

In Confidence

Office of the Minister for Land Information

Office of Te Minita Whanaketanga Māori

Chair, Cabinet Māori-Crown Relations Committee

Whenua Māori Reforms – Package of proposals to amend the Public Works Act 1981 and protected Māori Land

“Whatungarongaro te tangata, toitu te whenua” – “People perish, but land remains”

Proposal

1. This paper seeks agreement to amend the Public Works Act 1981 (**the PWA**) as part of the wider Whenua Māori reforms currently underway. Amendments will:
 - 1.1 Minimise the compulsory acquisition of protected Māori land, while enabling the Crown and local authorities to undertake and maintain required public works; and
 - 1.2 improve offer-back processes for the return of former Māori land no longer required for public purposes.

Executive Summary

2. The PWA has not been significantly amended since 1987. These amendments present an opportunity to update the PWA to reflect best practice and modern thinking, and for the Crown to incorporate a te ao Māori approach to land into the PWA.
3. The proposals in this paper are part of an overall package of initiatives designed to promote Te Puni Kōkiri’s Whānau Development through Whenua programme. As part of this package, the Government has previously agreed to:
 - 3.1 invest \$56.1 million in a whenua Māori programme to assist owners of Māori land to develop that land;
 - 3.2 amend Te Ture Whenua Māori Act 1993 to improve processes for succession to land, dispute resolution and efficiency of the Māori Land Court (Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill); and
 - 3.3 proceed with the drafting of changes to rating legislation, to improve outcomes for Māori land owners [DEV-18-MIN 0046 refers].
4. The amendment proposals for the Public Works Act are the final part of the Whenua Māori package. These amendments are designed to balance the principles of Te

Ture Whenua Māori Act 1993, so that protected Māori land is safeguarded, with retaining access for the Crown and local authorities to the land necessary to complete public works.

5. These amendments will:

5.1 minimise the compulsory acquisition of protected Māori land, while enabling the Crown and local authorities to undertake and maintain required public works, by:

5.1.1 demonstrating improved understanding of the significance of whenua to Māori to ensure decisions to acquire Māori land are robust and principled, and to provide for the retention of Māori land through increased Ministerial oversight, while balancing the options against the need for efficiency in the PWA system.

5.2 improve offer-back processes for the return of former Māori land no longer required for public purpose by ensuring that:

5.2.1 proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand.

6. Overall, these improvements will better recognise unique characteristics of Māori land and the association of Māori with their land holdings. The amendments will better facilitate the return of former Māori land to former owners, including improved communication around this process, where it is no longer required for public works.

7. When viewed through a te ao Māori lens, the new provisions will:

7.1 support the principles of retention of Māori land contained in Te Ture Whenua Māori Act 1993, and in so doing provide for land owners to use their land to fulfil their development aspirations (Whairawa – Thriving Whānau);

7.2 retain and re-establish the connection of Māori land owners with their land, thereby providing:

7.2.1 a firmer basis for intergenerational whānau development and wellbeing – through the transmission of knowledge, skills and experience (manaakitanga – social responsibility; and whanaungatanga – Social connections); and

7.2.2 for Māori landowners to actively engage with their land and steward its use and development, whether for social, economic, cultural, spiritual and/or environmental purposes (kaititakitanga – long-term guardianship, stewardship or protection).

8. From a public works perspective, these provisions build on existing and emerging best practice. They are designed such that there is very low risk of impeding necessary public works. While in a small number of cases they could lead to a modest increase in cost or time, they could equally support those works by providing assurance that protected Maori land is being used only where truly necessary.

9. Note that the definition of protected Māori land used throughout the proposals in this paper is the same that Cabinet has previously agreed to use in the urban development regime. It includes Māori freehold land – the largest class of Māori land, and land returned through Treaty settlements. A full list of categories of land included in ‘protected Māori land’ is provided in Annex Two.

Background

Historical and contemporary use of the Public Works Act

10. The PWA has historically provided wide ranging powers to acquiring authorities to take private land, including whenua Māori, for public works purposes. The PWA also provides a process by which acquired land is offered back to former owners or their successors once it is no longer needed for a public work.
11. There is currently no efficient and accurate measure of the total number of Māori land parcels acquired under the PWA. Historical documentation tells of Māori land taken under the PWA in its previous iterations.
12. Since 2010, 242 parcels of land were compulsorily acquired under the PWA. These parcels were of varied sizes and many were acquired for the purposes of a single public work, such as the Transmission Gully roadworks. In addition to this, over 2,500 parcels of land have been acquired by agreement after various stages of negotiation with landowners since 2010.
13. Since 2015, the Crown has received approval from the Māori Land Court to acquire only three parcels of Māori freehold land following agreement with the owners¹. In that time the Crown has taken any Māori freehold land by compulsory acquisition.
14. We can determine that in relation to the Crown in the previous five years:
 - 14.1 three parcels of Māori freehold land have been acquired by negotiated agreement (the record is of a successful vesting application through the Māori Land Court under s151 of TTWMA);
 - 14.2 no areas of Māori freehold land were taken by compulsory acquisition;
 - 14.3 one area of general land owned by Māori (and held by a Māori Trustee) was taken by Proclamation (compulsory acquisition), at the request of the Trustee; and
 - 14.4 between 3-6 current acquisition processes are underway, which include land that might be captured by these currently proposed reforms – these acquisitions have not been completed.
15. We do not have information for local authorities of any acquisitions of Māori freehold land by agreement by local authorities, as there is no central record of local authority public works actions.² However, as all compulsory acquisitions pass through LINZ

¹ LINZ is aware of five current acquisitions of Māori freehold land currently underway, where the Crown is negotiating with landowners or seeking a vesting order from the Māori Land Court.

² There has been one compulsory acquisition of general land held by the Māori Trustee on behalf of owners.

and the Minister to the Governor General, we can be satisfied that no compulsory acquisitions by local authorities happened in this period.

16. We are aware that the Crown has offered approximately 12 parcels of land for return to former Māori land owners since 2010.
17. We can only advise about Māori freehold land. We cannot easily identify from our records whether any other of the classes of protected Māori land were acquired (such as land held by post-settlement governance entity that was returned in a settlement).
18. Further information on the historical background of the PWA, the importance of Māori land, previous Waitangi Tribunal recommendations, and current entities with powers under the PWA is contained in Annex 1.

Policy proposals to improve and limit acquisition of Māori Land

Current approach to Māori land

19. Today, Māori land is acquired infrequently. This is because there is so little of it left, following acquisitions during the 19th and 20th centuries, that it is not often encountered during the planning of public works.
20. Māori land is also disproportionately located in remote areas, meaning it is less likely to be a critical piece of land for a modern public work. Land returned by post-settlement governance entities is often located in more urban areas, such as Auckland and Tauranga, so there may be more Māori land located in urban centres as claimants reach settlement.
21. When acquiring land under the PWA, acquiring authorities³ must first try to reach an agreement with the land owners. Compulsory acquisition only occurs after at least 3 months of negotiation, and after any hearing at the Environment Court if an objection is received.
22. The approach to the acquisition of land for public works has changed significantly over the past few decades. Modern practice is for Crown agencies not to take Māori land wherever possible. There are also a growing number of partnerships between Māori and the Crown or local authorities, which mean that compulsory acquisition is less commonly required.
23. Where Māori land is required for a public work, Land Information New Zealand has developed standards and guidelines on the acquisition of land that accredited suppliers – the property professionals who negotiate on behalf of Crown agencies – must meet. Crown agencies must comply with the standards and LINZ promotes these documents to local authorities as good practice for public works acquisitions.

³ 'Acquiring authorities' refers to the Crown, local authorities as defined in the Public Works Act 1981, and network utility operators with requiring authority status under the Resource Management Act 1991;

24. An improved understanding of the significance of whenua to Māori has led to a recent decrease in Māori freehold land acquired compulsorily. As noted above, there has been no compulsory acquisition of Māori freehold land in the last five years.

The proposed amendments aim to balance the retention of Māori land with the need for land for public works

25. The infrequency of Māori land being acquired – especially by compulsion – does not diminish the fact that remaining Māori land warrants protection. Rather, the scarcity of Māori land relative to New Zealand’s total land area furthers the need to protect it.
26. Despite many acquiring authorities having an ‘in-principle’ policy not to take Māori land when planning public works, as demands for land intensify, this policy may be insufficient or unsustainable. The lack of codification of improved practice into legislation means that there is certainty for Māori that past poor practice will not occur again.
27. The options in this paper propose to embed these safeguards into legislation, whilst retaining the ability for land to be accessed for critical public works. This will protect a rare taonga tuku iho and improve Māori Crown relations, by reaffirming the Crown’s commitment to the retention of Māori land with Māori landowners.
28. The proposals we present do not impact acquisition by agreement. They will take effect if an acquiring authority and the Māori land owners cannot reach a negotiated agreement. In these instances trade-offs will be needed between the retention of Māori land and making land available for public works.

Introduction to the policy options

29. The amendment proposals cover two broad categories:
- 29.1 Minimising the compulsory acquisition of protected Māori land; and
- 29.2 Improving processes for the offer-back of former Māori land.

Proposals to minimise compulsory land acquisition

30. The most effective means of striking a balance between protecting Māori land and the delivery of public works is by improving the decision-making process. We can improve the decision-making process by:
- 30.1 ensuring that acquiring authorities are robust and principled when looking to acquire Māori land; and
- 30.2 ensuring that Māori interests are represented at a Ministerial level.

Amendment Proposals to minimise the compulsory acquisition of protected Māori land

31. The package of proposals will ensure decisions to acquire Māori land are robust, principled, and provide for the retention of Māori land at a Ministerial decision-making level. We have balanced the options against the need for efficiency in the PWA system.

Consideration of principles that promote the retention of protected Māori land

32. A set of principles has the benefit of clearly emphasising the fundamental importance of retaining protected Māori land in Māori ownership for the benefit of present and future generations, while balancing this with the need to acquire land for public works. This approach aligns closely with TTTWMA, with its strong emphasis on the retention of Māori land. We recommend that the principles apply to Part 2 compulsory acquisition of land of the PWA.
33. The principles would be along the lines of the below:
 - 33.1 This Act (the PWA) recognises that Māori have strong associations with protected lands. Since time immemorial Māori have exercised and continue to exercise control over their lands, resources, and taonga in accordance with tikanga Māori and, consistent with the guarantees given to Māori in Te Tiriti o Waitangi, to protect the right of owners of Māori land to retain, control, occupy, and develop their land as a taonga tuku iho for the benefit of present and future generations of owners, their whānau, and their hapū.
 - 33.2 In recognition of the strong association of Māori to protected lands parties with functions, duties and powers under this Act must actively work to balance the need for land for public works with the protection of the interests of owners of protected land to retain, control, occupy, and develop protected land for the benefit of present and future generations
34. We intend to continue to work on the wording of these principles, and for drafting of these to occur through ministerial consultation. This process will inform how these principles are incorporated into the PWA.
35. Agencies would be required to provide information about how principles that promote the retention of Māori land had been considered. Relevant Ministers would then consider the information provided by agencies, via LINZ, when signing a Notice of Intention to Take Land. Lastly, where an objection is made to a taking, the Environment Court would specifically consider the principles in arriving at its decision.
36. The Waitangi Tribunal has recommended that the PWA be interpreted and administered to give effect to the principles of the Treaty of Waitangi. With regard to land acquisition, we consider the proposed principles outlined above will best give effect to our objectives and provide clearer direction on how to comply with the principles of the Treaty.

Exhausting the option of a lesser interest

37. This option will ensure that the lowest level of ownership must be extensively explored before acquiring Māori land for public works. Greater use of leasing or easement options for public works mean Māori will have greater chances of re-acquiring their land once the need for the land has expired.
38. This option would require that:

- 38.1 Acquiring authorities exhaust the practicality of taking a lesser interest in land (e.g. leases, easements) before progressing to an application for the fee simple;
 - 38.2 LINZ prepares standards and guidance on the way in which acquiring authorities could negotiate for a lesser interest prior to progressing to a Notice of Intention to Take Land, and what 'exhausted might entail';
 - 38.3 Owners of protected Māori land be able to object to the Environment Court if they consider that the compulsory acquisition of the Land has not adequately exhausted the practicality of lesser interests; and
 - 38.4 To protect the acquiring authority's interests, the landowner would have no right to terminate the lease, easement or other lesser interest prior to its termination date.
39. A requirement to exhaust the option of a lesser interest places an onus on the acquiring authority to demonstrate why the land is required for the work, and why the fee simple is required. Currently, acquiring authorities must consider alternative routes, sites, and methods, but not alternative estates or tenures (though they may do so through their own practices). In some cases, a lease will likely provide for the same outcome as the fee simple but allow the land to remain in Māori ownership.
 40. The requirement to exhaust the practicality of lesser interests is likely to have the most impact as, when used, a lesser interest would mean no change in ownership so land is not lost from Māori ownership.
 41. This option would provide the means for acquiring authorities to meet the Treaty principles requirement that protected Māori land is only taken as a last resort.

Consent of relevant Māori interest portfolio Ministers

42. This option would require the Minister for Land Information to seek the consent of the Minister for Māori Development (for land held under TTWMA) or the Minister for Māori / Crown Relations (for land that returned as part of a Treaty settlement) before signing a Notice of Intention to Take Land.
43. This option would provide a further check in the process to ensure that the acquisition is absolutely necessary (balancing the needs of retaining protected Māori land and the delivery of public works).

Minor and technical changes

44. This option would provide that all separately owned dwellings on a property are compensated when acquired under the Public Works Act 1981. This would provide more equitable compensation when a property has multiple dwellings.
45. Provide that, for the purposes of compensation under the Public Works Act 1981, Māori freehold land be valued as if it were general land. This would create equity between general and Māori land.
46. The full package of land acquisition proposals is summarised in the table below:

Table 1: Land Acquisition Options Summary Table

Proposal	Advantages	Disadvantages
<p>Introduce a requirement that principles that promote the retention of protected Māori land, and create a requirement that those principles be taken into consideration when parties acting under the PWA make any decision on the acquisition of land.</p>	<ul style="list-style-type: none"> • Provides clear expectations of the importance of the retention of protected Māori land • Judiciary understands Parliaments intent when hearing objections • Likely to improve Māori / Crown relationship • Potentially more protected Māori land retained in Māori ownership 	<ul style="list-style-type: none"> • The option may be seen as symbolic • May not prove effective in retaining Māori land in Māori ownership if progressed in isolation
<p>Requiring that options to take a lesser interest in land are exhausted before the fee simple is acquired (that is, before there is a change in ownership).</p>	<ul style="list-style-type: none"> • More land is retained in Māori ownership • Likely to improve Māori / Crown relationship • Better partnership options • No need for a disposal process where lesser interests acquired 	<ul style="list-style-type: none"> • Likely to increase costs to the acquiring authority • Lesser interests not likely to be practical for works relating to public roads. • Owners may regard taking lesser interests as alienating land if they cannot use or connect with their whenua • Improvements will need to be dealt with at the end of the term of the interest. • Decrease in opportunities for Rights of First Refusal
<p>Requiring the consent of the Minister for Māori Development and Minister for Māori Crown Relations: Te Arawhiti before signing Notices of Intention to Take Land.</p>	<ul style="list-style-type: none"> • Greater visibility across Government about PWA decisions • Opportunity for Ministers to represent Māori interests • Potentially more protected Māori land retained in Māori ownership 	<ul style="list-style-type: none"> • Longer decision-making time • Increased risk of judicial review

<p>Provide that all separately owned dwellings on a property are compensated when acquired under the Public Works Act 1981, and provide that Māori freehold land be valued as if it were general land, during the compensation process under the PWA.</p>	<ul style="list-style-type: none"> • Creates equity between general land and Māori land • Reduced potential for Māori land to be under-compensated 	<ul style="list-style-type: none"> • Higher costs for the requiring authorities if compensation provided for separate dwellings
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Proposals to improve the ease and communication of the offer-back of former Māori land

47. These proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand.

Current process

48. The obligation to offer back land is triggered when the land is no longer required for a public work. The offer is made to the former owner(s) or their successor.
49. 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.⁴ It does sets out the statutory process the relevant chief executive must follow.
50. Where land acquired for a public work was Māori freehold land, Section 41 of the PWA provides for the relevant chief executives⁵ to either comply with section 40 or to apply to the Māori Land Court to complete the offer-back.
51. Since 2010 the chief executive of LINZ has offered back twelve properties of Crown-owned land to former Māori land owners through the Māori Land Court.

The offer-back process could do more for former Māori land owners

52. There is an opportunity to improve the offer-back regime to provide a better chance for whānau to regain ownership of 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.

⁴ 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'.

⁵ Responsibility for complying with an offer-back rests with the chief executive of Land Information New Zealand (LINZ) for properties held by the Crown and Crown agencies for government works; or the chief executive of the local authority that holds land for a local work.

53. 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 and their successors.
54. Māori have long-held concerns about the return of land held for public work no longer required for its original purpose. Their concerns come from a lack of certainty and transparency in the process, and the loss of opportunity to purchase the land back before it is sold on the open market.

Amendment Proposals for offering back land

55. To address the issues of a lack of certainty and transparency, and improve opportunities for Māori to purchase their former land, we propose the following proposals:

Proposal	Comment	Benefits
Require the Minister for Land Information to explicitly consider the interests of the former Māori land owners before transferring the land for another purpose.	This would apply for transfers where the purpose would significantly change and not where the public work remains the same (e.g. a transfer of a road from NZTA to a local authority).	Improved ability for whānau to reconnect with their whenua.
Remove the restrictive criteria ⁶ from section 41 and clarify that the Māori Land Court process is available for the offer back of all former Māori land.	This is a minor and technical change.	Reduces administrative complexity.
Provide the Māori Land Court with additional powers to resolve disputes on price, terms and conditions.	The Court's jurisdiction would specifically exclude altering any easement, covenant or encumbrance required in respect of the land subject to offer back.	Ensure that the terms, conditions, and price are fair for the former owners. Improved prospect of land being returned to Māori ownership.
Require decisions to exempt land from the offer-back process to be published in the National Pānui of the Māori Land Court	Landowners would still be able to challenge such decisions through judicial review.	Increasing transparency of decisions while presenting only a small increase in administrative time and cost for Māori Land Court or local authorities.

⁶ Section 41 of the PWA and section 134 of TTMWA 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.

Proposal	Comment	Benefits
Former Māori land would be returned as Māori freehold land by default, unless the owners request for it to be general title land.	This is a minor and technical change.	Reduces administrative complexity.

56. There are also non-regulatory options that LINZ will undertake:

56.1 Update the LINZ Standards and Guidelines to cover appropriate use of the Māori Land Court. 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 should improve prospects of land being returned to Māori ownership.

56.2 Introduce clearer guidance to decision makers about the factors that should be considered when determining the price at which former Māori land should be offered back. These factors would include the means and circumstances of the acquisition⁷, and the adequacy of compensation (including whether compensation was paid). More land should be offered back at a fair price following this change.

Consultation

57. The following agencies have been consulted on this Cabinet paper: Te Arawhiti, Department of Internal Affairs, Ministry of Education, Ministry of Health, Department of Corrections, Ministry of Transport, New Zealand Transport Agency, KiwiRail, New Zealand Defence Force, Ministry for the Environment, and Ministry of Business, Innovation and Employment. The Department of Prime Minister and Cabinet, the Treasury, and the State Services Commission have been informed.

58. The Legislation Design and Advisory Committee (LDAC) were also consulted at an early stage of the process.

59. LDAC recommended that the policy options and the legislation create linkages to TTWMA to create clear expectations, use consistent concepts and ensure that the law is accessible and understandable to those looking to understand it.

Departmental technical advisory group

60. Policy options were tested with a technical advisory group consisting of representatives from the New Zealand Transport Agency, the Ministry of Transport, the Ministry of Education, the Department of Internal Affairs, KiwiRail, and Te Arawhiti.

Targeted consultation with affected parties

⁷ Such as whether it was compulsorily acquired and the legislation used for acquisition.

61. Targeted engagement on the recommended proposals was carried out with Māori leadership groups, Māori landowner groups, local councils and network utility operators during November 2019.
62. The stakeholder engagement confirmed that, for Māori and local councils, the offer-back obligations and processes are a high priority for them; acquisitions happen infrequently. Key themes included the need to align these proposals closely with impact on the Māori Land Court and on how to effectively consider the interests of former Māori landowners when transferring land from its original purpose to a significantly different purpose.
63. The response of local councils so far has also been largely supportive of the proposals. Councils have raised that broad communication with councils about how they are required to process Māori land transactions differently, following enactment of these proposals, will be important for councils to understand their new obligation.

Further Considerations

64. During the consultation process, stakeholders have raised issues that are outside the scope of this package of work. While these cannot be addressed now, there is potential for future work as part of a wider reform of the PWA.

Role of the Māori Land Court

65. Stakeholders referred to a review of the PWA in 2000, in which one of the proposals stated that if a Māori landowner objected to the Environment Court, a Māori Land Court judge must preside on the bench. Further consultation with the Ministry of Justice and the Ministry for the Environment would be required to investigate this further.
66. It was raised that the jurisdiction of the Māori Land Court should be clarified so that the Court can vest land in descendants or determine who is entitled to land if descendants cannot be found.
67. The Māori Land Court would need to be consulted further on these issues.

Connections with other Acts

68. Questions have been raised around how steps to prevent the compulsory acquisition of land could be incorporated into the RMA designation process. Considering the scope of RMA reforms currently underway, we believe any further work on this topic would be better suited to a larger review of the PWA.

69. [s 9(2)(f)(iv)]

70. [s 9(2)(f)(iv)]

71. There is opportunity to bring the PWA into better alignment with the TTWMA, through consistency around who land is being offered back to. S40(5) of the PWA refers to 'successors', and the TTWMA refers to 'descendants'. These are not always the same, and it would be preferable for them to be consistent.

Financial Implications

72. There will be financial implications as a result of the proposals in this paper. The implications will fall on acquiring authorities (including the Crown) and may be driven by time and legal costs, and a potential increase in the use of leases or easements.
73. The extent of the financial implications of lesser interests or agreements will be on a case-by-case basis, are expected to vary widely, and will depend on several variables that include:
- 73.1 The type of lesser interest or agreement used (licence to occupy, lease, easement, binding use agreement);
 - 73.2 The number of lesser interests or binding use agreements entered into by an acquiring authority;
 - 73.3 Terms and conditions of a lease;
 - 73.4 Geography – i.e., whether all the lesser interests are clustered together, size of the parcel, and the difference between urban and rural land values, and
 - 73.5 Complexity – a lease will be more complex if, for instance, land required for a road must also incorporate drainage, energy and telecommunication infrastructure along the road corridor.
74. We have had advice that for some transport infrastructure a long-term lease of 99 years will realise a similar value to the freehold value of that land. Provided that the lease terms do not restrict the lessee's ability to use the land, then a 99 year lease term will cost between 90-100% of the market value of the land.

Legislative Implications

75. Legislation is required to give effect to the policy proposals recommended in this Cabinet paper.
76. We will seek agreement to include the Te Ture Whenua Māori Public Works Amendment Bill on the 2020 Legislation Programme with a Category 4: to be referred to a select committee in the year.

Impact Analysis

77. A Regulatory Impact Analysis was required for the proposals in this Cabinet paper. It is attached as Annex One.
78. The RIA was reviewed by a panel from Land Information New Zealand and the Ministry for the Environment which considers the information and analysis summarised in the RIA meets Treasury's quality assurance criteria.

Climate Implications of Policy Assessment

79. The Ministry for the Environment CIPA team have been consulted on this Cabinet paper and confirm the CIPA requirement does not apply.

Human Rights

80. We have consulted the Ministry of Justice on the human rights implications of these options and will provide a Bill of Rights Act 1990 check (BORA vet).

Gender Implications

81. There are no gender implications as a result of the proposals in this paper.

Proactive Release

82. We intend to proactively release this Cabinet paper and relevant policy briefings.

Recommendations

The Minister for Māori Development and the Minister for Land Information recommend that the Committee:

1. **Note** that Cabinet has previously agreed to a package of initiatives designed to promote whanau development through whenua through the Whenua Māori Programme [DEV-18-MIN 0046 refers];
2. **Note** that the package of proposals recommended in this paper are a part of the broader Whenua Māori Programme already underway;
3. **Note** that the objective of this package of proposals is to balance the principles of Te Ture Whenua Māori Act 1993 so that protected Māori land is safeguarded; with the Crown and local authorities having access to the land necessary to complete public works;
4. **Note** that 'acquiring authorities' refers to the Crown, local authorities as defined in the Public Works Act 1981, and network utility operators with requiring authority status under the Resource Management Act 1991;
5. **Agree** that the land to be affected by the proposals in this paper would include those provided in Annex Two:
 - 5.1. Māori freehold land as defined by Te Ture Whenua Māori Act 1993;
 - 5.2. Former Māori freehold land that is owned by a Māori or a group of persons of whom a majority are Māori, and that ceased to be Māori freehold land in accordance with:
 - 5.2.1. An order of the Māori Land Court made on or after 1 July 1993; or
 - 5.2.2. A declaration of a change of status that was issued under Part 1 of the Māori Affairs Amendment Act 1967;

- 5.3. Land held by a post-settlement governance entity that was acquired –
 - 5.3.1. As part of a Treaty settlement; or
 - 5.3.2. Under a right of first refusal or a deferred selection process agreed in a Treaty settlement;
 - 5.4. Land held by or on behalf of an iwi or hapū if the land was transferred from the Crown or a local authority with the intention of returning the land to the holders of mana whenua over that land;
 - 5.5. Land constituted as a Māori reserve by or pursuant to the Māori Reserved Land Act 1955;
 - 5.6. Land set apart as a Māori reservation under Part 17 of Te Ture Whenua Māori Act 1993;
 - 5.7. Te Urewera land, as defined in section 7 of Te Urewera Act 2014.
6. **Agree** that the land acquisition provisions of the Public Works Act 1981 be amended to:
- 6.1. **Agree** to require that the Minister for Land Information seeks the consent of the Minister for Māori Development before signing a Notice of Intention to Take Land that is land held under Te Ture Whenua Māori Act 1993;
 - 6.2. **Agree** to require that the Minister for Land Information seeks the consent of the Minister for Māori Crown Relations: Te Arawhiti before signing a Notice of Intention to Take Land that was returned in a Treaty settlement;
 - 6.3. **Agree** to require that local authorities as defined in the Public Works Act 1981 seek the consent of the Minister for Māori Development or the Minister for Māori Crown Relations, as the case may be, before signing a Notice of Intention to Take Land;
 - 6.4. **Agree** to require that acquiring authorities exhaust the practicality of taking a lesser interest in protected Māori land before progressing to an application to take the fee simple;
 - 6.5. **Agree** to provide that all separately owned dwellings on a property are compensated when acquired under the Public Works Act 1981;
 - 6.6. **Agree** to provide that, for the purposes of compensation under the Public Works Act 1981, Māori freehold land be valued as if it were general land;
 - 6.7. **Agree** to introduce principles aligning with Te Ture Whenua Māori Act that promote the retention of protected Māori land;
7. **Agree** that the offer-back provisions of the Public Works Act 1981 be amended to:

- 7.1. **Agree** to require that the interests of the former Māori land owners be explicitly considered before any transfer of land under section 50 or 52 of the Public Works Act 1981;
- 7.2. **Agree** to repeal subsections 41(b)-(c) that restrict the circumstances in which the chief executive of Land Information New Zealand or the local authority may apply to the Māori Land Court for the district in which the land is situated for an order under section 134 of Te Ture Whenua Māori Act 1993;
- 7.3. **Agree** to provide the Māori Land Court with powers to resolve disputes on price, and the terms and conditions of an offer-back of former Māori land.
- 7.4. **Agree** to require that decisions to exempt former Māori land from an offer-back under section 40(2) of the Public Works Act 1981 be made publicly available;
- 7.5. **Agree** to require that where an offer-back of former Māori land is completed the land is returned as Māori freehold land by default, unless the new owners request for the land to be returned in general title;
8. **Note** that following enactment of the amendments to the Public Works Act 1981, Land Information New Zealand will update its guidance and standards to reflect the proposals;
9. **Note** that when resolving disputes on price, terms and conditions of an offer-back of former Māori land, the Māori Land Court would be excluded from altering any easement, covenant or encumbrance required in respect of the land subject to an offer-back;
10. **Agree** the Minister for Māori Development and the Minister for Land Information make minor and technical policy decisions in the development of the Te Ture Whenua Māori Public Works Amendment Bill, including the drafting of principles;
11. **Note** that a bid to include the Te Ture Whenua Māori Public Works Amendment Bill is being prepared for the 2020 Legislation Programme with a category 4: to be referred to a select committee in the year;
12. **Agree** that the Te Ture Whenua Māori Public Works Amendment Bill should include a provision stating that the Act binds the Crown;
13. **Agree** to proactively release this Cabinet Paper.

Authorised for lodgement

Hon Nanaia Mahuta
Te Minita Whanaketanga Māori

Hon Eugenie Sage
Minister for Land Information

Annex One – Regulatory Impact Assessment

Released under the Official Information Act 1982

Annex Two

- **Historical background to the Public Works Act**
- **Importance of Māori land**
- **Waitangi Tribunal recommendations**
- **Entities with powers under the PWA**

Historical background - the Public Works Act

1. Compulsory acquisition is based upon an approach to land law which was never designed to consider Te Ao Māori. Rather, previous versions of the PWA and other related legislation often actively discriminated against Māori land by making it easier to take than General land.⁸
2. Most Māori land was taken (by agreement, compulsion or confiscation) during New Zealand's early colonial period and under these discriminatory conditions.
3. The PWA 1981 marked a step change in the way that Māori land is treated in relation to public works. The 'equal treatment' of land under the PWA 1981 for acquisition purposes represents an attempt to treat Māori land as if it is General land. However, while the intent was laudable the approach fails to address Te Ao Māori, the special characteristics of Māori land, and the obligations that the Crown has to safeguard Māori land from alienation.
4. Today, there is less than 700 hectares of Māori customary land, and approximately 1.4 million hectares of Māori freehold land (5 per cent of New Zealand's land mass).

Māori land

5. TTWMA recognises that whenua Māori is a taonga tuku iho⁹ and promotes the retention of Māori land. The Act also empowers the Māori Land Court to assist Māori landowners in the use, development and control of Māori land.
6. The taking of whenua Māori, including land returned in Treaty settlements, can be more severe than taking other types of land because:
 - Māori lose something of fundamental importance to their identity and their cultural, social, and economic well-being;
 - Māori cannot replace land (including returned land) that is inextricably linked to their ancestors, history, and identity;
 - Māori land is held and succeeded to communally, its acquisition also impacts on more people both now and in the future than for General land;
 - Māori now hold a significantly smaller proportion of their tribal estate, meaning any loss of the remaining land is felt especially keenly; and

⁸ For example, the Public Works Act 1882 passed after the armed invasion at Parikaha which reflected the "the more uncompromising attitude that would be applied to the taking of Māori land for public works in the coming decades." Cathy Marr, *Public Works Takings of Māori Land, 1840-1981*, Waitangi Tribunal May 1997

⁹ An ancestral treasure handed down from generation to generation.

- Māori view compulsory acquisition as another form of raupatu (confiscation) which is not consistent with the principles of the Treaty of Waitangi.

Waitangi Tribunal recommendations

7. The Waitangi Tribunal has recommended¹⁰ that the PWA be amended to provide that it give effect to the principles of te Tiriti o Waitangi. Further, the Tribunal has recommended that the PWA be amended to provide:
 - the Crown should seek a lesser interest (e.g. a lease), or exchange of land if land is required for a public work, rather than a freehold title of such land;
 - the Crown or local authority should not seek to acquire Māori land without first ensuring that no other suitable land is available as an alternative;
 - if the Crown or a local authority wishes to acquire Māori land for a public work or purpose, it should first give the owners adequate notice and, by full consultation, seek to obtain their informed consent at an agreed price; and
 - if the owners are unwilling to agree, the power of compulsory acquisition for a public work or purpose should be exercised only in exceptional circumstances and as a last resort in the national interest.
8. In its reports, the Waitangi Tribunal has also made several recommendations concerning offer back under the PWA, including that the PWA be amended to require agencies to:
 - 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;
 - 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
 - offer to return surplus land to Māori ownership at the earliest possible opportunity with the least cost and inconvenience to the former Māori owners.

Entities with powers under the Public Works Act 1981

9. The PWA provides for local authorities¹¹ to acquire land in a similar way to the Crown. Local authorities may submit a request to take land directly to the Governor-General, and the land is then vested in the local authority for the purpose for which it was taken.
10. Unlike the Crown, local authorities must have financial responsibility for the works for which the land is being taken. Additionally, local authorities are constrained by debt

¹⁰ Te Kāhui Maunga Report (WAI 1130 2013)

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_75211378/Kahui%20Maunga%20Report%20Vol%203%20W.pdf

¹¹ Local authorities are defined in the PWA as “any regional council, territorial authority, catchment authority or regional water board, harbour board, electric power board, education authority within the meaning of the Education Act 1964, council of any university within the meaning of the Education Act 1989, airport authority, and any other person or body, however designated, having authority, under any Act, to undertake the construction or execution of any public work.”

limits and do not have access to central government funding and financing in the same way that Crown agencies do.¹²

11. The use of special purpose vehicles, and the proposal to provide them with access to the acquisition powers in the PWA, is one way in which local works may still be undertaken if local authorities are nearing the debt limit.
12. The debt limit and financial responsibility requirements will mean that the financial implications of the proposals in this paper will be different than those borne by the Crown. This is discussed further in the financial implications section of this paper.
13. The Resource Management Act provides for some companies to take land:
 - A network utility operator (NUO) is an operator undertaking works such as the distribution of gas, electricity, water and drainage and sewerage lines, and roads and railways or airports.
 - NUOs may apply to the Minister for the Environment for requiring authority status. This status enables them to apply to the Minister for Land Information to acquire or take land as if the project or the work were a government work, as defined in the PWA. Where a Proclamation is issued to compulsorily acquire the land, that land is vested in the NUO instead of the Crown.
 - The offer-back obligations in the PWA also apply to NUOs if the land was acquired under that Act.

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Annex Three: Protected Māori Land

- Māori freehold land as defined by Te Ture Whenua Māori Act 1993
- Former Māori freehold land that is owned by a Māori or a group of persons of whom a majority are Māori, and that ceased to be Māori freehold land in accordance with:
 - An order of the Māori Land Court made on or after 1 July 1993; or
 - A declaration of a change of status that was issued under Part 1 of the Māori Affairs Amendment Act 1967
- Land held by a post-settlement governance entity that was acquired –
 - As part of a Treaty settlement; or
 - Under a right of first refusal or a deferred selection process agreed in a Treaty settlement;
- Land held by or on behalf of an iwi or hapū if the land was transferred from the Crown or a local authority with the intention of returning the land to the holders of mana whenua over that land;
- Land constituted as a Māori reserve by or pursuant to the Māori Reserved Land Act 1955;
- Land set apart as a Māori reservation under Part 17 of Te Ture Whenua Māori Act 1993;
- Te Urewera land, as defined in section 7 of Te Urewera Act 2014.