

BRF 25-133 Public Works Act Review briefing five: Upholding Treaty of Waitangi settlement obligations and whenua Māori

Ki / To: Hon Chris Penk, Minister for Land Information **Rā / Date:** 1 November 2024


Ngā mahi matua kia mahia/key actions required

Minita/Minister	Key action required:	Deadline
Hon Chris Penk, Minister for Land Information	Note LINZ will discuss the contents of this briefing with you at your meeting with officials on 5 November 2024.	5 November 2024
	Indicate your preferred option for decision-making on the compulsory acquisition of whenua Māori.	6 November 2024

Toitū Te Whenua Land Information New Zealand Whakapā/contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/first contact
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Ngā kōrero a te Minita/Minister's comments



Pūtake/Purpose

This briefing reports back on upholding Treaty of Waitangi settlement obligations in the Public Works Act 1981 review and the Expert Advisory Panel's suggestions relating to whenua Māori.

Pānui whāinga/Key messages

- 1 Cabinet noted that any proposals to reform the Public Works Act 1981 (PWA) would need to ensure that the Crown's Treaty of Waitangi settlement obligations are upheld [CAB-24-MIN-0203].
- 2 Toitū Te Whenua Land Information New Zealand (LINZ) considers the PWA policy proposals to be consistent with upholding Treaty of Waitangi settlement obligations.
- 3 The Expert Advisory Panel (the Panel) provided suggestions on improving the treatment of whenua Māori in acquisition and compensation processes. LINZ has provided advice on these suggestions [BRF 25-116 and BRF 25-118 refers].
- 4 Relating to your decision to retain the Minister of Land Information as the decision-maker for compulsory acquisitions by the Crown [BRF 25-116 refers], the Panel suggested that the Minister for Māori Crown Relations or Minister for Māori Development have a joint decision-making role in relation to Section 23 notices (notice of intention to compulsorily acquire land) for whenua Māori.
- 5 LINZ preferred option is that the Minister for Land Information consult the Minister for Māori Crown Relations (for land returned as part of a Treaty settlement) or the Minister for Māori Development (for land covered by Te Ture Whenua Māori Act 1993 (TTWMA)).
- 6 The power to compulsorily acquire whenua Māori for public works is contentious. Requiring the Minister for Land Information to consult with the relevant Māori portfolio minister before exercising the power to compulsorily acquire whenua Māori may build trust in the decision-making process by ensuring the Minister is sufficiently informed before making a decision.
- 7 The Panel were of the view that it may be necessary to acquire Māori freehold land to delivery critical infrastructure, particularly linear infrastructure. However, they considered principles for promoting the retention of whenua Māori should be included in the PWA, along with changes to resolve inconsistency between these principles and the PWA.

Tohutohu/Recommendations

Toitū Te Whenua Land Information New Zealand recommends that you:

Indicate on **Appendix 1** your preferred options for decision-making on compulsory acquisition of whenua Māori under the Public Works Act 1981.



Amanda Moran

Toitū Te Whenua Land Information New Zealand

Rā/Date: 1/11/2024



Hon Chris Penk

**Te Minita mō Toitū te Whenua/
Minister for Land Information**

Rā/Date: 4.11.2024

Tāpiritanga/Attachments

- 1 **Appendix 1:** Detailed options table: decision-making on compulsory acquisition of whenua Māori.

Te Horopaki/Background

The power to acquire whenua Māori for public works is used sparingly

- 1 Historically, public works legislation has played a significant role in the Crown's alienation of whenua Māori. The Crown has acknowledged historical breaches of the Treaty of Waitangi through the use of public works powers. The Waitangi Tribunal has recommended reform of the Public Works Act 1981 (PWA) to better protect whenua Māori.¹
- 2 Current practice is for Crown agencies not to acquire whenua Māori wherever possible. Where the Crown requires whenua Māori for a public work, Toitū Te Whenua Land Information New Zealand (LINZ) has standards and guidelines on the acquisition of land. LINZ also promotes these standards and guidelines to local authorities.
- 3 The Crown has not compulsorily acquired any Māori freehold land under the PWA since 2013, when one property was acquired. LINZ is aware that between 2015 and 2020:
 - three parcels of Māori freehold land were acquired by the Crown following negotiated agreement with the owners and with the approval of the Māori Land Court
 - one area of general land owned by Māori (and held by the Māori Trustee) was taken by compulsory acquisition, at the request of the Trustee.
- 4 LINZ records of compulsory acquisitions by local authorities do not identify whether land was Māori freehold land or other protected Māori land. LINZ is not aware of any recent compulsory acquisition of Māori freehold land by local authorities.

Whenua Māori has unique characteristics relevant to the PWA

- 5 The tenure and ownership for Māori freehold land under Te Ture Whenua Māori Act (TTWMA) is based on the principle of retention of land by its owners, their whānau and their hapū. The Māori land tenure system has significant restrictions on the transfer of ownership. Most Māori freehold land has multiple owners and there are various statutory management structures and other methods for owners to use to make decisions about the land. The Māori Land Court has a role in scrutinising most dealings with Māori freehold land.
- 6 Whenua Māori is recognised in TTWMA as taonga tuku iho. Retaining their connection to ancestral lands is of cultural and spiritual significance to Māori. The proportion of Māori freehold land is currently around 5% of New Zealand's total land area.
- 7 The Expert Advisory Panel's (the Panel's) view was that the unique characteristics of whenua Māori should be provided for in any options to amend the PWA to facilitate the delivery of public infrastructure. The Panel proposed changes to improve the treatment of whenua Māori in their suggestions relating to acquisition and compensation [BRF 25-116 and BRF 25-118 refer].
- 8 The Panel viewed that it may be necessary to acquire Māori freehold land to deliver critical infrastructure, particularly linear infrastructure. However, they considered principles for

¹ In this briefing whenua Māori is used as a broad, non-statutory term for culturally significant land owned by Māori (it may include ancestral lands or land returned under Treaty settlements). Māori freehold land refers to land with Māori freehold land status under s129 of TTWMA.

promoting the retention of whenua Māori should be included in the PWA, along with changes to resolve inconsistency between these principles and the PWA.

Ngā tirohanga me ngā kōwhiringa o Toitū Te Whenua/Toitū Te Whenua LINZ views and options

PWA review policy proposals must uphold Treaty of Waitangi settlement obligations


- 9 Cabinet noted that any proposals to reform the PWA would need to ensure that the Crown Treaty of Waitangi settlement obligations are upheld [CAB-24-MIN-0203].
- 10 LINZ has reviewed Treaty of Waitangi settlement obligations and found no commitments of direct relevance within the scope of the review of the acquisition and compensation provisions of the PWA.²
- 11 There are numerous Treaty of Waitangi settlement obligations relating to the disposal of land held for public works, particularly first right of refusal options for post-settlement governance entities (PSGEs) to purchase or lease Crown-owned land. Upholding right of first refusal obligations was a key consideration in LINZ's preference for a non-statutory approach to improving the transfer of land between public works. This is supported by your decision on transfers [BRF 25-116 refers].
- 12 LINZ considers the PWA policy proposals to be consistent with upholding Treaty of Waitangi settlement obligations. LINZ informed PSGEs that a review of the PWA was underway as part of regularly scheduled relationship meetings [BRF 25-084 refers]. No substantive feedback was provided in response. There is a risk that some PSGEs consider upholding their settlement may require additional protections, for example, that land provided as redress in Treaty settlements cannot be compulsorily acquired under the PWA.
- 13 LINZ has Treaty of Waitangi settlement obligations for engagement when developing standards and guidance that are relevant to implementation of the PWA review.

The Panel suggested the Minister for Māori Crown Relations or the Minister for Māori Development have a role in the compulsory acquisition of whenua Māori

- 14 Related to your decision to retain the Minister of Land Information (Minister) as the decision-maker for compulsory acquisitions by the Crown [BRF 25-116 refers], the Panel suggested that, given its uniqueness, the Minister for Māori Crown Relations or Minister for Māori Development have a joint decision-making role with the Minister in relation to Section 23 notices (notice of intention to compulsorily acquire land) for whenua Māori. This would apply to Crown acquisitions only, as the Minister does not have a role in section 23 notices issued by local authorities.
- 15 LINZ supports the intent of the Panel's suggestion to involve the relevant Māori portfolio minister in decision-making. Involvement of the Minister for Māori Crown Relations (for land that returned as part of a Treaty settlement) or the Minister for Māori Development (for land

² The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and Te Urewera Act 2014 limit acquisitions under the PWA. These provisions are unaffected by the PWA review policy proposals.

covered by under TTWMA) may build trust in the decision-making process by ensuring the Minister is sufficiently informed before making the decision. However, LINZ recommends that the relevant Māori portfolio minister is consulted before the Minister makes a section 23 decision, rather than be a joint decision-maker. This is more consistent with current accountabilities and maintaining a streamlined process.

Options for ministerial decision-making on whenua Māori		
Options	Panel support	Key trade off
1. Minister for Māori Crown Relations or the Minister for Māori Development joint decision-maker with the Minister for Land Information: for section 23 notices for the compulsory acquisition of protected Māori land ³	✓ 	Greater oversight and accountability for contentious decisions with a high level of risk to the Māori Crown relationship. Additional procedural step, but for a very small category of acquisitions.
2. (LINZ preferred) Minister for Land Information to consult with Minister for Māori Crown Relations or the Minister for Māori Development: on decisions on section 23 notices for the compulsory acquisition of protected Māori land ²		Consistent with a streamlined process and accountabilities for land acquisitions for public works. May build trust in the decision-making process by ensuring the Minister for Land Information is sufficiently informed before making a decision. Additional procedural step, but for a very small category of acquisitions.

³ Protected Māori land is defined in the PWA as having the same meaning as in section 11 of the Infrastructure Funding and Financing Act 2020 meaning any of the following:

- (a) Māori customary land;
- (b) land vested in the Māori Trustee that—
 - (i) is constituted as a Maori reserve by or under the Maori Reserved Land Act 1955; and
 - (ii) remains subject to that Act;
- (c) land set apart as a Maori reservation under Part 17 of Te Ture Whenua Maori Act 1993;
- (d) any part of the common marine and coastal area in which customary marine title has, or protected customary rights have, been recognised under the Marine and Coastal Area (Takutai Moana) Act 2011;
- (e) land that forms part of a natural feature that has been declared under an Act to be a legal entity or person (including Te Urewera land within the meaning of section 7 of the Te Urewera Act 2014);
- (f) the maunga listed in section 10 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014;
- (g) Maori freehold land;
- (h) General land owned by Maori that was previously Maori freehold land, but ceased to have that status in accordance with—
 - (i) an order of the Māori Land Court made on or after 1 July 1993; or
 - (ii) Part 1 of the Maori Affairs Amendment Act 1967;
- (i) land held by a post-settlement governance entity if the land was acquired—
 - (i) as redress for the settlement of Treaty of Waitangi claims; or
 - (ii) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed;
- (j) land held by or on behalf of an iwi or a hapū if the land was transferred from the Crown, a Crown body, or a local authority with the intention of returning the land to the holders of mana whenua over that land.

- 16 The next step in advancing either of these options would be to for you to consult with the Minister for Māori Crown Relations and Minister for Māori Development.

The Panel engaged with stakeholders on whenua Māori

- 17 As part of their targeted stakeholder engagement, the Panel met with Te Hunga Rōia Māori o Aotearoa (The Māori Law Society) and received a written submission from Te Tumu Paeroa Office of the Māori Trustee. Invitations to engage were also extended to the Iwi Chairs Forum and the Federation of Māori Authorities, but these were not taken up.
- 18 Te Tumu Paeroa's feedback encouraged engagement with Māori landowners on the PWA review. Te Tumu Paeroa does not support alienation under the PWA, unless it will demonstrably help to protect, grow, and utilise whenua Māori. Te Tumu Paeroa suggested that the PWA review:
- include principles to consider te ao Māori perspectives and actively protect whenua as taonga;
 - exempt whenua Māori from any amendments that have potential to increase alienation; provide additional safeguards for the acquisition of whenua Māori;
 - reflect the cultural value of taonga tuku iho to Māori landowners in compensation;
 - retain a binding judicial decision maker for objections; and require consideration of the impact acquisition of general land can have on whenua Māori (e.g. landlocking).
- 19 Te Hunga Rōia Māori o Aotearoa thought the scope of the review was too narrow and wanted it expanded to include review of the PWA's offer-back provisions. Te Hunga Rōia Māori o Aotearoa were concerned that the process and timeframes for the review were inadequate to capture Māori voices. The foundation of Te Hunga Rōia Māori o Aotearoa's feedback was that the PWA is fundamentally inconsistent with the principles of the Treaty of Waitangi, as whenua is taonga to Māori. They saw the PWA review as an opportunity to:
- incorporate the principles of TTWMA;
 - ensure all other options to acquiring whenua Māori are exhausted;
 - increase the maximum term of a lease under the PWA;
 - incorporate tikanga Māori and Māori values into valuation processes;
 - better resource Māori in negotiations; improve use of land exchange; and
 - ensure the use of more innovative and consistent approaches by acquiring agencies to taking a partnership approach to negotiations.
- 20 The Panel also met with Hūhana Lyndon MP to discuss her Member's Bill *Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill*. Their meeting also included discussion of the practical issues and challenges for Māori landowners in navigating PWA processes. LINZ understands the content of the Bill is outside of the scope of matters sought to be addressed in the PWA review. Officials can provide further advice on this at your request.

The Panel provided additional suggestions relating to whenua Māori

- 21 Based on their targeted stakeholder engagement, the Panel considered and provided advice on principles for promoting the retention of whenua Māori and resolving inconsistency with these principles and the PWA. The Panel's suggestions included:
- including principles in legislation regarding the approach to acquiring whenua Māori

- including principles in legislation regarding compensation for whenua Māori (other than those relating to valuation and home loss, which are included in PWA policy proposals [BRF 25-118 refers])
 - clarifying in the PWA that whenua Māori set aside as Māori reservation and Māori customary land are not available for acquisition under the PWA
 - considering the position of land listed in the definition of “protected Māori land” in the PWA
 - providing for Te Tumu Paeroa or a person appointed by the Māori Land Court, rather than the Public Trust, to act on behalf of owners of under section 81 where the land involved is whenua Māori.
- 22 The Panel also identified non-legislative solutions to address some of the practical issues for Māori landowners in the negotiation process. Suggestions include upfront payments for professional advice and acquiring agency support in arranging hui where there are multiple owners. There is an opportunity for non-legislative solutions to be developed alongside implementation of the PWA review. Officials can provide further advice on this at your request.

Whakatūpato/Risks

- 23 The power to compulsorily acquire whenua Māori for public works is contentious. Requiring the Minister to consult with the relevant Māori portfolio minister before exercising the power to compulsorily acquire whenua Māori may build trust in the decision-making process by ensuring the Minister is sufficiently informed before making a decision.

Mātanga kōrero/Consultation

- 24 Ministries for the Environment, Primary Industries, Culture and Heritage, Transport, Housing and Urban Development, Business, Innovation and Employment, Justice, Education, and Health, and Departments of Internal Affairs, Conservation, and Corrections, the Treasury, Te Puni Kōiri, Te Arawhiti, the New Zealand Defence Force, New Zealand Transport Agency, New Zealand Infrastructure Commission Te Waihangā, KiwiRail, Transpower, and Health New Zealand were consulted as this briefing was prepared.
- 25 Te Arawhiti considered there should be a commitment to ongoing work, within a timeframe, to address the misalignments between the PWA and TTWMA. Te Arawhiti’s view is that failure to make a genuine commitment to address this misalignment places the Crown in a vulnerable position in the event of a contemporary Treaty claim, given the body of analysis and findings of Treaty breach by the Waitangi Tribunal over an extended period of time regarding the PWA.

Ngā Tāwhaitanga/Next Steps

- 26 This is briefing five of a series of briefings seeking your direction on matters for inclusion in the draft Cabinet paper in December.
- 27 If you wish to proceed with either of the options outlined in this briefing, you will need to consult with the Minister for Māori Crown Relations and Minister for Māori Development on your preferred proposal.

Appendix 1: Detailed options table: decision-making on compulsory acquisition of whenua Māori

Proactive Release

Proactive Release