

Clarifying the Crown's Differing Roles for Land Owners and Managing the Expectations of Owners/Consultants on Fees Reimbursements—A New Zealand Perspective

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SUMMARY

In New Zealand the Crown (Her Majesty the Queen) acquires land for public works under the Public Works Act 1981 ("PWA"). The Act generally deals with acquisition and disposal processes.

During public consultation required for planning for public works, land owners potentially affected become aware, often years in advance, that their land could be acquired for this purpose. This can lead to difficulties as land owners seek information on compensation for their land in advance of planning and decision making. This paper discusses these difficulties.

In New Zealand a requiring authority such as the New Zealand Transport Agency will consult publically on roading options ahead of a defined planning process required by New Zealand's Resource Management Act 1991 (RMA). The process outlined by the RMA covers work intended, measures to mitigate risk, and designates decision making to the appropriate government organisation. The RMA also allows objections to any planned roading to be heard.

Land Information New Zealand (LINZ) is involved during a later stage in the process, when the outcome of negotiations is presented for quality assurance and statutory decision making. Owners of affected properties receive a booklet (the "Land Owners Rights Booklet") outlining background and their entitlements as part of the public works and acquisition process. However, before contact by the Crown, through negotiators appointed by LINZ, earlier understanding of LINZ's role and the acquisition process is needed by land owners; in fact, land owners often seek information earlier on.

Section 66 of the PWA has provisions for land owners to be reimbursed "actual and reasonable" expenses once land is taken or acquired. Those expenses have historically been incurred for legal advice and costs of valuations, and have not been significant. Over the last five or so years, owners' negotiators/advocates have surfaced, acquisition has become more complicated, property issues have become more in depth and complex and claims by land owners have arisen.

Solicitors have also taken a more active role in negotiations, whereas historically landowners carried out negotiations themselves. Reimbursement has also occurred during negotiations and not at the end. A guideline is being developed to better define what is reasonable during negotiations, benchmarking off international examples where possible, and a better process for communicating the Crown's view and timetable for processing claims.

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In New Zealand, the acquisition process, conducted under the Public Works Act 1981 (PWA), is a statutory process intended to ensure that land can be acquired for the public good, while ensuring that landowners are compensated.

The PWA enables the Crown and local government in New Zealand 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.

Land Information New Zealand (LINZ) administers the Act and LINZ’s Clearances team, (part of Crown Property Management) acts under delegation to make statutory decisions that give effect to the Act. However, as set out in more detail below, the actual negotiation of acquisitions is undertaken by private sector companies and individuals, known as LINZ accredited suppliers who work for the Crown agency (the “acquiring authority”) that requires the land. Negotiations may take place over a significant period of time, for example a year or two before the Clearances team, as the decision maker, is asked to make a decision.

Please note, this paper is an opinion piece, and does not represent the views of LINZ.

RESPONSIBILITIES FOR ACQUISITIONS BY THE CROWN

Both the Crown and local authorities can use the PWA to acquire land. Until 1987, the acquisition of land and construction of public works for the Crown was undertaken by a single agency, the Ministry of Works and Development. The Minister of Works was responsible for making all statutory decisions associated with the acquisition of land for the Crown.

Following government restructuring, individual agencies are now responsible for their own public works, including funding the acquisition of land and construction of the work. For example, the New Zealand Transport Agency builds state highways and motorways, and the Ministry of Education constructs new schools.

However, the statutory responsibility for acquisitions by the Crown still rests with a single Minister (now the Minister of Lands), and the regulation of Crown acquisitions is undertaken by

the Minister's department, LINZ.¹ While the Minister delegates most of the decision-making powers to LINZ, any decisions for compulsory acquisition must be made by the Minister directly.

This has created a separation between the Crown agency funding and building the public works, and the Crown agency approving the acquisition of land for that work.

The Crown has also outsourced most of the operational work for the acquisition and disposal of land under the Public Works Act, which is seen as an efficient use of taxpayers' funds and ensures provision for contesting any acquisition and disposal proposals. This means that direct negotiations on land acquisition are carried out by private contractors, rather than government officials.

To ensure that risks of non-competent suppliers undertaking work on behalf of the Crown are minimised, these private sector contractors must be accredited by LINZ before it can submit work to LINZ or the Minister for statutory approval. This work must be carried out subject to standards set by LINZ, and to periodic audits by LINZ.

LINZ's objective for administering Crown property in New Zealand is that the Crown buys and sells property in a way that advances the public interest and protects private rights.

In summary, for any acquisition by the Crown there are a number of parties involved, being:

- the landowner,
- any consultants acting for the landowner,
- the Crown agency that conceives, funds and constructs the public work,
- the private sector accredited supplier that negotiates directly with the landowner and reports to both the Crown agency responsible for the public works and LINZ,
- the Minister for Lands (or their delegate, which is currently LINZ's Clearances team) who makes all statutory decisions for the acquisition, and
- LINZ, which regulates the acquisition through standards, their accreditation system and through audits. LINZ may also make statutory decisions under delegation from the Minister.

The Government is currently reviewing the compensation provisions in the PWA and other aspects of the acquisition process. This is intended to be an investigation into whether the process for determining compensation under the PWA should be shorter, but more generous to landowners. In addition, Government is looking to streamline and integrate the processes under the PWA and other legislation.

This work will be ongoing through 2010.

ACQUISITION PROCESS IS PART OF A WIDER PROJECT

¹ Local authorities are responsible for their own acquisitions and must comply with the Public Works Act directly, without reference to the Minister or LINZ.

The acquisition of land for public works is part of a wider infrastructure project that is being undertaken. The initial requirements for public works may widely be reported, and in most cases (such as roading infrastructure projects) a number of different routes or locations will be initially identified for a particular project. Public consultation and further investigations are then undertaken before commencing the process to acquire land.

The PWA allows landowners and the acquiring agency to reach an agreement at any time once the acquiring agency has committed to the project. This enables landowners to agree to sell their land early, ahead of construction commencing.

In addition, the Resource Management Act 1991, New Zealand's planning and land use legislation, includes a provision for a landowner to apply to the Environment Court for an order, requiring the agency undertaking the public work to purchase the landowner's property. This arises only where a landowner has tried unsuccessfully to sell their land, primarily due to an intended public work being designated over the property (i.e. due to identification of a public work requirement for the land). This provision has been rarely used and only applies after a designation has been put in place.

In practice, agencies are naturally hesitant to acquire land until a final location or route has been identified, as this may involve additional and unneeded expenditure. This also avoids owners of land becoming unnecessarily concerned if their land is not part of decided routes or locations.

Affected landowners are often placed in the position of not knowing whether their land could be affected by a project, or their rights or entitlements are if their land is ultimately required.

EXAMPLE – STATE HIGHWAY ONE DEVIATION, WELLINGTON

One recent example is of interest. In mid-2009, the New Zealand Transport Agency announced plans to construct a new state highway deviation linking the towns of Paraparaumu and Otaki, north of Wellington to reduce traffic congestion in these urban areas. The plans were published in local papers and on the internet to prompt public consultation on what the preferred route should be.

Although the need for the project had been identified, the Crown was not beginning acquisition negotiations as a final route for the road (and its land requirements) had not been determined.

However, within 24 hours of the announcement of the project, landowners in the area publicly expressed concerns about the impacts on their properties, and sought information on compensation they would be entitled to. These concerns appeared on the front pages of local newspapers.

This occurred before the Crown's accredited supplier had contacted any landowners to explain the acquisition process. As a result, many landowners were confused as to their rights or how compensation would be determined. The New Zealand Transport Agency fielded many questions from landowners and the media on the acquisition process. At the first public meetings on the project, landowners asked how acquisitions would be conducted, or what the roles of various parties would be.

PAUCITY OF GENERAL INFORMATION

Once acquisition negotiations begin, the Crown's accredited supplier provides each landowner with a document prepared by LINZ known as the *Landowner's Rights Booklet*. This provides information on the landowner's rights and entitlements to compensation under the PWA. This information is quite detailed and is intended to assist the landowner in their negotiations with the accredited supplier.

LINZ periodically reviews this document to ensure that the information is sufficient to fully inform a landowner at the outset of negotiations. However, due to its specific use during negotiations, the booklet is not general in nature and is provided only once the negotiations commence.

As the above case demonstrated there is currently a gap in general advice on how the land is acquired for public work and the linkage with the designation process under the Resource Management Act. As the acquisition process is outside the Crown agency's control, they tend to include little or no information on how acquisitions will take place. In addition, the roles of the various parties (the Crown agency, accredited supplier, Minister of Lands and LINZ) are rarely described.

To address this, LINZ intends to work with other Crown agencies to develop further information that agencies can use to provide the general public and landowners with advice on how the acquisition process works and how it relates to the wider public works project.

LESSONS

It is important to see land acquisition as part of a larger public works or infrastructure project. Landowners may have concerns about the acquisition of their land, the compensation to be paid or the impact of the infrastructure project on their remaining land. Landowners that have no land acquired will also be concerned about the wider impacts of that project.

As a result, information about land acquisition and the rights of landowners should be available from the moment the project is first publicly identified. It may not need to be detailed information on particular properties required or the scale of acquisitions. In fact, early on in a project this will not be possible. However, there should be enough advice, if possible, tailored to

the particular project, so that landowners can understand how the acquisition process will work, the roles of all of parties involved, and importantly, the timelines for when acquisitions will occur.

CONSIDERING “REASONABLE” IN RELATION TO REIMBURSEMENT OF EXPENSES INCURRED BY OWNERS.

This part of the paper provides a discussion on the issues relating to s66 of the PWA and in particular defining the term “reasonable”, and how to manage the process so that expectations and costs do not increase.

As noted previously, the actual negotiation of acquisitions is undertaken by private sector companies and individuals, known as LINZ accredited suppliers, working for the Crown agency (the “acquiring authority”) that requires the land.

An accredited supplier submits a report to the Clearances team on the outcome of an acquisition, or during the acquisition process if it longer than expected, and a land owner has incurred fees. The PWA provides for the recovery of “reasonable” fees incurred in respect of land taken or acquired. Considering what is “reasonable” and applying this definition to claims, often retrospectively, can cause problems at the decision making stage, and in the interests of equity, it is important to have a process that is clearly understood by all parties.

DISTURBANCE PAYMENTS

Specifically, s66 of the PWA provides for “Disturbance” payments. Disturbance is one aspect involving recoverable loss, and is not specifically linked to the value of the land. The PWA provides as follows:

- (1) Subject to subsection (2) of this section, the owner of any land taken or acquired under this Act for a public work shall be entitled to recover compensation for any disturbance to his land and in particular to recover, where appropriate,—
 - (a) All reasonable costs incurred by him in moving from the land taken or acquired to other land acquired by him in substitution for the land taken or acquired, including—
 - (i) [Repealed]
 - (ii) The reasonable valuation and legal fees or costs incurred in respect of the land taken or acquired:
 - (iii) The reasonable valuation and legal fees or costs incurred in respect of the land acquired in substitution, but not exceeding the reasonable valuation and legal fees or costs which would be incurred in respect of land with a market value equal to the land taken or acquired:
 - (iv) The actual and reasonable costs incurred by him in transporting his goods and chattels and those of his family from the land taken or acquired to the land

acquired in substitution, but not exceeding the reasonable costs of such transport by road over a distance of 80 kilometres, or such greater distance as is necessary to reach the nearest land that reasonably could have been acquired in substitution:

- (b) An allowance for any improvements not readily removable from the land taken or acquired which are of particular use to a disabled owner or any disabled member of an owner's family and which are not reflected in the market value of the land.
- (2) No person shall be entitled to compensation under this section unless—
- (a) He was not a willing party to the taking or acquisition; or
 - (b) He was a willing party to the taking or acquisition principally because the land had been notified

Historically fees for valuation and legal advice were reimbursed, as set out in the PWA after land was taken or acquired ie it was part of the settlement package. About five years ago, as acquisitions seemingly became more complex and solicitors started to act increasingly on behalf of landowners in negotiations, fees to hire negotiators started to rise considerably.

What was previously a norm of say \$1000 to \$3000 for a job suddenly became \$5000-\$10000. Adopting the “Principle of Liberality”, LINZ decided to apply a wider interpretation to the PWA, and not insist on owners paying these fees first, before claiming reimbursement. Instead, LINZ agreed to pay these invoices, providing these were correct, and the costs itemised.

CURRENT PROCESS

Accredited suppliers receive invoices for services rendered at various points in the acquisition process and are required to forward these to LINZ with a report either recommending full payment, part payment or no payment. The criterion in the legislation is “actual and reasonable”. In the last 2 ½ years the Crown has reimbursed approximately \$3.5m (\$1.5m Euro) against compensation of approximately \$440m (\$220m Euro).

By way of example, invoices are now received from:

- solicitors
- barristers
- Queens Counsel
- negotiators
- planners
- engineers
- surveyors
- valuers

- tree experts
- accountants
- board directors
- removal companies
- cleaners
- digital television companies
- telecommunication companies.

Table 1 shows where requests for reimbursement have been received in recent years and, based on previous experience as a guide, identifies which of three categories they may fall into at the outset of a negotiation.

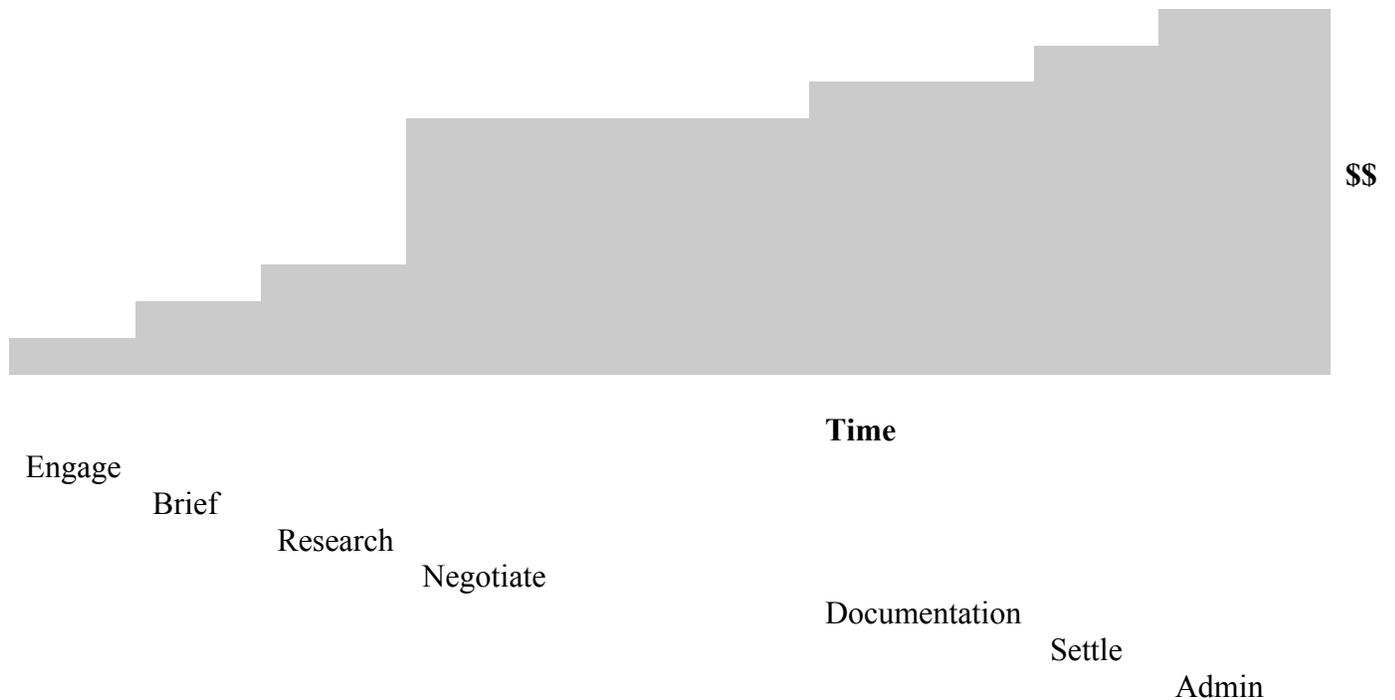
Table 1

Service provider	Reasonable	Arguable	Needs justification	
Solicitor	Yes			
Barrister	Yes	Yes		
Queens Counsel			Yes	
Valuer	Yes			
Negotiator	Yes	Yes		
Accountant		Yes	Yes	
Arborist			Yes	
Engineering		Yes	Yes	
Planning		Yes	Yes	
Surveyor		Yes	Yes	

Over time the acquisition process ends with an agreement to acquire the land (s17 agreement) or a proclamation under s26 of the PWA to take land, and occasionally with claims taken to the Land Valuation Tribunal to settle unresolved compensation claims. As a result, legal and/or negotiation fees can range between \$20000 to \$30000 per transaction. The highest claim to the Crown for fees for one acquisition was approximately \$70,000.

Table 2 sets out an expected pattern of fees accruing over a period of time.

Table 2



In considering any claim, sometimes it can appear that over time the complexity of transactions necessitates considerable resource on behalf of the owner. This is often mirrored by the Crown’s team of consultants and the definition of “reasonable” is easy to determine and apply. Other times little progress is made; a land owner can delay valuations, may not disclose valuations, may seek excessive compensation without reflecting a valuation (if it is disclosed), or negotiates to a certain point but then stops.

Defining what is reasonable has become more difficult.

If a claim is declined, the lawyer or consultant would either, expect payment from the land owner, accept the outcome, or challenge the decision by either approaching the decision maker or a Minister of the Crown, seek a judicial review, or perhaps distribute information publically, for example to the media.

There has been little if any judicial review of these s66 claims. Having said that, most are claims are paid. However, recently some amounts have accrued to \$20000 and \$30000 quickly, and the levels of expertise appear disproportionate to the transaction, or are not assessed as “reasonable”.

MITIGATING LOSS

New Zealand case law notes that a land owner is required to mitigate against losses. The following is an extract from the LINZ published Land Owners' Rights booklet published 2005.

“Obligation to Minimise Losses

The Courts have ruled that there is an obligation on landowners to take all reasonable steps to ensure that their losses are kept to a minimum. It is important you keep a record of all communications and detailed records of all expenses incurred and losses sustained, as you may be able to recover these as part of your claim for compensation. You may only receive compensation for expenses and losses that occur as a direct consequence of the acquisition of your land.

You are under a duty to mitigate your loss. This means you should take steps to minimise your losses. If losses are increased as a result of your actions (or lack of them) you will not receive compensation for these increased losses.

An Acquiring Authority that acquires your land will try where possible to extend every opportunity for the landowner to take any action necessary to minimise potential losses including actions such as delaying taking possession”.

In processing claims over the last two years, it is now appropriate to obtain guidance around what is considered to be “reasonable”. This will enable LINZ to consider more complex and expensive claims, and determine what is reasonable in a way that is sustainable in a court of law, or in the least, assist decision makers to determine a clear definition of “reasonable”. A set of guidelines is seen as desirable and are currently being developed.

RESEARCH TO DATE AND OBSERVATIONS

As part of preparation and research prior to preparing a guideline, internet research has found the following points or quotes to note:

- Suggestion that “reasonable costs” should be “proper legal costs”. While there might be doubt about what is “reasonable” there should be no doubt about what is considered “proper”
- If a solicitor and a negotiator are involved, the total fee payable should not exceed the amount payable if only one person had been involved.
- UK Land compensation manual notes:
 - The claimant must act reasonably in order to try to mitigate loss.

- Two relevant UK court cases, *Harvey v Crawley Development Corp*, and Privy Council in *Director of Buildings v Shun Fung Ironworks* touched on the definition of “reasonable”.
- The onus is on the acquiring authority to prove that a land owner has acted unreasonably.
- The standard of what is “reasonable” should not be set too high.
- The Canadian Law Reform Commission has drawn a distinction between ordinary litigation and expropriation proceedings:
 - There is no reason why the claimant should not be fully compensated for their legal and appraisal expenses.
 - Land owners should not be out of pocket simply because they settle.
 - Claimants should not be placed in a position where they are afraid to consult the legal profession.
- In a report by RB Robinson on the Expropriations Act, concern is expressed over the impact of costs. Relevant quotes from this report include:
 - “These provisions have been a golden goose, laying eggs but eggs of gold. Splendidly generous to landowners they have caused concerns from expropriators as guardians of the public purse. It has contributed to the unhealthy philosophy buy at any price rather than expropriate.”
 - “While I have always tried to be careful not to suggest that solicitors have done unnecessary work or have done necessary work in a time consuming manner...conclusion that with the pot of gold at the end of the rainbow many solicitors acting for claimants seem to have conducted themselves in an expansive manner such as to suggest acute awareness that their clients will not be required to pay their bills”.
 - “The client who knows they may never need to pay the bills might not act reasonably and solicitor who knows the client will not be responsible might not submit a reasonable account.”
 - “Legislature did not intend to fully indemnify the claimant for all reasonable legal costs.”

- The Concise Oxford Dictionary defines “reasonable” as “fair”, “just moderate”, “suitable under conditions”, “fit and appropriate to the end in view”, “governed by reason”, “not immoderate or excessive”, “rational”, “honest”, “equitable”, “suitable” and “moderate”.
- In *Amadue Holdings et al v City of Calgary* it was noted that the costs should however reflect such reasonable economical and straightforward preparation and presentation as is necessary to present an owners case. It also states that the owner should not be allowed the cost of unnecessary work or other expenses or costs incurred through over caution or over preparation
 - Where land has been taken compulsorily, it does not imply that the method of determining costs in ordinary litigation should be followed.
 - The owner should not be allowed costs which are the result of misconduct omission or neglect by the owner.
 - Bills should be sufficiently itemised and contain sufficient detail to be fully assessed by the decision-maker.
 - There is the need to record the number of hours, itemise correspondence calls emails and attendance.

POINTS TO NOTE

The following have emerged in discussions and during research, as points to note:

- LINZ needs to communicate its expectations on s66 invoices to all involved at the start of the acquisition process.
- There might be a threshold of what is “reasonable” for various types of transactions.
- The level of complexity of an acquisition is a factor that needs to be considered.
- Solicitors’ time and rates are a starting point however they don’t need to be accepted.
- Referral to the NZ Law Society’s Cost revision committee is one option open to a decision maker if it is considered costs claimed are not reasonable.
- Under the Lawyers and Conveyancers Act 2006 lawyers may have to disclose their fees upfront.

- It is not an appropriate expense for a solicitor or staff employed, who not experienced in PWA, to do research or up skill at the Crowns’ expense.
- Charge-out rates should reflect the requisite experience level.

SUMMARY

The outcome of research to date, and experience over the last two to three years involving significant claims, often months after costs have been incurred, is that it is desirable for LINZ to publish guidelines for its accredited suppliers to provide to landowners and their service providers. These should be issued at the first point of interaction. The guidelines should clearly set out the acquisition process and the stages that LINZ provides input, requirements regarding claims under s66, and the factors a decision maker may consider. It must be noted and clearly articulated to a landowner that a claim can be declined, and they may then be liable for any costs that are not reimbursed.

Issuing guidelines will reduce risk to LINZ of judicial review of its decisions, and assist landowners and service providers to more clearly understand what the possible outcomes of claims for expenses.

An appreciation of the applications of the term “reasonable” as a subjective test that is applied retrospectively, may result in less worry and risk for an owner affected by a proposed acquisition. It must be clearly understood that the preparation of guidelines is not an attempt to reduce costs to the Crown or to deny landowners access to fair expertise acting on their behalf. If all parties recognise the parameters inside which claims are made and considered at the outset, then better relationships should result in what is often an extremely stressful situation (acquisition or compulsory acquisition), which is never of an owners making.

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BIOGRAPHICAL NOTES

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TS 4F - Compulsory Purchase and Compensation II 14/15
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FIG Congress 2010
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 Sydney, Australia, 11-16 April 2010

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 the team charged with reviewing the Public Works Act 1981 and am currently on the team reviewing the compensation provisions of the Act. 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 under the Act, and for management of the Crown property accreditation system.

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Since 1977 I have worked for a variety of Central and Local Government property organisations in New Zealand including Lands and Survey, Forest Service, Ministry of Works, Wellington Regional Council, Wellington City Council and Land Information New Zealand. In that time I have worked on major land acquisition and disposal projects both from a hands on negotiation perspective, including two major land acquisition projects requiring over 1000 hours of resource, and a regulatory perspective. I have driven and assisted in the design of system processes. I manage a team of statutory decision makers who have made in excess of 30000 land-related statutory decisions in the past ten years

I have presented papers at the FIG 9 Seminar on Compulsory Acquisition in Helsinki in 2007 and FIG 7 Land Administration in Verona in 2008.

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