MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Urban development authority legislation – Compulsory acquisition and land assembly

Date:	30 November 2017	**Priority:**	High
Security classification:	**In Confidence**	**Tracking number:**	1297 17-18

Action sought		
	Action sought	**Deadline**
Hon Phil Twyford **Minister of Housing and Urban Development**	**Agree** to the recommendations. **Forward** a copy of this briefing to the Minister for Land Information. **Consult** the Minister for Land Information before making decisions.	6 December 2017
Hon Jenny Salesa **Associate Minister of Housing and Urban Development**	For your information.	Click here to enter a date.

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Di Anorpong	Manager, Construction & Housing Policy	04 901 8743	s 9(2)(a)	✓
Andre Anderson	Principal Advisor, Housing Markets	(04) 474 2815	s 9(2)(a)	

The following departments/agencies have been consulted					
☐ Treasury	☐ MoJ	☐ NZTE	☐ MSD	☒ LINZ	☐ MoE
☐ MFAT	☐ MPI	☐ MfE	☐ DIA	☐ TPK	☐ MoH
		☐ Other:			

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments:

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Purpose

On 16 November 2017, you received a briefing that discussed new legislation:

- that may be required to establish a national urban development authority; and
- that is required to provide more enabling development powers to support complex, large-scale development projects, such as those that form part of your strategy for delivering KiwiBuild.

That briefing described the core elements proposed for the new legislation, and signalled the following series of further briefings on critical issues, of which this is one (highlighted):

1. Fundamentals: legislative design, decision-making, role of local government.
2. Decision-making: priorities and principles.
3. Organisational functions and form of the national UDA.
4. Approach to Māori interests.
5. Land assembly powers, especially compulsory acquisition
6. Infrastructure and funding powers.
7. Planning and consenting powers.
8. Powers to change reserves.

Executive summary

This paper seeks your direction on the recommendations you would like to make to Cabinet regarding the land assembly powers that will be available for urban development projects in the new legislation.

Under the recommended approach described below, the nature of the public works for which land can be taken by compulsion will remain the same as under the Public Works Act 1981 ("PWA") and associated legislation. However, we recommend that the circumstances in which the works can be authorised be adapted to the needs of the proposed legislation. We also recommend that the new legislation clarify the Crown's obligations to offer land back to its former owners when disposing of it.

Officials recommend that you consult the Minister for Land Information on the land assembly options set out in this briefing, before making decisions on the recommendations you will make to Cabinet.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a) **agree** that the new legislation enable the UDA to apply to the Minister for Land Information to use the PWA to acquire land on its behalf by compulsory acquisition;

Agree / Disagree

b) **note** that any application would be subject to the standard processes of the PWA, including rights of appeal to the Environment Court for the landowner to challenge the taking;

Range of public works

c) **note** that, under the status quo, it is not always clear for which works the Crown and local authorities are authorised to take land by compulsion, because the PWA no longer specifies each work by name and are instead covered by the broad definition of 'public work' in the PWA which is vague and unclear;

d) **note** that the lack of clarity would create uncertainty and legal risk for the UDA if it is not addressed in the new legislation, especially in the context of those public works that are delivered by private developers (i.e. where the public work is realised by transferring the land to a private developer who will eventually sell the newly constructed buildings to private owners for a commercial profit);

e) s 9(2)(h)

f) **note** that:

   i. because not all public works are specified by name, doing so in the new legislation would be a departure from the status quo;

   ii. for example, commercial buildings are nowhere specified by name as a public work in existing legislation, but are currently authorised by more general empowering provisions, including the definition of 'public work', the definition of 'state housing purposes' and the definition of 'urban renewal';

g) **agree** that the new legislation:

   i. specify by name the following works for which the UDA can apply for compulsory acquisition in the project area ("specified works"):
      - drainage;
      - stormwater;
      - sewerage;
      - water supply;
      - waste disposal and recycling;

- river control, including flood protection works;
- soil conservation;
- energy infrastructure, including:
    - the production or distribution of electricity, gas or other energy;
    - the construction, acquisition or holding of any associated pipes and network infrastructure;
- hospitals or health centre facilities;
- education facilities, including universities, polytechnics, high schools, intermediate schools, primary schools, kindergartens or early childhood centres;
- roads, accessways or service lanes;
- pedestrian malls, cycleways or walkways;
- railways, bus terminals or other public transport facilities;
- airports;
- telecommunications infrastructure;
- police facilities;
- fire stations;
- harbour works;
- prisons and other correctional facilities;
- housing, including the construction, acquisition, or holding of dwellings and ancillary structures by the UDA for disposal by way of sale, lease, or tenancy to any person, including the acquisition or taking of land—
    - to deliver the development plan as it relates to housing; or
    - for the purposes of public or affordable housing; or
    - as sites for dwellings and ancillary structures; or
    - for subdivision or amalgamation into sites for dwellings and ancillary structures;
- commercial or industrial buildings, including the construction, acquisition, or holding of commercial or industrial buildings and ancillary structures by the UDA for disposal by way of sale, lease, or tenancy to any person, provided that either—
    - the buildings are ancillary to housing; or
    - the buildings are needed for the revitalisation or improvement of the project area;
- community facilities, including libraries or swimming pools;
- public open space, parks or reserves;
- the revitalisation or improvement of an urban area;[1] and

[1] These are the words used in the definition of urban renewal in section 3 of the Greater Christchurch Regeneration Act 2016.

ii. include the following more general descriptions, which repeat existing PWA provisions:
    - every use of land for the works described in subparagraph (i), above;
    - anything required directly or indirectly for those works; and
    - maintenance of, replacement and upgrades to, the works;

Agree / Disagree

h) **agree** that, in addition to being able to apply for compulsory acquisition for specified works, the UDA still be able to rely on the definition of 'public work' in the PWA (which will cover any types of works that we have not foreseen);

Statutory tests

i) **note** that, under the status quo, the definitions and applicable tests are not consistent across all public works, with certain works requiring the Crown or local authority to demonstrate some mix of control, financial responsibility or a public purpose (e.g. roading, drainage), while other public works do not require those matters to be demonstrated on a case by case basis (e.g. housing and ancillary commercial buildings,);

j) **note** that we consider the policy intention underlying the existing tests in the PWA is to ensure that:

    i. the compulsory acquisition powers are only used where there is a public benefit; and

    ii. the public benefit is actually delivered;

k) **note** that, under the new legislation:

    i. the proposed power would only be available in the context of a formally recognised development project that has already met whatever eligibility criteria and procedural requirements are required by the new legislation, including the need to demonstrate public benefits;

    ii. if the UDA itself develops the land, it will need to operate in that legislative context;

    iii. this will go some way towards ensuring that the UDA can only access compulsory acquisition for specified works that will have a public benefit, although there will still be a risk that individual works might not themselves deliver a public benefit; and

    iv. the recommended approach will remove the need to demonstrate a 'public purpose' on a case by case basis for those works where that test currently applies (e.g. education, corrections, defence), but make no change to works where there is no existing requirement to demonstrate a 'public purpose' on a case by case basis (e.g. 'state housing purposes' and 'urban renewal');

l) **agree** that, the new legislation adopt the following approach in cases where works are delivered by private developers rather than the UDA itself—

    i. in order to ensure the land is used for the intended public work, the Crown be given a power to take land back (resume land) in cases where the land is sold to a private developer to deliver the public work, but the private developer subsequently fails to do so;

ii. the power to take the land back otherwise conforms with the compulsory acquisition process set out in the PWA, except that:

- the land owner has no right to object to the Environment Court against the land being taken; and
- the compensation paid to re-acquire the land is the sale price the developer paid to acquire the land plus the actual cost of any improvements the developer has made;

iii. the above powers are supported by an obligation for the UDA to register a memorial against the title of any land when it sells that land to a private developer for a public work, which memorial must warn all subsequent interested parties that the Crown is entitled to re-purchase the land without any right of objection if the public work is not delivered as originally agreed;

Agree / Disagree

m) **note** that, when advising the previous Government, the Legislation Design and Advisory Committee supported the general approach recommended above, agreeing in principle that the need to achieve certainty, simplicity and clarity are paramount given the nature and context of the power being proposed;

n) **note** that the uncertainties of the status quo mean that some people may argue that certain works included in the proposed legislation go beyond what is currently enabled, despite legal advice to the contrary;

Impact of the recommended approach

o) **note** that, because of the inconsistencies in the current legislation, under the consistent approach recommended above—

i. for some specified works (e.g. roading, drainage), the UDA would not need to meet tests that would continue to apply to other parts of the Crown and local authorities;

ii. for other specified works (e.g. housing), the UDA would face tighter controls on the way land acquired under the PWA could be used than those that currently apply to other parts of the Crown and local authorities;

p) **note** for example that with respect to the construction of commercial or industrial buildings—

i. these works sometimes fall within the scope of works that central or local government are, in appropriate circumstances, authorised to undertake and for which land can be taken by compulsion under existing legislation;

ii. the recommended approach would change or remove some of the existing processes or criteria that currently apply to these works;

iii. the occasions when these works can be authorised under the recommended approach have been tied to the same principal condition that applies under existing legislation (i.e. that the buildings be ancillary to housing or be needed for revitalisation or improvement of the project area); and

iv. the nature of the work that can be authorised remains the same in either case;

Assembling existing public land

q) **note** that—

i. to fulfil your commitment to put all surplus urban Crown land under the control of the UDA, one option is to include a new power that would enable the Crown to require Crown entities to contribute the land that they own in a project area to the development project;

ii. this proposal would give the Crown more power to take publicly owned land for a development project than currently exists for public works carried out by other entities;

r) **note** that in the context of the previous Government's proposals Treasury and SSC did not support removing the right for Crown entities to object to their land being taken by the Crown, because Crown entities are independent of the Crown and entitled to the same protections as any other person that is independent of the Crown;

s) **note** that there are six types of Crown entity:

i. Crown agents, such as ACC, DHBs, HNZC and Callaghan Innovation;

ii. autonomous Crown entities, such as the Super Fund and Heritage New Zealand;

iii. independent Crown entities, such as the Commerce Commission and Financial Markets Authority;

iv. Crown entity companies and their subsidiaries, such as TVNZ and Crown Research Institutes;

v. school boards of trustees (which don't generally own any land); and

vi. tertiary education institutions;

t) **indicate—**

i. whether you would like the new legislation to include an accelerated power to take public land from Crown entities;

Agree / Disagree

ii. if so, whether you would like to restrict the application of the power to Crown agents only (which are the form of Crown entity that are closest to central government); or

Agree / Disagree

iii. whether you would like to apply the power to all Crown entities (as listed above);

Agree / Disagree

u) **agree** that, if you do want the new legislation to include an accelerated power to take public land from Crown entities—

i. the mechanism by which the power is implemented be via the standard process under the PWA, except that the entity that owns the land being acquired does not have a right to object to the Environment Court under section 23 of the PWA;

Agree / Disagree

ii. the accelerated power to assemble public land can only be exercised by the Governor-General on the recommendation of the Minister responsible for the proposed legislation, the Minister of Finance, the Minister for Land Information and the minister whose portfolio oversees or is responsible for the Crown entity whose land is being acquired; and

Agree / Disagree

iii. before recommending that the Governor-General exercise the power, the Ministers must consider whether it is expedient in the public interest for the Governor-General to do so;

Agree / Disagree

Clarifying the Crown's offer back obligations

v) **agree** that the new legislation clarify that the involvement of private developers has no impact on the status of public works, meaning that transferring such land to a private developer does not, in and of itself, trigger the Crown's obligations to first offer the land back to its previous owner;

Agree / Disagree

w) **forward** a copy of this briefing to the Minister for Land Information for her information; and

Yes / No

x) **consult** the Minister for Land Information on each recommended change before making decisions.

Di Anorpong
Manager, Construction & Housing Policy
MBIE

..... / ..... / .....

Hon Phil Twyford
Minister of Housing and Urban Development

..... / ..... / .....

Background

1. In our briefing to you dated 16 November 2017 (0854 17-18) , we proposed that the new legislation to empower complex development projects include land assembly powers, including access to powers of compulsory land acquisition. We also outlined the key themes of the feedback we received in relation to the land assembly proposals in the previous Government's discussion document on urban development authorities:
   - general support for the UDA being able to access compulsory acquisition powers, provided there is clarity about the public works it can pursue;
   - some enthusiasm for gaining access to unused Crown land;
   - concern at the Crown's ongoing "offer back" requirements for non-housing related developments; and
   - iwi concerns that the Public Works Act 1981 (PWA) would be used to take more of their land.
2. We address iwi concerns in our separate briefing on the critical issues you will need to address regarding Māori interests. This briefing outlines recommendations on the other three issues:
   - the range of public works for which the UDA can access compulsory acquisition powers;
   - the process of gaining access to publicly owned land to transfer to UDAs; and
   - how to manage the Crown's obligation to offer land back to its previous owner when the Crown no longer needs it.

Public works

3. We propose that the UDA be able to ask the Minister for Land Information to use the PWA to acquire land on its behalf, including by compulsory acquisition if necessary.
4. If you are unfamiliar with the Public Works Act 1981, we introduce and describe its powers in **Annex One**.

Uncertainty in the current legislation about when land can be acquired

5. While stakeholders generally welcomed the proposed power in the context of the previous government's proposals, they pointed out that it is not always clear for what works the Crown and local authorities can compulsorily acquire land under existing legislation.

6. There are two main reasons for the uncertainty. First, with some exceptions, the PWA does not identify public works by name.[2] Instead, it uses general definitions, covering any work that is:

   - a 'Government work', defined as a work that is "to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose"; or
   - a 'local work', defined as a work "constructed or intended to be constructed by or under the control of a local authority."

7. Secondly, the definitions and applicable tests are not consistent across all public works. While both definitions require 'control', the definition of 'Government work' requires that the work be for a 'public purpose', whereas the definition of 'local work' does not. Conversely, while a separate provision in the PWA requires that a local authority must have 'financial responsibility' before it can acquire land for a local work,[3] there is no equivalent requirement for central government before it can acquire land for a Government work. Nor is there any definition in the PWA of what is required to show 'control', 'public purpose' or 'financial responsibility'.

8. Adding to the inconsistency is the fact that the control, public purpose and financial responsibility 'tests' do not always have to be demonstrated, because some public works are defined and enabled by other legislation. In particular, neither 'control', 'financial responsibility' nor a 'public purpose' need to be established on a case by case basis before—

   - the Crown can use the PWA to acquire land for 'state housing purposes' under the Housing Act 1955; or
   - a local authority can use the PWA to acquire land for 'urban renewal' under the Local Government Acts 1974 and 2002.[4]

9. The same work can be authorised via two different statutes that impose two different 'tests'. Contrast taking land for an 'urban renewal' project, which includes moving a road, with taking that part of the land directly for roading purposes. Whereas the latter requires a local authority to show 'control' and 'financial responsibility', the former does not (while having to meet a different definition of its own[5]). Yet the actual work for which that part of the land is being taken (the road) is one and the same thing.

10. To illustrate the inconsistency and complexity of the current regime, we have summarised some key examples of how land acquisition powers are defined in **Annex Two**.

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[2] Between 1981 and 1987, the Public Works Act included a definitive list of public works for which compulsory acquisition was available (called "essential works"). However, this list was removed in 1987 because it was not flexible enough to provide for all works that the Crown or local government might wish to undertake.

[3] Section 16(2), Public Works Act 1981

[4] See s 644B of the Local Government Act 1974, as retained by s 189(1) of the Local Government Act 2002.

[5] In the Local Government Act 1974, 'urban renewal' was defined to mean, "the conservation, repair, or redevelopment of any land, or of any building on any land, within any urban part of the district (or the encouragement thereof), the standard of which should in the opinion of the council be improved; and includes the improvement, reconstruction, extension, development, and redevelopment of the utility services, roading, the landscape, and community and social facilities and services within that part." (s 644A)

Specifying the works that are covered by the compulsory acquisition powers

11. While the broad definitions that apply to public works in the PWA provide flexibility, they do so at the expense of certainty. s 9(2)(g)(i)

12. For this reason, we recommend that the new legislation specify by name the works for which land can be acquired on behalf of the UDA. We have specified these works in the recommendations, above. They are all works recognised under existing legislation that relate to urban development.

13. Note that, because the existing legislation does not identify public works by name, there is no definition of commercial or industrial buildings from which the new legislation can borrow when specifying these as public works (should you wish to do so). Instead, authorisation to take land for these types of urban development purposes comes via more general empowering clauses that can raise legal debates about their scope.[6]

14. Consequently, the new legislation may be the first time works such as the construction of commercial buildings is specified by name to be a public work for which land can be taken by compulsion. Nevertheless, to avoid uncertainty, we recommend that the new legislation specify these works, if you want them to be covered.

Conditions of use

15. We consider that the policy intention underlying the three tests set out in the PWA is to ensure that:
    - the compulsory acquisition powers are only used where there is a public benefit; and
    - the public benefit is actually delivered.

16. To overcome the inconsistencies and uncertainties in the status quo, we recommend that the new legislation adopt a consistent approach to each of the public works for which a UDA can access the PWA powers, including compulsory acquisition. The aim is to improve the level of certainty regarding the range of works that are covered and the terms that apply, while still ensuring the actual delivery of the intended public benefit.

Commercial profits from public works

17. The uncertainties are compounded in the context of the UDA because of the potential for private developers to make profits from some of the public works. There may be cases where the UDA would like to transfer public land to a private developer to construct a public work in circumstances where the private developer is intended to earn a commercial profit.

[6] There are three separate sources of power to take land for commercial and industrial buildings and other such urban development purposes: First, the Housing Act 1955 empowers the Crown to take land, not just for housing, but for "ancillary commercial buildings" and for "roads", "reserves", "pumping stations" and "other works …for the benefit of …the occupiers" (see the definition in s 2). Secondly, local authorities can rely on their power of general competence under section 12 of the Local Government Act 2002 to undertake relevant works for their district, which includes at least some works related to urban development (e.g. airports), but where the precise extent of that power has not been fully tested in the Courts. Provided a particular work can reasonably be considered to be for the benefit of a local authority's district, it is arguable that the local authority will be empowered to acquire land for that purpose as a "local work" under the PWA. Thirdly, central and local government may enter into an agreement under section 224 of the PWA in relation to undertakings of both national and local importance that could encompass various types of urban development works. In addition, as noted above, 'urban renewal' is a specified public work that may include commercial and industrial buildings in certain circumstances (see the definition in footnote 5, above).

This could occur for public works regarding housing and urban development, where the work can only be realised by selling the newly constructed land and buildings to private owners and where it is therefore more appropriate for private developers to take the development risk and so earn the associated commercial profit.

18. Given the sale of public land and the commercial profits involved, it would be in these scenarios that the 'public' nature of the works is most likely to be questioned and so where greater clarity is needed in the new legislation, especially in the context of compulsory acquisition.

Recommended approach

19. To avoid the inconsistencies of the status quo, we recommend that the new legislation not include any reference to the three tests ('control', 'public purpose' or 'financial responsibility'). Note that the absence of the three tests would not be unique to the new legislation, given that works such as "state housing" and "urban renewal" already eschew those tests in favour of separate legislative authorisation.

20. Note that, under the new legislation, the proposed power would only be available in the context of a formally recognised development project that has already met whatever eligibility criteria and procedural requirements are required by the new legislation, including the need to demonstrate public benefits. Consequently, if the UDA itself develops the land, it will need to operate in that legislative context. This will go some way towards ensuring that the UDA can only access compulsory acquisition for specified works that will have a public benefit, although there will still be a risk that individual works might not deliver a public benefit.

21. Whether removing any reference to the three tests will change the status quo depends on whether or not the current authorising provisions for any one particular work include those tests or not, a matter we consider below.

22. In cases where the UDA is not developing the land itself, we assume that it will need to transfer the land to a private developer to deliver the public work. In that scenario, we recommend the new legislation introduce a new approach designed to ensure the public benefits of the work are actually delivered, which includes an accelerated power for the Crown to re-take the land if the developer is failing to deliver the work.

23. A power to re-take land is not without precedent, being based on the right of reversion provided for in the State Owned Enterprises Act 1986, which applies whenever the Waitangi Tribunal recommends that land that is or was owned by an SOE be returned to Maori ownership.

    a. We recommend that, before a UDA can transfer land to a private developer to deliver any one of the works specified in the new legislation, the UDA and developer must enter into a development agreement that requires the developer to construct the specified work within an agreed period and sets out agreed conditions that ensure the nature of the specified work is fulfilled;

b. the development agreement must include terms that, upon a material breach of the development agreement:

   i. enable the UDA to step in to ensure that construction of the specified work is completed to the agreed conditions; and

   ii. if necessary to do so, enable the Crown to re-purchase the land; and

c. the UDA must place a memorial on the title of the land noting that the Crown has the right to resume the land upon a material breach of the development agreement until the specified work is delivered.

24. To give effect to the memorial, if and when there is a material breach of the development agreement, we recommend that the new legislation:

    a. empower the Minister for Land Information to take back the land for the specified work by acquiring or taking the land by compulsory acquisition; and

    b. provide that whoever the owner has become, they have no right of objection to the Environment Court to the Minister acquiring or taking the land, but they are still entitled to compensation.

25. Given that these developments will take place in the context of a significant development project, there is the potential for the value of the land to have increased since the UDA sold it. Consequently, there is a risk that the Crown would have to pay more to re-acquire the land than it first received when selling it. To avoid the developer earning the windfall gain from an increase in land value caused by the wider development project, we recommend that the compensation paid to re-acquire the land is the sale price the developer paid to acquire the land plus the actual cost of any improvements the developer has made.

Legislation Design and Advisory Committee

26. We have discussed these issues and the recommended approach with the Legislation Design and Advisory Committee (LDAC) in the context of the previous government's proposals, and they were generally supportive. More particularly, LDAC supported a departure from existing definitions and criteria. Although legislation should not create a new power if the objective can be achieved through an existing power, in this case LDAC agreed that achieving certainty, simplicity and clarity are paramount given the nature and context of the power. LDAC also agreed a resumption mechanism is appropriate to avoid land being lost to private developers' creditors.

27. Note that we did not discuss capping the land value when re-taking that land.

Implications of the recommended approach

28. The key point to note about the recommended approach is that, because of the inconsistencies in the current legislation, for some specified works the Crown and local authorities would need to meet tests that would not apply to UDAs. For example, to acquire land for a road under the PWA, a local authority would have to show both control and financial responsibility for the construction of the road. In contrast, a UDA would not, because a road would be a specified work named in the new legislation.

29. On the other hand, the effect of the recommended approach will be to increase the legislative enforcement powers in relation to the way land can be used by private owners, by introducing new requirements and powers that would not otherwise apply. In these cases, the Crown will have greater powers to ensure the public benefit of the work is delivered than currently apply to the Crown or local authority.

30. Overall, we consider that the recommended approach makes little change to the substance of the status quo. However, nor can it be said to provide for exactly the same requirements.

31. It's also worth noting that, by reducing legal risk, the recommended approach would also be likely to increase the use of compulsory acquisition. This could have flow-on effects on peoples' confidence in their property rights because they will see more private land taken. Any concerns could be exacerbated where land is taken for transfer to private developers.

Assembling existing public land

32. The Labour Party manifesto commits the Government to "putting all surplus urban Crown land under the control of the Affordable Housing Authority for use in its development projects." Doing so for all such land lies outside the scope of legislation focussed on project-based development in selected geographic areas. Responsibility for surplus Crown land rests with the Chief Executive of Land Information New Zealand. Consequently, if you wish to apply this commitment generally, we can support any discussions you may wish to have with the Minister for Land Information.

33. However, the proposed legislation offers an opportunity to pursue that commitment in the context of a development project. There is the potential for the new legislation to include a power that enables the Crown to require Crown entities (such as Housing NZ and district health boards) to transfer land that they own within a project area to the UDA. As the Crown can already take this land by compulsion under the PWA, the proposal does not add a new power; it merely accelerates the use of an existing one.

Categories of Crown land

34. We propose that public land owned by the following entities should not fall within the scope of the proposed power, although the Crown will continue to be able to take land from these types of organisations under the standard process of the PWA:

    - state-owned enterprises;
    - mixed ownership model companies; and
    - companies under schedules 4 and 4A of the Public Finance Act.[7]

35. At the other end of the spectrum of state sector entities, any land in a project area that is already owned in the name of Her Majesty the Queen is addressed separately through the powers to change the purpose of that land to one of the specified works. This would apply to entities such as the New Zealand Railways Corporation. In between is the land owned by Crown entities.

[7] e.g. Schedule 4: New Zealand Government Property Corporation and New Zealand Lottery Grants Board. Schedule 4A: Ōtākaro Limited (Crown-led anchor projects in ChCh) and Crown Infrastructure Partners Ltd.

Crown entities

36. There are six different types of Crown entity:

    a. **statutory Crown agents** (which must give effect to Government policy when directed by the responsible Minister): e.g. ACC, DHBs, HNZC, Callaghan Innovation;

    b. **autonomous statutory Crown entities** (which must have regard to Government policy when directed by the responsible Minister): e.g. Super Fund, Heritage NZ, Creative NZ;

    c. **independent statutory Crown entities** (which are generally independent of Government policy): e.g. Commerce Commission, Electricity Authority, Financial Markets Authority;

    d. **Crown entity companies** and their subsidiaries: e.g. TVNZ, NZ Venture Investment Fund Ltd, Radio NZ, Crown Research Institutes, Freeview Television Ltd;

    e. **school boards of trustees**: which generally don't own school land; and

    f. **tertiary education institutions**: e.g. polytechnics, institutes of technology and universities, which are in the process of taking title to their own land.

37. Where the type of Crown entity is still close to Government (such as Crown agents), the proposed power seems appropriate. As the distance increases to entities such as the Super Fund and universities, the proposed power seems less appropriate, certainly as compared to the Public Finance Act companies and state-owned enterprises that we propose not be included within the scope of the power. In between, there are Crown entity companies, some of which are similar to entities that are close to Government (e.g. Crown research institutes) and some of which are more similar to state-owned enterprises (e.g. TVNZ and NZ Venture Investment Fund).

38. Meanwhile, most independent statutory Crown entities own little if any land, being commissions and authorities focussed on regulation. Intended to be independent of government policy, there is also the question of whether the proposed power would run counter to the functional separation between these types of Crown entities and the Government.

Discussion

39. The proposal would give the Crown more power to take land than currently exists for any other form of public work. For example, if the New Zealand Transport Agency needs council or Crown entity land and cannot acquire it by agreement, it must use the existing compulsory acquisition powers. LINZ officials consider that there is no compelling case why urban development should be able to acquire land more easily than an entity undertaking nationally important public works such as defence or state highways. However, the policy rationale is to provide a swift means of capitalising a development project with public land at (or soon after) its establishment, and to ensure that the UDA knows what land it owns and controls when preparing the draft development plan.

40. In the absence of the proposed power, land owned by any Crown entity could still be acquired by compulsion under the PWA, regardless of how commercial or independent the

entity is. However, the issue with following the usual PWA process is the prospect of objections, which can create significant delays.

41. Whether objections should be retained in the case of Crown entities depends on whether one views them as more like private organisations or government departments. The reality is that they fall at different points along the spectrum in between. On the one hand, any land they own is ultimately owned by the taxpayer. On the other hand, apart from Crown agents, the other Crown entities are public bodies discharging independent functions outside the service of the Crown and so are not part of the Crown itself.

42. The fact the land is ultimately owned by taxpayers suggests that decisions on how a Crown entity's land is used should be made by central government and not the Environment Court. In contrast, the fact the entity is not part of the Crown itself suggests that the entity should retain the same right to object to the Environment Court as all other independent organisations.

The Treasury and State Services Commission

43. The Treasury and SSC did not support removing the right for Crown entities to object to their land being taken by the Crown when the previous Government considered this proposal. In their view, the proposal suffers from a misconception about the nature of Crown entities; and a lack of justification for removing objection rights.

44. The Treasury and SSC saw no conflict with the responsible Minister's ability under the proposed legislation to decide whether to compulsorily acquire the relevant land, as the Environment Court, when considering an objection, is confined to enquiring whether the Minister has considered alternatives and whether the taking of the land is "fair, sound and reasonably necessary" to achieve the Minister's objectives. The right of objection is an appropriate check where a power to expropriate property is concerned, and they are not persuaded that there is a case to treat Crown entities differently to those other owners of non-Crown land who will retain their rights to object.

45. The Treasury and SSC considered that removing the right of objection wouldn't eliminate the risk of delay. Nor do they consider that a case is made out for an ad hoc change to the system in which Crown entities operate. In their view, the existence of Crown entities' right of objection under the PWA reflects their independence from the Crown and the fact that they own their land independently and so should be retained.

Conclusion

46. Given that compulsory acquisition already applies to any land held by Crown entities, the key issue is not whether it's appropriate for the Crown to have the power to take the public land held in their name, but who the decision-maker should be in the event of a disagreement and what criteria should apply:

    a. the Environment Court, focused on protecting private property rights under the PWA; or

    b. Cabinet, focussed on what the best use of public land is in the public interest.

47. Thus, if you wish to pursue the proposal, the issues of delay, the identity of the decision-maker and the criteria for decisions can be addressed by retaining the PWA process, while removing Crown entities' rights of objection to the Environment Court and introducing a

focus on the public interest for Ministers' decisions. The advantage of retaining most of the existing PWA process is that it would avoid the added complexity of creating a stand-alone compulsory acquisition process that only covers Crown entities in the context of development projects undertaken by the UDA.

48. The remaining issue is the range of Crown entities that are covered. Conceptually, we suggest that either all Crown entities should be subject to the power, no matter how commercial or independent they are; or the power should be restricted solely to Crown agents, given that they are the only ones that fall squarely under the Crown's umbrella.

Offer back obligations

49. The Public Works Act requires the Crown to offer to its former owner any land that is no longer needed for a public work (s40). The sale of public land to a private developer does not in and of itself trigger these obligations, but the way the provisions are worded can create doubt about whether a work will still qualify as a public work if private developers are involved in the delivery of the UDA's projects. This could create legal challenges regarding:

    a. whether land can be compulsorily acquired for the work in the first place; and

    b. whether the land must be offered back before it can be transferred to the developer.

50. For these reasons, some territorial authorities and members of the development community strongly recommend that the new legislation make it clear that, when land is transferred to a private developer to deliver a public work, it continues to be held for a public work (albeit not by the Crown). Without that clarity, the risk is that the UDA will be unable to sell land to private developers to deliver a project's strategic objectives without significant uncertainty and risk attaching to the transaction, which either adds delay and cost or deters private developers altogether.

51. Given how critical it will be for the UDA to be able to sell land to private developers to deliver the public works for which the land is held, we recommend the position be clarified in the new legislation.

Consultation

52. The proposals on land acquisition affect the portfolio interests of the Minister for Land Information, since she will be responsible for making decisions on any compulsory acquisitions that are sought by the UDA.

53. Officials recommend that you consult the Minister for Land Information on the land assembly options set out in this briefing, before making decisions on the recommendations you will make to Cabinet.

Annexes

Annex One: Introduction to the Public Works Act 1981

Annex Two: Summary of existing compulsory acquisition powers

Annex One: Introduction to the Public Works Act 1981

1. The Public Works Act 1981 (PWA) sets out how the Crown or local authorities[8] acquire land for a public work,[9] how a landowner is compensated, and how this land is disposed of when it is no longer required.
2. The Minister for Land Information must make statutory decisions regarding the compulsory acquisition of land for Crown agencies under the PWA. This involves signing notices to the landowner and, if necessary, recommending the Governor-General takes land by Proclamation.

Ministerial powers and responsibilities

3. Under the PWA, the Minister is responsible for acquisition of land by the Crown. Local authorities can use the PWA for negotiated voluntary acquisition of land. If compulsory acquisition is necessary, the local authority may request that the Minister recommend that the Governor-General takes the land by proclamation.
4. Most of the powers of the Minister are currently delegated to officials in LINZ,[10] including making decisions on negotiated agreements. However, some decisions relating to compulsory acquisition of land cannot be delegated and must be made by the Minister. The volume of decisions is affected by the timing of government's infrastructure projects, but could be approximately 150 to 200 per year.

Public Works Act acquisition process

5. The acquisition of land under the PWA involves a number of steps, depending on whether an agreement to sell is successfully negotiated with a land owner. An example of the process is provided in Figure 1 over the page. The land acquisition process takes approximately two years, however appeals to the Environment Court or higher Courts will affect the timeframe. The steps are:

    5.1. First, the Crown agency that needs the land endeavours to negotiate with owners to reach an agreement. If an agreement is reached, LINZ signs the agreement on the Minister's behalf and the process does not continue any further.

    5.2. If an agreement is not reached with the land owner, then the Crown agency may request that LINZ signs a Notice of Desire to Acquire Land. This notice formally invites the owner to sell. The Crown agency must endeavour to further negotiate in good faith to reach an agreement, for no less than three months from the date of service of the notice.

    5.3. If agreement is not reached, the PWA's powers of compulsory acquisition are used. The Crown agency may make recommendations to the Minister and request he or she sign a Notice of Intention to Take Land. The owner can object to the taking of the land before the Environment Court.

    5.4. If there is no objection, or if the Environment Court does not uphold any objection, the Minister may be asked to recommend that the Governor-General takes the land by Proclamation.[11]

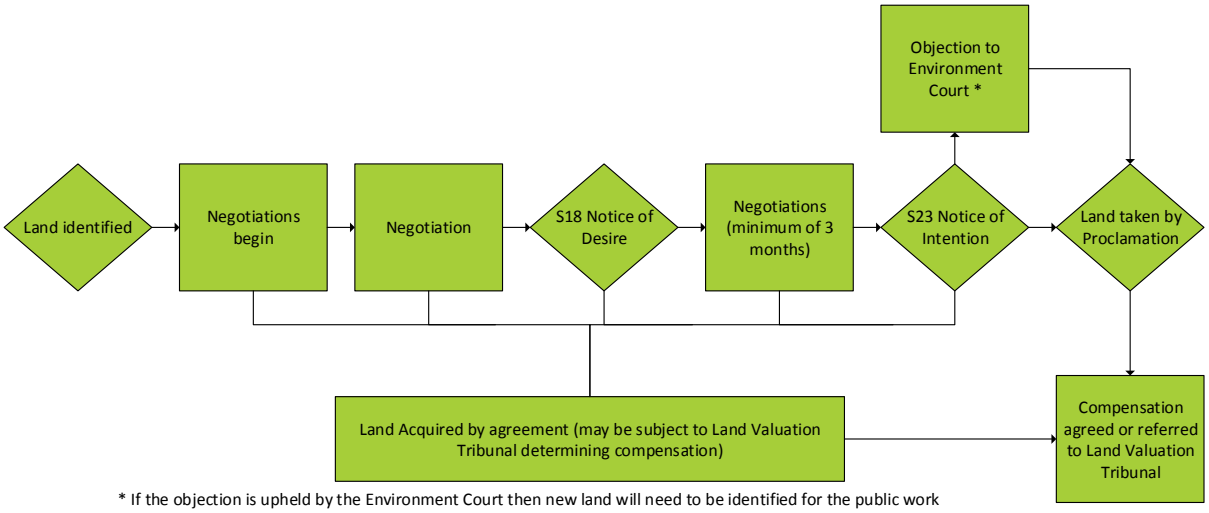
[8] Under the PWA, a 'local authority' includes regional and territorial councils, the NZ Fire Service Commission, airport authorities, universities and other entities.

[9] Examples of public works are: state highways, hospitals, schools, prisons, police stations, reserves and defence facilities.

[10] Powers that cannot be delegated to officials include Section 23 signing Notice of Intention and recommending the Governor-General takes land by Proclamation. Currently powers to carry out negotiations, signing Section 18 Notices of Desire to Acquire Land, and responding to objections lodged to the Environment Court or higher Court are delegated to LINZ officials.

[11] After land has been taken by Proclamation the relevant parties will need to agree on compensation payable. If an agreement on compensation is not reached, then either party can make a claim to the Land Valuation Tribunal.

Figure 1: Public Works Act acquisition process



6. Importantly, agreement can be negotiated at any time in the above process, up until when the Governor-General signs a Proclamation. The most common issue that prevents agreement is differences over the value of the land being acquired. Usually, compulsory acquisition occurs where agreement is considered unlikely to be reached within the timeframes necessary to secure the land.
7. The Chief Executive of LINZ is responsible for disposing of Crown-owned land. If Crown-owned land is not needed for another public work, the first obligation is to offer the land back to the former owner or their successors, unless a valid exception applies. For the Crown, disposal of public works land is also subject to obligations under Treaty settlements.

Annex Two: Summary of existing compulsory acquisition powers

Entity	Crown	Local Authorities	Crown + Local Authorities	Network Utility Operators	Housing New Zealand	Territorial authorities for 'urban renewal'
Act	Public Works Act + legislation which authorises the Crown to undertake the work involved (eg Government Roading Powers Act 1989)	Public Works Act + power of general competence under the Local Government Act 2002	Public Works Act (see s224)	Public Works Act + Resource Management Act 1991	Public Works Act + Housing Act 1955	Public Works Act + s189(1) of the Local Government Act 2002
Is the power limited to works that meet the current definition of 'public work'?	Yes	Yes	No (land is taken "as for a public work")	No (land is taken "as if the project or work were a government work")	No	No
Is there an offer back obligation (see s40)?	Yes	Yes	No	Yes (see s186(7) RMA)	No (provided land is disposed of for use as housing etc - see s15(2) HA)	Yes
Is control required (see definitions of government work and local work)?	Yes – over the construction/undertaking/ establishment/management /operation	Yes - over construction	No	No	No	No
Is financial responsibility required (see s16)?	No	Yes	No	Yes (see s167)	No	No
Is a public purpose required required (see definition of government work)?	Yes	No – but the work must be: • 'wholly or principally' for the benefit of the local authority's own district or region • within scope of the purpose and role of local government (see ss 11 and 12 LGA02)	No - but the 'undertaking' must be of both national and local importance	No	No	No – but the work must be within scope of the purpose and role of local government (see ss 11 and 12 LGA02)
Must the Minister or CE be able to show: • **The taking is reasonably necessary** • **Adequate consideration must be given to alternative sites, routes, or other methods of achieving the objectives (see s23)?**	Yes	Yes	Yes	Yes	Yes	Yes
Must the Minister or CE make a prior attempt to negotiate (see s18)?	Yes	Yes	Yes	Yes – note that the Minister of Lands acquires or takes land on NUO's behalf, and the NUO must pay the Minister's costs (and the compensation)	Yes	Yes