Restitution of State Land in New Zealand – Offer Back of Public Works Land and Return of Land to Indigenous People through Treaty Claim Settlements

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SUMMARY

New Zealand has two main processes by which the state or Crown enables the restitution of state. These are offer-back of land to former owners, and the return of land to Māori claimant groups. Such restitution has become a primary mechanism to address matters relating to the acquisition and use of land by the Crown. These acquisitions have been controversial, and often open to legal and political challenges. Concern from individuals and Māori groups over past government actions in acquiring land can be significant.

Introduced in 1981, offer back requires government to first offer any surplus land held for a public work to the former owner or their successors, at market price. This requirement applies to all such land and not just where compensation was not paid or the land was taken by compulsory acquisition.

Since the mid-1990s efforts have been made to settle Māori claims regarding the Crown's past actions. Known as Treaty claim settlements, these agreements enable redress that focuses on recognising these historical grievances, restoring the relationship between the Māori claimant group and Crown, and contributing to a claimant group's economic development. As part of the settlement certain Crown land can be returned to the claimant group. The claimant group also may receive a right of first refusal to purchase Crown land that may become available for sale in the future.

These two mechanisms address two different issues, however both recognise the impact of the Crown's past actions or omissions. The two processes have become integral parts of the way the Crown disposes of land that is no longer required.

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1. INTRODUCTION

In New Zealand, the return of state, or Crown-owned, land through offer back or through a Treaty settlement has become a primary mechanism to address matters relating to the acquisition and use of land by the state ('the Crown'). These acquisitions have been controversial, and often open to legal and political challenges. Concern from individuals and Māori groups over past government actions in acquiring land can be significant. This is particularly relevant where land was taken or confiscated from Māori, the indigenous people of New Zealand, following British colonisation from 1840.

This paper identifies some of the issues that government agencies have had to address, and some matters that are still outstanding. It also outlines the two main processes involved in the return of land, and some of the issues that must be addressed. It may provide insight for other jurisdictions dealing with similar issues, including matters to be considered in designing similar measures.

Please note, this paper is an opinion piece, and does not represent the views of Land Information New Zealand (LINZ) or the New Zealand Government.

2. HISTORICAL AND LEGAL CONTEXT

New Zealand is a parliamentary democracy and a constitutional monarchy. The head of state is Queen Elizabeth II. She reigns as the Queen of New Zealand, independently of her position as Queen of the United Kingdom. Her representative in New Zealand is the Governor-General, who has symbolic and ceremonial roles, and acts on the advice of Government Ministers. Like the United Kingdom, the government acts in the Queen's name. When New Zealanders talk about 'the Crown', they are usually referring not to the Queen as a person, but to the government as a whole. Crown-owned land is, in effect, state land. For consistency this paper uses the terms Crown, or Crown land, rather than state or state land.

New Zealand became a British colony in 1840, following the signing of the Treaty of Waitangi between representatives of the British Crown and Māori tribal chiefs. The Treaty was intended, in part, to facilitate the settlement of New Zealand. New Zealand was administered as part of the Australian colony of New South Wales until 1841, when it became a colony in its own right. Initially it was divided into provinces that in 1853 acquired their own legislatures until the provinces were abolished in 1876.

Initially, Māori could only sell their land to the Crown, which then granted title for that land to settlers. By 1859, European settlers were in the majority. The increased demand for land led to pressure on Māori. For Māori, land is an economic resource. It is also the fundamental geographic basis of Māori identity and provides a connection with their ancestors.

Competition for land between Māori and British settlers was a primary cause of the New Zealand Wars of the 1860s and 1870s that raged primarily in the Waikato, Taranaki, Bay of Plenty and East Cape regions of the North Island. Following British victory, large portions of the North Island were confiscated from Māori tribes (iwi), and distributed to settlers. These land confiscations were followed by subsequent alienation of land from Māori through government processes such as the Native Land Court and various public works legislation.

3. OFFER BACK OF LAND HELD FOR PUBLIC WORKS

3.1 Acquisition Process

Before discussing the offer back process, it is necessary to outline how the state (national and local government) can acquire land. The Public Works Act 1981 (PWA) and its predecessor Acts have enabled the Crown and local government to acquire land for public works, either by agreement or through compulsory acquisition. Similar provisions have existed since New Zealand became a British colony in 1840.

Under the PWA, public work has a wide definition that includes any work that the Crown is authorised to construct, undertake, establish, manage, operate, or maintain under any legislation (such as roads, railways, schools, court buildings, prisons, police and fire stations and defence bases). Local government agencies can also use the PWA for public works they undertake. This is a statutory process intended to ensure that land can be acquired in the interest of the public, while ensuring that landowners' rights are protected and that they are appropriately compensated for the loss of their land.

An underlying policy of the PWA is to minimise the extent to which land could be taken by compulsory acquisition. The Crown must first endeavour to negotiate in good faith to reach an agreement with the landowner, primarily over the amount of compensation to be paid.

If agreement cannot be reached, a statutory process is followed by a notice to the landowner, who can object the Environment Court. If no one objects, or the Court disallows the objections, the Minister for Land Information (referred to in the PWA as the Minister of Lands) can recommend to the Governor-General to declare, by Proclamation, that the land is to be taken for the public work. The PWA compensation machinery then operates to compensate the owner.

Throughout the use of public works legislation in New Zealand, there have been mechanisms for returning land when it was no longer required for a public work. However, these rights

usually attached to the owner of the title from which the land was acquired, or adjacent landowners.

3.2 Statutory obligation of offer back land

The enactment of the current offer back provisions in 1981 resulted largely from political developments of the 1970s. Land issues encountered during the 1970s and early 1980s included Māori land marches and occupations of Crown-owned land calling for the return of such land if the state no longer needed it. There was also concern from farmers as to the future of land acquired for major public works projects, but never used for that purpose.

Developments in Britain also influenced New Zealand practice. The Crichel Down Rules, developed in 1980, provided for the person from whom land was acquired to have the right to have the land offered back when it was no longer required by the Crown, subject to some exceptions.

Section 40 of the PWA 1981 introduced a new regime. 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 exemptions. These include situations where it would be impracticable, unreasonable or unfair to offer back the land, or there has been a significant change in the character of the land as a result of the public work.

This requirement to consider offer back applies to all land that is longer required for a public work and not just where compensation was not paid or where the land was taken by compulsory acquisition.

3.2.1 Benefits and Issues

The principle behind offer back is in fairness to restore the land to an owner if the Crown has acquired or taken that land in the interests of the public, but no longer needs it. To some extent it recognises that the owner would likely be an unwilling seller, as the Crown acquired the land either by compulsory acquisition or with the threat of compulsory acquisition hanging over the negotiations, by giving the former owner the first opportunity to reacquire the land.

In recognising this principle, offer back is essentially the opportunity for the former owner to be first to buy the land, ahead of it being used in a Treaty settlement (see below), or being sold on the open market. However, they must still pay current market value for the land (as determined by a valuer independent of the Crown), subject to the discretion of the Crown to specify a lower price.

Importantly, section 40 of the PWA does not allow the former owner to share in any capital gain from the expenditure by the Crown in the land. Due to the passage of time and

development of the land by the Crown, the offer back price the former owner is required to pay will usually be higher than the compensation they received when the Crown acquired the land.

Unlike the United Kingdom, the offer back process in New Zealand is codified in legislation. This provides an equitable and contestable system, enabling the former owner to challenge the Crown's holding of the land and its compliance with the statutory requirements if they consider that the land should be offered back.

In practice, acceptance of offers by former owners (or their successors) is low; less than 50 percent of the offers made. It appears that when a former owner accepts an offer, the motive is often a financial one, rather than the result of any deep desire to regain the land. Particularly in urban areas, offered back land is often quickly on-sold to commercial developers for housing or other construction. In fact, the developer may finance the former owner to enable them to accept an offer back, with the proviso that the land passes immediately to the developer, with a payment to the former owner. Only in rare cases will the former owner return to live on the land.

Section 40 of the PWA has been the subject of a range of litigation since it was introduced. The causes of litigation are varied, but are based on a number of common concerns with the offer back provisions. These include:

- whether land taken for one public purpose could be used for another, or transferred to another entity,

- seeking court direction that land is, due to the Crown's actions, no longer required for a public work and directing that an offer should be made,

- whether a particular exemption should have been applied, preventing an offer back being made, and

- determining the date that the land was 'no longer required' or surplus. This date determines the date at which the land is valued for offer back and therefore the value that the land is offered back at. There is often an advantage in having the surplus date set as early as possible (as the land will have to be offered back at a historic, usually lower, value instead of the current market value).

As a statutory process, section 40 does require time for Crown agencies to work through its requirements once land is no longer required for a public work. In practice it is implemented in stages. Firstly, the history of the acquisition and nature of the land are identified to determine whether the land should be exempted from offer back. Exemptions can be appropriate for a number of reasons including:

- the surplus land is too small to obtain a separate title,

- significant and permanent buildings straddle historic property boundaries, making it unreasonable to require the Crown to demolish the buildings just to make an offer back, or

- the land was owned by the Crown when it was first used for a public work (i.e. the Crown does not have to offer back the land to itself).

Secondly, if an offer is required, it is necessary to identify the former owner and confirm whether or not they are alive. If they are not, the Crown must identify the successors to the former owner, usually by searching wills or other testamentary documents. If the successors are also deceased (and this may happen for land that the state acquired in the late 19th or early 20th centuries) then no offer back is required, as there is no-one to offer the land to.

Thirdly, if an offer is made and the former owner or successor accepts, the land is then transferred to them. If the offer is declined, section 40 has been satisfied and the Crown agency can continue to dispose of the land.

The offer back process can take time, as the historic research, identification of former owners and the making of the offer may take anywhere between one and two years for difficult cases. This means the state incurs costs both to undertake the research necessary to determine the offer back obligations, and holding costs for the land while this occurs.

A full review of the PWA in 2001 and specific parliamentary consideration of section 40 in 2010 identified a diverse range of opinion on the merits of offer back. Firstly, the Crown and local government agencies that use the PWA sought measures that would simplify the provisions, ease the administrative burden and reduce the risks of litigation. Secondly, former owners and others who had been affected by the PWA sought measures that would further protect their rights. At this point, no changes have been made to these provisions.

Offer back does require detailed research of historic records of the acquisition to identify the background to the public work, and the former owners. If the former owner has died, it is also necessary to identify the successor to that former owner. This usually involves reviewing wills or other testamentary documents. Without such documents readily available it may be difficult to properly implement an offer back regime in other jurisdictions.

3.2.2 Summary

Offer back clearly recognises the interest that a former owner has in land acquired by the Crown, and the pressure of compulsion or 'force' the former owner may have been under to sell the land to the Crown. In practice, application of the offer back works well, though it has been subject to a range of litigation against the Crown and local government. For Crown agencies it is a time-consuming process to work through, however, it is a mechanism that appears to have wide acceptance and support from landowners and the wider public.

4. RETURN OF STATE LAND TO MAORI THROUGH TREATY CLAIM SETTLEMENTS

4.1 Historical Context

The Treaty of Waitangi was signed by representatives of the British Crown and by Māori in 1840. The Treaty was created in an attempt to protect the interests of both parties at a time of increasing settlement by British settlers. As part of the Treaty, the Crown could purchase Māori land to enable further settlement.

Since 1840, the Crown acquired most of the New Zealand land area from Māori, either through purchases, alienations or confiscation of land following the New Zealand Wars. Much of this land was sold for settlement. Māori today possess only a small portion of the land they held in 1840 (currently approximately 6% or 1.5 million hectares of New Zealand's land area). Most of this land is located in the North Island.

This loss of land has had a significant impact on Māori social and economic development, including the loss of access to natural resources such as forests and waterways and sacred sites. It forms the basis of many historical claims by Māori against the Crown.

In response, the Crown established an independent body, the Waitangi Tribunal, to investigate historical claims and the impacts of government polices and actions on Māori. Since the mid-1990s, the Crown has also directly negotiated with individual Māori claimant groups to reach lasting and acceptable settlements. These are known as Treaty claim settlements.

4.2 Outline of a Treaty claim settlement

A Treaty claim settlement is an agreement between the Crown and a Māori claimant group to settle all of that group's historical claims against the Crown. These claims usually relate to actions or omissions by the Crown in relation to the claimant group during the 19th and early 20th centuries, but they may also include such actions or omissions up to 1992. These may include confiscation or compulsory acquisition of land, failure to consult with the claimant groups or to provide access for Māori to sacred sites or other resources in the area which the claimant group represents.

The objectives are to reach settlements of historical claims that are lasting and acceptable to most New Zealanders, by taking a consistent approach, while recognising that each claimant group is different. It is the aim of the New Zealand Government to resolve all historical claims and reach settlements with all Māori claimant groups by the end of 2014. As a result, all Crown agencies are expected to contribute to these settlements as a priority.

A Treaty claim settlement is usually made up of the following:

- Historical account, acknowledgements and Crown apology – the historical account describes the events leading up to the claims, an acknowledgement of, and apology by the Crown, for its past actions or inactions.

- Cultural Redress – this provides the Māori claimant group with:
  - protected rights and access to customary food-gathering sources,
  - opportunities to input into the management, control or ownership of particular sites of cultural significance to the claimant group,
  - increased relationships with Crown and other agencies on issues important to the claimant group, and
  - recognition of the claimant group's attachment to land and geographic features by facilitating changes to place names.

- Financial and Commercial Redress – this represents the financial aspect of the settlement, detailing an agreed monetary amount for settling the claimant group's historical claims against the Crown. The claimant group usually takes this amount in a combination of cash and Crown land. The claimant group can decide what land it wishes to take, though this is limited by the amount of Crown land available in the area.

As part of the settlement, the claimant group accepts that the settlement is full and final, and settles all of its historical claims. Both parties accept it is not possible to fully compensate the claimant group for their grievances. Redress instead focuses on providing redress in recognition of the historical grievances, on restoring the relationship between the claimant group and the Crown, and on contributing to a claimant group's economic development. In addition, private land is not generally available for use in Treaty claim settlements.

4.3 Settlement Process

A Treaty claim settlement involves a long process of negotiation between the Crown and the claimant group. There are a number of common stages through the settlement process.

A settlement commences with the claimant group obtaining, and proving to the Crown, that it has a mandate from the Māori tribes they purport to represent to negotiate on their behalf with the Crown. Negotiations then commence towards an Agreement-in-Principle that sets out, at a high level, the terms of an agreement. Over time this is formalised and more detail is added, to the point that a Deed of Settlement is signed by the Crown and claimant group. This is effectively the contract between the parties setting out the agreed terms of the settlement. If necessary, this Deed is followed by legislation to enable the Crown to meet its obligations under the settlement, and once the legislation is passed, all Crown agencies must commence implementation of the settlement, including transferring any land if necessary.

4.4 Role of Crown agencies in the settlement process

For Crown agencies, the identification and preparation of land for use in a Treaty claim settlement can be a complex and drawn-out process. While there is one Crown agency (the Office of Treaty Settlements) that negotiates the settlements with claimant groups, all government departments, state-owned enterprises and other Crown-owned organisations that hold and administer land are required to contribute to the settlement process.

This role begins at the start of settlement, when each department prepares a list of the land it holds in the area covered by the settlement to enable the claimant group to decide whether it wants the land to be transferred to it once settlement is reached. The claimant group will then advise whether it is interested in the available land. In some cases the Crown may still need the land, and it may not be appropriate to transfer it to Māori (e.g. for operating roads or railways).

Once these expressions of interest are received, the Office of Treaty Settlements 'builds' a picture of the identified properties. This includes getting the Crown agency to check the legal status of the land and relevant survey and title information. This may involve the Crown agency undertaking site visits and historical investigations. All of this information is disclosed to the claimant group, along with relevant valuations so they can decide whether or not they want the land included in the settlement.

Once the settlement has been reached, and in particular the land to be transferred has been agreed, the Crown agencies must implement their part of the agreement. This may include preparing land for transfer. Much Crown-owned land may not be surveyed or held in title, so there may be substantial preparatory work to enable the Crown to transfer this land to the claimant group. All actions are tied into the Settlement Date – a set day the Crown and the claimant group have agreed for the transfer of assets to occur. Many of the actions required by the settlement are linked to the settlement date (e.g. a property must be transferred within six months of the settlement date).

Government departments and other core Crown agencies that are already disposing of land in an area where a settlement has not yet been reached, must submit these properties to a Protection Mechanism managed by the Office of Treaty Settlements. The Protection Mechanism is a way for the Crown to consult with Māori when Crown agencies wish to sell surplus land. If Māori express an interest in the land, and if the Crown agrees to retain ownership, the Office of Treaty Settlements will purchase the property from the Crown agency and hold it for potential use in a future Treaty settlement.

This land is not held for any particular claimant group, but is 'land-banked' so it is available in the future for settlement of claims.

4.5 Other forms of settlement using state land

As noted above, the Treaty claim settlement process provides for certain Crown-owned properties to be returned to claimant groups. These properties can either be sites of cultural significance to the claimant group, or properties with a commercial value.

In recent settlements, the Crown has transferred land to claimant groups, subject to a lease back allowing the Crown to continue to use the land. While the Crown still needs to use land, such as for a school, it may not need to retain land ownership. In these cases, the Crown will transfer the land to a claimant group with a long-term lease, allowing the school to continue to operate on the site.

This 'sale and leaseback' mechanism has been used primarily for land housing schools, police stations or other public works. It enables the Crown to continue to occupy and use the land for as long as it needs to, while also providing claimant groups with ongoing revenue in the form of rent. The buildings and other improvements remain in Crown ownership. The terms of the lease generally provide for regular reviews of the rent, allowing the income to the claimant group to be adjusted over time to reflect movement in land values.

The claimant group may also receive a Right of First Refusal to purchase certain Crown-owned property either listed in the settlement, or within a specified geographic area. This ability to acquire surplus Crown land lasts for a specific time period (between 50-150 years after the settlement) and covers all land the Crown owned at the time the settlement was reached. It does not apply to properties that the Crown may acquire after the settlement.

The Right of First Refusal requires the Crown, after it has met any offer back obligation under section 40 of the PWA (if that applies), to offer the land to the claimant group. If the claimant group declines to purchase the land, the Crown may sell it on the open market, provided the terms and conditions of this subsequent sale are not better than those offered to the claimant group. If the conditions are better, or the Crown has not been able to sell the land within a period agreed in the settlement (usually one to three years), the Crown must re-offer the land to the claimant group.

4.6 Benefits

Each Treaty claim settlement provides a range of benefits. Acknowledgements and a Crown apology are seen as symbolic recognition by the Crown of the impact that its actions or omissions have had on the claimant group. For claimant groups, the return of Crown land provides part of the concrete redress arising from the settlement. Regaining access to, and control of, sacred sites, or sites of cultural significance enables a claimant group to reconnect with the land, including at a spiritual level.

For example, in 1998 the Crown reached a settlement with Ngai Tahu, the Maori tribal group that covered most of New Zealand's South Island. The settlement included the transfer of

ownership of Mt Cook, New Zealand's tallest mountain, to the tribe, who then gifted it back to the nation. This symbolic process recognised the position of the mountain as key to the identity of the tribe and its people.

Also, the return of property of commercial value provides a claimant group with the basis for further economic and cultural development. Land already transferred is being put to a range of uses, including commercial, cultural, educational, recreational and administrative purposes. Other settlement assets, such as commercial forests, provide a regular and periodically reviewable income through licence fees and rentals. Commercial uses, either through sale by the claimant group or development of the land has provided a base for the economic development of Māori represented by the claimant group.

For example, the 1998 settlement with Ngai Tahu included a financial redress of $170 million. By 2010, Ngai Tahu's property arm had grown its asset base to have a market value in excess of $450 million. Ngai Tahu is perhaps the largest single landowner in the South Island, after the Crown. Its assets include residential and commercial developments in Christchurch, New Zealand's second-largest city (such as land at the former Wigram air force base), 80,000 hectares of forestry land, and approximately 30,000 hectares of high country farm land across the South Island. Over time, Ngai Tahu proposes to develop 35,000 hectares of its forestry land for agricultural and other higher uses.

Another example of commercial benefits provided by a settlement is the former air force base at Te Rapa. Te Rapa is located on the outskirts of the city of Hamilton in the North Island, about two hours south of Auckland. The 29 hectare block of land traditionally belonged to the Waikato-Tainui tribal group. The land was taken by the Crown before World War Two for defence purposes, under the PWA. It was used as a base by the air force until its closure in 1992.

Waikato-Tainui's settlement with the Crown in 1995 was the first major Treaty settlement. The Te Rapa Base was returned to the iwi as part of the settlement for Raupatu, or land confiscation claims. The iwi transferred the land into a form of title which prevents the sale of the land out of the tribe's ownership.

This land provided a prime development opportunity for the iwi. It had ready access to a state highway and main railway line, and it was in an area of Hamilton identified for future urban expansion. In 2002 a company owned by Waikato-Tainui began developing the site as a commercial retail site. The site is being developed in stages. Once completed, it will be New Zealand's largest retail centre covering 80,000 square metres of retailing space. Revenue from the leasing of this space will belong to Waikato-Tainui's commercial arm.

4.7 Issues

It is important to note that settlements are negotiated agreements or political deals, not policy outcomes. As a negotiated settlement, they require a pragmatic approach by both parties.

The settlement process is intended to be durable, fair and remove the sense of grievance and ensure that all claimant groups are dealt with fairly and equitably. At the same time, the Crown must take account of the fiscal and economic constraints and its ability to pay compensation.

In addition, innovation is an important part of the settlement process. As settlements are negotiated, Crown agencies must remain flexible to deal with new issues and new forms of redress as they are developed.

In particular for the land that might be used in a settlement, it is important that all survey, title and historic information on each parcel of land is identified, and the Crown agency makes an informed decision about whether or not to make it available for inclusion. As considerable Crown land in New Zealand is un-surveyed and untitled, it does impose a significant cost, both monetary and in terms of time, for the Crown agency to prepare the land for transfer to the claimant group.

However, without the full picture of the land, the Crown agency could face a number of risks which could hinder the settlement. These include:

- omissions in Deeds and legislation,
- a situation where the Crown cannot deliver what it has negotiated,
- tension in relations between the Crown and claimant group,
- a need to amend Deed/legislation to correct errors, and
- extended timeframes.

There are a number of other challenges that Crown agencies need to address. The pace of negotiations will vary as different claimant groups progress at different rates for reasons largely outside the Crown's control. Disposal of some land may be held up as negotiations stall. Preparations for the disposal of other land may have to be accelerated. The increased pace of the settlement process imposes resource pressures on Crown agencies, however, this is a recognised Government priority, and agencies are working towards reaching the target date of 2014 for settlement agreements to be completed.

Due to the non-competitive nature of a negotiated settlement or right of first refusal, a Crown agency is not able to 'test the market' to achieve the best possible price. However, for land transferred as part of a settlement, the transfer value received by the Crown agency is recognised through a financial accounting measure in the Crown agency's accounts (and the value of the land is deducted from the quantum of the claimant group's financial settlement). Where a Crown agency offers land to the claimant group in a right of first refusal, the claimant group will pay the agency the value of the land as determined by current market valuation.

There has been some concern from claimant groups about land that is transferred subject to long-term leases or licences, such as commercial forestry licences to private companies.

While the claimant group will receive revenue from rentals from licence holders, long-term arrangements do limit the group's future development of the land. After settlement, the Maori claimant groups require governance structures that maximise and balance economic, cultural and social development.

5. CONCLUSION

The two mechanisms address two different issues – offer back relates to the impact on individual former owners, while the return of land through Treaty claim settlements addresses a claimant group's historical claims. However, both mechanisms recognise the impact the Crown's actions have had on either private landowners or Māori. Both processes require Crown agencies to address historical investigation, surveying and titling issues before the land can pass out of Crown ownership. These actions can delay disposal of land and increase costs.

However, the return of land that is no longer required recognises provides commercial and other opportunities for use for future owners, while ensuring that the Crown's investment in the land is financially recognised. Taken together, offer back under the PWA and the return of Crown land through Treaty claim settlements are two significant processes that have become integral parts of the way Crown agencies dispose of land that is no longer required.

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BIOGRAPHICAL NOTES

I have worked in the Crown property area at the Department of Survey and Land Information and LINZ since 1995, in both operational and regulatory roles. In 1999, I was part of an inter-agency team charged with reviewing the Public Works Act 1981 and Land Act 1948, and I am currently on a similar team reviewing the compensation provisions of the PWA.

Following a period as advisor to the Minister of Lands, I was appointed manager of LINZ's Crown Property Regulatory team. My team is responsible for administration of the PWA, setting standards and guidelines for the acquisition and disposal of land by Crown agencies under the PWA and Land Act 1948, and Treaty claim settlement legislation.

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