

## BRF 21-356 Further Information on Process review of PWA

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

**Rā / Date:** 4 May 2021

### Ngā mahi e hiahiatia ana / Action Sought

Minita/Minister	Hohenga/Action	Rā Mutunga/Deadline
Minister for Land Information	<b>āmine/agree</b> to forward the cover letter and summary A3 to the Minister for Māori Development, Minister of Transport, Minister of Local Government, Minister of Housing, Minister for Māori Crown Relations: Te Arawhiti	10 May 2021
Minister for Land Information	<b>Direct</b> LINZ officials to develop a Cabinet paper seeking approval to start the exploratory phase of the Process review	24 May 2021

### LINZ Whakapā / LINZ Contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/ First contact
Jamie Kerr	General Manager, Policy	021 819 826	<input checked="" type="checkbox"/>
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### 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
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Poto kōrero/  
Comments

## Pūtake/Purpose statement

The paper provides further information on a potential Process review of the Public Works Act 1981 (PWA) and notes the opportunities and risks of a review. This briefing is one of two papers on the PWA reform package. On 4 May, LINZ provided you with a briefing seeking approval of minor and technical changes to the Whenua Maori Bill [BRF 21-450 refers].

## Pānui whāinga/Key messages

- 1 On 14 March, you agreed that the scope of a PWA review should be limited to a Process review under the current premise of the Act [BRF 21-304 refers]. At a meeting on 16 March, you asked officials to provide further details on the opportunities and risks a Process review presents to support a meeting with Ministerial colleagues.
- 2 The scope of a Process review presents a way to make improvements to substantially update and improve the PWA for the first time in 40 years through operational and/or legislative amendments. A Process review would aim to modernise the PWA process by:
  - making process improvements to improve efficiency, clarity, and fairness; including
  - embedding better recognition and protection of Māori interests in land.
- 3 Preliminary consultation with government departments has already identified opportunities to improve and modernise the PWA. For example:
  - There can be a significant need for more than one government agency and/or local authority to undertake a public work (e.g. Waka Kotahi and Kāinga Ora), however collaboration is only allowed in certain circumstances and is a time-consuming process.
  - For decades, Waitangi Tribunal reports have been recommending changes to the PWA to provide better protections for Māori land and current Waitangi Tribunal inquiries continue to raise PWA issues.
  - Some agencies have indicated a concern with duplication across the land system – particularly the resource management system in part of the objections process.
- 4 Key risks of a Process review include:
  - external push towards a fundamental review of the PWA and managing the expectations of agencies, Māori, and the public
  - if a Process review is not able to better reconcile or balance the taking of land for public works with Treaty of Waitangi principles and broader Māori interests, fundamental tensions will continue to harm Māori-Crown relations and be the subject of Waitangi Tribunal criticism.
- 5 To support your discussions with colleagues, this briefing and the summary in **Annex 2** provide you with further information on opportunities, issues, risks, and the relationship with the Whenua Maori Bill. Following your consultation, LINZ will then develop a Cabinet paper, stakeholder engagement plan, and Māori engagement plan in consultation with Te Arawhiti.

- 6 LINZ recommends you explore the merits of a Process review with your colleagues and emphasise that the next steps of scope refinement and issues identification would be exploratory. This will create an "off-ramp" should the conversations or further information indicate the need for a different approach.

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## Tohutohu/Recommendations

### It is recommended that you:

- 1 āmine/agree to forward the Annex 1 cover letter and Annex 2 Summary A3 to the Minister for Māori Development, Minister of Transport, Minister of Local Government, Minister of Housing, Minister for Māori Crown Relations: Te Arawhiti *Agree / disagree*
  
- 2 Direct LINZ officials to develop a Cabinet paper seeking approval to start the exploratory phase of the Process review *Agree / disagree*



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Jamie Kerr  
**Group Manager Policy, LINZ**  
Rā/date:

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Hon Damien O'Connor  
**Minister for Land Information**  
Rā/date:

## Tāpiritanga/Attachments

- 1 Draft cover letter for Ministers
- 2 Public Works Act Review Package
- 3 Public Works Act 1981 process

## Te Horopaki/Background

- 4 On 14 March, you agreed that the scope of a potential PWA review should be limited to a Process review under the current premise of the Act through operational and/or legislative amendments [BRF 21-304 refers]. A Process review presents a way to make tangible improvements to update and improve the PWA and its application. There have been minor amendments in the past, including changes to process and compensation in 2017, but a Process review could result in the most substantial process amendments in the last 40 years.
- 5 At a meeting on 16 March, you asked officials to provide further details on the opportunities and risks a Process review presents to support a meeting with Ministerial colleagues.

## Objectives of a PWA review

- 6 At this stage, LINZ considers that the objectives of the review could be as follows:
  - Efficiency: Improve the efficiency of the PWA process to reflect modern practice.
  - Clarity: Provide greater clarity for all involved in the PWA process.
  - Fairness: Achieve better alignment with the PWA premise that owners are left no better or worse off after acquisition.
  - Recognise and respect the Crown's responsibility to give effect to the principles of the Treaty.
- 7 These objectives would all be limited to the context of the PWA's fundamental premise: the ability for the Crown to use land is paramount, the process is fair, there is an independent check (objection rights) and offer back of land when no longer required.
- 8 These objectives will be refined through the scope refinement stage.

## Opportunities to improve the PWA's efficiency, clarity and fairness

- 9 The PWA is a mechanism for the Crown or a local authority to acquire and dispose of land for a public work. It reflects the Crown's power of eminent domain, that enables land to be acquired if it is in the public interest and compensation is paid. A 'public work' is defined as any Government work or local work for any public purpose that the Crown or any local authority is authorised to undertake. The PWA does not require decision-makers to look at wider public interest concerns; other government processes such as the RMA consider broader factors such as the environmental impact.
- 10 The PWA process enables public works to proceed, while also embedding protections for affected owners' rights when their interest in land is acquired or disposed. See **Annex 3** for details of the PWA process.
- 11 It will be critical to ensure the PWA process is appropriately aligned with various land-related reforms going on across government, including the proposed Strategic Planning Act and the Climate Change Adaptation Act. If the review does not proceed, there is a risk the PWA will fall out of step with other legislation and policy and create inefficiencies in the

whole land system. Recent legislation such as the Urban Development Act 2020 and the Canterbury Earthquake Recovery Act 2011 were created to provide the necessary different pathways to acquire land, adapting the PWA process in response to new challenges facing the Crown. There is significant interest from agencies and stakeholders for some reform of the PWA.

- 12 The PWA process can be unclear and inefficient, slow down the delivery of infrastructure, and create uncertainty for affected owners. LINZ anticipates the key areas where we can modernise the PWA process are around making process changes to improve efficiency, clarity, and fairness through legislative and operational changes. This will cut across all stages of the PWA process: negotiation, acquisition, objections, compensation, and disposals. Examples of opportunities to explore are outlined below.

*Examples of ways to improve efficiency include:*

- 13 A significant area of growth and urgent need is recognising that more than one government agency and/or local authority may undertake a public work (e.g. Waka Kotahi and Kāinga Ora, or Waka Kotahi plus a council). The PWA was created when a single Ministry of Works undertook most public works, and while collaboration between the Crown and local authorities is enabled in certain situations, that process is time-consuming and is only suitable in very significant situations.
- 14 When Crown-owned land is considered surplus by an agency that was using it to deliver a public work, the first step in the disposal process is to consider whether it is required for another public work. This repurposing allows another agency to use the land to deliver a public work. There are a number of inefficiencies in the process. For example:
  - LINZ is often not made aware of potential transfers between Crown agencies until an agreement has been reached or there is a problem. Offer back obligations may crystallise before agreement is reached, as the clock starts ticking as soon as the land is no longer required. This means LINZ may need to offer land back before agencies can figure out an agreement or otherwise risk being taken to court by former owners.
  - Multiple agencies wanting the same piece of Crown-owned land. There is generally a first-in, first-served process to evaluate or prioritise competing needs.

*Examples of ways to improve clarity of the process include:*

- 15 The Crown and local government can exercise different functions and powers, which produces inconsistencies. For example:
  - Crown agencies are required to use accredited suppliers to acquire land, while Local Government are able to complete the work in-house and only need to request that LINZ/Minister for Land Information make a decision for compulsory acquisition (and action acquisition via the Governor-General).
  - While LINZ makes decisions on Crown actions<sup>1</sup> and sets PWA standards and guidelines, these standards and guidelines do not apply to local authorities.

<sup>1</sup> Under delegation from the Minister for Land Information and the chief executive of LINZ.

16 PWA operational processes have been impacted by a body of case law built up by past Court judgments and Cabinet directions over the past 40 years. This results in inefficiencies with newcomers to the PWA getting up to speed and different information between parties. While LINZ provides guidance to aid clarity, the review could look to embed established practises into legislation or regulations for certainty and transparency. For example:

- Under a Cabinet directive [STA (95) M 11/3], the Crown can provide for land that was gifted to be returned the same way (ie by not requiring the former owner to pay for the land). However, this is not in the legislation.
- In housing, the Ministry of Housing and Urban Development and Kāinga Ora each have different Cabinet directions setting out their discrete roles in PWA processes. The Review would be a timely opportunity improve clarity, provide consistency, and embed a range of Cabinet policies made via Cabinet Direction into legislation.

*Examples of ways to improve fairness include:*

- 16 A premise of the Act is that affected owners are left no better or worse off following PWA action. However, this could be improved and modernised. For example:
- Where the public work being undertaken increases the value of land a landowner retains, this increase in value may be deducted from the total amount of compensation that would otherwise be paid to the landowner. This is known as "betterment". Betterment intends to ensure that affected owners be made no better or worse off following an acquisition. Affected owners can see this as inequitable relative to others who have received full compensation and has recently received media attention.

### **Opportunities to improve protection of Māori interests in PWA processes**

- 17 The Waitangi Tribunal has concluded that, historically, Māori have been subject to "sustained and serious discrimination" from Crown land takings including being offered fewer protections, notification, and consultation. For decades, Waitangi Tribunal reports, such as the Wairarapa ki Tararua report and more recently, 'Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims', have been recommending changes to the PWA to provide better protections for Māori land, and current Waitangi Tribunal inquiries continue to raise PWA issues.
- 18 The Process review provides the chance to analyse recommendations in scope. LINZ will need to engage Māori about which recommendations the review should focus on. Some examples to be considered from the Wairarapa ki Tararua report include:
- Consult with former Māori owners or their successors before deciding not to offer surplus land back to such owners, and before putting any land taken for a public work to any other purpose.
  - The requirement to offer the land back to the wider hapū/tribal group if the former landowners refuse an offerback proposal.

- 19 Additionally, the review presents an opportunity to address technical and discrete matters raised by iwi policy technicians through consultation on the Whenua Māori Bill. Options that could be considered include:
- Whether to expand the PWA definition of successor when land is being offered back during disposal to more than one generation from the original owner.
  - Providing more structure, guidance and transparency around a chief executive's consideration of whether it is "impracticable, unreasonable, or unfair" to offer land back to a former owner or their successor or considering whether that formulation remains an appropriate test.

*Identified issues around acquisition of Māori land*

- 20 On 14 March, you agreed to incorporate the deferred land acquisition provisions from the Whenua Māori workstream into a Process review. Acquisition of Māori land has been, and will continue to be, a key concern for many Māori groups.
- 21 Under the status quo, all Māori freehold land can be compulsorily acquired (with exception of some land deemed inalienable under other legislation, e.g., Māori reservations under Part 17 of Te Ture Whenua Maori Act 1993).
- 22 The use of the PWA to compulsorily acquire Māori freehold land has been infrequent in recent history (it is usually acquired by agreement), in part due to the scarcity of Māori land and many acquiring authorities having an in principle policy not to take Māori land. However, some acquisitions by agreement may not have occurred if the compulsory acquisition power was not available as a last resort.
- 23 The Review should also consider the future state, where demands for land and infrastructure could intensify. This could place pressure on the in principle practices of acquiring agencies to avoid Māori land where possible, especially as needs for housing and related infrastructure increase and more land is returned to iwi through the Settlements process.
- 24 Any options taken forward will need to be designed to balance the principles of Te Ture Whenua Maori Act 1993 so that protected Māori land is safeguarded, with ensuring essential infrastructure and works can be delivered. There are a range of ways to approach this, and examples of options include:
- a) Exhaust options for acquiring a lesser interest – the practicality of taking a lesser interest (eg leasing land) would have to be thoroughly explored and discounted before a fee simple interest is taken. This could be an option for all types of acquisitions, not only Māori land, but may not be practical for some types of work, for example a road.
  - b) Certain circumstances only – ensure Māori land can only be taken under certain circumstances (eg for linear public works like roads, railways, or those of national interest).
  - c) No compulsory acquisition – meaning protected Māori land could not be compulsorily acquired. Cabinet will need to consider whether this option should be in scope.



## There are risks with any review

- 25 Until public consultation, LINZ will have limited information on all issues in the process, particularly at a local government level. The examples outlined are based on LINZ current understanding on key opportunities for improvements. This is based off the last major review in 2000, experience as stewards of the Act, engagement and workshops with agencies, work on the Whenua Māori PWA project, and the PWA fast-track project, undertaken in response to the COVID-19 lockdown in 2020 (which did not proceed).
- 26 Our current limited understanding of opportunities needs to be balanced against the risks below, as outlined previously [BRF-304]. To help mitigate this situation, LINZ recommends you explore the merits of a Process review with your colleagues and emphasise that scope refinement and issues identification are exploratory. This will create an “off-ramp” should the conversations or further information indicate the need for a different approach.
- 27 Stakeholder expectations - Maintaining stakeholder expectations on what outcomes can be achieved within a Process review may be difficult, and a pull towards a fundamental policy review is expected from a variety of groups. For example, affected owners would likely look to fundamentally tip the balance of the Act towards protection, which would be a fundamental reform.
- 28 Conflicting opinions - Many issues in the PWA will be contentious, as there are opposing perspectives due to the nature of the process. Finding a package that balances the interests of each group will be a challenge. Limiting the scope to a Process review helps to mitigate some of this risk, as contentious issues such as removing the right to object are out of scope.
- 29 Treaty of Waitangi/Māori interest - A Process review will not fully resolve the fundamental tension between the authority to compulsorily acquire land and the preamble of the Te Ture Whenua Māori Act 1993, which emphasises the retention of Māori land and the principles of the Treaty of Waitangi. A fundamental review of the PWA would be required to address this.

## Mātanga kōrero/Consultation

- 30 Waka Kotahi, Te Arawhiti, Ministry of Transport, Te Puni Kōkiri, Ministry of Housing and Urban Development have been consulted on this paper. Department for Internal Affairs has been informed of this paper.
- 31 There is significant interest from agencies for a review of the PWA process, although opinions on what amendments should look like vary depending on their role in the system as either an acquiring authority or representing an affected owner.

## Ngā Tāwhaitanga/Next Steps and angawā/timeframes

- 32 You indicated your preference to speak to your colleagues. LINZ recommends speaking to the Transport, Housing, Local Government, Māori Crown Relations, and Māori Development Ministers, who are likely to have views on PWA reform and what a reform process should include. The Minister for the Environment may also have a view on how PWA reform might best align with ongoing Resource Management Act reform.
- 33 Once you have spoken to your colleagues, LINZ will proceed to develop a Cabinet paper seeking approval for the review. In the meantime, LINZ will further develop a stakeholder

engagement plan and a specific Māori engagement plan. This plan will reflect your agreement to undertake a three-stage process of refinement of scope, understanding of issues and development of options [BRF 21-304]. The first two stages are exploratory, which provides an opportunity to take an “off-ramp” if based on the evidence it would be better to progress a review at a later stage.

- 34 LINZ recommends that you speak to your colleagues before you meet with iwi policy technicians to discuss a Process review as well as the Whenua Māori Bill. LINZ can provide you with further information to support your discussions with iwi policy technicians.

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## Annex 1: Draft cover letter to Ministers

Dear Hon [Minister's name],

Public Works are critical for improving the living standards for New Zealanders. However, the Public Works Act 1981 (PWA) governing the process to acquire land has not been substantially updated in 40 years. Since the PWA came into force, there have been significant changes to its context and New Zealanders' expectations in relation to the acquisition of land for public works. For instance:

- There is a significant need for more than one government agency and/or local authority to undertake a public work (e.g. Waka Kotahi and Kāinga Ora). However, collaboration is only allowed in certain circumstances and is a time-consuming process.
- For decades, Waitangi Tribunal reports have been recommending changes to the PWA to provide better protections for Māori land, and current Waitangi Tribunal inquiries continue to raise PWA issues.
- The process to transfer land between agencies is unnecessarily complicated and inefficient.

I am proposing a review of the PWA which will look to improve its clarity, fairness, and efficiency through operational and/or legislative amendments. This approach would retain the current premise of the PWA, such as the Crown's ability to take land and the affected owners' ability to object, but refine the processes that support these objectives. A review provides an opportunity to align the PWA process with the range of reforms underway, to mitigate duplication and help ensure the land system is operating efficiently.

Should the PWA review receive Cabinet approval, the next steps will be an exploratory stage to gather further information on the issues and initial engagement with stakeholders.

I would appreciate the opportunity to meet with you to discuss the proposal. To support a discussion, attached is a summary of this package and how it builds on the proposed Whenua Māori PWA Bill. The Whenua Māori Bill addresses PWA compensation and disposal issues and introduces principles to consider Māori interests before the acquisition of Māori land.

Sincerely

Hon Damien O'Connor

**Minister for Land Information**

## Annex 2: Public Works Act Review Package

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## Annex 3: Public Works Act 1981 process

### PWA Acquisition Process

