

AIDE MEMOIRE

Scoping Briefing for Potential Amendment to the Public Works Act 1981

Purpose statement

1. The purpose of this briefing is to provide an approach to policy development which balances the protection of Māori land as defined in Te Ture Whenua Māori Act 1993 with Crown, local government and network utility operator land acquisition requirements.
2. Some scenarios for use as potential case studies are included in **Annex One**.
3. **Annex Two** provides you with the policy options you have previously seen.

Background

4. You have had a number of meetings with Minister Mahuta and with officials regarding the Public Works Act. Most recently you met with Minister Mahuta on 27 November 2018 to discuss the options that Te Puni Kōkiri (TPK) has drafted [BRF 19-140 refers].
5. At that meeting, in addition to the discussion on specific options, you and Minister Mahuta discussed:
 - 5.1. Minister Mahuta's preference that the urban development legislation and amendment to the Public Works Act 1981 (PWA) be "considered together";
 - 5.2. Your decision that a broader review of the PWA would not begin until the next Parliamentary term;
 - 5.3. The former Te Ture Whenua Māori Bill, and how future policy development can 'borrow from' the previous consultation and use the policy proposals in the Bill as a starting point, and
 - 5.4. Minister Mahuta's desire to submit a policy paper to Cabinet in August 2019 with a view to getting a Bill introduced by the end of 2019.
6. At the meeting you requested this scoping briefing and asked for a number of scenarios to illustrate where there may still be policy work to be done and what some potential unintended consequences could be.

High-Level Approach to the Work

Advice and cross-agency collaboration

7. We intend to set up a cross-agency Advisory Group to provide guidance, reporting to LINZ and TPK. We will prepare a Terms of Reference to define the scope of its work. The Group would comprise experts from:
 - 7.1. Māori Crown Relations: Te Arawhiti;
 - 7.2. Ministry of Justice;
 - 7.3. Te Puni Kōkiri;
 - 7.4. New Zealand Transport Agency (NZTA);
 - 7.5. Department of Internal Affairs (local government);
 - 7.6. Ministry for the Environment (for alignment with the Resource Management Act 1993);
 - 7.7. Ministry of Business, Innovation and Employment (electricity, oil and gas networks);

7.8. Ministry of Education, and

7.9. Ministry of Housing and Urban Development¹

Projected briefings for policy decisions

8. In the lead up to the August 2019 Cabinet paper LINZ and TPK will prepare a number of joint briefings for you and Minister Mahuta to make decisions on points of policy. These briefings are likely to cover:

8.1. High level decisions about whether the PWA is to be amended to limit the use of compulsory acquisition, and if so, the nature and extent of that limitation. There are a number of decisions you could make here such as:

- How would you like to treat local authorities and network utility operators;
- What, if any, tests and conditions ought to apply before Māori freehold land is taken including having the Minister for Māori Development as a potential co-decision-maker, and
- Whether it is your intention to prevent any interest in Māori freehold land from being acquired, or whether Māori may still sell their land by agreement.

8.2. The approach you would like to take to public consultation. The August 2019 deadline does not allow for a full public consultation process. We would still consult with other agencies and relevant stakeholder organisations and Māori groups. If you would like more intensive consultation we recommend extending the timeframe beyond August 2019.

8.3. Any additional policy points that are identified during the policy development, including minor and technical details (for example, transitional provisions for public works projects already underway).

Te Tiriti o Waitangi Principles

9. The compulsory acquisition provisions of the PWA align well with international practice. However, compulsory acquisition sits within a uniquely Aotearoa/New Zealand context. Under Te Ture Whenua Māori Act 1993, Māori land is recognised as a taonga tuku iho². In order to facilitate its retention in accordance with the Treaty right of Māori to the full, exclusive and undisturbed possession of their land, the alienation of Māori land is subject to legislative protections.

10. The PWA reflects the principle of Crown sovereignty over land in New Zealand and the right of Māori to be treated like any other landowner (in terms of process and compensation).

11. The core issue through which we are working is how to balance these two concepts and principles in legislation.

12. We think that there is a strong opportunity to align potential amendment to the PWA with the responsibilities of the new portfolio – Māori Crown Relations: Te Arawhiti. We are working to engage with the new agency, noting again that the August 2019 creates limitations on consultation and engagement.

Assumptions

13. We have identified some assumptions, which we have tested with TPK:

¹ As distinct from the planned Housing and Urban Development Authority which will have a separate approach to the PWA under the proposed urban development legislation. The Ministry, as part of the Crown, will have access to the compulsory acquisition powers for public works.

² Loosely translated as an heirloom, cultural property or heritage that is handed down for future generations.

- 13.1. The PWA will remain the primary vehicle available to the Crown, local authorities and relevant network utility operators to assemble (other, non-Māori) land, and provide for its disposal once the land is surplus.
 - 13.2. The offer-back provisions for former Māori land will still apply – noting where there have been proposed amendments regarding the return of former Māori land.
 - 13.3. All provisions in Treaty settlement legislation and Rights of First Refusal will remain and will not be affected by any of the policy options progressed as a result of this work.
 - 13.4. Māori freehold land owners will still be able to sell their land by agreement, and do anything else currently available to them with respect to their land, subject to applicable Māori Land Court decisions.
 - 13.5. Any interest the Crown, local authorities or network utility operators currently have in former Māori freehold land (or any other land) will not be revoked, including the right of access to the land for any activity associated with the public work.
14. We also recognise that the PWA is concerned principally with the ownership and disposal of land. Issues and objections related to the use of land – such as local authority zoning – are out of scope.

Strategic Objectives

15. LINZ administers the PWA for New Zealand on behalf of both acquiring authorities and landowners. It is therefore important that the objective of the work is strategic, and balances the need to advance public works with protecting private rights.
16. Our objective in approaching this work is to collaborate with all agencies so that it is clear that all parts of the Crown, local authorities and network utility operators are working toward a shared goal of improving lives for New Zealanders. This is equally as true for those advocating the protection of Māori land as it is for those who provide public works. The objective could be summarised as:

In assembling land for any public work the acquiring authority appropriately recognises the principles of Te Tiriti o Waitangi and Te Ture Whenua Māori Act 1993.

Acquiring authorities use compulsory acquisition as a tool of last resort to acquire land for public works that will provide positive outcomes for New Zealand.

Knowledge gaps

17. In order to meet this objective we have identified two key knowledge gaps:
 - 17.1. A comprehensive understanding of how all acquiring authorities are using the PWA, including actions undertaken by accredited suppliers³.
 - 17.2. An impact assessment of what a ban on the compulsory acquisition of Māori freehold land would mean for current and planned public work projects.
18. The Advisory Group would contribute to addressing the first point, and we would also speak with property managers from agencies and local authorities. LINZ will incorporate an operational perspective throughout policy development from staff with experience with negotiations.
19. In preparing an impact assessment of a ban on compulsory acquisition we would consider:
 - 19.1. the scale of land in question – 5% of New Zealand's land is Māori freehold land, and we would seek figures on the amount of other types of Māori land which you might like to protect;

³ Accredited suppliers are contracted by an agency looking to acquire land. The accredited supplier undertakes negotiations with the land owner on behalf of the agency. They are accredited by LINZ.

19.2. partnership options. There may be some cases in which protecting Māori freehold land and progressing public works is not a trade-off but a joint partnership. Using partnerships wherever possible would be expected to lessen the negative impacts of a ban on compulsory acquisitions;

19.3. the impact of a public work not progressing at all, or not as optimally, if agreement to acquire the land by agreement could not be reached. This would include the potential effects on other landowners. A true understanding of this impact would be important for agencies' future planning.

Next steps and timeframes

20. Our next step is to convene the Advisory Group, and to continue working with our inter-agency colleagues.

21. The next piece of advice you can expect from us will be prepared jointly with TPK to you and Minister Mahuta. Subject to your agreement, we would like to seek your feedback and agreement to high-level options about which policy options you and Minister Mahuta would like to progress, if any (paragraph 8.1 refers).

22. Minister Mahuta has indicated that she would like to take a policy paper to Cabinet in August seeking agreement to policy options that amend the PWA. We recommend that this is a joint paper with you.

23. Minister Mahuta further indicated that she would like a Bill introduced to the House prior to the end of 2019 – our indicative date for introduction is 5 December 2019.

LINZ Contacts

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Annex One: Scenarios

1. The following scenarios consider a variety of 'types' of public work:
 - 1.1. linear infrastructure;
 - 1.2. non-linear infrastructure;
 - 1.3. lesser interests such as easements and covenants, and
 - 1.4. work to mitigate climate change and natural disasters.

Please note that the scenarios referred to below are hypothetical.

Linear Infrastructure:

Context

2. Linear infrastructure includes roads, railways, pipes and cables which traverse multiple properties along a route. This scenario refers to roads.

Scenario

3. NZTA and Opotiki District Council have planned an expressway between Opotiki and a new development experiencing high growth; the existing route is a 'back road' and cannot accommodate the increase in traffic volumes.
4. There are three potential routes for the expressway and each of them would include some Māori freehold land, each owned by different groups. None of the owners want to agree to sell their land, each hoping the road takes an alternative route.
5. There are other benefits and constraints to each option including cost, environmental impact, and the number of private property owners (general and Māori freehold land) affected by the route.
6. If compulsory acquisition cannot be used to acquire any Māori freehold land and the only viable routes would include Māori freehold land then it is likely that the road would not go ahead.

Non-linear Infrastructure:

Context

7. Non-linear infrastructure includes public works commonly thought of as 'sites' such as hospitals, prisons and schools. It may also include works associated with linear infrastructure such as railway stations.
8. The PWA has been used less frequently for these types of works than for roads or other linear infrastructure. This scenario uses schools as an example.
9. The location of works depends on the community in which the work will be located. For example, many communities consider it desirable to have a primary and intermediate school closely located. Sometimes, the location has other mandatory requirements. For example, the Ministry of Education has mandatory design principles for the construction of a new school which are to a higher standard than the Building Code. These principles could eliminate certain site options.

Scenario

10. The population of Kaitaia is growing, particularly with young families with children. The Ministry of Education is looking at two options to ease pressure on growing class sizes:
 - 10.1. Expand an existing school or
 - 10.2. Construct a new school.
11. Its preferred option is to expand the existing school because the existing primary school has strong links to the local marae and surrounding community, and is located in an area with a large Māori population.

12. However, it is having difficulty getting the threshold for agreement to acquire the neighbouring Māori freehold land as some beneficial owners cannot be found.
13. The alternative option is to construct a new primary school. The construction of a new school requires more land than is required to expand an existing school. Some sites have been identified that are on general land, not Māori freehold land. However, the sites are not as well connected to existing communities, transport routes, and existing early childhood and secondary schooling.

Lesser interests in land – leases, easements and covenants:

Context

14. Compulsory acquisition can also be used to acquire a lesser interest in land. If it is Ministers' policy intent to prohibit the compulsory acquisition of the ownership of land (the fee simple), then compulsion may still be used for lesser interests. However, if it is Ministers' intent to prohibit the use of compulsion when negotiating with Māori freehold land owners, then the acquisition of any interest will need to be by agreement. Lesser interests can be used to:
 - 14.1. Provide for a right of way, or access across the property or utility;
 - 14.2. Lease the land from the landowner without the ownership changing.
15. In the previous options table provided by TPK, it was proposed that agencies could be required to demonstrate that they have exhausted lesser interest options before taking the fee simple of Māori freehold land. LINZ would support this option.

Scenario – Housing and Urban Development Authority provision

16. Cabinet has previously agreed that the proposed Housing and Urban Development Authority (HUDA) would not be able to compulsorily acquire 'sensitive Māori land'.⁴ This means that if the HUDA wants to construct a public work on sensitive Māori land it can only do so if the owners agree and/or if the land is leased.
17. A new process has been proposed for engaging with Māori which presents a scenario which could be applied to how the rest of the Crown negotiates with Māori. The process is that:
 - 17.1. in urban development areas, including areas where the HUDA is taking over aspects of local government's role, participation arrangements for Māori are maintained;
 - 17.2. the UDA's processes accommodate iwi and hapū decision-making processes and decision-making processes under Te Ture Whenua Māori Act;
 - 17.3. the HUDA engages effectively with Māori and understands Māori perspectives, and
 - 17.4. the HUDA's processes are compatible with the Māori land tenure system under Te Ture Whenua Māori Act [CAB-18-MIN-0563 refers].
18. All negotiations to acquire land must start with the accredited supplier seeking to acquire the land by agreement. If the supplier was required to exhaust a lease option during that negotiation period, we do not consider that this would significantly increase the time taken to acquire land.

Climate change and natural disasters:

Context

19. From time to time land may be required to undertake public works such as flood protection and climate change resilience work. Works like these differ from other types of works in that the location is central to the reason for undertaking the work (for example, land acquired to mitigate coastal erosion must be on the coast where erosion is occurring.)

⁴ This includes Māori freehold land, former Māori freehold land, land held by a post-settlement governance entity or land held by an entity (or an entity controlled by it) on behalf of an iwi or hapu holding mana whenua if the land was vested in, or transferred to, the entity pursuant to an agreement with a Crown agency or local authority.

20. Land acquisition for these types of works does not happen frequently but its use may increase due to climate change, coastal erosion and the growing impact this is having on properties.⁵ The use of compulsory acquisition may also increase, as there will likely be some landowners who would prefer to stay in their properties, despite potential risks.
21. There is also a significant area of Māori land in fragile natural environments such as wetlands and coastal areas or bordering lakes and rivers.⁶ The intersection between climate change and the disproportionate effect it is likely to have on Māori will require a cross-agency approach. There may be significant unintended consequences from a restriction on the use of compulsory acquisition on Māori freehold land if land cannot be acquired to mitigate the risk of loss of life and property.

Scenario

25. A portion of the coast line in Gisborne is being eroded, requiring that a gas line be re-routed inland. The line sits on a corridor of former Māori freehold land that was acquired several years ago. The same Māori freehold landowners also own the large neighbouring Māori land blocks, including part of the original section of land from which the corridor was created. Every alternative route and site the operator has proposed includes Māori freehold land.
26. If the Crown could not acquire land by agreement on the operator's behalf, and it could no longer proceed to compulsory acquisition then in this scenario the work would not progress. Other, more circuitous routes would need to become the main links in and out of the communities there, which increases the risk of an unreliable supply of gas to the city.

⁵ For example see: <https://interactives.stuff.co.nz/2018/11/beach-road/>

⁶ 'Māori land ownership and land management in New Zealand,' Tanira Kingi, Making Land Work: Volume Two – Case Studies on Customary Land and Development in the Pacific, 2008, p134

Annex Two: Options Update

Options Considered So Far

Whenua Māori Work Programme

1. The policy options you saw at your meeting with Minister Mahuta on 27 November 2018 were developed by TPK. We have provided comment on the options, and the issues they intend to resolve [BRF 19-140 refers].
2. Some of the options presented were in the Supplementary Order Paper 279 of the withdrawn Te Ture Whenua Māori Amendment Bill (TTWM). Those options, and our comment on them are:

TTWM Option	Comment
Require adequate consideration of other options [when taking land for a public work], including the principles and preamble of Te Ture Whenua Māori Act 1993 ⁷	This option largely reflects current practice. We would support an option that makes current practice a legal requirement.
Provide equivalent compensation – disapply the rating valuation discount for Māori freehold land when it is valued for compensation purposes under PWA.	Support
Each separately owned residential dwelling on Māori freehold land receives a compensation payment when land is acquired.	Support
Increase powers for the Māori Land Court to: <ul style="list-style-type: none"> • Vest land in the hands of former owners or successors; • Allow offer-back to apply beyond the person from whom it was acquired, or their successors, and • Remove the restriction on using s41 of the PWA where the land was owned by 1 to 4 people or was vested in trustee(s) 	No objection
Disputes on price to be determined by the Land Valuation Tribunal, presided over by a Māori Land Court judge	No objection

⁷ Preamble: “Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.”

Agencies administering land decide whether surplus land is exempt from an offer-back ⁸	No objection (we note that this is the status quo, requiring that the chief executive of Land Information New Zealand is satisfied that an exemption applies).
Require that offered-back land to be returned as Māori land	Recommend that this occurs on a case-by-case basis, taking the former landowners or their successors' aspirations for the land into account.

3. The options contained in this table represent the least contentious options which could be progressed most quickly.

Urban Development Legislation

4. The urban development legislation currently being drafted proposes three variations from the way in which the PWA currently applies. Those variations are:

4.1. **Access to the land assembly powers:** The HUDA will have access to the land assembly powers in the PWA. These powers are currently limited to the Crown and local authorities, not Crown entities.

4.2. **Compulsory acquisition of 'sensitive Māori land':** The HUDA will not be able to compulsorily acquire Māori freehold land, former Māori freehold land, land held by a post-settlement governance entity or land held by an entity (or an entity controlled by it) on behalf of an iwi or hapu holding mana whenua if the land was vested in, or transferred to, the entity pursuant to an agreement with a Crown agency or local authority;

4.3. **Offer-back obligations:** If it is intended that former Māori land is to pass out of public ownership as part of the urban development project, the former owners of the land (or the owner's descendants) will be offered back the land. This offer back will be carried out before any development on that land commences. Former owners of general land will not receive an offer-back. We note that while this provision has not been enacted, in our view, if it was, it could be challengeable at law as discrimination.

5. We understand that Minister Mahuta and TPK would like to extend the options in paragraphs 4.2 and 4.3 to the rest of the Crown, local government and relevant network utility operators. The scenarios in Annex One describe what such a 'roll-out' could look like.

6. There are other options which you have previously seen and which we have discussed with TPK:

6.1. The remainder of the options presented to you at your 27 November meeting with Minister Mahuta [BRF 19-140 refers];

6.2. The options we drafted and shared with you in Briefing 18-325:

- A 'ban' on compulsory acquisitions could be applied to land held by Māori trusts and incorporations in addition to land currently vested as a Māori reservation;
- The scope of protections could be expanded to include various tenure types, including general land with protections under other legislation (such as heritage protections). It could also include protection for parts of land with significant inherent values regardless of tenure, such as urupā and cemeteries;
- The PWA could be amended so that compulsory acquisition could only be used for certain public works such as trunk infrastructure.

⁸ Exemptions are where the chief executive of Land Information New Zealand considers that it would be impracticable, unreasonable, or unfair to do so or there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held.