

6 May 2020

BRF 20-527

PŪKETE ĀWHINA / AIDE MEMOIRE

Options for Public Works Act changes to align with the Resource Management Act fast-track process

Te Horopaki / Background

1. Cabinet agreed on 28 April 2020 to the Minister for the Environment's proposed COVID-19 Recovery (Fast-track Consenting) Bill 2020. This will create time-limited powers to fast-track resource consenting and designation processes for specified development and infrastructure projects in order to support New Zealand's economic recovery.
2. The fast-tracking will involve decisions being made by an 'Expert Consenting Panel' (ECP), with limited reasons to decline an application. Projects must either be written into the Bill or meet key criteria to access the fast-track processes by Order in Council [CAB-20-MIN-0182 refers].
3. Drafting of the Bill is underway already. The Minister for the Environment has stated publicly his intention to introduce a Bill into the house in May or June.

Tūranaga / Current status

4. The Resource Management Act (RMA) fast-track process has direct implications for the Public Works Act (PWA). We understand there have already been conversations between the Minister for the Environment and the Minister of Transport on the importance of aligning PWA processes to give certainty to infrastructure development projects.
5. Cabinet has invited Ministers¹ to report back on possible options around processes under the Public Works Act 1981 by 18 May 2020 [Paragraph 89, CAB-20-MIN-0182 refers].
6. Without changes, the PWA processes will likely become the impact point where the fast-track projects slow down considerably.
7. This paper presents options for operational and legislative changes to the PWA to support the intent of the RMA Fast-track process and enable projects to begin as soon as possible. It includes the operational changes that are underway or proposed to ensure community engagement, consultation with affected persons, and access to mediation services.

Maintaining checks and balances within the PWA

8. Through the recent work on potential Whenua Māori PWA Amendments, as well as input into the Urban Development Legislation, we understand the importance of retaining balance in how the PWA is applied. The stages of land acquisition in the PWA all serve the purpose of balancing rights for land owners with the importance of progressing critical national infrastructure.
9. According to recent NZTA data, the majority of their acquisitions (approximately 75 percent) are accomplished through negotiation with landowners, without entering the compulsory acquisition process. A further 20 percent (approximate) of landowners reach settlement through negotiation

¹ Ministers of/for Māori Crown Relations: Te Arawhiti, Transport, Land Information, Housing, Building and Construction, and Local Government, and Associate Minister of Finance Hon David Parker.

after receiving a notice of desire. This means that approximately five percent of total acquisitions occur through compulsory acquisition.

10. We are proposing several packages of options that retain wherever possible these checks and balances in the current system. This includes increasing resources for community engagement and supporting acquiring authorities to deploy a wider range of tools than those legislated in the PWA (eg ex gratia payments). In the table below (**Appendix 1**), we have outlined the impact on the current PWA checks and balances for each of the proposed options.

There are options to reduce the impact of the PWA on the RMA fast-track

11. The RMA fast-track Cabinet paper proposes two basic mechanisms – fast-tracking consents/designations through an Expert Consenting Panel (ECP) either by writing into the Bill or by Order in Council, and giving some projects permitted activity status. Our proposed options vary for each of these mechanisms.

There are two packages of options to consider

12. Appendix 1 presents two packages of operational and legislative changes to the PWA that will support the intent of the RMA fast-track process. Non-legislative interventions (colour coded in green) have been prioritised.
13. The intent of the changes is to retain as many of the typical PWA process as much as possible – and balance the Government’s power to acquire land for public works with the processes that acknowledge a landowner’s rights. The changes are designed to contribute to the Government’s COVID-19 recovery plans and assist key infrastructure works to occur in an efficient and timely manner, while ensuring any new processes are fair in their application.
14. Further to these options, we can work with agencies to provide additional advice on the timing and interaction points of these proposed changes, relative to current practices between the RMA and the PWA.

Proposed exemption for Māori land

15. Māori land² is excluded from the temporary alignment/fast-tracked PWA compulsory acquisition powers. There is a risk with this approach that it may establish a precedent but we consider this risk to be smaller than the risk caused by not excluding Māori land – which includes undermining the Māori-Crown relationship, creating new Treaty grievances, and undermining the work on Māori Land in policy development for the Urban Development Legislation and the [redacted] [s 9(2)(iv)]. Additionally, we note that nothing stops the sale and purchase of Māori land, or the application of existing usual PWA processes.³

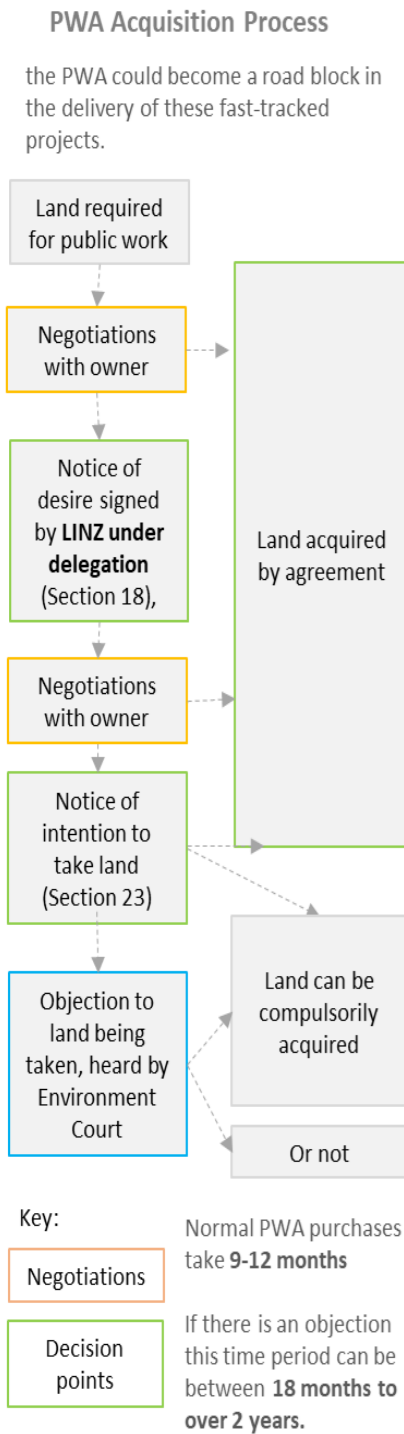
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² The exact definition of Māori land that will be used is yet to be determined.

[s 9(2)(b)(ii)], [s 9(2)(iv)]

Appendix 1- operational and legislative changes to the PWA



Impact of Package 1 on current PWA checks and balances

This package prioritises operational changes, but may not speed up objections enough to give certainty to developers

The majority of PWA land acquisitions are by **negotiated agreement** (on a willing buyer-willing-seller basis), the greatest increase in speed comes from incentivising landowners into early agreement.

The time-savings will vary, negotiated agreements can be reached in a minimum of 3-4 months.

Operational processes can align the **decision** to take land with RMA fast-track processes if it is optimal.

Objections are slow and time consuming, but only happen rarely. Officials can work with the Environment Court to support prompt decisions, but this will be slower than package 2.

Landowners would need to go to Environment Court for PWA, and ECP for RMA.

Some projects may not be able to progress until any objections are resolved, but others may.

LINZ advises that adding a criteria to the Environment Court's considerations could help align with the intent of RMA changes. But could give extra risk of objection/judicial review.

Table of operational and legislative changes to the PWA that will support the intent of the RMA Fast-track process

Key:
Green – Operational change
Black – Legislative change

	Package 1 – operational improvements and changes to negotiations		Package 2 – speed up and align with RMA – Infrastructure (NZTA) proposal	
	PWA changes to match the RMA 'fast-track' Expert Consenting Panel	Other fast-track processes (permitted activities)	PWA changes to match the RMA 'fast-track' Expert Consenting Panel	Other fast-track processes (permitted activities)
Negotiation	Improve information to owners, such as project specific information on PWA provided at outset of engagement.		Same as Package 1.	
	Provide Crown's valuation at first discussion and pre-approve landowner's valuation and legal costs.		Note that all these negotiation operational improvements are currently underway by LINZ and NZTA	
	Provide a funded mediation service to facilitate speedy and non-adversarial resolution if compensation is not agreed.			
	Provide access to counselling and support services.			
	Explore financial incentives for speedy agreement, including paying over market value if negotiations with landowner are successful within the first 2-3 months.			
	Work to expand the pool of PWA accredited suppliers and enhance industry capability.			
Decision	Align decision (Notice of Intention) with RMA fast-track process.			
Objections				
	Work with Environment Court to secure prompt decision making.			
Other				

Impact of Package 2 on current PWA checks and balances

This package of legislative changes prioritises processing objections faster, but may reduce fairness for landowners

The same improvements to **negotiations** are proposed.

Requiring **decisions** on taking land to happen in line with the RMA fast-track process removes flexibility from the current PWA processes.

Objections would be considered by an expert retired **Environment Court Judge** on the **ECP**, with the usual PWA s.24 criteria.

From the time of a landowner lodging an **objection** to the ECP reaching a decision would be only about 2 months, and at the same time as the decision on the consent is made. Landowners may have a shorter-time to lodge an **objection**, making it difficult for them to form a case.

landowners would only have to deal with ECP for both PWA and RMA issues.

This timeframe may be challenging for the Minister/Crown Law to meet..

Limited appeal rights are retained.