

Review of the

Public Works Act

Summary of Submissions

August
2001

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I am pleased to present this report summarising the outcome of the consultation on the *Review of the Public Works Act Issues and Options Public Discussion Paper*. The submissions will be important in helping shape better legislation through involvement at the earliest opportunity.

Public, Maori and stakeholder consultation on the review of the Public Works Act commenced in December 2000 with the release of the discussion paper. I extended the original 30 March deadline for submissions to 31 May 2001 in response to many representations seeking more time to co-ordinate group submissions and prepare substantive submissions on a review that includes some very complex issues. During the consultation period 17 hui and 6 public meetings were held around the country. The summaries of all these consultation meetings have been treated as submissions.



Overall, 278 submissions were received which is a good response for reviews of this type of complex and technical legislation. Interest came from New Zealanders as far afield as Canada, facilitated by the internet. A wide range of stakeholder groups made submissions ranging from bodies that exercise powers under the Public Works Act to individuals that have been affected by the legislation through the acquisition or offer back processes. These, together with the various professional and interest groups concerned with different aspects of the Public Works Act, bring valuable perspectives. I am particularly pleased with the thoroughness and detail of a large number of these submissions and with the suggestions for improving the legislation.

Two characteristics about the submitters stand out. The first is the high percentage of submissions from Maori, which was not unexpected given the history of public works legislation in alienating Maori land. This adverse historical association was made very clear to me at the hui that I attended at Waiwhetu and Orakei Marae. The second characteristic is the high percentage of submissions from representative groups or organisations compared to individual submissions.

Key areas such as the definition of a public work and who can exercise powers under the legislation, acquisition, compensation and offer back provisions, enforcement and compliance issues, and Treaty of Waitangi implications were the primary focus of the submissions. Strong views on these issues were put forward in the submissions. Whilst some views are common to particular categories of submitters there was considerable divergence on a number of issues. Consequently, a policy position on a particular issue that is universally acceptable is unlikely to result. However, the transparency of the review process and the robustness of the policy development process should assist in understanding the policy decisions that Ministers eventually make.

Some submissions identified issues relevant to the review that were not included in the discussion paper. These, along with the other submissions, will be taken into account during the policy development process. A number of submitters also raised matters outside the scope of the review which, in the main, relate to the responsibilities of other departments. These will be transferred to the relevant departments for their consideration.

When policy options have been developed and evaluated, Ministers will decide on the policy that will underpin the legislation. I note that a number of submissions asked for further involvement and consultation once policy proposals had been developed and this is a matter that officials are currently investigating. In any event, there will be further opportunity for public comment when the Select Committee considers the Bill.

Progress on the review will be posted on <http://www.linz.govt.nz>.

Finally, I wish to thank all those who participated in this phase of the consultation process by attending hui and public meetings and in making submissions on this important legislative review. Particular thanks are due to the officers of Land Information New Zealand whose hard work guaranteed the success of the consultation process and to the earlier input received from other government departments and agencies, as well as from stakeholders, in the preparation of the public discussion paper.

A handwritten signature in black ink that reads "Matt Robson". The signature is written in a cursive, flowing style.

Hon Matt Robson
Minister for Land Information

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1.1 Submission Process

In November 2000 Cabinet agreed to the release of a wide-ranging public discussion paper on the review of the Public Works Act 1981 (the Act) for public, stakeholder and Maori consultation. Consultation commenced in mid-December 2000 and was originally scheduled to end on 30 March 2001 but this was extended until 31 May 2001 following numerous requests to the Minister for Land Information.

A total of 278 submissions were received and included the summaries of 17 hui and 6 public meetings. A wide range of stakeholder groups made submissions including bodies that exercise powers under the Public Works Act, various professional and interest groups, through to individuals that have been affected by the acquisition or offer back processes in the legislation.

Two characteristics about the submitters stand out. The first is the high percentage of submissions from Maori relative to their percentage in the population. The second is the high percentage of submissions from groups or organisations compared to individual submissions.

On some key issues there was a consensus of views across all categories of submitter. More commonly, a range of views was expressed with a tendency for views to be polarised between users of the legislation and those affected by the legislation.

1.2 Definition and Use

The definition of a public work to be used in the legislation was seen as having far reaching implications for the future use of the Act and its potential impact on society. There was strong support from most categories of submitter for the definition to be linked to an essential work or a work in the public interest although views varied on the meaning of the terms “essential work” and “public interest” depending on the perspective of the individual or organisation. Users of the legislation generally opposed defining a public work in such a way because it could limit their flexibility in catering for the future needs of the community.

Who should have access to the powers in the Act (Crown, local authorities, private providers of public services) and the extent of those powers (compulsory versus negotiated acquisition) proved controversial. Many submissions considered that the facilitation of essential services and who benefits from the work (i.e. the public good) should be the focus rather than who provides the service or who has the power to do the work. There was considerable concern about the ability to adequately define what was a “public good”.

1.3 Acquisition and Compensation

The tensions between users of the legislation and affected landowners were evident in considering whether the power to compulsorily acquire land should be limited to specifically defined works. Over two thirds of all submissions on this section, especially those from Maori, favoured such a limitation. Many Maori also held a view that Maori land should not be compulsorily acquired under any circumstances. Opposition to this concept came mainly from users of the legislation as they saw a list as being too restrictive.

Users of the legislation considered the right of compulsory acquisition to be a critical part of public works legislation. Many saw continued access to the powers contained in the Act as being necessary to enable private providers to provide essential services. On the other hand, many of those affected by the legislation thought that private providers, as commercial entities, should not have access to the Act, and should have to enter agreements with landowners as with any other commercial transaction.

A number of hui and Maori submissions expressed the view that the powers of compulsory acquisition should be limited to the Crown because granting such powers to other organisations may mean loss of Maori rights under the Treaty of Waitangi. Others submitted that powers of acquisition must be limited to the Crown because of past abuses by requiring and local authorities. Furthermore, many submitters considered the status, use or significance of land should be taken into account when an organisation seeks to compulsorily acquire land. However, many users of the legislation considered there were currently sufficient checks and balances to ensure the appropriate use of these powers.

All categories of submitters were generally in support of acquisition by negotiation being an open market transaction rather than being set in legislation. This was seen to allow more flexibility when negotiating the purchase of land. Users of the legislation saw an advantage in speeding up the transaction processes and reducing both the need to invoke the compulsory provisions and overall transaction costs. Many submitters considered that negotiating the acquisition of less than a freehold interest (such as a lease or licence), or entering into a joint venture, was preferable to the compulsory acquisition of the freehold.

Those affected by the legislation considered that the currently prescribed level of compensation was inappropriate. Current market value did not take account of the sacrifice that a landowner made for the good of the country and solatium payments were considered to be too low and narrow in scope. Current market value was considered to be irrelevant in determining compensation for Maori land, as there is no market for Maori land on which to formulate a current value. Also, there is currently no provision for considering the spiritual value of the land or the owners' attachment to the land. The option of exchanging land for land acquired was attractive to Maori submitters.

Those affected by the legislation also sought compensation, in the event that their land was not acquired, for losses brought about by a proposed public work and costs incurred when approached regarding acquisition of their land. Users generally opposed any extension of compensation to people indirectly affected by their activities.

1.4 Disposal

Submissions were received from all major categories of submitters with Maori and users of the legislation being the most prominent. There was general agreement that the current provisions were in need of amendment in order to provide clarity and certainty.

Of note are the differences expressed between users of the legislation and those affected by it, particularly Maori. There was widespread support from users for the offer back provisions to become less onerous. Many felt the current provisions were too costly and time consuming to implement and they were in favour of streamlining the process as much as possible.

On the other hand, those affected by the legislation had diametrically opposed views to users when it came to the offer back provisions. Many affected parties wanted strengthening, rather than streamlining, of the offer back requirements and were generally supportive of any suggestions to remove exemptions. Maori had particularly strong views and wanted land to be offered back in all cases, preferably at less than current market value or at no cost. Some Maori wanted additional compensation because the acquiring authority had received the benefit of the use of the land.

One area where there was majority agreement across all categories of submitters was in the area of protecting former owners' rights. Both users of the legislation and those affected by it saw the benefit in having some form of memorial on the certificate of title in order to provide clarity, certainty and protection to both the former owner and the land holding agency when it came to disposal of the land.

Strong views were also expressed by all categories of submitters on transferring land held for an existing public work to another public work without invoking the offer back provisions. Again there were differences between users of the legislation and those affected by it. Users were very supportive of the current provisions while at the same time they recognised that where land was to transfer from the Crown to a local authority, the Crown's obligations to Maori needed to be clarified. Those affected by

the legislation, particularly Maori, were strongly against the continuing practice of allowing land to be acquired for one public work and, when the need for that work had finished, using the land for another public work. Many opponents to such transfers sought the return of the land to the former owner, that the former owner be consulted, or that there be a requirement for the new work to be assessed on its merits and not to go ahead simply because the land was available.

Having an open and contestable disposal process was viewed favourably by most submitters. Many felt that the focus on disposal should ensure the process adopted was fair and equitable in the particular circumstances, although Maori considered the principles of the Treaty of Waitangi should be paramount. There was also general consensus among submitters that surplus public works land should not be exempt from complying with resource consent requirements as there should be a "level playing field" where everyone is subject to the same rules and requirements.

1.5 Treaty of Waitangi Issues and Matters Affecting Maori

Many Maori submissions noted that public works legislation used for the development of New Zealand's infrastructure had resulted in considerable loss of Maori land and a number of these referred to historical Treaty grievances involving ancestral lands. The recommendations of the Waitangi Tribunal in relation to public works grievances were strongly endorsed by the Maori submissions. Inclusion of Treaty of Waitangi provisions is keenly sought by Maori (and also supported by a number of non-Maori) in the body of the Act (rather than in a preamble) to legislatively protect their interests. Maori consider that it should also be binding on all bodies exercising powers under the Act.

Overall, there was considerable consensus among Maori on the key issues. Many Maori are very concerned about protecting the remaining small amount of Maori land. Submissions were emphatic that no more land should be acquired, or only acquired in exceptional circumstances with absolute protection of wahi tapu. Leasing rather than acquisition of the freehold is preferred along with joint management of the public work. Compensation provisions in current legislation are considered deficient in that they do not take into account spiritual, cultural and social values that are associated with land, and the level of compensation is insufficient to purchase equivalent replacement land.

Maori consider that all land no longer required for the particular public work for which it was taken should be returned promptly to the former owners or their successors (in accordance with Maori custom), at less than market value or, preferably, at no cost.

Maori also considered that many institutions have worked against them in the past and they have little faith in Crown agents acting on their behalf in land acquisitions. Consequently, a continuing role by the Maori Trustee in public works legislation was not supported. However, if the role were to continue then any future involvement should be more circumscribed and focused on protection of Maori interests. In contrast, Maori view the Maori Land Court more favourably because of its specialist knowledge and understanding of tikanga, which they consider is lacking in the Environment Court. There was support for the Maori Land Court to be mandated and resourced to deal with all Maori land issues currently under the jurisdiction of the Environment Court.

The need for communication and consultation in administering the legislation featured strongly and Maori submitters also supported dual Maori and English notices relating to acquisition and disposal matters.

A number of non-Maori commented on this chapter of the discussion paper and expressed the view that all people should be treated equally, and that no provisions should be included in the revised Act that would apply only to Maori people.

1.6 Administrative Issues

Submissions on administrative issues included discussion of whether acquisition and disposal of land under the Act should be controlled centrally. The majority of those affected by the legislation, and some users of the legislation, considered that central control was a good safeguard for the interests of

landowners. In order to protect the public interest, it was also suggested that there be an independent body or tribunal to oversee public works activities and handle disputes.

Another issue raised was the need for a consistent approach on roading between the Public Works Act, the Local Government Act 1974 and the Transit New Zealand Act 1989.

Holding land acquired under the Act in a certificate of title in the land registration system was favoured by most submissions on this issue. The reasoning was that this would address compliance and enforcement concerns including the provision for protections (such as a caveat on the title) so that offer back processes were properly administered, particularly where land had transferred from the Crown to a local authority or to a private entity.

1.7 Additional Matters Raised in Submissions

Additional matters raised in submissions that were within the scope of the present review will be taken into account during the policy development or legislation drafting phases of the review. Also, a number of submissions raised issues outside the scope of the review, e.g. Treaty related grievances, Treaty interpretation, Public Works Act (non Treaty) grievances, local authority, roading and designation issues that are the responsibility of other departments. These will be referred to the relevant departments so that they can address any issues requiring attention.

2.1 Background

A comprehensive review the Public Works Act 1981 (the Act) is being undertaken to develop new legislation that:

- reflects changes in the social and economic environment relating to acquisition and disposal of land for public works;
- clarifies the rights and obligations of former and current owners of property subject to the 1981 Act;
- ensures that exercise of the 1981 Act powers, functions and duties is within a statutory framework that accords with Treaty of Waitangi principles;
- ensures adequate provision for non-Crown providers of public services;
- reduces the risk of incurring further liabilities; and
- make efficiency gains.

Land Information New Zealand is responsible for conducting the review.

2.2 Public Consultation Process

A public discussion paper was released in December 2000 and identified issues and options for consideration. It provided some background to the current Act as well as information on relevant legislation in other common law jurisdictions.

Almost six thousand copies of the discussion paper were circulated and it was also available on line.

The public consultation programme consisted of 17 hui and 6 general meetings held throughout the country between January and April 2001. The review and the meetings were widely advertised in newspapers, panui, various general and specialist publications, radio and television.

In response to requests, the Minister for Land Information extended the deadline for submissions to 31 May 2001.

2.3 Submissions

In total, 278 submissions were recorded. These are listed numerically in Appendix A and alphabetically in Appendix B.

Submissions were made on the standard form that accompanied the discussion paper or its on-line counterpart, or by letter (i.e. free form submissions) (Figure 2.1). They were received by post, or electronically submitted via the website or by e-mail (Figure 2.2). In addition, the summaries of hui and general meetings were recorded as free form submissions.

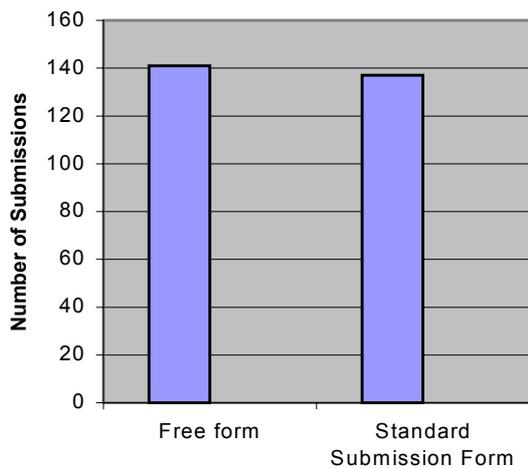


Figure 2.1: Submission type

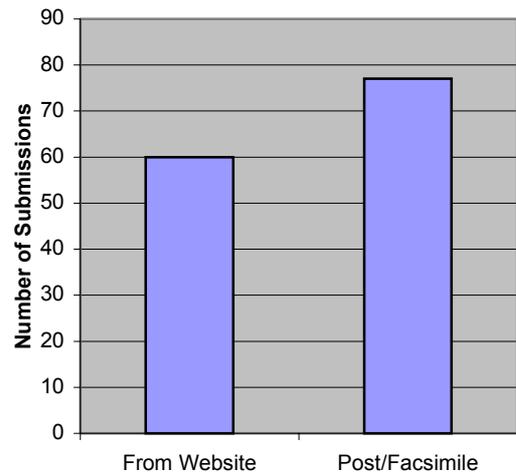


Figure 2.2: Method of transmission of the standard submission form

Each submission was formally acknowledged on receipt. The details of the submission were logged together with a unique identifying number. Submissions were then analysed to provide this summary report.

2.3.1 Submission Profile

A feature of the submissions is that a significant proportion do not address every issue in the discussion paper. Acquisition issues received the most responses, closely followed by disposal issues. The profile of submissions by key issue area is seen in Figure 2.3.

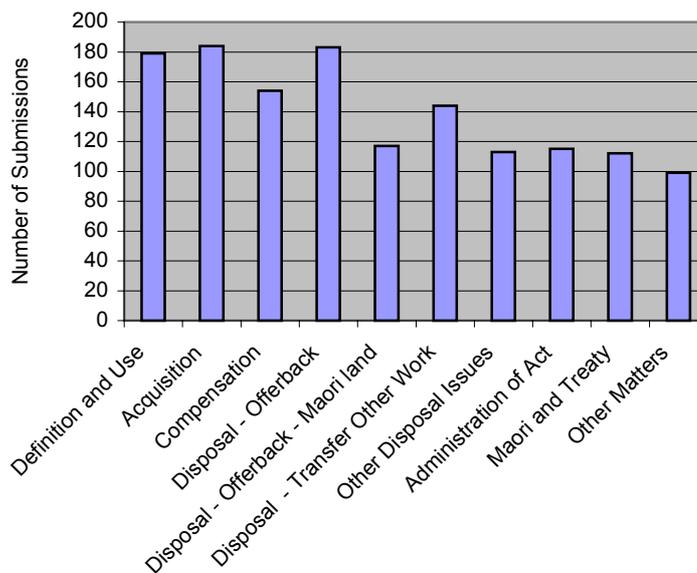


Figure 2.3: Number of submissions by key issue area

2.3.2 Submitter Profile

Submissions were received from a wide range of individuals and organisations. Over two thirds of the submissions came from groups or organisations representing anywhere from a few individuals to several thousand in the case of iwi submissions (Figure 2.4). However, as many organisations did not specify their membership numbers, weightings cannot be assigned to the views they expressed. When referring to submissions, where possible these have been identified as group or individual submissions to provide some indication of weighting, albeit imprecise.

Likewise, a number of assumptions have had to be made in identifying particular groups. For example, submissions were categorised as Maori submissions if they were from Maori land owners or had a hapu, whanau, iwi affiliation, or were from a Maori Trust Board or Ahu Whenua Trust, as were the hui summaries. Although it is possible for non-Maori to own Maori land, it is expected that such individuals would represent only a small fraction of the Maori submissions (and an even smaller proportion of Maori represented by those submissions). Equally, some Maori may not have chosen to identify themselves in any of the above ways and so would not be included in the Maori submissions category.

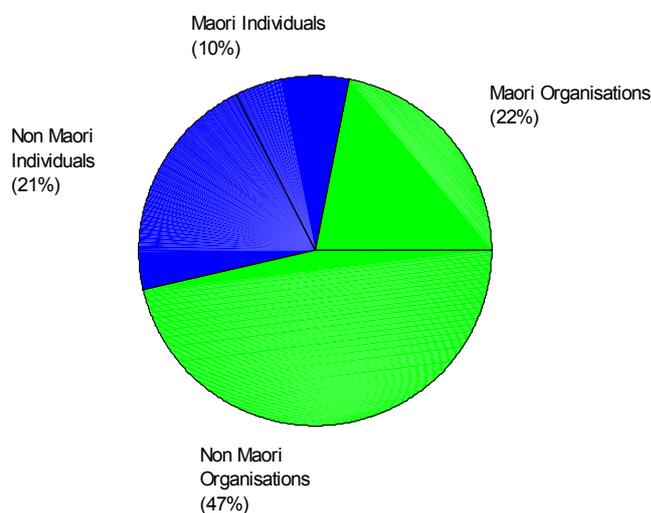


Figure 2.4: Submissions from individuals and organisations

Maori were well represented with 32% of the total number of submissions coming from individuals or organisations that represented Maori interests (as determined above). Over two thirds (68%) of these submissions were from organisations rather than from individuals. Although this is very similar to the percentage (69%) from non-Maori groups and organisations, the composition of these groups and organisations is quite different. Whereas Maori groups were largely representative of iwi, whanau and hapu or trusts, non-Maori groups comprised users of the legislation (local authorities, requiring authorities, government departments and Crown agencies), land professionals and environmental/regional groups (Figure 2.5).

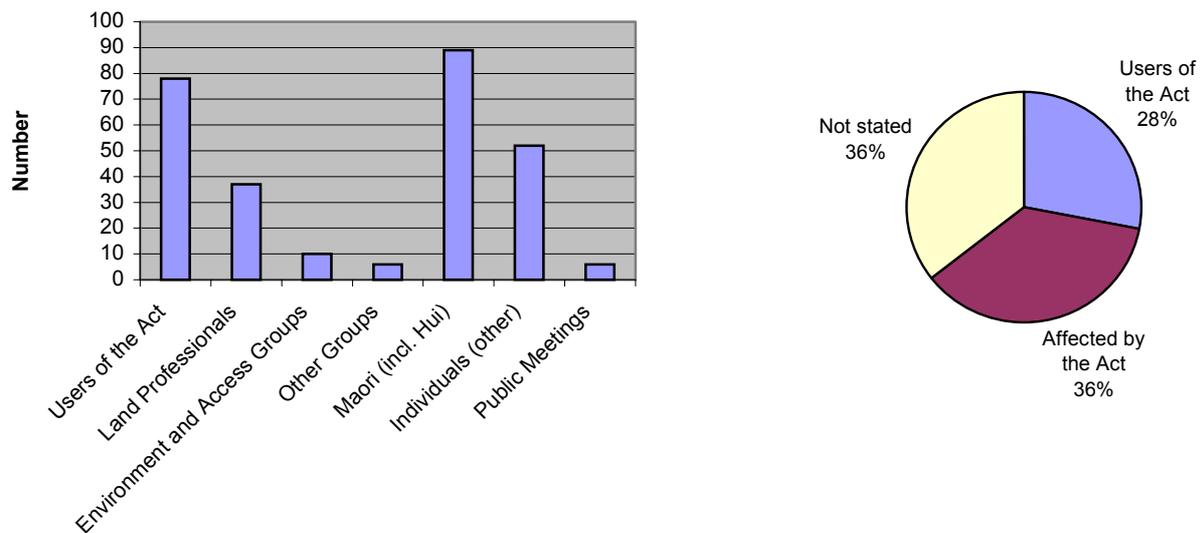


Figure 2.5: Submitter category and relationship with the Act

Submissions were concentrated in a small number of areas with almost 56% coming from three regions – Auckland, Waikato and Wellington. The South Island accounted for only 15% of submissions.

Table 2.1: Geographic distribution of submissions

Region	Number
Auckland	61
Bay of Plenty	25
Canterbury	17
Central Districts	4
Gisborne	7
Hawkes Bay	8
Manawatu	11
Nelson/Malborough	15
Northland	10
Otago	8
Southland	3
Taranaki	5
Waikato	38
Wanganui	2
Wellington	58
Overseas	2
Not Stated	4
Total	278

Of the 122 submitters who provided information on land ownership, all except one described themselves as New Zealand landowners. Where there was no further specification of land type, it has been assumed that this was general land. Of those that identified themselves as New Zealand landowners, 25% owned Maori land and a further 12% owned both Maori land and general land (Figure 2.6).

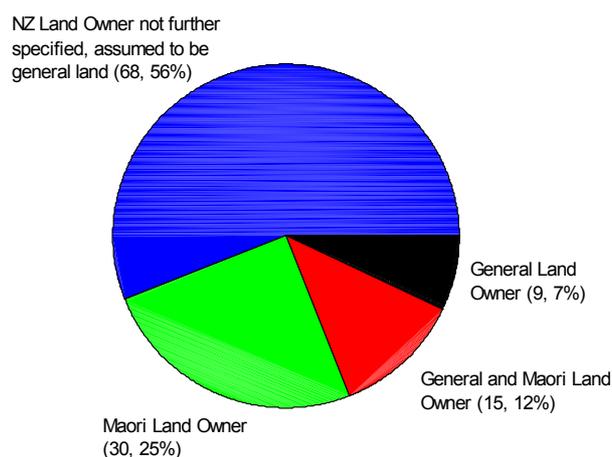


Figure 2.6: Land ownership type

Some submitters also provided further information on whether the land was rural, residential or commercial. There were 41 submissions from rural landowners. Of these rural landowners, 26 had had land acquired from them under public works legislation, 14 of whom were Maori. Residential landowners made 41 submissions, about half of whom also belonged in the above group of rural landowners. Only 13 commercial landowners made submissions and three of these owned residential and rural land as well.

A significant number of submitters (101) registered that they had been affected by the legislation. Where the type of involvement was further specified, acquisition was the most predominant as seen in Table 2.2. Only 3 out of 13 submitters who purchased former public works land did so by taking up an offer back. It is purely coincidental that the same number of persons received an offer back as purchased former public works land (Table 2.2).

Table 2.2: Type of previous involvement with the Public Works Act

Previous Involvement	Number
Had land acquired for a public work	62
Gifted land for a public work	11
Received an offer back of land	13
Purchased former public works land	13

Maori were the most affected by legislation with 63 of the 101 submissions coming from this category of submitter.

2.4 Report Structure

This report sets out the views received in response to the issues and options for the key areas raised in the discussion paper, and records the additional issues that were raised in submissions. Where views differ between the various groups of submitter, these have been reported to the extent permitted by the identifying data provided by the submitter. The purpose of the report is to faithfully represent the views expressed in the submissions and consequently the report does not comment on or evaluate the content of the submissions or the practicality of any suggestions.

The report is arranged in chapters and sections that broadly reflect those in the discussion paper. Key areas addressed include: the definition of a “public work”, who should have access to the Act, acquisition, compensation, disposal, issues of specific interest to Maori, and administrative issues. Where Maori submitters have a view on a particular issue, it is covered under the relevant key area and is also summarised in the chapter dealing with issues of specific interest to Maori. This summary chapter also includes submitters’ views on the recommendations of the Waitangi Tribunal on public works issues and on recognition of the Treaty of Waitangi in new public works legislation.

Direct quotes capturing the essence of themes that run through various submissions have been included. They appear italicised in the outside column, followed by the number of the submission, e.g. [56]. Actual numbers of submissions, individuals or organisations etc appear in round parentheses e.g. (278).

3 Definition of a Public Work

3.1 Overview

The definition of a public work was of great concern to many submitters. This is reflected in the large number of submissions (163, 59% of all submissions) from all sectors that provided comment on the definition. Submitter details and their relationship with the Public Works Act (the Act) are shown in Figure 3.1.

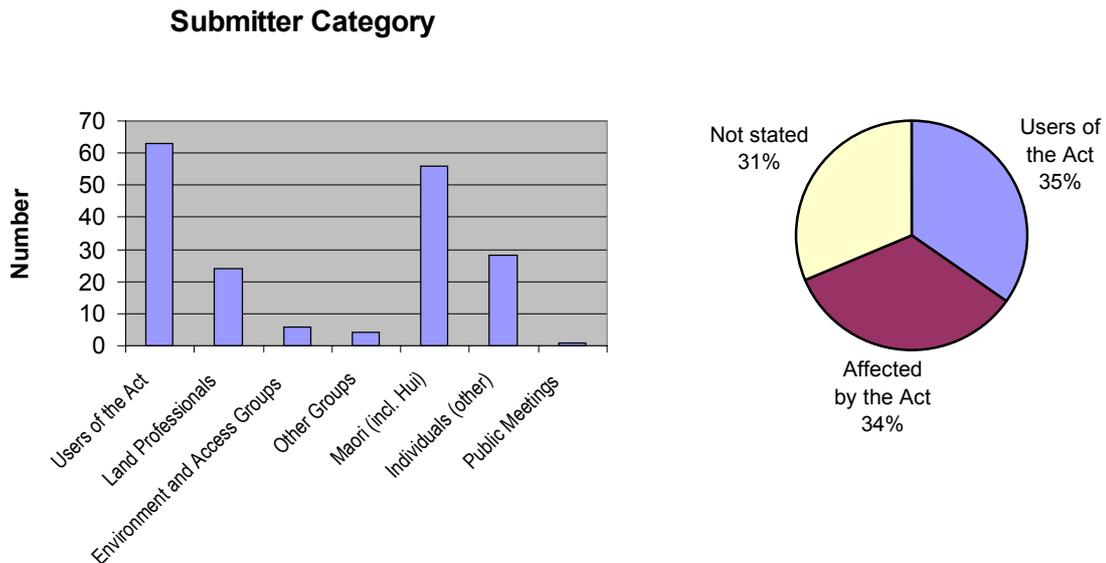


Figure 3.1: Submitter category and relationship with the Act (Definition)

The definition of a public work to be used in the legislation was seen as having far reaching implications for the future use of the Act and its potential impact on society. There was strong support from most groups of submitters for the definition to be linked to an essential work, or a work in the public interest. Many ideas exist on what the terms *essential* and *public interest* actually represent, depending on the perspective of the individual or organisation.

Users of the legislation made up the majority of submissions that opposed defining a public work in such a way. Many saw such a move as limiting their flexibility to cater for the future needs of the community.

Also of interest is the high number of submissions that were undecided as to whether they supported or opposed the concept. The reasons for this indecision are unclear, however what does come through in many submissions is that greater clarity of the definition is required to provide for certainty, both in the present and into the future.

3.2 Should Public Works be Defined as Essential or in the Public Interest?

The current definition of a public work includes any activity the Crown or a local authority is authorised to undertake. This broad definition may result in land being used for works that the general public may not see as being in the *public interest*. Submissions were sought on whether or not public works should be specifically defined to be *essential* or in the *public interest*.

"The emphasis needs to be on "essential" as opposed to "public interest", given the lack of certainty in determining what is in the public interest and what is not. So long as the definition of "essential" is clear then any non-essential work should fall outside the legislation and be subject to market forces." [142]

"Public works should not be specifically defined as essential works. The definition has to be inclusive and apply to any activities undertaken by local government that are "in the public interest" and "reasonably necessary" for communities." [80]

"Also the 'public interest' slant is detrimental and ignores the special constitutional place of Maori [in] the scheme of things as tangata whenua and a group afforded special rights under the Treaty. Public interest is loaded term that not helpful to Maori or groups that do not make up a majority. There should also be consideration of Multiple ownership of Maori [land] and when considering the public versus private right. Clearly where Maori land is concerned it is not one individual owner being affected in the 'public interest' but in many cases hundreds of owners and therefore it becomes a public interest versus a public interest. [223]

"It is important to preserve in legislation the meaning of what is essential or what is the public interest. The current legislation does not achieve this objective. Greater clarity with regard to what is essential or public interest work should be more clearly defined so as to set the scene" [265]

A bare majority of submitters, made up of those affected by the legislation, particularly Maori (one quarter), as well as some users of the legislation (one fifth), supported public works being defined as *essential* or in the *public interest*.

Of those who supported a definition, seven submitters from various categories of submitter including the New Zealand Business Roundtable supported public work being defined as both *essential* and in the *public interest*.

Twenty-four submitters from various categories, including Federated Farmers, supported defining the work only as *essential*.

Nineteen submitters from a variety of categories supported the work being defined as *in the public interest*.

A quarter of those who made submissions on this issue were undecided as to whether they supported or opposed the concept. This may be due to the confusing nature of the question, or to the lack of a clear definition of the terms *essential* and *public interest*.

Opposition to the proposal accounted for only a sixth of submissions, almost two thirds of which were users of the legislation. One user argued that these aspects of the work were decided by the process they had to adhere to in order to fund the project for which the land is to be acquired rather than define works as being *essential* or in the *public interest*.

Opposition to a definition based on the public work being *essential* came mainly from users of the legislation. Many favoured the retention of the status quo, which was seen to provide the necessary flexibility to cater for future needs of the community. Local Government New Zealand and a number of other groups supported this view.

Opposition to a definition based on the public work being in the *public interest* was small and generally centred on the perception that there is no clear definition of *public interest*. This definition was seen as being a potential source of conflict, particularly with private providers using the legislation. Another argument presented was that the *public interest* slant was detrimental to the special interests of Maori.

3.3 Other Issues on Definition

A number of other issues were raised about the scope of the definition of public work to be used in the revised Act.

As can be seen from the above comments a great deal of confusion exists as to the specific definition of *essential*, *public interest* and even *public work*. Many submitters sought clarity of the definition of these terms in order to provide transparency and certainty for both users of the legislation and those affected by it.

A number of different categories of submitter sought that a tight definition of public works be included in the Act, possibly in the form of a list. Others opposed such a rigid definition and were generally of the opinion that the definition should be as wide as possible.

It was proposed that the definition needed to be sufficiently broad to avoid having to amend the legislation to account for changing needs and technologies in the future, yet tight enough as to avoid possible litigation.

Alternative proposals include that:

- the definition should relate to the use of the land and whether the needs of the community are being met;
- emphasis should be on who benefits rather than who carries out the work;
- emphasis should not only be on the public good but also on a sustainable environment; and
- if the purpose of changing the definition of “public work” is to:
 - (a) limit or clarify requiring authorities’ ability to compulsorily acquire land; and/or
 - (b) limit or clarify the offer back obligations,then a better solution would be to amend those provisions directly. Changing the definition of public work was seen as a very indirect means of addressing perceived problems with the Act. The New Zealand Law Society supported this view.

“There must also be clear proof that there is wider community benefit and that disbenefits have been mitigated.” [210]

“... definition of public interest and public work must ensure that Maori interests are examined within a framework that is consistent with the Treaty of Waitangi principles and consistent with the intent of the Ture Whenua [Maori] Act.” [51]

“Te Atiawa believe iwi involvement in the process of developing a definition of “public work” and government work” is very important. As the Crown’s partner, Iwi should be involved in the decision-making process to determine: whether public work is necessary; whether public work is an essential service; and whether the Crown or a local authority should be allowed to use the Public Works Act to acquire the land in question.” [147]

A user suggested that the definition of public work must ensure that Maori interests are treated in a manner consistent with the Treaty of Waitangi and Te Ture Whenua Maori Act 1993.

A sentiment endorsed by Maori was that a process of consultation needs to be undertaken before land can be acquired, to identify whether the work is an *essential* service. Maori also considered that further consultation was required prior to any definitions being promulgated in a new Act.

4 Who Should Have Access to the Public Works Act

4.1 Overview

The need for a mechanism that enables the provision of public services to be provided by the Government through the Public Works Act 1981 (the Act) was recognised as beneficial. However, there was great concern expressed regarding who should have access to the powers in the Act and to what degree.

Support was high across all categories of submitter for the government to provide a mechanism for building essential services that the private sector can provide. Submitter details and their relationship with the Act are shown in Figure 4.1.

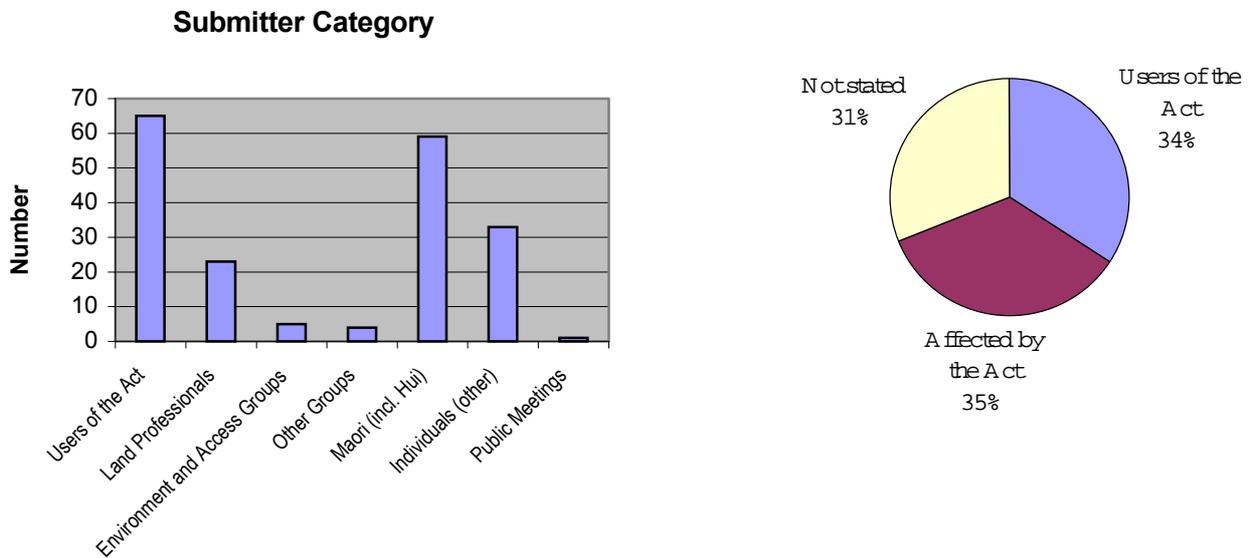


Figure 4.1: Submitter category and relationship with the Act (Access)

Widespread support was expressed for the emphasis to be placed on who benefits from the work i.e. “the public good” rather than on who has the power to do the work. Many users of the legislation saw such a concept as being appropriate in the current deregulated environment where private providers now provided many of the services previously provided by the government. The ability to adequately define what was a “public good” was a concern of many submissions, whether they supported or opposed the proposal. Users of the legislation saw any attempt to limit their current powers as being detrimental to their ability to carry out new public works.

The differences between users of the legislation and those affected by it were evident when the question of whether the power to compulsorily acquire land should be limited to specifically defined works. Over two thirds of all submissions on this section were in favour of such a limitation. Maori in particular were supportive of such a move. While a number of users also supported such a concept, the majority of opposition came from this category of submitter.

A number of hui expressed the view that the powers of compulsory acquisition should be limited to the Crown. Their fears were that by granting such powers to other organisations, Maori rights under the

Treaty of Waitangi would be lost. This view was also expressed by a number of other Maori along with a view held by many that under no circumstances should Maori land be compulsorily acquired.

Many users held the opposite view. They saw specifically defining works as being too restrictive with many expressing support for the status quo. A number of users considered there were currently sufficient checks and balances to ensure the appropriate use of these powers.

4.2 Access to the Act

The Act currently allows the Crown and local authorities to use the Act for any activity they are authorised to undertake. The Resource Management Act 1991 also allows any network utility operator (that is also a requiring authority) to request the Minister of Lands to consider compulsorily acquiring land on its behalf. Submissions were sought on who should have access to the Act.

"...In terms of private sector involvement in the provision of essential infrastructural services, the status quo should be upheld. Council strongly supports the Act's present provisions in this regard. Private providers should not be able to use compulsory acquisition powers independently of either the Crown or a local authority." [90]

A number of users supported the status quo. A land professional also supported this view but suggested that the process needed to be more streamlined. A number of users supported extending this provision to allow access to the Act for any organisation serving the interest of the public with some Maori submitters suggesting purposes that served the Maori community.

A landowner wanted the Crown to be the only agency to have access to the Act as local government had proven that it was not accountable. Many Maori also expressed this view.

This concern was also expressed at hui as the Crown has obligations to protect Maori lands under the Treaty of Waitangi that do not bind other entities. Maori therefore feared that by granting the power to compulsorily acquire land to organisations other than the Crown, their rights under the Treaty of Waitangi would be lost.

A hui also expressed concern about foreign investors (for example Telecom) having access to the Act.

4.3 Essential Services that the Private Sector can Provide

In many cases the private sector can provide the infrastructure to support a public work the Crown or a local authority requires. Often developers can enter into normal commercial leases with the Crown or local authorities if they already own the land without having to resort to the Act. However, while the commercial sector may be willing to develop a site for a public work, land may not be available in a particular locality. Submissions were sought on whether the government should provide a mechanism for building essential services that the private sector can provide.

Support was high for the government providing a mechanism. Of the 125 submissions that commented on this issue three quarters supported the concept, of which over one third were users of the legislation and a further one-quarter were Maori. A minority opposed the concept, over half being Maori.

"The status quo provides an adequate mechanism for private providers. It allows private providers to have access to the compulsory acquisition provisions in the 1981 Act, but also ensures that suitable checks are in place." [97]

Users of the legislation strongly favoured retention of the status quo whereby the power to compulsorily acquire land be available to the Crown, local government and those private providers who meet the current provisions under

the Resource Management Act. The New Zealand Law Society and Local Government New Zealand were also generally supportive of retaining the status quo.

One user suggested that an independent Crown agency working to clear criteria be charged with determining whether the works of private companies meet broader public interest criteria.

"The Government, through various legislation, is requiring line companies to reduce costs and improve operating efficiencies to pass on to the general public. If we cannot, as an absolute final backstop, use the PWA to obtain land for essential services then additional costs would be passed on to end users." [221]

There was solid support from a number of categories of submitter that the facilitation of essential services should be the focus rather than who provides the service. A number of submissions considered that without such a mechanism the ability to carry out new public works would be impaired. Federated Farmers supported the need for identified essential services to be provided for. A Maori Trust suggested such processes should include provisions and funding for tangata whenua input.

"Essential for cost analysis and delivery." [2]

It was suggested that the Crown facilitate, control, manage and/or own public utilities and the private sector could operate the utilities in the form of a contractual arrangement.

Opposition to this provision centred on it being the government's responsibility to provide essential services, a role not well suited to the private sector where a profit ethic prevails. Another submission considered it appropriate for the private sector to provide essential services. However it did not believe that the private sector should have access to the compulsory acquisition provisions of the Act.

"The Government should take responsibility for essential services. Private sector providers have a profit rather than a service ethic." [8]

One submitter affected by the legislation felt there was no justification for widening the powers to include private providers as they were making a success of their enterprises without that success being at the expense of landowners.

Generally speaking Maori opposed any mechanism that threatened the ownership of their land.

4.4 Limiting Compulsory Acquisition to Specifically Defined Works

As noted in Section 3.2, the current definition of a public work includes any activity the Crown or a local authority is authorised to undertake. Submissions were sought on whether the ability of the Crown or local authority to compulsorily acquire land should be limited to works that were specifically defined to be "essential" or in the "public interest".

The power to compulsorily acquire land was a contentious issue amongst submitters. Of the 136 submissions that made comment on the extent of compulsory acquisition powers, two thirds favoured limiting the compulsory acquisition powers of the Crown and local authorities to specifically defined works. Maori made up almost one third of the support for this proposal and users almost one-fifth of the support. Less than one quarter of submissions on this issue opposed such limitations and almost two thirds of these were users of the legislation.

A number of classes of submitter felt that limiting compulsory acquisition to a defined list of works would assist in curbing any excesses or abuse of power.

However, defining the extent of the limitations brought a variety of comments that largely reflected the arguments presented in Section 3.2. Suggested limitations to compulsory acquisition included:

- for essential works only,
- works in the public interest,
- for national states of emergency,
- in the best interests of the community.

One landowner put forward the view that compulsory acquisition should only apply to specifically defined works in exceptional circumstances. It was proposed that the implementation of the compulsory acquisition process should be authorised by an independent review body that would assess the proposed acquisition against a given set of criteria.

"Maori land with recognised characteristics and values should be exempt from all modes of acquisition under the Public Works Act – even if the owners are willing." [263]

From a Maori perspective, one owner of Maori land proposed that such works should be defined in line with common law expectation. One Maori Trust suggested there needed to be a better mechanism for negotiating agreement rather than providing for compulsory acquisition. Another two owners of Maori land shared the view that, to be consistent with the Treaty of Waitangi, the ability to compulsorily acquire be balanced by tangata whenua input. However, Maori generally considered that under no circumstances should Maori land be compulsorily acquired.

"The ability to compulsorily acquire needs to be retained for all public works to achieve acceptable timeframes and costs for the project." [91]

Opposition to limiting the ability to compulsorily acquire land in this manner was high among users of the legislation. A number considered that there was a high risk of a specific list omitting some of the powers of acquisition in other enabling statutes. The New Zealand Law Society supported this view. Others, including the New Zealand Law Society expressed support for the status quo. One user saw the proposed provision as being too restrictive. Some felt that the end result could be an increase in the costs of works not listed in the legislation.

Local Government New Zealand advocated that if a community decided that it wants the local authority to undertake an activity, then that activity should be deemed to be a public work. They further suggested that the test of whether something is a public work should be threefold:

- that a local community had determined that the local authority should undertake the activity;
- that the work is "reasonably necessary" for the local authority to undertake; and
- that the work is "in the public interest".

4.5 Use of the Act to Acquire Land for any Authorised Activity

Submissions were sought on whether it was better to retain the status quo whereby the Crown or local authority can use the Act to acquire land for any activity they are authorised to undertake.

"The status quo has the very real advantage of allowing flexibility for the Crown and Local Authorities to operate effectively, while still having appropriate checks and balances within the system to ensure against the abuse of the powers of compulsory acquisition." [97]

Support and opposition to this issue was fairly evenly divided among the 138 submissions that provided comment.

The status quo was strongly supported by users of the legislation who made up almost half of the total support. Local Government New Zealand and the New Zealand Law Society also supported the retention of the status quo.

Many of these users considered that sufficient checks and balances currently

exist to ensure appropriate use of the powers. This view was also held by the New Zealand Law Society and Local Government New Zealand.

A number of other categories of submitter also supported the continued use of the Act by the Crown or local authorities to acquire land for any activity they are authorised to undertake. Many provided support subject to various qualifications, which included:

- compulsory/independent environmental impact reports;
- offer the residual land back after completion of the works;
- iwi consent to activity;
- that the work is in the public interest;
- that acquisition is for an essential work;
- precise definition in the Act of any activities that are in the public interest;
- meeting a very severe test;
- compulsory acquisition only where the work is essential and alternative land cannot be brought; and
- imposition of additional requirements to enable the appropriate judicial authority to impose conditions where the requirement is not site specific or is predominantly commercial.

Maori (including eight hui) were generally opposed to the status quo. A number of Maori groups opposed the status quo on the basis that Treaty interests were not being protected. This view was supported by two hui, which considered that land taken by a local authority was no longer available for Treaty settlements. Along similar lines, two hui based their opposition on grounds that utility companies/network utility operators should not have access to the Act. Other hui went further and considered the power to acquire land under the Act should exclude local authorities. One Maori Trust supported this view and considered that the Crown should be the only authority to take land under the Act.

Other hui were suspicious of local councils and considered that they were not receptive to discussion in contrast to the Crown. While one Maori Trust felt that access to the Act should be on a merit system, with each acquisition considered on a case by case basis subject to strict criteria.

A number of submissions from other categories of submitter also opposed the status quo. Some required the access to be limited to works that were essential or in the public interest. Federated Farmers also held this view. Another submitter affected by the legislation considered the current environment in which the Act is operating is completely different to that when the last major review of the Act occurred. The submission noted that a user pays environment now exists and that it is appropriate that land for non-essential works is purchased on a willing buyer-willing seller basis without recourse to the Act.

4.6 Emphasis on Who Benefits from the Work

The current definition of a public work emphasises who has the power to undertake the work. With private providers increasingly supporting the public work framework, emphasising who has the power is perhaps less appropriate now. If the concept of a private provider is to continue, ultimate ownership of the public work may be of lesser importance. Submissions were sought on whether the emphasis would be better placed on who benefits from the work i.e. “the public good” rather than on who has the power to do the work.

Support for the emphasis being on who benefits from the work rather than on who has the power to do the work, was high – particularly among users of the legislation and Maori groups. Of the 146 submissions that commented on this issue, 64% expressed support and 14% opposed the notion. Over a quarter of this support came from users of the legislation with similar support coming from Maori. Almost half of the opposition was from Maori. Of interest is the fact that a further 14% neither supported or opposed the concept. Half of these submissions were from users and a third from Maori.

"The objective of the legislation should be on attaining appropriate 'public good' outcomes irrespective of whether this is achieved by public or private providers. Those affected often see the Council as the villain – not appreciating why Council has to acquire their property." [30]

Many users were in favour of there being an outcome focus that looked at the nature of the work rather than the ownership. This view was also held by a number of other categories of submitter. Many users of the legislation felt that such an approach was appropriate in the current deregulated environment where private providers now provide many of the services previously provided by the government. A number of land professionals also supported this view.

It was suggested by a number of supporters of the concept of who benefits, that there needed to be an appropriate Crown agency to maintain a gate-keeping role. Other supporters considered the public good aspect was only appropriate for "essential" works. Federated Farmers and a Maori Trust also held this view.

"The definition of 'public good' could cause difficulties and lead to a more subjective test than at present." [176]

The ability to adequately define "public good" was a concern of many submitters, including the New Zealand Law Society and Federated Farmers, whether they supported or opposed the proposal.

A supporter of the proposal who was affected by the legislation considered that the benefits needed to be wider than just "public". They considered that it should be for the good of a sustainable environment. A Maori Trust and a land professional felt there were accountability issues that would need to be addressed.

Opposition to the proposal was generally low. As noted above, a number of opposing submissions held similar views to those that supported the proposal. In addition, a number of Maori Trusts required that further discussion/consultation be held. A number of other Maori representative groups suggested that the emphasis would be better placed on who loses as a result of the enactment of the Public Works Act.

One hui suggested that private organisations and local bodies should not have access to the acquisition powers in the Act. It was further noted that local authorities covet Maori land and resent the Treaty of Waitangi. Another Maori Trust felt that with the large number of "greens" etc many essential works would not get done as those interest groups would veto the work.

"There should be consideration of the population that will benefit and of the statutory powers of the initiating body." [207]

A number of categories of submitter including Local Government New Zealand neither supported or opposed the proposal that the emphasis would be better placed on who benefits from the work rather than on who has the power to do the work. A number of these submissions felt that both the public good and who has the power to do the work needed to be considered.

A number of users considered that the existing provisions of the Act and the Resource Management Act were appropriate to ensure both public good and power to act are addressed. A number of users also considered that using public interest as the sole criterion would be undesirable. They, and Local

Government New Zealand, considered that this could result in a number of non-public work type activities using the Act because they met someone's definition of a public interest e.g. works undertaken by charitable organisations. In contrast, one user of the legislation suggested that the current definition of a public work needed to be expanded to include the "public good element".

4.7 Place of Market Forces

Feelings were mixed as to whether it would be appropriate to allow market forces to dictate the acquisition and construction of works that fall outside a specific definition of public work. Of the 117 submissions that made comment 41% supported the concept and 43% were opposed. Almost one third of the support was from users of the legislation and over half of the opposition was from Maori with a further fifth from users of the legislation.

The diametrically opposed views are illustrated by a Maori land owner who submitted that market forces should have no rights at all in any discussion with Maori in contrast to a land professional who suggested that market forces should dictate all works.

A number of users favoured the use of market forces where the work falls outside a specific definition. This view was also held by a rural landowner.

A number of categories of submitter considered the definition of "essential services" to be crucial for this approach to work, with the definition needing to be broad enough or flexible enough to cater for future needs and exceptions. One user supported the proposal provided it only applied to non-Crown/local authority works. The Natural Gas Corporation supported the proposal subject to a test of fair and reasonable compensation.

"The definition of essential services becomes crucial if this approach is adopted. The definition must be broad enough to encompass advances in technology and essential services, and allow for the introduction of new types of work over time." [119]

The use of market forces where the work falls outside a specific definition was seen by a rural landowner as ensuring more accountability in terms of the inappropriate threat of the coercive powers of the Act that sometimes prevails.

Support for the concept was voiced by a small number of Maori, provided the activity was undertaken through a joint venture or leasehold title rather than purchase of the freehold. One Maori landowner, while not supporting the concept, provided comment that it should only occur if the iwi of the area agreed.

Many users of the legislation were quite strong in their opposition to the concept of allowing market forces to dictate acquisition/construction of works that are outside a specific definition. A number of users and Local Government New Zealand were opposed to any specific definition of a public work.

Two users considered that it was inappropriate to remove provisions enabling governments to construct public works if they deem them necessary. Along the same lines, another felt that one of the roles of local and central government was to intervene when the market was failing to provide.

One user felt such a provision was not necessary as, at present, if a public work was not reasonably necessary then market forces would dictate the acquisition. A land professional noted that market forces could lead to legitimate approaches to central and local government to take initiatives and

use the Act's powers. This submission considered that it would be wrong in principle for powers to be used for mainly "private" advantage or profit.

One Maori landowner opposed the concept on the basis that abuses ensuing from the misuse of the Act in the past have in many cases yet to be addressed to the satisfaction of those affected, namely Maori. This submission noted that it had been far too easy for government and local bodies to hide behind the Act. A Maori Trust considered that the rights or wrongs of such an approach would depend on a number of factors regarding need, long-term viability, purpose etc. If it was to be included at all it should be on a case by case basis subject to strict criteria.

A number of arguments were mounted for not allowing market forces to dictate the acquisition/construction of works outside a specific definition and included:

- sole reliance on market forces may make the cost of providing some services prohibitive;
- private providers (the market) are profit orientated;
- few people benefit at the expense of many;
- fear of private companies gaining access to the powers of compulsory acquisition;
- complexities relating to Maori land mean that more thought is needed; and
- abuse, e.g. Casino Licensing Authority ignoring local majority wishes.

"Market forces rarely dictate policy for the good of many, only for a few." [177]

4.8 Other Issues on Who Should Have Access

Other issues raised regarding who should have access to the Act included:

- the need for better linkages between the Act and other related legislation. Examples include the Resource Management Act 1991 and the Reserves Act 1977;
- new legislation should be sufficiently robust to allow projects to be implemented under schemes such as build, own, operate and transfer (BOOT); or build operate and transfer (BOT); and
- exclusion of reserves, parks or scenic reserves from the Act.

5.1 Overview

The right of compulsory acquisition is a critical part of the Public Works Act 1981 (the Act) for users of the legislation. Users, including requiring authorities (network utility operators) and local authorities saw continued access to the powers contained in the Act as being imperative for private providers to be able to provide essential services. However, many of those affected by the legislation saw a need for a transparent process, with public consultation, to provide for network utility operators to become requiring authorities and use the Act. Many also thought that private providers, as commercial entities, should not have access to the Act, and should have to enter agreements with landowners as with any other commercial transaction. Submitter details and their relationship with the Act are shown in Figure 5.1.

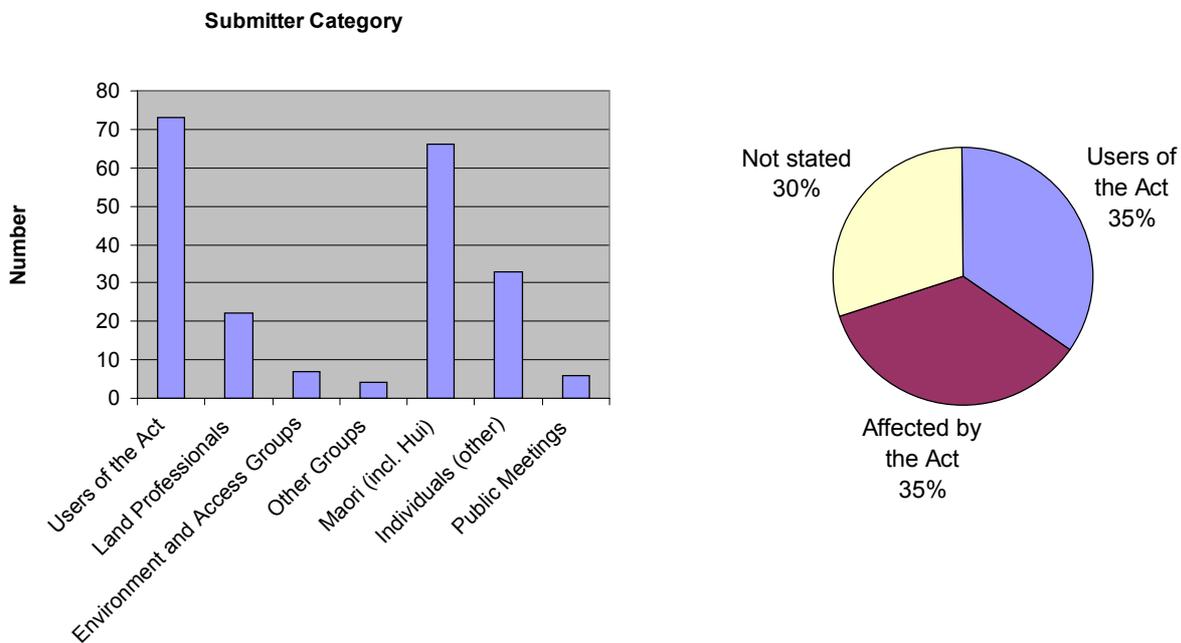


Figure 5.1: Submitter category and relationship with the Act (Acquisition)

Those affected by the legislation tended to consider that their interests in the land would be better protected if the Crown retained control of land compulsorily purchased on behalf of such agencies.

A process whereby landowners can object to each compulsory acquisition through the Environment Court was supported by landowners, who considered that the Environment Court afforded them some protection. Users of the legislation considered that they should only be required to address the issues once in the Environment Court where there is a lineal development. Otherwise, use of this process for every acquisition was costly and time consuming once it had been decided that the land is needed.

Those affected by the legislation, especially Maori, generally considered that compulsory acquisition of land should be limited to works specifically defined in legislation or that tighter controls on those who acquired land, along with reviewable processes, were necessary. Users of the legislation were generally opposed to a tightening of the current regime.

Approximately 80% submissions on this topic agreed that status, use or significance of land should be taken into account when an organisation seeks to compulsorily acquire land.

The majority, from all categories of submitters, considered that negotiating the acquisition of a less than freehold interest, or entering into a joint venture, was preferable to the compulsory acquisition of the freehold.

All categories of submitters were generally in support of acquisition by negotiation being an open market transaction rather than set in legislation. This was seen to allow more flexibility when negotiating the purchase of land, which would speed up transaction processes and reduce the need for the compulsory provisions to be used, thereby reducing overall transaction costs.

In order to protect the public interest, it was suggested that the process of acquisition of land for public works be subject to judicial review, or that there be an independent body or tribunal to oversee public works activities.

5.2 Acquisition by Agreement

5.2.1 Alternatives to the Purchasing of Freehold for a Public Work

When acquiring land for a public work, it is currently possible to acquire less than a freehold interest. The provision could be widened in new legislation to the purchase of a right to occupy or entering into a joint venture agreement with a landowner. This would enable landowners to continue to hold an interest in their land.

160 submissions commented on the concept of acquiring a less than freehold interest or joint venture by negotiation rather than purchasing freehold interests. The majority from all categories of submitters expressed strong support, and a minority expressed opposition to the option.

The supporters considered that this option was efficient and beneficial to all parties as the landowner would be able to retain ownership and the acquirer would not have to spend more money than necessary to conduct their activities. Benefits were also seen to come from the flexibility in the acquisition process in terms of cost and time that this option would introduce.

"The provisions should be broadened to allow the acquisition of rights, leasehold, strata, or other less than freehold interest to enable owners with an emotional or cultural interest in the land to retain an attachment to that land." [155]

"...[T]he provisions could be widened to allow joint venture agreements with landowners. However, this shouldn't allow the landowner to derive a benefit from the public works if they do not have an interest in the end use. [...] There needs to be more flexibility in negotiating agreements, in much the same way that the Resource Management Act provides for 'avoiding remedying or mitigating' adverse environmental effects." [249]

Maori welcomed a provision to acquire less than freehold title by agreement as they saw it as a way of protecting traditional Maori interests in the land and also ensuring their commercial base was not taken away. They consider that the Crown does not need to own the freehold of the land in order to provide for the public work, which could be achieved by leasing the land. In Maoridom land is linked to ancestors and guardianship and should not be passed out of Maori control.

However, users of the legislation, along with Local Government New Zealand and the New Zealand Law Society, noted that provision currently exists to enable acquisition of such an interest, if it is desired.

A range of other categories of submitters considered that the acquiring authority should retain the discretion to acquire land at the level of interest they deem most appropriate to the specific situation, and that this flexibility should not be restricted by legislation.

Arguments raised in opposition to acquisition of a less than freehold interest

were that the latter allowed for a “cleaner”, transparent transaction that provided certainty for all parties, with lower transaction costs.

A range of categories of submitters expressed concern over the potential pitfalls and complications that may arise if a less than freehold interest was acquired. Issues identified included commercial liability, occupational health and safety issues, and tenure of lease if the project was long-term and/or the project finished before the lease expired. It was suggested that guidelines would be needed to address these issues.

5.2.2 Method of Acquisition Set in Legislation

Submitters were asked whether, where there is a negotiated agreement to acquire land, the method of acquisition should be set in legislation or be an open market transaction to provide more flexibility in negotiations. Comments were provided in 113 submissions and a majority of submitters opposed the method of acquisition by negotiation being set in legislation. Many considered that a legislated process would be too restrictive and unable to reflect changes over time.

A majority of submitters, both users and those affected by the legislation suggested that clear guidelines would result in fairness, clarity and consistent administration.

5.2.3 Method of Acquisition an Open Market Transaction

Submissions were heavily in favour of acquisition by negotiation being by an open market transaction, with 75% of submissions favouring this option. Support came from all categories of submitter and included Local Government New Zealand. Federated Farmers argued that negotiations must be unconstrained, as with normal commercial transactions.

“The key principle should be the reasonableness of the agreement and it should rely on existing contract law principles to protect both parties.” [252]

The ability to pursue a purely open market transaction outside the Act was also seen as favourable by some landowners and a government agency, as the threat of the powers of the Act has influence during negotiations.

Opposition to open market transactions was based on the potential for abuse and lack of transparency in the use of public money.

5.3 Compulsory Acquisition

5.3.1 Limitations on Compulsory Acquisition

The 1981 Act originally limited compulsory acquisition to a defined number of public works. However, the scope was widened in 1987 to include all public works. If compulsory acquisition was limited to works that legislation defines, special legislation would be required where the work is outside a prescribed list. This approach would mean that Parliament as a whole decides what works are in the public interest.

More than half of the 143 submissions that provided comment on whether compulsory acquisition of land should be limited to works specifically defined in legislation supported the concept. The majority of supporters were those affected by the legislation, including Maori landowners. They agreed that works outside the definition of a public work in the legislation should require a

"Essential work concept should be put back into the Act. We obviously don't consider Recreation and Open Space as a reason for taking someone's land & business from them. Any Act that gives the power to any organization to force them to sell should only be used in the most extreme circumstances." [145]

"The use of specific acts of Parliament would open projects up to politics at a national level, when the issues may be local." [268]

"Legislative solutions may not be able to keep place [sic] with technological change or commercial time horizons for projects." [55]

specific Act of Parliament. Such legislation is standard procedure in the cases of defence works and major arterial routes and provides a monitoring system for any new works outside the defined works.

Others submitted that there should be tighter controls on the use of compulsory acquisition (for example by further restricting the criteria to be a requiring authority) and that it should only be used as a last resort and in the national interest.

Many went further seeking that there be no compulsory acquisition under any circumstances, a stand favoured by Maori. Maori also considered that when Maori land is proposed to be acquired, much thought, consideration and negotiation between the Crown and tangata whenua should occur.

Less than one third, mainly users of the legislation, were opposed to specifically defining those works for which land can be compulsorily acquired. Users of the legislation saw the current limitations on compulsory acquisition as a satisfactory mechanism that enabled, rather than restricted, the present and future needs of communities to be met. Others argued that given the difficulty in defining the scope of a public work such a limitation would prove to be very costly, both financially and in terms of time. The appropriateness of the current provisions was reflected in the infrequent use of the power to compulsorily acquire. Many, therefore, favoured the status quo.

5.3.2 Land Status or Significance Considered

Submitters were asked to consider whether it was appropriate to make distinctions based on the type, nature or characteristics of the land that is proposed to be taken. For example, some private land may be of such significance that it should only be taken as a last resort. In other cases, the present use of the land might mean that other land should, if possible, be sought in preference for the proposed public work.

"... [S]pecial protection should be accorded [to] Maori lands, which have special highly significant heritage sites. These warrant special legislation and Maori will need to determine the appropriate criteria to enable such legislation to be incorporated in the revised Act." [93]

Approximately 80% of 143 submissions agreed that status; use or significance should be taken into account when an organisation seeks to compulsorily acquire land.

A large portion of the support came from Maori. Arguments presented centred on the special relationship that Maori have with their land, the significance of which is priceless, and to ignore such values would be in breach of the Treaty of Waitangi and/or Te Ture Whenua Maori Act 1993. Others went further to say that Maori land should not be compulsorily acquired under any circumstances.

"Criteria already exist in existing case law for determining the extent to which such matters are taken into account. It may be appropriate to consider extending these to provide specifically for a higher threshold to be satisfied with respect to specific classes of land, eg Maori Land or areas with significant conservation values." [82]

Significant characteristics suggested by others, including many local authorities included:

- cultural/spiritual;
- historical/heritage;
- archaeological;
- environmental/ecological;
- reserves;
- recreational;
- importance to communities, and
- commercial significance.

Of the submitters that disagreed, some proposed that the justification for compulsorily acquiring land for essential public works does not depend on the status or significance of the land and that some works are site specific. It was also suggested that particular status, significance or use be reflected in the compensation paid to the landowner. Other points raised regarding special considerations included:

- recognition of classes of land status or use would be beneficial when it came to negotiating with landowners;
- catering for land status and use may render some site specific works as non-viable; and
- the same process should apply to all land and the process needs to be straightforward.

"Land of "significance" within the meaning of the Resource Management Act [...] should not be a consideration in acquisition. Those factors could well affect the price to be paid as compensation." [266]

5.3.3 Further Issues on Compulsory Acquisition

Further issues raised regarding compulsory acquisition not covered in other sections included:

- the Business Roundtable suggested that a judicial review of the process, rather than prescriptive legislation, should provide a mechanism for ensuring that taxpayers and ratepayers interests were properly protected;
- a requiring authority considered that the Crown should not be able to acquire land compulsorily and then profit by on-selling the property at a higher price to a private company;
- a land professional suggested that, before land can be compulsorily acquired, there should be a "pause and consider" requirement to ascertain that there is no reasonable and practicable alternative; and
- a government agency considered that users should be able to have the power to determine an essential work having regard to the nature of their business.

5.4 Private Providers

5.4.1 Options for Meeting Land Needs

5.4.1.1 Compulsory acquisition by requiring authorities through the Resource Management Act

Currently the Resource Management Act 1991 determines the criteria for a network utility operator to become a requiring authority and, consequently, who can request the Minister of Lands to invoke the compulsory acquisition processes on their behalf. This process is linked into the designation process also managed under the Resource Management Act. There is public consultation when considering the designation process but not when the Minister for the Environment considers whether or not a network utility operator should become a requiring authority.

132 submissions commented on whether network utility operators should continue to have access to the power to compulsorily acquire land through becoming a requiring authority under the Resource Management Act. Overall, opinion was equally divided, with mainly users of the legislation agreeing that network utility operators should continue to have access, and mainly landowners (particularly Maori) disagreeing.

"With the privatisation of rail/energy/roading/telecommunications/airport/harbour uses it is important for the requiring authority provision to continue as a matter of public interest." [233]

"Provided strict criteria established for who can become a requiring authority and these are equitably applied to all competing private sector service providers..." [88]

Requiring authorities argued that deregulation has required non-public authorities to provide public services. Private providers should therefore be entitled to rely on the same powers as public agencies. Current users of the legislation consider that sufficient checks and balances exist within the present Resource Management Act to ensure fairness and avoid abuse of power. The New Zealand Law Society would like sections 186 and 197 to be clarified as to the steps required to be taken by network utilities. Some submitters considered that the focus should be on the work being in the public interest rather than who carries it out (also reflected in Section 4.6).

Most opposition to private providers having powers of compulsory acquisition came from landowners. It was considered that private companies should enter into agreements with landowners as they would in any other commercial transaction. A Maori Trust and a hui shared the opinion that private providers should not have the power to compulsorily acquire land on the grounds that the traditional and customary land ownership rights of Maori would not be protected.

Other general land and Maori land owners considered that consultation throughout the process would be beneficial to reaching agreements over acquisition, and some suggested that any proposed work should be subject to public notification to allow public input.

5.4.1.2 Compulsory acquisition by the Crown and leasing to private providers

Submitters were asked to consider whether, where the Crown needs to compulsorily acquire an interest in land to support a requiring authority, the Crown should retain the interest in the land and lease it to the requiring authority. Comment was provided in 103 submissions on a scenario whereby the Crown uses its powers to compulsorily acquire land on behalf of a requiring authority and subsequently leases the land to the authority for the duration of the work. Just over half, from a number of categories, supported the idea.

Positive arguments were presented in favour of this provision including:

- all ongoing statutory obligations would remain with the Crown, especially section 40 provisions;
- allowing multiple use of strategic land;
- protection of Maori land ownership;
- the privilege of pre-emptive purchase must solely benefit the state representing the community; and
- the Crown would bear the acquisition and lease administration costs (as viewed by a requiring authority).

"This option may assist the Crown where land taken is strategic in either its location for various service providers, or in terms of its intrinsic or cultural value." [268]

Arguments opposing this concept centred around the potential administrative difficulties including:

- ongoing costs;
- liability issues;
- risk to the Crown;
- dealing with failed leases;
- competing interests;
- corruption;

"The desirability of certainty in the allocation of property rights suggests that it would be better for the Crown to transfer freehold ownership to a requiring authority outright rather than incur the complexities and uncertainties of a lease." [107]

- funding of the acquisition remains with the requiring authority and not the Crown; and
- dealing with land for which the purpose has been completed but the lease is yet to expire.

A number of submitters, mainly government agencies and local authorities, supported the transfer of freehold ownership to the requiring authority only if a caveat or memorial was placed on the title to protect the rights of the former owner.

“... [T]here should be a mechanism for noting the certificate of title for the land to ensure that any offer back obligations are complied with.” [137]

Another government agency questioned the rationale behind compulsorily acquiring land only for it to subsequently be leased. They argued that if the freehold title was acquired it would be reasonable to assume that the alienation from the owner was intended to be permanent and therefore the creation of intervening leasehold estates should not be necessary. This position was shared by others who saw that it would be appropriate for the landowner to receive the market rental for the lease, rather than the Crown.

A number of submitters saw the option of the Crown leasing compulsorily acquired land to an authority as being best determined on a case by case basis, dependant on the specific circumstances of the individual case.

“The ownership of land is a decision to be made on rational grounds. Leasing may be appropriate in some cases...” [233]

5.4.2 Competition Among Private Providers

5.4.2.1 Codification of the selection process

In future, a number of competing requiring authorities may wish the Crown to acquire land on their behalf. A private provider, which is able to request the Crown to acquire land on its behalf, may have an unfair advantage over other providers without this ability.

Comments were received in 66 submissions on whether the selection process should be codified where competing requiring authorities want the Minister to use the compulsory acquisition provisions of the Act. The majority, being both users of the legislation, and those affected by the legislation, agreed. They considered that codification of the relevant criteria would provide certainty and a clear, transparent, equitable and co-ordinated process.

“Equity in administration which promotes competition. ‘Level playing field’ where possible.” [88]

Those opposed to codification of the selection process considered that it could result in greater administration costs for the Crown, commercial losses for the requiring authorities and reduced flexibility.

“If implemented there would be high administration costs involved for the Crown. A formal procedure would significantly reduce the flexibility of the Minister to make an appropriate decision based on the circumstances of the particular case.” [192]

Local authorities and Local Government New Zealand considered this to be an issue of formal long-term planning and development involving communities, the Local Government Act 1974 and the Resource Management Act 1991.

5.4.2.2 Existing network developments made available to private providers

Submitters were asked to consider whether existing lineal developments could be made available to any new network provider to enable competing providers to share a common corridor. This issue attracted 99 submissions and slightly more submitters across all categories supported than opposed the concept.

“This seems sensible in principle as it would result in the least interference with property rights and could prevent monopolies or other unfair competition.” [176]

Both supporters and opposers considered that each case should be judged on its merits.

Supporters favoured sharing land where necessary and practicable, as it would ensure competition and reduce costs. It was also suggested that market rates be paid and/or costs divided between the parties.

Network utility operators that were opposed to the concept considered sharing to be a threat to commercial sensitivity and viability. One rural land owner raised the issue that sharing should only be permitted provided the land was solely being used for the purpose for which it was acquired and that the former owners' rights were protected. Maori representatives suggested that land should not be shared unless consented to by the tangata whenua.

Some considered that sharing was a matter for existing network utility operators and private providers to decide. It was proposed that the Act should therefore provide flexibility to allow sharing but not make it mandatory.

5.4.2.3 Sharing a common area of land

Comment on requiring authorities sharing a common area of land was provided in 75 submissions. A small majority, being both users and those affected by the legislation, agreed that requiring authorities should be required to share common land.

Although the rationale for agreeing and disagreeing was fundamentally similar, both sides considered the sharing of land to be of benefit but only where practical, involving compatible services, and satisfactory resolution of any safety issues following consideration of all the circumstances.

Some other views were expressed, including:

- that creation of a rule that forced authorities to share land would prove to be difficult and contentious in its application;
- the need for clarity on the pricing structure of land sharing arrangements, and potential subsidisation of subsequent users; and
- use of land for competing purposes should be decided under the Resource Management Act, rather than public works legislation.

5.4.3 Lineal Developments and the Environment Court

Under the current Act, where a lineal development such as a highway or transmission line has been promulgated, each owner can appeal against a compulsory acquisition to the Environment Court. There were 122 submissions on whether or not parties needed to go to the Environment Court for every acquisition relating to lineal development. Overall opinion was equally divided.

"The landowner must be able to protect their rights. Anything else would be a violation of human rights."
[212]

Support for going to the Environment Court each time came mostly from land owners who considered that the Environment Court was an avenue that provided them with the opportunity to have their say in a forum that was expert in land matters and protected their rights. Federated Farmers considered that all parties must be given the same opportunities to appeal against each proposal.

It was also suggested that a single lineal development could impact on a number of different environments. Provisions that require every acquisition to go through the Environment Court were therefore seen as critical as they would allow the characteristics of each property to be judged individually.

"The Court would be required to consider the impact of the development on each property it would pass through." [155]

Opposition to having to go to the Environment Court for every acquisition was mostly from users of the legislation because it was a costly, time consuming and an inappropriate process once it has been decided that the land is needed. They consider that all individual applications and affected parties should be dealt with as a group by the Environment Court.

"The EC should conduct a collective hearing where multiple submissions occur." [268]

Many users of the legislation, including Local Government New Zealand, recommended that the Environment Court only be involved in a case where there is an objection to a proposal or compulsory acquisition is necessary.

Other suggestions included:

- a fair process of consultation, acquisition and compensation to reduce the need for cases going to the Environment Court;
- decision on a case by case basis on access to the Environment Court;
- limiting the right of appeal to enhance efficiency and reduce lead in costs and time; and
- developing a process of fast tracking lineal development appeals to the Environment Court.

"Fair processes for compensation & acquisition would minimise this need. [to go to the Environment court]." [85]

5.5 Other Issues on Acquisition

Issues raised regarding acquisition that are not covered in other sections include:

Process:

- the negotiation process should involve "good faith" bargaining, exploration of alternative sites, notification of rights and demonstration of a proven benefit of the project. Where agreement cannot be reached, an independent tribunal should decide;
- the acquisition process should be quick, fair, and transparent;
- the "specified date" for assessment of compensation should be defined;
- the current process for acquisition is unnecessarily complex and results in additional delays and costs;
- it should only be necessary to serve affected parties with one notice when seeking to acquire land, rather than two, as this would simplify the process;
- land owners have two opportunities to object to the taking of their land, one under the Resource Management Act 1991 and the other under the Public Works Act 1981. This duplication only serves to further delay the process and add costs to the transaction. The acquisition process should be integrated with the land use requirements of the Resource Management Act;
- the acquiring authority should provide landowners with information and guidance as to their rights, and grief counselling, when seeking to acquire their land;
- private providers must apply to the Minister of Lands to be able to compulsorily acquire where agreement has failed to be reached; and
- lineal developments need "as built" plans to be recorded.

"A regional committee should be appointed to first of all approve that the works are of a National interest. Once this has been established then allowing this committee to consult and negotiate with parties, whether affected or not." [166]

Maori Issues:

(For issues on acquisition specific to Maori see Section 8.3.1)

- Maori traditions, beliefs and tapu must be considered;
- retention of Maori lore is necessary to preserve Maori heritage and culture;
- private providers should acknowledge wahi tapu;
- any assets within a rohe should not be acquired without the input of the local hapu and iwi;
- iwi authority, hapu, whanau of the rohe, should also be consulted when compulsory acquisitions go to the Environment Court; and
- multiply owned Maori land should have a minimum of 75% owner input before a sale can proceed.

Dispute resolution:

- rights of appeal to the High Court should be extended to issues relating to the need to compulsorily acquire and the quantum to be acquired;
- where agreement cannot be reached an independent tribunal should decide whether the land should be acquired; and
- an acquiring authority may win the case to acquire land by default where the owners do not have the financial means to appeal the decision.

General:

- land is a non-renewable resource which needs to be protected from misuse; and
- legislation should seek to curb the inappropriate use of powers to prevent environmental costs or unwanted private profit.

6.1 Overview

The majority of submissions, made up of all categories of submitters, considered that the compensation provisions should be reviewed in some way. Submitter details and their relationship with the Public Works Act 1981 (the Act) are shown in Figure 6.1.

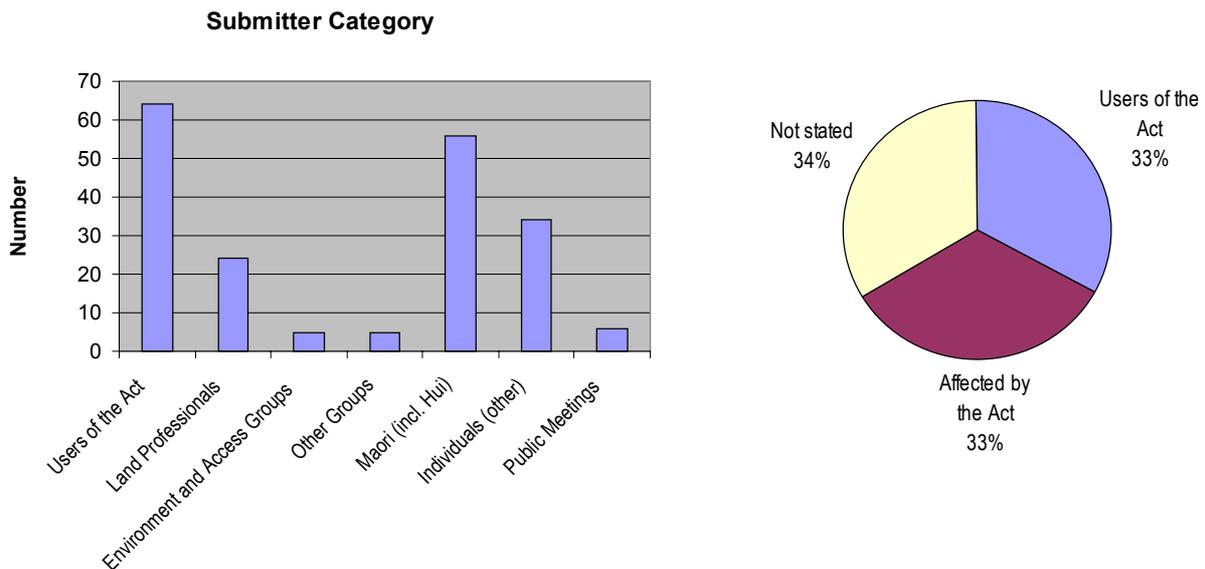


Figure 6.1: Submitter category and relationship with the Act (Compensation)

Users of the legislation considered that a more flexible regime for establishing the level of compensation would allow for easier negotiations with landowners and hence reduced costs in terms of time delays and not having to pursue compulsory acquisition.

Those affected by the legislation considered that the currently prescribed level of compensation (current market value) was inappropriate, as it did not account for the sacrifice a landowner made for the good of the country. Current market value was also seen to be an irrelevant mechanism for determining compensation for Maori land, as there is no market for Maori land on which to formulate a current value.

Those affected by the legislation thought that compensation should be full and fair and based on “like for like” (including land for land) to ensure that an acquired property could be replaced with equivalent property. The option for exchanging land for land acquired was particularly popular with Maori submitters.

Those affected by the legislation sought compensation for losses brought about by a public work, or costs incurred when approached regarding acquisition of their land, when their land was not acquired. Compensation for losses incurred through “planning blight” was also discussed. Users generally opposed any extension of compensation to people indirectly affected by their activities in this way.

The solatium payment was largely seen as ineffectual and many considered that it needed to be widened and/or increased.

6.2 Legislative Provision

The current Act does not provide for consideration that is outside the compensation provisions. Where both parties agree to an acquisition, an open market transaction is often not possible because of the Act's strict compensation requirements. These requirements do not allow the Crown or local authority to pay more for the land than the value determined by a registered valuer. Consequently, payment over and above the prescribed amount is unable to be traded off against time and administrative cost even if the overall cost to the Crown or the local authority is less than the cost of a compulsory acquisition.

"This [current] narrow focus ignores the benefits to be gained by freeing up the compensation provisions. The removal of the limits would allow negotiators to offer landowners 'reasonable levels' of compensation commensurate with the relevance of the site, in terms of the public good being provided and/or the value of the land to the owner." [59]

Of the 114 submissions on this subject, a small majority said that compensation should be determined by negotiation rather than set in legislation. Both landowners and users of the legislation saw advantages. The level of negotiated compensation paid to the landowner could be sufficient to cover any loss or inconvenience, including cultural and historical issues on the land. The acquiring organisation would benefit through savings of time and the cost of pursuing other options.

In contrast, many users and those affected by the legislation saw setting of compensation in legislation as providing certainty, consistency and equitable principles. Legislative provision was supported by some Maori as a possible way of accounting for Maori values. Some considered that legislation would be appropriate for providing a framework and guidelines for assessing compensation.

6.3 Injurious Affection When Land Not Acquired

The impacts of a public work designation are currently part of the resource consent process in the Resource Management Act 1991. However, no legislation provides for compensation to those who claim injurious affection through the operation of the work. A claim for injurious affection while a public work was being built would only succeed if the claimant has an actionable case in law.

"There will also be land-owners whose land has not been taken who will be able to demonstrate that they have been detrimentally affected by the development. There should be an avenue for them to seek compensation by way of an opportunity to demonstrate 'injurious affection'." [83]

The majority of the 137 submissions on the issue of whether landowners should be entitled to compensation for injurious affection, even though their land was not acquired, agreed that compensation should be paid. This support was mainly from landowners and those affected by the legislation. They considered that the cost of public works should reflect the true cost and that fairer compensation provisions would reduce the level of opposition to a public work.

Suggestions for matters to be compensated included decreased valuation of property; loss of income, security, peace of mind, ability to sleep (including lessees of property); damage to lifestyle; health effects, failure to provide service; air pollution, environmental destruction and stress.

While a high degree of support was expressed for compensating for injurious affection, the support was often qualified. Limitations on support included:

- fair and reasonable compensation for quantifiable loss of value caused by the public work, including effects on livelihoods and future developments;

- where it can be proven in the Maori Land Court that injurious affection has occurred;
- limiting the compensation to the landowner at the time of the operation of the public work and not a subsequent landowner;
- careful definition of the meaning of “injurious affection” in any new legislation;
- payment for injurious affection only in instances an equivalent claim would have been successful under common law, had the work been a private work;
- inclusion of betterment in calculation; and
- defining the intended scope of injurious affection in the new Act to minimise the potential litigation that would otherwise arise.

“If this form of compensation is to be considered in a new Public Works Act then consideration should also be given to betterment. For example, many property owners may benefit from improved property values when located adjacent to a park and how this is factored into the equation, along with compensation, needs to be dealt with.” [103]

Users of the legislation and Local Government New Zealand were generally opposed to widening injurious affection provisions to people who did not have their land taken. They considered that it would result in significant increases in costs that could threaten the viability of many public works, due to time delays and litigation. Many favoured retention of the status quo, where provisions exist in common law for compensation outside of that covered by the Act. One preferred that injurious affection be limited to actual damage or physical loss.

“...we strongly support the status quo. Compensation can be paid under the existing provisions of section 63 of the Act plus further defined by case law.” [260]

6.4 Compensation for Costs Where Land is not Acquired

On occasion, landowners are approached or they are advised that their land is or may be required for a public work. In the event that their land is not acquired, the landowner may have incurred costs because of that approach or advice.

The majority of both users and those affected by the legislation supported compensation to be paid to landowners for reasonable and actual costs incurred as a result of being approached regarding acquisition of their land, even where their land was not eventually acquired. This issue was addressed in 144 submissions.

Reimbursement of reasonable and actual costs that result from an approach to a landowner to acquire land was seen as fair. Some landowners considered that it would help to promote best practice among requiring authorities. The development of effective guidelines to define “reasonable” costs was seen as necessary to provide clarity.

“Landowners should be entitled to recover actual expenses incurred where they can reasonably prove such expenditure.” [265]

A Maori landowner proposed that compensation should be paid for costs involved in trying to safeguard heritage, family, oneself and land. Also, compensation should not be based on receipted expenses as costs involved are not always easily identifiable, for example when they are incurred as a result of discussion with elders.

Other suggestions for what would be reasonable to be covered by compensation included:

- duress;
- sound proofing;
- loss;
- stress;
- professional advice;
- imposition on time;

“The stress created from this, causes no end of problems ... Why approach people until you are sure. Why cause anguish if [you are] not sure.” [219]

- planning blight;
- life style;
- security;
- peace of mind;
- loss of market value;
- livelihood or future developments; and
- unaccounted costs.

"The existing provisions of section 76 of the Act already cover this issue. We strongly support the status quo i.e. that only actual and reasonable costs can be claimed." [252]

A local authority suggested that costs associated with any actions to stop the acquisition should not be paid.

Some users, including Local Government New Zealand, consider that retention of the provisions in sections 63 to 76 of the Act, under which actual and reasonable costs can be claimed, is satisfactory.

"If requiring authorities were required to compensate everyone simply because the market falls away due to anticipation of or uncertainty as to the effects of a proposed work, no authority could afford to notify any work." [82]

Users of the legislation considered that a requirement to pay compensation when land is not taken would prohibit acquiring authorities from notifying any work, due to the potential costs of compensation if the work does not proceed. It was also seen that quantifying the amount of compensation would be difficult and any attempts to do so could result in expensive and time-consuming litigation.

They saw the process of consultation and notification and the lengthy delays as a result of the Resource Management Act binding requiring authorities. To be forced to pay compensation as a result of the Resource Management Act process was, therefore, seen as unreasonable.

6.5 Solatium Payments

A "solatium" of \$2000 is a sum paid over and above the purchase price and other payments. Essentially it is some recompense for loss and disruption when land acquired contains a dwelling used as a private residence. Submitters were asked to consider whether the solatium might be recalculated to take into account the rate of inflation, and be inflation indexed in future. The solatium could also be discretionary when acquiring land not involving a private residence, thus allowing for flexible negotiations with landowners, and enabling the intrinsic (attachment) value of land to the landowner to be taken into consideration.

6.5.1 Criteria for Payment

Comments in 108 submissions related to widening the solatium payment to cases where land that was acquired did not include a residence. The majority, mostly landowners, supported the option.

Suggested criteria for payment included situations where the outcome of the works resulted in a problem for the owner, for example, excessive noise, loss of access, diminution of privacy/lifestyle and/or where the viability of a business has been threatened.

"The status quo should be preserved. The purpose of the solatium is to pay land owners who are having to move out of their homes the loss." [97]

Those opposed to widening the criteria supported the status quo. Users of the legislation expressed concern over the difficulty in determining who would be entitled to the payment and to what degree, unless it was open to all owners. Either way, the resulting increased cost of production for the provider of the service was considered unreasonable.

6.5.2 Widening Solatium Payment to Include Intrinsic Value or Allow Negotiation Flexibility

The majority, again mostly landowners, supported the widening of the solatium payment to include intrinsic value. Support was particularly high from Maori who comprised almost half of those who indicated support. Maori submissions welcomed the inclusion of allowance for tikanga, turangawaewae and how they regard their land in the new legislation.

"If the provision was widened it would dramatically increase the number of claims and the overall cost of purchases. It would be very difficult to devise a set of fair criteria that could be used to establish rights to the payment under a widened provision, unless all vendors are entitled to claim." [260]

Users of the legislation that supported including intrinsic value in the solatium payment saw that it would facilitate negotiations and reduce transaction costs and lead in time.

While supporting the extension of the solatium payment in general, concern was expressed by a variety of categories of submitter that any extension of the solatium payment should be reasonable and not open to abuse.

"This is an important issue because at present there appears to be no allowance for the cultural, emotional and spiritual impact of the loss of a home." [191]

Those opposed, mostly users of the legislation, considered that such an option was fraught with difficulty, especially quantifying in economic terms something so subjective. Extending the solatium payment to include intrinsic value was considered contrary to the original intention of the payment. It was suggested that a negotiated settlement would better account for intrinsic value, as the vendor would not sell unless the price offered fully covered any additional value they placed on the land.

"Too difficult to quantify. Easy to create 'emotive issues' where money is involved." [13]

Other negative impacts of compensating for intrinsic value included that such compensation would result in a significant increase in costs and hide direct compensation.

"Likely solatium will be paid in most situations, thereby significantly increasing costs of acquisition." [88]

6.5.3 Increasing the Amount

Nearly all of the 106 submissions that provided comment supported increasing the value of the solatium payment to keep pace with inflation.

Options suggested for determining the value of the solatium payment included:

Bulk sum plus future adjustments:

- \$2000 inflation adjusted from 1981 when it was originally introduced;
- a sum relevant to current day prices, inflation adjusted in the future;
- \$15,000 adjusted for inflation or 5% of the value of land and buildings, whichever is greater;
- limited to a range e.g. between \$5,000-15,000 with a statutory provision for the Minister to review the limit at five yearly intervals; and
- a figure set in legislation and adjusted at three yearly intervals.

"... option where it is first made relevant to current day prices and then where it is increased to keep pace with inflation, is considered appropriate." [103]

Bulk sum only:

- \$10,000; and
- substantial increase in the amount to cover removal and other costs and to speed up acquisitions.

Percentage:

- percentage of agreed amount;
- percentage of settlement price/land value;
- 5-10%;
- 15-20%; and
- 10% where the residence is purchased and 5% for other land.

Indexing, other than inflation:

- indexed to the Consumer Price Index;
- indexed to the Minister's salary; and
- some other form of indexing.

Other:

- no set minimum payment;
- a ceiling should be set; and
- amount should directly reflect the costs incurred.

6.5.4 Further Issues Regarding Solatium Payments

Further issues raised regarding solatium payments included:

- the solatium should reflect the length of time a person has occupied the land as the longer a person has lived on the land the more sentimental attachment they have to the land;
- clarity of the rationale for the solatium payment needs to be spelt out in the legislation, including whether it should be paid to vendors who already have their properties on the market;
- the solatium could be applied in cases where a minor acquisition has little affect on land value but causes disruption to the owner; and
- provision for increasing the amount of the solatium by Order in Council would allow the amount to be reviewed more frequently.

6.6 Other Issues on Compensation

Other issues raised regarding compensation included:

Legislation:

- legislative changes to compensation must be clearly defined, easily understood and practical, and require that information on rights be publicly available; and
- new provisions in the Act regarding compensation should be applied retrospectively.

Process:

- flexibility must be allowed that recognises the costs involved if agreement cannot be reached and the land has to be acquired compulsorily;
- the matter of determining the level of compensation should, at the outset, be put to the Land Valuation Tribunal, or a similar single purpose expert authority;
- the threat of compulsion may force owners into accepting a level of compensation below what they would be prepared to accept if they were a willing seller; and
- the owner of the land should have the right to request a professional to act as an agent during the negotiations.

"The Act should be amended to provide for more flexibility recognising the likely cost of compulsory acquisition, valuation advice, legal counsel and Environment Court hearings under the Resource Management Act or Land Valuation Tribunal to achieve settlement." [67]

Maori:

- for other issues on compensation specific to Maori see Section 8.3.2; and
- Maori should be paid royalties for land used.

Dispute resolution:

- rights of appeal to the High Court should be extended to issues relating to the need to compulsorily acquire;
- provisions for mediation and arbitration, in addition to the Land Valuation Tribunal, would assist the settlement of compensation disputes; and
- in the case of determining the current market value for Maori land, this is a subjective exercise as no market exists for Maori land. If the landowners object to the valuation they should have the right to nominate an independent valuer. Compensation should be the higher of the two valuations.

General:

- evidence of loss in option value for land under the shadow of compulsion could justify timely compensation prior to actual taking;
- the requiring authority should acquire a property at the owner's request and at a fair price prior to designation where they are affected by planning blight;
- compensation rights should be clear in the legislation;
- compensation should be set at a percentage above market valuation; 50% and 150-200% were suggested;
- compensation should be full and fair. It could be based on "like for like" (including land for land) to ensure replacement with an equivalent property; and
- loss in terms of heritage values, including social, cultural, historical and archaeological values should be factored into the level of compensation paid.

"Any compensation must follow the Pareto-Principle, that means nobody should be worse off, after the land has been acquired." [212]

"...the concept of 'an equivalent home' needs to be considered ... where there are specific needs to be met ... [and] where market value may not be sufficient to enable families to be relocated without incurring financial hardship." [138]

"...but there are some personal values pertaining to Maori which you cannot put a price on. These need to be included when compensation is being considered." [198]

7.1 Overview

Much discussion was generated on the issue of disposal of surplus public works act land. Perhaps not surprisingly the provisions relating to offer back of surplus land to the former owner drew most responses. Submissions were received in numbers from all major categories of submitter involved in the review with Maori and users of the legislation being most prominent. All parties generally agreed that the current provisions of the Public Works Act (the Act) were in need of amendment in order to provide clarity and certainty to everyone. Submitter details and their relationship with the Act are shown in Figure 7.1.

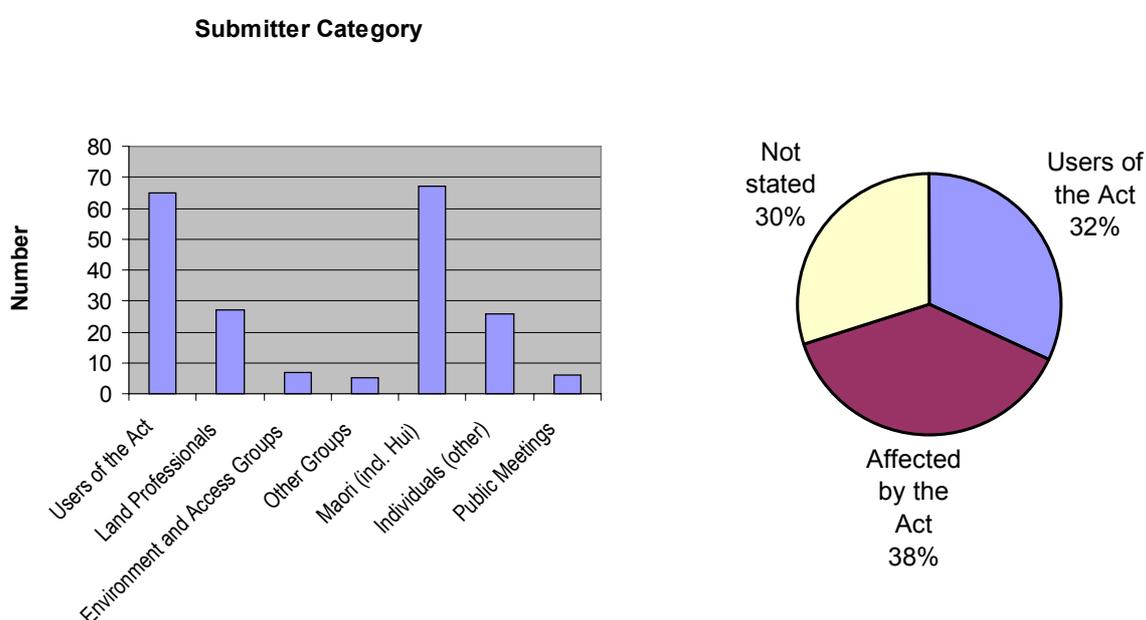


Figure 7.1: Submitter category and relationship with the Act (Disposal)

Of note are the differences expressed between users of the legislation and those affected, particularly Maori. There was widespread support from users for the offer back provisions to become less onerous. Many felt the current provisions were too costly and time consuming to implement and they were in favour of streamlining the process as much as possible. At the same time, there was also general support from users for a revised offer back process to be required where an element of compulsion was involved in the acquisition for the public work.

On the other hand, those affected by the legislation had also diametrically opposed views to users when it came to the offer back provisions. Many affected parties wanted the offer back requirements strengthened, and were generally supportive of any suggestions to remove exemptions. Maori had particularly strong views and wanted land to be offered back in all cases, preferably at less than current market value or at no cost. Some Maori wanted additional compensation because the acquiring authority had received the benefit of the use of the land.

One area where there was consensus across all categories of submitter was in the area of protecting former owners' rights. Both users of the legislation and those affected by it saw the benefit in having some form of memorial on the certificate of title in order to provide clarity, certainty and protection to both the former owner and the land holding agency when it came to disposal of the land.

Strong views were also expressed by all categories when it came to the issue of transferring land held for an existing public work to another public work without invoking the offer back provisions. Again there were differences between users and those affected. Users were very supportive of the current provisions while at the same time they recognised that where land was to transfer from the Crown to a local authority, the Crown's obligations to Maori needed to be clarified. Those affected by the legislation, particularly Maori were strongly against the continuing practice of allowing land to be acquired for one public work, and when the need for that work had finished, using the land for another public work. Many opponents of such transfers required either the return of the land to the former owner, or the former owner to be consulted, or for the requirement for the new work to be assessed on its merits and not to go ahead simply because the land was available.

Having an open and contestable disposal process was to a large extent viewed favourably by most submitters. Many felt that the focus on disposal should ensure the process adopted was fair and equitable in the particular circumstances, although Maori considered the principles of the Treaty of Waitangi should be paramount.

Another area where there was generally consensus was with the suggestion that surplus public works land be exempt from complying with resource consent requirements. There was widespread opposition to this proposal with the majority of submissions requiring a "level playing field" where everyone is subject to the same rules and requirements.

7.2 Offer Back of Land to Former Owners

7.2.1 Current Offer Back Provisions

"The perception is that given landowners were 'forced' to sell their land for the good of the nation's development of public services and infrastructure, the offer back clauses provided some opportunity to 'right the wrong' if land happened to be surplus to requirements. If this is correct then offer back was and remains a valid protocol for land taken prior to the completion of the legislative review." [266]

"The offer back provisions desperately need to be changed. They are overly onerous to requiring authorities, uncertain, incredibly difficult to properly administer, generating vast amounts of litigation and creating liabilities for requiring authorities which are arguably unforeseen." [97]

"Section 40 as it currently exists disenfranchises Maori owners." [40]

The Act currently requires the Crown or local authority to dispose of land no longer required for a public work first to the person from whom the land was acquired for a public work and where that person has died, to their successor. This "offer back" regime is subject to a number of exceptions. Submissions were sought on whether the current offer back provisions should remain unaltered.

Only a quarter of the 121 submissions that provided comment on the current offer back provisions supported the status quo being retained, while two thirds sought change in some way. The few remaining submitters were undecided.

Support for the status quo was centred on concern of having the offer back provisions removed or altered to the extent that individuals saw they may lose their potential to regain their land in the future.

Opposition to the current offer back provisions was expressed in two ways. Firstly, those who use the legislation sought measures that would simplify the provisions, ease the administrative burden and reduce the risks of litigation. Secondly, those who have been affected by the legislation sought measures that would further protect their rights, particularly Maori who felt disenfranchised by the current provisions.

7.2.2 Alternatives to the Current Provisions

7.2.2.1 Notification of former owners at the time of disposal

To ensure that a former owner's continuing interest in the land is considered, submissions were sought on whether all former owners should be notified at the time of disposal so that they could participate in any public offering of the land.

Of the 113 submissions that provided comment on the proposal, 62% supported the idea (almost half of which were from Maori) while 31% expressed opposition. The rest of the submitters were undecided.

Maori who supported this option predominantly saw it as an opportunity to formally have their land offered back to them. Maori who opposed the option sought that they have the first preference on the land. One Maori landowner saw this provision as offensive and contrary to the Treaty.

"Offensive to Maori. It is a Treaty principle that timely consultation occur – I don't think an invitation to a public auction [sic] would meet that criteria." [223]

Support from users of the legislation focused on this being a more streamlined approach to offer back. Other users offered qualified support for the provision in cases where land was compulsorily acquired; or where the property was not on the market at the time of sale. Support from other sectors was qualified by conditions such as where practicable and subject to a sunset clause.

"It is more streamlined for former owners to be notified to participate in a public sale, than the current process of offer back and exemptions." [118, 119]

Some saw the original owner as the appropriate person to be receiving notification, while others saw the owner from whom the land was taken as the appropriate person to be receiving notification. Knight Frank Limited saw it as unfair for former owners to have to bid for their land at auction.

"The original owners from whom the land was acquired must have 1st option. Notifying all former landowners is unnecessary." [266]

Users of the legislation who opposed this provision did so on the grounds that notifying all former owners would create an administrative burden. The New Zealand Law Society saw this form of disposal as being in breach of various Claims Settlement Acts, as the right of first refusal generally applies immediately after the satisfaction of the 1981 Act offer back obligation – this sentiment was supported by users of the legislation.¹

7.2.2.2 Time limit on any offer back

The current Act requires offer back when land is no longer required for a public work. Where a long period of time elapses between the land acquisition and the subsequent decision that it is no longer required, the offer back process often becomes difficult to implement. Submissions were sought on whether it was appropriate to include a sunset clause in any revised legislation whereby the requirement to offer land back is subject to a time limit following the acquisition.

Support for a time limit on the offer back of surplus land to former owners was expressed by over 50% (half of whom were users of the legislation) of the 122 submissions that commented on this issue. A further third opposed the time limit (three-quarters of whom were Maori). The rest of the submitters were undecided.

¹ Many submissions have interpreted "former owner" as any owner who formerly owned the land rather than the owner immediately prior to the acquisition for the public work.

"A sunset provision would streamline the offer back process and would remove the necessity for futile investigations where acquisition occurred a long time ago." [192]

"...this approach would significantly reduce the costs of complying with the offer back requirements... and introduce an element of certainty, which can be lacking in some cases." [113]

"If a sunset clause is introduced, LINZ may like to consider whether there should be a mechanism, which a landowner could use to extend the term of that sunset period if the former owner had a particular affinity with the land." [262]

Users of the legislation who supported the provision saw the benefits of a sunset clause to be simplification and reduction of administration costs. Some users also considered it would provide certainty to all parties. Other users who supported the provision saw the inclusion of a sunset clause in the legislation as a good compromise between retaining and removing the present offer back obligations.

It was proposed that there should be specific circumstances where the sunset clause should not apply, for example where the land is of special significance. One submission recommended that inclusion of a sunset clause should be assessed on a case by case basis taking into account all the circumstances including the offerees' circumstances.

There was wide opposition from Maori to the proposal however few provided comment to expand on their opposition. A number of Maori, while not putting forward a view as to whether they supported or opposed the proposal, sought separate considerations for Maori land. Some non-Maori groups supported this view.

A land professional opposed the time limit for offer back on the basis that the former owner has no influence on the time span within which the public work will proceed.

Suggestions for the length of time for the sunset clause included:

- 1 year;
- 2 years;
- 10 years;
- 10 to 20 years;
- 15 years;
- 20 years;
- 20 years or the death of the original owner (or the winding up of the company);
- 25 years;
- 40 years;
- 50 years;
- 60 to 80 years; and
- minimum of the lifetime of the former owner.

The majority of these suggestions were put forward by users of the legislation.

7.2.3 Scope of Offer Back

7.2.3.1 All land except where impracticable

The Act currently has several exceptions to the requirement to offer land back to former owners or successors. A number of steps must be followed to decide whether offer back is required. This process could be simplified by reducing the exemptions to offering back the land. Submissions were sought on whether land should be offered back in all cases except where it is impracticable to do so.

Of the 114 submissions that contained comments on this proposal, over 50% supported the concept (over a third of which were from Maori) and one third were opposed. The rest of the submitters were undecided.

Many submitters, whether supporters of the concept, opposed, or undecided saw the definition of “impracticable” as being extremely important. A number of submitters felt there should be a list of examples or greater specification as to what was considered “impracticable”.

“This provision has been largely nullified by the courts as it comes down to opinion. It is dangerous for any authority to use, as it is open to challenge. Either specify exceptions ...or omit all exceptions” [89]

A preference was expressed that exceptions be removed and that all land taken under the Act be offered/handed back.

A mixed response was drawn from Maori over the issue of offer back except where it was impracticable. Over one third of the total support for the concept came from Maori groups. Despite this level of support a number of Maori were opposed to this option based on the belief that it should be mandatory to offer all (Maori) land to the former owners, or their successors. They were therefore seeking the removal of all exceptions. Non-Maori also shared this latter view.

“[Offer back of] Maori land should be compulsory (yes). Depends on definition of impracticable.” [60]

The New Zealand Law Society noted that the existing section 40 exceptions often provided practical solutions. The example was given of section 40(4) avoiding a proliferation of sub-standard lots.

Local authorities opposed the removal of exceptions to the offer back requirements. They were particularly concerned that the removal of exceptions could lead to the situation where a sub-standard allotment might be able to be offered back to a former owner. Local Government New Zealand supported this view.

“The number of exceptions should definitely not be decreased. The offer back provisions should be less restrictive.” [137]

7.2.3.2 Offer back elected at the time of purchase

In many cases land is offered back to former owners who have no interest in repurchasing their former land. Where land is required for a public work, the owner’s view on some future offer back could be obtained at the time the land is acquired. Obtaining the owner’s comment at the time of acquisition could mean any offer back requirement could form part of the acquisition agreement. This may result in a more streamlined process with less Crown or local authority expenditure to attempt to locate someone who has no desire to receive an offer.

Submissions were sought on whether seeking expressions of interest in receiving an offer back at the time of acquisition was appropriate. Of the 118 submissions that provided comment on the concept, three-quarters of submitters approved while about 15% were opposed. The rest of the submitters were undecided.

“This would create much greater certainty and avoid unnecessary time consuming negotiations in tracking down former owners and the like. Would also remove a considerable litigation threat.” [98]

Some submitters who supported the concept saw it as a fair and reasonable approach. Many submitters, mostly users of the legislation, expressed the view that this would speed up the disposal process.

A number of users who supported the concept considered that any application would need to be clear and legally binding. A mixture of users and those affected by the legislation felt that a memorial on the title was the most appropriate means of recording the former owner’s wishes regarding offer back. Federated Farmers supported this form of protection.

“An owner may feel fully compensated and has no ties/significance to the land, and therefore does not want offer back. This should be binding.” [91]

The New Zealand Law Society provided strong support for statutory provisions authorising the purchase and waiver of section 40 rights. As with many other

submitters noted above, the Law Society supported the registration of the waiver against the relevant certificate of title.

Some users expressed qualified support for the concept and the qualifiers included:

- provision should exist to sell/purchase this right in an open negotiation; and
- a sunset clause should be imposed.

The following safeguards were recommended by a land professional to ensure fairness to all parties:

- ensure that the land owners are independently advised before agreeing to this provision; and
- making the offer back right automatic for all compulsory acquisitions.

"Carter Holt Harvey considers it both unreasonable and illogical to make decisions about 'offer back' at the time land is acquired. It is presumably in the interests of the original owner to record such interest irrespective of whether at some time in the future he or she will in fact wish to reacquire. The ability for the land owner to forgo rights of offer back should be recognised, perhaps by way of a higher acquisition price." [144]

Opposition to the concept of an owner waiving their future rights to offer back at the time of purchase centred on potential future conflict. This conflict could arise where the former landowner changes their mind or the next generation opposes the decision.

It was proposed that some form of compensation be provided where the right to receive an offer back is voluntarily waived.

Maori were generally supportive of the concept with only about 10% of Maori submitters expressing opposition to the idea.

7.2.3.3 Compulsorily acquired land

Submissions were sought on whether there should be a distinction between people who co-operate with the agency empowered to take their land and those that don't. The offer back regime is generally seen as a mechanism to reunite a former owner with his or her land where the land had been acquired for the greater good of the community. Where the former owner was willing to relinquish their land without the Crown or other acquiring agency having to invoke the compulsory provisions of the Act, or without the threat of compulsion being used to induce the former owner to sell should an offer back regime remain?

"We submit that the requirement to consider offer back of land should be limited to land compulsorily acquired. The Act should not cover land that has been acquired by arms-length agreement or by purchase on the open market. Clearly the protections afforded the previous owners by the Act are not as relevant when an owner has agreed (freely) to sell their land for use for public works. This would remove a large number of property disposals from the scope of the Act and therefore streamline the disposal of surplus property." [61]

Of the 125 submissions that provided comment on whether the requirement to consider offer back of land be limited to land compulsorily acquired, 41% agreed (half of which were from users of the legislation) and 52% disagreed (half of which were from Maori). The rest of the submitters were undecided.

"If it was compulsory to offer land acquired through open market purchase it would make a mockery of the process of negotiation." [221]

The need to only offer back land if it was compulsorily acquired, was a concept welcomed by users of the legislation. Generally they saw no rationale for offer back provisions to be applied in cases where agreement was the basis of the transaction.

"The Council is aware that some owners do sell their land because the owners believe the compulsory provisions of the Public Works Act can be exercised if they do not sell voluntarily. There can therefore be an implied compulsion." [260]

Two users saw this as a helpful clarification. Another felt that limiting offer back to compulsorily acquired land would significantly streamline the disposal process.

Many users also recognised that often land is acquired under the shadow of compulsion and in these cases the offer back provisions should also apply. Local Government New Zealand and a number of land professionals supported this view.

Users accounted for about 10% of submissions that opposed the concept. In many cases users concerns were similar to their counterparts who supported the concept i.e. They felt the offer back provisions should apply to all land acquired under the shadow of compulsion, notwithstanding that the land may have been acquired by agreement.

Maori made up about half of the submissions that opposed the concept. This view was strongly expressed at hui with participants requiring that all land be offered back.

Both Maori and non-Maori submitters were in agreement with users in that any land acquired under the shadow of compulsion should be offered back. Others felt that an owner should not be penalised simply because they had co-operated with the requiring authority.

7.2.3.4 Public Works Act land subsequently declared Crown land

The Act provides that land taken for a public work, which was surplus to requirements or was not required immediately for the public work may be declared Crown land under the Land Act 1948 to facilitate holding or disposal. Some of this land remains in Crown ownership. Land declared Crown land under the earlier Public Works Act did not contain any requirement to consider offer back. Similarly, changes of status under the present Act may also not have triggered the offer back provisions. Crown land currently is not subject to any requirement to consider offer back, in spite of its earlier public work status. Submissions were sought on whether such land should be subject to offer back to the former owner.

Support for this proposal was expressed in 84% of the 99 submissions that contained commented on this issue (one fifth of which were users and one third Maori). Only 7% opposed this concept. The rest of the submitters were undecided.

Arguments in support of this proposal included:

- the fairness and equity that this provision would offer;
- that transferring land to the status of Crown land was seen as just another disposal mechanism that should be subject to the same offer back provisions as any other mechanism;
- that former owners were subject to the Public Works Act 1981 when the land was taken and so their rights to offer back under this legislation should therefore be protected; and
- that land acquired for a public work should be disposed of under the provisions of the Act.

"... The principle that it was originally acquired for a public work should be paramount and what various Crown agencies choose to do with it in the interim should not affect this principle." [240]

One land professional offered qualified support subject to there being an exception where the change in land status was an interim step in its use for conservation purposes with the land being given reserve status consistent with the purpose for which it was taken.

Users recommended the introduction of a common disposal mechanism for both the Public Works Act 1981 and the Land Act 1948. The current requirements to deal in a different manner with surplus land that may have become reserve or Crown land under the Land Act by a historic accident is expensive, confusing and unnecessary.

Opposition to the concept was limited. One local authority proposed that any public works land being considered for disposal should be offered to local authorities, and the process include public consultation. A land professional proposed that all land be held in perpetuity for the future needs of all citizens.

A Maori Trust sought that all whenua (land) be returned to Maori.

7.2.3.5 Land that has been significantly changed

“Significant” change describes situations where the nature or condition of the land has been altered to such an extent that it bears little resemblance to what it was like when it was acquired by the Crown or local authority. The current Act provides an exemption to offer back where land no longer required for a public work meets these criteria. Submissions were sought on whether significant change should be removed as grounds for exemption to offer back.

Removal of this criteria was supported by 54% of 115 submissions that commented on this issue, nearly half of which were from Maori. Opposition to the removal of this provision was expressed in 41% of the submissions, nearly half of which were from users. The rest of submitters were undecided.

Support for the concept came largely from Maori and those affected by the legislation, although almost 15% of submissions in support of the removal of significant change as an exemption came from users. Maori, especially the hui, were generally of the view that there should be no exemptions and all land should be offered back. Te Runanga o Ngati Awa felt that provision should be made for a process of consultation with the affected landowner, including the opportunity to make submissions and a right of appeal. A number of Maori expressed a view that any exemption be subject to the former owner’s wishes.

“Difficult to ‘hide behind’ significant changes in character.” [13]

One user considered that the courts have largely nullified the exemption. A land professional noted that “significant change” was inherently subjective and arguable.

“... The exemption provides a useful filter for land that has changed in character such that the former owner could no longer claim to have any continuing affinity with the land. Removing the exemption would increase the number of properties being offered back and would significantly increase the administrative costs of compliance...” [192]

Users suggested retention of the exemption was appropriate due to former owners no longer being able to claim any affinity with the land, or no longer being able to use the land for the same purpose as they had prior to acquisition. The Auckland District Law Society supported this latter point. Users also felt that the exemption was justified on the grounds of administrative and economic efficiency.

Many users recognised that to be effective as an exemption, clarification would be needed as to what constituted “significant change”. One user proposed a benchmark percentage of value attributed to the improvements be used to determine whether significant change had occurred.

7.2.3.6 Consultation with former owner prior to significant change exemption

One of the recommendations of the Waitangi Tribunal was to consult with former Maori owners or their successors before deciding not to offer back surplus land to such owners. Following this theme, and in recognition that former owners’ money is as good as any one else’s and therefore they should be given the opportunity to take up an offer of repurchase despite the significant change, submissions were sought on whether this exemption should be retained but with a requirement for consultation with the former owner required prior to any

decision being taken.

The retention of significant change as grounds for exemption in conjunction with consultation with the former owner before deciding was supported by 34% of the 91 submissions that included comment on this issue. Nearly half of the support came from Maori. However the majority (57%) were opposed, nearly half of which were users of the legislation. The rest of the submitters were undecided.

Maori supported the concept on the basis that consultation would allow for a mutual decision to be made.

A land professional supported the requirement to consult with the former owner and suggested that the former owner should have the first right of purchase of improvements made to the land, rather than such improvements being the basis of exempting an offer back.

"Consultation is not desirable as it is a question of fact whether there has been a significant change. Consultation introduces potential for complexity and/or delay." [118]

Opposition to the concept of consulting the former owner prior to exempting on the grounds of significant change came largely from users who saw administrative difficulties with such an approach. Users suggested that consultation would introduce the potential for complexity and delay. Such a requirement would also be unduly onerous on the disposing authority. It was noted that the administrative time and costs were in locating the former owner and if consultation were required then it would be more efficient to simply make an offer to the former owner. The New Zealand Law Society supported this view.

If the requiring authority must consult with the previous owners then why not require it to make an offer back? The administrative time and cost is in tracing a previous owner. Once that is done, there would not seem to be much difference between the time and cost of consulting and the time and cost of offering back." [262]

7.2.4 To Whom the Offer Back Should be Made

7.2.4.1 Offer back to former owner only

The Act requires land to be offered back to the former owner or to his or her successor. In many instances a former owner has died and the Crown or local authority has to undertake an often lengthy and expensive process in an attempt to locate the former owner's successors. The justification for offering land back to a former owner appears to be well founded. The former owner may have felt an affinity with the land and may not have been a willing seller. When considering the requirement to offer land to a successor, these sentiments may not be as strong.

Submissions were sought on whether the offer back obligation should be to the former owner only. Opinion was equally divided between the 113 submissions that provided comment on the proposal. Almost half of the supporters were users of the legislation while Maori accounted for almost one third of those who opposed the concept.

Users of the legislation saw offer back only to former owners as a workable restriction that would simplify the offer back process. Users also felt that such a restriction would reduce the administrative burden. This provision was also seen to balance the interests of both the former owner and the acquirer.

"...limiting the offer back obligation to the former owner would be a fair and appropriate way of balancing the interests of former owners with the interests of the acquirer... The practicality and cost of offering land back must be balanced against the benefit that the offer back provides..." [192]

While offering support to limiting offer back to former owners many submissions, particularly from users, sought even greater restrictions on the offer back requirement. Many submitters wanted the offer back be limited to situations where the land was compulsorily acquired. Others felt there should be a time limit beyond which it was not required to offer back the land.

"Some have deceased, however family and descendants are around." [81]

"Successor in title is relevant - the purpose should be to realign the land with the original land." [16]

"Former owners' family should not be disenfranchised albeit within the constraints of the sunset clause." [82]

"Original owner or descendants. In the case of Maori land back to the hapu, not tribe." [219]

Other supporters of the concept considered that it was too restrictive. Many qualified their support by adding a rider that opened up the requirement, for example with the exception of Maori land, including the family of the former owner, or including the former owner's successors.

The rationale behind opposition to the provision of offer back to the former owner only was often a repeat of the qualifications on support above, including offering to descendants, offering to successors in title, offering to an adjacent owner, and offering to the family of the former owner.

The preference of Maori was offer back to the former owner and then descendants. One Maori Trust sought that all whenua (land) be returned to Maori.

7.2.4.2 Offer back to nominee of former owner instead of former owner

The Act does not provide for an alternative offer to be made to anyone when a former owner or successors are alive and decline an offer back. In practice the former owner or their successors often take up the offer and immediately sell the land to a nominee. Submissions were sought on whether the offer back regime should be widened to provide for an offer to be taken up by a nominee instead of a former owner.

Comment on widening the offer back provisions to include a nominee was made in 99 submissions. This was opposed by two thirds of the submissions, made up of all categories of submitters. Support was expressed by only one quarter of the submitters, mainly those affected by the legislation. The rest of the submitters were undecided.

This issue drew much comment from various Maori groups. One Maori Trust supported the concept. However they saw that the provision could lead to misappropriation and suggested there should be a Court appointed trustee to look after the former owner's interests. Other Maori supported the concept provided the extension was subject to the wishes of the former owner and/or the present day successors in genealogy and/or probate.

Opposition to this option was expressed by seventeen Maori landowners. Views were diverse. However the general feeling was that the land should be retained within Maori circles. Introduction of a nominee would not necessarily align with this principle. Comments received included that former Maori land should be offered back to iwi or marae, family and descendants should be considered first and return to whanau/hapu to decide themselves. One comment suggested that to introduce the concept of a nominee would open more Maori land to manipulation by those who may have dubious motives.

Other submissions opposing the widening of the offer back provisions came from users of the legislation. Users' concerns were generally around the administrative difficulties of such a concept. Some saw the extension as increasing the costs of compliance with the offer back requirements. Other users as well as Local Government New Zealand and the New Zealand Law Society expressed concern that widening the provisions would make it difficult to be certain that offer back obligations were satisfied. Other users considered that the concept would undermine the essence of the offer back regime.

A land professional suggested that the only reason for extending the offer back provisions would be if the courts had thrown doubt on the issue. They also

"It should not be the intention of the Act to provide for an offer back to any conceivable person under the sun. If the provisions were widened it may make it more difficult for local authorities to be certain that offer back obligations have been satisfied." [250]

considered that inclusion of a nominee was within the spirit of the section.

7.2.4.3 Offer back to family, whanau/hapu members

The Act does not provide for an alternative offer to families and extended families (whanau and hapu) when a former owner or successors are alive and decline an offer back. The Waitangi Tribunal recommended this approach and an approach along these lines could also be advantageous to non-Maori. Submissions were sought on whether land should be offered back to family, whanau/hapu members where former owners decline (or are unable to) take up a repurchase offer.

Approximately 60% of the submissions that commented on this proposal supported the proposal and over half of these were from Maori. The balance of submissions, over half of which were users of the legislation, opposed the proposal.

Support for this provision was particularly strong among Maori, including hui, as it was seen as a means of preserving Maori land in Maori ownership. One submitter felt such a provision should only apply to Maori owned land and was seen as complying with Te Ture Whenua Maori Act 1993.

A number of different groups proposed that this provision should only apply where the land is of some significance to the family or whanau/hapu members.

Opposition to offering land to family and whanau/hapu members, where former owners decline or are unable to take up a repurchase offer, was strong among users and focused on the reality of compliance being messy and costly to administer. One area of difficulty highlighted was identifying who was the correct person to make the offer to. The New Zealand Law Society considered that such a requirement would be onerous to requiring authorities and considered the provision unnecessary as former owners were already free to enter into “back to back” contracts. The latter view was also expressed by a number of users.

One submitter affected by the legislation proposed that allowing the former owner to nominate another party to receive the offer back would address the issues without adding significantly to the administrative burden.

Users considered that:

- the extension went beyond the original intention of the offer back provisions;
- the opportunity already exists for the former owner to buy the land for their family;
- there should be discretion for the Crown/local authority to consider making such an offer at the time a former owner declines the offer back;
- there was always the option of the family purchasing if/or when a property is offered for public sale; and
- that it should be sufficient to advertise for successors to come forward, and/or publicly notify the sale.

7.2.4.4 Offer back to former owner's successors

Currently, the former owner's will determines who is a successor in probate. This generally limits a successor to one generation unless a former owner's will specifically mentions further generations. Submissions were sought on whether

“... the retention of Maori land needs to be paramount and under Maori custom we are only the Kaitiaki.” [198]

“Often the owner does not have the money to buy it back and it could be of historic importance to the whanau or hapu, this gives the people the opportunity to repurchase the land. [219]

“But only where the land is of some significant historical importance. Probably should be restricted to Te Ture Whenua Maori Act land.” [244]

“OK in perhaps Maori land, but only on basis that it is clear they are the rightful whanau/hapu – otherwise only creates more problems than it solves. But only at current market value.” [13]

the offer back provisions should be widened so that an offer back is required to be made to present day successors in probate or present day successors in genealogy.

Almost two thirds of the 113 submissions that commented on this concept of widening the offer back supported the proposal. The majority of these were from Maori. One third were opposed to the idea, mostly users of the legislation.

Many Maori felt that the offer back should be to successors in whakapapa. A Maori Trust supported this view but qualified it by requiring the owner's will to take precedence if there was one.

"Should be successors in probate or administration, but not genealogy. This is consistent with current property rights, whereby land succeeds under testacy." [244]

"...the considerations supporting an offer back to the successor in probate or successor in title are far outweighed by the administrative burden of making the offer back." [174]

"Such an arrangement could also upset legitimate family arrangements and go against the wishes of the former owner." [262]

Users of the legislation who supported the provision were mainly in favour of limiting the extension to successors in probate. A number of other groups also supported this view. Limited support was also given to the regime being widened to include successors in genealogy.

Opposition was strong among users of the legislation and Local Government New Zealand. Many users felt that such a concept would increase the administrative costs and delays as well as being overly onerous on the disposing authority.

Other users as well as the New Zealand Law Society considered that including successors in genealogy could be contrary to the wishes of the former owner.

One government agency recommended that the current provisions should not be widened.

7.2.4.5 Offer back to successors in title

Where part of a person's land has been acquired for a public work, the definition of "successor" currently includes a successor in title. A successor in title could be any person who holds the balance (or part of the balance) of the original land holding not acquired. Submissions were sought on whether the requirement to consider offering to successors in title to the former owner be removed.

Opinion on whether the requirement to remove successors in title was equally divided among the 110 submissions that commented on this issue. Support for the proposal was strong among users who made up almost half of the total support. On the other hand Maori were strongly in favour of retaining the provision and accounted for about half of the total opposition.

"The removal of any reference to successors in title would clarify the offer back obligations enormously." [137]

"It is difficult to fathom the rationale for providing for offer back to successors in title especially when it is considered that successors in title [sic] would be aware (through searching the title) as to the extent of the land. Offer back for such parties is therefore an anomaly and should be removed." [150]

Support for the removal of the requirement to consider offering land to successors in title was strong among users. A number of users felt that removal of successors in title would reduce the administrative burden attached to offer back. Others felt that such a proposal would assist in clarifying the offer back obligations. The New Zealand Law Society supported this view.

Many users questioned the rationale for offering land to a successor in title, considering those parties have no attachment to the land. Others believed there were adequate existing provisions to cater for situations where the land should be sold to an adjoining owner.

A hui sought the retention of the provision, except where it impacted on Maori

aspirations. A residential landowner proposed that if the offer to successors in title is retained, it should be limited to one generation of a succession line.

Opposition to the removal of successor in title was particularly strong among Maori. One Marae Committee requested that removal of successors in title did not take place without wider whanau consultation.

A number of users also opposed the removal of successor in title provisions. It was often felt that there were genuine times when land could only be offered to a successor in title. One user qualified his support for retaining successor in title by requesting that it be limited to adjoining successors in title, and that there be a mandatory amalgamation condition.

7.2.4.6 Decision maker to have authority to decide

Historically, the Crown or local authority was able to decide between successor in probate and successor in title depending on the circumstances of each case. This allowed a focus on the land and ensured that the land was disposed of in the most practical and appropriate way. In more recent times, following a number of Court decisions, land has been offered back on the basis of an established priority of succession.

Submissions were sought on whether the authority for a decision-maker deciding between successor in probate and successor in title should be reinforced. Of the 81 submissions that commented, a small majority agreed with this option, about one quarter of which were from Maori with a similar number being users of the legislation. The minority was opposed to this option, of which one third were users of the legislation, and almost one third were Maori.

Some users who supported the proposal felt that retaining the flexibility allowed for the land to be dealt with in a practical manner. Another user considered that certainty of process was likely to promote timely, efficient resolutions.

Another supporter sought clarity as to the priority between the groups of successor.

Opposition to the proposal from users focussed on the concept that an offer to the successor in title should be removed entirely therefore the requirement to consider legal authorities were not required. Other users identified that the purpose of offer back was to reunite former owners with land that was forcibly taken, and that successors in title should not necessarily retain that right. Local Government New Zealand supported this view.

"The current provisions need to be altered. The purpose of the offer back right is to reunite former owners with land that was forcibly taken by an acquiring authority. It does not follow that all successors in title should retain the same right." [250]

A number of Maori submissions raised the question as to who was the decision maker, with one also noting that if there was a will it should be followed.

7.2.5 Timing of Offer Back

7.2.5.1 Automatic return of land not used within a specific time

Land is often acquired for a public work and not used for that work for some time. Some consider that where land has been acquired, and not used within a defined timeframe it should automatically be returned to the former owner.

This view needs to be balanced against the nature of some projects and the need for some authorities to acquire land well in advance of any actual work construction.

Submissions were sought on whether land that has not been used for a public work within a specified timeframe following acquisition be returned to the former owner automatically. The automatic return of land was supported by two thirds of the 128 submissions that commented on the issue. Of note is that submissions from Maori comprised the majority of the total support, and no Maori expressed opposition to this provision in their submissions.

There was much opinion on how this provision should be applied.

Suggestions included:

- at the original price so that the Crown does not benefit from a windfall through an unnecessary acquisition;
- with various compensation provisions to protect owners;
- without costs of any kind;
- where the land was compulsorily acquired; and
- for Maori land owners.

"The offer back should be automatic, at the original compensation price on the basis that the land was never required and the Crown should not benefit from a windfall through an unnecessary acquisition. The former owner can take up the offer or otherwise." [241]

A local authority saw this provision as being fair, equitable and relatively simple to administer. An accredited supplier saw the provision as consistent with recent case law.

A hui recommended that the timeframe should be dependent on the nature of the work. An extension of the hui's recommendation was that provision should also exist to extend the timeframe in exceptional circumstances, for example where the land was the only site suitable for the work. This suggestion was also made by a number of submitters who opposed the provision.

A Maori Trust suggested the timeframe be negotiated and agreed to. Another Maori Trust sought that all whenua be returned to Maori.

Time frames proposed included 5 years, 10 years and various intermediate terms up to 20 years.

Less than one third of submitters opposed the provision of automatically offering land back where it was not used within a specific timeframe most of whom were users of the legislation. Arguments focused on the constraints this provision would place on the ability of the user to plan for the future in a manner that would best meet the needs of the community. This was considered to be particularly relevant in the cases of long-term projects. A land professional supported this view.

"We strongly disagree. Some projects require acquisition well in advance of any construction works or preparation of the land. Having to use the land within a statutory time period would unduly hinder local government's ability to respond to community needs." [252]

It was seen that determining an appropriate timeframe for the land to be used would be difficult due to the wide and varied nature of public works. Also, it was seen that deciding whether the land had been "used" was subjective and would lead to uncertainty.

"With having no time limit, the Council is often able to buy properties well in advance of the proposed construction date, as land becomes publicly available for sale. This avoids later use of the compulsory acquisition procedure." [137]

Users saw the ability to buy land in advance as an advantage. This allowed land to be acquired through open market transactions as it became available, thus reducing the need to compulsorily acquired land in the future. This advantage was seen to be threatened if a time limit were imposed. The New Zealand Law Society supported this view.

A user and a number of land professionals proposed that the return of land should not be automatic, but should only be offered back if there was no foreseeable use for a public work.

7.2.5.2 Offer back when original use has ceased

Currently, where land is not required for the public work for which it was acquired or is held, the Crown or a local authority can transfer the land for any other public work. Such transfers do not trigger the offer back obligations and consequently any offer back to the former owner is deferred until when the land is no longer required for the new public work (or any subsequent works).

Submissions were sought on whether it is fair to continue to allow land acquired for one public work to be transferred for another public work without offer back to the former owner. Offering land back to the former owner when the use for which it was originally acquired has ceased was supported by over two thirds of the 130 submissions that provided comment on this issue, mostly Maori and others affected by the legislation.

Support from Maori was particularly strong, including ten hui. A number of Maori considered that land should be returned in the same condition as when it was acquired. Others felt that compensation should be provided in instances where land is returned in a less useable state than when it was acquired. One submission suggested that land should be offered back whether it had been acquired by agreement or not. One hui commented that the offer back needed to take account of any depreciated state of the land.

“Consistent with the comments of the Court of Appeal in recent decisions relating to the obligation to offer land back I favour the Act having a ‘use it or lose it policy’. In other words if the acquiring authority has forced either directly or indirectly the acquisition of land then when the use of that land for that purpose is finished it should be offered back...” [73]

Maori also proposed that all (Maori) land should be returned to Maori, with one hui suggesting land be returned at no cost. A Maori Trust sought that land be returned to owners and not to hapu or a Maori authority.

Support from users was often given subject to a rider or set of criteria that ensured their ability to deal with their land portfolio was not undermined. For example, conditions for return of land no longer required for the original purpose included:

- consideration whether acquired by agreement or not;
- only if it had been compulsorily acquired;
- only where the land was not on the market at the time of sale and property sale was reached by agreement;
- only to the immediate past owner or successor in probate;
- not if it was acquired on a “willing seller/willing buyer” situation;
- when the land was under the constraint of a sunset clause;
- subject to section 50 of the Public Works Act 1981 (i.e. if it was required for another work or exchange); and
- subject to section 40(4) of the Public Works Act 1981 (i.e. exempt by virtue of its size and shape).

A number of land professionals supported the view that requirements for another public work may justify the retention of the public land.

Users made up the majority of the quarter of submissions that opposed the concept of offering land back to the former owner when the use for which it was originally acquired has ceased. Loss of flexibility and subsequent limited ability to meet the changing needs of the community was cited as being the main reason for opposing this provision by many including Local Government New Zealand. Users also felt that as the land was already publicly owned it

“There is a need to retain flexibility to consider any other types of public work. Land should be released when the Local Authority is ready to dispose of it.” [91]

should be available for other public works when no longer required for the original purpose. This view was supported by a number of property professionals.

A regional park association proposed that where land has been compulsorily acquired for a purpose (other than a park or reserve) is no longer required for that purpose and is of significant value for reasons of culture, heritage or public recreation the land should be retained in public ownership and protected for those purposes.

"Bear in mind the former owner has been compensated for the land when it was acquired. Again the threshold should be whether the land has truly become 'surplus' as opposed to simply ceasing to be used for the original acquisition purpose." [142]

It was the opinion of a government agency that the definition of "ceased" would need to be clearly defined if this approach was to be adopted. Another government agency pointed out that the original owners had already been compensated when the land was acquired. Land should therefore only be returned when it is surplus, as opposed to when the use of the land changed. A land professional and network utility operator required the offer back to be at current market value, as the land is a public investment.

7.2.5.3 Clarification of point at which offer back is triggered

The Act currently requires the Crown or local authority to start to consider offer back at the time the land is no longer required for the public work. No account is taken of problems that may be experienced in readying the property for disposal. Submissions were sought on whether the point at which the disposal of an interest in land will invoke an offer back needed to be clarified.

Support for the clarification of the point at which disposal of an interest in land will invoke an offer back was almost unanimous, with nearly 90% of the 110 submissions supporting clarification. A third of the support came from Maori and users of the legislation also accounted for one third of the support. Opposition came from a mixture of categories of submitters.

"This issue has been one of the greatest causes of section 40 litigation. It desperately needs clarification and simplification." [97]

Clarification of the point at which disposal triggers offer back was welcomed by all sectors including hui and public meetings. Clarification set out in legislation was seen by users as providing certainty and reducing the amount of litigation that presently occurs. The New Zealand Law Society supported this view.

"The disposal of land should be when the Public Works owner is in a position to sell, not when the land is no longer required. This would allow for appropriate consideration of alternatives to be made, particularly when there are areas of adjoining interest or values..." [103]

Many suggestions were made as to when the offer back should be triggered, the most widely supported by users being when the disposing agency resolves to dispose of the land. Local Government New Zealand supported this view. One land professional considered there should be an obligation on the Crown or public body to state in writing when the land was no longer required, and for that date to be conclusive.

"A provision allowing former owners (having offer back rights) to apply to the authority administering the land to declare land surplus and if the authority declines to give reasons for its decision, with such decision being subject to judicial review, is a reasonable provision provided that the sale price is specified as being calculated at the date the land is declared surplus or the date of the decision made determining it surplus on judicial review." [150]

Two users suggested that transferring land that will continue to be used for a "necessary" work should not invoke the offer back process even though a public provider may no longer carry out that work.

Other options suggested for when offer back should be triggered included:

- adoption of the Railways model;
- provision for the former owners to apply to the authority administering the land to declare the land surplus and where the authority declines, for that decision to be subject to judicial review; and
- when the land is no longer actively used.

Many Maori representatives considered that the offer back should be triggered immediately when the land was no longer used for the purpose for which it was taken. One hui sought consultation with Maori before a decision on disposal was made. Another hui sought clarification on the point at which land became surplus and who made that decision.

7.2.6 Conditions of Offer Back

7.2.6.1 Encumbrances

At times agencies may enter into long-term leases or encumbrances over public works land before disposal to former owners. Sometimes the presence of a long-term lease or an encumbrance may make the property unattractive to former owners. Submissions were sought on whether the relationship between long-term leases, restrictive covenants or strata rights and former owners' rights needed to be clarified. Of the 86 submissions that commented approximately 70% (almost half of which were from Maori, and one quarter were users of the legislation) agreed that the relationship between long-term leases, restrictive covenants, strata rights and former owners rights should be set in law.

Many users supported codification, as it was seen to provide clarification of relationships and rights and therefore certainty for all parties.

A land professional suggested this issue could be adequately dealt with in the memorandum of transfer documents.

One user sought that the criteria should be the same for everyone.

A number of Maori representatives sought a regular review of the circumstances with a suggestion that every 5-10 years would be appropriate. One Maori Trust noted that long-term leases needed constant review by mutual agreement. A Maori landowner requested that the relationship be defined with iwi consultation and agreement.

Opposition to codifying the relationship between long-term leases, restrictive covenants or strata rights and former owners' rights was expressed by less than a quarter of submitters, half of which were users. Any codification of relationships and rights was seen as being too restrictive by a number of users. An alternative was proposed that the nature of the public work and the development of the land and operational requirements would dictate how the land should be dealt with.

7.2.7 Value of Offer Back

7.2.7.1 Discretion to offer back land at less than current market value

Where offer back is required, any offer is generally made at current market value, unless grounds exist to make the offer at any lesser price. The Waitangi Tribunal has recommended that the Crown be able to negotiate return to Maori of any lands compulsorily acquired where the land is no longer required for any public purpose. Depending on the circumstances of each case, this return could be at no consideration, or at a negotiated price that may be less than current market value. The Waitangi Tribunal recommended that the quantum of compensation should be based on a fair return to Maori

*"Such an approach would:
(a) Provide certainty for all interested parties;
(b) Reserve some flexibility for the requiring authority to maximise use of the land; and
(c) Make it easier for a requiring authority to offer land back at an early date, rather than having to hold the land to ensure its objectives can be met."* [97]

"Where private operations are considered over which the public has no influence, clear legal definitions are necessary." [212]

"Maintain the status quo. For example, the nature of the public work and development of the land and operational arrangements will dictate how a local authority deals with the land." [250]

for the Crown's use of the land, and how long the land had been used for any public purpose. This argument could apply to any land requiring an offer back, rather than just Maori land.

Submissions were sought on whether there should be discretion to offer land back to the former owner at less than current market value. This was supported by over two thirds of the 117 submissions that commented on this issue, mainly Maori submitters and others affected by the legislation, along with a small number of users.

"Local authorities must be able to negotiate the sale of property and not be bound by inflexible and at times unrealistic determinations of 'current market value'." [250]

Users of the legislation and Local Government New Zealand supported the discretion to offer land back at less than current market value as it would provide them with the flexibility to achieve sensible solutions on financial grounds. It was noted that holding costs were often higher than market value and sometimes there was a restricted market. The Maritime Safety Authority suggested that rather than having discretion to offer land back at less than current market value, it should be a requirement in defined circumstances.

Other groups also supported a discretionary provision but on the grounds that offer back at less than current market value is appropriate in specific circumstances, for example when:

- fair compensation was not paid at the time of acquisition;
- land was gifted;
- land was compulsorily acquired; or
- land acquired was formerly a reserve or park.

Users of the legislation and the New Zealand Law Society also supported the discretion to offer back at less than current market value where the specific circumstances of the property warranted this.

Palmerston North City Council proposed that as land was taken for a public purpose and not speculation that it should be offered back at cost plus inflation.

A Maori Trust sought that where land is reverted to Maori land status the owners should be accommodated in terms of reduced commercial value of land under Te Ture Whenua Maori Act.

Two hui proposed that the price paid should be determined by negotiation based on the value of the land and not the improvements. Another hui felt that the circumstances of the owner must be taken into consideration. One hui also considered that at the very least, if the former owner was unable to meet the offer back price, the land should be disposed of according to the former owner's wishes. Other Maori sought that all (Maori) land should be returned. Some considered the return should be at no cost. Another suggestion was that the offer be "at cost" or at some limited cost, e.g. legal costs of transferring the land.

North Shore City Council recommended that land taken for a public work that was previously owned by the Crown or a local authority and which has conservation, heritage cultural or recreational value should be returned at no cost and declared a reserve.

Less than one third of submitters opposed the discretion to offer back at less than current market value. Users' opposition centred mainly on the fact that the land was purchased at current market value. A land professional

supported this view. Other groups considered the discretion to be inappropriate, as the offer back is only a pre-emptive right to receive an offer at market rate.

“Especially, where private providers have acquired the land, a discretion to offer land at a lesser value should not be included. This is not an Act to protect somebody’s loot. In addition, compensation should include compensation for the loss of intrinsic values.” [212]

The Whangarei District Council proposed that the only criterion for offering land back at less than current market value was where there was no market for the land other than the former owner. The Eastern Bypass Action group saw the only grounds for offer back at less than current market value to be where such a requirement had been registered on the title at the time of acquisition.

While Maori made up a high proportion of those opposed to the concept of offer back at less than current market value no reasons were offered to explain this opposition.

7.2.7.2 Legislated criteria for offer back at less than current market value

Currently the Act allows the Crown or local authority to offer land back at less than current market value where it is reasonable to do so. No criteria are set down in the Act to ensure that the discretion is applied in a consistent manner.

Submissions were sought on whether there should be criteria set in legislation for offer back at less than current market value. Setting the criteria in law was supported by over half of the 141 submissions that commented on this issue. Twice as many Maori supported this provision than opposed it.

The value of having clear criteria set in legislation that would provide certainty to all parties was also recognised by users of the legislation. A land professional supported this view. Others saw that the legislation should retain some degree of flexibility.

“A criteria is required for certainty, therefore codification would be beneficial.” [118]

The Wellington Tenth Trust sought that the method being set in legislation should allow for genuine opportunities to repurchase land that reflected the economic position of Maori.

The Department for Courts recommended there be a general provision that would allow Maori land to be offered back to the former owner at less than current market value when it was clear the land would be retained as a cultural asset rather than an economic asset. It was also proposed that any criteria must be equitable to all New Zealanders.

Nearly half the submissions opposed the concept of codifying the criteria for offer back, and the opposition was received from many categories of submitter. Many argued that compensation based on the current market value was reasonable, fair and equitable for all. Local Government New Zealand shared this view. Two users who considered that offer back at current market value was appropriate believed this would maintain consistency between how land is purchased and how land is offered back.

“If purchased at then market value, land should be offered back at current market value. The right to repurchase should only be a right of first refusal at current market value and if not exercised the local authority should be empowered to place the land on the open market.” [80]

Other users felt that provision for offering land back at less than current market value could be difficult to manage in a fair and consistent manner. Another user considered the circumstances would be too broad to cover in a clear and workable provision. A number of submitters from various categories suggested that each case should be decided on its merits to take account of varying circumstances.

Environment Waikato considered that disposal of land at less than current market value would disadvantage ratepayers who funded the acquisition and development of the land. The Property Group suggested that it was inappropriate for the Government to create a statutory contingent liability without providing a specific funding mechanism.

7.3 Offer Back of Maori Land and Protection of Maori Interests

7.3.1 Separate Offer Back Process for Former Maori Land

The Act currently contains a separate offer back regime where the land was formerly Maori land. Where set criteria are met, the land can either:

- be offered back in the same manner as for any other offer back; or
- the Crown or local authority may apply to the appropriate Maori Land Court for an order under section 134 of Te Ture Whenua Maori Act. (A section 134 order vests the land in the offerees as Maori freehold land).

Submissions were sought as to whether there should continue to be a separate offer back process for former Maori land. Support for the retention of separate provisions for Maori land was expressed by two thirds of the 111 submissions that commented on this issue. Maori (including 14 hui) made up the majority of submissions supporting the provision. Comment from non-Maori was equally divided between support and opposition.

"Maori owners should be empowered to decide appropriate processes to repatriate land including spiritual and community protocols." [35]

Maori saw a separate offer back process as a means of ensuring their values and customs became entrenched in the process. The Maori Land Court was seen as the appropriate body to mediate in the offer back process.

Maori and non-Maori alike considered that separate provisions would be of benefit, as the Maori and non-Maori perspectives are not the same. Separate provisions would therefore account for the needs of each group.

It was proposed by a Maori submitter that the protection currently extended to Maori land might also be appropriate for non-Maori, provided it did not diminish the Maori Treaty relationship with the Crown.

Vector Ltd proposed that the Maori process should be consistent with Te Ture Whenua Maori Act.

"The principles of the offer back process should be the same for both Maori and non-Maori former owners, however issues associated with multiple owners need to be recognised. This seems to be adequately addressed by Section 41 of the 1981 Act." [137]

One quarter of submitters (predominately non-Maori) expressed opposition and considered the principles of the offer back process should be the same for Maori and non-Maori. They also recognised that accommodation needed to be made for the issues associated with multiple ownership, including the timeframe needed to contact many owners. However, this was seen by others to be adequately covered by the current section 41 of the Act. The New Zealand Law Society supported this view.

Two local authorities sought that the offer back provisions for former Maori land and general land be the same but that provision should be put in place to assist Maori with re-vesting of the land.

Maori who did not support a separate offer back process saw the option of consultation prior to any action as being more important.

"Magna Carta 1275 – equality before the law." [104]

Opposition to separate provisions expressed by non-Maori including Federated

Farmers was based on seeking equity in the law.

Although not supporting the concept of a separate regime for Maori land, a number of submitters recognised that there were more difficulties with multiply owned land, which may need to be taken into consideration. Local Government New Zealand supported this view.

A land professional did not support separate provisions for Maori land but noted that iwi, hapu, or whanau land may need to be catered for differently.

7.3.2 Return of Former Maori Land in the Same Status

Where former Maori land is required to be offered back, offerees are generally able to choose how they wish to receive the land. The thrust of Te Ture Whenua Maori Act is to preserve the status of Maori land. This suggests that it may be incumbent on the Crown to return the land as Maori land (as opposed to general land owned by Maori). By insisting that former Maori land be returned as Maori land, potential offerees lose the opportunity to choose how they would like to receive an offer and may also have limited ability to take up an offer because it is difficult to use Maori land for security to obtain finance.

Submissions were sought on whether former Maori land should be returned in the same status as it was prior to the acquisition for the public work. The majority of the 84 submissions that commented on this issue supported the return of former Maori land in the same status. Maori largely supported this option and non-Maori were divided equally between support and opposition.

While support was high for former Maori land to be returned as Maori land it was recognised by Maori that this may not always be practical or possible. A user of the legislation and a Maori Trust saw offering the land in the same status as a compromise.

"Maori land should be returned as Maori land. If the owners then wish to later change the status of the land they can do so under Te Ture Whenua Maori Act (1983)." [263]

The Hastings District Council supported offering land back in the same state as it was prior to acquisition as it would simplify the administration of the process. A hui saw that Maori may suffer a financial disadvantage when land was returned as general land and then changed to Maori land which would have a lower value.

Maori sought that any damage to the land be compensated and a user recommended payment should be made for improvements.

The Whangarei District Council expressed opposition to offering land back as Maori land, quoting the McCarthy Royal Commission on the Maori Land Courts which saw no benefit in there being two mechanisms for recording land title.

Concern was expressed by users that a precedent on re-establishing status may lead to a request to rezone.

Other non-Maori suggested that returning land as general land would be simpler and that avenues existed for the owners to have the status changed if they wished.

"Generally everybody wants a fee simple title. Where they don't, they can easily change its status through the normal Maori Land Court Mechanism." [82]

A Maori landowner was opposed to the provision as they saw offering land

back as Maori land as being seldom practical.

A land professional pointed out that returning land to Maori as general land was problematic as the title does not allow for multiple ownership.

7.3.3 Return of Land as Chosen by Offeree

"Land should be offered back in the state the owners want it, for example Maori freehold land." [95]

As noted in Section 7.3.2 above, where former Maori land is required to be offered back offerees are generally able to choose how they wish to receive the land. Submissions were sought on whether it was appropriate to continue to allow this choice. Returning former Maori land in the status the offeree chooses was supported by the majority of the 89 submissions that commented on this issue. Almost half the support came from Maori including 13 hui with one quarter of submissions in support coming from users of the legislation.

Users expressed support for the option of former owners of Maori land choosing the status in which the land was returned. This support was based on the practical difficulties associated with obtaining finance for the purchase of Maori land. The New Zealand Law Society and a Maori landowner shared this view.

Maori accounted for two fifths of the opposition, with users of the legislation numbering almost one fifth. Opposition from non-Maori suggested that all land offered back should be in the status of general land. It was felt that the same rules should apply for everyone. Where the former owners wish to have the status of the land changed it should be at their discretion after the land has been returned.

"Any change in status of land can be done by the owners without involving Crown/local authorities." [88]

7.4 Offer Back Administration

Many of the views expressed in submissions on the administration of offer back have been included in other sections, including:

- the point at which disposal of an interest in land will invoke an offer back - see Section 7.2.5.3;
- discretion to offer land back at less than market value – see Section 7.2.7.1;
- legislated criteria for land to be offered back at less than market value – see Section 7.2.7.2; and
- offer of land to family, whanau or hapu members when the former owner declines offer back – see Section 7.2.4.3.

7.4.1 Interests of Former Owners Protected Through Notation on Titles

Currently, the Act contains no provision to ensure former owners' rights to receive an offer back are protected. Precedent exists for a caveat/memorial type process to be implemented to identify the rights of former owners as this process is used in a number of situations where land is transferred to another operator of the public work with a deferral of the offer back.

Submissions were sought on whether caveating or memorialising titles to protect the rights of former owners was appropriate. This proposal was supported by nearly all of the 113 submissions that commented on this issue, of which one third were Maori, and the rest included users and those affected by the legislation.

Support from users focused on the simplification that having titles caveated /memorialised would have on the administration of offer back requirements within the legislation. Two land professionals supported this view. Others noted the clarity, certainty and protection this provision would supply. An accredited supplier saw this as being useful for State Owned Enterprise land where the State Owned Enterprise is sold.

"It would save time and cost for vendor agency. It would be preferable for both parties clearly setting expectations and providing certainties." [142]

The issue was raised by a number of users as well as Local Government New Zealand who supported the concept that a new provision to this effect should be applied retrospectively. However, most users of the legislation would not support retrospective application of this provision as the costs were seen to outweigh the benefits. A land professional shared this concern. A number of Maori representatives supported the concept of caveating or memorialising titles of land taken in the future. It was suggested that land acquired prior to any change to the current Act should be reviewed and lands no longer in use returned at no cost. A transitional arrangement to consider memorials on titles of land compulsorily acquired and not already disposed of was seen as a good first step.

While supporting the concept, a number of submissions expressed concern regarding the restrictions that a caveat would impose. Users considered memorials were a better and more workable solution that would provide certainty and transparency for all parties. A land professional supported this view. Users suggested that a memorial incorporate the ability to transfer land to other providers to crystallise upon the land no longer being required by the acquiring authority.

"It is submitted that the caveat procedure is too restrictive and likely to impede legitimate dealings with the title to the property. I would support some form of notification by way of a memorial recording the fact that the land had been compulsorily acquired and that offer back obligations may exist in respect of it." [172]

Opposition to the proposal to caveat or memorialise titles to protect the rights of former owners was limited. Users noted that former owners' interests were already recognised by local authorities. Another user considered this unnecessary where interested parties have already had the opportunity to indicate and formalise their interests during the original purchase negotiations.

A Maori representative opposed the proposal as they felt that whanau were able to administer their own lands. Another Maori group thought it would be inappropriate where custodial responsibilities had been entered by the Court.

7.5 Transfer to Another Public Work

7.5.1 Transfer for Another Public Work Without Offer Back

As noted in Section 7.2.5.2 where land is not required for the public work for which it was acquired or is held, the Crown or a local authority can transfer the land for any other public work. Such transfers do not trigger the offer back obligations and consequently any offer back to the former owner is deferred until when the land is no longer required for the new public work (or any subsequent works).

Submissions were sought on whether it was fair to continue to allow land acquired for one public work to be transferred for another public work without offer back to the former owner. Of the 138 submissions that commented on transferring land for another public work just over half were opposed to any form of transfer. Maori were strongly against such transfers, comprising two thirds of the total opposition. Just under half thought it was fair to transfer land, of which many were users of the legislation.

"Land purchased for a particular public work should be used for that purpose alone or otherwise disposed of." [16]

A number of users opposed the provision to transfer land between acquiring authorities. Their belief was that each new work needed to be assessed on its merits and that land acquired for one public work should not automatically be able to be used for another. A land professional proposed that as the land value would change over the interim period the former owner should receive further compensation.

Maori were strong in their opposition to this provision. Many believed the land should be returned to the former owner when no longer required for the original public work. This view was supported by a number of other categories of submitters. One Maori Trust considered offer back to be a contractual issue not a Treaty issue.

Maori, in particular hui, saw consultation with the former owners as a minimum if offer back was to be delayed by a subsequent transfer of the land. Others considered that negotiation should occur with the former owner before any decision to transfer the land for another public work.

Other suggestions for adoption if transfer were allowed included:

- notation on the title to protect former owners interests;
- formal public process of transfer;
- mandatory internal audit to ensure actions are consistent with the Treaty of Waitangi, as recommended by the Waitangi Tribunal; and
- claw back provision that would ensure the land returned to the Crown when the original purpose ends.

*"If this provision were removed from Section 40, the requiring authority would be forced to:
(i) offer land back to the previous landowner and seek to reacquire it for the new purpose; or
(ii) seek to acquire land elsewhere, in which case another land owner is affected by the public works process." [262]*

Some users of the legislation considered that it is fair to transfer land previously used for a public work to another public work without offer back if the work is in the public interest. Some users further argued that to do so is fair for efficiency and cost effectiveness reasons. Two users and a land professional qualified their support by requiring both the previous and proposed works to be essential works. A private landowner similarly supported the concept where the work was in the public interest. The New Zealand Law Society and a land professional considered the concept of reacquiring land from an owner who had just been reunited with their land to be undesirable.

A number of categories of submitters were satisfied that the present section 50 provisions were adequate and should be retained.

"Yes. One must be pragmatic over changing needs and priorities. eg change secondary school site into to youth prison." [233]

Numerous cases were presented where the transfer of land between authorities was judged to be warranted. These included:

- meeting the changing needs of communities require flexibility in land use to meet such demands. Local Government New Zealand and a land professional supported this view; and
- situations where a succeeding authority takes over the work of another.

Suggestions to ensure fairness to the process of transfer included:

- consultation with former owners;
- opportunity for public debate;
- assessment to ensure it is the best site for the work;
- going through a designation process with subsequent public scrutiny; and
- revaluation of compensation issues e.g. injurious affection when the land is transferred.

"If it first goes through a new designation procedure. Transfer should not be used as a way of circumventing designation process and therefore public input." [21]

While supporting the concept, one submission felt that transfer would not be appropriate where the land was originally compulsorily acquired but the subsequent use would not justify compulsory acquisition. Transit New Zealand considered transfer would also be inappropriate where the land had been gifted for a specific purpose. One hui requested that transfer should not take place where there were not already existing utilities on the land.

7.5.2 Other Agencies Needs Canvassed

Historically, other government agencies were notified that land was surplus before open market disposal. This meant that that the agencies could advise their interest in using the land for another public work. The practice ceased with the demise of the Ministry of Works and Development.

Submissions were sought on whether a regime was required to ensure other agencies' needs for surplus public works land are considered or canvassed prior to disposal. This suggestion was opposed by just over half of submitters, and supported by just under half. The categories of submitters were divided in their views.

Opposition from users was on the basis that the agency should be able to deal with their assets in terms of their own specific needs. Others considered that if land was required by an agency they should actively purchase the land rather than wait to be consulted. A land professional supported this view.

"Other agencies should have the responsibility to make their own enquiries of land holding Departments or local authorities." [220]

Opposition from Maori, including three hui was strong. A number of Maori saw the process as potentially denying Maori the opportunity to have land offered to them. Others required consultation to take place.

Any regime that added to disposal obligations was not welcomed, as it would place further burden on disposing authorities.

Clarity was sought as to the scope of "agencies" canvassed. Other submissions made suggestions as to who would be included in the term "agencies". One hui supported Crown agencies only but this was seen as undermining the integrity of the process by one user. A Maori Trust wanted the scope to be limited to Maori agencies under Te Ture Whenua Maori Act.

To canvass other agencies prior to disposal was seen as in the public interest as it would ensure land was not returned only to be acquired by another agency. It was proposed that this be done by public notice or consultation.

"Other public agencies should have a priority of former owners or Maori to enhance the public interest and best utilisation of public land." [233]

7.5.3 Criteria for the Transfer of Land for Another Public Work

The Crown has the discretion to transfer land from the Crown to a local authority for another public work. Similarly, a local authority can transfer land to the Crown or another local authority for another public work. There are no criteria set down in the Act to ensure robustness of the process.

Submissions were sought on whether criteria are required for the transfer of land from the Crown to a local authority for another public work. Over two thirds of the 98 submissions that commented, welcomed criteria for such transfers. The support was spread among the range of categories of submitters.

The establishment of criteria relating to the transfer of land was seen by some users as creating clarity, simplicity and transparency within the process.

Environment Canterbury supported the introduction of criteria governing the transfer process if it was required to ensure the continued availability of Crown public works land for local authority public works. A land professional suggested that public notice could be required.

A number of Maori groups supported the requirement for criteria when transferring land from the Crown to a local authority. Some required consultation to take place with the former owner before any transfer. Other suggestions from Maori included:

- providing a mechanism whereby land could be held in trust;
- providing for a caveat; and
- referring former Maori land to the Waitangi Tribunal.

Less than one third of submissions, covering the range of categories, were opposed to establishing criteria. Users of the legislation argued that the transfer should be allowed provided the proposed use fits the definition of a public work. Also, section 50 was seen to adequately cover the issue of transfer between agencies and that any further legislation on this issue would only serve to inhibit their ability to execute their public works operations. The New Zealand Law Society supported this view. The only suggested change to section 50 was that it should be clarified in respect of section 40 obligations. The New Zealand Law Society supported this view and also wanted Maori interests to be clarified.

"If the requirement fits the definition of a public work then it is appropriate that a transfer be authorised... Both the Crown and the Local Authorities should be able to transfer land to each other and other public bodies for public works as this would be in the public interest." [91]

7.5.4 Protection of Maori Interests

Where land transfers from the Crown to a local authority the offer back obligations are not invoked until the land becomes surplus to local authority requirements. Therefore the interests of former owners are protected. The Crown has established administrative mechanisms to protect Maori interests where surplus public works land has been cleared through the offer back process. However these mechanisms do not apply to land owned by local authorities, or to proposed transfers to local authorities for another public work. This means the Crown's obligations under the Treaty of Waitangi may be overlooked, as land that transfers to a local authority is no longer available for use in any future Treaty settlements.

Submissions were sought on whether Maori interests should be protected where the Crown transfers land to a local authority for another public work. Support for the protection of Maori interests was expressed by over 70% of the 102 submissions that commented on this issue. Half the support came from Maori, including hui, with users providing almost a quarter of the total support.

Suggestions for protecting Maori interests included:

- placing a memorial on the Title;
- placing a caveat on the Title;
- negotiation with the former owner before land can be transferred;
- ownership of the land returning to the Crown when it is no longer required so that the Crown can fulfil its responsibilities to Maori; and
- not allowing Maori land to be transferred;

"The Crown must discharge all of its responsibilities in respect of Maori regardless of its actions under the Public Works Act. In particular in no way can requiring authorities be seen as having responsibilities which are those of the Crown." [56]

Local authorities, Local Government New Zealand and the New Zealand Law Society, expressed support for the Cabinet policy guidelines (16 October 2000) regarding the transfer of Public Works Act 1981 land held by the Crown to a local authority for a public work.

Nearly 20% of submitters were opposed to the concept, almost two thirds of whom were users of the legislation. Opposition was directed at the specific protection of Maori interests as it was seen that all interests should be treated equally.

"Maori interests should receive the same protection afforded to any other citizen, natural person or company." [80]

One user believed that adequate protection was currently available, as Ministerial signoff was required under existing legislation. Another user identified that there may be a case for scrutinising transfers of former Maori land to local authorities because of the scarcity of Maori land on the same criteria for justifying a compulsory taking. In other cases giving Maori special rights was seen as preventing the Act from functioning.

7.6 Transfer From the Crown or Local Authority to a Private Provider

7.6.1 Registration of a Caveat Against the Certificate of Title at the Time of Transfer

In many instances, control and ownership of a public work on land originally acquired by the Crown or a local authority has transferred to a private provider. This can lead to problems with complying with Crown or local authority statutory requirements, particularly obligations to offer land back to former owners.

Submissions were sought on whether the Crown should retain any statutory obligations when transferring land to a private provider by registering a caveat against the certificate of title to the land at the time of transfer. Such a measure was supported by three-quarters of the 99 submissions that provided comment on this issue.

Support for the proposal was strong across all categories, particularly Maori, with many (including Local Government New Zealand) believing that the Crown should ensure that the obligations of the Act are satisfied, particularly former owners' rights.

"Private providers are able to administer their statutory obligations without the need for Crown oversight. The proposed controls will create an unnecessary administrative overlay and increase the costs of administering the offer back obligation." [174]

Nearly 20% of submitters opposed the proposal, particularly users of the legislation. Caveats were seen as unworkable and unduly restrictive on administering bodies. The use of caveats to provide protection was, therefore, seen as inappropriate. One user considered that if the private provider is bound by legislation a caveat should be unnecessary.

7.6.2 Transferring the Land in Trust

As noted in Section 7.6.1 above, in many instances, control and ownership of a public work on land originally acquired by the Crown or a local authority has transferred to a private provider. Submissions were sought on whether

the Crown should transfer land to a private provider in trust, so that when it is no longer required for the work the land returns to the Crown and reduces compliance problems with statutory obligations.

Opinion was equally divided on whether this was an acceptable mechanism. Comment was provided by 85 submissions on this issue. Whereas the majority of Maori supported the concept, the majority of users opposed it.

Transferring land in a trust was seen as a good mechanism for allowing the Crown to retain ultimate responsibility for the land it acquired. A Maori Trust sought provisions to incorporate obligations to Maori. A Maori landowner suggested a similar procedure to that used for transfer of land to State Owned Enterprises, with a proviso that, where possible, a less than freehold interest in Maori land be acquired.

"Once the land has passed to the requiring authority it ceases to be Crown land, however NZ Police recommends that the Minister of Lands has no function here." [261]

In contrast it was expressed that the Crown's responsibility for the land should cease when the land is transferred, as once it has passed to the requiring authority it is no longer Crown land. Retaining a future obligation by transferring land in a trust was therefore seen as inappropriate.

Concern was raised regarding the responsibility of ensuring the land is used for the original purpose for which it was acquired especially where the transfer is long-term.

Clarity of what would happen if only part of the land transferred became surplus was sought by a land professional.

7.6.3 Codification of Crown Enforcement Role of Disposal Requirements

A private provider's actions might effectively determine that land is no longer required. However, the Act does not currently allow the Crown or local authority to invoke or enforce the Act's disposal provisions. Submissions were sought on whether the Crown's enforcement role should be codified. Of the 86 submissions that commented on this proposal, three-quarters agreed. Support came from a range of categories of submitters, with Maori support being the strongest.

"Codification is welcomed as who has the responsibility of enforcement is unclear." [118]

Codification of the Crown's enforcement role was seen by many groups as providing a consistent, transparent and fair mechanism. It was also considered that codification would ensure the Crown complies with its statutory obligations.

Two Maori Trusts suggested that the codification must have regard to the Articles and principles of the Treaty of Waitangi.

"... Enforcement should be self regulating with the Audit Office having the principal role coupled with the suggested protections concerning lodgement of memorials, sunset provision etc." [98]

The balance of submitters, heavily weighted by users, opposed codification. Opposition centred on the principle that while an offer back mechanism may be appropriate, the responsibility to comply should remain with the requiring authority. Enforcement should therefore be self-regulating and by way of audit and/or the requiring authority filing a certificate that offer back obligations have been complied with.

7.6.4 Private Provider Responsible for Complying With Statutory Requirements

Where the Crown compulsorily takes land on behalf of a requiring authority, the Crown remains responsible for complying with any statutory responsibilities to a former owner (should the land be declared surplus at a later date). Submissions were sought on whether the responsibility for complying with ongoing statutory requirements should pass absolutely to the private provider.

Of all the options relating to transfer of land to private providers, transferring statutory responsibilities to the private provider was the least favoured option, with only one third (mainly users) of the 89 submissions that commented on this issue expressing support.

Much of the comment in support centred on the ongoing obligations to offer back surplus land to former owners. A number of users supported the offer back responsibility passing to the private providers.

"If offer-back provisions for private providers are introduced in the Act, then a private provider should have the responsibility of complying with those provisions." [250]

If private providers were to have statutory responsibility for offer back, some submitters felt that remedies would be available to the former landowners when the private provider went bankrupt, or failed to comply with their obligations. The New Zealand Law Society also held this view. Others suggested that a watch dog group or policing body was required.

"Private providers may become insolvent etc and be liable to lose the land under mortgagee sale." [233]

Maori were strongly opposed and made up nearly half of the total number of opposing submissions. Users accounted for a further fifth of the opposition. Opposition focused on it being the Crown that acquired the land so it should rightly be the Crown that retains the obligation to offer the land back. This argument was seen as particularly relevant in the case of Maori land as the Crown is the only body that currently has obligations under the Treaty of Waitangi.

"The Crown is responsible for its own house. Providers are merely licensed users." [2]

It was also proposed that passing the offer back obligations to the private provider could potentially result in a conflict of interests for the provider between their moral obligations and their commercial imperatives.

Local Government New Zealand and the Wellington Regional Council proposed a compromise whereby there is a discretion whether the Crown/local authority or the transferee of the land is responsible for the offer back and disposal processes.

7.7 Disposal Administration

7.7.1 Open and Contestable Administration

The Act mostly requires an open and public process to be followed when disposing of surplus land. This ensures the market is tested and the best possible return for land disposal is obtained. Submissions were sought on whether the disposal process should be open and contestable.

Having a disposal process that is open and contestable was supported by three quarters of submitters comprising a range of categories of submitters, especially users of the legislation.

"Provided LINZ or the Audit Office take a policing role."
[170]

In order to achieve a disposal process that was open and contestable it was seen that robust procedures would need to be developed.

A land professional proposed that disposing of land through the Treaty of Waitangi or the Waitangi Tribunal did not satisfy the criteria of openness and contestability. Another land professional argued that all land (with the exception of former Maori land) should go on the open market and that there should be a separate procedure for the disposal of Maori land that involved negotiation with Maori tribes and associates.

Whilst it was agreed that the process should always be open, in reality it would not always be able to be contestable. Local authorities expressed support for the status quo. Local Government New Zealand supported this view.

Users of the legislation considered that once the offer back requirements were complied with it was proposed that the manner of disposal should be at the landowner's discretion. This concept was opposed by around 15% of submissions, half of which were Maori.

7.7.2 Best Return to Land Holding Agency

As noted in Section 7.7.1 above, the Act mostly requires an open and public process to be followed when disposing of surplus land. Submissions were sought on whether the disposal process should ensure the best return to the land holding agency.

Overall, opinion on a requirement for the disposal process to ensure the best return to the land holding agency was closely divided among the 102 submissions that commented on this issue. Users were strongly in support of this proposal making up half of the total support. In direct contrast, Maori were decidedly opposed accounting for more than half of the dissenting submissions.

"Yes, as a first principle but subject to the public body's right to take other factors into account in the disposal decision." [89]

Support for this proposal was often on the basis that as long as the disposal of the land was fair and equitable under the circumstances it should be acceptable. In a similar vein, it was considered that the disposal price should be at the agency's discretion weighing up the costs and benefits. Local Government New Zealand also held this view.

"The agency should decide what is the best price in all of the circumstances, including holding costs if the land is not a particularly desirable parcel." [220]

Opposition to the proposal argued along similar lines to supporters of the concept, i.e. the focus should not be on the best return to the land holding agency, but on how fair and equitable the disposal is in the particular circumstances. Allowing the agency discretion as to the disposal price was also raised as grounds for opposition.

Suggested exceptions to seeking the best possible return included disposal of former reserve land and compulsorily acquired Maori land.

Two public meetings noted that offer back to the former owners may not realise the highest price. In some cases adjacent landowners may be willing to pay more, or a former owner might immediately on sell the land and make a large profit.

A land professional proposed that the Crown should not profit from land dealings.

7.7.3 Disposal of Land without Going to the Market in Certain Circumstances

The Act contains an exception to an open and public process where a disposal is by private treaty. Private treaty was introduced to enable a sale of land, once it had cleared offer back requirements, to existing tenants or leaseholders. Under a private treaty scenario there is no public exposure to a sale. Potentially the land may be sold for less than its true worth.

Submissions were sought on whether agencies needed to retain the ability to dispose of land without going to the market in certain circumstances. Retaining the ability for agencies to dispose of land without going to the market in certain circumstances was supported by around 60% of the 90 submissions that commented on this issue. Over half of those in support were users of the legislation.

Support from users was on the basis that the best result might not always come from the market. A landowner also supported this notion. Many users supported the existing provisions contained in section 42 of the Act, which provides for disposal of land without going to the market where appropriate. It was proposed that sufficient checks and balances exist in the Local Government Act 1974 to ensure the process will always be fair.

“The ability to transfer land from one private provider to another is very important to accommodate a rapid change in ownership needed to maintain the public work. In many instances there is commercial merit in the requiring authority holding a ‘closed tender’ or negotiating privately.” [118]

Circumstances suggested where this discretion would validly apply include:

- transferring to other private providers;
- when seeking to exchange land for land;
- selling land to a lessee when the improvements to the land are owned by the lessee;
- where the land has been gifted;
- only when offering to the former owner; and
- only in the context of Maori land

“But only in the context of offer to Maori. Local A’s [sic] have been quite dishonest in undisclosed transactions of the past including as recently as 1995!” [35]

“Generally the disposal process should be open to avoid deals and undue influence by developers or corporates.” [233]

One third of submissions were opposed, the majority of which were from Maori. Opponents of the proposal sought that the process be open and transparent. Others requested that the “certain circumstances” needed to be defined.

7.7.4 Ability of the Crown to Act as a Developer

When disposing of any surplus land held for a public work the Crown is bound to comply with the requirements of the Resource Management Act where subdivision is needed to effect the disposal. This means the Crown must spend considerable public money to provide services and facilities to meet district plan requirements. It may be more appropriate for any future land developers to provide these services once the Crown has effected disposal.

Submissions were sought on whether the Act needed to clarify the ability for the Crown to act as a developer when attempting to dispose of surplus land and reinforce the requirement for compliance. Of the 85 submissions that commented on the need for clarification, two thirds agreed. Support was evenly split between categories of submitters.

"We support the status quo. Preparing land for sale to achieve the best price is part of a landowner's discretion and choice. The Crown, like any landowner must act responsibly as a 'good neighbour' and should not attempt to absolve itself through legislation from obligations that other land owners would ordinarily have to satisfy, even though there may be financial implications." [80]

Users welcomed codification of these issues, as it would provide clarity to the process. Users of the legislation generally agreed that under no circumstances should the Crown be able to forgo normal resource consent requirements. A Maori Trust supported this view as did Local Government New Zealand and the New Zealand Law Society.

One quarter disagreed with the proposal. Again, this was evenly split between categories. Opposition was expressed in a number of ways. One landowner argued that the Crown should not act as a developer but instead should be focusing on returning the land to the previous owners. A user, on the other hand, argued that the Crown should have the right to do what it wished in terms of preparing land for disposal.

Transit New Zealand submitted that it was difficult for an agency to define when it was acting as a developer, particularly when external influences could be increasing or decreasing the value of the land.

A land professional suggested the Act be brought into line with the Resource Management Act as it was that Act which often rendered an offer back impractical, due to the Crown's inability to raise a Title.

7.7.5 Compliance with Resource Consent Requirements

As noted in Section 7.7.4 above, the Crown is bound to comply with the requirements of the Resource Management Act where subdivision is needed to effect the disposal of surplus public works land.

Submissions were sought on whether surplus public works land should be exempt from complying with resource consent requirements when attempting to title the land for disposal. Nearly three quarters of submitters were against such an exemption. Opposition came from a range of categories of submitters including Local Government New Zealand and the New Zealand Law Society, with users of the legislation being the majority.

"Integrity of process would be irreparably damaged by such exemptions – both for the PWA and the RMA." [56]

Exempting the Crown was seen as a threat to the integrity of the process. It was noted that exempting the Crown from statutory considerations in the past, for example the Building Act 1991, had resulted in unfortunate consequences. Resource consents were seen as critical as they were the only part of the process that was open to public consultation.

A compromise proposed by a land professional was for consent requirements to be dependent on how the land was to be disposed of. Where land was to be amalgamated with another title it should be exempt from requiring a resource consent, but when a separate title was to be created it should comply with the requirements.

Support also came from a range of submitters and focused on the burden that complying with the resource consent would impose on the disposer. A land professional thought this was appropriate, as otherwise the Crown would be forced to act as a developer. This burden was seen as unjust particularly when the authorities are required to return the land.

At present resource consent requirements prevent surplus land from being sold and results in inefficient land use. This was viewed as particularly relevant where strips of land are acquired. It was proposed that a better approach would be for some form of notice on the title that set out what was required on the part of the purchaser before the land could be used.

7.7.6 Enabling Regime where Disposal Costs Outweigh Return

When disposing of land, the cost of complying with current legislative or Cabinet-directed processes often outweighs the return to the Crown or local authority. This inhibits land disposal and may result in agencies holding on to land when it is not necessarily required for the public work.

Submissions were sought on whether the Act needed to provide a more enabling regime to assist in the efficient disposal of land where the costs outweigh returns. Two thirds of the 92 submissions that commented on this issue welcomed the proposal and comprised a range of categories.

Many users of the legislation felt that an enabling regime was necessary to provide an efficient mechanism for the disposal of financially unviable land. While such a regime would certainly assist with the disposal of low value land, it was considered imperative this was not at the expense of people's rights. One option suggested streamlining disposals to minimise compliance costs.

"A major thrust in relation to streamlining disposals should be the minimising of compliance costs." [190]

The status quo was seen as already providing a flexible framework that allows for the disposal of land at less than current market value.

Maori support was tempered. Two Maori Trusts wanted Maori involvement in the process. One Maori landowner considered the process to be important to avoid ongoing Treaty grievances.

Nearly one third of submissions opposed a more enabling regime. A number of users, as well as Local Government New Zealand and the New Zealand Law Society, said that all landowners should have to comply with resource consent requirements. One user suggested that disposal costs should have formed part of the initial assessment prior to acquisition.

"Land is forever. Costs are only relative to the short term." [30]

Two landowners suggested that land dealings for public works are to facilitate the provision of a work for the public and not to enable the best return on the disposal of land.

An alternative suggestion for the future of land that is uneconomic to dispose of is retention as a park or open space. A Maori landowner suggested that the Act should protect former owners and that creative administrative processes were required in relation to Maori land.

7.8 Other Issues on Disposal

Other issues raised regarding disposal included:

- where land that was once a park or reserve is no longer required for a public work it should be returned to public open space; and
- due regard for heritage values in any fast track method of disposal.

Other offer back issues included:

- the costs involved in offer back are insignificant in relation to the whole project, the importance of offer back to landowners, and constitutional rights;
- land should be returned in the same or better condition than when it was acquired;
- the offer back obligation should be required for disposing of strata rights where the balance of the land is to remain for the public work;
- whether offer back should be limited to natural persons only;
- the Crown should make funds and/or payment options available to enable the landowner to repurchase land if required. Such funds should be accessible to Maori and non-Maori alike;
- the offer back period of forty working days is too short;
- park and reserve land should be subject to offer back;
- when land is offered back it should not be polluted by designations from other authorities;
- a condition of offer back should be that the landowners are required to retain ownership for a period of time before they can sell the land in order to avoid windfall gains; and
- the Maori Select Committee should review all land held by the Crown and ensure accountability on how the land is used.

Maori:

- for further issues on disposal specific to Maori see Section 8.3.3.

8 Issues of Particular Importance to Maori

8.1 Overview

The 90 submissions from Maori on the review of the Public Works Act 1981 (the Act) comprised 32% of the total number (278) of submissions received. Seventy-two of these included comment on the chapter of the discussion paper summarising issues of particular interest to Maori as did 40 other non-Maori submissions. Submitter details and their relationship with the Act are shown in Figure 8.1.

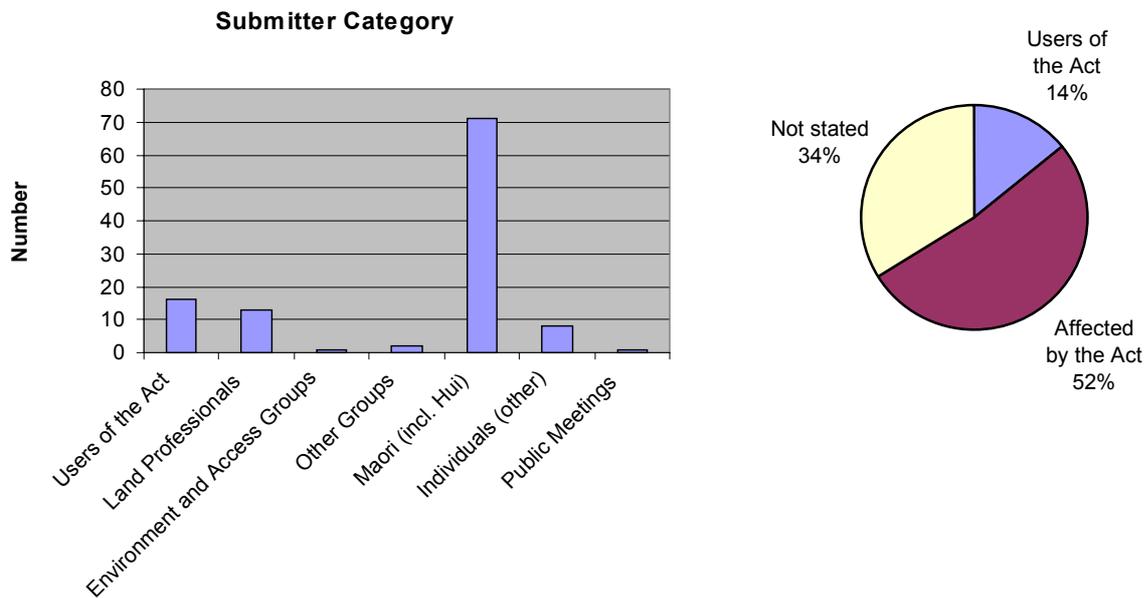


Figure 8.1: Submitter category and relationship with the Act (Maori Issues)

The disproportionately high number of submissions from Maori (relative to their proportion of the population) and the fact that over two-thirds of these submissions represented whanau, hapu or iwi groups or hui attendees attests to the considerable interest and importance that Maori place on this legislative review. Overall, there was remarkable consensus among Maori on the key issues, i.e. recognition and valuation of the spiritual aspects of land for the purposes of compensation in the event that the freehold is taken, protection of land from compulsory acquisition (with absolute protection of wahi tapu), prompt return of any such land as soon as it is no longer required for a public work, institutional organisations that understand tikanga issues, and legislative protection of Maori interests through a Treaty of Waitangi section in the new Act.

Past public works legislation has resulted in considerable taking and use of Maori land for development of New Zealand's infrastructure and a number of submissions refer to historical Treaty grievances involving their ancestral lands. The recommendations of the Waitangi Tribunal in relation to public works grievances were strongly endorsed by the Maori submissions. Inclusion of Treaty of Waitangi provisions and that these be binding all bodies exercising powers under the Act was keenly sought by Maori (and also supported by a number of non-Maori) who considered that they should be contained in the body of the Act rather than in a preamble.

Many Maori are very concerned about protecting the remaining small amount of Maori land. Submissions were emphatic that no more land should be acquired, or only acquired in exceptional

circumstances as a last resort in the national interest. Leasing rather than acquisition of the freehold is preferred along with joint management of the public work.

Compensation provisions in current legislation are considered deficient in that they do not take into account spiritual, cultural and social values that are associated with land, and the level of compensation is insufficient to purchase equivalent replacement land.

Maori consider that land no longer required for a public work should be returned to the former owners or their successors (in accordance with Maori custom) without exception, at less than market value or no cost. In many cases Maori are not in a financial position to afford repurchase of their former land at current market value (particularly if the land has been rezoned) and feel that compensation should be paid for the benefit of the use of the land for the duration of the public work. Some submitters recommended that all public works land currently in Crown ownership should be returned to Maori and leased back to the Crown for the public work.

Compliance and enforcement concerns included the need for protections (such as a caveat on the title) to ensure that offer back provisions were properly administered. This was seen to be a particular problem where land had transferred from the Crown to a local authority or to a private entity. Some submitters went further to state that powers of acquisition should be limited to the Crown because of past abuses by requiring and local authorities.

Maori also consider that many institutions have worked against them in the past and have little faith in Crown agents acting on their behalf in land acquisitions. Consequently, a continuing role by the Maori Trustee in public works legislation was not supported. In contrast, Maori view the Maori Land Court more favourably because of its specialist knowledge of tikanga, which they consider is lacking in the Environment Court. There was support for the Maori Land Court to be mandated and resourced to deal with all Maori land issues that are currently under the jurisdiction of the Environment Court.

The need for communication and consultation in administering the legislation featured strongly and notification in Maori and English was supported by Maori submitters.

8.2 Treaty of Waitangi Recognition

“... Any new Act should consider every proposition of the Tribunal with the utmost of priorities.” [182]

“Many of the Tribunal views apply equally to non Maori concerns and the affinity of some early settlers and descendants to land may be equally as strong as that held by some present day Maori. Many of the recommendations should be applied to all land to ensure equality under the law.” [233]

“I believe the Treaty is important to all peoples of Aotearoa; and must be included in all Acts...” [44]

“The Treaty of Waitangi is a living document and all new acts should take these obligations into consideration.” [34]

“The Treaty of Waitangi must be written into the Act in the strongest possible terms.” [40]

8.2.1 Waitangi Tribunal Recommendations

Strong support for the Waitangi Tribunal's recommendations relating to Maori land and public works (see pages 60-61 of the discussion paper) was expressed in 17 Maori submissions and was implicit in a number of other Maori submissions. General support was also expressed in 6 non-Maori submissions but two of these were qualified in some way and a further submission recommended that the Tribunal's recommendations be applied to all land.

Suggestions were also made that the Waitangi Tribunal should have a role in retrospective approval of historical acquisitions and for it or the Maori Land Court to confirm disposals of former Maori land no longer required for public purposes.

8.2.2 Treaty of Waitangi Clause

The need to include Treaty of Waitangi provisions was expressed very strongly in 41 Maori submissions. Inclusion of a Treaty clause is seen as a means of ensuring the partnership between Maori and the Crown.

Specific matters that Maori wanted addressed in the Act included recognition

and protection of tino rangatiratanga and recognition of Maori culture, beliefs and affinity to the land.

Views about inclusion of a Treaty clause were mixed among non-Maori submitters. Seven submissions supported such legislative reform. However, there were also a lesser number that either did not support such inclusion or voiced reservations. For example, the New Zealand Business Roundtable considered that such inclusion would undermine the rule of law and respect for the law, and fuel racial resentment. The Whangarei District Council was concerned that a Treaty clause in legislation would potentially result in increased litigation and impose costs on ratepayers. Some other submissions were opposed to discrimination on racial grounds (see Section 8.8).

There was a strong preference among Maori for the Treaty reference to be contained in the body of the Act, rather than in the preamble. One submitter also wanted specific provisions throughout the Act in addition to a general Treaty provision while another submitted that the provision should be based on the Maori text of the Treaty and include prescriptive provisions on the Crown and local authorities' powers and activities relating to acquisition, compensation, offer back and disposals.

Nine suggestions were made as to the form that the Treaty clause might take in new public works legislation. These were based on those in existing legislation and ranged from the highest forms of protection of Treaty of Waitangi principles such as in the State-Owned Enterprises Act 1986 and in the Conservation Act 1987 through to the Fisheries Act 1996 and Resource Management Act 1991. Overall, Maori submissions on this issue tended to align most strongly with the higher forms of protection whereas the two local authority submissions suggested provisions similar to those in the Resource Management Act. An individual non-Maori submitter suggested a Treaty provision either of the type in the Conservation Act or in the Resource Management Act.

Many Maori submitters considered it imperative that Treaty obligations need to be exercised by all bodies exercising powers under public works legislation and not just the Crown. This view was also expressed in some non-Maori submissions.

Eleven local authorities made submissions on the Maori chapter of the discussion paper and their views ranged from agreeing that the Crown and local authorities exercising powers under the Act should be bound by the Treaty or comply with its principles, through an intermediate position of consideration of some of the Treaty principles, to preference for the status quo or objection to the proposition. Two local authorities proposed that all compulsory acquisitions should be carried out by the Crown, and one submission did not present a view. At the Nelson public meeting, it was submitted that any difference among users of the legislation in respect of Treaty of Waitangi obligations would need to be justified and the responsibilities clarified.

Five requiring authorities (out of a total 23 requiring authorities and network utility operators) made submissions on the Maori chapter of the discussion paper. One of these was ambivalent to being bound by the principles of the Treaty; another supported new legislation acknowledging Maori aspirations whereas a third submission supported some consultation without being further bound by Treaty obligations. The remaining two submissions suggested rights

"Treaty of Waitangi provisions should be thrown out, burnt, written out of all legislation." [1]

"... [V]ariations in the rules that accommodate variations in land ownership types can be accommodated without reference to race or ethnicity. We argue that there should be no Treaty of Waitangi clause in the Public Works Act, nor any other distinctions based on race or ethnicity." [107]

"... Treaty of Waitangi provisions in the Act should provide for Kaitiakitanga and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as in the Resource Management Act 1991." [18]

"... We would like to see the Treaty of Waitangi reflected in the Act in a way that is binding on any body exercising powers under the Act." [47]

of first refusal similar to those already existing in legislated Treaty settlements.

8.3 Acquisition, Compensation and Disposal of Maori Land Under the New Act

Comments on the acquisition, compensation and disposal of Maori land under the new Act were provided by 74 submitters (54 Maori and 20 non-Maori).

8.3.1 Acquisition

"... the detrimental effect of the Public Works Act which was designed to take Maori land... We submit: That no more Maori land be taken under the Public Works Act ..." [179]

The majority of submitters on this section, mainly Maori land owners or representative bodies, were concerned about the small amount of Maori freehold land remaining in Maori ownership and wanted to avoid any more being acquired by the Crown. A number are firmly against any further taking of Maori land for public works. However, many consider that the reality is that land will still need to be acquired, but that it should only be in exceptional circumstances, as a last resort and in the national interest (mirroring the view of the Waitangi Tribunal). The majority of these submitters considered that whenua should only be leased for public works, and the freehold should not be acquired, or that public works be managed under joint management and participation which enables a form of kaitiakitanga to continue. Some also considered that the powers of acquisition have been abused by requiring authorities and local authorities and that only the Crown, should have the right to use Maori land for public works.

Many Maori submitters also considered that the acquiring authority needs to consult fully with whanau/hapu/iwi on proposed public works affecting Maori land, and that the consent of the landowners is necessary.

It was also proposed that in exceptional circumstances where freehold title of Maori land is compulsorily acquired as the public work is deemed essential, Maori should have the right to firstly determine whether the work is essential, and secondly, whether the interest in Maori land should be less than freehold. The determination should be undertaken by an appropriate person or body.

Other recommendations received were that:

- the Crown should not be able to compulsorily acquire land simply because the owner is unable to be located due to the difficulty in finding descendants/successors to Maori land;
- whanau, marae or hapu from whom land has been previously taken and have less than ten acres left should be exempt any from further taking of land;
- dealings relating to Maori land and general land owned by Maori be dealt with under Te Ture Whenua Maori Act 1993; and
- granting Maori land a heritage status, as outlined in the discussion paper may restrict ability to utilise the land to its full potential.

8.3.2 Compensation

"Monetary compensation for compulsorily acquired land from Maori addresses only the economic part of their loss. Spiritual and cultural ties that go back generations are severed." [175]

Some points specific to Maori regarding compensation were raised. The main concern is that compensation does not take into account spiritual, cultural and social values. Another concern is that the level of compensation paid for Maori land does not allow owners to purchase an equivalent piece of land in replacement of the land they have lost.

Suggestions to remedy the concerns were offered including that compensation be:

- paid in the form the owners wishes, for example land for land; and
- decided by the Maori Land Court at no expense to the former owner.

“Given Maori succession rights, monetary compensation when divided amongst a group, are often of comparatively small amounts that do not allow for land to be repurchased or to replace land that has been lost.” [167]

8.3.3 Disposal

Many submitters considered that all lands taken from Maori in the past and no longer required for the purpose for which they were taken, should be returned to Maori with no exceptions. Expansions of this sentiment included:

- at no cost;
- at the least possible cost;
- at the price paid plus inflation;
- at less than market value; and
- that compensation be paid for the use of the land.

This is because the compensation paid at the time of acquisition, the current financial position of Maori due to the loss of land, and the increase in value due to the current use or zoning of the land, means that they are not in a position to re-purchase their land at current market value.

Some submitters also recommended that all land that is currently under Crown ownership be returned to Maori and leased back by the Crown for the duration of the public work.

It was also submitted that Maori structures and customs be considered when land is offered back, particularly the structures within the hapu/iwi in order to ensure land is offered to the correct person/people. Furthermore, when an offer back is made to a successor the definition should be as it is in Maori custom.

“The Crown must recognise that the structures inside the Hapu and iwi should be used when land offered. An offer back to individual owners is not accepted “as this asset belonged to the tribe”.” [166]

A Maori landowner proposed the privatisation of land taken under the Act for roading should not proceed until the original owners have been compensated for it.

8.3.4 Further Issues

Further issues raised regarding acquisition, compensation and disposal included:

- the rights of Maori and non-Maori should be equal;
- the various needs and requirements of the different types of Maori land (Maori /general) should be provided for in the legislation;
- the need for a distinction between individually and collectively owned titles;
- the protection of Maori interests and jurisdictional powers over such matters as compulsory acquisition should reside with the Maori Land Court under Te Ture Whenua Maori Act;
- provision for on-going Maori involvement with former land and potential former owners in the event that former Maori owners do not, or cannot take up an offer back; and
- lack of strong background in Maori issues and limited appreciation of tangata whenua perspectives in Maori issues by the Land Valuation Tribunal and the Environment Court.

8.4 Compliance and Enforcement Issues

Comments were provided by 18 submissions (15 Maori and 3 non-Maori) on compliance with and enforcement of statutory provisions.

Maori expressed a need for a review of compliance and enforcement issues along with statutory enforcement provisions in order to safeguard the interests of former owners and their descendants. Concerns were expressed about compliance with offer back obligations (especially when land had passed out Crown control) and that a caveat placed on the title to Maori land would offer some protection by recording the existence of statutory obligations. Two submissions proposed a “claw back” mechanism so that land no longer required by a provider reverts to the Crown, which would be responsible for addressing offer back obligations. One non-Maori submission also supported caveating title to Maori land that had been acquired.

“In situations where the Crown or local authority has transferred ownership, the responsibility should still fall back on the Crown to ensure the former owners retain their rights.” [30]

One local authority considered that where the Crown or local authority had transferred ownership, the responsibility for compliance with statutory requirements should still fall back on the Crown to ensure that former owners still retain their rights.

8.5 Roles of the Maori Trustee and the Maori Land Court

The majority (83%) of comments on the section dealing with the roles of the Maori Trustee and the Maori Land Court under the new Act were provided by Maori (34 submissions) with only 7 non-Maori submissions.

There was relatively little support for retention of a role by the Maori Trustee in matters relating to public works. Furthermore, any role should be more circumscribed and focus on protection of Maori interests.

In contrast, an expanded role with accompanying resourcing was sought for the Maori Land Court to deal with acquisition, compensation and disposal issues relating to Maori Land. This is driven by dissatisfaction with the Environment Court’s handling of Maori land issues and, in particular, the specialist knowledge and understanding of tikanga that the Maori Land Court would bring to such deliberations.

8.5.1 Maori Trustee

“The Maori Trustee who is a body corporate sole has probably outlived its time and usefulness.” [93]

Fewer than half of the 41 submissions on this section included comments on the role of the Maori Trustee. A number of Maori submitters favoured removal of the position for reasons that the Maori Trustee was paternalistic and interfering, had acted to the detriment of Maori interests in the past, had outlived its usefulness and should have no role in acquisition settlements, or simply should have no role. One other Maori submission commented that the Maori Trustee took little notice of tikanga.

Only one Maori and one non-Maori submission supported the status quo although the former was qualified by suggesting investigation of other options

for dealing with claims for compensation where Maori land had been taken for public works.

“ . . . [T]hese two institutions have been to the detriment of Maori Lands. They have clearly been formed to advantage Pakeha in their move alienate and acquire land for their own needs and purpose.” [63]

Most of the remaining submissions commented on how the Maori Trustee should operate. In particular, these Maori submissions considered that the Maori Trustee should speak for Maori and exercise any discretion in such a manner as not to dispossess Maori, work in the interests of the former owner or descendants in accordance with their wishes, and not make decisions without consultation. A further two submissions considered that the position of Maori Trustee should not be under the control of the Crown.

A non-Maori submission proposed that the Maori Trustee represents Maori in designation and public works matters and a local authority submission stressed that this position needed to be independent of any interests.

Maori tended to see the roles of the Maori Trustee and the Maori Land Court as separate.

8.5.2 Maori Land Court

The majority (30) of the submissions that commented on the Maori Land Court were from Maori. Only 5 submissions were from non-Maori.

There was a general view that the powers of the Maori Land Court should be widened although some concerns were expressed about its predecessor (the Native Land Court), compensation determinations, paternalistic and interfering nature, and draconian powers. A number of reasons were given by Maori submitters, but principally, the dissatisfaction about the Environment Court's handling of Maori land issues and its lack of knowledge and sensitivity towards aspects of tikanga. Maori, particularly at the hui, expressed the view that the Maori Land Court possessed specialist knowledge and understanding of tikanga to apply to matters involving Maori land. The Maori Land Court is seen as the vehicle to help Maori with land issues relating to public works legislation and to protect interests in Maori land through the way it is hoped that it would operate.

“ . . . [T]here is a perception among Maori that the Environment Court possesses insufficient knowledge and sensitivity towards aspects of Maoritanga, resulting in a feeling of disempowerment, experienced at hearings before the Environment Court.” [47]

“[The Maori Land Court] is independent, is a court of law, has specialist knowledge on Maori land and is already in place. There would be no need to create a new body. Its jurisdiction could be expanded to include lay experts or assessors on issues relevant to public works takings. Its decisions can be appealed to the Maori Appellate Court and it is subject to judicial review.” [259]

The proposed extent of the Maori Land Court's role was seen to include:

- Maori land acquisition issues;
- mediation if acquisition is unable to be agreed by negotiation;
- compensation determinations;
- valuation;
- disposal and offer back issues including the determination of repurchase price;
- hearing of disputes brought by dissatisfied owners; and
- jurisdiction in relation to all matters dealing with Maori land under any legislation.

“The Maori Land Court or Waitangi Tribunal should confirm disposals of land no longer required for public work purposes where the former ownership was Maori land.” [159]

A number of submissions and hui highlighted that additional resources would need to be provided for the Maori Land Court to undertake this expanded role. One submitter proposed that the jurisdiction of the Maori Land Court should include both Maori land and general land owned by Maori.

“Under a revised Act we would support a greater role for the [Maori Land] Court and this would require additional resources including specialist staff and more judges.” [263]

One (non-Maori) submission advocated no extension of Maori Land Court powers into areas that are currently within the jurisdiction of the Environment Court. The Department for Courts and the New Zealand Law Society agreed with some widening of powers to include valuation issues and ability to impose a charge on the land to facilitate offer back, as recommended by the Waitangi Tribunal. The Department for Courts also suggested either concurrent jurisdiction of the Maori Land Court with the Environment Court, or the mandatory application of existing provisions in the Resource Management Act to the appointment of Maori Land Court Judges as alternate Environment Court Judges in hearings relating to Maori land.

8.6 Dual Language Notices

Comments on dual language notices under the new Act were provided by 27 submissions (23 Maori and 4 non-Maori).

“ . . . [S]trongly support the use of reo Maori in public works activities as an appropriate recognition that it is an official language of New Zealand. . . . Recommend that all documents issued under the Public Works Act in relation to Maori Land should be in the Maori language with an English translation appended...” [93]

Strong support was expressed by Maori for the use of both English and Maori for notifications under the Act. The reasons varied and included supporting biculturalism, promotion of the Maori language, recognition of Maori as an official language, and ensuring that the information was communicated to Maori who did not understand English. Another key theme at some hui was the need to communicate the information in such a way that was understood by the layperson, no matter what the language. At one hui, consultation was considered to be more important than dual language notification.

Support for dual notification was not confined to Maori.

Some concern was expressed about possible differences that might occur with if notification occurred in two languages and the need to decide which version would take legal precedence.

Only one submission, from a non-Maori, explicitly opposed dual language notification.

8.7 Other Issues of Particular Importance to Maori

Concern was expressed by Maori that they have borne the greatest burden of resource deprivation for the development of New Zealand's infrastructure, and that they have little left to give. This has involved the desecration of sacred sites and it is therefore paramount that future protection be given to wahi tapu. Where actions under the Act and other legislation conflict with the objects of Te Ture Whenua Maori Act, the latter should have precedence over other legislation.

It was also suggested that the name of the Public Works Act should be changed in view of the particular history of past public works legislation and the role that it has played in the diminution of the Maori estate.

Consultation and decision-making involving Maori when implementing the provisions of the Act were requested. More importantly, on-going consultation in the subsequent phases of the review (e.g. policy development underpinning the new legislation and opportunity to comment on policy proposals) was sought, especially by Maori attending hui, to ensure their interests were not overlooked. Three submissions wanted kaumatua involvement at all levels of policy and legislative decision-making relating to whenua. Submissions from several non-Maori organisations also requested an opportunity to comment on policy proposals or draft legislation before it was introduced in the House of Representatives.

"Parts of [the] Act that relate to Maori should be negotiated between the Crown and Maori and not with everyone else because [the] weight of non-Maori numbers would overcome Maori concerns." [125]

Comments extended to the retention of the Privy Council and that the new legislation should specifically refer to this judicial body as a "port of last resort".

8.8 Some Concerns Expressed by Non-Maori

One submission considered that many Maori land owners were disadvantaged by the legal, valuation and other costs they were having to incur in relation to public works matters and suggested that arbitration by an independent body be available at little or no expense to Maori landowners.

"Oppose racially based legislation. It is possible to observe the Treaty Principles, and then apply the same criteria, processes etc as any other New Zealander would be obliged to observe." [22]

A sentiment was expressed by some non-Maori that all people should be treated equally, and that no provisions should be included in the revised Act that would apply only to Maori people. (See also Section 8.2.2)

"Every private landowner should be treated the same. Non Maori have in many cases just as strong an attachment to their homes, lifestyle and land as Maori or Treaty holders." [227]

9.1 Overview

Included in the submissions on administrative issues are discussions on the roading provisions of the Public Works Act (the Act), whether land held under the Act should be held in a certificate of title in the land registration system and whether acquisition and disposal of land under the Act should be controlled centrally. Submitter details and their relationship with the Act are shown in Figure 9.1.

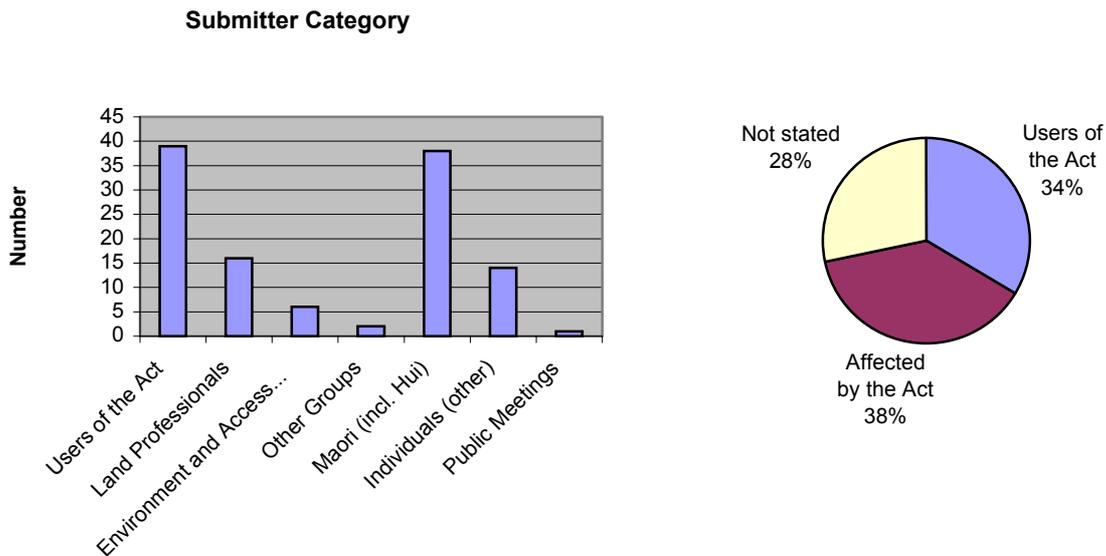


Figure 9.1: Submitter category and relationship with the Act (Administration)

9.2 Roding Provisions

Four separate Acts define what constitutes a road: the Transit New Zealand Act 1989, Local Government Act 1974, Public Works Act 1981 and Transport Act 1962. This potentially causes some confusion, especially regarding motorways, which are deemed to be roads in some Acts, but not in others. Of the 93 submissions that commented on the definition of what constitutes a road in various Acts, the majority supported a consistent approach, with only a few preferring varied definitions on the grounds that the roading provisions in each Act fulfil different purposes.

The Act most preferred by users of the legislation to contain the roading provisions was a combination of the Local Government Act and the Transit New Zealand Act. Those affected by the legislation preferred the provisions being contained in the Public Works Act. A small number of submitters preferred that they be held in a totally new Act.

It was also suggested that tangata whenua definitions be included for consistency.

"While consistency is appealing, the definition of roads varies between the pieces of legislation because of necessity. The PWA is an enabling piece of legislation, a mechanism from which other pieces of legislation can be referred to. It should not seek to duplicate their rules." [103]

Local authorities, Local Government New Zealand and the New Zealand Law Society were concerned that care should be taken with any action as a change would affect a number of statutes, regulations, bylaws and district plans, and had implications for many agencies. Public Access New Zealand is concerned that any action has the potential to adversely impact on the constitutional rights of citizens.

Other views relating to roads were:

- land for roads should only be taken if absolutely necessary and not merely for convenience. Existing roads should be improved where possible, in preference to realignment, to protect adjacent landowners; and
- roading provisions should be retained in all Acts and third party check and audit should remain.

9.3 Land Taken for a Public Work Held in a Certificate of Title

Since the first Public Works Act of 1876 a proclamation or declaration was registered with the Land Registry and the certificate of title was cancelled. The Act authorises, for the first time, use of a memorandum of transfer under the Land Transfer Act 1952 for acquisition by agreement. Although this provision is not always used, it means the land continues to be held in a certificate of title against which memorials (including easements and covenants) can be registered.

Section 17 could be widened to include all land acquired or held under the 1981 Act, to give land holding agencies the flexibility needed to operate in today's environment. This option was commented upon by 93 submissions. The majority, made up of both users of the legislation and those affected by it, agreed the land should be held in a certificate of title for reasons including:

- aiding the administration of the land, including compliance with offer back requirements, and facilitation of future transactions; and
- to protect the position of both the acquirer and the landowner by memorialising the title, and to create certainty.

"This will allow for continuity of record and enhance awareness and knowledge of the implications of the Act in relation to any particular parcel of land." [172]

"Retaining title particularly with memorialised rights of first refusal will create certainty." [265]

"The notion of 'titles' and possessory interests over roads is completely contrary to the law of Highways. No one can or should possess a public road to the exclusion of others. The existence of 'title' implies occupation rights. Occupation creates trespass rights." [15]

Opposition was expressed mainly by users of the legislation who were mainly concerned that:

- mandatory holding of roads in certificate of title would be unreasonable, impractical and costly, given the length of the connected network of formed and unformed roads;
- existence of a title implies possessory rights and roads should be freely accessible to all; and
- this would place an extraordinary burden on network utility operators who would be required to obtain an easement every time they wish to lay cables on, under or above a road.

9.4 Central Control of the Acquisition and Disposal of Public Works Land

While local authority chief executives are currently responsible for acquisitions by agreement and disposals under the Act, only the Minister of Lands, as successor to the Minister of Works, can acquire land on behalf of Crown agencies using the Act. The Chief Executive of Land Information New Zealand, as successor to the Ministry of Works and Development, disposes of land for a Crown agency using the Act. These requirements do ensure consistency.

However, as chief executives are now accountable under the Public Finance Act 1989 and the State Sector Act 1988, there is a case for transferring authorisation to responsible Ministers or Chief Executives.

Of the 89 submissions that commented on whether the control of acquisition and disposal of public works land should be held with a central position, two thirds said that it should and one third were opposed.

The reasons for support focused on:

- the benefits of centralisation, including administrative efficiency, consistency, accountability, transparency, and ease of dealing with only one agency;
- ensuring an open process with no political influence; and
- continuity and consistency of record keeping.

“A fragmented system would increase costs on taxpayers to pay sundry additional officers in different government departments.... Centralisation of functions is historically a justifiable policy, and desirable for consistency of sound administration.” [233]

Submitters speaking from a Maori perspective sought consultation and representation with details including:

- a controlling authority be answerable to a board of directors representing the government and tangata whenua, or to the Waitangi Tribunal;
- an administering body with at least 50% Maori on the board; and
- iwi consultation.

“Local authorities are empowered by legislation to acquire and dispose of land for public works. The role of the Crown in having final control over what is acquired and disposed of is out dated and unnecessary, and not in spirit with the accountability which Local Authorities bear for their public works.” [91]

Opposition to central control generally arose from dissatisfaction with the status quo. An alternative of agencies being empowered to take control of their own affairs was supported. Some suggested that rules and standards be set to ensure consistency.

10.1 Overview

Other issues covering the scope of the revised legislation, including separate provisions to protect Maori and retrospective application of offer back provisions, were raised in submissions.

Anecdotal evidence of experiences with the Public Works Act 1981 (the Act), technical information and legislative drafting suggestions were provided in many submissions.

Comments on the discussion document, submission form and the consultation process are set out in Appendix C.

A number of issues were also raised that were outside the scope of the review. Where appropriate, Land Information New Zealand will be forwarding these issues on to the relevant agency for consideration.

10.2 Issues Relating to the Review Not Addressed in the Submission Form

10.2.1 Scope of the Act

Concern was expressed by landowners and land professionals about separate provisions for the specific protection and rights for Maori land. Fourteen submissions requested that all land and landowners be treated equally in the legislation. (See also Section 8.8.)

“...[M]any of the Tribunal views apply equally to non-Maori concerns and the affinity of some early settlers and descendants to land may be equally strong as that held by some present day Maori. Many of the recommendations should be applied to all land to ensure equality under the law.” [233]

One Maori submitter sought that all land, including Maori Reserve, be covered by public works legislation, as his land has been used for public works with no consultation and no compensation. The land should now be returned.

Users of the legislation recommended retrospective application of the new legislation, particularly in relation to offer back provisions. This would help alleviate the problems caused by the myriad of different rules that presently apply. It was seen that a transitional period for landowners, the Crown and local authorities to review their land portfolios might be required before such measures could be implemented.

A land professional commented that the main parts of the Act work well and should not significantly be changed. The new legislation should concentrate on three things:

- a mechanism for acquisition;
- a mechanism for price setting; and
- obligations on disposal.

It should concentrate on enabling rather than empowering these works as the powers are provided by the Local Government Act 1974 and Transit New Zealand Act 1989.

A Maori Trust Board recommended the Act in its present form should be abolished and replaced by a commission that would ensure direct negotiation between the Crown and Maori.

10.2.2 Other Issues

Other issues raised include:

- should land acquired prior to the revised Act be subject to offer back provisions of the 1981 Act or the revised Act?;
- should the revised Act specify the remedy available for breach of section 40?;
- a need to look at common law outside the Act and whether a party can seek justice outside the Act, e.g. for planning blight; and
- protection of ratepayers'/taxpayers' investment in public works. Any change in the legislation should reflect this.

10.3 Technical Information

Technical information was supplied in 39 submissions that require more detailed analysis than can be provided in the summary of submissions. The submitters who provided this information may also be valuable for stakeholder consultation on detailed legislative provisions and include:

- hui;
- Maori groups;
- government agencies;
- land professionals;
- LINZ accredited suppliers;
- local authorities;
- private companies;
- requiring authorities; and
- stakeholder representatives.

10.4 Legislative Drafting Suggestions

Drafting suggestions for the new legislation were offered in 34 submissions including those from:

- hui;
- other Maori groups;
- government agencies;
- land owners (other than Maori);
- land professionals;
- a LINZ accredited supplier;
- local authorities;
- private companies;
- requiring authorities; and
- stakeholder representatives.

10.5 Anecdotal Evidence

Anecdotal evidence was supplied in 68 submissions, including those from:

- hui;
- other Maori groups;
- government agencies;
- a health board;
- land owners (other than Maori);
- land professionals;
- local authorities;

- private companies;
- requiring authorities; and
- stakeholder representatives.

10.6 Spiritual Values

Spiritual values were commented on in 17 submissions. (See Section 8.3.2.)

10.7 Issues Outside The Scope of The Review

A number of matters were raised in submissions that were outside the scope of the review. These included references to perceived breaches of the Treaty of Waitangi from a variety of different Maori groups and also from the New Zealand Law Society. There were also a number of references to the Treaty that related to interpretation and recognition issues. The majority of these were from Maori groups and included three hui.

Two hui and one iwi sought retrospective application of the revised Act to address past issues.

One iwi submission asked for a review of land now in Crown or local authority ownership that had been compulsorily acquired from Maori under public works legislation. An investigation was sought as to the practicalities of returning those lands or providing other redress without the need for those former owners to lodge a claim with the Waitangi Tribunal.

There were numerous references to Public Works Act grievances. These generally related to land that had previously been acquired for a public work, or land that was in the process of being acquired. The submissions came from all groups affected by the legislation. The New Zealand Law Society also provided comment on Public Works Act grievances.

A number of submissions provided comment relating to local authorities that were outside the scope of the review. Many of these comments came from Maori including seven hui. Designations under the Resource Management Act was another area to generate a number of comments. Many of these submissions had concerns about the way that the designation/acquisition processes had been applied in particular instances. Issues relating to the Resource Management Act were also mentioned in a number of submissions

Some roading issues mentioned in a number of submissions were also outside the scope of the review.

Other matters raised included:

- airports;
- Crown Minerals Act 1991;
- Fire Services Act 1975;
- Housing Corporation;
- Land Transfer Act 1952;
- access to Land Information New Zealand records;
- Maori Land Act 1993;
- marginal strips; and
- survey matters

Appendix A

Persons and Organisations that made Submissions Ordered by Submission Number

Submission Number	Submission From	Contact
1	Patterson, R W	
2	Tareha Taraia Trust & Turanga Ariki Mahinaarangi Whanau	Runga, Te Okoro Joe
3	Harrow, Raymond	
4	Ngarauru Iwi Trust	Hurunui, Rangi
5	Knight Frank Limited	Papps, Tim
6	Hawkes Bay Network	Whitfield, Don
7	Te Runanga-o-Turanganui-a-Kiwa	Tangihaere, Tracey
8	Brock, Lyndsay	
9	Archives New Zealand	Provost, Lyn
10	Ngata, Sir Henare Kohere	
11	Francis, Barbara	
12	Sheehan, Michael	
13	Osler First National	Bowis, Evan
14	Little, LC	
15	Public Access New Zealand	Mason, Bruce
16	Southland Regional Council	Popham, DF
17	The Rupa Family	Rupa, Dilup Kumar
18	Taranaki Regional Council	Bayfield, WE
19	Krist, Christl	
20	The Horticulture & Food Research Institute of New Zealand Limited	Neilson, Grant
21	Franklin District Council	Wahrlich, Beth
22	Knight, L	
23	Panekire Tribal Trust Board	Hemmingsen, Brian
24	Nolans Solicitors	Devonport, CJ
25	Berghan, Elva	
26	Jim Hughes	
27	Ngati Awa Manawhenua (Central & Southern) Trust	Chambers, E
28	Landcorp Farming Limited	Muirhead, Gavin
29	Nelson Marlborough Health Services Limited	McArthur, Paul
30	Palmerston North City Council	Lawrence, Bruce
31	McQuoid, Russell	
32	Arms, Shona	
33	McCarlie, Ailsa	
34	Karaitiana, Harvey	
35	Ahuwhenua Trust	Morgan, Kepa
36	Nelson City Council	Hansen, Julie
37	Cruden, Dr Gordon N	
38	Ngati Maniapoto Hapu	Douglas, Rahera Barrett
39	Ngati Maniapoto, Maniapoto Maori Trust Board	Turner, Pura
40	Ngati Maniapoto, Maniapoto Maori Trust Board	Maniapoto, Harold
41	Pukepoto Farm Trust, Ngati Maniapoto	Haar, Roy Matengaro
42	THRMC - Maniapoto	Wi, John
43	Anonymous	
44	Anonymous	
45	Ngati Pahere Ngati Rae Rae Maniapoto	Wi, John

46	Southland District Council	McNaught, Kevin
47	Department for Courts	Ratima, Tina
48	Federated Mountain Clubs of NZ (Inc)	Marsh, Barbara
49	Te Roopa Whakatapuranga O Waiomio Trust & Huna Whatanga Ahu Whenua Trust	Hura, Turei
50	Ngati Rarua Iwi Trust	Eade, Lorraine
51	Waitakere City Council	McLeod, Ross
52	TrustPower Limited	c/o Rudd Watts & Stone
53	Paine, Margaret R	
54	Tai, Henare Robert	
55	Natural Gas Corporation	Hodgson, Dr Paul
56	Watercare Services Limited	Ford, KM
57	Mokau Ki Runga, Regional Management Committee	Marsh, Barbara
58	GasNet	Coe, Jim
59	Clear Communications Limited	c/o Harrison Grierson Consultants Limited
60	Waimate A & B Trust Ahu Whenua	Hoani, Kyle James
61	Canterbury District Health Board	Bayly, Jeannie
62	Kauri Point Centennial Park & Chatswood Management Committee	Arnold, Trevor
63	Koopu, Eureti	
64	The Neil Group	c/o Glaister Ennor
65	Landon, Caroline	
66	Nga Kaitiaki Taranaki	Pue, Rata
67	Tauranga District Council	Budden, John
68	KPMG Legal, Auckland	Berman, Keith
69	Dunedin Electricity Limited	c/o Gallaway Haggitt Sinclair
70	Department of Conservation	Baker, Grant
71	Coles, Gillian Kay	
72	Ngati Whaita Charitable Trust	Barlow, Brenda
73	Sharp Tudhope	Christie, Alasdair
74	Masterton District Council	Hove, Wes
75	Thompson, Lindsey	
76	New Zealand Institute of Surveyors	Miller, Ross
77	Barry, Muira	
78	Mangamaunu Reserve Land Trustees Inc & Nga Uri O Mangamauna Whanui Inc	Zyskowski, Andrew
79	Chelsea Regional Park Association	Elliot, Michael
80	Whangarei District Council	Chief Executive
81	Wainuiomata Marae Association	Hemmingsen, Brian
82	The Property Group	Graham, Peter
83	New Zealand Contractors Federation	Pfahlert, John
84	Auckland Trotting Club	c/o Morrison Kent
85	Eastern Bypass Action Committee Inc	Robertson, Sue
86	Phillips, John	
87	Te Kapuamatotoro	Lawrence, Huriana
88	Hastings District Council	Woodroffe, Peter
89	Environment Canterbury	Cumming, Ian
90	Rotorua District Council	Eynon-Richards, Jane
91	Auckland City Council	Smith, Christine
92	Ngai Tamahaua Hapu	Williams, Tuwhakairiora
93	Environment Bay of Plenty – Maori Regional Representation Committees	Vercoe, TW
94	Wilcock, Maggie	

95	Dunedin Community Law Centre & Ngai Tahu Maori Law Centre	Gotlieb, Kim
96	Environment Waikato	Crickett, Clare
97	Waimakariri District Council	Rapley AF
98	Transit New Zealand	Carr, Neil
99	Te Runanga o Otakou Inc	Ramsay, Shirley
100	Upper Hutt City Council	Hood, Marilla
101	Hurunui-o- Rangi Marae	Kawana, Charmaine
102	Muriwai Beach Progressive Association	Mason, Brian
103	Auckland Regional Council	Bull, Cr GJ
104	Riddiford, DTS	
105	Thin, Karyn	
106	Manu Waiata Restoration & Protection Society	Pond, Wendy
107	New Zealand Business Roundtable	Kerr, RL
108	Gray, P J	
109	Wech, C J	
110	Renata, Rev Erina	
111	Burkhill, David and Margaret	
112	Tranz Rail Limited	Elton, Ron
113	Hutt City Council	Ambler, Matt
114	Auckland Utility Operators Group	Burley, Robert
115	Wech, Mike	
116	Massey University	c/o Cooper Rapley
117	Wellington Tenths Trust	Love, Peter
118	Telecom New Zealand Limited	c/o Russell McVeagh
119	Genesis Power Limited	c/o Russell McVeagh
120	Hui Summary - Christchurch 29/01/01	
121	Hui Summary - Dunedin 31/01/01	
122	Hui Summary - Picton 02/02/01	
123	Hui Summary - Hamilton 10/02/01	
124	Hui Summary - Rotorua 12/02/01	
125	Hui Summary - Whakatane 14/02/01	
126	Hui Summary - Gisborne 16/02/01	
127	Hui Summary - Hastings 17/02/01	
128	Hui Summary - Lower Hutt 20/02/01	
129	Hui Summary - Auckland 28/02/01	
130	Hui Summary - Stratford 01/03/01	
131	Hui Summary - Palmerston North 02/03/01	
132	Hui Summary - Tuakau 14/03/01	
133	Hui Summary - Tokaanu 16/03/01	
134	Hui Summary - Te Kuiti 18/04/01	
135	North Shore City Council	Dawson, Geoff
136	Te Arawa Maori Trust Board	Rangiheuea, Anaru
137	Christchurch City Council	Shutt, Karilyn
138	Hudson, Jenny	
139	Descendants of Local Iwi	Renata, Rev Erina
140	Curnow Tizard	Barnaby, Richard
141	Robertson, Susan	
142	New Zealand Fire Service	c/o Phillips Fox
143	Kett, Muriel K	
144	Carter Holt Harvey	Parrish, Murray
145	Doelyn Partnership	Sutton, Stephen
146	Ramanui, M	
147	Te Atiawa Manawhenua Ki Te Tau Ihu Trust	du Feu, Jane
148	Sinton, Calum & Sinton, Jan	

149	Rodney District Council	White, Paul
150	Maritime Safety Authority of New Zealand	Hickey, Barbara
151	Taurewa 5 West Trust, Whangaiepeka Trust, Ngati Hikairo Papakainga Trust, Ngati Hikairo Marae	Co-ordinator
152	Te Taawhi Patena & Rauaiterangi Patena Mariu Whanau Trust	Patena, Kepa
153	Jones, Gudrun	
154	Arms, Cliff	
155	Ruapehu District Council	Kellow, Dan
156	Gibb, Angus	
157	New Zealand Historic Places Trust	Richardson, Peter
158	ICOMOS New Zealand	Richardson, Peter
159	Environment Bay of Plenty	Mandemaker, John
160	Broadcast Communications Limited	c/o Ellis Gould
161	Western Bay of Plenty District Council	Main, Gary
162	Barry, Muira	
163	Trustees of Te Heiotahoka 2B & Te Kopani 36 & 37	Paku, Rangi
164	Rene, P	
165	Ngati Maru Iwi Authority	Peters, William
166	Pukeroa Oruawhata Trust	Patchell, Murray
167	Nga Ture Kaitiaki ki Waikato Community Law Centre	c/o Patrick O'Driscoll
168	Proprietors Whareroa Station & Proprietors Hauhungaroa No.6	Connolly, Meriln
169	Mokau Ki Runga Regional Management Committee	Marsh, Barbara
170	Mighty River Power Limited	c/o Chapman Tripp
171	Counties Power Limited	Lack, Bob
172	Cockram, Matthew	
173	Auckland District Law Society Property & Business Law Committee	Nicholls, Aaron
174	VECTOR Limited	c/o Buddle Findlay
175	Ngahina Trust	c/o Patrick O'Driscoll
176	Victoria University of Wellington	Fehl, Peter
177	Cunningham, Rosemary	
178	Kaiherau Trust	c/o Patrick O'Driscoll
179	Te Paemate Marae	Marsh, Barbara
180	Electricity Networks Association	c/o Rudd Watts & Stone
181	Hoani Ihakara Trust	c/o Patrick O'Driscoll
182	Ngapotiki Hapu	Cooper, Hinenui
183	WEL Networks Limited	Underhill, Mike
184	New Zealand Railways Corporation	Trotman, Peter
185	Ministry of Agriculture and Forestry	Bagnall, Don
186	Tararua District Council	Taylor, Stephen
187	Ngai Tukairangi Hapu	Ellis, Riri
188	Ngaiterangi Iwi	Dickson, Brian
189	Ministry for the Environment	Chetwynd, Jenny
190	Transpower New Zealand Limited	Forbes, Andy
191	Gore, Andrew	
192	UnitedNetworks Limited	Vickers, Jenny
193	Horizons.mw	Allen, BL
194	Andrew, Jenny	
195	Barker, Graham Leslie	
196	Barnett Consultants Limited	Barnett, AG
197	Benfield, Leigh	
198	Bray, Stephen	
199	Brown, Trudy	

200	Chapple, Reuben P	
201	Christini, Paul Stephen	
202	Crosswell, Grant	
203	Croucher, Mark	
204	Davies, Russell	
205	Donley, Joan	
206	Wanganui District Council	Duncan, Helen
207	Elliot, Michael Barrie	
208	Firmin, Glen P Te Awaawa	
209	Long Bay - Okura Great Park Society	Gatward, David
210	Mongomery Watson	Gottler, John
211	Grose, Jennifer Dawn	
212	Gruger, Hiltrud	
213	Otorohanga District Council	Hall, David
214	Hamilton, Nathan	
215	Hellendoorn, Foster	
216	NZBR	Henare, Ann
217	Hendren, Gillian	
218	Hill, Christine	
219	Home, Mandy	
220	Hood, JCM.	
221	Electralines	Hughes, Rachael
222	Kahotea, Des	
223	Kingi, Victoria	
224	Te Reti B & C Residue Trust	Kohu, Brandon Jaye
225	Landward Management Limited	MacLeod, Ray
226	Hukanui Marae	Manihera, Bob
227	McCook, WJ	
228	RadioWorks NZ Limited	McRae, Trudi Maree
229	Millar, Elizabeth Ann	
230	Royal Forest & Bird Protection Society	Mitcalfe, Kate
231	Ngati Hau Trust Board	Nehua, Te Raa
232	Nicol, Robert W	
233	Palmer, Dr Kenneth	
234	Pointon, Ashley	
235	Preece, Peter & Wang, Hui	
235	Wang, Hui & Preece, Peter	
236	Quinn, Patrick James	
237	Quirke, Naomi Frances	
238	Radford, D	
239	Horizon Energy Distribution Limited	Robertson, Ian H
240	Shephard, Robyn	
241	Treasury Properties Limited	Sherrell, Robert David
242	Nga Potiki Resource Management Unit	Tuhakaraina, Rongokahira Sandra
243	Tunncliffe, Steve	
244	Southland District Health Board	Whitcombe, Todd
245	Windust, Ross	
246	Wolf, Dr Allan Brian	
247	Marlborough District Council	Quirk, AP
248	Timaru District Council	Bartholomew, Keith
249	Rangitata Diversion Race Management Limited	Young, John
250	Waikato District Council	Jones, Gudrun
251	Central Equipment Company Limited	Faloon, CJ
252	Local Government New Zealand	Morrison, Basil
253	Contact Energy Limited	Hill, David

254	TelstraSaturn	Weir, Deanne
255	Petition "Pohara Walkway" Beach Access	Ford, Robin James
256	Jorna, Andre R	
257	Te Runanga o Ngai Tahu	Cook, Sandra
258	Land Compensation Consultants Limited	Wein, Daniel
259	Te Runanga o Ngati Awa	c/o Walters Williams & Co
260	The Wellington Regional Council	Schollum, Greg
261	New Zealand Police	Pritchard, Kate
262	New Zealand Law Society, Property Law Section	Veneer, Michael
263	Ngati Kahungunu Iwi Inc	c/o Atareta Poananga
264	Crown Company Monitoring Advisory Unit	Hancock, Genevieve
265	Meridian Energy Limited	Hay, James
266	Federated Farmers of New Zealand (Inc)	Metcalf, Lewis
267	KPMG Legal, Wellington	Edmunds, DA
268	New Zealand Property Institute	c/o Phillips Fox
269	Fletcher Law	Fletcher, Charles
270	Public Meeting - Christchurch 30/01/01	
271	Public Meeting - Nelson 01/02/01	
272	Public Meeting - Hamilton 09/02/01	
273	Public Meeting - Wellington 21/02/01	
274	Public Meeting - Auckland 27/02/01	
275	Hui Summary - Kaitaia 23/02/01	
276	Hui Summary - Whangarei 26/02/01	
277	Public Meeting - Hamilton 15/03/01	
278	Electricity Engineers Association of NZ Inc	Berry, PE

Appendix B

Persons and Organisations that made Submissions Ordered by Submitter

Submission Number	Submission From	Contact
35	Ahuwhenua Trust	Morgan, Kepa
194	Andrew, Jenny	
43	Anonymous	
44	Anonymous	
9	Archives New Zealand	Provost, Lyn
154	Arms, Cliff	
32	Arms, Shona	
91	Auckland City Council	Smith, Christine
173	Auckland District Law Society Property & Business Law Committee	Nicholls, Aaron
103	Auckland Regional Council	Bull, Cr GJ
84	Auckland Trotting Club	c/o Morrison Kent
114	Auckland Utility Operators Group	Burley, Robert
195	Barker, Graham Leslie	
196	Barnett Consultants Limited	Barnett, AG
77	Barry, Muiora	
162	Barry, Muiora	
197	Benfield, Leigh	
25	Berghan, Elva	
198	Bray, Stephen	
160	Broadcast Communications Limited	c/o Ellis Gould
8	Brock, Lyndsay	
199	Brown, Trudy	
111	Burkhill, David and Margaret	
61	Canterbury District Health Board	Bayly, Jeannie
144	Carter Holt Harvey	Parrish, Murray
251	Central Equipment Company Limited	Faloon, CJ
200	Chapple, Reuben P	
79	Chelsea Regional Park Association	Elliot, Michael
137	Christchurch City Council	Shutt, Karilyn
201	Christini, Paul Stephen	
59	Clear Communications Limited	c/o Harrison Grierson Consultants Limited
172	Cockram, Matthew	
71	Coles, Gillian Kay	
253	Contact Energy Limited	Hill, David
171	Counties Power Limited	Lack, Bob
202	Crosswell, Grant	
203	Croucher, Mark	
264	Crown Company Monitoring Advisory Unit	Hancock, Genevieve
37	Cruden, Dr Gordon N	
177	Cunningham, Rosemary	
140	Curnow Tizard	Barnaby, Richard
204	Davies, Russell	
47	Department for Courts	Ratima, Tina
70	Department of Conservation	Baker, Grant

139	Descendants of Local Iwi	Renata, Rev Erina
145	Doelyn Partnership	Sutton, Stephen
205	Donley, Joan	
95	Dunedin Community Law Centre & Ngai Tahu Maori Law Centre	Gottlieb, Kim
69	Dunedin Electricity Limited	c/o Gallaway Haggitt Sinclair
85	Eastern Bypass Action Committee Inc	Robertson, Sue
221	Electralines	Hughes, Rachael
278	Electricity Engineers Association of NZ Inc	Berry, PE
180	Electricity Networks Association	c/o Rudd Watts & Stone
207	Elliot, Michael Barrie	
159	Environment Bay of Plenty	Mandemaker, John
93	Environment Bay of Plenty – Maori Regional Representation Committees	Vercoe, TW
89	Environment Canterbury	Cumming, Ian
96	Environment Waikato	Crickett, Clare
266	Federated Farmers of New Zealand (Inc)	Metcalf, Lewis
48	Federated Mountain Clubs of NZ (Inc)	Marsh, Barbara
208	Firmin, Glen P Te Awaawa	
269	Fletcher Law	Fletcher, Charles
11	Francis, Barbara	
21	Franklin District Council	Wahrlich, Beth
58	GasNet	Coe, Jim
119	Genesis Power Limited	c/o Russell McVeagh
156	Gibb, Angus	
191	Gore, Andrew	
108	Gray, P J	
211	Grose, Jennifer Dawn	
212	Gruger, Hiltrud	
214	Hamilton, Nathan	
3	Harrow, Raymond	
88	Hastings District Council	Woodroffe, Peter
6	Hawkes Bay Network	Whitfield, Don
215	Hellendoorn, Foster	
217	Hendren, Gillian	
218	Hill, Christine	
181	Hoani Ihakara Trust	c/o Patrick O'Driscoll
219	Home, Mandy	
220	Hood, JCM.	
239	Horizon Energy Distribution Limited	Robertson, Ian H
193	Horizons.mw	Allen, BL
138	Hudson, Jenny	
129	Hui Summary - Auckland 28/02/01	
120	Hui Summary - Christchurch 29/01/01	
121	Hui Summary - Dunedin 31/01/01	
126	Hui Summary - Gisborne 16/02/01	
123	Hui Summary - Hamilton 10/02/01	
127	Hui Summary - Hastings 17/02/01	
275	Hui Summary - Kaitaia 23/02/01	
128	Hui Summary - Lower Hutt 20/02/01	
131	Hui Summary - Palmerston North 02/03/01	
122	Hui Summary - Picton 02/02/01	
124	Hui Summary - Rotorua 12/02/01	
130	Hui Summary - Stratford 01/03/01	
134	Hui Summary - Te Kuiti 18/04/01	

133	Hui Summary - Tokaanu 16/03/01	
132	Hui Summary - Tuakau 14/03/01	
125	Hui Summary - Whakatane 14/02/01	
276	Hui Summary - Whangarei 26/02/01	
226	Hukanui Marae	Manihera, Bob
101	Hurunui-o- Rangi Marae	Kawana, Charmaine
113	Hutt City Council	Ambler, Matt
158	ICOMOS New Zealand	Richardson, Peter
26	Jim Hughes	
153	Jones, Gudrun	
256	Jorna, Andre R	
222	Kahotea, Des	
178	Kaiherau Trust	c/o Patrick O'Driscoll
34	Karaitiana, Harvey	
62	Kauri Point Centennial Park & Chatswood Management Committee	Arnold, Trevor
143	Kett, Muriel K	
223	Kingi, Victoria	
5	Knight Frank Limited	Papps, Tim
22	Knight, L	
63	Koopu, Eureti	
68	KPMG Legal, Auckland	Berman, Keith
267	KPMG Legal, Wellington	Edmunds, DA
19	Krist, Christl	
258	Land Compensation Consultants Limited	Wein, Daniel
28	Landcorp Farming Limited	Muirhead, Gavin
65	Landon, Caroline	
225	Landward Management Limited	MacLeod, Ray
14	Little, LC	
252	Local Government New Zealand	Morrison, Basil
209	Long Bay - Okura Great Park Society	Gatward, David
78	Mangamaunu Reserve Land Trustees Inc & Nga Uri O Mangamauna Whanui Inc	Zyskowski, Andrew
106	Manu Waiata Restoration & Protection Society	Pond, Wendy
150	Maritime Safety Authority of New Zealand	Hickey, Barbara
247	Marlborough District Council	Quirk, AP
116	Massey University	c/o Cooper Rapley
74	Masterton District Council	Hove, Wes
33	McCarlie, Ailsa	
227	McCook, WJ	
31	McQuoid, Russell	
265	Meridian Energy Limited	Hay, James
170	Mighty River Power Limited	c/o Chapman Tripp
229	Millar, Elizabeth Ann	
189	Ministry for the Environment	Chetwynd, Jenny
185	Ministry of Agriculture and Forestry	Bagnall, Don
169	Mokau Ki Runga Regional Management Committee	Marsh, Barbara
57	Mokau Ki Runga, Regional Management Committee	Marsh, Barbara
210	Mongomery Watson	Gottler, John
102	Muriwai Beach Progressive Association	Mason, Brian
55	Natural Gas Corporation	Hodgson, Dr Paul
36	Nelson City Council	Hansen, Julie
29	Nelson Marlborough Health Services Limited	McArthur, Paul
107	New Zealand Business Roundtable	Kerr, RL
83	New Zealand Contractors Federation	Pfahlert, John

142	New Zealand Fire Service	c/o Phillips Fox
157	New Zealand Historic Places Trust	Richardson, Peter
76	New Zealand Institute of Surveyors	Miller, Ross
262	New Zealand Law Society, Property Law Section	Veneer, Michael
261	New Zealand Police	Pritchard, Kate
268	New Zealand Property Institute	c/o Phillips Fox
184	New Zealand Railways Corporation	Trotman, Peter
66	Nga Kaitiaki Taranaki	Pue, Rata
242	Nga Potiki Resource Management Unit	Tuhakaraina, Rongokahira Sandra
167	Nga Ture Kaitiaki ki Waikato Community Law Centre	c/o Patrick O'Driscoll
175	Ngahina Trust	c/o Patrick O'Driscoll
92	Ngai Tamahaua Hapu	Williams, Tuwhakairiora
187	Ngai Tukairangi Hapu	Ellis, Riri
188	Ngaiterangi Iwi	Dickson, Brian
182	Ngapotiki Hapu	Cooper, Hinenui
4	Ngarauru Iwi Trust	Hurunui, Rangi
10	Ngata, Sir Henare Kohere	
27	Ngati Awa Manawhenua (Central & Southern) Trust	Chambers, E
231	Ngati Hau Trust Board	Nehua, Te Raa
263	Ngati Kahungunu Iwi Inc	c/o Atareta Poananga
38	Ngati Maniapoto Hapu	Douglas, Rahera Barrett
39	Ngati Maniapoto, Maniapoto Maori Trust Board	Turner, Pura
40	Ngati Maniapoto, Maniapoto Maori Trust Board	Maniapoto, Harold
165	Ngati Maru Iwi Authority	Peters, William
45	Ngati Pahere Ngati Rae Rae Maniapoto	Wi, John
50	Ngati Rarua Iwi Trust	Eade, Lorraine
72	Ngati Whaita Charitable Trust	Barlow, Brenda
232	Nicol, Robert W	
24	Nolans Solicitors	Devonport, CJ
135	North Shore City Council	Dawson, Geoff
216	NZBR	Henare, Ann
13	Osler First National	Bowis, Evan
213	Otorohanga District Council	Hall, David
53	Paine, Margaret R	
233	Palmer, Dr Kenneth	
30	Palmerston North City Council	Lawrence, Bruce
23	Panekire Tribal Trust Board	Hemmingsen, Brian
1	Patterson, R W	
255	Petition "Pohara Walkway" Beach Access	Ford, Robin James
86	Phillips, John	
234	Pointon, Ashley	
235	Preece, Peter & Wang, Hui	
168	Proprietors Whareroa Station & Proprietors Hauhungaroa No.6	Connolly, Meriln
15	Public Access New Zealand	Mason, Bruce
274	Public Meeting - Auckland 27/02/01	
270	Public Meeting - Christchurch 30/01/01	
272	Public Meeting - Hamilton 09/02/01	
277	Public Meeting - Hamilton 15/03/01	
271	Public Meeting - Nelson 01/02/01	
273	Public Meeting - Wellington 21/02/01	
41	Pukepoto Farm Trust, Ngati Maniapoto	Haar, Roy Matengaro
166	Pukeroa Oruawhata Trust	Patchell, Murray
236	Quinn, Patrick James	
237	Quirke, Naomi Frances	

238	Radford, D	
228	RadioWorks NZ Limited	McRae, Trudi Maree
146	Ramanui, M	
249	Rangitata Diversion Race Management Limited	Young, John
110	Renata, Rev Erina	
164	Rene, P	
104	Riddiford, DTS	
141	Robertson, Susan	
149	Rodney District Council	White, Paul
90	Rotorua District Council	Eynon-Richards, Jane
230	Royal Forest & Bird Protection Society	Mitcalfe, Kate
155	Ruapehu District Council	Kellow, Dan
73	Sharp Tudhope	Christie, Alasdair
12	Sheehan, Michael	
240	Shephard, Robyn	
148	Sinton, Calum & Sinton, Jan	
46	Southland District Council	McNaught, Kevin
244	Southland District Health Board	Whitcombe, Todd
16	Southland Regional Council	Popham, DF
54	Tai, Henare Robert	
18	Taranaki Regional Council	Bayfield, WE
186	Tararua District Council	Taylor, Stephen
2	Tareha Taraia Trust & Turanga Ariki Mahinaarangi Whanau	Runga, Te Okoro Joe
67	Tauranga District Council	Budden, John
151	Taurewa 5 West Trust, Whangaiepeka Trust, Ngati Hikairo Papakaiinga Trust, Ngati Hikairo Marae	Co-ordinator
136	Te Arawa Maori Trust Board	Rangiheuea, Anaru
147	Te Atiawa Manawhenua Ki Te Tau Ihu Trust	du Feu, Jane
87	Te Kapuamatotoro	Lawrence, Huriana
179	Te Paemate Marae	Marsh, Barbara
224	Te Reti B & C Residue Trust	Kohu, Brandon Jaye
49	Te Roopa Whakatapuranga O Waiomio Trust & Huna Whatanga Ahu Whenua Trust	Hura, Turei
257	Te Runanga o Ngai Tahu	Cook, Sandra
259	Te Runanga o Ngati Awa	c/o Walters Williams & Co
99	Te Runanga o Otakou Inc	Ramsay, Shirley
7	Te Runanga-o-Turanganui-a-Kiwa	Tangihaere, Tracey
152	Te Taawhi Patena & Rauaiterangi Patena Mariu Whanau Trust	Patena, Kepa
118	Telecom New Zealand Limited	c/o Russell McVeagh
254	TelstraSaturn	Weir, Deanne
20	The Horticulture & Food Research Institute of New Zealand Limited	Neilson, Grant
64	The Neil Group	c/o Glaister Ennor
82	The Property Group	Graham, Peter
17	The Rupa Family	Rupa, Dilup Kumar
260	The Wellington Regional Council	Schollum, Greg
105	Thin, Karyn	
75	Thompson, Lindsey	
42	THRMC - Maniapoto	Wi, John
248	Timaru District Council	Bartholomew, Keith
98	Transit New Zealand	Carr, Neil
190	Transpower New Zealand Limited	Forbes, Andy
112	Tranz Rail Limited	Elton, Ron
241	Treasury Properties Limited	Sherrell, Robert David

163	Trustees of Te Heiotahoka 2B & Te Kopani 36 & 37	Paku, Rangi
52	TrustPower Limited	c/o Rudd Watts & Stone
243	Tunncliffe, Steve	
192	UnitedNetworks Limited	Vickers, Jenny
100	Upper Hutt City Council	Hood, Marilla
174	VECTOR Limited	c/o Buddle Findlay
176	Victoria University of Wellington	Fehl, Peter
250	Waikato District Council	Jones, Gudrun
97	Waimakariri District Council	Rapley AF
60	Waimate A & B Trust Ahu Whenua	Hoani, Kyle James
81	Wainuiomata Marae Association	Hemmingsen, Brian
51	Waitakere City Council	McLeod, Ross
235	Wang, Hui & Preece, Peter	
206	Wanganui District Council	Duncan, Helen
56	Watercare Services Limited	Ford, KM
109	Wech, C J	
115	Wech, Mike	
183	WEL Networks Limited	Underhill, Mike
117	Wellington Tenths Trust	Love, Peter
161	Western Bay of Plenty District Council	Main, Gary
80	Whangarei District Council	Chief Executive
94	Wilcock, Maggie	
245	Windust, Ross	
246	Woolf, Dr Allan Brian	

Comments on the Consultation and Submission Process

Overall Process	<ul style="list-style-type: none">▪ Very satisfied with the whole process including the responsible consultative process and considerate time line.▪ General satisfaction with the process.
Discussion Document	<ul style="list-style-type: none">▪ Congratulations to LINZ on the production of an informative summary of recognised issues and possible options for their resolution.▪ The discussion document was clear and easy to understand.▪ Iwi should have been consulted on the preparation of the discussion document.▪ A disturbing lack of reference to the Treaty in the discussion document.▪ Section 32.3 is incomplete in its reference to Heritage Protection Authorities.▪ Many minor points were not raised in the discussion document. This suggests that the issues have not been fully thought out.▪ The options are really difficult to understand. They do not correlate to all options in the explanations. I have doubts that decision makers have actually understood this legal document. It is a huge mess.
Submission Form	<ul style="list-style-type: none">▪ Submission form is too complicated and difficult to understand.▪ While the ability to submit electronically is great concerned about the narrow scope of questions considering the plethora of information in the discussion document.▪ The Council was impressed with the submission booklets, but found it difficult to answer “Yes” or “No” to a number of questions. This is because:<ul style="list-style-type: none">(a) It is impossible to answer most questions in isolation; and(b) Some of the questions could be interpreted in more than one way, each way leading to a different response.
Electronic Submissions	<ul style="list-style-type: none">▪ Would be helpful if the headings stayed at the top of the page.
Consultation Process	<ul style="list-style-type: none">▪ Refreshing to note the responsible consultative process and considerate timeline being followed.▪ Opposed to Maori getting 8 hours to discuss the review at hui while the general public got only 2 hours at public meetings.▪ Second round of consultation with Maori requested to discuss policy proposals once they are developed.▪ Second round of consultation with non-Maori requested to discuss policy proposals once they are developed.▪ Request for on-going consultation and input into policy development process.▪ Would welcome further opportunity to comment before draft Bill goes to the House.

Hui

- While the hui had some problems, generally the consultation process has been a good step towards a meaningful involvement of Maori.
- Badly advertised and insufficient notification of hui.
- Maniapoto iwi was not included on the list of hui.
- Should be held on marae or neutral venues.
- Should have been longer and more indepth.
- Time frame between hui and submission close off date was too short to consult fully with iwi.
- Te Runanga o te Ika opposed the consultation process on the grounds that matters affecting Maori should be only addressed between Maori and the Crown.
- Crown should look at approaching Maori from a different viewpoint and seek Maori views in a proper consultative manner.
- Failure to provide a Maori translator to keep the minutes of the hui could have resulted in overlooking subtleties.

- Non-Maori groups need to be more adequately informed about the Treaty and issues affecting Maori.

Submission Analysis

- Submissions on behalf of a number of people need to be treated as multiple submissions.