

20 January 2016

BRIEFING

Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill

Purpose

This paper briefs you on this private members' Bill supported by Catherine Delahunty.

Key messages

1. The Bill would remove the power of the Crown and local authorities to compulsorily acquire Māori land, and make it very difficult to agree on some acquisitions by consent. This goes further than most mainstream proposals for reform in this area.
2. The Bill would increase the costs of some projects. Most critically it could prevent some projects (primarily roading) proceeding at all.
3. The law already gives Māori land owners some protection from compulsory acquisition.
4. Work by officials in 2016 may propose changing the policy settings for taking Māori land. It is very unlikely this work would recommend removing compulsory acquisition powers altogether.

Recommendation

Do not support the Bill being referred to a Select Committee.

LINZ contacts

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Catherine Delahunty's private members' Bill

5. Catherine Delahunty of the Green Party gave a notice of proposal for this Bill in April 2015. It was drawn in the ballot of members' Bills and introduced on 3 December 2015.
6. The Bill reflects Green Party policy. The Maori Party issued a related press release "Welcoming debate on Public Works Bill" on 3 December.
7. The Bill sat below the line on the last Order Paper of 2015. We expect it will be placed at no.6 on the first Order Paper for 2016. It is unlikely to get its first reading before the second members' day in 2016, which is likely to be Wednesday 9 March.

How the Bill would affect acquisitions

8. The Bill would exempt all Māori land (as defined in Te Ture Whenua Māori Act 1993) from the compulsory acquisition powers in the Public Works Act 1981. This would mean the Crown and local authorities could only acquire Māori land by agreement.
9. Current practice concentrates on reaching an agreement with owners about acquisition and price. The sale price can be agreed independently of the compensation provisions of the Public Works Act and can (within limits) be more generous. As a result compulsory acquisitions are quite rare, and acquisitions by agreement are the norm.
10. Everyone involved in the process recognises that owners are incentivised to agree because compulsory powers sit in the background ready to be used if the Crown or local authorities need them.
11. In the absence of compulsory powers Māori land owners could simply refuse to have their land taken or could hold out hoping to get a payment well in excess of any plausible valuation of their land.
12. The Bill as drafted would also make it extremely difficult to negotiate with multiple owners. The Bill would remove the current provision (in subsections 17 (4) and (5)) of the Public Works Act which lets the Crown or a local authority apply to the Maori Land Court to appoint an agent with whom they can negotiate. This is an essential step where Māori land has many owners. It would be effectively impossible to negotiate with the hundreds of people who own shares in many Māori land parcels.

Effects on projects

13. Most modern acquisitions under the Public Works Act are for new roads. These are typically built in areas with high population and economic growth. There is relatively little Māori land in these areas.
14. We have a sense of how much Māori land is acquired from looking at applications to the Māori Land Court for the confirmation needed to acquire Māori land by agreement.
15. Since January 2005, LINZ has applied for 29 such confirmations and there has been one attempt at compulsory acquisition. These figures cover acquisitions by New Zealand Transport Authority for the major Crown road projects over that time, but exclude takings by local authorities.
16. We think that although there are not a huge number of acquisitions the number is not trivial. Anecdotally some projects had significant dependencies on acquiring Māori land. Examples are the Hawkes Bay expressway between Napier and Hastings, new roads around Tauranga, and the Kapiti Expressway.
17. We think that (depending on how strategically placed Māori land is) the Bill would require road builders to devise workarounds (which have a cost), or render some projects unviable. In many cases, benefits (like travel time savings or accidents avoided) would be foregone.

Existing protections for Māori Land

18. The current system already contains significant protections for Māori land:
 - objections heard by the Environment Court (section 24 Public Works Act)
 - confirmation orders (Part 8 Te Ture Whenua Māori Act 1993).
19. The first of these is the most significant. Any owners can object to any compulsory acquisition. The Environment Court considers whether the taking is fair, sound, and reasonably necessary. It also considers alternate routes or sites. In the case of Māori land it looks at the cultural values associated with the site. The case law makes it clear that Māori cultural values can tip the balance against a taking.
20. In *Grace v Minister for Land Information* [2014] NZEnvC 82 the Environment Court upheld an objection to taking Māori land at Kapiti because it considered that compulsory acquisition was not reasonably necessary in the circumstances.
21. Part 8 of the Te Ture Whenua Māori Act 1993 requires the Māori Land Court to confirm alienations of Māori land before they can take effect. It applies to voluntary and compulsory takings under the Public Works Act. Most importantly, the Court looks to see if the transaction fully reflects the value of the land, and the relationship of owners to it.

Work by LINZ and TPK officials

22. Minister Flavell has a paper "Enabling Better Utilisation of Māori Land" which we understand is on the agenda for a Cabinet meeting on 26 January 2016.
23. The paper recommends that officials from LINZ and TPK in consultation with the Ministry of Transport, present issues and a timeframe for proposed amendments to the Public Works Act 1981, for a report back to EGI, by 30 June 2016.
24. This work (if approved by Cabinet) might address matters like the process and triggers for taking Māori land and the way compensation is calculated. It might involve some rebalancing of the values associated with Māori land and the public interest in public works.
25. We think it is extremely unlikely that officials would recommend a complete removal of the power to compulsorily acquire Māori land.

Other proposals for reform

26. Māori can be very sensitive to past misuses of public works legislation. Sometimes there are calls to exempt Māori land from the operation of the Public Works Act. For instance, several trusts made such submissions in consultation on the Te Ture Whenua Māori Bill in 2015 even though the issue was out of scope.
27. More fully developed and mainstream proposals usually retain some role for compulsory acquisition recognising that the interest in a public work may outweigh the interest in protecting Māori land.
28. The 2001 review of the Public Works Act, relevant Waitangi Tribunal decisions, and Minister Flavell's members Bill in 2007¹ all recognised the need to retain powers to compulsorily acquire Māori land in some circumstances.

¹ The Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill was introduced in 2007 and failed to get a second reading in 2010

Conclusions

29. We do not think that having Catherine Delahunty's Bill proceed is advisable. Complete removal of compulsory acquisition powers from Māori land is not a viable policy setting nor is it a useful starting point for a developing a more nuanced and durable change to the law.

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