landowner has a right of objection at the time of the designation."

The Public Works Amendment Act 1948 enacted some substantial sections dealing with electricity transmission lines. In particular section 43(2) extended the middle line provisions to include this new category:

> Where, under the powers conferred by the principal Act or by any other Act, it is proposed to construct, erect, or lay down any transmission-line over, upon,

> or under any land, the Governor-General may issue a Proclamation defining the middle-line of that transmission-line, or any part thereof, and in any such cases the provisions of section two hundred and sixteen of the principal Act shall, as far as they are applicable, and with the necessary modifications, and except in so far as the same may be inconsistent with the provisions of this section, apply in respect of the construction of the transmission-line in like manner as if a railway were to be constructed.

Later this authorisation was to be found in section 14 of the Electricity Act 1968, until that section was repealed by the Electricity Amendment Act 1992.

Sections 139 of the Public Works Act 1981 was repealed by the Transit New Zealand Act 1989, and was substantially reproduced in section 72 of that Act. That section was repealed along with sections 36 to 39 of the Public Works Act 1981, by the Resource Management Act 1991.

It appears that when the tide turned against this simplified type of Proclamation, which so reduced the rights of land owners, was driven by the Ministry for the Environment, which sought the repeal of all such legislation. It was perhaps timely, as most of the major railways had long been completed, and most motorways required for urban areas were up and running.

A transitional provision (section 36A) was inserted into the Public Works Act 1981:

> Where a notice has been issued in the Gazette defining the middle line of a road or railway line under sections 36 to 39 of this Act, that notice shall continue to have effect until its expiry or until the fifth anniversary of the date of commencement of the Resource Management Act 1991, whichever date first occurs, as if sections 36 to 39 of this Act had not been repealed.

Acquisitions for defence purposes

Another matter that was considered to be so important to the realm that the usual rules of acquisition were to be modified was defence.

Part IX of the Public Works Act 1905 was devoted to defence works, and empowered the Minister for Public Works to close roads and streets and take those closed roads, streets or other land for any fortification or other work for defence purposes.

The definition of "fortification" or "defence purposes" included any fortification or other work intended to be used for the purposes of defence, and all roads necessary for approach. The procedure for taking the land was very brief—set out in the first three paragraphs of section 223(1):

(a) A map shall be prepared in duplicate, showing accurately the position and extent of the land' road or street proposed to be taken or kept free from obstruction.

(b) Such map shall be signed by the Surveyor-General, or some authorised surveyor appointed by him to certify plans for the purpose of any Act relating to the conveyance or transfer of land, as evidence of the accuracy thereof.

(c) The Governor may thereupon, by Proclamation publicly notified, declare that such land or road or street, or part thereof, a description whereof shall be contained in or annexed to the Proclamation, is taken or closed for defence

purposes, or required to be kept free from obstruction in respect of the use of any fortification.

Subsequent sections confirm that the owner of land is entitled to compensation for the loss of loss (while there is no compensation for firing or artillery, except in respect of damage to a house).

It would appear that these provisions were a legacy of the land wars, as there is an immediacy about the nature of what is being acquired or protected. The numerous references to "obstructions" apply to houses, trees, etc, which would impede the use of the artillery.

The essentials of this Part of Public Works Act 1908 subsequently came to form Part IX of the Public Works Act 1928, which remained substantially the same, notwithstanding an amendment in 1978 to the procedure for land taking land.

By the time of the Public Works Act 1981, Defence needs were not seen as having such priority. Accordingly Part XV of the Public Works Act 1981 consists of only two sections—section 184 (as amended in 1988) authorising the Crown to construct defence works, and section 185 prescribing the penalty for mutilating or taking away defence works, or associated survey pegs, etc.

Acquiring land by agreement

When acquiring by agreement was introduced it was still necessary to give effect to the purchase by a Proclamation signed by the Governor-General. This remained the case when the provisions were re-enacted as section 32 of the Public Works Act 1928. Subsequently section 32(4), which required a Proclamation, was re-enacted in a new form by section 4 of the Public Works Amendment Act 1962.

This gave the Minister of Works the power to sign a declaration stating that the land was thereby acquired for a public work. He was to be satisfied first that a sufficient agreement had been entered into with the owner by the Crown (usually signed on his behalf by an authorised person in the Ministry of Works) or by the local authority.

A new subsection 4A said that the declaration would have the force of, and be deemed to be, a Proclamation under the Act. Subsection (6) said that the provisions of the Act would apply to land purchased, conveyed or surrendered under this section, except that the compensation provisions would not apply unless that was specially provided.

Although section 32 of the Public Works Act 1928 did not expressly refer to transfer by memorandum of transfer under the Land Transfer Act, in practice the Ministry of Works used a memorandum of transfer in some cases. State housing and Maori housing land was frequently transferred to the Crown in that manner.

Section 20 of the Public Works Act 1981, which was the equivalent of section 32 in the 1928 Act, continued this option. For the first time there was express authorisation for the use of a memorandum of transfer (section 17(2)).

The Public Works Act 1981 put a greater emphasis on acquiring by agreement than earlier Acts had. Even where compulsory acquisition was contemplated, section 18(1)(d) required the Minister or local authority to “make every endeavour to negotiate in good faith with the owner to reach an agreement for the acquisition of the land."

Until this time, the Minister of Works and Development personally signed declarations, although the power to sign the agreement had been delegated to some officers of the Ministry of Works and Development, and most agreements were executed by district solicitors. The power to sign declarations under section 20 was first delegated to persons in the Ministry of Works and Development in the late 1980’s. At the time of the abolition of the Ministry of Works and Development, an amendment which inserted sections 4A to 4C clarified the issues of who was to sign documents and how ministerial powers could be delegated.

The first Public Works Acts, from 1876 onward, read as though the Minister would carry out all functions personally, although it was recognised that in many cases the actual work would be carried on by the department or other people contracted to carry it out.

Compensation certificates

Compensation certificates were first authorised by section 17 of the Public Works Amendment Act 1948.

The object of a compensation certificate is to record details of an agreement which has been reached for the acquisition of land, against the affected certificate of title. The effect of this, according to subsection (6) was as follows:

> “Registration of a compensation certificate shall affect with notice of the agreement to which it refers all persons having any estate or interest in the land comprised in the titles against which the compensation certificate is registered, and in mortgages and charges of that land, and in rights, easements, and appurtenances belonging to that land, or therewith usually held and enjoyed, and their successors in title.”

Compensation certificates were a useful way of recording agreed terms against a certificate of title, and thus protect the agreement. Completion of the requirements of an agreement could often take a long time because of the need for survey office plans, or dealing with the interests of people such as mortgagees. If the owner died prior to settlement, a new buyer might take title without knowing of the arrangement with the Crown and, in the absence of any fraud, section 182 of the Land Transfer Act 1952 would protect that buyer.

Registration of a compensation certificate would fix the purchaser or potential purchaser with notice of an agreement for a purchase of all or part of the land, or in respect of damage or temporary occupation.

An addition to section 17(1), inserted by section 33 of the Public Works Amendment Act 1975, allowed compensation certificates to be used in respect of "the imposition of any conditions or restrictions in respect of land", where those conditions or restrictions had been imposed by agreement. In these cases, a compensation certificate had the effect of recording a form of encumbrance of the title. So, if the owner had agreed to keep the land free from combustible materials or trees of a certain height, this restriction would run with the land.

In the Public Works Act 1981, the corresponding section dealing with compensation certificates is section 19. Its wording goes one step further in specifying the effect of the certificate:

> "(5) Every person who acquires an estate or interest in any land in respect of which a compensation certificate under this section has been registered shall be bound by the agreement to which it relates to the same extent as the person from whom he acquired the estate or interest."

While there may be no difference in practice, this wording puts it beyond doubt that the agreement is to be binding on persons who subsequently acquire an interest in the land.

The provisions relating to compensation certificates were used in section 115 of the Public Works Act 1981 as the model for a similar certificate to protect Part VIII proposals. This certificate was first introduced in the 1981 Act after legal staff in the Ministry of Works and Development found that there was a need to "freeze" the position when consents were being obtained to the proclaiming of land as road.

For example, a local authority might be legalising a road widening which affected a line of properties. By the time all consents had been obtained, an owner who consented at an early stage might have sold, or have a new mortgage registered against his or her land. Subsection (4) of section 115 said that the consents of person who acquired an interest after the certificate was registered would not be needed.

Compulsory acquisition of land from Maori

As discussed in the following sections of this paper (see "compulsory acquisition of land for return to Maori" and "Offer back—predecessors to section 40") procedures for righting breaches of the Treaty of Waitangi through the exercise of Public Works Act powers were slow to develop.

"Article the Second" of the Treaty is as follows:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and the tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands, Estates, Forests and Fisheries and other properties which they may individually or collectively possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes, and the individual Chiefs yield to Her Majesty the exclusive right of pre-emption of such lands as the proprietors thereof may be disposed to alienate at such Prices as may be

> agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

In short, Maori were entitled to keep their land until they wanted to dispose of it, at which point the Crown would have a right of pre-emption.

At no stage did any Public Works Act exclude Maori land from compulsory acquisition. (Individual acts made exceptions. For example, section 5 of the Housing Act 1955 has a proviso "that no Maori land shall be taken for State housing purposes without the consent of the Minister of Maori Affairs".)

When the National Government published a promise in its 1978 election manifesto that a National government would not take any Maori land compulsorily, the High Court held that the policy could not be applied because it was not a policy of the Act itself. (*Dannevirke Borough Council* v *Governor-General* [1981] 1 NZLR 129).

An important act for acquiring Maori land, which was not included in the 1876 consolidation of public works legislation, was the New Zealand Settlements Act 1863. This is the notorious "raupatu" or confiscation legislation that was a response to the land wars. Its lengthy preamble begins with the words

> Whereas the Northern Island of the Colony of New Zealand has from time to time been subject to insurrections amongst the evil disposed persons of the Native race to the great injury alarm and intimidation of Her Majesty's peaceable subjects of both races…

And ends:

> Whereas the best and most effectual means of attaining those ends [i.e. permanent protection and security of both races] would be by the introduction of a sufficient number of settlers able to preserve themselves and preserve the peace of the Country

Section II empowered the Governor in Council, when "satisfied that any Native Tribe or section of a Tribe … has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority", to declare the district to come under this Act.

Section III then empowered the Governor to set apart land within the district for settlements for colonisation, and section IV stated:

> For the purposes of such settlements the Governor in Council may from time to time reserve or take any Land within such district and such Land shall be deemed to be Crown Land freed and discharged from all Title Interest or Claim of any person….

Section IV provided for the payment of compensation, with five classes of person who would not be entitled to any compensation. These were mainly people who had made war against the Crown or who assisted in various ways.

Under section VI the Governor could by Proclamation require people to submit to trial as to whether they were guilty of any of the offences set out in section 5, and if they did not submit to trial they would not be entitled to any compensation.

Compensation Courts were established under this Act, with the Governor appointing judges.
Under section XIX proceeds of the sale of any land taken under this Act were to be applied to the suppressing of the insurrection, the formation of the settlements, and the payment of compensation.

According to the preamble of the Waikato Raupatu Claim Settlements Act 1995, "the Crown unjustly confiscated approximately 1.2 million hectares from the Tainui iwi in order to punish them…."

The Native Land Act 1873[12] being a consolidation and amendment of earlier Maori land acts, generally worked to protect the interests of Maori land owners. Where a sale was proposed, the Court was to be "satisfied of the justice and fairness thereof." Section 60 said:

> "Before the completion of the sale of any land held under a Memorial of ownership, the Court shall explain to the owners that the effect of such sale will be absolutely to transfer their own rights in the land to the proposed purchaser without any further claim on their part, either on the land or on its proceeds, and the Court shall satisfy itself in every case that the owners understand such effect."

Section 75 authorised the court to declare, after a valid sale, that the land was in future to be held on a freehold tenure, and the Native title extinguished.

Section 106 said that, from land granted by Crown grant to Maori,

> "it shall be lawful for the Governor at any time thereafter to take and lay off for public purposes one or more line or lines of road or railway through the said lands, provided that the total quantity of land that may be taken for such line or lines of road shall not be more than after the rate of five acres in every one hundred acres…." The power would cease ten years after the grant.

Another proviso was that "nothing herein contained shall authorize the takings of any lands which shall be occupied by any pahs, Native villages or cultivations, or by any buildings gardens orchards plantations burial or ornamental grounds…."

The **Public Works Act 1876** does not include any sections dealing with the way that Maori land was to be taken or how compensation was to be paid for it.

In the **Public Works Act 1882** the powers given to the Governor in the Native Land Act 1867 was extended to apply to "land held by Natives under certificates of title or memorial of ownership, subject to the same limitations (section 23).

Section 24 then said:

> "Whenever it may be necessary to take any land for any Government work which may be held or occupied by Native owners, under any tenure or for any estate or interest whatsoever, the Governor in Council may order that such

[12] see also the Native Lands Act 1865, the Native Lands Act 1867, and the Native Lands Act Amendment Act 1869

> work shall be constructed on or through any such land, to be defined in general terms in such Order in Council, without complying with any of the provisions hereinbefore contained."

The "provisions hereinbefore contained" include section 10, which sets out the general procedure for a compulsory acquisition, including the right to object and to a hearing of the objection.

By contrast section 25 sets out the procedure following an Order in Council in respect of Maori land:

> "Upon the gazetting for two months of any such Order in Council, the Governor may take and hold all such lands as may be necessary for the construction of such work, and may enter upon any lands for the purpose of taking surveys or levels, without giving any notice or making any application to any person owning or occupying such lands other than such as may be prescribed by the Order in Council:
> Provided that no person shall be entitled by virtue hereof to enter upon any cultivated land so as to damage any crops growing thereon, or on which dwellings if any kind may be erected, without the consent of the person occupying the same."

Compensation was to be determined by the Maori Land Court, in accordance with the general provisions on compensation, except in the case of title derived from the Crown, which was to be dealt with in the same manner as general land as far as compensation was concerned.

The provisions in Part IV of **the Public Works Act 1894** modify those in the 1882 Act in some respects. They begin with section 87—"Notwithstanding anything contained in any law in force to the contrary, any Native land and any land owned by Natives under title derived from the Crown may be taken for any public work in the manner hereinafter provided."

Section 88 then sets out the procedure. After a map of the land to be affected has been prepared the Governor in Council can then make an Order in Council declaring that the land is deemed to be taken for the public work and vested in the Crown or the local authority. The Order in Council is to be gazetted at least one month later, and the land vests in the Crown or local authority from a date specified in the Order in Council, being at least one month after gazetting of the Order in Council.

Again this contrasts with the provisions for the taking of other land compulsorily for a public work (sections 17 and 18), where persons affected have forty days to lodge an objection following the gazettal of a notice.

Part IV did not apply to land required for a railway or defence purposes, which were covered by their own procedures. The ordinary provisions for acquisition could be applied in the case of title derived from the Crown (section 88(2)).

Part IV was re-enacted in essentially the same terms in the Public Works Act 1905, and in the Public Works Act 1908.

Similarly the Public Works Act 1928 sets out in Part IV the same procedure for acquiring "Native land and any land owned by Natives under title derived from the Crown".

Sections 102-104 dealt with the procedure for taking the land (still without any objection rights being mentioned, and with the procedure for claiming compensation in the Maori Land Court.

Section 104 was later repealed and replaced by section 6 of the Public Works Amendment Act 1962, which allowed section 32 (taking by agreement) and Part III (general compensation provisions) to apply to land taken from Maori under Part IV.

The same amendment repealed section 105 and 106, relating to the assessment of compensation, and appeals. Under the new section 104 the Maori Trustee was charged with bringing claims on behalf of Maori from whom land had been acquired (except in respect of existing claims under section 104, which the Maori Trustee could complete).

The remaining sections of Part IV (102, 103 and the re-written 104) were repealed by section 12(8) of the Maori Purposes Act 1974. In the same year, Part IX of the Maori Affairs Amendment Act provided a procedure for having agents appointed so that Maori land in multiple ownership could be acquired by agreement.

Incidentally it may be noted that the original versions of section 23 of the Public Works Act 1928, (notices of intention to take land), and section 104 (dealing with claims for compensation in respect of Maori land taken) refer to a document called the *Kahiti* or "Maori Gazette". This was defined in the Acts Interpretation Act 1924 as a gazette for matters which Ministers of the Crown considered appropriate for publication in the Maori language. Early in the life of the Public Works Act 1928, the *Kahiti* ceased publication, and section 47 of the Finance Act 1931 (No.2) declared that publication in the New Zealand Gazette would be equivalent to it.

The Public Works Act 1981, while not containing any special provisions for the compulsory acquisition of land from Maori, expressly recognised in section 17(4) the availability of the Maori Land Court to enable agreement to be reached:

> "If the land sought is—
> (a) Maori freehold land as defined in section 2 of the Maori Affairs Act 1953; and
> (b) Beneficially owned by more than 4 persons; and
> (c) Not vested in any trustee or trustees—
> The Minister, or any person authorised generally or particularly in writing by him, or the local authority as the case may be, may apply to the Maori Land Court for the district in which the land is situated for an order under the provisions of Part IX of the Maori Affairs Amendment Act 1974. The Maori Land Court shall deal with the application as is a notice under an enactment had been issued to those owners."

The failure to make any substantial changes to the Act so as to stop the taking of Maori land was a disappointment to some groups. The Hon. Koro Wetere, in the debate on second reading, assured the Speaker that matters relating to the protest at Bastion Point had been addressed in the Committee stages of the Bill. He asked why Maori land could not be used under lease more frequently, as was done at the Huntly Power Station.

The Maori Land Act 1993 (Te Ture Whenua Maori Act 1993) states in its preamble that the Treaty of Waitangi created a special relationship between Maori and the Crown, and that land is a taonga tuku iho of special importance to the Maori people, so that it was desirable to promote its retention in the hands of its owners.

Alienation of Maori freehold land is not to take place in accordance with that Act (section 146), and "alienation" is defined in section 4 as including an agreement for the acquisition of the land under the Public Works Act 1981.

Although Te Ture Whenua Maori Act 1993 made amendments to section 41 of the Public Works Act 1981, there is no corresponding amendment in respect of section 17(4). To clarify the matter, it would be desirable for the subsection to be replaced in any new act or amendment act.

Compulsory acquisition of land to return to Maori

Restructuring of central and local government bodies, which commenced with the passing of the State-Owned Enterprises Act 1986, has led to provisions in a number of acts which would allow land to be acquired by the Crown for return to Maori.

The Treaty of Waitangi (State Enterprises) Act 1988 arose because some Maori were concerned about the effect that the transfer of land held for public works would have on their claims to the Waitangi Tribunal.

Traditional legal teaching was that New Zealand was settled "by discovery" and that the Treaty of Waitangi did not form part of the law of New Zealand. This was on the basis that New Zealand was not a nation under a single government at the time that the treaty was signed, and the chiefs of tribes who signed were therefore not in a position to make it binding on New Zealand as a country.

The preamble of the Treaty of Waitangi Act 1975 stated "…it is desirable that a Tribunal be established to make recommendations on claims relating to the practical applications of the principles of the Treaty…." Section 3 said that the Act was to bind the Crown and the Waitangi Tribunal was established under section 4.

With this legislation in place, many claims in respect of land, including acquisitions under Public Works Acts and confiscatory legislation, were lodged.

The procedures in the State-Owned Enterprises Act 1986 involved transferring land from Crown ownership to State-owned enterprises, which were separate legal entities to be registered under the Companies Act 1955. Section 24 of the State-Owned Enterprises Act 1986 said that this transfer would not be subject to the requirements

of sections 40 or 41 of the Public Works Act 1981, although the land would be subject to those sections after the transfer.

Maori interests were protected by two sections of the State-Owned Enterprises Act 1986:

Section 9 said,

> "Nothing in this Act shall permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi."

Section 27 said that the transfer to a State-owned enterprise of land subject to a claim under the Treaty of Waitangi Act 1975 would be subject to that claim. If the Tribunal recommended the return of the land to Maori owners, the Crown was resume the land for that purpose and pay the State-owned enterprise an amount equal to the value of the land.

The New Zealand Maori Council was not satisfied that sufficient protection was given to claims under this section. They were concerned that some land would be sold by State-owned enterprises before a claim could be commenced. Before the transfer of land to the State-owned enterprises could begin, they (with Graham Stanley Latimer as joint applicant) brought proceedings for judicial review against the Attorney-General in the High Court on 30 March 1987. The proceedings, because of the importance of the issues, were moved to the Court of Appeal by an order dated 1 April 1987.

The Court of Appeal said its in judgment that the Treaty of Waitangi was to be regarded as a part of the law of New Zealand to the extent that it was recognised in statute law. Sections 9 and 27 clearly showed that principles of the Treaty were intended to be applied in the context of transferring Crown assets to State-owned enterprises.

The Court held that the Crown must establish a system that would safeguard the Maori interests, and in particular (as set out in the preamble to the Treaty of Waitangi (State Enterprises Act 1988):

> "(i) Including power for the Waitangi Tribunal to make a binding recommendation for the return to Maori ownership of any land or interests in land transferred to any State enterprises under that Act; and
> (ii) Requiring the Waitangi Tribunal to hear any claim relating to such land; and
> (iii) Precluding State enterprises and their successors in title."

The Treaty of Waitangi (State Enterprises) Act 1988, made amendments primarily to the State-Owned Enterprises Act 1986, the Treaty of Waitangi Act 1975, and the Public Works Act 1981. Part I inserted new sections in the Treaty of Waitangi Act; Part II inserted sections in the State-Owned Enterprises Act 1986, and Part III (now repealed) amended the Legal Aid Act 1969.

The amendments to the Treaty of Waitangi Act 1975 provided a procedure for making a claim in respect of land which had been transferred to a State-owned enterprise. In the event of a recommendation by the Waitangi Tribunal finding that the claim was well-founded, it could further direct (and this would not be the outcome in all cases) that the land was to be resumed under section 27B of the State-Owned Enterprises Act 1986 for return to Maori.

The only direct reference to the Public Works Act 1981 in the amendments to the Treaty of Waitangi Act 1975 is in section 8A(5), which says that the land when resumed will cease to be subject to sections 40 and 41 of that Act.

The amendments to the State-Owned Enterprises Act 1986 affect the Public Works Act 1981 more directly. Section 27C requires the land to be resumed under the Public Works Act 1981 as if it were required for both a Government work and a public work, and sections II, IV, V, VI, and VII of the Public Works Act would apply.

Schedule 2A of the Treaty of Waitangi (State Enterprises) Act 1988 contains modifications of the Public Works Act to apply when there are resumptions under section 27B of the State-Owned Enterprises Act 1986.

The modifications may be summarised thus—

- The notice of intention to take does not specify a period for objections, as persons with an interest in the land do not have such a right.
- Sections 24 and 25 dealing with the hearing of objections therefore do not apply.
- The usual information about the proposed work and how the land is to be used is replaced with "a statement that the land is to be resumed under section 27C of the State-Owned Enterprises Act 1986 pursuant to a recommendation of the Waitangi Tribunal".
- There is a modification of section 26(1) (when Proclamation may issue) reflecting the fact that the Proclamation may issue after twenty working days, and not by reference to objections and decisions of the Environment Court.
- The wording of a notice of intention as prescribed in the First Schedule is substituted by a differently worded form, reflecting the fact that the Minister of Lands is obliged to acquire the land, and that there is no right of objection.
- Similarly there are modifications to the form for claiming compensation in Table A of the Third Schedule to reflect these variations.

Similar provisions in other legislation followed—
Section 213 of the Education Act 1989
Fifth Schedule to the New Zealand Railways Corporation Restructuring Act 1990
Third Schedule to the Waikato Raupatu Claims Settlement Act 1995

Sections 42A and 42B

Preparation of the Waikato Raupatu Claims Settlement Act 1995 raised the question the effect on section 40 and 41 rights when land was returned to Maori ownership. This led to the passage of sections 42A and 42B of the Public Works Act 1981, as discussed on page 62.

Compensation

From the first Public Works Acts there has been provision for compensation when land is taken or damaged in connection with public works.

Availability of compensation (principle that land is not to be taken unless compensation is available

The term “compensation” is more often used in this legislation than, say, “purchase price”, as there is a perception that the owner is being compensated for a loss, the initiative for the sale having been with the body acquiring the land, i.e. the Crown or local authority.

In these circumstances the person from whom the land is being taken or acquired will receive recompense for matters which an ordinary vendor would not, such as shifting costs.

Full compensation

The term “full compensation”, is used in all Public Works Acts in New Zealand, starting with section 33 of the Public Works Act 1876:

> “Every person having any estate or interest in any lands taken for, or injuriously affected by, any public works under this Act, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Minister, County Council, or Road Board, as the case may be, by whose authority such works may be executed or power exercised.”

Generally the term “full compensation” is taken to mean putting the owner in a financial position as close as possible to what he or she would have enjoyed if the acquisition had not taken place. It is on this basis that the High Court has sought in cases such as *Drower* and *Coombes* to devise formulae for awarding interest and adjusting amounts in line with the Consumer Price Index.

The kinds of compensation available have been added to over the years. An examination of the amending legislation and revisions over the years shows that the addition of contributions for matters such as legal costs and removal expenses has been a gradual process.

Looking at section 61 of the Public Works Act 1876, one has the impression that not every claimant would have received full compensation:

> Costs payable by the claimant may be deducted from the compensation payable to the claimant under the award; and if such costs exceed the compensation payable, the award shall be for the payment by the claimant of the amount of such excess.

While the second half of section 61 seems rather draconian, provision still remains for such a negative award, in substantially the same terms, in section 91 of the 1981 Act. In practice, with provision for payment of such items as reasonable legal costs, it

would be unusual for a claimant to end up in this position unless he or she was purely pressing for a type of compensation that was not payable.

Limits on right to compensation

Essentially compensation is just that—a payment to compensate for damage or loss, not an opportunity to obtain the maximum profit from a sale. Section 62 of the Public Works Act 1981 states some of the principles in this regard:

(1) The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions.

(a) Subject to the provisions of sections 72 to 76, no allowance shall be made on account of the taking of any land being compulsory.

Thus, the valuation is geared to its true value. Section 72 makes allowance for a solatium payment as some recompense for the element of compulsion, and there are also provisions for additional payments covering expense where the land was taken following notification.

(b) The value of the land shall, except as otherwise provided, be taken to be that amount which the land, if sold on the open market by a willing seller to a willing buyer on the specified date might be expected to realise…[exceptions].

Valuations made on the basis of this paragraph usually include references to comparable sales in the district.

(c) Where the value of any land taken for a public work has on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account.

(d) The special suitability or adaptability of the land, or of any natural material acquired or taken under section 27 of this Act, for any purpose, shall not be taken into account if that purpose is a purpose to which it could be applied only pursuant to statutory powers, or a purpose for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government department or of any local authority.

Another limit placed on compensation can be seen in section 63, relating to payment of compensation for injurious affection. Here the action will succeed only if the claimant would have succeeded under the common law.

English common law cases have recognised since the nineteenth century that there is a limit to the matters which are actionable—construction of buildings and works is something that people need to recognise as one of the realities of life, and a reasonable of noise and dust is allowed without any person affected being empowered to pursue court action.

A search of local legislation dealing with compensation will show that that the entitlements of land owners to compensation as prescribed in the Public Works Act

have frequently been varied. Many of these Acts provide for the local authority and the owner to reach agreement on the compensation to be payable, and for the Public Works Act machinery to be used if they cannot agree. Such legislation may exclude compensation altogether for some claimants[13], or make land available as compensation.[14]

Part IIIA of the Public Works Act 1928: Additional Compensation"

The new compensation provisions enacted by the Public Works Amendment Act 1970 (later amended by the Public Works Amendment Act 1973 and the Public Works Amendment Act 1975) were a response to a public demand for better compensation provisions in the Public Works Act 1928. The news media, Federated Farmers and Maori groups, among others, called for fuller recompense for their loss when land was taken compulsorily for works such as roads and motorways. Often the call was for a "home for a home", e.g. in submissions from the St Albans Residents Association and from the Home for Home Movement.

Solatium

Section 101B instigated the payment of $2000 "by way of solatium", which was a sum to be paid in addition to purchase price and other payments. Essentially this was to be some recompense for the loss and disruption when land was taken—limited to land containing a dwelling used as a private residence which had been the subject of a designation or requirement.

The figure of $500 was originally specified and this became $2000 in the 1975 Amendment. This figure, continued under section 72 of the Public Works Act 1981, has been in place for 25 years, and now seems to be extremely low given that the value of land has multiplied during this time.

Because of this passage in time, some local authorities have taken it upon themselves to raise the amount of solatium to something more substantial, while this department has not done so because of the lack of statutory authority to pay this amount from taxes.

Section 101C: Additional compensation to assist in purchase of a dwelling

Section 101C sought to deal with the situation where persons were obliged to shift from their private residence and were unable to purchase a comparable dwelling place for the amount that they were receiving in compensation.

Such a payment was discretionary, and limited by a number of preconditions. Only the owner (or spouse of the owner) of the land at time when the designation was imposed could receive this compensation. He or she had to be dwelling on the land immediately before vacant possession was given, and the loan would be made on the

[13] e.g. section 8 of the Balclutha Borough Vesting and Empowering Act 1950 excludes liability in respect of improvements made after a stated date
[14] e.g. section 7 of the Auckland Harbour Improvement Act 1888

basis of lack of means, and age or infirmity, or solely on the basis of age or infirmity. If it was on the basis of age or infirmity and lack of means, the amount paid (in excess of $1000) became a charge on the estate or interest of the person in the land acquired by him or her. A statutory land charge could be registered against the land.

Refund of expenses incurred in negotiations for designated land no longer required

Section 101D (enacted in the Public Works Amendment Act 1970) recognises that the designation of land to be acquired for a public work involves the owner of the land in expenses—such as legal and valuation assistance.

If at any stage of the negotiations the Crown or local authority decides to withdraw the designation and not to acquire the land, the owner may be left with large accounts to pay. The obligation under section 101D(1) is that

> the designating authority shall, on receiving an application in that behalf from the owner of the estate or interest, pay to the owner such sum of money as the authority considers will fairly reimburse him for the costs incurred by him in entering into the negotiations.

Subsection (2) disallows claims that are made more than six months after the land was designated or made the subject of a requirement. In section 76 (equivalent in the Public Works Act 1981) the six-month period runs from the time that the notification was cancelled or withdrawn, the Proclamation or declaration was revoked, or the owner was informed that the negotiations would be discontinued. This appears to be a more realistic and fair period of limitation.

Section 101F: Additional compensation to assist in purchase of farms, commercial, or industrial property

Section 101F was enacted by the Public Works Amendment Act 1975 to deal with the situation where a farming, commercial, or industrial business was shifted as part of the process of having land taken for a public work.

The additional compensation was payable when the owner was unable to acquire comparable land for the sum of compensation being paid, and would not exceed 15% of the value of the land being acquired for a public work. The additional compensation would then constitute a debt due by the person to whom it was paid, and the notifying authority could register a certificate under the Statutory Land Charges Act 1928.

Adaptation into Public Works Act 1981

The “additional compensation” provisions that formerly made up Part IIIA of the Public Works Act 1928 were re-enacted in Part V of the Public Works Act 1981 as sections 72 to 76. One aspect of the requirements here that was clarified is that the

"shadow of compulsion" is necessary before there is any entitlement to such additional compensation.

Section 72 (solatium), section 73 (assistance to purchase dwelling), and section 74 (assistance to purchase farm, commercial, or industrial property) are all restricted in this way. The money is not payable unless the owner was not a willing party to the taking or acquisition of the land, or was a willing party to the taking or acquisition principally because the land had been notified.

This differs from the earlier legislation, which referred to land taken at the instigation of the notifying authority, or land taken or acquired "otherwise than at the request or instigation of the owner". The reality is that designations may lead an owner to take the initiative in selling to the requiring authority, knowing that a prudent purchaser on the open market would find out about the designation before entering into an agreement.

"Alternative compensation"—land for land

Frequently there has been a call from farmers or Maori groups for compensation to take the form of land comparable to the land which is being taken or acquired. At least since 1905 there has been provision for a vesting of land in exchange. Section 86 of the Public Works Act 1876 read:

> In payment or satisfaction or in part payment or satisfaction of the compensation payable for any land which has been or which may hereafter be purchased, taken or acquired, or for any damage done, or which may hereafter be done by reason of the construction or use of a public work, the Governor may grant to the person entitled any Crown land or any land reserved or taken, purchased, or acquired for the use, convenience or enjoyment of the said public work, but which was not required for such public work:
>
> Provided that, before such land is conveyed, the Minister shall certify that the land to be conveyed has been valued by a competent person, and the total value (with money compensation, if any) does not amount to more than the sum which would be paid by the Government for the land taken, purchased, or acquired, or for any damage done if compensation for the same were made wholly in money in the usual way.

So the source of an exchange at that time would be either Crown land or land acquired for the "use, convenience or enjoyment" of a work. In effect the requirement for the latter class of land was that it was surplus.

This wording appears with little alteration as section 99 of the Public Works Act 1928. Later it was repealed and substituted by a new section 99, enacted by section 4(1) of the Public Works Amendment Act 1965. The new version considerably more detailed (including provisions for bringing down encumbrances and reserving rights to coal to the Crown), setting out the duties of the Chief Surveyor, District Land Registrar, and the Commissioner of Works General Manager of Railways. The Commissioner and General Manager now had the power to execute a certificate vesting the land in the person entitled. The certificates were popularly referred to as "vesting certificates".

By now the categories of land were extended to land that was held for a public work as well as land held for use convenience or enjoyment.

Vesting certificates were commonly used to give small pieces of land to persons whose land had been taken. Sometimes this would arise from road realignment.

The alternative means of vesting stopped road and land severed by a new road was to use section 24 of the Land Act 1924, dealing with the legalisation of roads. When that section was repealed and substituted by section 29 of the Public Works Amendment Act 1948, this was a further option for the Ministry of Works.

Indeed section 29 notices were probably the most commonly type of document executed under the Public Works Act, and many of them effected land exchanges. This remains true of the present equivalent, Part VIII of the Public Works Act 1981, in which sections 117 provide for the vesting of stopped road and severed land.

In 1976, the Government of the day decided to respond to the call for "a home for a home", leading to the enactment of sections 32A and 101H of the principal act.

Section 32A said:

> Any designating authority, as defined in section 101A(2) of this Act, may acquire any estate or interest in any land under section 32 of this Act and develop and construct buildings on such land or on any other land owned by the designating authority for the purpose of granting the land or any part of it in payment or satisfaction or in part payment or part satisfaction of the compensation payable, to the person entitled for any land taken, purchased or acquired for or in connection with a public work.

Thus the Crown and local authorities were now empowered to buy land to grant as compensation. It was to be on a limited scale. The same amendment act enacted section 101H of the principal act, which authorised the granting of land to persons who had previously used the land that was taken as a dwelling, or for farming, commercial or industrial purposes.

The land which could be granted (subsection (1)) was—

(a) Crown land or other land of the designating authority freely available for sale or other disposition; or
(b) Land reserved, taken, purchased or acquired for any public work which is no longer required for any public work or which is no longer required for the use, convenience or enjoyment of any public work; or
(c) Land acquired, and developed and built on, under section 32A of this Act.

In keeping with the call for a "home for a home" subsection (3) prescribed that

> Any land granted under subsection (1) of this section in full payment or satisfaction of compensation shall be of a standard comparable to that of the land so taken or acquired.

The vesting of the land was to be effected by a section 99 certificate, subject to some modifications.

The new sections 32A and 101H had their equivalents in sections 21, 105, and 106 of the Public Works Act 1981.

Section 21 authorised a notifying authority (the previous act has used the term "designating authority") to acquire any land under section 17 (i.e. by agreement) and develop and construct buildings on it for granting as full or part compensation.

Section 105 is headed "Granting land as compensation where equivalent land not readily available". Again it refers to land which was personally used by the owner, either as a dwelling place or "personally for any other purpose" (not this time restricted to farming, commercial or industrial uses).

The option was available only if the owner of the land was not a willing party to the taking or acquisition, or was a willing party to the taking or acquisition principally because the land had been notified. When all criteria were met, the notifying authority

> "shall take all reasonable steps to grant to the owner in payment or satisfaction or part payment or part satisfaction (subject to payment by way of equality of exchange where appropriate) of the compensation to which the owner may otherwise be entitled…"

Crown land, land no longer required for a public work, or land acquired under section 21.

Section 106 relates to "granting of land as compensation in other cases". This time the "shall" is absent—land "may be granted" when land is taken or acquired for a public work, or as compensation for damage or injurious affection.

Sections 107 to 109 set out the details of vesting the land by the appropriate certificate. One matter required to be set out is the question of rights reserved to the Crown. The 1928 Act referred only to reservations of coal; the form in the Fifth Schedule requires all reservations to be set out. Persons receiving the land were deprived by statute of certain rights on alienation from the Crown, including reservations under the Atomic Energy Act and the Geothermal Energy Act.

In 1991, the Crown Minerals Act simplified this aspect. Section 11(1) says:

> Every alienation of land from the Crown made on or after the commencement of this Act whether by sale, lease, or otherwise) shall be deemed to be made subject to a reservation in favour of the Crown of every mineral existing in its natural condition in the land.

The effect of this is that the Crown will now (unless it acquired the land during the period minerals were excluded from the acquisition) retain a wide variety of minerals. The Crown Minerals Act now defines "mineral" widely enough to include building stone and fireclay, along with metallic and other valuable metals.

A further form of "alternate compensation" is the awarding of easements or other rights in land in satisfaction or part satisfaction. The Public Works Act 1905 provided for easements, rights of occupation, and other rights and privileges to be given by agreement with the Minister (section 84) or awarded by the Compensation Court (section 86).

The right of the Minister or local authority to grant such easements or rights remains through to the present act (section 103).

Limitation period

Section 72 of the Public Works Act 1876 established a limitation period:

> No claim for compensation under this Act shall be made in respect of any lands taken, after a period of five years after the date of the Proclamation taking the said lands, or in respect of any damage done, after a period of six months after the execution of the works out of which the claim arises; and all right and title to compensation in respect of such lands, or for damage arising out of the execution of such works, shall after such period absolutely cease.

All Public Works Acts have included a section limiting the time in which a claim may be made. Section 72 of the Public Works Act 1876 did not allow a claim to be made more than five years after the taking of land, or in the case of a claim for damage, more than six months after the execution of the work.

The same limitation periods are found through to the Public Works Act 1908 (section 37), and section 45 of the Public Works Act 1928.

In the Public Works Amendment Act 1954, the period was reduced. The Minister of Works Mr Goosman, in introducing the bill said:

> "In the past there has been some trouble at [sic] arriving at compensation agreements with people whose land has been taken under the Public Works Act 1928. At present the person from whom the land is taken does not need to put in a claim to the Ministry of Works for five years. He can just sit back and write letters and negotiate. Some of these people write to the press and say that the Ministry of Works will not settle with them. Some of them get quite abusive. But until they lodge a formal claim the Ministry of Works can do nothing, and they have five years in which to lodge the claim. Many of them spend that time in harassing the Ministry. To amend that position clause 2 provides that, if a formal claim is not made within twelve months, the Ministry of Works can give four months' notice that it intends to take the matter to the Compensation Court and have it settled."

Although section 2 of the Public Works Amendment Act 1954 became law along the lines described in the Minister's speech, it did not affect the five-year limit specified in section 45 itself.

Section 78 of the present Act is less generous to claimants:

> (1) Subject to the provisions of this or any other Act, a claim for compensation under this Act or any former Act relating to public works shall not be made (in respect of any land taken) after a period of two years after the date of the Proclamation or declaration taking the land, or (in respect of any other claim under this Act) after a period of two years after the execution of the works or the exercise of the power out of which such claim has arisen or may arise.

Subsection (3) allows the Minister or local authority to extend the period to such period not exceeding six years as he or it thinks fit.

Section 73 declared that no compensation was payable in respect of land taken for a road or railway that the Crown otherwise had a right to make under this or any other Act. This exception comes through to the present section 61 of the Public Works Act 1981—now including motorways as well:

(1) Compensation shall not be payable in respect of—
  (a) Any land taken for a road, a motorway, or railway under this Act where the right to make a road over the land is otherwise reserved to the Crown, and has not lapsed or become barred:
  (b) Any road, service lane or access way vested in a territorial authority by section 316 of the Local Government Act 1974.

(2) If—
  (a) Any road, service lane or access way, or a reserve for any such purpose; or
  (b) Any other land—

Has been declared Government road or motorway or acquired by the Crown for any purpose, and the land comprising it was originally taken, purchased or otherwise acquired by a territorial authority with the assistance of a subsidy, grant, or payment paid or made by the Crown or Transit New Zealand, the compensation payable shall be reduced by the same proportion as the amount as the amount of that grant, subsidy or payment bore to the full purchase price or compensation paid by the territorial authority.

The main provisions under which land will now vest in a local authority without payment are section 316 of the Local Government Act 1974, and section 239 of the Resource Management Act 1991. The latter relates to subdivisional plans, which will usually include some land that is to become a road.

The reference to motorways appears to be included as a matter of caution in case legislation is enacted to deal with automatic vesting of land as motorway in the same manner as roads. Land declared by the Governor-General to be a motorway under section 71 of the Transit New Zealand Act 1989 (previously section 138 of the Public Works Act 1981) has usually been paid for at that stage. Another exclusion of payment in this Part of the Transit New Zealand Act, found in section 75 of that Act, relates to parts of road which are stopped or taken in connection with a motorway.

The last section in this part of the Act, section 74, directs that the compensation money is to come from money appropriated by Parliament for the works in respect of which the claim for compensation arises, or from the funds of the local authority,

> "but neither the Minister nor any member of a County Council or of a Road Board shall be personally liable for any compensation which may be payable under this Act."

This direction is has come through substantially to the present Act (section 102) except that the section no longer expressly exempts the Minister from personal liability

Jurisdiction to assess compensation and procedure

The 1876 Act required claims to be made by a Compensation Court, consisting of an assessor appointed by the claimant and an assessor appointed by the respondent, together with a Judge of the Supreme Court, (who was to be "the president thereof".)

Section 38 must have put some pressure on the Minister or Council to respond promptly when a claim for compensation was served on them:

> "If the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it, the claimant may file a copy of his claim, together with the receipt for the service thereof, in the Supreme Court; and such claim, when so filed, shall be deemed to be and shall have the effect of a judgment of the Supreme Court, and may be enforced accordingly.

On the other hand the claimant was not in such a strong position if the Court awarded costs against him or her—section 61 said that if the costs exceeded the compensation payable, the award was to be for the payment of the excess by the claimant.

Part III, dealing with compensation, was largely concerned with the establishment and procedures of compensation courts, and the manner in which compensation was to be assessed was far less detailed than in the present legislation:

> 64. In determining the amount of compensation to be awarded, the court shall take into account severally the value of the land or interests in land, including riparian rights, taken, and the extent to which any adjacent lands in which the claimant has an interest are or are likely to be injuriously affected, either by severance or the nature of the works in question, and shall also take into account, by way of deduction from the amount of compensation to be awarded, any increase in the value of such adjacent lands likely to be caused by the execution of such works. But the Court may award one gross sum as the compensation to be paid to the claimant on all accounts, or they may determine that no compensation is payable.

Section 69 dealt with land subject to a mortgage, for which the mortgagee could apply to have all or part of the compensation paid in discharge or partial discharge of the mortgage debt.

Section 70 provided for part of the compensation to applied in respect of a rent charge; where part only of the land was being acquired the Court could determine how much of the compensation was to be paid in redemption so that the land which remained was as good a security as theretofore. Similarly section 71 allowed the Court to determine the part of rent which was to cease to be payable in respect of the balance of land for which rent was payable.

Offer back

Predecessors to section 40 of the Public Works Act 1981

Section 29 of the Public Works Act 1876, dealing with land which was found not to be required for public use, specified that the Governor-General was first to “cause the land to be sold” by an Order in Council.

Subsection (2) then said:

> “The Minister, County Council, or Road Board, as the case may be, shall cause the land proposed to be sold to be valued by one or more competent valuers, and shall offer such land at the price fixed by such valuation, first to the person then entitled to the land from which such land was originally severed; and if he refuse it, or cannot after due inquiry be found, then to the owner of the adjacent lands, or, if there be more than one such owner, then to each of such owners, in such order as the Minister, County Council, or Road Board thinks fit; and if no such owner accepts such offer, may cause the land to be sold by public auction.”

Before this, the terms of section C of the Land Clauses Consolidation Act 1863 had been similar:

> Before the promoters of the undertaking dispose of any such superfluous lands they shall unless such lands be situate in a town or be lands built upon or used for building purposes first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed or if such person refuse to purchase the same or cannot after diligent inquiry be found then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold such persons being capable of entering into a contract for the purchase of such lands and where more than one person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession one after another in such order as the promoters of the undertaking shall think fit.

Section CI gave the offeree six weeks in which to accept. It also made provision for the promoters of the undertaking to make a declaration before a Justice to the effect that the offer had been refused or that the person entitled to the offer was out of the country or could not be found. The declaration was to be accepted by he courts as sufficient evidence of the truth of it.

Section CII authorised that taking of the matter to arbitration if the promoters and the person entitled could not agree as to the price.

The requirement here appears to have been modelled on nineteenth century English statutes which recognised that the person from whom the land was acquired was the person most immediately affected by the execution of the work, and that the adjoining owners the next most affected. Thus they were entitled to buy at a price set by a valuer (now expressed as “current market value”) whereas disposal to any other person was to be by auction so as to secure the highest price.

It is to be noted that wording does not refer to the "person from whom the land was acquired", as in the present act. The land was to be offered to the person entitled to the land from which the surplus land was originally severed. In other words, the land was to be offered to the person holding the balance of the land in the original title. This would be the former owner only if he or she remained at the same address when the Crown or local authority was required to make the offer.

The requirements of section 29(2) remained in substantially the same words in subsequent Public Works Acts through to section 35(b) of the Public Works Act 1928. The only substantial difference in section 35 from the 1876 version was a proviso which allowed the Governor-General to declare surplus land held for a Government work to be Crown land.

Then in 1954, section 35 was repealed and replaced by section 4(1) of the Public Works Amendment Act 1954. Paragraph (b) now said:

> "The Minister or local authority, as the case may be, shall cause the land to be sold either by private contract to the owner of any adjacent lands, at a price fixed by a competent valuer, or by public auction or by public tender; and public notice shall be given of every auction or invitation for tenders under this section, and, in addition, written notice thereof shall be served on every owner of land adjacent to the land proposed to be sold, so far as they can be ascertained, not later than 10 days before the date fixed for the auction or for the closing of tenders, as the case may be."

The main changes to be noted here are:

(i) that reference to vesting the land in the person entitled to the land from which the land was severed is absent; and

(ii) that the owners of adjacent land are not given priority over persons who would buy at the auction or by tender.

The proviso about declaring the land to be Crown land remained (with the signing now to be by the Minister instead of the Governor-General). A further proviso allowing a local work to be dealt with in that way was added, and there was a proviso allowing land to be sold to an Education Board without complying with the requirements of the section.

Mr Goosman, then Minister of Works and Development, made no specific reference to the omission of the offer-back provisions when he introduced the Bill. He did refer to the amendments as saving "a lot of trouble and delay".

Although the Act now no longer empowered the Ministry of Works and Development to offer land to a former owner, frequently that option was regarded as the most equitable. Maori objected to the use of land at Bastion Point and the Raglan Golf Club, knowing that the Crown had acquired it from them for public works, and demanded that it be returned to them.

Legislation for returning land held for public works to Maori

Maori Purposes Act 1943

Section 7(1) of the Maori Purposes Act 1943 (printed originally as the Native Purposes Act 1943 and to be read with the Native Land Act 1931) provided as follows:

"Where any land set aside, taken, purchased, or acquired, whether by gift or otherwise howsoever and whether before or after the passing of this Act, under the Public Works Act 1928, or under any other Act or otherwise howsoever, for a public work is no longer required for that public work or for any other public purpose, and it is deemed expedient to return that land to, or to vest the same in [Maoris], or the descendants of [Maoris] or their successors in title, the Minister of Works or other Minister or authority at whose instance the land was acquired or under whose control the land is held or administered may apply to the [Maori Land] Court to vest the land in accordance with the provisions of this section."

Subsection (2) said that the application could be made to the court notwithstanding anything to the contrary in any Act, and notwithstanding any terms or conditions imposed on the land as to its sale or disposition.

The Court was given the jurisdiction to make orders for the vesting of land in persons nominated by the applicant or found by the Court to be entitled to the land. The legislation would be vested in fee simple, and if there was more than one person it would be vested in them as tenants in common in equal shares. Subsection (5) said that any land vested under the section was to be Maori freehold land, unless the court otherwise ordered.

The next legislation in which a comparable procedure appears is section 436 of the Maori Affairs Act 1953, which repealed the provisions of section 7 of the Maori Purposes Act 1943.

Section 436 was explicit in stating that the land to which it applied was Maori or general land owned by Maori which had at any time been acquired by the Crown or a local authority for a public work. Otherwise, the opening sections of section 436 of the Maori Affairs Act 1953 operated essentially as described above in respect of section 7 of the earlier Maori Purposes Act, except that there was no requirement for the land to be vested in joint owners as tenants in common.

Subsection (4) of section 436 enabled the Court, as an alternative to making a vesting order, to amend an existing instrument of title so as to include the land or part of the land in the application, and make it subject to the same rights, trusts, encumbrances, etc.

Section 436 remained in force until its repeal and replacement by section 134 of Te Ture Whenua Maori Act 1993. Thus, from the repeal of the offer-back provisions of section 35 of the Public Works Act 1928 in 1954, there was a system in place for the

return of public works land to Maori, while there was no such system in respect of other former owners.

What led to the enactment of section 40 of the Public Works Act 1981?

The enactment of section 40 was largely politically driven. In the late seventies the Ministry of Works and Development carried out a major review of the Public Works Act 1928. It was during that period that a Maori land march through the country to Parliament took place. Maori protestors occupied Bastion Point and the Raglan Golf Club, calling for the return of this land to Maori now that it was no longer required for the purpose for which it had been taken.

Among submissions to the Review were many from Federated Farmers, who also considered it just for land which was no longer required for the purpose for which it was held to be returned to the person from whom the land was acquired.

Certainly the government of the day was sympathetic to the call for offer-back obligations—its election manifesto promised that provision would be made for it in the legislation. .

The case of *Upper Hutt City Council* v *Burns* [1970] NZLR 578 drew attention to the way that the rights of former owners could be ignored. Burns agreed to sell some of his land for a street. The Council did not form the street and decided to sell the land to Woolworth's at a price much greater than it had paid.

Both the High Court and the Court of Appeal held that Burns' successors were entitled to a share of the profit made on the land. Their reasoning was not based on any common law obligation to former owners of land taken for a public work. Rather it was on the basis that the Council had not obtained a declaration or Proclamation acquiring the land, and was now legally unable to do so as they were aware that it was not required for the street. Thus the plaintiffs obtained justice on the basis that land was still theirs, and could not be taken belatedly for a road now that the Council was determined not to construct that piece of road.

R.I Barker[15] records that Burns, or someone in the same situation, had in 1969 petitioned Parliament for a share in the Upper Hutt Council's capital gain after they on-sold some land which they acquired from the petitioner for a public work. The Chairman of the Petitions Committee said "The Committee believes that, although the action of the Council was legally correct, it was morally wrong, that the Council could take land, hold it for a certain number of years, and then could, if it desired, speculate with the property. The City Council, being within its legal rights, the Committee had no recommendation to make."

In Britain, public concern had also led to offer-back rules being formulated. The sale of land taken during the war years at Crichel Down, with no regard to the persons

[15] R.I.Barker, *Private Right versus Public Interest—Compulsory Acquisition under the Public Works Act 1928* [1969] NZLJ 258.

from whom the land was acquired compulsorily, drew immense criticism. In October 1980 the Secretary of State for the Environment published for comment some new rules, under which the person from whom the land was acquired would have a right to have the land offered back, subject to some exceptions.

New Zealand courts have noted a parallel to earlier English legislation. In the words of Chilwell J in *McNicholl* v *Auckland Regional Authority* August 1986, High Court, Auckland, at page 90:

> [Sections 40 and 42 of the Public Works Act 1981] introduced a new regime for the protection of land owners, viz., requiring local authorities to dispose of land no longer, requiring the land to be offered back to the original owner, then to the owner of adjacent land, and finally to the public for public sale. The first step is in the interests of fairness to restore an owner to his former position; the second step embodies an old principle recognised in the English statutes of last century, it recognises that the person most likely to be affected is the adjacent land owner; the third step recognises the public interest that this type of land disposal must be on the open market so that the proper price is seen to be obtained from an identified purchaser who has to compete with other members of the public. The proper price principle is also recognised in the first and second steps because the price has to be fixed by an independent valuer unless, in the case of the original owner, the local authority considers it reasonable to reduce the price.[16]

It may be noted that section 40 of the Public Works Act 1981 does not allow the former owner of land taken for a public work to share in any capital gain. Indeed the former owner is more likely to find that the offer being made is for a sale at a price much higher than the compensation that was paid (subject to the discretion of the chief executive or local authority to specify a lower price).

On the other hand, when the person from whom the land was acquired accepts a section 40 offer, the motive is often a profit-making one, as opposed to a re-purchase because of a deep affiliation with the land as a home or workplace.[17]

In *Harris and McDonnell* v *Attorney-General* High Court Auckland 8 November 1991 M1336/91, a case where negotiations between the Department of Survey and Land Information were protracted and the Department finally withdrew its offer, Eichelbaum CJ commented:

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[16] This passages was quoted at length by Gault J in *Auckland Regional Authority* v *Attorney-General* (No. 2) at page 16. The "proper price" principle has since been modified in that the third step could be a sale by private treaty. In practice, sale by auction or tender is still favoured, and private treaty used only where a good opportunity to sell on favourable terms might otherwise be lost.

[17] Some cases where there has been such a mercenary motive are: *McNicholl* v *Auckland Regional Authority (supra)* which was an action brought because the first plaintiff wished to buy land from the owner of adjacent land if she succeeded in having it offered to her; *Dean* v *Auckland City Council,* High Court 15 June 1990 CP 663/88, in which the plaintiff successfully sued the Council for the profit it made in selling the land at the highest price rather than to Dean when the Council considered that negotiation were at an end; and *Harris and McDonnell* v *Attorney-General* High Court 6 November 1991 M1336/91, in which the successors to the persons from whom the land was acquired wished to purchase the land for on-sale. More recently, *Rowan* v *Attorney-General* was litigated to decide who had had the right to buy surplus school land and sell it at a premium to Seventh Day Adventists for a proposed hospital.

> The Department's officers had grounds for suspecting that the delays did not relate so much to the valuation as to an investigation of the possibility of turning the prospective purchase into profit. In correspondence play had been made upon the offerees' right to resume family lands but it had become apparent that baser motives were at work. Not, I add that there was anything wrong with the offerees wishing to make a profit out of the opportunity to re-purchase; their predecessors would have been entitled to do that had the lands not been compulsorily taken.

An argument sometimes made in favour of the "rightness" of accepting the offer so as to make a quick profit is that the opportunity to obtain the best possible price was denied when the land was taken or acquisition under the Public Works Act.

The original section 40 of the Public Works Act 1981 and amendments in the Public Works Amendment Act 1982

Section 40 of the Public Works Act 1981 was a much more detailed section than its predecessors, as its authors were aware that the obligation to offer land to the person whom it was acquired would need to be subject to exceptions in order to be workable.

The Bill was introduced with section then numbered clause 39, and section 41 as 39A. Mr Schultz for the Government commented in the first reading:

> "Clause 39 makes it mandatory, in general, for land that is surplus to requirements for a public work, and which is not required for another essential work, to be offered for repurchase by the former owner if its initial purchase was made under the threat or by compulsory acquisition."

In the second reading, the Minister Mr WL Young said:

> "One of the most significant of the changes that have been recommended [by the Select Committee] is the re-writing of clause 39. That clause will now give effect to the general principle that when land has been acquired by the Government or by a local authority for a public work, and subsequently ceased to be required for a public work in respect of which there is right of compulsory acquisition, the land should be offered back to the original owner, or his representative, except in circumstances where there was no element of compulsion at the time the land was originally acquired.[18]
>
> "If land becomes surplus to the work for it was originally acquired, but is required for another essential work it may be set apart for that work without being offered back to its former owner. In such cases, however, the former owner is declared to have a standing for the purpose of making an objection,

[18] Note the assumption here that the person entitled to have the land offered back was someone from whom it had been taken *compulsorily*. This assumption was not accepted by the High Court in the *Bowler Investments* case—see discussion under "Litigation". (Until the "essential works" concept was removed in 1987, the assumption would be generally correct with regard to some acquisitions after 1 February 1982, although there could also be purchase by agreement for these classes of work also.)

> or appeal against, any application that may arise under the Town and Country Planning Act. Clause 39A makes it clear that, when the surplus land was originally Maori land, or general land owned by Maoris, the land must either be offered back under the general provisions of clause 39, or application must be made to the Maori Land Court to revest the land in its former owners or their successors under the procedures set out in section 436 of the Maori Affairs Act 1953."

Subsection (1)

Thus section 40 began:
"(1) Where land held under this or any other Act or in any other manner for a public work—
(a) Is no longer required for that public work; and
(b) Is not required for any essential work; and
(c) Is not required for any exchange under section 105 of this Act—
The Commissioner of Works or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land."

Immediately exceptions can be seen. Paragraph (b) recognises the right of the Crown to retain the land if has another use for it. When the Public Works Act 1981 first came into force in 1982, the new use was restricted to an "essential work", which meant that land could not be set apart for a purpose for which it could not have been taken compulsorily.

The other exception given here is land required for exchange under section 105. That section provides for land to be given in exchange for land taken for a public work, if the land acquired contains a dwelling used by the owner and any family or in use by the owner personally for any purpose.

Land required for exchange in other situations, covered by section 106, was not exempted from the requirements of section 40.

Subsection (2), including amendments by the Public Works Amendment Act 1982

Subsection (2) of section 40 sets out the substance of the offer-back requirement. In the original version when the Public Works Act 1981 was enacted, it read:

> "Except as provided in subsection (4) of this section, the Commissioner or local authority shall, unless he or it considers that it would be impractical, unreasonable, or unfair to do so, offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer, or, if the parties so agree, at a price to be determined by the Land Valuation Tribunal."

Officers of the Ministry of Works and Development were aware that there would be cases where it was "impractical, unreasonable, or unfair" to offer the land back.

Some former owners would be hard to locate. Some land might be subject to leases that gave the lessees a right to purchase.

The case in which the meaning of these words has received the most judicial comment is *Auckland City Council* v *Taubmans (New Zealand) Ltd and others,* High Court, Auckland, CL 66/92. The Auckland City Council formed the view that it would be impracticable, unreasonable or unfair to sell properties owned for car parking to the persons from whom it was acquired, and this resolution was considered by Barker J[19]

> The facts need only be summarised to see that the Council's resolution to the above effect is a reasonable one. First there are some two lots where the land was acquired between 31 January 1982 and 3 March 1987; in respect of these lots s.40(3) of the Act provides expressly that the offer-back provisions do not apply. So that there would be, as Mr Asher put it, a "jig saw" with two pieces missing if the offer-back were required for the other lots.
>
> Secondly, there are seven cases where the former owner of the land has died with no successor or where the former owner was a company which has now been dissolved.
>
> Thirdly, there are 29 cases where the original allotments do not conform to the current district scheme and a separate title could not be issued.
>
> Fourthly, in some instances the land was owned jointly or in common and one or more of the owners has either indicated that he or she has no interest or one or more of the owners has died with no successor.
>
> Fifthly, in all but one instance, i.e. Mr Cramer-Roberts, it appears that the persons from whom the land was acquired or their successors have no interest in reacquiring the land.
>
> Sixthly, approximately 17 of the former owners entered into agreements with Mainzeal Group Limited ('Mainzeal') to grant Mainzeal the right to acquire any land offered back by the Council. Mainzeal has now assigned its interest under that agreement to BIL.
>
> Seventhly, a considerable period of time, in some cases up to 43 years, has gone by since the acquisition of the land.
>
> Lastly, almost all buildings previously on the land have now been demolished.
>
> In those circumstances, I think the decision of the Council that it is impracticable or unreasonable to offer the land back is a valid one. The Council is entitled to a declaration to that effect.[20]

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[19] Pages 10-11
[20] This judgment needs to be re-considered in any review of the Public Works Act 1981, as some of the grounds given are more valid than others. In particular, the seventh ground is on the basis of the time that had passed since the land was acquired. While some local authorities and Government agencies have sometimes suggested that a "sunset clause" be included, it would be unsatisfactory for the courts

Ministry of Works and Development recognised that the word "impractical" was an error and that what was intended was "impracticable", i.e. not capable of being put into practice. That was remedied by the Public Works Amendment Act 1982.

The same amendment broke references in the first part of subsection (2) into paragraphs (a) and (b), the latter adding a further ground for not applying section 40:

> There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held.

Ministry of Works and Development staff believed that there was a need for this exception, as there were some cases where the character of the land had changed to a degree that the person from whom it was acquired would not receiving back what had been taken. This did not fit neatly into the "impractical, unreasonable or unfair" categories.

Hansard does not show evidence of debate from the Opposition on this change when it was brought in. The explanation of the Minister, Mr Friedlander, was marked by its brevity:

> "Since the 1981 Act has been in force, it has been apparent that, when the land has changed substantially in character as a result of the public work, the land should not be offered back to the former owner, but should be disposed of in accordance with its changed character."

Incidentally, the rules of the Secretary of State for the Environment in the United Kingdom had included this exception from the start:

> 7. Where a Government Department wishes to dispose of land to which the rules apply, former owners will as a general rule be given a first opportunity to repurchase the land previously in their ownership provide that it has not been materially changed in character since acquisition. By material change is meant change such as the development of agricultural land with houses, afforestation of mainly open land, the redevelopment of an urban site with offices or substantial works to existing buildings which effectively alter their

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to introduce this *de facto* on the basis of reasonableness. For some people 43 years would not be long—claims by former Maori owners in particular frequently go back further than that.

The fifth ground—that people are not interested in reacquiring the land—is an unsatisfactory ground. In *McNicholl* v *Auckland Regional Authority*, the company from whom the land was acquired was approached informally to find out whether it would be interested in repurchasing the land. Chilwell J was quick to point out that this was not a compliance with what section 40 required.

The fourth ground given here is that where land was held jointly or in common, it was not possible to vest the land in all the former owners in some cases, as some of them had died or had no interest in reacquiring the land. It would appear to me that, if the land was a joint tenancy, the survivors would be entitled to an offer. If some of the former owners were no longer interested in acquiring the land, it seems unfair on the other former owners—regardless of the sort of joint ownership—to deny them their rights, although the section is silent on this situation. Perhaps a further subsection added to section 40 could make it clear one way or the other.

character. In deciding whether buildings or other works have materially altered the character of land regard will be had to the extent of the expenditure which would be needed to restore it to its original use. The erection of temporary buildings on land will not necessarily be regarded as a material change. (Journal of Planning and environment Law, February 1982 issue)

It is notable also that the equivalent right given in New Zealand by section C of the Land Clauses Consolidation Act 1863 excluded land situated in a town or "lands built upon or used for building purposes". Although these characteristics are not referred to as "changes", in many cases the construction would have taken place after acquisition.

The 1982 amendment also broke up the latter part of the subsection into two further subsections, dealing with the price, and added a new subsection (2A). Thus the offer was to be made:

"(c) At the current market value of the land as determined by a valuation carried out by a
registered valuer; or
(d) If the Commissioner of Works or local authority considers it reasonable to do, at any lesser price.

(2A) If the Commissioner of Works or local authority and the offeree are unable to agree on a price following an offer made under subsection (2) of this section, the parties may agree that the price be determined by the Land Valuation Tribunal."

The original version, which stipulated sale at current price, had proved to be inequitable in some cases where, for example, the person from whom the land was taken or confiscated had not received compensation.

The re-writing of this portion of subsection (2) also made it clear that the parties were not to have recourse to the Land Valuation Tribunal until they had first endeavoured to reach an agreement on price.

Subsection (3): original version and Public Works Amendment Act (No. 2) 1987

The original subsection (3) read:
Subsection (2) of this section shall apply only in respect of land that was acquired or taken—
(a) Before the commencement of this Part of this Act; or
(b) For an essential work after the commencement of this Part of this Act."

Reference to "this Part" was included because the original intention was to have some parts of Public Works Act come into force before others. In practice the whole Act came into force on 1 February 1982.

The reason for subsection (3) was, implicitly, that the offer-back obligation was considered to be the right of an owner would not have sold willingly. Any land taken by Proclamation or agreement before the Act could have been taken

compulsorily; so too could any land acquired for an essential work after the Act came into force. Reference is frequently made to the "shadow of compulsion", which acknowledges that an owner may reach agreement quickly to avoid some of the lengthy procedures in the Public Works Act.

Because this "shadow of compulsion" could not be perceived in respect of works which were not classed as essential works, the legislature saw no need to direct the Commissioner of Works to offer the land back when it was no longer required.

When the Public Works Amendment Act (No. 2) 1987 was passed, most references to essential works were removed from the Act, and the new section 40(3), replacing the original, was the exception:

"(3) Subsection (2) of this section shall not apply to land acquired after the 31st day of January 1982 and before the date of commencement of the Public Works Amendment Act (No. 2) 1987 for a public work that was not an essential work."

The effect of this was to apply section 40 to almost all land acquired for public works, the only exception being land acquired between the time that the Act came into force and the date of this amendment, if the work was not on the essential works list.

Subsection (4)

Subsection (4) deals with a special situation, where the general requirements are not considered to be appropriate:

> " Where the Commissioner of Works or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties."

Where subsection (4) applies, it overrides other subsections of section 40 (as stated expressly in subsection (2)).

Subsection (5)

Subsection (5) is a matter for interpretation:

> (5) For the purposes of this section, the term "successor", in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person."[21]

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[21] A matter of some uncertainty is whether these are the only types of "successor" that section 40 recognises. Not all forms of succession are by will. In the case brought by the Auckland Harbour Board against the Attorney-General, proceedings were taken over by the Auckland City Council and Ports of Auckland Limited. Gault J in his interim judgment said: "In clause 34 of the further amended statement of claim it is alleged that [Ports of Auckland Limited] is the successor to the Auckland

Subsection (5) has not been subject to any amendments.

During the first ten years of the section being in force, the way that "successor" was interpreted by the Crown was more liberal than its words require. Property officers would follow the history of the family from whom the land was taken, and offer the land to people several generations later.

In the 1990s the Office Solicitor of the Department of Survey and Land Information pointed out that this was not required by the subsection, which refers only to the person who would have been entitled to the land if he had owned it at the date of his death. Further, if the meaning were to be extended, it would become speculative, as one would need to ask the question of how the land that was never owned by the second generation would have been dealt with under a will.

There was also a certain amount of confusion between entitlement under a will and the question of relationship. Section 40(5) does not specify that land will be offered to children, grandchildren, etc.

The case of *Rowan* v *Attorney-General* in 1997 determined one important matter concerning section 40(5)—the person from whom the land was acquired is the prime person to consider. Although section 40(5) says that the land is to be offered to the person from whom the land was acquired *or his successor*, this did not mean that it was a matter left to the discretion of the notifying authority. In that case, Ministry of Works and Development officials considered that there was good reason to offer the land to the successor in title of the balance of the land, instead of Mrs Rowan. The court held that this was contrary to the purpose of the section.

Time limits

Section 40 of the Public Works Act 1981 does not indicate the period in which the offer is to be accepted. In effect it is specified in section 42(1), which permits the holding body to sell the land elsewhere when the offer has not been accepted within forty working days or such longer period as the chief executive or local authority considers reasonable.

The discretion to extend the time is often useful where the negotiation of price or terms of purchase is prolonged. The High Court accepted in *Harris and McDonnell* High Court Auckland 8 November 1991 M1336/91 accepted that the Crown had the right to withdraw its offer after giving reasonable extensions of time, where agreement had not been reached.

Section 41

Harbour Board in terms of s.40(2) and that is to be taken as fact for the purpose of the present application, although I apprehend it will be disputed if the matter goes to trial." The matter did not proceed to trial.

As discussed at page 48 there was at the time of enactment of the Public Works Act 1981 a system for the return of land held for public works, where it had formerly been Maori land or General land owned by Maori.

Section 41 of the Public Works Act 1981 dealt with the relationship between section 40 rights of Maori land owners and the procedure available under the Maori Affairs Act. Its original text was:

"Notwithstanding anything in sections 40 and 42 of this Act, where any land to which section 40(2) applies was, immediately before its taking or acquisition, --

(a) Maori freehold land or general owned by Maoris (as those terms are defined in section 2 of the Maori Affairs Act 1953); and
(b) Beneficially owned by more than 4 persons; and
(c) Not vested in any trustee or trustees—
The Minister or local authority, as the case may be, shall—
(d) Comply with the requirements of section 40 of this Act; or
(e) Apply to the Maori Land Court for the district in which the land is situated for an order under section 436 of the Maori Affairs Act 1953."

In short, the right to use the Maori Affairs Act 1953 alternative was restricted to land which was beneficially owned by more than 4 persons before its acquisition. Otherwise the Minister or local authority was free to make a choice as to which approach was the more appropriate. Using section 40 in a straightforward case would be speedier than waiting for a fixture in the Maori Land Court. On the other hand, in a disposal involving a large number of Maori claimants, the Court would be better placed to determine which of them was beneficially entitled to the land.

A major difference between the two procedures was that section 40 prescribed a sale at current market value, whereas section 436 of the Maori Affairs Act 1953 said that the Minister or local authority could stipulate a price or leave it to the discretion of the Court. The amendment to section 40 in 1982 that allowed the land to be sold at a price less than current market value, helped the use of the section for Maori land, as there was frequently reason to return land to Maori at a lesser price.

The passing of Te Ture Whenua Maori Act 1993 involved the repeal of the Maori Affairs Act 1953. Consequential amendments to section 41 of the Public Works Act 1981 meant that it now applied to:

"Maori freehold land or General land owned by Maori (as those terms are defined in section 4 of Te Ture Whenua Maori Act 1993)" and the application to the Maori Land Court was to be made pursuant to "section 134 of Te Ture Whenua Maori Act 1993".

Section 134 of Te Ture Whenua Maori Act 1993 is wider in its scope than the former section 436. It covers five classes of land, of which the class in paragraph (Council) is the relevant one for these purposes:

"Any Maori land or General land owned by Maori that has at any time been acquired by the Crown or by any local authority or public body for a public work or other public purpose and is no longer required for that public work or other public purpose". Under subsection (3)(c),

applications in respect of that class of land were to be made by, or on behalf of—

(i) The Minister of the Crown under whose control the land is held or administered; or

(ii) The chief executive of the Department of Survey and Land Information; or

(iii) The local authority or public body by which the land was acquired."

Subsection (6) says that the applicant may specify in the application the person in whom the land is to be vested, the price which is to be paid, and any other terms and conditions.

Sections 42A and B of the Public Works Act 1981 provide for payment of a solatium for loss of the right to re-purchase. These sections were inserted by the Waikato Raupatu Claims Settlement Act 1995.

The Waikato Raupatu Claims Settlement Act addressed the effect of the New Zealand Settlements Act 1863, discussed earlier in this paper. A major question that needed to be addressed in the legislation was that both Maori and the person from whom the land was acquired might have an interest in the same surplus land.

This was not a new issue—for example, the process set up in the Treaty of Waitangi (State enterprises) Act 1988 required that land which was to be returned to Maori ownership would longer be subject to sections 40 and 41 of the Public Works Act 1981.

Accordingly, the net is cast wider than the context of Waikato Raupatu claims, as set out in subsection 42A(1):

Where:

(a) A recommendation is made or deemed to have been made by the Waitangi Tribunal under section 8A of the Treaty of Waitangi Act 1975 for the return to Maori ownership of any land that is held for a public work takes effect as a final recommendation; or

(b) Any provision of any Act of Parliament returns to Maori ownership any land that immediately before being so returned was held for a public work….

A person who loses rights under section 40 of the Public Works Act 1981 can apply to the Land Valuation Tribunal for the solatium payment.

The New Zealand Railways Corporation Restructuring Act 1990

The New Zealand Railways Corporation has traditionally exercised the powers and functions of the Ministry of Works and Development and its successor departments in respect of section 40. Its authority for this is section 30 of the New Zealand Railways Corporation Act 1981, section 30(2) of which says:

"The powers and duties conferred and imposed on

(a) The Minister of Lands in respect of any provision of the Public Works Act 1981…and….

(d) any chief executive under any provision of that Act

are hereby conferred and imposed on that Corporation in respect of all matters and works under the control of, or being carried out by, the Corporation." (Note: this is not the original wording. The section was re-enacted in 1988 largely to remove doubts about the Corporation's actions under section 40.)

In 1988 the Auckland Harbour Board, claiming rights under section 40 of the Public Works Act 1981, filed an application for judicial review in respect of some land owned by the Crown which was alleged to be no longer required for a public work. The most substantial part of this land was held for railway purposes.

The litigation was costly to the New Zealand Railways Corporation, which has wide powers in section 24 of its Act to dispose of or lease its property. The Corporation resented the fact that the Harbour Board (later the Auckland Regional Council and Ports of Auckland) could commence such an action because of its own opinion that the land was no longer required for a public work. They also though it inappropriate that a local authority or its successors would take action against the Crown of this sort.

A major restructuring of the New Zealand Railways Corporation, involving the creation of transferee companies, led to the enactment of the New Zealand Railways Corporation Restructuring Act 1990. Section 21 of that Act says:

"Notwithstanding anything in section 30 of the New Zealand Railways Corporation Act 1981, nothing in sections 40 to 42 of the Public Works Act 1981 applies to—

(a) Land that is held or occupied by the Crown for railway purposes:
(b) Land that is held by the Corporation, or by a transferee company, or by a railway operator."

The Act then proceeds to set new rules for offer-backs, which are largely a modified version of section 40 of the Public Works Act 1981. In all cases, these obligations come into force before land is sold, not when it is perceived as being no longer required for a public work.

Section 23 deals with the disposal of land by the New Zealand Railways Corporation and section 24 with disposal by a transferee company or a railway operator. The Corporation had the rights and obligations equivalent to section 40 in the first case; in the second, the matter is dealt with by [now] the chief executive of Land Information New Zealand.

The offer-back obligation under this Act does not apply to land acquired from local authorities, and their successors, such as port companies, have no right to re-purchase. Some other particulars of the procedure are varied. For example, the offeree may within 20 days of receiving the offer give notice that the question of price is to be referred to the Land Valuation Tribunal (under the Public Works Act 1981, the parties must agree to that step being taken).

The requirement on price is also notable for not having the option of returning the land at less than current market value.

There are other direct and indirect references to section 40 of the Public Works Act 1981 in the New Zealand Railways Corporation Restructuring Act 1990. Section 7(4) says that the transfer of land to the Crown or a Crown transferee company shall not be subject to anything in the Public Works Act 1981.

Section 28 of the New Zealand Railways Corporation Restructuring Act 1990 says that the discharge of a duty or the exercise of a power under the Public Works Act 1981 shall not be held invalid by reason of being discharged or exercised by the New Zealand Railways Corporation. This includes things done before the commencement of the Act, so that past section 40 decisions by the Corporation could not be questioned on the grounds of jurisdiction.

The State-Owned Enterprises Act 1986 and other legislation for restructuring Government departments and local authorities

(See also "Use of the Public Works Act 1981 by private companies (infra).

State-Owned Enterprises Act 1986

In the mid-eighties, the process of transferring certain Crown activities to new bodies began. In each case the legislature had to address the question of how section 40 of the Public Works Act 1981 was to apply.

State-owned enterprises were authorised under the State-Owned Enterprises Act 1986 as companies registered under the Companies Act 1955 (now the Companies Act 1993). Land that had previously been held by the Crown for purposes such as electricity generation or Government offices was to be transferred to those companies

Such a move might raise the presumption that the land was no longer required by the Crown for the purpose for which it was held. In that case the person from whom the land was acquired could expect to have it offered to him or her before it was transferred to the State-owned enterprise.

If those requirements could be bypassed and the land was transferred to the company, section 40 would then appear not to apply, as the land was not held for a public work.

Further, the process of transferring Crown-owned land to companies would be contrary to the rights of adjacent owners in section 42, and would ignore the requirement for sale by auction, tender, or public application.

To get around these problems, section 24(4) stated:

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a State enterprise pursuant to this Act, but sections 40 and 41 of that Act shall after that transfer apply to that land as if the State enterprise were the Crown and the land had not been transferred pursuant to this Act.

The effect of this would be that the responsibility for dealing with the requirements of sections 40 and 41 would remain with the Commissioner of Works.

The Commissioner was already responsible for making decisions in respect of the land of other departments. Now the division of functions was greater, as the State-owned enterprises were required to function as successful businesses, and sought to obtain the best return on any surplus assets. It became a frequent occurrence for State-

owned enterprises to challenge decisions made in favour of the person from whom the land was acquired.

As section 42 of the Public Works Act 1981 was no longer to affect the land, a State-owned enterprise would be free to dispose of its land once the Commissioner of Works had gone through the section 40 processes.

An amendment to section 7 of the Auckland Airport Act 1987 dealing with the transfer of assets to the airport company inserted a provision similar to section 24(4) of the State-Owned Enterprises Act 1986, whereby section 40 would apply after acquisition as if the company was the Crown and the land had not been transferred. This gave the powers and duties in effect to the Ministry of Works and Development and its successor departments.

Section 26 of the Port Companies Act 1988, being legislation for the restructuring of harbour boards, followed this precedent:

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a port company pursuant to this Act, but sections 40 and 41 of that Act shall, after the transfer, apply to that land as if the port company were a Harbour Board and the land had not been transferred pursuant to this Act.

Interpreting this section in the same manner as the sections previously discussed, it can be seen that the intention is to leave the responsibility for making an offer, or for deciding not to make an offer, in the hands of the Harbour Board. In practice the powers and duties of the Board would by then have been divided between a regional council and a port company. The regional council would be the body responsible for the regulatory and non-commercial activities of the former harbour board, and by analogy to the State-Owned Enterprises legislation would be the appropriate body to deal with the offers and related decisions. The section is on the face of it ambiguous.

The provisions for local authority trading enterprises by an amendment to the Local Government Act 1974 in 1989 began in similar style:

> 594ZF. Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a local authority trading enterprise pursuant to this Act, but sections 40 and 41 of that Act shall, after the transfer, apply of that land as if the local authority trading enterprise were a local authority and the land had not been transferred pursuant to this Act.

And then went a step further:

> 594ZG. (1)The rights of persons from whom land was acquired and their successors to have land offered to them under section 40(2) of the Public Works Act 1981 shall be deemed to be interests in land for the purposes of section 137 of the Land Transfer Act 1952, and the local authority that transfers land to a local authority trading enterprise pursuant to this Act is hereby authorised to lodge, and shall lodge, and appropriate caveat.
> (2) In stating, in a caveat lodged pursuant to subsection (1) of this section, the interest claimed by the caveator, it shall be sufficient, for the purposes of section 138 of the Land Transfer Act 1952, to refer to sections 40 to 42 of the Public Works Act 1981, and to this section.

Until then, there had not been any authority for lodging a caveat to protect section 40 rights. Three years later, when the Auckland Regional Council underwent a restructuring which involved the transfer of assets to the Auckland Regional Trust a section modelled on section 594ZG (section 707ZA of the Local Government Act 1974) was enacted.

The provisions for caveats were a matter of protection for the person from whom the land was acquired. When land is transferred from the person who has the statutory authority for making the decisions and offering the land, the caveat serves as a reminder to that owner, and would prevent the registration of a transfer of land where section 40 had not been first complied with.

In each case, the caveator is not the person from whom the land was acquired; rather the caveat is to be entered by the body that is transferring the land. Nevertheless, all these sections declare that the right to be offered land under section 40 is a caveatable interest, and on this basis, some former owners took the opportunity to register their "interest" in the land by means of caveats.

The right of former owners to do this was first considered in the case of *Auckland City Council* v *Taubmans Paints and others*. The Council in that case had formed the view that it would be unreasonable to offer back certain sections in the city area, and intended to sell the land to a company which would develop the Sky Tower. When the former owners lodged caveats, the Council was obliged to test their validity in Court.

Barker J rejected the argument that section 594ZJ applied only in the context of local authority trading enterprises. He could find nothing in the section which indicated that this was the intention—it declared that the right to have land offered under section 40 was deemed to be an interest in land for the purposes of section 137 of the Land Transfer Act 1952 without restriction.

This did not mean, he ruled, that the caveat must remain of the title forever. Once he had considered and upheld the validity of the Council's decision, he directed that the caveats must now be withdrawn.

Barker J's decision was reversed in *Glucina* v *Auckland City Council.* The High Court considered an argument that, if the intention had been to make the right one of general application, it would not have been necessary to re-state in section 707ZJ of the Act that section 40 rights were deemed to be interests in land for the purpose of lodging a caveat. The effect of that decisions is that a caveat cannot now be lodged to protect a section 40 interest unless the legislation relating to the particular type of work or enterprise has a section authorising caveats.

The next important legislation modifying section 40 of the Public Works Act 1981 was the Crown Research Institutes Act 1992 . The pattern of excluding the operations of sections 40 to 42 when land was transferred from the Crown to the institute, and the obligation to lodge a caveat, followed the models of acts already discussed. There were some aspects of this legislation that were clearer than earlier equivalents—

(i) the first subsection sets out which transactions are subject to these modifications, and this included transfers from one Crown research institute to another as well as transfers from the Crown to a Crown research institute. There is no such statutory exception from section 40 in other such legislation—presumably, for example, a State-owned enterprise could not transfer any of its affected land to another State-owned enterprise without first going through section 40 processes.

(ii) The legislation is clearer as to when section 40 is to apply—"Nothing in sections 40 to 42 shall apply to the transfer of land or an interest in land to a Crown Research Institute … so long as the land or interest in land continues to be used but, if all or any part of the land or interest in land is longer required for such purposes, section 40 and 41 of that Act shall apply…."

(iii) The time limit from section 42(1) of the Public Works Act 1981 is incorporated in the "modification" section.

In 1990, Part XIII was added to the Education Act 1989. Part XIII deals with tertiary institutions, including the transfer of Crown-owned land to these institutions. Section 207(4) included the usual statement along the lines of section 24(4) of the State-Owned Enterprises Act 1986 that sections 40-42 would not apply to the transfer of land for an institution, and that sections 40 and 41 would apply after the transfer.

In section 9(4) of the Irrigation Schemes Act 1990, a wording very similar to section 24(4) of the State-Owned Enterprises Act 1986 was used, with no provision for caveats. The Crown was to remain responsible for section 40 in respect of land which it transferred to a person to whom an irrigation scheme is sold.

The Energy Companies Act 1992 (section 69) contained the usual modifications of section 40 in the context of land being transferred from a local authority to an energy company. This time there was no provision for a caveat.

The following year brought a major restructuring of the health system, and the First Schedule to the Health Reform (Transitional Provisions) Act 1993 set forth the process for the transfer of assets to Crown Health Enterprises.

The details of the modification of section 40 are substantially similar to those for Crown Research Institutes. This includes a requirement for a caveat to be lodged at the time of transfer—a material difference being that the caveat this time is to be lodged by the transferee (previous acts with such provisions placed the obligation on the transferor).

It is apparent then that the development of these sections was at least in part a matter of learning from other people's experience. For example, the inclusion of the right of a Crown research institute to sell to another such institute without being subject to section 40 of the Public Works Act 1981 was followed in the Health Reforms legislation, and the addition of the need for a caveat has its roots in Local Government legislation.

Litigation

Application of section 40 of the Public Works Act 1981 to land compulsorily acquired

Sections 40 and 41 of the Public Works Act 1981 have proven to be a source of continuous litigation again the Crown and local authorities.

The first case of consequence was *Bowler Investments Ltd* v *Attorney-General* . The Ministry of Works and Development operated by an internal instruction, setting out the procedures and policy of section 40, including the way that the word "unreasonable" in subsection (2) was to be interpreted. The instruction assumed that offer-backs were for the benefit of persons who had lost land under the Public Works Act 1981 under compulsion. This a record of the land having bought by agreement would be regarded as grounds for forming the opinion that it would be "unreasonable" to offer the land back.

The land acquired from Bowler Investments Ltd was in the line of a proposed motorway. Because of this the company had not been able to sell its land, and had taken the initiative in selling the land to the Crown. Therefore, when the Ministry found that the land was not needed for a public work, property officers in the Ministry of Works and Development, acting under delegation from the Commissioner determined that it would be unreasonable to offer the land to Bowler Investment.

The High Court held that the policy set out in its instructions on this point was incorrect.[22]

> "While I accept Mr Parker's submission that the Commissioner or his delegate is entitled to look at all the circumstances, both of acquisition and otherwise, in determining whether it is unreasonable to offer the land back, I am concerned that the guidelines do appear to place the element of compulsion in an erroneous light.
>
> "It might well be possible to find a case where, there being no element of compulsion, it could be regarded as unreasonable to offer back, but it does not seem to me to be right to adopt the stance that the absence of any element of compulsion leads ipso facto to the proposition that it is unreasonable to offer the land back to the original owner.
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> "Each case must be assessed on its own particular mix of circumstances…it may be unreasonable in those circumstances, but equally it may not."[23]

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[22] Page 11 of the judgment.

[23] A case which might possibly have shown where the boundary would be drawn was *Hattaway* v *Her Majesty's Attorney-General and others*, High Court, Auckland, 1 August 1991 M701/90. The applicants for judicial review inherited the land from their father, and decided to sell it to the Crown (Housing Corporation) as they could not afford their death duties. The land had subsequently been divided up with parts gong to the Auckland Area Health Board and to the Department of Education. Unfortunately, the respondents managed to end the proceedings when it was decided that the land was still needed for a hospital, and that their review of whether the land was surplus was now affected by legislation that was about to be introduced into the House to restructure area health boards. (Even on these facts, the Court might not necessarily have agreed that it was unreasonable to offer back—Eichelbaum CJ in the *Bowler* case had pointed out that section 40 was to apply to all land held for a

Accordingly, the Crown was required to reconsider the matter.

It may be commented that there are some indications that section 40 of the Public Works Act 1981 was primarily intended to apply to land that was taken compulsorily:

(a) Subsection (3) of section 40 excludes land which was bought for a non-essential work between 1982 and 1987—land for such purposes could be taken only by agreement.
(b) There is no requirement for land acquired for a State-owned enterprise to be offered back to the person from whom it was acquired, unless it was first transferred by the Crown from land taken for public works. The exception is any land that a State-owned enterprise acquires compulsorily pursuant to section 186 of the Resource Management Act 1991.

It may be noted that the English policy on offer-backs following the Crichel Down controversy contemplates that only which was taken with some degree of compulsion will be subject to the requirements of the rules.

Another point raised in this case was whether the "person" to whom the land was to be offered necessarily included a legal person such as a company. An artificial legal person, counsel for the Crown argued, did not suffer the anguish which a natural person would feel on land being taken, and the intention was to offer the land to natural persons who would feel some degree of personal affinity to the land. The High Court could find nothing in the Public Works Act 1981 to support this argument, and quickly ruled that a company was entitled to an offer-back in the same manner as a natural person.

The next important case was *McNicholl* v *Auckland Regional Authority*, which concerned the application of section 50 as well as section 40.

McNicholl was an adjoining owner of land that became surplus to the roading needs of the Auckland Regional Authority. The ARA decided to sell the land to the Mount Wellington for its own roading purposes, and did not offer the land back to the company from which it had originally been taken.

Perhaps the most cogent argument made for the ARA was that the land was required for another essential work, which was a situation set out in section 40 where the obligation would not apply.

Chilwell J took a narrow view of this exception—it referred, he said, to another public work to be undertaken by the body holding the land. It did not refer to a transfer of land from one local authority to another, as that would put the local authority acquiring the land in a position of unfair advantage.

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public work whether taken compulsory by Proclamation, by a declaration under section 20, or by ordinary purchase with a memorandum of transfer.

Availability of the Public Works Act 1981 for acquisition of land by bodies other than the Crown and local authorities

Historically, Public Works Acts in New Zealand have dealt only with land to be held for a public purpose, classified as a Government work or local work. Thus, in the early statutes, the Crown is empowered to take land compulsorily for a railway pursuant to middle-line Proclamation, while private railways are mentioned only in the context of regulation for safety reasons, etc.

New Zealand has traditionally had one of the most centralised forms of government in the world. The Public Works Act 1876 was designed to bring together the diverse pieces of legislation dealing with public works, vesting all the roads in the Crown, and that time the Crown was seen as the appropriate body to undertake major works such as railways.

Sir Julius Vogel was then undertaking an extremely large public works programme, with the Crown allocated a million pounds for the purpose. There was a perception that the Crown would be responsible for major projects—e.g. because the Government was making education compulsory for all, it was seen as being obliged to provide schools without cost to the users.

Under the law preceding the restructuring of departments in the last two decades of the twentieth century, even land administered by bodies such as the New Zealand Railways Corporation and the Housing Corporation vested in the Crown.

The common law recognised that public works legislation was needed to cover some situations where the public good outweighed the private damage. A case which illustrated the limitations placed on these powers was *Bartrum* v *Manurewa Borough,* [1962] NZLR 415, which arose from a notice of intention to take land compulsorily for a road.

The court heard that Bartrum and another land owner both wished to subdivide land and would require land for road access. The Council had favoured the other owner in publishing its notice of intention, and Bartrum argued that the compulsory acquisition was in practice to be for the benefit of a private individual. The court agreed, and held that the Council could not proceed further with its acquisition by these means.

Although this is the way that the common law regards the powers of compulsory acquisition, a reading of old Public Works Acts and related legislation shows that there have been some exceptions. Since the nineteenth century, there has been from time to time legislation enabling the compulsory acquisition of land or interests in land for the benefit of private individuals.

Marr's report on Public Works Act acquisitions[24] documents the way that powers of compulsory acquisition arose largely through the enterprises of private companies.

> Although railways and other works were promoted as providing undoubted improvements for the general public, in England they were developed, promoted and owned by private interests in many cases until well into the twentieth century. These were typically combinations of wealthy entrepreneurial land owners and industrialists. In order to promote and build their works and often to compulsorily obtain land required, they had to obtain the special Acts of Parliament required to authorise the work and the necessary taking of land. These acts enabled them to set up a company, raise money from shareholders, and buy the required land, by compulsory purchase if necessary, to build their railways or similar works. The Stockton and Darlington Act of 1823 and the Liverpool and Manchester Act of 1823 were typical of these local Acts.
>
> In fact those promoting the works and those occasionally suffering compulsory purchase almost invariably belonged to the same numerically small land owning class with similar priorities and outlook. This class also owned most of the land. The vast majority of the population at this time was landless and there was no widespread land ownership by the middle and working classes as happened later. It was this same small landed class therefore who were interested in using rights to take land where necessary for the works they were promoting, and who were occasionally subject to takings. The role of the state at this time has been described as being more like a neutral umpire, limited to laying down the general principles and procedures for taking land and determining compensation. This included providing machinery for resolving disputes between the private promoters who had obtained compulsory powers and the landowners subject to them.

Marr refers to the development of steam locomotives in 1814, and the first steam-hauled train opened for freight only authorised by Parliament as a public line.

> The improvements in town planning and town amenities were the other great branch of public works that had begun to develop by this time. Once again, in England, landowners played a significant role. The joint initiatives of industrialists and landowners resulted in the creation of new towns and considerable expansion in many old ones. Much of this was made possible by the development of rail transport and by the efforts of land owners and industrialists in providing land and establishing new industries on it. They laid out streets and built public amenities such as churches, schools, shops and waterworks and they reaped the profits from the industries the towns serviced. An example is the town of Crewe which was built by a railway company and included company built houses, church and school as well as company provided doctor, schoolmaster, curate and policeman.

[24] Marr, Public Works Takings of Maori Land: Report for the Treaty of Waitangi Policy Unit, December 1994. The quotations here are from pages 16-18

New Zealand's early reflects this approach to some extent. For example, the Kaitangata Railway and Coal Company Limited Empowering Act 1875 (an Act of which there is no record of repeal)[25] contains these sections:

> 6 Subject to the provisions of this Act, and the wholly and partially incorporated herewith, the company may exercise all or any of the powers conferred by this Act or the said incorporated Acts for the construction of the railway, and may enter upon or cause to be entered upon all land which they are authorised to use or acquire under this Act for the purpose of making such surveys as may be necessary, and may take and use all such lands as the Company shall have permission to use as aforesaid, and may take and hold the lands specified in the plan and book of reference and required for the railway along the line so set forth and described as aforesaid, or within the limits of deviation, and may temporarily hold and use such lands as may be necessary on either side of the railway during the construction thereof.
>
> 7. Subject to the provisions of this Act, all persons being owners of, or having any less estate or interest in, any lands so taken, under authority of this Act, or which may be damaged by the construction of the railway, shall be entitled to receive compensation for such land or damage; the amount whereof shall be ascertained in the manner set forth in the Act of the General Assembly of New Zealand called "The Lands Clauses Consolidation Act 1863, which Act and any Act amending the same for that and other purposes is incorporated with and shall form part of this Act."

As we have seen in the first part of this paper, the Land Clauses Consolidation Act 1863 was designed to deal with acquisitions by companies such as this. Where public works acts from 1876 onward deal with the Crown and local authorities, the Land Clauses Consolidation Act makes constant references to "the promoters". The term is defined in section II as "those who by the Special Act are empowered to execute or carry out such works or undertakings".

Surprisingly, the Public Works Act 1876 contains some provisions dealing with private benefits that are not found in more recent Public Works Acts. Sections 181 to 198 are headed "*Powers of Private Owners to procure Outfall*". They allow an owner who needs to connect to a public drain the right to drain his or her property through adjoining land. Application was to be made to a Magistrate's Court for an order to make the drainage works. Two Justices were to be satisfied that the works were necessary, that the land would be drained in the way causing the least possible damage, and that no injury would be done for which compensation was not payable.

The next Part of the 1876 Act is headed "Part VIII. OF THE SUPPLY OF WATER FOR GOLD FIELDS". Under that Part of the Act, the Governor was given powers to declare land within a proclaimed gold field to be a water-race. The Governor could then "demise and lease any water-race to any person willing to work the same"

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[25] Two other private acts which have not been repealed called the Duck's Nest Dam Act 1865 and the Lincoln Road Mill Dam Act 1965 empowered individuals to enter private properties for the construction of his dam, provided that they paid compensation.

(section 212) and all the real and personal property would vest in the lessee during the period of the lease.

An exception in the Public Works Act 1928 (repealed)

Section 209 of the Public Works Act 1928 gave a person who owned timber or the right to cut timber, as set out in subsection (1):

> Any person (hereinafter called "the applicant") owning timber or the right to cut timber on any land from which there is no practicable and suitable means or way of removing the same to any railway, road, mine, or sawmill, except by crossing private lands, may, by proceedings under the Summary Proceedings Act 1957 … summon the owner and occupier of the private lands to appear before a Magistrate and show cause why the applicant should not be authorised to construct a road or tramway over such lands for the removal of the timber.

The magistrate could make an order setting forth the route of the road or tramway, the amount of compensation to be paid, the time in which the road or tramway is to be constructed and how long the right was to last (not exceeding ten years).

Ashley River Improvement 1925

The Ashley River Trust under section 18 of this Act was empowered to buy land and pay compensation for it as under the Public Works Act—no compulsory acquisition powers are given.

Petroleum Act 1937 (repealed)

Section 35 of the Petroleum Act 1937 was as follows:

(1) For the purpose of facilitating the carrying on of any mining operations, the Governor-General may, on the application of a licensee, and at the licensee's expense in all things, take under the Public Works Act 1928, as if for a public work within the meaning of that Act, any land, or any interest or estate in land, (whether for the time being subsisting separately or not) or any easement or profit a prendre over any land (whether the time being subsisting or not).

(2) Notwithstanding anything to the contrary in the Public Works Act 1928, the effect of a Proclamation issued for the purposes of this section shall be to vest the land, estate, easement, or profit a prendre as the case may be, in the licensee instead of the Crown, and all proceedings subsequent to the issue of the Proclamation in respect of compensation, or otherwise for complying with the said Act shall be taken against the licensee, who shall be deemed to be the respondent, and shall be liable in respect to the taking to the same extent as the Crown would have been if the taking had been for the purpose of a Government work.

Geothermal Energy Act 1953 (repealed)

The Geothermal Energy Act 1953 included a section that appeared to give a power to take land which would be used for a particular undertaking. After the relevant Ministers had declared that section 8 applied to the undertaking—

> (2) …the Governor-General may, on the application of the persons responsible for the undertaking, and at their expense, take under the Public Works Act 1928 any land within the area specified by the declaration….

The National Development Act 1979

The late seventies were a time of major national projects, such as hydro dams, and the Government of the day was keen to see these projects proceed without unnecessary delay. The National Development Act did not give any special powers for the acquisition of land. It may be seen as one of the precursors of legislation such as section 186 of the Resource Management Act 1991, in that it was designed to "fast-track" enterprises for the orderly utilisation of New Zealand's resources, self-sufficiency in energy, exports or import substitution, and significant opportunities for employment. It would have applied to both0 private and public works, enabling the consent process needed under various pieces of legislation to be dealt with more quickly.

In particular, the Act would have sped up the planning process. The Minister of Works and Development had particular powers and responsibilities under this Act. It was repealed by the National Development Repeal Act 1986.

Landlock

One piece of legislation that makes possible a form of compulsory acquisition of land for a private individual is section 129B of the Property Law Act 1952, dealing with landlocked land. Where a person owns land that has no frontage to a legal road, he or she may apply to the Court to be given access over other land. If the Court "is of the opinion that the applicant should be given access to the landlocked land", it can make an order vesting suitable land for that purpose.

Section 129A of the same act also allows the court to make orders for changing the ownership of land when there is an encroachment.

Current acts that empower the taking of land for companies

There are now several statutes in which there are powers to use the Public Works Act 1981 for the acquiring of land "as for" a public work, or even where a project of a company may be deemed to be a Government work.

Perhaps the most far-reaching of these is Part VIII of the Resource Management Act 1991, dealing with the powers of network utility operators. Network utility operator are defined in section 166 as a person who—

(a) Undertakes or proposes to undertake the distribution or transmission by pipeline of natural or manufactured gas, petroleum, or geothermal energy; or
(b) Operates or proposes to operate a network for the purpose of purpose of telecommunication as defined in section 2(1) of the Telecommunications Act 1987; or
(c) Is an electricity operator or electricity distributor as defined in section 2 of the Electricity Act 1992 for the purpose of line function services as defined in that section; or

(d) Undertakes or proposes to undertake the distribution of water for supply (including irrigation); or
(e) Undertakes or proposes to undertake a drainage or sewerage system; or
(f) Constructs, operates, or proposes to construct or operate, a road or railway line; or
(g) Is an airport authority as defined by the Airport Authorities Act 1966 for the purposes of operating an airport as defined by that Act; or
(h) Is a provider of any approach control service within the meaning of the Civil Aviation Act 1990; or
(i) Undertakes or proposes to undertake a project or work prescribed as a network utility operation for the purposes of this definition by regulations made under this Act.

It may be generally observed that most of these activities have in the past been undertaken by the Government and local authorities. Most of them are activities that must follow a continuous course, such as road or sewerage system, and public works legislation to deal with the avoidance of gaps was formerly available. They are also matters that are vital to human life (e.g. water supply) or business activity (e.g. telecommunications).

Thus the Resource Management Act 1991 gives special powers to "requiring authorities", defined as—
(a) a Minister of the Crown; or
(b) a local authority; or
(c) a network utility operator approved as a requiring authority under section 167.

The Minister for the Environment may under section 167 approve a network utility operator as a requiring authority for a particular project, or a particular operation.

Section 168 allows a requiring authority to give a territorial authority notice of its requirement for a designation in respect of a project or work, or in respect of a restriction on land, water, subsoil or airspace necessary for the efficient functioning or operation of such a project or work.

The effect of the designation is set out in section 176. Subject to certain provisos, the requiring authority can do anything that is in accordance with the designation. Other people are prohibited from other acts, including subdividing it or changing its character.

Section 185 of the Resource Management Act 1991 gives the owner of interest in land to apply to the Environment Court to have an order made for the taking of the land under the Public Works Act 1981. The owner is then deemed to have entered into an agreement with the Minister of Lands on behalf of the network utility operator.

Section 186 is headed "Compulsory acquisition powers" (although the section also provides for land to be acquired under the Public Works Act 1981 by agreement, and for land owned by the Crown to be set apart or transferred under section 50 or 52 of the Public Works Act 1981).

Subsection (1) authorises a network utility operator which is a requiring authority to apply to the Minister of Lands to have land taken for a project or work as if it were a Government work. "If the Minister of Lands agrees", the land can be acquired or taken. That appears to give the Minister wide discretion to decline the application where he or she does not see it as an appropriate use of the powers.
The effect of taking the land "as if the project or work were a Government work" is that

- the land shall vest in the network utility operator instead of the Crown (subsection (2))
- claims for compensation are made against the Minister of Lands (subsection (5)), and
- all costs incurred by the Minister of Lands are recoverable from network utility operator (subsection (6)).

Heritage protection orders under the Resource Management Act 1991

Part VIII of the Resource Management Act 1991 also includes the law related to heritage protections orders, which may lead to the exercise of acquisition powers by a body which is not the Crown or a local authority—namely heritage protection authorities.

Under section 188(1)—

> Any body corporate having an interest in any place may apply to the Minister [i.e. for the Environment] in the prescribed form for approval as a heritage protection authority for the purpose of protecting that place.

If that Minister considers the body to be the appropriate body for the protection of the particular place, he or she may approve the applicant by notice in the Gazette.

The heritage protection authority then has the power to give notice under section 189(1) to a territorial authority of its requirement for a heritage protection order protecting

(a) Any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons; and
(b) Such area of land (if any) surrounding that place as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of that place.

(Territorial authorities also have a power to give notice of requirement under section 189A.)

After the procedure for public notification, submissions and hearing, the territorial authority decides where the requirement will be confirmed or withdrawn (section 191(2)).

Along with the status of a heritage protection authority comes a power of compulsory acquisition. Section 197(1) says:

> The acquisition of land by a heritage protection authority for the purposes of giving effect to a heritage protection order shall be deemed to be an acquisition of land, or an interest in land, for a public work for the purposes of the Public Works Act 1981.

Subsection (2) says that, where a heritage protection authority is neither the Crown nor a local authority, they have the compulsory powers of a network utility operator under section 186. Thus, for instance, if the Save Erskine College Trust, which was approved as a heritage protection authority under regulations made in 1992, wished to acquire part of the college which was not vested in the Crown, it could acquire the land as for a Government work. The land would vest in the heritage protection authority instead of the Crown.

All the same requirements as for an acquisition by a network utility operator would apply, including the need for the agreement of the Minister of Lands to the compulsory acquisition. Again note that the reference in the heading to compulsory powers is unduly restrictive, as section refers to both "taking" and "acquiring" land. That is to say, purchase by agreement, using the Public Works Act 1981 to avoid certain survey and subdivision requirements, would be an option if such an agreement could be reached.

Rights of other companies to acquire land under the Public Works Act 1981

Airport Authorities

<u>Legal definitions</u>:
For the purposes of the Airport Authorities Act 1966, an "airport authority" is a *local authority* authorised for the time being under section 3 of that Act to establish, maintain or operate or manage an airport. Subsection (2) says that also includes a person or association of persons authorised under section 3(3) to carry out the powers of a local authority with regard to an airport. This body may become an *airport company*. This is defined as a company registered under the Companies Act 1955 or the Companies Act 1993, as the case may be, that is for the time being authorised under section 3(3) to carry out the functions of a local authority under that section 3 of the Airport Authorities Act.

By virtue of section 594B(2) of the Local Government Act 1974, an airport authority is not a local authority trading enterprise

The Local Government Act 1974 recognises airport authorities as local authorities, while excluding airport companies. (First Schedule to the Act.)

For the purposes of the Public Works Act 1981, an airport authority is a local authority (section 2), while an airport managed by an authority that is not a local authority is a Government work: section 3d(b). The Governor-General may where appropriate acquire land compulsorily for an airport and vest it in the company.

Airport authorities are also listed as network utilities in the Resource Management Act 1991, which means that the procedure in section 186 of that Act could be used to

acquire land for them. That would probably not be a preferred option as it involves first being made a requiring authority.

Local authority trading enterprises

LATEs, where they have been incorporated under the Companies Act 1955 or 1993, are distinct legal entities, and are not given any powers under the Local Government Act 1974 to acquire land under the Public Works Act 1981.

At the same time, local authorities still have their statutory powers to run commercial enterprises such as motels and amusement halls, and it would therefore be possible for a local authority to acquire land under the Public Works Act 1981 for transfer to a LATE.[26] This contrasts with the transfer of Government works to State-owned enterprises, in which most cases the Government works themselves have ceased to be activities which the Government is empowered to undertake.

The compulsory provisions would probably not be used for such a purpose, as it would be difficult to persuade the Environment Court that the taking of the land was reasonably necessary.

Crown Research Institutes

No power is given in the Crown Research Institutes Act 1994 for a CRI to take land. Formerly section 11 of the Scientific and Industrial Research Act 1974 authorised land to be taken for the department's functions.

Energy Companies Act 1992

No powers are given to companies under the Energy Companies Act 1992.They would need to be dealt with as network utility operators under the Resource Management Act 1991.

Summary

There is a perception in New Zealand that compulsory acquisition powers are appropriate only for the Government, including local government with the Minister of Land and the Governor-General having the final say. The history of statutes giving powers of compulsory acquisition shows that this is not the solid tradition that we might think—that indeed the legislation in its nineteenth century English roots enabled certain types of work to proceed whether they were undertaken by the Crown or by private enterprise.

The introduction of the Public Works Act 1876 was a measure to gain uniformity in the area of compensation by having a centralised standardised system of acquisition, in which all such takings went through the Minister of Works. Meanwhile the

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[26] I do not express an opinion as to whether a local authority would succeed if it were judicially challenged in such a compulsory acquisition. There are cases such as *Burns* v *Upper Hutt City Council* in which courts have said that a local authority has no authority to acquire land for a purpose for which it does not intend to use the land.

practice of passing authorising acts for each work, each piece of legislation having the procedure set out, would become unnecessary. This approach, together with the tendency of central Government to take responsibility for matters such as education and railways, in time made it seem inappropriate for the procedures to be used for the benefit of anyone but the Crown.

The procedures provided in the Resource Management Act 1991 in effect show a return to the approach of the nineteenth century, when powers were given to companies involved in important project where those projects were seen to be for the public good. A shift to the “public good” concept, rather than enterprises which are defined in the legislation as public works, would place the emphasis on public benefit rather than public ownership.

Even so, there would probably be the need for such acquisition to be controlled by either a Minister of the Crown or by the courts. Thus an independent body could be seen to assess the question of whether there is an actual public benefit, and whether there might be ways of acquiring appropriate land without interfering with land owners’ private rights.

APPENDIX:

Observations arising from the short historical investigation (Opinions expressed in this appendix are personal to the writer and may not reflect the opinions of Land Information New Zealand or of its Policy Division.)

Cross-references to section 40 of the Public Works Act 1981 in other legislation

The history of cross-references to section 40 shows that the development of these processes has been one of building on experience, each statute in turn having a better model to start from. Two major issues which were not contemplated when section 24(4) of the State-Owned Enterprises Act 1986 was drafted were:

(a) whether a transfer to another State-Owned Enterprises Act 1986 was to be possible without first offering the land to the person from whom the land was acquired and

(b) whether anybody would have a right to lodge a caveat against the land.

(c) At what point the section 40 obligation arises, given that the purpose for which the land is held has ceased to have public work status anyway

(a) Transfer to another State-owned enterprise

On the first of these points, the policy may be considered by comparing the situation with similar situations. Section 40 does not come into play when land held for a public work is needed for another public work.

There is some logic and fairness in this, especially if the new work is (in a real sense) essential. If a school site is no longer needed, there is less inconvenience to all if it the Crown uses it for a new hospital—instead of taking another piece of land compulsorily for the hospital.

The case is even stronger if the need for the new work is site specific, e.g. if it is in the line of a motorway. (On the other hand, if the need is not essential or site specific, the person from whom the land was acquired might well see it as passed from one hand to another to keep him or her from ever getting it back.)

The situation with State-owned enterprises is more complex, as the equivalent issues might be—

(1) where the State-owned enterprise wishes to sell the land back to the Crown for a public work;

(2) where the State-owned enterprise wishes to sell the land to another State-owned enterprise (which would be unlikely to use the land for the same purpose);

(3) where the State-owned enterprise sells the land to another Crown body such as a Crown research institute (which would be unlikely to use the land for the same purpose);

(4) where the State-owned enterprise transfers the land to a subsidiary company; and

(5) where the State-owned enterprise sells the land and related assets to another person or company as a “going concern”.

Only the first of these scenarios is at present exempt from section 40, while the third is treated as though there were an exception.

The Crown Minerals Act stands out as being one piece of legislation that allows transfer to another body established under the same Act, free from section 40 of the Public Works Act 1981 requirements. This appears reasonable, as research institutes are not likely to be in competition with one another over the same business.

- A contrary view might be that it is unfair to the person from whom the land was acquired to take land for particular research and then use it for another type of research. That line of argument would be stronger in the context of the State-Owned Enterprises Act 1986, as the activities carried out by the companies concerned are more diverse. On the other hand, there is something to said for allowing a local authority trading enterprise to sell land to another local authority trading enterprise established under the same Council.

- It would be useful if the legislation were to make it clearer for all classes of Crown body what exceptions were to apply.

- It might also be useful if the word "required" in section 40(1)(b) could be defined so that the exception could not be used capriciously—clearly that was the intention when that paragraph originally referred to land required for an essential work. This would be best restricted to land that has been transferred to a Crown body or land that has been taken compulsorily by the Crown.

(b) Caveats

It would have been useful if something in the nature of a caveat or registrable notice had been introduced when the restructuring legislation began. With the passage of time, it may be that some State-owned enterprises will own a substantial amount of land that was not transferred to them by the Crown under the State-Owned Enterprises Act 1986. A reminder of the need to comply with section 40 would then be timely. The district land registrar would then need to be satisfied that the section had been complied with before registering any transfer of ownership.

Perhaps this is not entirely appropriate to be done in the form of a caveat. Existing legislation requires the transferor (or in one case the transferee) rather than the person who actually has the right of pre-emption to lodge the document. The wording of these sections reads as though it recognises a right that would also allow the person from whom the land was acquired to register a caveat. This may lead to the situation in the *Taubmans* case where there was no removal of the caveats until the validity of the section 40 decision was tested in court.

Perhaps some other form of statutory document could be used so as to require the District Land Registrar to record on the title that the land is subject to section 40. Or it could simply be a statutory requirement for the District Land Registrar to include such a memorial each time that a title issued from a transfer of land under the State-owned enterprise (or equivalent act). This would need to have provisions on the prerequisites for the removal that memorial.

(c) Defining the point at which an offer to the person from whom the land was acquired is required

Some of the legislation for Crown entities and local authority businesses is difficult to reconcile with the actual opening words of section 40 of the Public Works Act 1981, which tell us when the land is required to be offered to the person from whom the land was acquired:

> (1) Where any land held under this or any other Act or in any other manner for any public work—
> (a) Is no longer required for that public work; and
> (b) Is not required for any other public work….

Section 24(4) of the State-Owned Enterprises Act 1986 is particularly vague:

Nothing in section 40 to 41 of the Public Works Act 1981 shall apply to the transfer of land to a State enterprise pursuant to this Act, but sections 40 and 41 of that act shall after that transfer apply to that land as if the State enterprise were the Crown and the land had not been transferred pursuant to this Act.

That first begs the question of when it will apply, given that it is no longer needed for something defined as a public work.

The New Zealand Railways Corporation Restructuring Act 1990 is much clearer in saying that the offer-back provision is to apply before the land is sold to somebody who is not a railway company or railway operator.

Section 30(2) of the Crown Research Institutes Act 1992 is also clearer, in saying that the obligation arises when the land is no longer required for the purposes of a Crown research institute.

Clear words like this would be useful in all such legislation, including the acts of the late 1980's.

(d) Wording of sections

Another aspect which makes much of this legislation unclear is the use of legal fictions to state how section 40 is to apply. The reader is intended to work out who would have the responsibility if the holding body was the Crown or a local authority and the land had not been transferred to it. To take a case in point, section 26 of the Port Companies Act 1988 says

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a port company pursuant to this Act, but sections 40 and 41 of that Act shall, after the transfer, apply to that land as if the port company were a Harbour Board and the land had not been transferred pursuant to this Act.

If the Port Company was a Harbour Board still holding the land, it would have the power to offer to sell the land either to the person from whom it was acquired, and to decide when the exceptions applied. If the real intention was to give those powers to the regional council, it would have been far better to have stated explicitly that the

regional council was to exercise the powers and functions of a local authority under sections 40 and 41 at the relevant stage.

Minerals

As can be seen from the history of acquisition of land, and the history of the granting of land as compensation, the ownership of minerals in land acquired for a public work has developed in a way that is sometimes haphazard or in appropriate. Perhaps it is now timely for a provision in the Public Works Act to address these aspects:

(a) The exclusion of minerals from land acquired under the Public Works Act 1928. The person from whom the land was acquired was probably unaware that he or she retained these minerals, and it would make more sense for the Crown to take them. That would give some certainty to the question of ownership, as opposed to the test of whether the minerals are necessary for the support of the public work. Land taken under Public Works Acts prior to 1928 was also subject to this exclusion—retrospectively. I recognise that this would be seen as a from of compulsory acquisition without compensation.
(b) The reservation of all minerals to the Crown when land is alienated (pursuant to the Crown Minerals Act 1991) means that the person from whom the land was acquired does not get everything that he or she formerly owned when accepting an offer pursuant to section 40 of the Public Works Act 1981.

Compulsory acquisition for bodies other than the Crown and local authorities

Although it may seem inappropriate for anyone other than a Government body or local authority to be able to take land compulsorily, an argument can be made for it on the basis that the public good may be served. The “public good” argument places the emphasis on who benefits, whereas the concept of a “public work” places more emphasis on who has the power to undertake it.

As can be seen from the history set out here, this is far from a new development. In the nineteenth century, important projects such as railways in England were undertaken by private enterprise. The role of Parliament was to give the companies the powers that they needed, including the compulsory acquisition of where necessary, while protecting the rights of land owners as far as possible.

It is not surprising that the number of compulsory acquisitions has dropped considerably under the 1981 Act, as the process is—
(a) lengthy, involving attempts at negotiation, the section 18 notice followed by three-month minimum until the notice of intention, objections and hearings, and the final obtaining of the Proclamation.
(b) Expensive, with administrative and legal costs for all these procedures in addition to compensation
(c) Controversial, likely to draw adverse criticism publicly, and
(d) Uncertain—the plans of a public body could be thwarted by a successful objection to the Environment Court, a judicial review in the High Court, or the refusal of the Minister to recommend the taking where appropriate.

Network utilities that have the opportunity to become requiring authorities are therefore reluctant to begin the process, and do not seem to be in danger of using it frequently or in a heavy-handed way.

Two trends that can be seen in the giving of powers of compulsory acquisition to network authorities are:

(a) With public bodies using compulsory acquisition less for unessential works at the same time, the "public good" element increases, while the legal "public work" definition becomes less relevant, and
(b) A restriction similar in many ways to the "essential works" concept (indeed most of the network utilities are involved in tasks which were formally "essential works") is necessary to keep the powers within proper bounds. The powers then assist State enterprises and their competitors to provide services that are regarded as important to the public in a modern society.

Beyond these comments any discussion would become very much one of politics. It would be controversial, for example, if the Government were to allow the taking of land for other commercial purposes, e.g. enterprises that earned tourist dollars. If the Government of the day considered it appropriate that land be taken compulsorily for an enterprise of that type it would be more appropriate to use special legislation for the particular company or the particular project, rather than to extend section 186 to that class of business.

Another "political" aspect of the compulsory powers given to network utility operators is the question of motive in the acquisition. Traditionally, if the post office wanted to install a transmission line across a farm, and this was resisted by the farmer, compulsory powers would be used, as going around the farm would add thousands of pounds to the expenses. Perhaps the public is less sympathetic to a company such as Telecom using compulsory powers in these circumstances.

A consequential matter needing attention: definition of "road" in the Local Government Act 1974

The effect on section 315 of the Local Government Act 1974 was not properly considered when the original section 150 of the Public Works Act 1981 (which has now become section 185 of the Transit New Zealand Act 1989) was amended by the Public Works Amendment Act 1983.

The original section 150(1) read:

> Except as expressly provided in this Act or in any regulations in force under this Act, a motorway shall not be deemed to be a road.

In 1983 the effect of the section was reversed with subsection (1) now reading:

> Except as expressly provided in this or in any other enactment, a motorway shall be deemed to be a road for the purposes of every enactment and all civil and criminal proceedings under any enactment.

Because a motorway is now deemed to be a road, it appears that the word “road” in the Local Government Act 1974 will include a motorway, although the definition of road in section 315 of the Local Government Act 1974 was drawn up so as to exclude motorways. The definition of a road is a lengthy one ending with the words:

> But, except as provided in the Public Works Act 1981 or in any regulations under that Act, does not include a motorway within the meaning of that Act.

Although the subsequent repeal of section 150 of the Public Works Act 1981 could cause some confusion, it appears to me that a motorway does come within the definition of a road for the purposes of the Local Government Act 1974.

It could also be useful for the sake of clarity to have an amendment that makes it clear that Part VIII of the Public Works Act 1981 does not apply to motorways.

McNicholl* v *Auckland Regional Authority

As noted in this history there are some aspects of Chilwell J’s interpretations of parts of the Public Works Act 1981 that may been seen as departing from what was intended by the people who drafted it. If new sections are drafted, or the existing ones amended, some steps could be taken to try to avoid the ambiguity which led to his ruling. In particular:

(a) Section 17 could make it clear that there is freedom to negotiate an agreement to acquire land for public works, without having to comply with the formalities of section 18.
(b) Section 40(1)(b) could make it clear that the transfer of an existing public work to another body does not trigger an offer-back obligation, and, if appropriate, that the land can be transferred for a different public work.[*]

[*] I am aware that in the consultation with Maori, there was opposition to the idea of use of land for another public work when it became surplus.