

## BRF 21-210 Broad approaches to Public Works Act 1982 reform

**Ki / To:** Minister for Land Information

**Rā / Date:** 14 December 2020

### Ngā mahi e hiahiatia ana / Action Sought

Minita/Minister	Hohenga/Action	Rā Mutunga/Deadline
Minister for Land Information	<b>Discuss</b> this briefing with LINZ officials in January 2021.	January 2020

### LINZ Whakapā / LINZ Contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/ First contact
Elisa Eckford	Principal Advisor, Policy	027 237 7695	<input type="checkbox"/>
Jamie Kerr	Group Manager, Policy	021 819 826	<input checked="" type="checkbox"/>

### Te Tari o te Minita ki te Whakaoti / Minister's office to complete

Kounga/ Quality	<input type="checkbox"/> 1 Unsatisfactory	<input type="checkbox"/> 2 Fell short of expectations	<input type="checkbox"/> 3 Met expectations	<input type="checkbox"/> 4 Exceeded expectations	<input type="checkbox"/> 5 Greatly exceeded expectations
Poto kōrero/ Comments					

## Pūtake/Purpose statement

This briefing provides advice on possible approaches to addressing issues that LINZ, other agencies, and stakeholders have identified in relation to the Public Works Act 1981 (PWA), for discussion with you in the new year.

## Pānui whāinga/Key messages

- 1 Since the PWA came into force in 1981, there have been significant changes to its context and New Zealanders' expectations in relation to the acquisition of land for public works.
- 2 Despite this, the PWA has not been substantially updated since the 1980s. Previous attempts to reform the PWA have not resulted in change, and any amendments to the PWA have been minor, although LINZ has undertaken a programme of operational improvements to address agencies' concerns about the way the PWA is working.
- 3 A recent regulatory assessment carried out by LINZ found that, despite the age of the legislation and the changes in context since it was enacted, the PWA is still delivering on its intended outcomes.
- 4 However, there is no recognition in the PWA of the obligations that the Crown has as a Treaty partner, nor of the rights and principles that derive from the Te Tiriti – this is out of step with modern legislation.
- 5 In addition, agencies and stakeholders who have involvement with the PWA have identified a number of problems with the design of the PWA that cannot be addressed solely through operational improvements or changed practices. Recent legislation such as the Urban Development Act 2020 has bypassed the PWA because it is seen as difficult to use in response to new challenges facing the Crown. There is significant interest from agencies and stakeholders for some reform of the PWA.
- 6 The environment in which the PWA operates will continue to change as the Crown addresses future challenges including managed retreat and increased demand for land for urban development and large-scale infrastructure projects. If the PWA is unable to respond adequately to these challenges, it is more likely that legislative changes in other areas - particularly planned RMA reform - will further encroach on PWA powers, and land acquisition and disposal by public agencies will increasingly occur outside the PWA.
- 7 LINZ has identified three possible approaches to improving the PWA:
  - focus on operational improvements, and make legislative changes on an 'as needs' basis
  - amend the PWA to address specific issues with its design and operation within the current scope of the Act
  - fundamentally reform the PWA including reviewing its principles and scope.
- 8 Addressing the issue of the way the PWA operates in relation to Māori land would be a component of all three approaches.
- 9 It is likely that any PWA reform would attract considerable public interest, and extensive consultation would be needed. Many of the issues managed by the PWA are complex and

their consideration is likely to bring up, or reopen, a range of contentious issues. PWA reform would also require significant resource commitment from LINZ and other agencies, and may test agencies' capacity to deliver given other legislative reform priorities.

- 10 LINZ will do further analysis of the implications of each of these approaches to PWA reform and look to discuss this with you early next year.

## Tohutohu/Recommendations

It is recommended that you:

1. **discuss** this briefing with LINZ officials in January 2021.

---

Jamie Kerr

**Group Manager Policy, LINZ**

Rā/date:

---

Hon Damien O'Connor

**Te Minita mō Toitū te Whenua**

Rā/date:

## Te Horopaki/Background

- 1 The PWA sets out how the Crown and local authorities acquire, hold and dispose of private land for public purposes.
- 2 On 1 December, LINZ undertook to provide you with initial advice on options for possible reform of the PWA, including the Whenua Māori reforms [BRF 21-174 refers].

## Tūranga/Current status

- 3 Since the current PWA came into force in 1981, there have been significant changes to its context and New Zealanders' expectations in relation to the acquisition of land for public works. For instance:
  - the types of public works projects now undertaken has changed – for example, from major hydro generation projects to urban development
  - rather than a single Ministry of Works, a range of agencies, including Crown entities, now acquire or hold land for public works
  - affected landowners are more informed about the process and more prepared to challenge acquisitions
  - approaches to the delivery of public works and planning have changed and are changing, including increased interest in multiparty collaborative development involving central and local government, and private parties such as iwi and commercial developers
  - although the acquisition of Māori freehold land is now less frequent than before the 1980s, there are strong sensitivities around the use of PWA powers to acquire Māori land
  - there is increasing demand from Crown agencies to easily use Crown-owned land held for the purpose of one public work for other public work uses (e.g. for housing programme).
- 4 Recent legislation has bypassed or modified the use of acquisition and other PWA powers in some specific areas because it is seen as difficult to use in response to new challenges facing the Crown.<sup>1</sup> LINZ has also had feedback that agencies avoid using the PWA to acquire land wherever possible because of the uncertainty, complexity and costs involved.
- 5 Despite this, the PWA has not been substantially updated since the 1980s. Previous attempts to reform the PWA have not resulted in change<sup>2</sup>, and any amendments to the PWA have been minor.

<sup>1</sup> The Christchurch Earthquake Recovery Act 2011/Greater Christchurch Regeneration Act 2016 provided for a curtailed compulsory acquisition process to enable land to be taken for recovery and regeneration projects. The Urban Development Act 2020 enabled the PWA to be used to acquire land for a wider set of specified uses than would normally be considered to be public works, but prevented Māori land from being compulsorily acquired for urban development purposes.

<sup>2</sup> In 1998, Cabinet gave approval for a comprehensive review of the PWA, involving extensive consultation with stakeholders, Māori, and the public. Between 2003 and 2005, policy papers were submitted to Cabinet for the consideration of policy options to change the PWA and the Land Act 1948 – however, these changes did not proceed.

- 6 There has been a focus more recently on regulatory system and operational improvements in relation to how the Crown acts under the PWA, including:
- a stronger focus on greater community engagement and information provision
  - improving information provided to owners in the earliest stages of negotiations
  - funding more frequent use of mediation in valuation disputes early in the process
  - pre-approving the payment of owners' legal, valuation, and other costs to a certain amount
  - providing access to counselling and support services.

### Does the PWA need to be reformed?

- 7 A recent regulatory assessment carried out by LINZ found that that, despite the age of the legislation and the changes in context since it was enacted, the PWA is still delivering on its intended outcomes. To some extent, this is because operational practices have developed to more closely reflect New Zealanders' expectations and to better support the Crown-Māori relationship.
- 8 However, agencies and stakeholders who have involvement with the PWA have identified a number of potential problems with the design of the PWA that cannot be addressed solely through operational improvements or changed practices. In particular:
- there is no recognition in the PWA of the obligations that the Crown has as a Treaty partner, nor of the rights and principles that derive from the Te Tiriti – this is out of step with modern legislation<sup>3</sup>
  - under the PWA, all land is effectively treated equally, and there is no provision in the PWA for consideration of different cultural or social impacts in decisions on the compulsory acquisition of land – this is particularly an issue in relation to Māori land
  - the PWA is seen by some agencies as slow and complex, and as reducing certainty and increasing costs for investment in large infrastructure projects. This has become more of an issue in the context of post-COVID recovery and a desire for improved efficiency and faster, more streamlined infrastructure development processes. The offer back process is seen as particularly cumbersome.<sup>4</sup> It should be noted, however, that the length and cost of PWA processes provide for natural justice/due process for landowners (for instance giving adequate time of landowners to consider an offer or providing appeal rights for compulsory acquisition)
  - linked to the above, the PWA doesn't reflect modern approaches to urban development, including collaborative arrangements between Crown and other parties. The PWA also does not enable the future-focused strategic acquisition of land - for instance, to enable a managed retreat approach in response to climate change.

<sup>3</sup> The Waitangi Tribunal has recommended that the PWA be amended to give effect to the principles of the Treaty of Waitangi, as well as recommending changes to acquisition and offer back processes for Māori land.

<sup>4</sup> For instance, determining whether to offer back the land may require extensive historical and legal research, valuation and, where Māori land may be involved, court processes to determine who land should be vested in.

- 9 The environment in which the PWA operates will continue to change as the Crown addresses future challenges including managed retreat and increased demand for land for urban development and large-scale infrastructure projects. If the PWA is unable to respond adequately to these challenges, it is more likely that legislative changes in other areas - particularly planned RMA reform - will further encroach on PWA powers, and land acquisition and disposal by public agencies will increasingly occur outside the PWA.

### What are some possible ways forward?

- 10 LINZ has identified three broad approaches in relation to the PWA:

- focus on operational improvements, and make legislative changes on an 'as needs' basis
- amend the PWA to address specific issues with its design and operation within the current scope of the Act
- fundamentally reform the PWA, including reviewing its principles and scope.

- 11 Addressing the issue of the way the PWA operates in relation to Māori land would be a component of all three approaches.

#### *Make changes as needed*

- 12 One approach is to focus primarily on operational improvements, while making legislative changes in some targeted areas, for instance:

- the RMA reforms may necessitate changes to improve alignment between the two systems – particularly in relation to consents/designations and land acquisition processes, non-Crown entities that use the PWA (such as Network Utility Operators) and managed retreat (for example, if government seeks to acquire land for managed retreat, the current PWA settings may not enable this where the land is not being used for a specific purpose)
- the current package of tightly-focused Whenua Māori reforms could be advanced, should Ministers wish to progress with them, with a view to improving the way the Crown-Māori relationship is reflected in the PWA.

- 13 Legislative changes to the PWA beyond these matters could also be considered, based on their individual merits.

- 14 This approach would mean that amendments to the PWA would largely be driven by key Government priorities in other areas and legislative reform in other portfolios. It is likely to require significantly less resource than a standalone reform – although the Whenua Māori reforms could become more significant if further changes to the Bill are desired, or if the land acquisition options are revisited.

- 15 A risk of this approach is that it may mean the legislation will increasingly become out of step with modern practice and more recently-developed legislation, and it is unlikely to address all the issues raised by other agencies. This is particularly relevant in relation to Māori land interests, especially in relation to acquisition of Māori land as more iwi move into a post-settlement space.

### *Amend the PWA*

- 16 Another approach is to undertake some standalone amendments to the PWA within the current scope of the Act. This approach would retain the current framework – such as the broad principles and objectives – but modernise, remove or add provisions within that framework.
- 17 Key areas of focus for such a reform could include:
- incorporating Treaty of Waitangi principles and reflecting the Māori-Crown relationship in the legislation
  - improving the interface with related systems (particularly the resource management, land transport management, and local government systems) to avoid unnecessary duplication and get better alignment
  - recognising and better providing for the range of relationships that landowners have with their land
  - modernising acquisition and disposal processes.
- 18 The scope of this approach is similar to the previous review of the PWA in the early 2000s outlined above, and would require early engagement with Māori and local government, as well as public consultation.
- 19 This approach could address many of the concerns raised by stakeholders about the operation of the PWA, and help to future proof the PWA by helping ensure that it better reflects current expectations and practices. There could be a particular benefit in undertaking PWA reforms alongside the resource management reforms in terms of removing duplication and improving alignment between these two systems – although there is a risk that key stakeholders will not have sufficient capacity to engage in both.
- 20 This approach would also be easier to implement than fundamental reform because it would require less resource, and should result in less disruption to operational processes.
- 21 However, the level of reform would still be a significant undertaking and could potentially extend beyond a single parliamentary term, based on the experience of the previous review.<sup>5</sup> It may also test LINZ's capacity to deliver given the current Crown pastoral land reform work and Overseas Investment Act Bill No.3 implementation.
- 22 This approach may also be seen by iwi and other stakeholders as a missed opportunity to undertake a more fundamental reform of the PWA (see below).

### *Fundamentally reform the PWA*

- 23 This approach would involve examining the system objectives of the PWA at a first-principles level, and potentially overhauling the framework of the legislation in a way that could result in a radically different Act. It would involve a more complete and comprehensive review of the PWA than the previous review, including considering whether the Act is fit for purpose,

<sup>5</sup> The previous review involved approximately five months of public consultation, which included 17 hui and nine public meetings around the country. From the very first approval in 1998, it took five years to undertake the review and develop policy proposals for Cabinet to consider in late 2003.

and whether a new or changed framework would result in a better-aligned and more modern piece of legislation.

24 Key areas of focus for such as approach could include:

- consideration of Māori interests and Treaty of Waitangi obligations in a way that facilitates partnership and protection and recognises the special status of Māori land
- reconsideration of what constitutes a public work
- consideration of public good/community interest in decisions on land acquisition
- streamlining and modernising processes and making better provision for collaborative urban development and strategic land acquisition, enabling local and central government to partner with infrastructure providers and iwi/Māori organisations to deliver works
- better aligning the PWA with other legislative frameworks such as the (reformed) RMA and UDA to future proof the PWA in the context of changing needs, such as managed retreat.

25 Undertaking a fundamental review provides a chance to think about how the PWA could better support the government to address some of the key challenges it faces – particularly in relation to future urban development and managed retreat.

26 A fundamental review would also enable investigation of how Māori perspectives and interests can be better incorporated and integrated into a PWA. This is likely to be the approach preferred by iwi.<sup>6</sup>

27 A fundamental overhaul of the PWA would require working collaboratively from the outset with Māori and local government and other stakeholder groups to develop a framework that considers the wide range of perspectives. Large-scale public consultation would also be required. Reform on this scale would require significant people resource, time, and cost.

### Whakatūpato/Risks

28 As noted above, it is likely that any PWA reform would attract considerable public interest, and extensive consultation would be needed. Many of the issues managed by the PWA are complex and their consideration is likely to bring up, or reopen, a range of contentious points.

29 PWA reform would also require significant resource commitment from LINZ and other agencies, and may test agencies' capacity to deliver given other legislative reform priorities.

### Mātanga kōrero/Consultation

30 LINZ has had initial discussions with other government agencies with a role or interest in the PWA, including holding a workshop to discuss options for reform. Their views have informed this briefing.

<sup>6</sup> During the previous review of the PWA, the Māori Technical Consultative Group (Te Roopu Arataki) noted that not undertaking a first principle review was a missed opportunity to develop a PWA that incorporates a Māori worldview.



- 31 LINZ has not yet engaged with local authorities and Māori. If you wish to pursue reform of the PWA, LINZ recommends early engagement with Māori and local government to better understand their perspectives and experience of the PWA.

### **Ngā Tāwhaitanga/Next steps**

- 32 LINZ will do further analysis of the implications of each of these approaches to PWA reform and look to discuss this with you early next year.

Released under the Official Information Act 1982