

BRF 25-146 Public Works Act review briefing four: Policy decisions on Transpower's access

Ki / To: Hon Chris Penk, Minister for Land
Information

Rā / Date: 31 October 2024

Ngā mahi matua kia mahia/key actions required

Minita/Minister	Key action required:	Deadline when this action should be completed by
Hon Chris Penk, Minister for Land Information	Indicate on Appendix 1 your preferred option for Transpower's access to the Public Works Act 1981	5 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 seeks your decisions on how Transpower accesses powers under the Public Works Act 1981 (PWA). It is part of a series of briefings seeking policy decisions on key PWA matters, and relates to discussions on how Crown agencies and entities access the PWA [BRF 25-116 refers].

Pānui whāinga/Key messages

- 1 As a state-owned enterprise (SOE), Transpower does not access the PWA like Crown users. If its commercial negotiations fail, it may apply to you under the Resource Management Act 1991 (RMA) like other Network Utility Operators (NUO) to undertake a full standard PWA acquisition process.
- 2 Transpower's view is that this arrangement takes too long and will delay its ability to build critical new infrastructure to meet growing demands on the National Grid.
- 3 The PWA Expert Advisory Panel concluded that the RMA mechanism remains an appropriate check for Transpower's access to PWA powers, noting its greater independence from the Crown and Ministers. If Transpower's access were made more direct, the Panel considered this would require appropriate checks and Ministerial oversight.
- 4 Toitū Te Whenua Land Information New Zealand (LINZ) has identified two options for how Transpower could access the PWA:
 - i **Option 1:** Transpower continues to apply to you under the RMA mechanism to access the PWA, but will benefit from improvements to PWA processes under this review.
 - ii **Option 2:** Transpower has direct access to the PWA to initiate PWA negotiations, without your approval. Your approval would still be necessary for compulsory acquisition decisions. This would not limit Transpower's ability to acquire land outside the PWA.
- 5 Under Option 2, Transpower's access would largely resemble that of Crown users such as the New Zealand Transport Agency (NZTA). A similar arrangement to Option 2 exists for the SOE New Zealand Railways Corporation for the benefit of providing land to KiwiRail (also an SOE).
- 6 Option 1 offers greater system integrity for the PWA, while Option 2 is more enabling and efficient, and may better align with the Government's broader policy goals.

Tohutohu/Recommendations

Toitū Te Whenua Land Information New Zealand recommends that you:

Indicate in **Appendix 1** your preferred option for Transpower's access to the PWA.



Stacey Newlands

**Toitū Te Whenua Land Information New
Zealand**

Rā/Date: 31/10/2024

Hon Chris Penk

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


Rā/Date:

Tāpiritanga/Attachments

Appendix 1: PWA Transpower access options summary

Te Horopaki/Background

Transpower expects to need more land to support new Grid infrastructure, and accesses PWA powers via the Resource Management Act 1991

- 1 Transpower is a state-owned enterprise (SOE) that owns and operates National Grid (Grid) infrastructure for transmitting electricity. Transpower expects a growing need to acquire land interests including compulsorily in coming years to build new and upgrade existing critical infrastructure. This will support significant growing demands on the Grid, security of supply, and decarbonisation goals. Increasing transmission capacity is necessary to achieving the Government's goal of doubling the supply of renewable energy.
- 2 As an SOE, Transpower's access to the PWA is less direct than Crown agencies and local authorities. Access is through its status as a network utility operator (NUO) under the Resource Management Act 1991 (RMA).¹ Section 186 RMA allows NUOs that are requiring authorities to apply to you as Minister for Land Information to use PWA powers. Land acquired under the PWA then vests in the NUO rather than the Crown.
- 3 
- 4 In the past 10 years, the Minister for Land Information has only considered s186 RMA applications for two projects (one each for Transpower and Top Energy) and fewer than 10 land interests, and Transpower obtained three of these by compulsory acquisition. LINZ practice has been for LINZ to assume responsibility for managing negotiations (which occur under your authority) after an application succeeds.

Transpower seeks more direct access to PWA powers

- 5 Transpower's view is that it is the only SOE delivering critical national linear infrastructure that needs to rely on the RMA mechanism to access compulsory acquisition powers. By comparison, New Zealand Railways Corporation has direct access to the PWA through the New Zealand Railways Corporation Act 1981. Transpower's view is that its less direct access to PWA powers will constrain its ability to deliver a significantly increased programme of work. From its experience, Transpower considers that the section 186 RMA process adds at least 12 months to acquire land compulsorily compared with arrangements for other users.
- 6 Transpower also has concerns with a PWA negotiation process needing to follow on from its commercial negotiations, and notes that having to hand over negotiations to LINZ on your behalf during this process weakens its relationships with landowners. Transpower relies on ongoing relationships with landowners for its maintenance and operational activities.

¹ NUOs are defined in section 166 of the RMA include entities (private and public) that distribute gas, petroleum, electricity, water and wastewater, or construct or operate roads, railway lines and airports.

- 7 Transpower advises that any options for greater PWA access cannot simply provide that it should acquire land like a Crown agency, with all land acquisition and disposal occurring under the PWA framework. Due to the nature of the electricity system, many of its land dealings are complex and require connections with other infrastructure providers. Transpower needs land to be vested in Transpower rather than the Crown,² and it wishes to continue to acquire land commercially where it can reach agreement before initiating a PWA process. Any changes to how Transpower accesses PWA powers will require legislative changes specific to Transpower.

The Panel considered Transpower's PWA access

- 8 The Panel recognised the difficulties faced by Transpower to acquire land to support critical infrastructure. Because its SOE ownership differs from other private NOUs, the Panel noted a case for Transpower to have more direct access to the PWA. However, the Panel noted that Transpower's SOE status makes it more independent from Ministers than Crown entities like NZTA, with less public accountability. As this creates greater concern about its use of compulsory powers, the Panel concluded that the section 186 RMA mechanism for Transpower's access to the PWA remains an appropriate check.
- 9 If Transpower's access was made more direct, the Panel noted that appropriate checks and Ministerial accountability would have to be in place for the use of compulsory acquisition powers.

Options and analysis

Option 1: Transpower continues accessing the PWA via section 186 RMA with operational changes made for its access to be more efficient

- 10 Consistent with the Panel's advice, Transpower would continue to access the PWA via the section 186 RMA mechanism, following attempts at negotiating commercially. A standard PWA process (as improved and streamlined by this review) would follow, including a minimum of three-months good faith negotiations under the PWA.
- 11 Following a successful section 186 application, Transpower would benefit from the efficiency improvements to the PWA through this review, such as changes to the section 18 notice (advice to be provided in BRF 25-145 due on 4 November).
- 12 Further operational changes can be made to make Transpower's access through section 186 more efficient. Based on its experiences, Transpower reports that the section 186 RMA process adds approximately 12 months to compulsorily acquire land compared with other PWA users, including four months to prepare an application, three months for LINZ's and your consideration, and subsequent negotiations. A recent Supreme Court judgment has clarified what is required of your decision making on section 186 RMA applications.³

² Transpower land must be on its Regulated Asset Base to be recoverable under Commerce Act processes.

³ *Dromgool v Minister for Land Information* [2022] NZSC 157

Operational changes can be made to make the application process clearer and faster as a result of this.

- 13 While this process would be under your authority, LINZ does not consider it essential that it undertakes these negotiations on your behalf for Transpower, and could make operational changes to effect this. Transpower could instruct an accredited supplier, which would improve their ability to maintain negotiations with landowners.⁴

Option 2: Transpower has direct access to the PWA

- 14 If you would prefer a more enabling mechanism, a second option is to allow Transpower to access the PWA directly so it does not need to use section 186 of the RMA. This option requires a legislative provision and would give Transpower access similar to the New Zealand Railways Corporation (NZRC),⁵ and NZTA under the arrangements you agreed to in BRF 25-116 (where NZTA can enter into acquisition by agreement itself).
- 15 Should this option be chosen, changes to Transpower's access would be as follows:
- Transpower could initiate a negotiated PWA acquisition itself (that is, put the owners on notice that if the land is not acquired by commercial agreement it would be acquired under the PWA) and enter into a negotiated PWA agreement itself (rather than through you).
 - You would still make any compulsory acquisition decisions (that is, the decision to issue a Section 23 Notice of Intention and to recommend a Proclamation). This is consistent with your decision on compulsory acquisition decision-making in BRF 25-116.
 - If Transpower has put the owners on notice, and then reaches agreement or compulsorily acquires it, it would be a PWA agreement with all of the disposal requirements attached.
 - Land acquired or taken under the PWA would vest in Transpower, rather than the Crown.
- 16 The Minister for State Owned Enterprises makes Section 23 notice decisions for NZRC, but LINZ recommends that you make Transpower's Section 23 notices. This would be consistent with your decision to oversee compulsory acquisition processes for Crown users including NZTA [BRF 25-116 refers], and with the Transpower provision sitting in the PWA, whereas NZRC's powers sit in its specific legislation.

Option 1 has greater system integrity for the PWA, while option 2 is more efficient

- 17 Option 2 would not limit Transpower's ability to acquire land outside of the PWA. Transpower has advised that its preference is to maintain flexibility, so that it can acquire land outside of the PWA by negotiation where it can. Like Option 1, Transpower would need to negotiate for at least 3 months under the PWA after it had shifted to a PWA process even

⁴ LINZ will seek decisions from you about the role of accredited suppliers in a subsequent briefing ahead of the second Cabinet paper, planned for March 2025, as part of a wider package of options relating to regulatory oversight and tools.

⁵ NZRC is an SOE which has direct access to PWA powers under the New Zealand Railways Corporation Act 1981. This arrangement is for the benefit of providing land to KiwiRail, another SOE. It allows NZRC to undertake most PWA actions itself and to apply to its responsible Minister (the Minister for State-Owned Enterprises) for compulsory acquisition decisions.

if commercial negotiations had already taken place. It would also be able to choose, for example for specific projects, to use the PWA and not carry out commercial negotiations, in which case it would be acquiring land like a Crown user or NZRC.

- 18 This practice would more enabling and different to other Crown users, who only acquire land under the PWA. It would also be different to NZRC which advises that most of its land acquisitions occur under the PWA, rather than using its ability to acquire land commercially.
- 19 LINZ considers that the section 186 RMA mechanism in Option 1 is a protection that makes the shift to PWA powers and process clear to landowners, Transpower, and statutory decision-makers. If Option 2 is preferred, Transpower would need to communicate clearly to landowners when it was initiating or shifting to a PWA process so that landowners understood the process and their rights under the PWA, including that the land acquired will then be held under the PWA and subject to the disposal requirements in the PWA.⁶ If Transpower has not communicated clearly that it was shifting to a PWA process, it will be unable to satisfy the requirement for good faith negotiation and you will not be able to issue a Notice of Intention.
- 20 Option 2 is more efficient for Transpower than Option 1. In bypassing the need to apply to you under section 186 RMA, Transpower would be able to initiate PWA acquisition without Ministerial agreement, and could enter into acquisition agreements under the PWA itself rather than through you. In addition, a decision under section 186 RMA can be judicially reviewed. Option 2 may be more enabling of the government's broader policy goals, while Option 1 provides greater system integrity for the PWA.
- 21 The need for you to make compulsory acquisition decisions provides Ministerial oversight and safeguards on the use of compulsory powers, but not to the extent of Option 1.

Mātanga kōrero/Consultation

- 22 LINZ consulted with Transpower, the Ministry of Business, Innovation and Employment (MBIE), and the New Zealand Infrastructure Commission Te Waihanga in preparing this briefing. Transpower and Te Waihanga support option 2. MBIE noted the trade-offs of both options, and prefers option 2.
- 23 On an earlier draft of a briefing which included content on Transpower (among other matters), LINZ further consulted with the 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, Corrections, the Treasury, Te Puni Kōkiri, Te Arawhiti, the New Zealand Defence Force, New Zealand Transport Agency, KiwiRail, and Health New Zealand.
- 24 Te Arawhiti, Te Puni Kōkiri, and the Ministry for Primary Industries (MPI) supported retaining section 186 RMA as a check on Transpower's access to PWA processes, and considered

⁶ If accredited suppliers are retained in the system through subsequent policy work for Cabinet paper 2 (see footnote 4), a shift to a PWA process would be signalled through Transpower's use of an accredited supplier.

checks were necessary due to issues that have arisen from transmission lines on whenua Māori.

- 25 The Treasury prefers option 1 based on Transpower's status as an SOE, its primary objective to be a successful business, and the views of the Panel. The Ministry of Justice noted the importance of ensuring Ministerial and Crown oversight in the use of compulsory powers by commercial entities.

Ngā Tāwhaitanga/Next steps

- 26 This is one of a series of briefing seeking your direction on matters for inclusion in the draft Cabinet paper in December.
- 27 You may wish to discuss the options with the Minister for Energy and Minister for State Owned Enterprises.

Proactive Release