

27 January 2010

The Chair
Local Government and Environment Select Committee
Parliament Building
WELLINGTON

Dear Select Committee Members

Re: Public Works (Offer Back of & Compensation for Acquired Land) Amendment Bill

Introduction

Business New Zealand would like to provide some brief thoughts regarding the private member's bill entitled the *public works (offer back of and compensation for acquired land) amendment bill* (referred to as 'the Bill'). Overall, we believe there are some significant issues that the Committee will need to take into account when examining the details of the Bill. While we agree in principle, with the objectives sought from some of the Bill's proposals, we do not think that this Bill is the appropriate vehicle via which to achieve them.

As the commentary on the Bill states, the Bill's purpose is to ensure that former owners of Maori or general land taken or acquired by the Crown for public works are given the first right of refusal to purchase the land where the Crown no longer requires it for the particular public work for which it was originally taken and/or acquired. The Bill also provides for solatium payments to be made for loss of land and/or opportunities associated with the use of that land and/or opportunities associated with the use of that land where it was acquired or alienated for a public works use for which it was not actually used.

Our Approach

We have 3 points to make:

1. There should be constraints, as well as a high threshold test, on the use of the right to take works for a public use;
2. Generally there should not be restrictions on the use of that land once it is procured; and
3. The price that is paid should be full and final.

The rest of this section is to comment on what the Bill seeks to do. In essence, we would agree that the Bill goes some way towards point 1 above, but in a rather ham-fisted manner, and we have issues with the remaining parts of the Bill.

First, Business New Zealand is of the view that any taking of private land for public use should involve a very high threshold test before it occurs. Prices established for private land transactions are based on a full and final handover of property rights, with new owners able to use the land for their own purposes (barring standard regulations such as zoning and any conflicts that might arise under other regulations). Significant and ongoing acquisition of land by the Crown under the Public Works Act can create ongoing uncertainty and doubt regarding future private sector transactions, particularly in parts of the country where sizeable ongoing public infrastructure work is required.

The Bill's proposed changes focus the Crown on future land acquisitions, which can be based only on specific public works. The focus on a specific public works means there is no fall back for the Crown enabling it to retain land for a reason other than its original purpose.

But despite what we view as some positive steps regarding future acquisitions and a high threshold test for the Crown, the changes proposed in the Bill will also see previous land acquisition taken into account, which we believe will have significant negative consequences.

As a report prepared for Business NZ in late 2008 points out, currently *full compensation is due for land compulsorily acquired and for an injurious affection or damage arising from a public work. There are provisions for disturbance payments, a \$2000 solatium to alleviate grief, suffering and anxiety resulting from a loss of a private residence, and assistance with purchasing a replacement property*¹. In addition, clause 42A of the Act provides for a solatium payment for loss of the opportunity to purchase the land, but with no payment under this section to exceed \$20,000. We believe there is certainly scope for changes regarding full compensation and/or solatium payments when in the future land is acquired and compensation sought. In particular, provision should be made for a premium on top of market value and/or for the raising of the threshold for the existing solatium payments for which the Act provides (For instance, in some States in the U.S.A compensation is set at the market rate + 50% to take into account the full costs associated with persons having to move, as opposed to making the choice of their own free will).

However, once such transactions have taken place and compensation has been given, the possibility of further compensation in the future as outlined in the Bill seems problematic to Business NZ on two levels. At one level, this negates the idea of full compensation provided to the owner when land is acquired. Also, it raises questions regarding previous acquisitions where both parties considered the transaction to be completed and not to be re-entered into.

¹ A Primer on property Rights, Takings and Compensation (Bryce Wilkinson, 2008).

Our concerns in this area are based on attempts in the Bill to provide solatium payments in terms of lost opportunities post the ownership transfer. In short, we believe this has the potential to open a Pandora's box regarding not only the number, but the level of payments made.

As clause 6(42AA)(2) of the Bill states, an affected person '*may apply to the Land Valuation Tribunal for a solatium payment from the Crown for the loss of use and the loss of the opportunities associated with the use of that land*'. In other words, the Crown may have to make a payment not only on the opportunity lost in respect to the use of the land prior to the taking, but also in regard to other opportunities arising from that use. While the following clause states that '*In assessing the amount of the solatium payment regard must be taken of the means of the former owners and the circumstances surrounding the compulsory acquisition of such land*', there is every chance that those affected will attempt to game the process by way of trying to maximise the monetary amount of a solatium payment by pushing the boundaries of what they could have used the land for.

For instance, a dairy farmer may have had his/her farm acquisitioned for a public work, which after ten years did not go ahead. Under the proposed Bill, the farmer may apply to receive a solatium payment for the use of that land as a dairy farm over that ten year period, but may also seek compensation regarding lost opportunities in respect to that land, possibly arguing an intention to double the size of the dairy operation, or perhaps to sub-lease part of the land for commercial building construction.

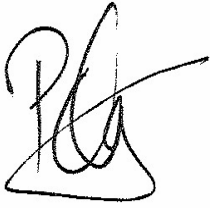
The presence of hindsight regarding future solatium payments may heavily tilt the playing field in favour of applicants. The property boom from 2001-2007 is an example; applicants could say they intended to turn their land into residential blocks, even though in reality they had absolutely no intention of doing so had they still retained the land. Overall, solatium payments as outlined in this Bill have the potential to create perverse outcomes, as well as 'guessing game' decisions by the Land Valuation Tribunal.

Our Recommendation

While there are some positive features that we would, in principle, support, Business New Zealand is concerned that changes to this part of the Act appear piecemeal, and its relationship to other parts of the Public Works Act or indeed to other Acts has not been thoroughly thought through. Although there have been previous attempts to review the Act in its entirety, we believe that if this Bill is to progress further, it needs to be put in the context of the whole entire Act. While there was a review in 2001, there has been no overall concentrated attempt amend the Act in its entirety. We believe it would be better to see this Bill as part of a wider Bill so any associated effects could be better examined.

Thank you for the opportunity to comment.

Kind regards,

A handwritten signature in black ink, appearing to be 'Phil O'Reilly', with a stylized, flowing script.

Phil O'Reilly
Chief Executive
Business New Zealand