



## HEI WHAKATAU | BRIEFING

### High Level Options for Amending the Public Works Act 1981: Offer Back

<b>Date:</b>	12 August 2019	<b>Priority</b>	Medium
<b>Classification</b>	In Confidence	<b>Tracking Number</b>	39863

Action sought	Date action required by
<p>It is recommended that you:</p> <ol style="list-style-type: none"> <li><b>agree</b> in principle, subject to further work, that the following options be advanced into an upcoming Cabinet paper: <ol style="list-style-type: none"> <li>Provide that the interests of former owners are explicitly considered when land is being transferred for another public purpose <b>(1b)</b>;</li> <li>Enhance the standards and guidelines for the appropriate use of the Māori Land Court in the offer-back process <b>(2a)</b>;</li> <li>Enhance the standards and guidelines with regard to the price and terms of offer-backs <b>(3a)</b>;</li> <li>Remove current restrictions on using section 41 <b>(4a)</b>;</li> <li>Provide the Māori Land Court with the power to rule on disputes regarding terms and conditions (where section 41 is used) <b>(5a)</b>;</li> <li>Provide the Māori Land Court with the ability to rule on disputes regarding price (where section 41 is used) <b>(5c)</b>;</li> <li>Require publication of decisions regarding exemptions to offer-backs <b>(6a)</b>; and</li> <li>Provide that land is returned as Māori land by default, but owners can choose to have it returned as general land <b>(7c)</b>.</li> </ol> </li> <li><b>indicate</b> whether you require any further information or advice on the issues within this paper.</li> </ol>	19 August 2019

Contact for telephone discussion (if required)				
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Other Agencies Consulted					
<input type="checkbox"/> MBIE	<input checked="" type="checkbox"/> MoJ	<input checked="" type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input checked="" type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input checked="" type="checkbox"/> DIA	<input type="checkbox"/> Treasury	<input type="checkbox"/> MoH
<input checked="" type="checkbox"/> Other	Te Arawhiti				

Attachments
1. A3 Table – Issues and Options

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments:

Released under the Official Information Act 1982

12 August 2019

Te Minita Whanaketanga Māori

The Minister for Land Information

## **High Level Options for Amending the Public Works Act 1981: Offer Back**

### **Purpose**

1. This paper seeks your feedback on high-level options to improve the offer back process for former Māori land owners under the Public Works Act 1981 (**the PWA**).

### **Executive Summary**

2. The obligation to offer back land is triggered when the land is no longer required for the public work for which it is currently held, or for any other public work.
3. There is an opportunity to improve the offer-back regime to provide a better chance for whānau to reconnect with their whenua. This will improve their ability to realise their cultural and economic aspirations regarding their whenua and will align the regime more towards the principles of TTMWA.
4. While compulsory land acquisition has been the biggest issue for Māori historically, ensuring that surplus land is offered back to the former owners is a more contemporary issue for former owners of Māori land.
5. The main policy issues relate to:
  - a. the transfer of land for another public work;
  - b. the use of the Māori Land Court in the offer-back process; and
  - c. support for former owners to purchase back their land.
6. There are several other more technical issues where improvements to the regime can be made.
7. Once you have provided your views on the options within this briefing, we will undertake further detailed policy work on the preferred options. We note that the options are illustrative and may need to be adjusted as a result of further consideration.
8. Subject to your direction, we anticipate Cabinet policy decisions will be sought in November 2019 on options to amend the PWA for both the land acquisition and offer back regimes as they relate to Māori land.

### **Introduction**

9. This paper is the third briefing you have received with options to amend the PWA. The first two briefings related to improving protections for sensitive Māori land from compulsory acquisition [BRF 19-216 and BRF 19-392 refer].



10. There are a series of steps and choices made by the relevant decision-makers throughout the offer-back process. These steps and choices should be reassessed to ensure the interests of former Māori land owners are adequately protected, promote participation of former owners and improve clarity of the process.
11. This paper is part of a cross-agency Whenua Māori Programme aimed at supporting Māori land owners with the use and retention of their whenua. Proposals in this paper could potentially be advanced as part of the Whenua Māori (Rating and Other Matters) Bill where agreement can be reached. Cabinet policy decisions for amendments to the PWA are expected to be sought in November 2019.

## Background

### *Offer back under the Public Works Act 1981*

12. The obligation to offer back land is triggered when the land is no longer required for the public work for which it is currently held, or for any other public work (including as an exchange for other land needed for a public work). The offer is made to the former owner(s) or their successor, or to the successor in title to the property from which the land being offered back was acquired.
13. Section 40 of the PWA is the main provision used for the disposal of land held for a public work to a former owner or their successor.<sup>1</sup> Responsibility for complying with section 40 rests with:
  - a. the chief executive of Land Information New Zealand (LINZ) for properties held by the Crown and Crown agencies for government works; or
  - b. the chief executive of the local authority<sup>2</sup> that holds land for a local work.
14. The relevant chief executive is required to make offers to former owners unless it is impracticable, unreasonable, or unfair to do so, or if there has been a significant change in the character of the land.<sup>3</sup> Land can be offered either at market value or a lesser price if it is considered reasonable to do so. The former owner or their successor has 40 working days to accept an offer, unless the relevant chief executive extends this timeframe.
15. Section 41 of the PWA provides for the relevant chief executive, where land acquired for a public work was Māori freehold land, to either comply with section 40 or to apply to the Māori Land Court for a vesting order under section 134 of Te Ture Whenua Māori Act 1993 (TTWMA). Section 134 of TTWMA allows the Māori Land Court to change the status of any land to Māori freehold land and to vest it in those entitled to the land.
16. Offer back provisions apply to land acquired for a public work by the Crown, local authorities and in certain circumstances network utility operators. This can also include land acquired

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<sup>1</sup> For the purposes of s40 successor means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and; in any case where part of a person's land was acquired or taken, includes the successor in title of that person. See *Williams v Auckland Council* [2015] NZCA 479, 9 October 2015, where the Court of Appeal held that the test in s40(5) 'is whether a person would have been entitled to the land under the will or intestacy of the person who owned the land at the time of the acquisition had that person owned it at the date of his or her death'.

<sup>2</sup> Under the PWA local authority is wider than territorial and regional councils, and includes universities, airport authorities, and polytechnics.

<sup>3</sup> In addition, where the relevant chief executive believes on reasonable grounds that, because of the size, shape, or situation of the land it could not expect to sell the land to any person who did not own adjacent land, the land may be sold to an owner of adjacent land at a negotiated price.



by the Crown by confiscation or prior to public works legislation if that land has continued up to its disposal to be used as a public work. The obligation applies regardless of whether the acquisition was agreed voluntarily or using the compulsory acquisition powers.

17. LINZ publishes standards and guidelines for disposal of land held for a public work.<sup>4</sup> These aim to ensure that Crown agencies and their suppliers address the rights of those with a recognised interest in the land when the land is disposed of. However, they do not give any additional direction or guidance on the treatment of former Māori land in the offer back process.
18. An offer back has statutory priority over a right of first refusal under a Treaty settlement. The right of first refusal only occurs if the land is exempted from offer back or the land is not reacquired by the former owner.
19. Since 2010, for Crown disposals, the chief executive of LINZ has offered back, through the Māori Land Court twelve properties to former Māori land owners.

*Feedback on the offer-back of former Māori land*

20. Māori have long-held concerns about the return of land no longer required for its original purpose, including:
  - a. land being kept for longer than necessary;
  - b. land used for alternative public works without consulting with the former owners or considering their interests (which has been a particular grievance featured in several claims to the Waitangi Tribunal);
  - c. land being sold to private purchasers without an offer back being made to the former owners or their descendants; and
  - d. where offers back have been made, the costs have sometimes meant that Māori are unable to regain ownership of their land (a recent example is the 2016 offer back of surplus land associated with the Gisborne airport (Awapuni 1F3)).
21. In its reports, the Waitangi Tribunal has made several recommendations concerning offer back under the PWA, including that the PWA be amended to require agencies to:
  - a. consult with former Māori owners or their successors before deciding whether to offer surplus land back to such owners, and before putting any land taken for a public work to any other purpose;
  - b. treat the transfer of former Māori land for another purpose as a new acquisition, with a full process of consultation, opportunity to object, and fresh compensation; and
  - c. offer to return surplus land to Māori ownership at the earliest possible opportunity with the least cost and inconvenience to the former Māori owners.

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<sup>4</sup> LINZS15000 Standard for disposal of land held for a public work; LINZG15700 Guideline for disposal of land held for a public work.

### *Scope of current work*

22. The scope of this work centres on assessing whether the offer-back regime for former Māori land is achieving the core principles<sup>5</sup> of TTWMA – the retention of Māori land in the hands of its owners, and to facilitate the occupation, development, and utilisation Māori land. This includes issues related to:
- a. the transfer of former Māori land for another public work;
  - b. the use and powers of the Māori Land Court;
  - c. the financial capacity of former owners; and
  - d. exemptions to offer-back, the status of returned land, and other technical issues.
23. Former Māori land (as described in this briefing) means land that was Māori customary land or Māori freehold land immediately before it was acquired.

### *Former Te Ture Whenua Māori Bill*

24. The former Te Ture Whenua Māori Bill was withdrawn from the House in December 2017. The Bill included a Supplementary Order Paper containing provisions that sought to address some of the issues with the process of offering land back.
25. The former Bill included provisions to provide the Māori Land Court with additional powers to vest land in former owners, provide Māori Land Court judges with a role to preside over disputes on price, and removed current restrictions on using section 41 of the PWA.

### *Kāinga Ora–Homes and Communities (Urban Development Authority)*

26. In December 2018, Cabinet agreed to a range of measures to protect Māori interests in the new urban development legislation, including some related to offer back obligations. These decisions now have a bearing on whether/how they should be applied more widely in relation to the operation of the Public Works Act and Māori land.
27. There are exceptions to offer back under the Housing Act 1955 that apply to public land, including land that was Māori land when it was acquired. In addition, Cabinet had previously decided that offer back obligations will not apply to the transfer of land from Kāinga Ora – Homes and Communities to private developers where the end user is a private person or entity under the new legislation.
28. In the case of former Māori land, Cabinet agreed that the offer back provisions in the Public Works Act will apply, with minor modifications,<sup>6</sup> in cases where, through development, it is proposed that the land would pass out of public ownership.
29. Cabinet agreed that if public land that was Māori land when it was acquired is to stay in public ownership following its development (e.g. for a road or school) then the offer back requirement will not apply unless and until at some future date the land is no longer required and becomes surplus as per the standard provisions of the Public Works Act 1981.

<sup>5</sup> Preamble to Te Ture Whenua Māori Act 1993: ..... to promote the retention of that land in the hands of its owners, their whanau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapū....

<sup>6</sup> Including that the requirement in certain circumstances to offer the land first to the owner of adjacent land will not apply, the exceptions to an offer back to former owners in section 40 of the Public Works Act will not apply to Māori land, and the option to apply to the Māori Land Court be available regardless of the number of owners the land had when it was acquired or whether it was at that time vested in trustees.



## Opportunity and key issues

### *Opportunity*

30. There is an opportunity to improve the offer-back regime to provide a better chance for whānau to reconnect with their whenua. This will improve their ability to realise their cultural and economic aspirations regarding their whenua and will align the regime more towards the principles of TTWMA.
31. While compulsory land acquisition has been the biggest issue for Māori historically, ensuring that surplus land is offered back to the former owners is a more contemporary issue for former owners of Māori land.

### *Main policy issues*

32. We have identified three main policy issues with the offer-back regime in relation to former Māori land:
  - a. Former Māori land acquired for one public purpose can remain alienated by being used for different public purposes, without providing for an opportunity for Māori to re-connect with their whenua;
  - b. There is a lack of specific direction and guidance for decision makers on when the Māori Land Court should be utilised for the offer back of former Māori land<sup>7</sup>; and
  - c. The current financial capacity of former owners and the terms that land is offered back on can limit their ability to purchase the land.

### *Other issues*

33. In addition, there are several more technical issues with the offer back regime:
  - a. Section 41 of the PWA and section 134 of TTWMA are not available if the land was owned by four or fewer people or vested in a trust before its taking or acquisition for public works. The sections are also restricted to land that was formerly Māori freehold land or General land owned by Māori (as defined in section 4 of TTWMA), and exclude former Māori customary land.
  - b. Section 134 of TTWMA does not sufficiently empower the Māori Land Court to resolve disputes on price and terms.
  - c. The process of deciding whether any exemptions to offer back apply can lack transparency and options for challenging these decisions can be expensive.
  - d. Former Māori land can be returned as general land, bypassing the status change requirements and protective mechanisms of TTWMA.

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<sup>7</sup> Case law and legal advice can provide some assistance.



## Policy objectives and assessment criteria

34. The key policy objectives are:

- a. Protect the interests of the former owners of Māori land;
- b. Promote participation of Māori throughout the offer-back process;
- c. Ensure that the process is clear and easy to understand; and
- d. Minimise the time/cost on agencies.

35. We have used these objectives as our assessment criteria for analysing the respective options against the status quo. We consider the two key criteria are the protection of interests of owners of former Māori land and to minimise the time/cost on agencies. We have assessed how we consider each option either achieves the objective (✓), does not achieve the objective (\*), or has no impact on the objective (-). We note that the options are illustrative and may need to be adjusted as a result of further consideration.

36. We consider that protecting the interests of current and future owners and promoting the return of land to Māori will help the Crown fulfil its duty of active protection under the Treaty of Waitangi.

37. It is noted that any changes to increase the number of successful offers back could reduce the occasions where a right of first refusal under a Treaty settlement is triggered (i.e. the land would potentially be transferred to former Māori land owners, as opposed to post settlement governance entities).

## Options for key policy issues

### ***Transferring former Māori land for another public purpose***

#### Status quo

38. Former land owners are not involved in, or informed of, the process of determining whether land is surplus. Decisions to transfer land for another purpose without having first offered back the land can be controversial with former owners (for example, a parcel of land may have been acquired for a hospital or school, but is now used for an alternative purpose such as housing).

39. This has been a particular source of grievance through Treaty of Waitangi claims. There is a strong view that where land is no longer needed for the purpose it was acquired it should be offered back to the former owners.

40. The policy rationale for the transfer provisions of the PWA is to facilitate public works while avoiding further acquisition of private land. Decision makers still need to demonstrate that the land is 'required' for another public work. The provisions also allow transfer of administration (e.g. from NZTA to a local authority for a road).

41. However, there is no explicit requirement to consider Māori interests if former Māori land is proposed to be set apart for another public work under section 52 of the PWA.<sup>8</sup> By comparison, if a vendor agency proposes to transfer land to a local authority for the same purpose under section 50 of the PWA, it must provide LINZ with a report containing an assessment of the significance of the land to Māori.

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<sup>8</sup> LINZS15005 Standard for the Acquisition of Land under the Public Works Act 1981.

## Options

42. We have identified the following options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 1a:</b> Require disposing agencies to consult or notify former owners before land is transferred for another public purpose; <b>OR</b>	-	✓	✓	x
<b>Option 1b:</b> Provide that the interests of former owners are explicitly considered before land is transferred for another public purpose; <b>OR</b> (preferred)	✓	✓	✓	x
<b>Option 1c:</b> Require agencies receiving land as a transfer to offer to partner with the former owners on the public work; <b>OR</b>	✓	✓	✓	x
<b>Option 1d:</b> Treat transfers of former Māori land as new acquisitions; <b>OR</b>	✓✓	✓	✓	xx
<b>Option 1e</b> Require disposing agencies to offer back former Māori land to former owners before transferring it for another public purpose	✓✓	✓	✓	xx

43. While requiring disposing agencies to consult or notify former owners before land is transferred for another public purpose (Option 1a) would improve the clarity of the process and participation of former landowners, it is unlikely to result in significantly improved protection of the interests of former owners (such as an improved opportunity of the return of land). This option would also present practical and administrative difficulties for vendor agencies.
44. However, there is scope to improve how the interests of former Māori owners are considered and accounted for during the process of determining whether land is surplus. Our preferred option is to impose a higher decision-making threshold on the proposed transfer of former Māori land by amending the PWA to require the Minister for Land Information to explicitly consider the interests of the former owners before transferring the land for another purpose (Option 1b). This obligation would not apply to any other land being offered back.
45. This option would apply for transfers where the public purpose significantly changed and not where the public work remains the same (e.g. a transfer of a road from NZTA to a local authority). Guidelines on how these interests are considered and when this requirement would apply would need to be developed to support decision making.
46. Alternative options include:

a. Option 1c – requirement to offer to partner with former owners

This option would improve the protection of interests and participation by providing former landowners an opportunity to benefit from the new public work. It would impose some cost on agencies in locating former landowners and developing and implementing partnership arrangements. This option may require financial assistance to former landowners in order for them to partner with agencies.



b. Option 1d - treating transfers of former Māori land as new acquisitions

This option would improve the protection of interests of former owners by ensuring the transfer meets the tests of land acquisition, but would impose significant operational cost and time on disposing agencies and could result in the new public work not proceeding. This could also result in a lesser interest (such as a lease) being used as opposed to the agency holding the land, particularly if the option to require agencies to exhaust the practicality of a lesser interest is advanced.

c. Option 1e – require offer back of former Māori land before transferring

This option would result in the most significant improvement in protection of the interests of former owners and opportunity for the return of land. However, we consider this option would also present vendor agencies with the greatest administrative requirements and has the highest risk of the public work not proceeding.

***Use of the Māori Land Court under section 41 of the PWA***

Status quo

47. Where former Māori land meets the criteria set out in section 41 (see paragraph 15), the relevant chief executive can opt to initiate offer back either under section 40 or through the Māori Land Court under section 41 of the PWA (and therefore section 134 of TTWMA). LINZ standards and guidelines do not provide any specific guidance on how decision makers should exercise this discretion.
48. LINZ's current practice is to follow the section 41 route through the Māori Land Court in most cases where it could be applied. However, in cases involving relatively few owners and land that was acquired for public purposes more recently, it is sometimes easier and quicker to use section 40 as the mechanism to return the land.
49. Given the long time span over which land may have been acquired and that it may have been acquired from collective groups rather than individuals, use of the Māori Land Court under the section 41 process offers some advantages for the offer back of former Māori land. The Māori Land Court has the expertise and historical records to identify former owners and their successors. The court is also empowered to determine, more broadly, the people that it "may find to be entitled to the land". This is a broader group of successors than the definition provided under section 40 of the PWA (which is limited to one level of succession).

Options

50. We have identified the following options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 2a:</b> Enhance the standards and guidelines for when it is appropriate to use the Māori Land Court ( <i>preferred</i> ); <b>OR</b>	✓	-	✓	x
<b>Option 2b:</b> Use of the Māori Land Court under section 41 of the PWA is mandatory for all cases that involve former Māori land	✓	✓	✓	xxx



51. We consider that while using the Māori Land Court to facilitate the return should be encouraged, it is appropriate to retain the discretion to use section 40 where it would be the simpler and more efficient option for owners to buy back their former land. This could particularly be the case with recent acquisitions where the ownership of the land is easier to trace.
52. Providing that it be mandatory to use the Māori Land Court for all cases involving former Māori land (Option 2b) could have a significant impact on the resources of the court and would likely lengthen the process to offer land back.
53. However, we consider that the standards and guidelines should provide firmer direction and guidance to decision makers for when it is appropriate to utilise the Māori Land Court (Option 2a).

### **Support for former owners of Māori land to have land returned**

#### Status quo

54. The current financial capacity of former owners and the terms that land is offered back on can limit their ability to purchase the land.
55. Under section 40(2)(d) of the PWA, the relevant chief executive has discretion to offer land at a lower price than the current market value if they consider it reasonable to do so. However, the current standards and guidelines do not provide any specific guidance on how decision makers should exercise this discretion. Where a vendor agency seeks to offer back land at less than market value, it is required to seek an appropriation for the loss.
56. By way of comparison, the Crown has a policy to return gifted land at no cost, but to charge market value for any buildings or improvements. Where a vendor agency returns gifted land at nil consideration under this policy, a disposing agency can apply to Treasury to gain reimbursement through an appropriation.
57. Offering back former Māori land at market value is not always appropriate given the history of acquisition. Historically, Māori land was compensated at a lesser value, if compensated at all, when it was acquired but this is not reflected in contemporary offer back practice. Māori land more generally was subject to sustained discrimination under the public works regime for several decades.
58. Finally, even when offered at less than market value, Māori land owners can still have difficulties raising the money necessary to purchase their former land in the time available.

#### Options

59. We have identified the following options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 3a:</b> Enhance the standards and guidelines to: <ul style="list-style-type: none"> <li>provide guidance on the relevant considerations for offering land back at less than market value</li> <li>provide guidance for dealing with any request for extensions to the statutory timeframes for offer backs (<i>preferred</i>)</li> </ul> <b>AND/OR</b>	✓	✓	✓	x

<b>Option 3b:</b> Establish dedicated Crown funding to facilitate the return of former Māori land	✓	✓	-	xx
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60. There is scope for clearer guidance to be given to decision makers about the factors that should be considered when determining the price at which former Māori land should be offered back (Option 3a). These factors would include the means and circumstances of the acquisition<sup>9</sup>, and the adequacy of compensation (including whether compensation was paid). Taking factors such as these into account should ensure that land is offered back to former owners at a fair price. We expect that this would result in more land being offered back at less than market value.
61. To support this option, we are considering whether there needs to be clearer guidance for vendor agencies to seek funding for offering back land at less than market value (similar to the gifted lands policy).
62. Due to the fact that there are often multiple ownership interests, guidance should also be crafted for when extensions to any offer back period are considered for offer back for former Māori land (also Option 3a).
63. This approach would improve protection of interests by improving the opportunities for the owners of former Māori land to have their land offered back at a fair price without presenting undue burden on vendor agencies.
64. However, there remains a risk that former Māori owners will be prevented from reconnecting with their whenua due to their current financial circumstances. This could also be relevant for non-Māori who cannot afford to purchase their land back. We propose advancing Option 3a in the first instance and to investigate Option 3b on a longer timeframe.

### Options for other issues

65. In addition to the main issues outlined above, there are also a range of other, more technical issues related to the offer back process.

### **Restrictions on using Section 41**

#### Status quo

66. Section 41 of the PWA and section 134 of TTWMA are not available if the land was owned by four or fewer people or vested in a trust before its taking or acquisition for public works. The sections are also restricted to land that was formerly Māori freehold land or General land owned by Māori (as defined in section 4 of TTWMA). This definition excludes Māori customary land that might have been acquired for public purposes.
67. Section 41 was originally inserted in the PWA during the Select Committee process. Its criteria are consistent with other provisions concerning the acquisition of Māori land in the PWA.<sup>10</sup> However, there is no clear policy rationale for retaining these criteria in relation to offer back, particularly as they may not adequately capture the circumstances under which former Māori land was acquired for public purposes.

<sup>9</sup> Such as whether it was compulsorily acquired and the legislation used for acquisition.

<sup>10</sup> See sections 17(4) and 18(5).



## Options

68. We propose to remove these criteria from section 41 and clarify that the Māori Land Court process is available for the offer back of all former Māori land.

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 4a:</b> Remove these criteria from section 41 and clarify that the Māori Land Court process is available for the offer back of all former Māori land	✓	-	✓	

69. We do not see any clear policy rationale for the restrictions on using section 41 of the PWA. Removing these restrictions will allow more former Māori land to qualify to be offered back under section 41 (and to thereby use the Māori Land Court).

## Powers of Māori Land Court

### Status quo

70. Section 134 of TTWMA (invoked in conjunction with section 41 of the PWA) does not sufficiently empower the Māori Land Court to resolve disputes on price and terms. For example, the Māori Land Court does not have the power to make a ruling on price or any terms and conditions that are disputed between the agency and the former owners. The Land Valuation Tribunal is only available to determine price when an offer back is made under section 40(2).

## Options

71. We have identified the following options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 5a:</b> Provide the Māori Land Court additional powers to resolve disputes on terms and conditions ( <i>preferred</i> )	✓	-	✓	x
<b>AND</b>				
<b>Option 5b:</b> Disputes on price determined by the Land Valuation Tribunal, presided over by a Māori Land Court Judge; <b>OR</b>	✓	✓	✓	x
<b>Option 5c:</b> Disputes on price determined by the Māori Land Court with assistance of experts in the valuation of Māori land ( <i>preferred</i> )	✓	✓	✓	x

72. We consider it appropriate to provide the Māori Land Court with additional powers to resolve disputes on terms and conditions (Option 5a) given this would help to ensure the terms and conditions are fair for the former owners. The Court's jurisdiction would specifically exclude altering any easement, covenant or encumbrance required in respect of the land subject to offer back. These can be important if, for example, an easement needs to be retained to provide access to other land. If these encumbrances cannot be guaranteed other public works (such as pipelines held by local authorities) will be put under threat.



73. Providing the Māori Land Court with the power to resolve disputes on price with experts in the valuation of Māori land (Option 5c) would ensure that the unique characteristics of Māori land are taken into account in the price and potentially allow all of the issues to be dealt with in a single hearing. This would also be a more comfortable and accessible forum for former owners to engage with. This option could result in delays to the process, particularly where multiple hearings are required.
74. Providing that disputes on price are determined by the Land Valuation Tribunal (with a MLC Judge presiding) (Option 5b) would ensure the characteristics of Māori land are taken into account but would require a separate Land Valuation Tribunal hearing.

### **Exemptions to offer-back requirements**

#### Status quo and issues

75. Once land is declared surplus, the relevant chief executive decides whether any of the exemptions to the offer back process apply (see paragraph 14). The current guidelines offer guidance and examples to inform decision making in this area. The relevant chief executive is accountable through judicial review, and there is a strong body of case law as to when specific exemptions can be applied.
76. However, undertaking a judicial review through the High Court is a costly avenue for former Māori land owners to pursue, and can be a significant barrier to challenging these decisions. In addition, former owners may also not be aware that a decision to exempt land from the offer-back requirements has been made and may therefore not be in a position to appeal.
77. The Waitangi Tribunal has previously questioned the appropriateness of these exemptions for former Māori land and has noted that the scale of use of these exemptions is difficult to ascertain.<sup>11</sup>

#### Options

78. We have identified the following options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 6a:</b> Publish summaries of decisions to exempt former Māori land from offer back requirements ( <i>preferred</i> ); <b>OR</b>	✓	✓	✓	x
<b>Option 6b:</b> Oblige relevant chief executives to notify former owners of decision to exempt land from offer back requirements;	✓	✓	✓	xx

79. We consider that publishing summaries of decisions to exempt former Māori land from offer back requirements (Option 6a) provides a good balance of outcomes against our objectives. It would improve clarity of the process while presenting only a small increase in administrative time and costs for LINZ or local authorities.
80. We do not consider that obliging relevant chief executives to notify former owners of decisions to exempt land from offer back requirements (Option 6b) would result in any appreciable improvement in the opportunity to buy back land, and would present a potentially significant increase in administrative time and costs for vendor agencies.

<sup>11</sup> Waitangi Tribunal, Wairarapa ki Tararua Report.

81. We are currently considering a further option to enable former Māori land owners to appeal to the Māori Land Court (instead of through judicial review in the High Court). Further work is needed to determine whether this would be possible via legislative amendment and how that could be advanced.
82. We note that the ability to seek a judicial review of decision on offer-back is a principle of administrative law. The High Court has the inherent jurisdiction in New Zealand's judicial system to review any statutory decision and LINZ considers that this should remain.

### **Status of returned land**

#### Status quo

83. Under section 40 of the PWA when surplus land is sold to former owners or their successors, or sold to private purchasers after an offer back, former Māori land can be sold by the relevant chief executive as general land without any recourse to the Māori Land Court.<sup>12</sup> This effectively means that the status of the land has changed while bypassing the requirements of TTWMA.
84. General land is more easily transacted, potentially resulting in land being lost from Māori ownership. This can have long-term implications, as section 147A of TTWMA preserves the rights of members of the preferred class of alienees (those with ancestral and cultural connections to the land) to be able to reacquire Māori land in the future through a statutory right of first refusal. If former Māori land returned as general land, however, this right of first refusal is no longer available to current or future members of the preferred class of alienees.
85. The former Te Ture Whenua Māori Bill (2016) proposed that former Māori land would be returned as Māori land in all cases.

#### Options

86. We have identified the following two options:

	<i>Protection of interests</i>	<i>Participation</i>	<i>Clear process</i>	<i>Time/cost</i>
<b>Option 7a:</b> Require offered back land to be returned as Māori land to former Māori land owners; <b>OR</b>	✓	-	-	x
<b>Option 7b:</b> Require offered back land to be returned as Māori land regardless of who it is sold to; <b>OR</b>	✓	-	x	xx
<b>Option 7c:</b> Land is returned as Māori land by default, but owners have the right to choose to receive it as general title land ( <i>preferred</i> )	✓	✓	-	x

87. In general, we consider that if land was acquired for public purposes as Māori land it should be returned with the same status in the first instance. This protects the interests of current and future owners, and preserves the protections afforded by TTWMA.

<sup>12</sup> The exception to this is that since 1993 the acquisition of Māori freehold land for a public work does not change the status of the land unless the Māori Land Court makes an order changing the status. This means that if the offer back is not taken up or the chief executive applies an exception, before the land can be sold to a private purchaser Te Ture Whenua Māori Act 1993 needs to be complied with, including the requirement to first offer the land to members of the preferred classes of alienees.



88. These options require a balancing of the interests of potential future owners. Returning offered back land as Māori land regardless of who it is sold to (Option 7b) would inhibit the rights of any property owners to do as they wish with that property. However, this option would also offer the highest protection for the interests of current owners (and the preferred class of alienees), and create an opportunity for former public works land to be returned to Māori ownership in the future if an offer back is declined or unsuccessful<sup>13</sup>.
89. However, some former Māori land owners may wish to receive land back as general title land in order to provide more flexibility in decision-making and a greater ability to secure finance over the land. We consider Option 7c adequately protects the interests of former owners by providing them with the choice, as well as enhancing their participation in the process. However, further work is required to determine how owners might make these decisions, including whether any decision making thresholds would need to be reached.
90. It should be noted that in December 2018 Cabinet agreed to amendments to TTWMA to provide that non-Māori owners will only be able to pass Māori land on to their next generation (i.e. their children will not be able to pass it on to subsequent generations).

### **Consultation**

91. We have consulted with the Ministry of Justice, New Zealand Transport Agency, the Ministry of Education, and Te Arawhiti on this briefing paper.

### **Next Steps**

92. We propose the following next steps:
- a. Meet with officials to discuss the options in this paper (early September 2019);
  - b. Engagement with Ministerial colleagues (September 2019);
  - c. Targeted engagement with Māori groups (to be confirmed) (October 2019); and
  - d. Cabinet policy decisions sought (November 2019).
93. We will provide you with material to support your Ministerial engagement as well as a proposed targeted engagement plan.

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<sup>13</sup> This is because under this option any future sale of Māori land would need to be first offered to the preferred class of alienees, which could result in Māori gaining ownership of the land in the future.




## Recommended Action

95. It is recommended that you:

1. **agree** in principle, subject to further work, that the following options be advanced into an upcoming Cabinet paper:
  - a. Provide that the interests of former owners are explicitly considered when land is being transferred for another public purpose (1b); Yes / No
  - b. Enhance the standards and guidelines for the appropriate use of the Māori Land Court in the offer-back process (2a); Yes / No
  - c. Enhance the standards and guidelines with regard to the price and terms of offer-backs (3a); Yes / No
  - d. Remove current restrictions on using section 41 (4a); Yes / No
  - e. Provide the Māori Land Court with the power to rule on disputes regarding terms and conditions (where section 41 is used) (5a); Yes / No
  - f. Provide the Māori Land Court with the ability to rule on disputes regarding price (where section 41 is used) (5c); Yes / No
  - g. Require publication of decisions regarding exemptions to offer-backs (6a); and Yes / No
  - h. Provide that land is returned as Māori land by default, but owners can choose to have it returned as general land (7c). Yes / No
2. **indicate** whether you require any further information or advice on the issues within this paper. Yes / No

  
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Hon Nanaia Mahuta Te Minita Whanaketanga Māori	Hon Eugenie Sage Minister for Land Information
Date: ____ / ____ / 2019	Date: ____ / ____ / 2019