

BRF 24-357 Public Works Act 1981 – Approaches to a review

Ki / To: Hon Chris Penk, Minister for Land Information

Rā / Date: 27 March 2024

Ngā mahi matua kia mahia/key actions required

Minita/Minister	Key action required: Agree/note/forward	Deadline when this action should be completed by
Minister for Land Information	<p>Āmine/Agree to meet with officials to discuss the range of high-level approaches to a review</p> <p>Me tuku-whakamua/Forward a copy of this briefing to Hon Simeon Brown and Hon Chris Bishop.</p>	12 April 2024

Toitū Te Whenua Land Information New Zealand Whakapā/contacts

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Ngā kōrero a te Minita/Minister's comments

Pūtake/Purpose

This briefing outlines high-level approaches to a review of the Public Works Act 1981.

Pānui whāinga/Key messages

- 1 On 27 February 2024, Toitū Te Whenua Land Information New Zealand (LINZ) provided three options to you and your Ministerial colleagues, Hon Simeon Brown and Hon Chris Bishop, for improving the efficiency of land acquisition processes, alongside the Fast Track Approvals (FTA) Bill [BRF 24-328 refers].
- 2 You chose to use the FTA Bill to streamline how the Environment Court considers objections to compulsory acquisitions of land for FTA projects. LINZ will continue to engage you on this Bill and is supporting its progress through select committee.
- 3 You also asked for advice on reviewing the Public Works Act 1981 (PWA). Following discussions with other agencies, including public works delivery agencies, LINZ has identified three high-level review approaches for your consideration:
 - i A targeted review that would modernise specific provisions in the PWA to improve its efficiency and align the PWA with the current context and practise for land acquisition, disposal and compensation.
 - ii A targeted review as above, extended to consider certain more fundamental shifts to address specific Government priority areas.
 - iii A fundamental review that would involve examining the system objectives of the PWA at a first-principles level, and potentially overhauling the framework of the legislation to future-proof the legislation for future challenges.
- 4 Overall, the PWA delivers for public works, while not significantly affecting private landowners' confidence in property rights. However, processes under the PWA can be lengthy, and issues have emerged due to a lack of reform in the context of an environment that has changed significantly.
- 5 The approach you choose to advance will depend on your aims: timeliness, a desire to advance Government priority areas, or to enable significant public engagement and scope for change. If you are seeking a review that shifts the PWA to align with specific Government priorities in a timely way, the targeted review with certain more fundamental shifts would best achieve this.
- 6 Any review must balance the fundamental tension between the need to provide for public works and protect the property rights of landowners. LINZ expects there will be significant public interest, with conflicting views between landowners, mana whenua, and delivery agencies about how to achieve this balance.
- 7 LINZ expects there will be significant interest in ensuring that the PWA protects Māori land interests. A fundamental review, or inclusion of Māori land provisions as a priority area in a targeted-plus review, allow the most scope to consider these matters.

- 8 LINZ recommends that you meet with officials to discuss these approaches and next steps. LINZ also recommends consultation with your Ministerial colleagues and Cabinet to inform your deliberation on the PWA review approach.

Tohutohu/Recommendations

Toitū Te Whenua Land Information New Zealand (LINZ) recommends that you:

- | | | |
|---|---|-------------------------|
| 1 | Me mātai/Note that LINZ is progressing your decision to include changes to land acquisition objection processes as part of the Fast Track Approvals (FTA) Bill | <i>Noted</i> |
| 2 | Āmine/Agree to meet with LINZ to discuss the range of approaches and next steps | <i>Agree / disagree</i> |
| 3 | Me mātai/Note that if you agree with a fundamental review, criteria will be determined through consultation | <i>Noted</i> |
| 4 | Me tuku-whakamua/Forward a copy of this briefing to Hon Simeon Brown and Hon Chris Bishop for discussion | <i>Forward</i> |

Amanda Moran

Toitū Te Whenua Land Information New Zealand

Rā/Date: 27 March 2024

Hon Chris Penk

**Te Minita mō Toitū te Whenua/
Minister for Land Information**

Rā/Date:

Tāpiritanga/Attachments

- 1 Appendix 1: Summary of approaches for reviewing the Public Works Act 1981 (PWA) regime
- 2 Appendix 2: Public Works Act 1981 – High-level processes for acquisitions and Environment Court objections

Te Horopaki/Background

- 1 On 27 February 2024, LINZ provided options to you and your Ministerial colleagues, Hon Simeon Brown and Hon Chris Bishop, for improving land acquisition processes under the Public Works Act 1981 (PWA) [BRF 24-328 refers]. You chose to use the Fast Track Approvals (FTA) Bill to streamline the practices by which the Environment Court considers objections to compulsory acquisitions of land for FTA projects. You also asked for further advice on reviewing the PWA.
- 2 The streamlining of the Environment Court objections process has been drafted in the FTA Bill. LINZ will continue to engage you on this Bill and is supporting its progress through the select committee.
- 3 Since the PWA came into force in 1981, there have been significant changes to the context in which the PWA functions, including:
 - i changes the types of public works projects now undertaken (for example, from major hydro generation projects to urban development)
 - ii a significant increase in the number of Crown agencies and entities involved in the PWA (for example, NZTA, Transpower, education entities)
 - iii changed approaches to the delivery of public works and planning, including increased interest in multiparty collaborative development involving central and local government and private parties such as iwi and commercial developers
 - iv increasing population, and a desire to increase the supply of land available to facilitate future growth
 - v strong sensitivities around the use of PWA powers to acquire Māori land (although the acquisition of Māori freehold land is now less frequent than before the 1980s).
- 4 Despite this, the PWA has not been significantly amended since the 1980s, reflecting the difficulties and contentiousness of making changes to legislation that affects property rights. The following attempts to review and reform the PWA have occurred, without legislative change:
 - i In 1998–2003, a significant review of the PWA occurred. 278 submissions were received, with a large number from Māori. There was considerable divergence among submitters on a number of issues.
 - ii In 2020, a Bill was drafted to address some technical refinements to the process for dealing with whenua Māori under the PWA, however this Bill was ultimately not introduced.
 - iii In 2021, a further wider review of the PWA was initiated, but ultimately was not progressed.
- 5 LINZ will draw from these previous reviews where relevant to inform its analysis.

- 6 While the fundamental principle of the PWA mirrors international best practice, when compared to other jurisdictions the PWA is one of the oldest and least reviewed acts of its kind.
- 7 A review of the PWA allows LINZ to consider the role of the PWA in the land system across government. LINZ will look for opportunities across the land system and incorporate any other legislative changes when considering issues.

Ngā tirohanga me ngā kōwhiringa o Toitū Te Whenua/Toitū Te Whenua LINZ views and options

- 8 Following consultation with other Government agencies, LINZ has identified three high-level approaches to a review
 - i Approach 1 – a targeted review that would modernise specific provisions in the PWA to improve its efficiency and align the PWA with the current context and practise for land acquisition, disposal and compensation.
 - ii Approach 2 – a targeted review as above, extended to consider certain fundamental shifts to address specific Government priority areas.
 - iii Approach 3 – a fundamental review that would involve examining the system objectives of the PWA at a first-principles level and potentially overhauling the framework of the legislation to future-proof the legislation for future challenges.
- 9 A high-level summary of these review approaches (including criteria, scope and indicative timeframes) is presented in **Appendix 1**. A high-level summary of PWA processes, with an emphasis on acquisition and objection processes, is available in **Appendix 2**.
- 10 These approaches are distinguished according to whether, and to what extent, they would affect the fundamental principles of the PWA. The fundamental principles of the PWA, derived from the legislation, are that:
 - i the Crown and local authorities can acquire or take interests in land needed for a public work
 - ii the legislative procedures are fair and transparent for all parties, ensuring good faith negotiation and full compensation to leave landowners no better or worse off following PWA action
 - iii there is an independent and binding judicial check on the Crown's powers to take interests in land
 - iv where land is no longer required for a public work, the Crown and local authorities must offer the land back (offer back) to former owners unless exemptions apply.
- 11 LINZ has considered whether there are other feasible amendments to the FTA Bill that could facilitate the delivery of significant infrastructure and development projects. LINZ considers that the FTA Bill is not an appropriate means of addressing issues further than the provision included. Progressing separate legislation allows for changes to apply consistently across

acquisitions and not just to FTA projects. It also allows for any issues with broader PWA functions (e.g. compensation and disposals) to be considered.

Targeted review

- 12 The targeted review would modernise specific provisions in the PWA to improve its efficiency and align the PWA with the wider land system. This would include exploring land acquisition, disposal, and compensation. The PWA's fundamental structures and principles would be retained but the review will identify and recommend specific legislative and operational improvements across its key functions.
- 13 Of the three review approaches, this approach would take the shortest time and would address known efficiency and modernisation issues that do not impact upon the PWA's existing structures and principles. These structures and principles have delivered land for public works while not significantly affecting private landowners' confidence in property rights.
- 14 Amendments would need to be progressed through a Bill and subsequent operational changes by LINZ and delivery agencies. If the scope remains sufficiently targeted and the Bill is prioritised by the Government, LINZ considers that a Bill could be enacted by late 2025 / early 2026.
- 15 To determine the targeted issues that would be included in this review, LINZ would further work with relevant agencies and external reference groups to develop a list of issues to be addressed. Reference group members would include local government as a key user of the PWA, and Māori.
- 16 The criteria to determine which issues would be included in a targeted review include:
 - i Efficiency – improving process efficiency and removing unnecessary duplication
 - ii Modernisation – aligning the legislation with current context and practice, international best practice, modernising language, and ensuring land system coherence
 - iii Clarity – providing transparency for those using and affected by PWA processes
 - iv Property rights – ensuring that due process is taken to maintain natural justice for all affected parties.
- 17 A non-exhaustive list of issues that could be addressed include:
 - i Improving incentives to reach agreements. This could speed up acquisition by agreement, in turn improving the efficiency of public works delivery.
 - ii Adapting notice requirements. Prior to compulsory acquisition, delivery agencies must serve two notices signalling a desire to acquire land and then a notice of intention to take land. In many other jurisdictions, only one statutory notice is required. Simplifying this process could improve the efficiency of land acquisition practices.

- iii Enabling greater collaboration between agencies during PWA processes when working on the same projects. Current settings often require agencies to go through these processes separately (such as each having to acquire land individually). Changing this could create efficiencies, ultimately benefiting the timeliness of project delivery.
- iv Correcting issues with “offer back” provisions as part of land disposals. Complexities have emerged in part due to case law, particularly for identifying and offering land to successors when the person from whom it was acquired has died. Addressing these matters would improve certainty and efficiency, resulting in improved outcomes for landowners and landholding agencies.

Targeted review with certain fundamental shifts

- 18 This review approach extends upon on the scope of a targeted approach to additionally address specific Government priority areas. These priority areas could result a fundamental shift in the PWA’s principles for these specific areas.
- 19 This approach provides for a scope broad enough to address key priority areas for the government, while also making changes to modernise the PWA as provided for in the targeted review. It maintains the fundamental structure of the PWA but could amend these key principles to make the PWA meet wider objectives.
- 20 If this approach is chosen, LINZ would provide you with advice and seek direction on which areas to include in this review. An indicative list of the types of areas that could be included are:
 - i Entities with access to PWA powers. Consider if the powers and responsibilities of land-acquiring entities are consistent, appropriate, and fit-for-purpose. This would include considering which entities have access to powers, for instance Transpower’s current exclusion from accessing the PWA directly.
 - ii Corridor protection. Explore whether the PWA could become a suitable tool to protect certain corridors for future housing and infrastructure development.
 - iii Emergency powers and managed retreat. Consider the PWA’s role in ensuring that land practices in preparation and response to emergencies are efficient and effective. This could include considering the PWA’s suitability for facilitating planned relocations of coastal areas due to the worsening effects of climate change.
 - iv Māori land matters. Consider the PWA’s impacts on Māori land interests and Treaty of Waitangi obligations, especially compulsory acquisition protections and compatibility of disposal practices with Māori land ownership structures.
- 21 These matters would explore the core principles, rationale, and policy settings of the PWA, further than a targeted review would. For instance, currently the scope of “public works” is not broad enough to accommodate managed retreat, emergency management practices, and corridor protection.
- 22 Dependant on which issues are included in this review they may more numerous and fundamental in nature, and would require more resources, analysis, and time than for a

targeted review. LINZ would brief you on the trade-off between issues and timeframes if you proceeded with this approach but anticipates a Bill could be enacted by mid-2026.

Fundamental review

- 23 This review 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 significantly different Act. It would involve a more complete and comprehensive review of the PWA than a targeted review, including considering whether the Act is fit for purpose, and whether a new or amended framework would result in a better-aligned and more modern piece of legislation.
- 24 This approach provides the best opportunity for stakeholder buy-in through engagement from the start, allowing them to help set the scope and raise concerns government may not be aware of. Reviewing the PWA from first principles will allow for the full PWA processes to be considered in a holistic, balanced and coherent way, instead of making piecemeal changes to address priority areas. It would also provide an opportunity to fully investigate how Māori perspectives and interests should be incorporated and integrated into a PWA.
- 25 Criteria to use as part of this review would be defined through public consultation, but could also include (in addition to the criteria for the other two review approaches):
- i Future-proofing – ensuring the legislation considers future land acquisition challenges
 - ii System coherence – considering the future state of land processes in New Zealand, which parties exercise which powers, and the role of the PWA.
- 26 The PWA fundamentally does allow agencies to take land for public works while retaining confidence in property rights, although improvements can be made. There is a risk that reviewing the PWA's fundamental principles and structures could result in a regime that substantially resembles that current one. However, it could result in a significant step-change in how land is dealt with.
- 27 Reform on this scale would require significant resources, time, and cost. This would take a longer period, indicatively 2028. A fundamental overhaul of the PWA would require working collaboratively from the outset with local government, Māori and other stakeholder groups to develop a framework that considers the wide range of perspectives. Large-scale public consultation would also be required.

Sensitivities and risks

- 28 Any review of the PWA would attract considerable public interest and concern. 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, including criticism of how the PWA was used in the past. Any changes must balance the inherent tension between the Crown's ability to provide for public works and the property rights of landowners.
- 29 Any review will require significant resource commitment from LINZ and other agencies.

Māori land interests

- 30 LINZ expects that any review will likely revive a significant public interest in ensuring that PWA processes protect Māori land interests and are compatible with the types of tenure and land ownership structure associated with Māori land.
- 31 Historically, compulsory acquisition played a significant role in the Crown's alienation of Māori land and the economic and social disempowerment of Māori. 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 where possible.
- 32 However, in the future, demands for land and infrastructure could intensify. This could place pressure on the current practices of avoiding taking Māori land where possible, especially as needs for housing and related infrastructure increase and more land is returned to iwi through the Waitangi Tribunal settlement process.
- 33 There is considerable interest in enhancing the PWA's protection of Māori land, which the Waitangi Tribunal has advocated for over decades in its reports.¹ A key point of contention is that Māori freehold land remains eligible for compulsory acquisition.²
- 34 All proposed review approaches allow for Māori land issues to be addressed at different scales. However, a fundamental review or inclusion of Māori land provisions as a priority area in a targeted-plus review allows the most scope to consider integrating whenua Māori approaches. This ability is more limited with the targeted review approach.

Proposed review consultation processes

- 35 Given the significance of the PWA and the public's interest in it, LINZ proposes that there is external consultation ahead of policy decisions on a Bill. This recognises the range of stakeholders affected by, and interested in, the PWA regime. It would also ground policy decisions in evidence of those who are using the PWA, in particular those whose views would be beneficial to consider in relation to any possible changes.
- 36 The consultation approach would be different for each review:
- i Targeted review and targeted review with fundamental priority areas: LINZ would consult with a reference group of key external stakeholders (including local government and iwi) with a set list of issues and potential changes. A public discussion document with proposals could be developed ahead of Cabinet approval of the policy.

¹ Notable examples include the Wairarapa ki Tararua report and more recently, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*.

² Other Māori land is deemed unalienable under separate legislation. This includes Māori reserves under Te Ture Whenua Māori Act 1993. More recently, the Urban Development Act 2020 prevents the compulsory acquisition of Māori land for urban development projects. This was introduced to avoid taking Māori land for projects where the land could be passed to private developers for them to undertake the development.

- ii Fundamental review: LINZ would encourage more open-ended discussion, allowing stakeholders to present their perceptions of issues. This would be a two-stage public consultation period – one to understand the issues and opportunities with the PWA, and one on the proposed solutions. This would likely involve public meetings and hui.

Mātanga kōrero/Consultation

- 37 The Ministry of Transport, Ministry of Housing and Urban Development, Ministry for the Environment, Te Arawhiti, Ministry for Culture and Heritage, the Treasury, Department of Conservation, Ministry for Primary Industry, Department of Internal Affairs, Te Puni Kōkiri, and the Ministry of Justice have reviewed this briefing. LINZ has drawn from their feedback in the preparation of this briefing.
- 38 The Department of the Prime Minister and Cabinet has been informed.

Ngā Tāwhaitanga/Next Steps and/or angawā/timeframes

- 39 LINZ recommends that you meet with officials to discuss these approaches and next steps.
- 40 Given the scope and the importance of a review of the PWA, LINZ recommends that Cabinet agrees to the scope of the review.

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