

BRF 22-133 Public Works Act review next steps

Ki / To: Minister for Land Information

Rā / Date: 21 October 2021

Ngā mahi e hiahiatia ana / Action Sought

Minita/Minister	Hohenga/Action	Rā Mutunga/Deadline
Minister for Land Information	āmine/agree to discontinue the Process Review	10 November 2021

Toitū Te Whenua LINZ Whakapā / Contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/ First contact
Anna Wilson-Farrell	Head of Strategy, Policy and Design	04 460 0292	<input checked="" type="checkbox"/>
Simon Skews-Poole	Manager, Crown Land and Information Policy	04 460 0166	<input type="checkbox"/>
Rosie Parry	Senior Policy Advisor	04 471 6509	<input 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
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 Poto kōrero/
 Comments

Pūtake/Purpose statement

To seek agreement on the next steps for the review of the Public Works Act 1981.

Pānui whāinga/Key messages

- 1 In May 2021, you agreed to undertake a Process Review of the Public Works Act 1981, at the same time as the Public Works Act (Whenua Māori) Amendment Bill (the Whenua Māori Bill) progresses through the house [BRF 21-356 refers].
- 2 Since this time, Toitū Te Whenua LINZ has been scoping and engaging with relevant government departments on the Process Review. The main feedback from agency engagement is that:
 - a although the PWA has now been in place for 40 years, it still empowers the Crown to acquire land for public works while ensuring the process provides for landowner rights;
 - b there is significant work underway in the “land system” across government, such as the Resource Management Act (RMA) reform and work on coastal areas that may become inhabitable due to climate change (‘managed retreat’). The impact of these programmes on the PWA is still uncertain, and will remain uncertain until the form of future RMA legislation is decided (due late 2022);
 - c there is limited capacity for central agencies and local government to effectively engage in a Process Review of the PWA, given the range of land system and local government reforms underway; and
 - d some of the issues agencies have raised on the PWA could be mitigated by operational improvements, instead of through legislation. For example, operational guidance around how land taken for public works should be transferred between Crown agencies could be updated.
- 3 Given the intensity of land system reforms over the next year, LINZ recommends the Process Review be discontinued. LINZ recommends instead focussing on developing and implementing improvements to its operational processes. This will lead to real and relatively fast improvements, and any future legislative PWA review will have a much better picture of the future resource management system and how PWA fits into that. While there are some risks in delaying legislative change, such as the PWA legislation being increasingly out of step with modern practise, the PWA will continue to allow the Crown to acquire land for public works.
- 4 If you would prefer, LINZ will continue to progress the Process Review and officials will work with your office to set up a joint ministers meeting to agree the scope and approach, as agreed at our weekly update on 6 September 2021.
- 5 Following your 26 August meeting with the Minister for Māori Development and the Minister for Māori Crown Relations: Te Arawhiti, LINZ is working with the Parliamentary Counsel Office to update the Whenua Māori Bill. LINZ will provide the draft Bill and further advice on next steps for the Whenua Māori Bill in November 2021. Should you agree to the

Process Review being discontinued, LINZ can provide messages which outline the rationale to your colleagues at this time.

Tohutohu/Recommendations

It is recommended that you:

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|----|--|-------------------------|
| 1. | manatu/note in May 2021 you agreed to a Process Review, which would result in operational and legislative change | <i>Noted</i> |
| 2. | manatu/note Toitū Te Whenua LINZ undertook further engagement which has led us to reconsider whether a Process Review is appropriate at this time | <i>Noted</i> |
| 3. | āmine/agree to discontinue the Process Review | <i>Agree / disagree</i> |
| 4. | manatu/note if the Process Review is discontinued, Toitū Te Whenua LINZ will develop and implement an operational improvements programme for the Public Works Act 1981 | <i>Noted</i> |
| 5. | manatu/note Toitū Te Whenua LINZ will report back to you on progress with the operational improvements programme | <i>Noted</i> |
| 6. | manatu/note Toitū Te Whenua will provide you with an updated version of the Whenua Māori Bill with advice on next steps in November 2021 | <i>Noted</i> |

Simon Skews-Poole

Policy manager, Toitū Te Whenua LINZ

Rā/date:

Hon Damien O'Connor

Te Minita mō Toitū te Whenua

Rā/date:

Te Horopaki/Background

- 1 Since the PWA came into force in 1982, there have been significant changes to its context and New Zealanders' expectations in relation to the acquisition of land for public works. Despite this, the PWA has not been substantially updated since the 1980s.
- 2 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.
- 3 Throughout the first half of 2021, LINZ provided you with advice on a range of options to review of the PWA. The review was initiated as it is one of LINZ older pieces of legislation.
- 4 In May 2021 [BRF 21-356], you agreed to progress with a Process Review resulting in legislative and operational amendments, which 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.
- 5 On 26 August, you met with the Minister for Māori Development and the Minister for Māori Crown Relations: Te Arawhiti and agreed to progress the Whenua Māori Bill. The Parliamentary Counsel Office have been provided with drafting instructions. LINZ will report back to you in November on next steps, including opportunities for further engagement with iwi policy technicians.

Tūranga/Current status

- 6 Since May 2021, LINZ has been further engaging with government departments to progress the Process Review.
- 7 There are a range of active reforms and change across government that will affect the land system, and potentially the PWA itself.
 - The Strategic Planning Act proposes the introduction of Competitive Urban Land Markets (CULM). Under CULM, agencies will be able to identify areas for future urban development/growth and acquire land for the purpose of corridor protection. There may be impact on the future use of PWA, as the acquisition of land for corridor protection does not currently fit under the premise of the Act.
 - Mechanisms for land acquisition and compensation will be required to facilitate managed retreat. The application of the PWA's land acquisition and compensation powers is not suited for the purpose of managed retreat and currently falls outside the scope of the PWA.
- 8 Our external stakeholders such as local government, Māori landowners, and key cross-agency contacts are heavily involved in these reforms, as well as wider work such as freshwater and future of local government.

Tūkupu/Comment

- 9 With the intensity of active reform and change, there are benefits to holding off on a legislative review of the PWA. Any future PWA review will be able to work from a much

better picture of the future land management system and assess how PWA processes should fit into it. It would also enable stakeholders to engage with full knowledge of the impacts.

- 10 A programme of operational improvements will lead to real and relatively fast improvements, as there will be no need to go through legislative process. It will also further build LINZ knowledge of areas of the PWA that may require legislative changes in the future.
- 11 LINZ still recommends that the Whenua Māori Bill progresses, to lock in amendments to improve fairness for Māori landowners and introduce principles to support the retention of protected Māori land.
- 12 The need to undertake operational improvements, largely through LINZ updating standards and guidelines, has been recognised following the LINZ regulatory assessment on the Crown management system in 2019, which outlined:
 - a *LINZ issues standards and guidance, but some of these standards are old and are not very accessible for modern audiences in the current operating environment. Some think there are gaps in the suite of standards LINZ produces and find it tricky to understand what any given standard's intended outcome is.*
- 13 Since this time, some incremental operational improvements have been undertaken to address specific agencies' concerns. However, a comprehensive programme looking across the suite of standards has not been developed, as scoping of the Process Review was underway.
- 14 Significant gains could be made through operational improvements. Examples of issues LINZ could address through operational improvements include:
 - a 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 allows another agency to use the land to deliver a public work. There are several inefficiencies in the process that operational improvements / standards and guidelines could help mitigate by setting clear expectations, for example:
 - LINZ is often not made aware of potential transfers between Crown agencies until there is a problem which delays reaching an agreement. 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 be placed in a situation where it has to offer land back to avoid litigation risk from former owners (even though it is still required for a public work) because agencies were unable to reach an agreement.
 - Multiple agencies wanting the same piece of Crown-owned land. There is generally a first-in, first-served process which fails to evaluate or prioritise competing needs.
 - b The legislation provides for the LINZ chief executive's consideration of whether it is "impracticable, unreasonable, or unfair" to offer land back to a former owner or their successor. To aid in transparency and consistency, there is an opportunity to provide more transparency around the chief executive's consideration.

- c In 1995 Cabinet agreed to a principles-based restructure of LINZ's property area. Cabinet agreed that LINZ's non-core functions associated with property acquisition, management, disposal, responsibility over disposal of properties inherited by LINZ and future acquisitions on behalf of the Crown, be outsourced to a new body to be set up, known as accredited agents (CGA (97) M 12/2 refers). There are mixed views on the appropriateness of using accredited suppliers, given the significance of their role in the system. Given the changing context of the past 25 years, it is timely for a review of the accredited supplier framework and their role should be undertaken.
- 15 LINZ develops and leads the update of standards and guidelines for how Crown agencies and their suppliers acquire and dispose of land under the PWA. These are non-statutory documents that set out LINZ's expectations for how this work should be carried out.
- 16 The standards have been developed in consultation with affected government departments, accredited suppliers, and public consultation. Overall, the process for updating a standard or guideline takes approximately 12 months.
- 17 LINZ aims to start and complete a review of the Disposal Standard, by the latter half of 2022. Reviewing the Disposal Standard will assist with the clarity and modernisation of PWA processes – it was last reviewed in 2009, and since this time interim advisory notes have been issued following judgements in anticipation of a full review.
- 18 LINZ would also develop a plan for a comprehensive programme of work, prioritising operational improvements that:
- a have a significant impact on the efficiency, clarity, and fairness of the regime, in line with Process Review aims [BRF-356];
 - b update operational practice that has fallen out of step with modern practice; and
 - c can be undertaken and are beneficial independent to the wider reforms underway across government.
- 19 This would be coupled with a communication and engagement plan on the improvements, potentially including training and education.

Whakatūpato/Risks

- 20 As operational improvements are limited by the legislation, Crown agencies may criticise the operational approach for not going far enough. For example, the PWA legislation sets a high bar for multi-agency collaborative projects. The risk is partially mitigated by continuing with the Whenua Māori Bill and revisiting a legislative review in a year.
- 21 Changes to the PWA legislation will continue to be ad hoc, driven by key Government priorities in other areas and legislative reform in other portfolios without looking at the wider PWA system and impacts. LINZ will continue to engage in these reforms to bring a wider PWA perspective.
- 22 Recent legislation has bypassed or modified the use of acquisition and other PWA powers in some specific areas because they are seen as difficult to use in response to new challenges

facing the Crown¹. Given challenges such as managed retreat, there is a strong risk this may happen again.

- 23 The legislation will increasingly become out of step with modern practice and more recently-developed legislation. 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. Modernising PWA operational process will help mitigate this.
- 24 Standards and guidelines are not applicable to local authorities, therefore there is a risk the impact will be limited. However, this risk is largely mitigated by the widespread use of the standards and guidelines by local authorities to inform their practise, and undertake limited compulsory acquisition.
- 25 As previously outlined, engagement with Māori on the Whenua Māori Bill has not been comprehensive and there is a risk of criticism. Additionally, there is a risk that the Bill is perceived as not addressing issues of significance to Māori. A key mitigation for this was the Process Review providing an opportunity to engage in the PWA and explore issues of significance, such as compulsory acquisition of Māori land. Should the Process Review not proceed, this risk is heightened [BRF 21-450].

Mātanga kōrero/Consultation

- 26 LINZ has been engaging on the Process Review with other government departments but has not consulted with them on limiting the project to operational improvements. LINZ anticipates support from agencies heavily involved in the land management reform, who will understand the rationale for the change of approach.
- 27 There is likely to be disappointment should a Process Review not proceed from those that frequently use the PWA, for example Waka Kotahi NZ Transport Agency who believe not progressing the process review in parallel to the RMA reform is a missed opportunity. To help mitigate the impact, LINZ will work closely with key agencies on the operational improvements programme.

Ngā Tāwhaitanga/Next Steps

- 28 Officials will be available to talk through any questions at the weekly update meeting on 27 October.
- 29 Should your preference be for LINZ to proceed with an operational approach, LINZ will develop a plan for a comprehensive programme, start work on updating the disposal standard and report back to you on progress. LINZ can provide you with messaging on the discontinuation of the Process Review for discussions with your colleagues.

¹ 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.

- 30 Should your preference be to continue with a Process Review, LINZ officials will work with your office to set up a joint ministers' meeting to agree the scope and approach of the review before seeking Cabinet approval.
- 31 LINZ will provide you with a briefing with the updated drafting and next steps for the Whenua Māori Bill in November 2021.

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