

[In Confidence]

Office of the Minister for Land Information

Chair, Cabinet Economic Development Committee

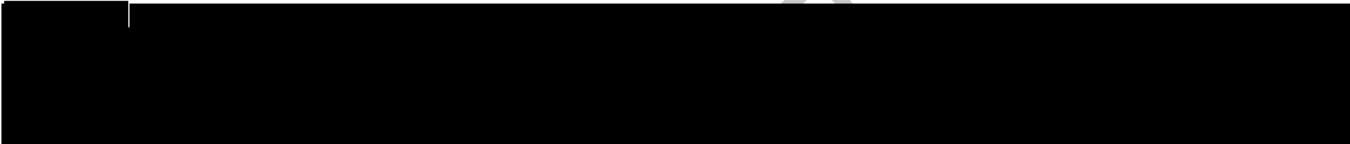
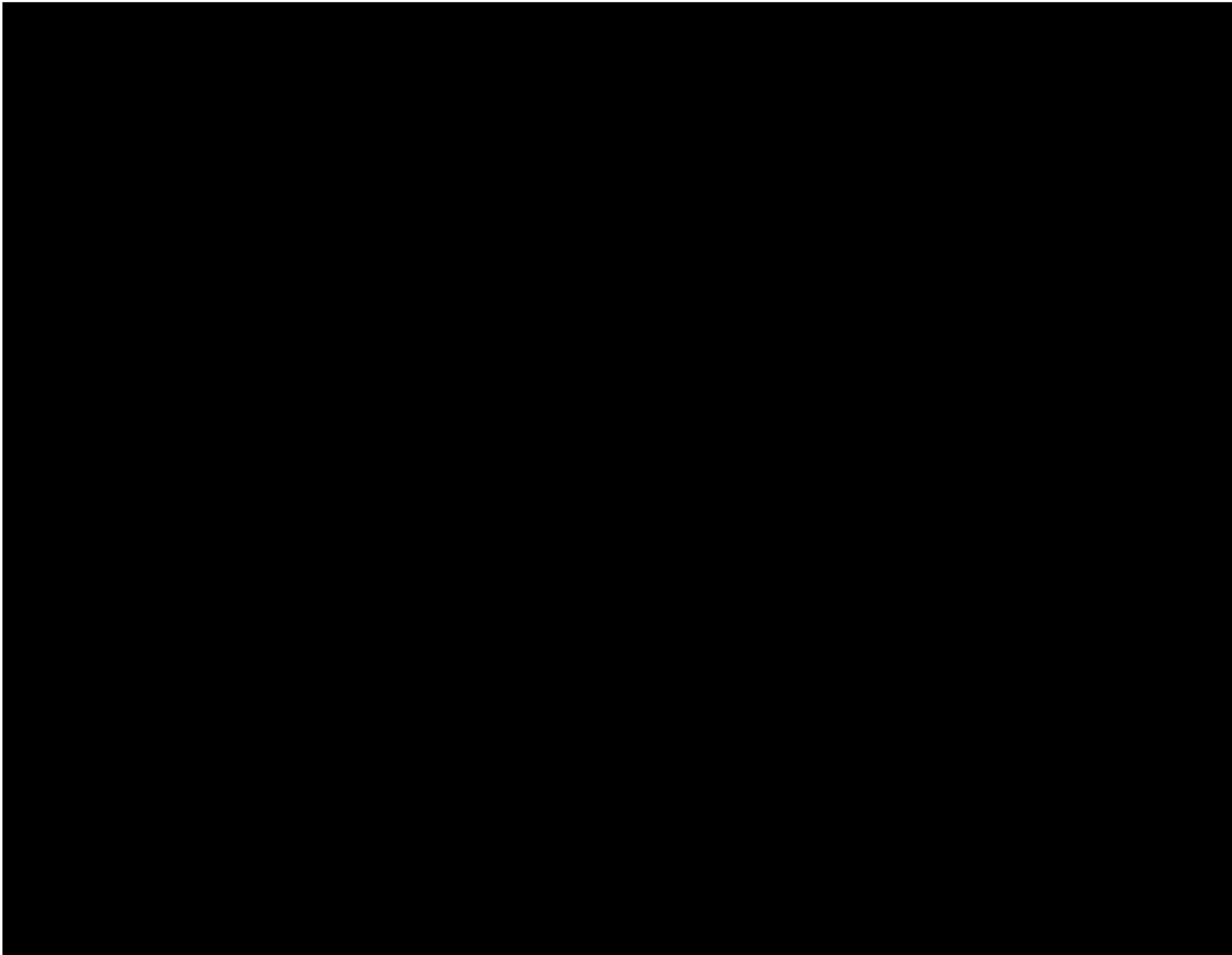
Possible changes to the Public Works Act to support the Resource Management Act Fast-Track Process

Proposal

1. This paper sets out options for changes to the Public Works Act 1981 (PWA) to support the Resource Management Act 1991 (RMA) fast-track process. It also identifies further non-legislative changes additional to PWA operational improvements that are currently planned or underway.

Executive Summary

2. On 3 June 2020, the Cabinet Economic Development Committee (DEV) invited the Minister for Land Information, in consultation with the Minister of Transport, Minister of Local Government, Minister for Māori Development and Minister for Infrastructure, to report back on possible PWA legislative changes in addition to a package of agreed operational changes (set out in **Annex 1**) [DEV 20-MIN-098 refers].
3. DEV sought these legislative changes to further reduce barriers caused by the application of the PWA to RMA fast-track projects by either significantly increasing the speed of the land acquisition process, or providing increased certainty on the timing of decisions for acquiring authorities.
4. Cabinet has agreed that Māori land should be exempted from any legislative changes to fast-track the process to acquire land under the PWA. Officials have done further work on how “Māori land” should be defined in this context, and I recommend that the definition of Māori land be based on the categories of Māori land listed the Urban Development Bill (UDB) - set out in **Annex 2**. I do not recommend that Māori land owners be exempted from beneficial operational changes to the PWA, that have been agreed by Cabinet.



Background

11. On 3 June 2020, DEV noted that acquiring authorities have identified timing challenges between the RMA fast-track process and the PWA regime for the acquisition of land that could impact on how long it takes to progress COVID-19 recovery fast-track projects, and agreed to a package of operational changes to help address this [DEV 20-MIN-098 refers].
12. DEV also invited the Minister for Land Information, in consultation with the Minister of Transport, Minister of Local Government, Minister for Māori Development and Minister for Infrastructure, to report back to DEV on possible PWA legislative changes in addition to the agreed operational changes.

Aim and scope of proposed changes

13. The COVID-19 Response (Fast-Track) Bill aims to support economic recovery and create jobs by accelerating the start of construction of a range of infrastructure projects.

14. The focus of any changes to the PWA should be on reducing as far as possible barriers caused by the application of the PWA to these projects - while maintaining the principles of the PWA - by either:
- 14.1 significantly increasing the speed of the land acquisition process (above and beyond the planned operational changes), or
 - 14.2 providing increased certainty on the timing of decisions for acquiring authorities – noting that this is certainty of the timing of decisions, not certainty of the outcome of those decisions.
15. The package of operational changes already agreed by DEV (set out in **Annex 1**) aim to increase both the speed and the certainty of the process. This paper looks at whether legislative or further operational changes may be desirable in addition to this package.
16. I have not considered any changes to the compensation regime because they would be likely to introduce equity issues relative to non fast-track projects – including for Māori land owners because whenua Māori is excluded from legislative changes. In addition, any compensation changes may have significant financial impacts for acquiring authorities. It is not possible to quantify this impact as the number and nature of projects under the fast-track will change over the next two years.
17. The scope for any PWA legislative changes is also likely to be limited by:
- 17.1 the lack of opportunity for meaningful public consultation or engagement with Māori
 - 17.2 constraints on the legislative programme.
18. Because of the short timeframes involved, there has not been time for officials to fully consider the impacts of the options set out in this paper, and all estimated time savings are indicative only.
19. In addition, officials are not aware of the number of projects, including local government projects, that will be appropriate for fast-track consenting and how many will require PWA acquisitions. This limits officials' ability to determine the nature of the problem and the degree of change required to address it.

Exemption of Māori land

20. Cabinet has agreed that Māori land should be exempted from any legislative changes to fast-track the PWA. Officials have done further work on how “Māori land” should be defined in this context. I recommend that if legislative changes are progressed, the definition of Māori land be based on the categories of Māori land listed in the Urban Development Bill (UDB) (set out in **Annex 2**). This includes categories listed in the ‘Protected land’ provisions, as well as in other parts of the legislation.

21. Officials have worked with iwi policy technicians (from the Iwi Chairs Forum), Ngāi Tahu, and Papa Pounamu to determine how Māori land should be defined in this proposal. Iwi policy technicians, along with Te Puni Kōkiri and Te Arawhiti, recommended using the definition of protected land in the UDB.
22. In the UDB, protected land categories are split into 'land absolutely protected from acquisition and development' and 'land protected from use of certain powers without agreement'. This is because the owners of absolutely protected land have no legal ability to sell it and it cannot be acquired under the PWA. For that reason we would maintain this split in order to preserve the status quo. Land that is absolutely protected from compulsory acquisition would be exempted from the PWA fast-track and would continue to be inalienable. Land that is protected from the use of the PWA fast-track would continue to be alienable under the status quo.
23. The exemption would not stop the voluntary sale and purchase of Māori land, or the application of any existing PWA acquisition processes (non-fast-tracked). Owners of Māori land who are willing to sell their land for public works would still be able to do so.
24. Officials are also investigating how the operational changes recommended in the Cabinet paper considered 3 June 2020 will relate to Māori land. I do not recommend that Māori land owners be exempted from beneficial operational changes to the PWA that improve practice, that have been agreed by Cabinet.



Analysis of options

30. Officials have assessed each of these options against the following criteria:

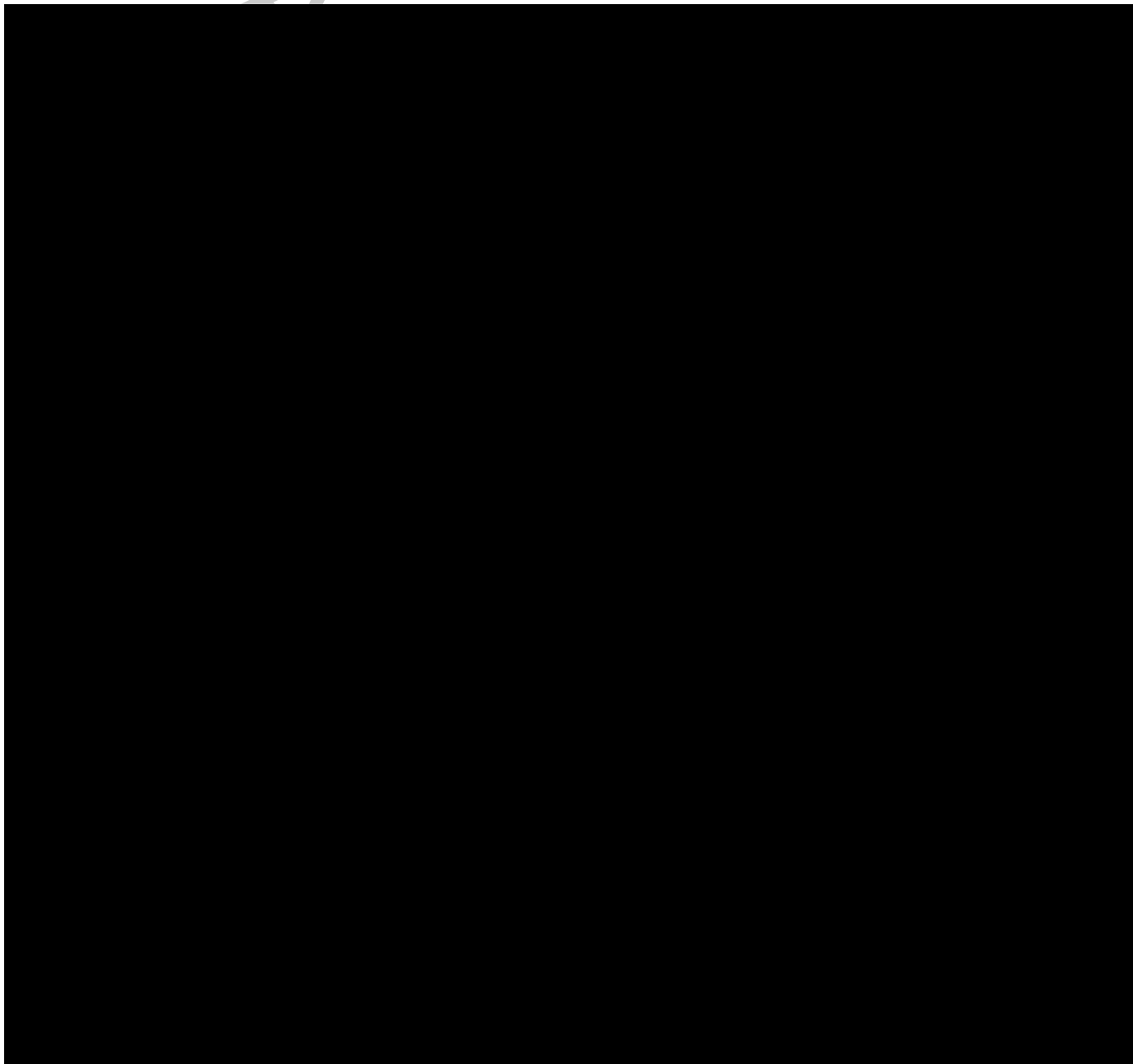
- 30.1 *Need* – e.g. does the proposed change achieve the intent/objectives above? Could the same effect be achieved through non-legislative change?
- 30.2 *Fairness* – e.g. does the proposed change provide adequate access for landowners to justice/procedural fairness? Does the proposed change impact on fair compensation for landowners?
- 30.3 *Practicality* – e.g. is it practical/feasible to make the proposed change? Is the proposed change workable in practice?

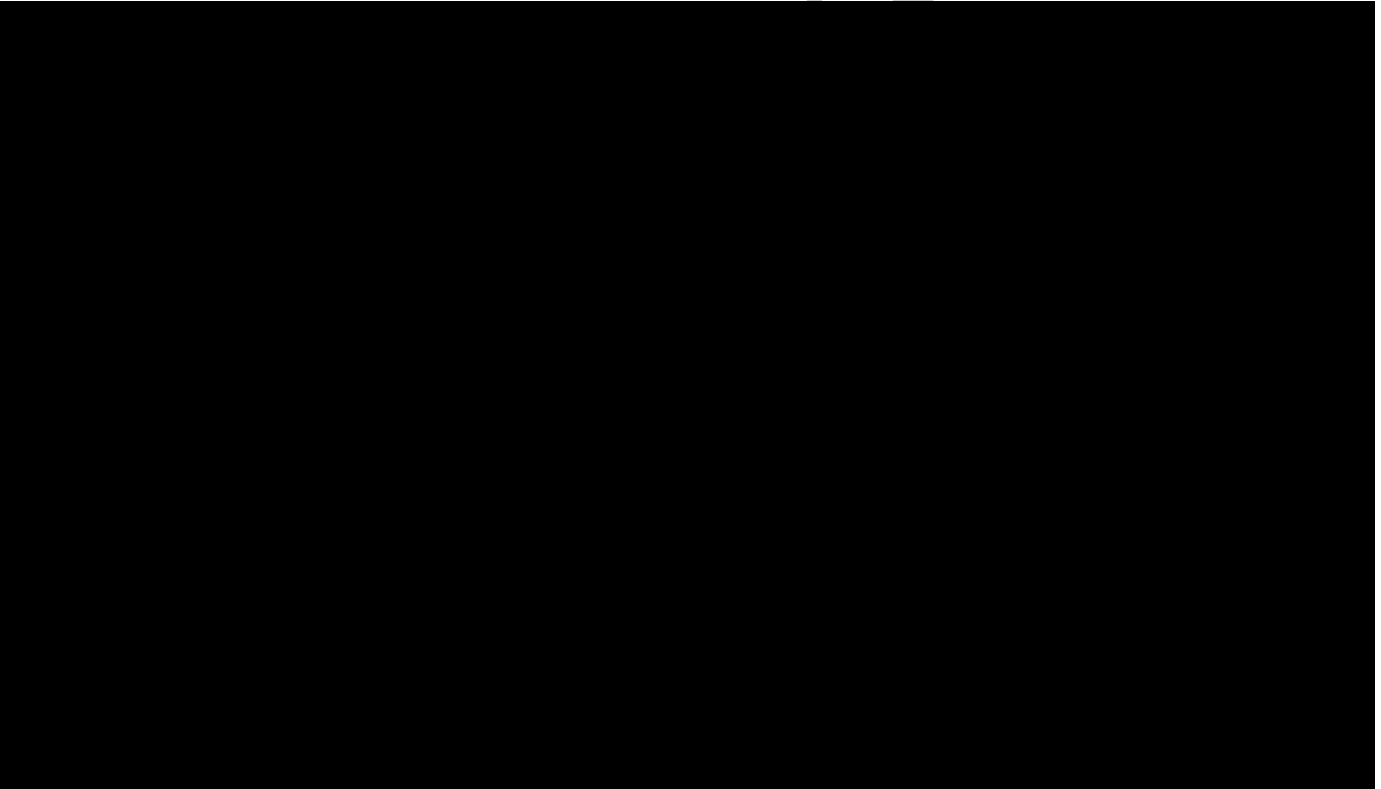
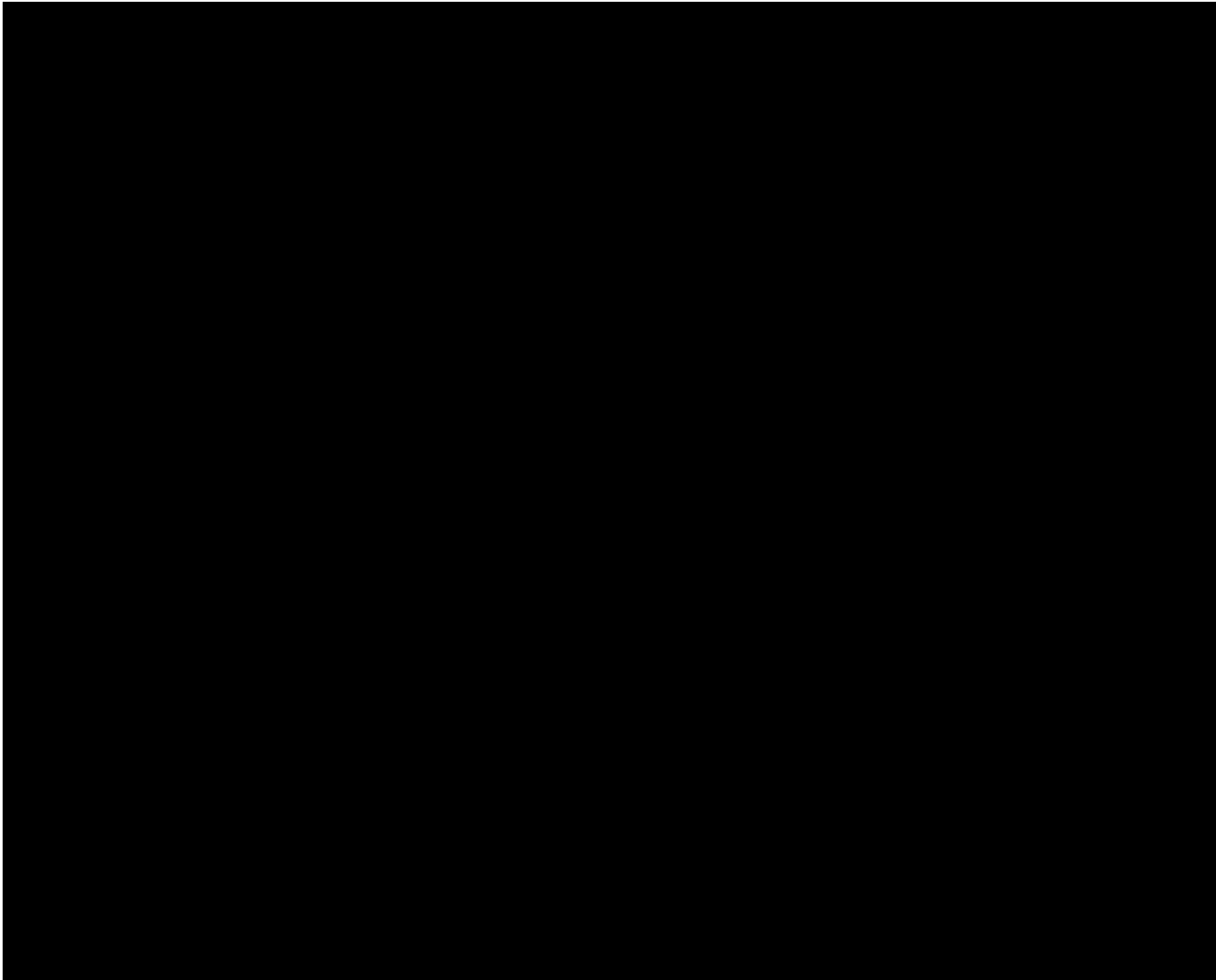
30.4 *Impact on system integrity* – e.g. does the proposed change create equity issues across the system? Does the proposed change create precedent or are there unintended consequences?

30.5 *Impact on regulated parties* – e.g. does the proposed change impact on landowners' property rights?

30.6 *Cost* – e.g. does the proposed change significantly increase costs to the Crown or landowners? Are there likely to be significant deadweight costs?

31. An analysis of the options against the criteria, including the likely impact on landowners, is set out in **Annex 3**. This analysis also identifies potential non-legislative alternatives, over and above the operational changes already agreed by DEV. Given the time constraints involved, including a lack of time to engage with stakeholders, the analysis has only been able to estimate some of the potential impacts.





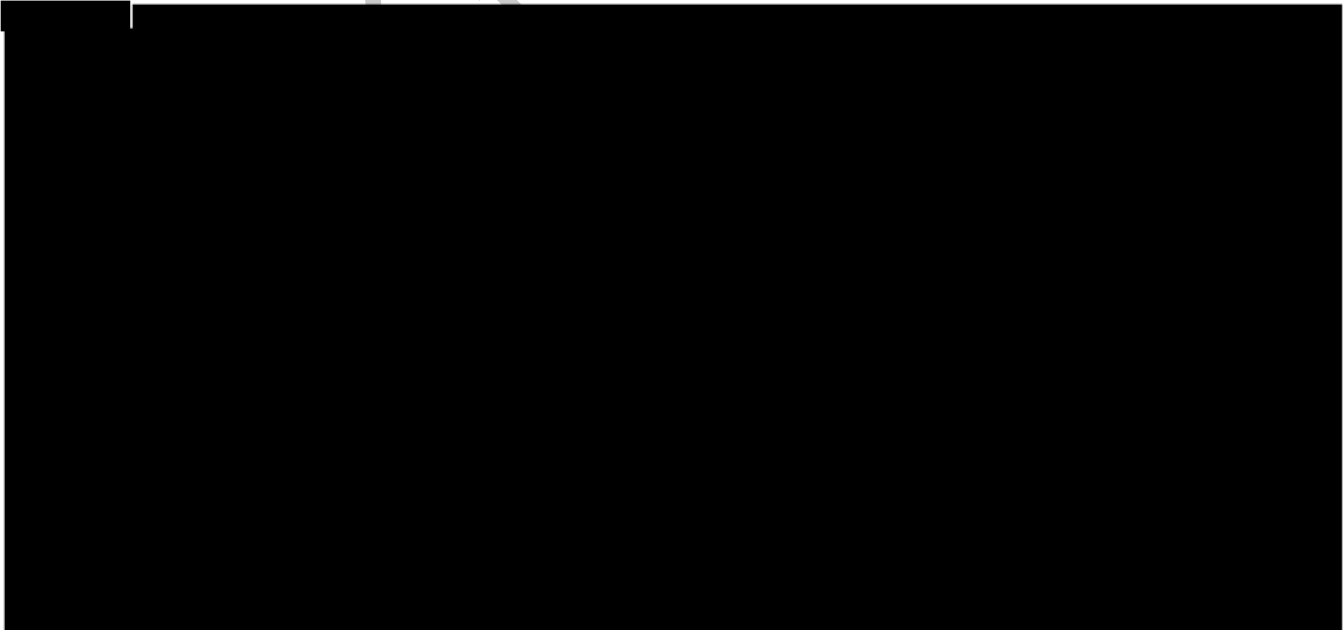
Options for progressing legislation

42. Although the recommended approach is to pursue non-legislative options, officials have identified two options for progressing the legislative changes above, should Cabinet wish to make them:

42.1 *through a stand-alone Bill passed before the end of this Parliamentary term* - this would best support the RMA fast-track process but would not allow for any meaningful consultation, and may not be feasible given other legislative priorities

42.2 *through a Bill to be introduced in the next Parliamentary term* - this would be less effective at supporting the fast-track changes as it would mean a significant delay before any of these changes could be implemented. However, there might be benefit to projects, including local government projects, that access the Order in Council path in the fast-track legislation.

43. Based on the above, progressing a stand-alone Bill this Parliamentary term is likely the best option to make any changes to the PWA if Cabinet wishes to do so.



Consultation

47. We have consulted with the following organisations or people in preparing the options in the attached draft Cabinet paper:

47.1 Iwi technical advisors (from the Iwi Chairs Forum), Ngāi Tahu, and Papa Pounamu

47.2 Local Authority Property Association (a group of council staff with property expertise)

47.3 Government agencies: Ministry of Housing and Urban Development, Infrastructure Commission, Waka Kotahi NZ Transport Agency, Ministry of Transport, Department of Internal Affairs, Te Puni Kōkiri, Ministry for the Environment, Ministry of Justice, Te Arawhiti, Treasury.



51. They, therefore, support the proposed non-legislative options.

Engagement with Māori

52. Engagement undertaken partly mitigates Treaty risks but falls short of normal standards of engagement (largely due to timeframes). We have endeavoured to engage as widely as possible given the time constraints, but we have been unable to consult at the hapū and whānau level due to short timeframes.

53. Consultation included meetings with iwi policy technicians, with focus on the definition of Māori land in any legislative changes. In addition to the meetings, iwi policy technicians, Papa Pounamu, and Ngāi Tahu were provided an early draft of Māori land text from this Cabinet paper, the draft options for legislative change, and draft definition of Māori land. All were given opportunity to provide their comments or feedback on this.

54. If a legislative package is agreed by Cabinet, we intend to continue engaging with Māori groups to ensure drafting is in line with Māori interests.

Engagement with local government

55. LINZ worked with the Local Authority Property Association (LAPA, a group of council staff with property expertise) to gain information on local council experience of Public Works Act processes. The feedback is incorporated into the options analysis.

Risks

56. There is a risk that the legislative changes outlined above could be perceived as undermining property rights by shortening the time it takes to compulsorily acquire land. The PWA compulsion powers represent an imbalance of power between acquiring

authorities and landowners. Requiring decision makers and organisations involved in these processes to act with speed and urgency could impact the ability of landowners negotiate or make a case to retain their land. This risk is exacerbated by the relatively short timeframes that would be involved in passing any legislative changes, and the lack of opportunity to engage meaningfully with Māori, landowners and stakeholders to understand the impacts of these options on them.

57. This risk is mitigated by the existing duties on decision makers in the PWA system when considering compulsory acquisition, as well as the previously agreed operational changes to engage early with landowners and provide increased levels of support for informal property negotiations.

58. Limiting further changes to operational changes would also mitigate this risk significantly.

Financial Implications

59. The legislative and non-legislative options in this paper can be met within existing baselines. The areas of potentially higher costs that would need to be met within baselines include:

59.1 hearing and responding to additional objections to proposed land takings, if shorter time frames for land negotiations lead to more objections than otherwise

59.2 administering and hearing objections to land taking proposals through the ECP process, if this option is pursued

59.3 producing alternative descriptions of the land if the survey requirement is deferred and alternatives to survey are not readily available

59.4 time and effort to make operational changes to speed up the PWA process.

Legislative Implications

60. The legislative options set out in this paper would require amendments to the PWA. If Cabinet wishes to pursue legislative change, it will need to give its approval to LINZ to issue the Parliamentary Counsel Office with drafting instructions to make these amendments.

Impact Analysis

61. The Treasury has determined that this proposal is a direct Covid-19 response and has suspended the Regulatory Impact Analysis requirements in accordance with Cabinet decision (CAB-20-MIN-0138). While a formal Regulatory Impact Statement is not provided, Treasury has worked with the agency to ensure available relevant analysis is included in this paper. The paper provides detailed analysis for both regulatory and non-regulatory options based on a set of well-developed criteria. Stakeholders' views are included where it is possible. It also describes the impacts of the preferred approach and demonstrates how it would help achieve overall objectives. It recognises that more

in-depth engagement with stakeholders such as local government and landowners would enable better understanding of the nature of the problem and the potential impacts.

Human Rights

62. A Bill of Rights assessment has yet to be done and potential impacts on human rights have yet to be fully assessed. BORA analysis would be needed if legislative changes are recommended to understand the full impacts on landowner property rights and access to justice.
63. If legislative change is progressed, then there may be impacts on natural justice and the right to be heard if landowners have less time to pursue objections and are not provided opportunity to make a case for retaining their land and for their objections to be heard fully. Making a hearing a compulsory step in the PWA objections process under the ECP could mitigate this risk.
64. There are no known disability or gender implications for these proposals.

Publicity

65. I will liaise with the Minister of Transport, Minister of Local Government, Minister for Māori Development, Minister for Infrastructure and the Minister for the Environment in relation to any future announcement of PWA changes.

Proactive Release

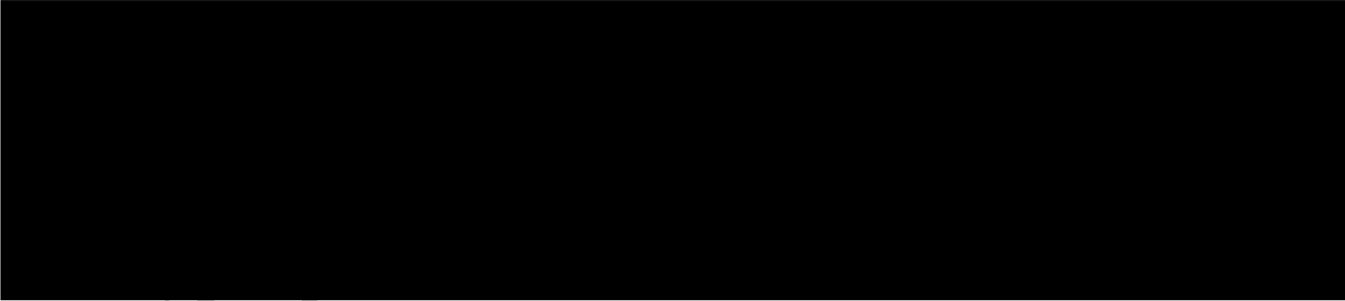
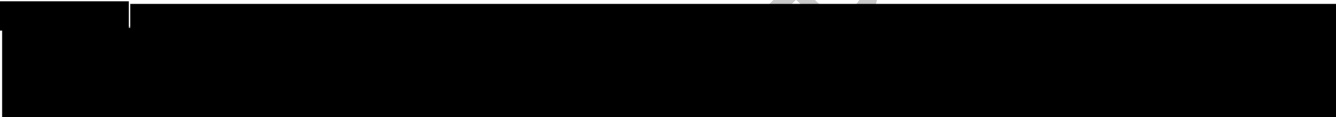
66. I intend to proactively release this paper at an appropriate time, subject to the redaction of any material as consistent with the Official Information Act 1982.

Recommendations

The Minister for Land Information recommends that the Committee:

1. **note** that, on 3 June 2020, DEV invited the Minister for Land Information, in consultation with the Minister of Transport, Minister of Local Government, Minister for Māori Development and Minister for Infrastructure, to report back to DEV on possible Public Works Act 1981 (PWA) legislative changes
2. **note** that the package of operational changes already agreed by DEV aim to increase both the speed and the certainty of the process
3. **note** that Cabinet has agreed that Māori land should be excluded from any PWA legislative changes for COVID fast-track projects
4. **agree** that the definition of Māori land in this context should be the same as that used in the Urban Development Bill
5. **agree** that Māori land owners should not be exempted from operational changes to the PWA that have been agreed by Cabinet.

6. **note** that the scope for any PWA legislative changes is limited by the lack of opportunity for meaningful public consultation or engagement with Māori and constraints on the legislative programme

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8. **note** that, given the limited House time now available, it is unlikely that the benefits of the options for legislative change outweigh the risks in fast-track legislative change
9. **agree** to direct officials to implement the following non-legislative changes, in addition to the operational changes agreed by DEV (refer to Recommendation 2 above):
- a. ask the Environment Court to give priority to PWA hearings for fast-track projects
 - b. issue guidance to decision-makers to act quickly in relation to fast-track RMA projects.
10. **note** that progressing a stand-alone Bill before the House rises is likely the best option to make any legislative changes to the PWA if Cabinet wishes to do so
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Authorised for lodgement
Hon Eugenie Sage
Minister for Land Information

Annex 1: Operational enhancements already agreed by Cabinet

Option	Detail	Impact on landowners	Increase speed of negotiations	Increased likelihood of agreement	Resourcing impact
Improve information to owners	LINZ is currently reviewing the information it provides to owners on acquisition. This can be enhanced by further explaining compensation terms, and the processes that would apply. Additional information can be prepared on fast-tracked projects to be made available as early as possible.	++ Providing more information to landowners earlier better equips them to engage in the process.	++ Those landowners who are likely to agree to a negotiated settlement will do so faster if they are better equipped.	+ Supports landowners to engage and reach a negotiated agreement.	0 Relatively easy to achieve within current resourcing.
Enable more frequent use of mediation in valuation disputes	Where there is dispute over valuations obtained by the Crown and landowners, mediation could be undertaken before referring the matter to the Land Valuation Tribunal (the Tribunal can be time consuming and costly for both parties). This option involves utilising third-party mediation more often, to identify and attempt to resolve valuation disputes to facilitate speedy and non-adversarial resolution if compensation is not agreed. This would be funded by the acquiring agency, any outcome submitted to the Minister (LINZ) for approval, have Crown Law oversight, and can be provided for in LINZ's standards and guidance.	++ Giving landowners access to a funded mediation service removes financial barriers that may hinder them from trying to seek the compensation they want.	++ Those landowners who are likely to agree to a negotiated settlement will do so faster if they can access mediation to reach an agreed level of compensation faster.	+ Resolving disputes by mediation will reduce the use of compulsory acquisition but not objections (which are related to the taking of land, rather than the compensation).	- LINZ will need to work with acquiring agencies to each contribute some funding to a mediation service.

Option	Detail	Impact on landowners	Increase speed of negotiations	Increased likelihood of agreement	Resourcing impact
<p>Pre-approve the payment of owners' legal and valuation costs</p>	<p>The PWA provides for an owner to recover the reasonable fees from obtaining legal, valuation and other advice or support. Often these invoices need to be paid before a final agreement is reached. However, approval to pay these fees can take time, which can create stress for owners. This option would involve LINZ providing agreement at the start of a project for an acquiring agency to pay up to a specified level without needing to seek a formal decision on each invoice. LINZ approval would only be required for invoices above the approved quantum.</p>	<p>++ Enabling landowners to get the information they want earlier better equips them to engage in the process.</p>	<p>++ Those landowners who are likely to agree to a negotiated settlement will do so faster if they are better equipped.</p>	<p>+ Supports landowners to engage and reach a negotiated agreement.</p>	<p>T.B.C. Would need to check that there is sufficient funding for the scale of proposed projects.</p>
<p>Provide access to counselling and support services</p>	<p>This would see NZTA providing easier access to, and funding counselling and support services for landowners affected by PWA acquisitions in the fast-tracked projects. LINZ would support this initiative.</p>	<p>+++ Supporting landowners who are affected by PWA acquisitions has positive impacts on wellbeing.</p>	<p>+ This may support landowners to engage in negotiation when they may not otherwise be able to.</p>	<p>0 Does not provide incentives for landowners who are inclined to object to reach a negotiated agreement.</p>	<p>- LINZ will need to work with acquiring agencies to each contribute some funding to enable access to the necessary support services.</p>

Option	Detail	Impact on landowners	Increase speed of negotiations	Increased likelihood of agreement	Resourcing impact
Enhance industry capability and capacity	LINZ maintains a pool of accredited suppliers who have experience in PWA negotiations to support agencies undertaking acquisition, through discussions with suppliers and agencies to ensure that they have the capability to undertake an enhanced programme of land acquisition where required. This would also include looking at ways to expand the pool of accredited suppliers, if necessary.	+ Ensures landowners are not affected by delays in negotiations due to PWA system capability.	++ An adequate pool of accredited suppliers will enable negotiations to proceed at the speed desired by acquiring agencies.	0 Does not provide incentives for landowners who are inclined to object to reach a negotiated agreement.	0 Some administrative cost on LINZ that should be able to be met through baselines.

Annex 2: Categories of Māori land exempted from fast-track legislative options

Land absolutely protected from acquisition and development – land that is currently inalienable and will continue to be so.

- a) Māori customary land
- b) land vested in the Māori Trustee that
 - i. is constituted as a Māori reserve by or under the Maori Reserved Land Act 1955; and
 - ii. remains subject to that Act:
- c) land set apart as a Māori 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 Te Urewera Act 2014):
- f) the maunga listed in section 10 of Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.

Land protected from use of fast-track PWA – may be acquired as per the status quo under the PWA.

- g) Māori freehold land:
- h) general land owned by Māori that was previously Māori freehold land, but ceased to have that status under
 - 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 the land.

In this section:

land held by a post-settlement governance entity includes land that is, in accordance with a Treaty settlement Act, held in the name of a person such as a tipuna of the claimant group (rather than the entity itself)

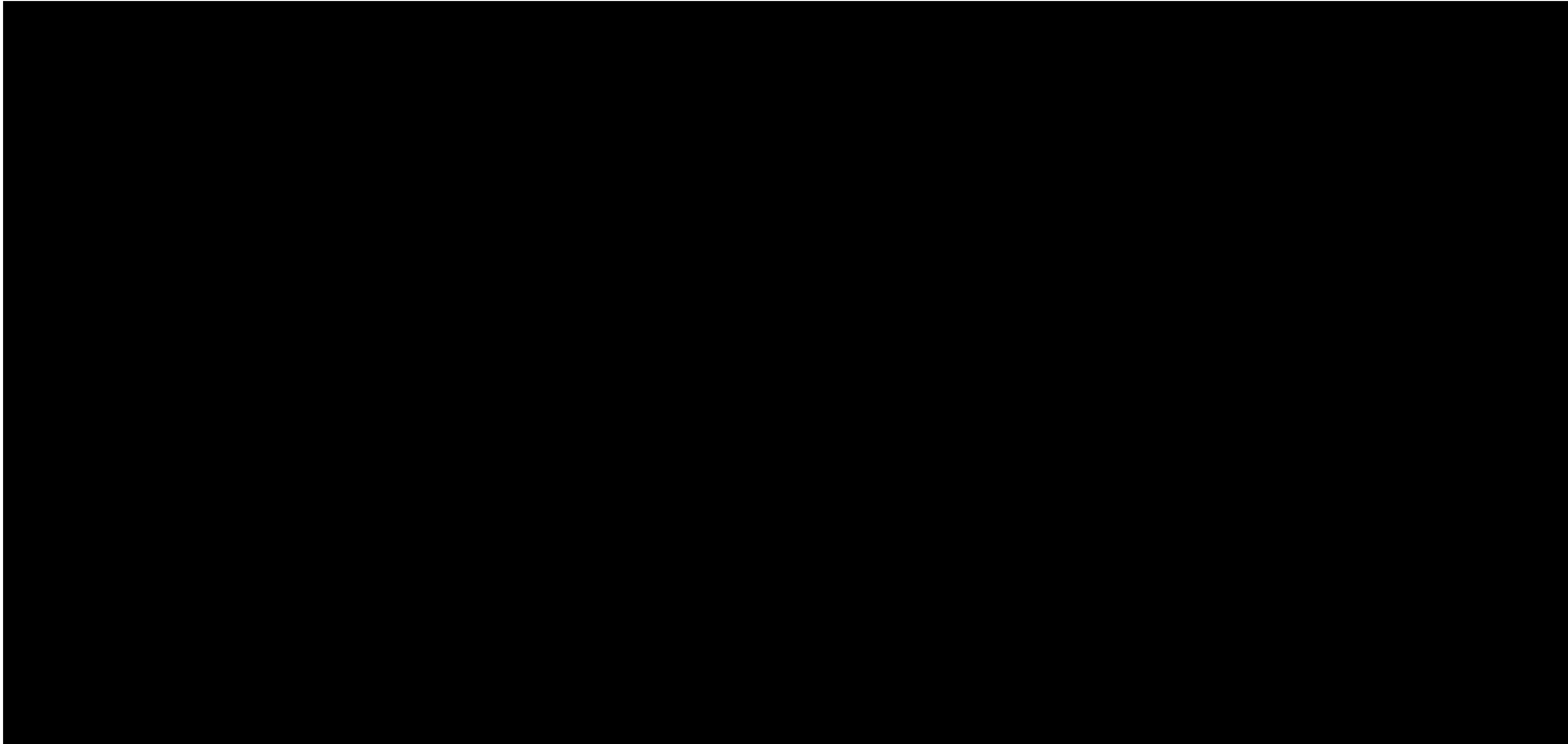
mana whenua has the same meaning as in section 2(1) of the Resource Management Act 1991

Māori customary land has the same meaning as in section 4 of Te Ture Whenua Maori Act 1993.

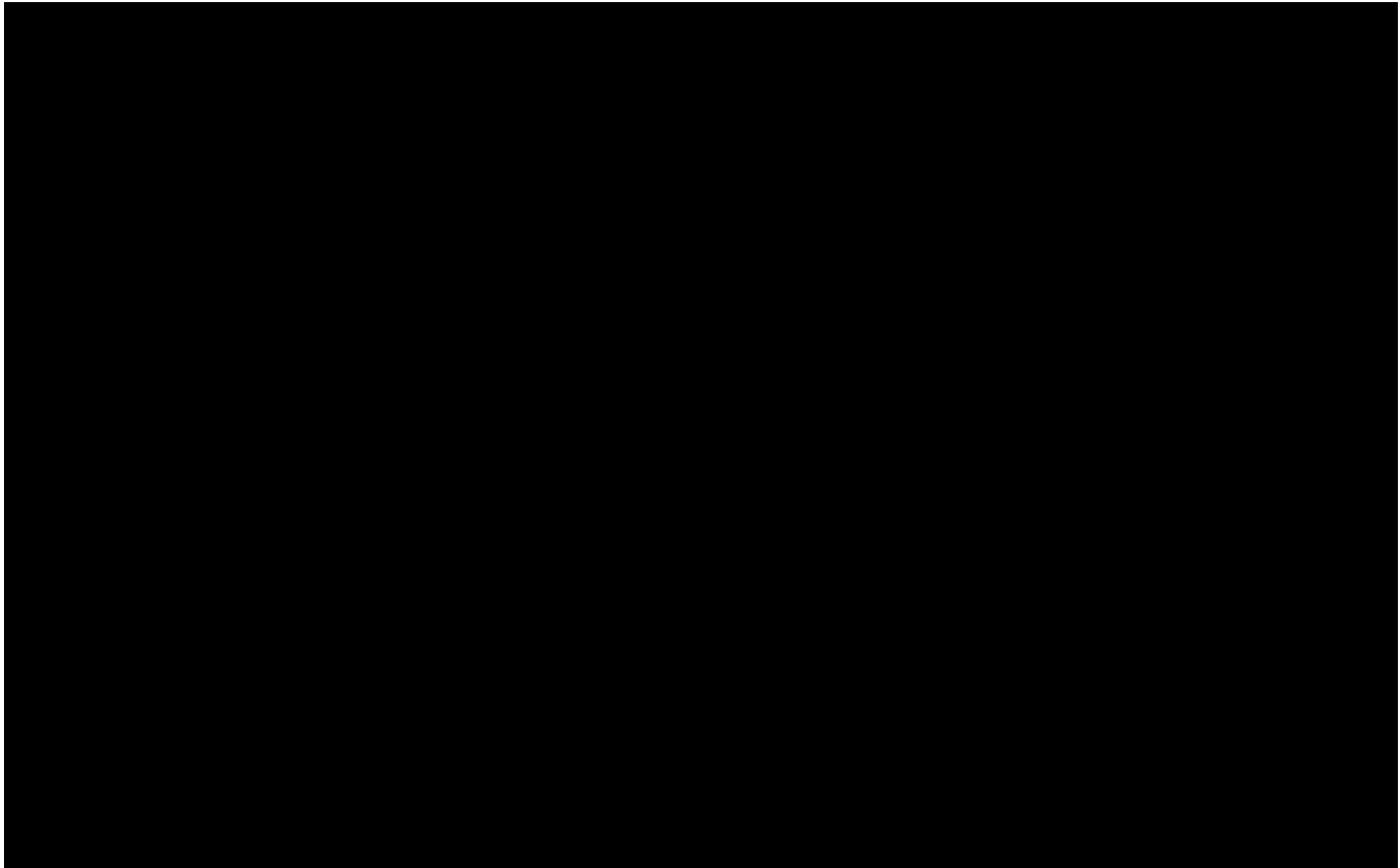
Maori freehold land has the same meaning as in section 4 of Te Ture Whenua Maori Act 1993

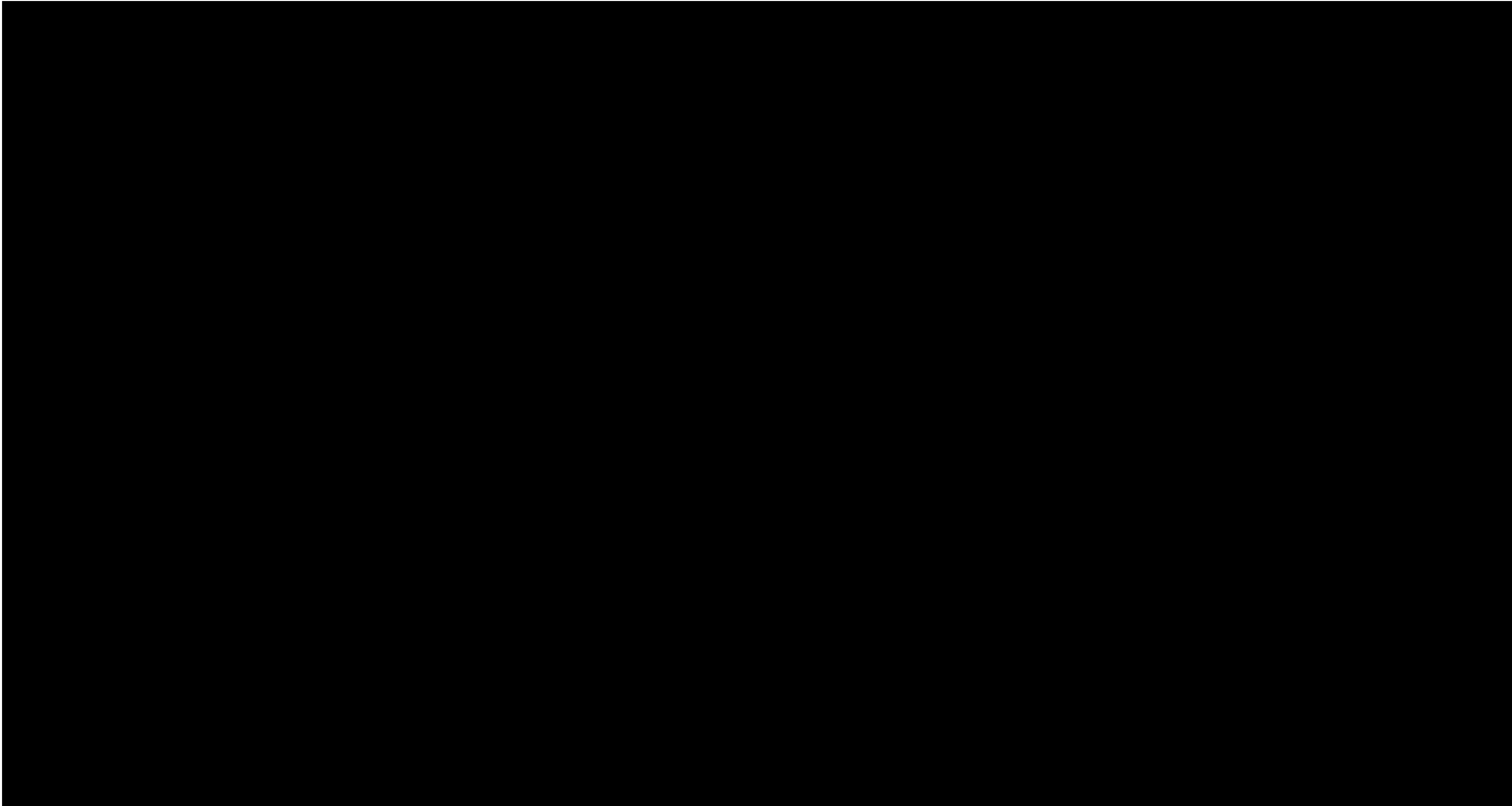
General land owned by Maori has the same meaning as in section 4 of Te Ture Whenua Maori Act 1993

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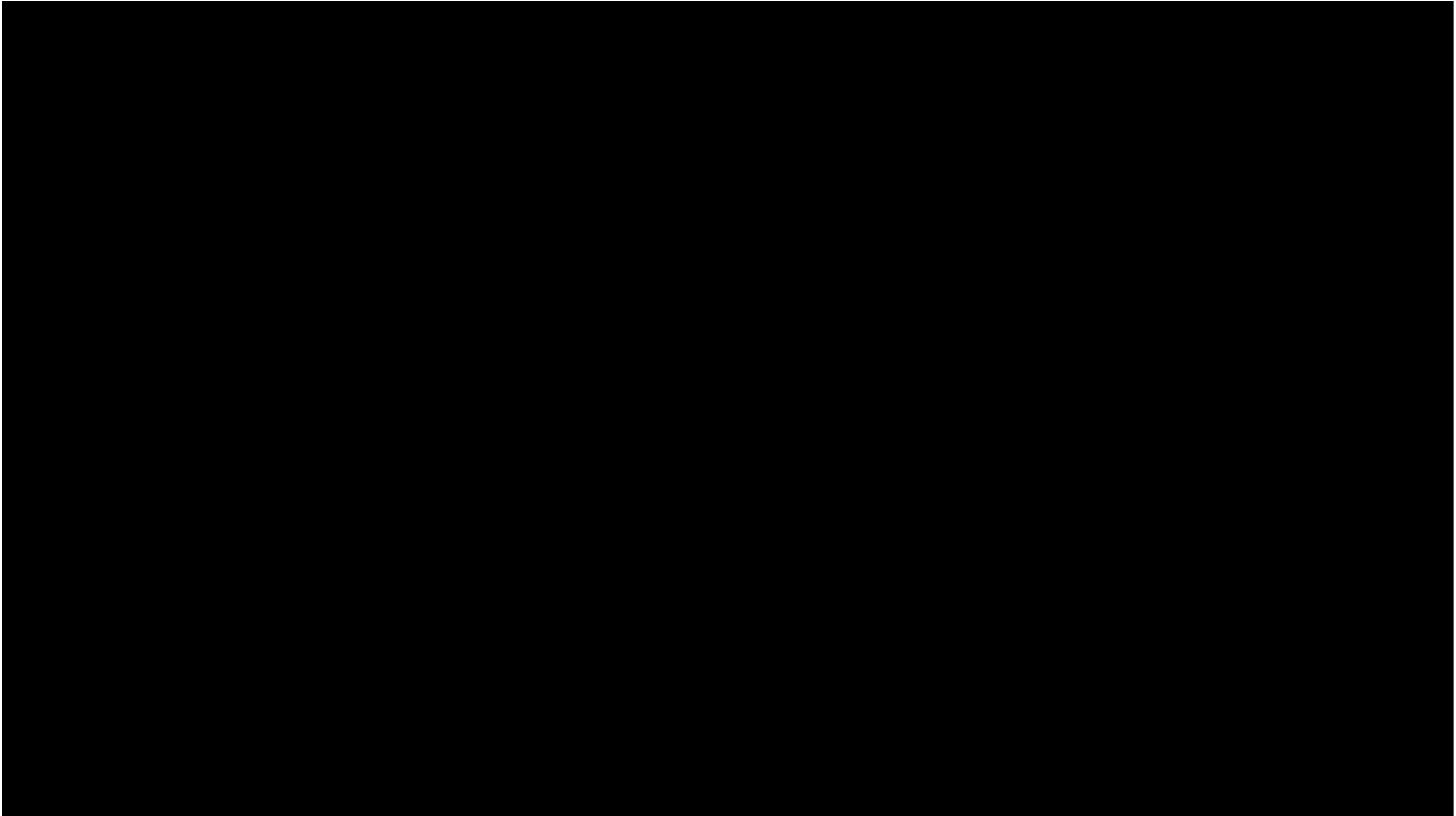


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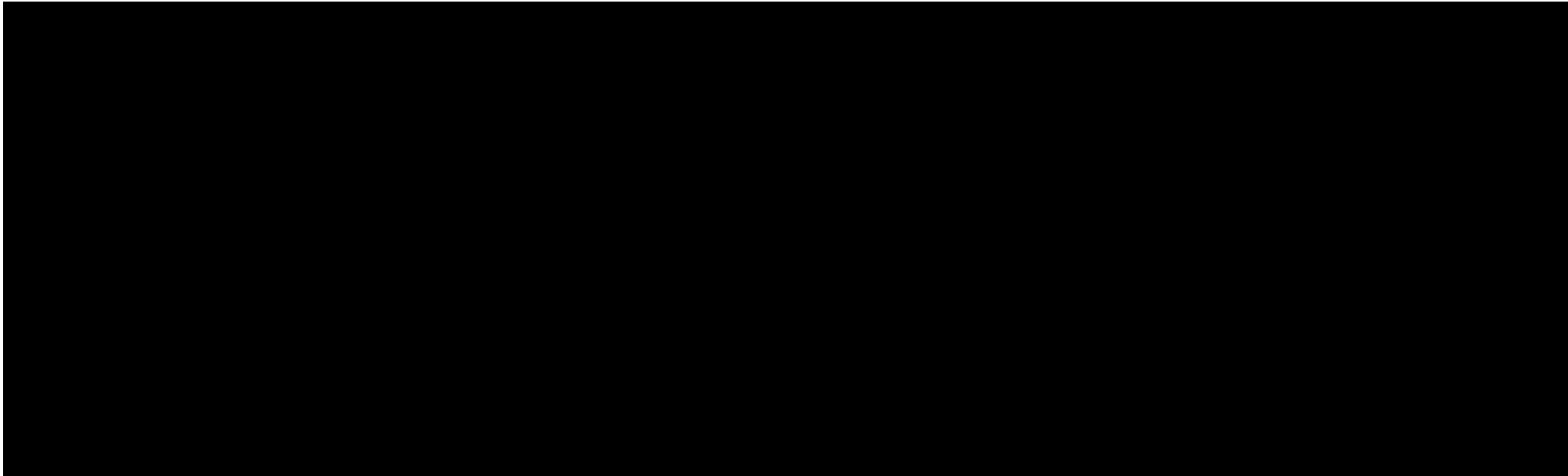




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UNRELEASABLE



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Supporting the Resource Management Act Fast-Track Process: Possible Changes to Public Works Act

Portfolio Land Information

On 1 July 2020, the Cabinet Economic Development Committee (DEV):

- 1 **noted** that on 3 June 2020, DEV:
 - 1.1 agreed to a number of operational changes to improve the timing alignment between the Public Works Act 1981 (PWA) regime and the Resource Management Act 1991 (RMA) fast-track process;
 - 1.2 agreed that further work be undertaken on options for legislative changes to the PWA;
 - 1.3 agreed that Māori land be excluded from any legislative changes aimed at streamlining the PWA land acquisition processes;
 - 1.4 invited the Minister for Land Information, in consultation with the Minister of Transport, Minister of Local Government, Minister for Māori Development and Minister for Infrastructure, to report back on possible PWA legislative changes;
- [DEV-20-MIN-0098]
- 2 **noted** that the package of operational changes referred to in paragraph 1.1 above (the approved operational changes) aim to increase both the speed and the certainty of the process;
- 3 **agreed** that the definition of Māori land in this context be the same as that used in the Urban Development Bill;
- 4 **agreed** that Māori land owners should not be exempted from the approved operational changes;
- 5 **noted** that the scope for any PWA legislative changes is limited by the lack of opportunity for meaningful public consultation or engagement with Māori and constraints on the government's Legislation Programme;

7 **noted** that, given the limited House time now available, it is unlikely that the benefits of the options for legislative change outweigh the risks in fast-track legislative change;

8 **directed** officials to implement the following non-legislative changes, in addition to the approved operational changes:

8.1 ask the Environment Court to give priority to PWA hearings for fast-track projects;

8.2 issue guidance to decision-makers to act quickly in relation to fast-track RMA projects;

9 **noted** that progressing a stand-alone Bill before the House rises is likely to be the best option to make any legislative changes to the PWA, if Cabinet wishes to do so;

10

Janine Harvey
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Damien O'Connor
Hon Kris Faafoi
Hon Shane Jones
Hon Willie Jackson
Hon James Shaw
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for DEV