IN THE SUPREME COURT OF NEW ZEALAND SC 123/2024

I TE KŌTI MANA NUI O AOTEAROA

BETWEEN	TONY JAMES SOFUS PASCOE and DEBBIE ANN PASCOE Appellants
AND	MINISTER FOR LAND INFORMATION Respondent

WRITTEN SUBMISSIONS OF COUNSEL ASSISTING

12 September 2025

COUNSEL ASSISTING CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION.

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MAY IT PLEASE THE COURT

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Summary of the argument

1. The Court of Appeal held that negotiations for the purposes of s 18(1)(d) of the Public Works Act 1981 ("**PWA**") can be conducted on a day-to-day basis by an authorised representative of the Crown such as The Property Group ("**TPG**").[1] In order for the Minister for Land Information ("**Minister**") or their delegate to be satisfied that every endeavour has been made to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land, there must be systems in place to ensure sufficient oversight by the Minister (or delegate) of the negotiations, and to ensure the Minister (or delegate) receives sufficient information about the negotiation process to support that conclusion. Depending on the course the negotiations take, reference back to the Minister (or delegate) may be required during the negotiations.[2]

2. The Supreme Court granted leave on the following question:[3]

> …whether the Court of Appeal was correct to find that negotiations prior to the compulsory acquisition of land for essential works, under s 18 of the Public Works Act 1981 ["**PWA**"], may be undertaken by an accredited contractor rather than by the Respondent personally (or an official of Toitū Te Whenua | Land Information New Zealand with delegated authority by the Respondent).

3. The Court has asked for the focus of argument to be on the following three questions:

    a. May the negotiation function be exercised by an accredited contractor?

    b. Does the negotiation function need to be formally delegated if it is to be exercised by an accredited contractor?

    c. Was the outsourcing of the negotiation function consistent with the respondent's statutory duty to "make every endeavour to negotiate in good faith"?

4. Counsel assisting submit that the Court of Appeal was not correct, and in response to this Court's questions, answer:

    a. No, the negotiation function must not be exercised by an accredited contractor. The nature of the function indicates that it

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[1] *Pascoe v Minister for Land Information* [2024] NZCA 557 ("***Pascoe (CA)***" or "**Court of Appeal decision**" at [12]

[2] *Pascoe* (CA) at [13]

[3] *Pascoe v Minister for Land Information* [2025] NZSC 54

is intended to be undertaken personally. While discrete elements of the function (e.g. information gathering) could be exercised by a contractor, the essence of negotiating must remain with the Minister or delegate. Reviewing a report summarising a chronology of negotiation attempts is not negotiation.

b. Yes, the function would need to be formally delegated under the Public Service Act 2020 ("**PSA**") which contains appropriate safeguards where delegation to a private sector entity is contemplated.

c. No. Outsourcing the function of negotiating with a landowner is not consistent with the respondent's statutory duty to "make every endeavour to negotiate in good faith," even where: (i) the Minister and Land Information New Zealand ("**LINZ**") have a system in place that is intended to ensure the accredited supplier negotiates in good faith; and (ii) a LINZ official theoretically retains the s 18(1)(d) function, which it purports to exercise by reviewing a report on the negotiation and deciding whether there is sufficient evidence of negotiation in good faith. Outsourcing to a contractor engaged by the New Zealand Transport Agency ("**NZTA**") rather than the Minister raises additional inconsistencies with the obligation to negotiate in good faith, particularly when the terms of that engagement are factored in.

5. In response to the respondent's notice of intention to uphold the Court of Appeal's decision on other grounds, counsel assisting submit that the Court of Appeal's decision should not be upheld on the ground raised. The erroneous approach to s 18(1)(d) has affected the validity of the s 23 notice of intention to take land, and that invalidity is not superseded or cured by the Environment Court's conclusion that taking the appellants' land was fair, sound and reasonably necessary pursuant to s 24(7) PWA.

Narrative of facts relevant to the issues on appeal

Background to the s 18 negotiation

6. Mr and Mrs Pascoe own a farm in the Mangapēpeke Valley.

7. Te Ara o Te Ata: the Mt Messenger Bypass Project ("**Project**") is a roading improvement project involving the construction of a 5.2 km bypass route east of State Highway 3 ("**SH3**") between Taranaki and Waikato. NZTA requires interests in the Pascoe's land for the Project (being acquisition of approximately 11 ha for construction and permanent occupation and a

leasehold interest in approximately 12.7 ha for temporary occupation during construction).

8. The Minister has delegated to the Chief Executive of LINZ the "powers and functions" in s 18(1)(a) to (d) PWA and has consented to those powers and functions being sub-delegated.[4] The LINZ Chief Executive has sub-delegated those functions and powers to the LINZ Deputy Chief Executive and has consented to the further sub-delegation of those powers and functions to LINZ employees and any other person described in s 41(1A) of the State Sector Act 1988.[5] The LINZ Deputy Chief Executive has sub-delegated those powers to LINZ employees with specified roles.[6]

9. TPG is an accredited supplier to LINZ under LINZ's accredited supplier scheme,[7] a non-statutory scheme under which companies or individuals who carry out Crown property work are approved to undertake such work on the basis that they will comply with standards and guidelines specified by LINZ in relation to the work.[8]

10. LINZ does not engage the accredited supplier; they are engaged by the entity undertaking the project that requires the interest in land; in this case NZTA (referred to by LINZ as the "Crown acquiring agency"). The Minister and LINZ do not delegate statutory functions and powers to accredited suppliers.

11. NZTA initially engaged TPG in April 2016 to undertake consultation with affected owners, discuss route options and negotiate land entry agreements required for investigative work for the Project.[9] From July 2016, TPG engaged with the Pascoes as affected owners, discussing project updates, proposed land routes and land entry agreements and, later, land purchase options.[10]

12. An earlier s 18 process (to the process relevant to this proceeding) took place in 2018. On 26 February 2018, TPG recommended to Trevor Knowles, Manager of Clearances in the Regulatory Practice and Delivery

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[4] Instrument of delegation and sub-delegation dated 14 July 2009 **301.0112**, **301.0114**

[5] Instrument of delegation dated 29 November 2019 **301.0122**, **301.0123.** The reference to s 41(1A) of the State Sector Act 1988 should be read as a reference to clause 2 of Schedule 6 of the PSA, which replaced it.

[6] Those roles are the Group Manager Land and Property, Manager Land and Property, Senior Portfolio Manager, Portfolio Manager, Manager Clearances, Senior Advisor Clearances, and Advisor Clearances: Instrument of sub-relegation dated 29 November 2019 **301.0136, 301.0138**

[7] Affidavit of Craig Harris at [49] **201.0028**

[8] Affidavit of Craig Harris at [35] **201.0022**

[9] *Pascoe v Minister for Land Information* [2025] NZHC 1782 at [17]

[10] At [17]

Group at LINZ, to issue a notice of desire to acquire land under s 18 PWA.[11] A notice was issued on 5 March 2018 and served on the Pascoes on 14 March 2018.[12] Negotiations continued, and amended purchase offers were made to the Pascoes in June 2018.[13] Mr Pascoe became unwell, and negotiations stopped for a period. On 20 August 2018, TPG submitted a report to LINZ recommending that the Minister issue a s 23 notice to the Pascoes.[14] On 13 November 2018 and 15 February 2019, LINZ submitted briefings with recommendations to sign a s 23 notice to the then Minister. However, on 11 March 2019, the Minister decided not to sign the s 23 notice because issues relating to acquisition of land owned by Te Rūnanga o Ngāti Tama were unresolved, and the Project could not therefore proceed. As a s 23 notice was not issued, the first s 18 Notice lapsed on 14 March 2019.[15]

13. By July 2019, the Pascoes stopped engaging with TPG on the basis that TPG had no authority to negotiate the purchase of their land and they wished to negotiate directly with the Minister or Minister's delegate.

14. On 2 July 2020, TPG recommended that LINZ issue a second s 18 notice to acquire land. On 15 July 2020, LINZ decided to issue the second s 18 notice ("**Section 18 Notice**").[16,17] It is that Notice, and the process subsequent to its service on the Pascoes, that is relevant to this appeal.

15. On 23 July 2020, TPG provided the Pascoes with three purchase offers. No response was received in relation to those offers. The Section 18 Notice was served on the Pascoes on 31 August 2020.[18] The Pascoes were not willing to negotiate with TPG. The Minister and LINZ were not willing to negotiate directly with the Pascoes.

16. TPG produced and submitted a report to LINZ, dated 15 March 2021, recommending issue of a notice under s 23 PWA.[19] A chronology of communications was attached (although it included communications pre-dating the issue of the Section 18 Notice).[20] Mr Knowles, who has

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[11] *Pascoe v Minister for Land Information* [2025] NZHC 1782 at [19]
[12] At [19]. A notice of entry for the purpose of surveying the land in question was also issued (under s 110 PWA) and was served on the Pascoes on the same date.
[13] At [21]
[14] *Pascoe v Minister for Land Information* [2025] NZHC 1782 at [24]
[15] At [24]
[16] Affidavit of Trevor Knowles at [29] – [35] **201.0045**
[17] A second s 110 notice authorising land access for a survey was also issued.
[18] Chronology attached to TPG report **302.0579**
[19] TPG Report dated 15 March 2021 **302.0552**
[20] **302.0572**

delegated authority under s 18(1)(d), reviewed the report and decided that the requirements of s 18(1)(d) had been met. [21]

17. The power to issue a notice of intention to take land under s 23 has not been delegated and remains with the Minister.[22] Mr Knowles included a statement to the effect that s 18(1)(d) was complied with in his briefings to the Minister recommending that a notice of intention to take land be issued.[23] The Minister signed the s 23 notices,[24] and on 4 August 2021 notice of intention to take land under s 23 PWA was served on the Pascoes.

18. The Pascoes filed an objection to the s 23 notice with the Environment Court[25], which was not upheld.[26] A High Court appeal was not allowed.[27]

19. The Pascoes also filed an application for judicial review of the s 23 decision, which is the origin of the present appeal.[28]

20. Separately, in December 2017 NZTA lodged a Notice of Requirement for the alteration of the current SH3 designation (in its capacity as a requiring authority under s 169 Resource Management Act 1991 ("**RMA**")) and an application for resource consents, for the Project. These were heard and decided in 2018 - 2019.[29]

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[21] Affidavit of Trevor Knowles at [36] **201.0047** and briefing BRF 21-412 **302.0783** and BRF 21-424 **302.0806**

[22] Affidavit of Trevor Knowles at 35 – 36 **201.0047**

[23] Affidavit of Trevor Knowles at [36] **201.0047** and briefing BRF 21-412 **302.0783** and BRF 21-424 **302.0806**

[24] Affidavit of Trevor Knowles at [46] **201.0050** A corrected notice was signed on 2 August 2021.

[25] In accordance with s 24(7) PWA

[26] *Pascoe v Minister for Land Information* [2024] NZEnvC 101

[27] *Pascoe v Minister for Land Information* [2025] NZHC 1782

[28] The High Court decided that the grounds for review raised questions of law suitable for preliminary determination: *Pascoe v Minister of Land Information* [2022] NZHC 3173 ("***Pascoe (HC)***" or "**High Court decision**") at [6]. The Pascoes appealed the High Court decision to the Court of Appeal.

[29] A Hearing Commissioner recommended that the alteration to the designation be confirmed and decided to grant the resource consents on 8 December 2018. NZTA accepted the Commissioner's recommendation subject to two changes. Appeals to the Environment Court were lodged. The Environment Court approved the resource consents and Notice of Requirement by way of an interim decision dated 18 December 2019, a final assessment dated 10 March 2021 and a final decision dated 1 April 2021: *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203; [2021] NZEnvC 27, (2021) 22 ELRNZ 557; [2021] NZEnvC 40. An appeal to the High Court was dismissed: *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202. An application to appeal directly to the Supreme Court was declined: *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 87, [2021] ELHNZ 173; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 124, [2021] ELHNZ 238 (partially successful recall application).

Further details of the arrangements between the Minister, LINZ and TPG

21. Where entities such as NZTA seek to rely on the Minister's PWA acquisition powers, the relationship between the Minister/LINZ and the entity undertaking the project is framed by LINZ's "Standard for the acquisition of land under the Public Works Act 1981".[30] The Standard uses the term "Crown acquiring agencies", which it defines to mean both the Crown agency (here NZTA) and any accredited supplier they contract (here TPG).[31] Counsel note that the PWA does not provide for Crown acquiring agencies; the acquisition power stays with the Minister.[32,33] The term, "Crown acquiring agency" is a non-statutory term which risks confusing the powers, roles, and responsibilities involved in delivering government works.

22. The Standard includes direction on how a "Crown acquiring agency" must engage with landowners, including a requirement that Crown acquiring agency must ensure that any dealings with the owner, including negotiations, are undertaken in good faith.[34] It specifies the information that must be submitted to LINZ where the Crown acquiring agency seeks a notice of intention to take land under s 23.[35]

23. The Standards are supported by a LINZ Guideline,[36] which contains a section on good faith negotiation. It provides that:

> While there is no clear statement as to what constitutes good faith, the Crown acquiring agency should ensure that it acts in an honest, fair and open manner with the owner, including:
> (a) acting honestly during any dealing,
> (b) having regard to the owner's legitimate interests,
> (c) meeting and regularly communicating with the owner and responding to the owner's inquiries, and
> (d) acting professionally towards the owner.

24. When submitting a report and conclusion to LINZ seeking a notice of intention to acquire land, the Crown acquiring agency must provide a

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[30] Standard for the acquisition of land under the Public Works Act 1981 **301.0290** Counsel note that this relevantly provides that "Any Crown acquiring agency must use this standard when **applying** to the Minister to exercise powers under the acquiring provisions under the PWA." (our emphasis) This appears to reference applications by requiring authorities under s 186 RMA. In this case, the Project was treated as a government work and there was no "application".

[31] Definition of "Crown acquiring agency" **301.0294**

[32] Or local authorities for local works.

[33] This is different to the New South Wales system as discussed below.

[34] At 4.3 **301.0299**

[35] At 11 **301.0314**

[36] LINZG15703: Guideline to the standard for the acquisition of land under the Public Works Act 1981 ("Guideline") **301.0207**

chronology which should identify all of the issues raised during the negotiations that may have contributed to an agreement not being reached, detailing the views of both the Crown acquiring agency and the owner on each issue.[37] This report forms the basis of the Minister's delegate's consideration of whether s 18(1)(d) has been complied with, which is how the Minister's delegate purports to discharge their s 18(1)(d) statutory function.

25. The relationship between LINZ officials with delegated powers under s 18 and accredited suppliers like TPG is also framed by:

    a. LINZ's Conditions of Crown Property Accreditation[38] which set out the conditions that accredited suppliers (including TPG) must comply with when they undertake Crown property work that will require LINZ staff members to perform statutory functions delegated to them by the Minister and Chief Executive of LINZ.

    b. LINZ's Procedures for Becoming a LINZ Crown Property Accredited Supplier.[39]

26. We also note the application for accreditation by Terralink (the predecessor of TPG), which was in the form of a statutory declaration, contains duties that include:[40]

> 4. To accept a duty of care to both the client agencies and [LINZ] to act appropriately and confirms that accreditation is a fiduciary arrangement between the accredited agent, client agencies and Land Information New Zealand that allows the accredited agent to act on behalf of Land Information New Zealand when executing work for client agencies.

Further details of the arrangements between NZTA and TPG

27. The relationship between NZTA and accredited suppliers is governed by the contract between the acquiring agency and the accredited supplier, in this case an Acquisition Services Agreement ("**ASA**") between NZTA and TPG.[41]

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[37] Page 59, **301.0265**
[38] Conditions of Crown Property Accreditation **301.0362**
[39] Procedures for Becoming a LINZ Crown Property Accredited Supplier **301.0327**
[40] **301.0378**
[41] **302.0827**

Submissions

Preliminary issue – Further evidence: Acquisition Services Agreement

28. Rule 40 Supreme Court Rules 2004 enables parties to apply for leave for the admission of further evidence. The further evidence sought to be admitted by counsel assisting is the ASA between NZTA and TPG, which is not evidence of the type listed in Rule 40(1).[42] However, counsel submit that the Court has discretion to admit the ASA under Rule 5.

29. The requirements that apply to an application to admit further evidence are that the evidence is fresh, credible and cogent.[43] The ASA is fresh in that it was not before the High Court or the Court of Appeal. Although it could potentially have been introduced at either stage, NZTA was not a party, and its relevance may not have been evident to the appellants as lay litigants. Counsel assisting was only engaged during the later stage of the Court of Appeal process and noted the likely existence and relevance of the document.[44] The ASA is credible. Counsel assisting made a request to NZTA under the Official Information Act 1982 for "the written terms of engagement between NZTA and TPG covering TPG's provision of services for NZTA in negotiating acquisition of land for the Mt Messenger project". NZTA provided the ASA in response to that request.

30. The ASA is highly cogent, and its admission will facilitate the just and expeditious resolution of the appeal.[45] The respondent's case, accepted by the Court of Appeal, is that the Minister can discharge their duty to negotiate in good faith by having TPG undertake negotiations where TPG was contractually engaged by NZTA, because the interests of NZTA and the Minister align. The ASA is directly relevant to whether that is correct, because its terms are pertinent to whether TPG's contractual obligations to NZTA are consistent with the Minister's duty to negotiate in good faith. Admitting the ASA ensures the Court is properly informed of the relationship between the Minister, NZTA, and TPG, which is essential for the just resolution of the appeal, the outcome of which has significant consequences for the appellants and for public process.

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[42] Rule 40 refers to oral examination, affidavit, or depositions.

[43] *Erceg v Balenia Ltd* [2008] NZCA 535, relying on earlier decisions of the Court of Appeal. Counsel note that the case law on this point generally relates to Rule 45 of the Court of Appeal rules, however that rule mirrors Rule 40 of the Supreme Court Rules.

[44] As recorded at paragraphs [83]-[85] of the Court of Appeal's decision.

[45] Supreme Court Rules r.5

Issue on which this Court has granted leave to appeal

Introduction

31. Section 18(1) provides that where any land is required for any public work the Minister shall, before proceeding to take the land under the PWA, take steps that include inviting the owner to sell the land to him or her and "make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land".[46] The Minister may only proceed to take the land if the owner fails to respond to an invitation, or refuses to negotiate with the Minister, or an agreement for sale and purchase is not made.[47]

32. The High Court considered that "negotiations and attendant operational issues" could properly be performed by a third party (TPG) and that "the Minister was entitled to rely on the assurances provided by the appropriately delegated LINZ staff, which were in turn based on the expertise and experience of TPG, to be assured that the requirements of s 18(1)(d) had been satisfied".[48] The Court of Appeal similarly considered that the Minister could "make every endeavour to negotiate in good faith" with a landowner by appointing (personally, or through a delegate) an appropriately skilled and knowledgeable person to undertake those negotiations on the Minister's behalf, provided that the Minister (or delegate) retains ultimate responsibility for the negotiation. The Court found that person need not have delegated decision-making power:[49]

> [104] … Negotiation towards an agreement conducted under the oversight of the Minister (or delegate), without authority to approve entry into the agreement, is a form of preliminary or incidental work which the Minister can choose to undertake in a range of ways for the purpose of s 18(1)(d), as under s 17.

33. The Court of Appeal accepted that it is necessary to ask whether a particular task is of a kind that can only be carried out by a person with statutory authority to do so, having regard to relevant public law principles and to the specific statutory context, and that this depends on the nature of the task.[50] It found that where a Minister's functions encompass matters such as gathering information, or administrative tasks, the Minister (or their officials) can engage any appropriate person to perform those tasks.

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[46] Section 18(1)(d) PWA
[47] Section 18(2) PWA
[48] High Court decision at [41]
[49] At [104]
[50] At [108]

The person who is allocated the task may be an employee of a public sector entity who does not hold any delegated powers. Or they may be an external private sector provider. [51] Whether such an engagement involves delegation of a function will depend on the extent of decision-making authority and control retained by the office holder, and the nature of the task that the third party is engaged to perform.[52]

34. To that point, counsel assisting respectfully agree with the Court's analysis. However, when the Court came to consider how those principles apply in the context of negotiating in good faith to acquire land under the PWA, it concluded that it was open to the Minister to negotiate through an authorised representative such as TPG.[53] Counsel assisting disagree.

Counsel assisting submissions

35. Determining whether the Court of Appeal was correct requires particular consideration of:

    a. The nature of the statutory power to acquire land and duty to "make every endeavour to negotiate in good faith".

    b. The nature of the arrangement between LINZ and TPG.

    c. The role of NZTA and the arrangements between NZTA and TPG.

36. It is acceptable for Ministers and departmental officials to employ agents to execute some parts of a statutory power, but if they do so they must retain control of the exercise of their statutory duties and powers.[54] They must not denude themselves of a statutory power or duty **that is of such a character that it is apparent that it is intended to be exercised or carried out personally.**[55]

37. In our submission, s 18(1)(d) negotiations are a statutory duty that must be performed by the entity that holds the statutory power or their formal delegate. There are some discrete aspects of the function that can be given to a third party to perform (such as the preparation of information to inform the negotiation) but the negotiation itself must be between the Minister or their delegate and the landowner. Reviewing a report on the

[51] At [109]
[52] At [111]
[53] At [122]
[54] *Morrison v Shire of Morwell* [1948] VLR 73 at page 79.
[55] *Morrison*, above n 54, at page 82 – 83.

negotiations to satisfy oneself that good faith negotiations have occurred is not negotiating.

38. The nature of the arrangements between LINZ and TPG and between NZTA and TPG reinforce that view.

The nature of the statutory power and duty to "make every endeavour to negotiate in good faith"

39. The context - that the negotiation forms part of a compulsory acquisition process - is important. The compulsory acquisition of land by the Crown involves a significant interference with an individuals' property rights. The Crown's powers "must therefore be strictly construed".[56] The requirement to negotiate in good faith plays an important role in mitigating the extent of that interference. The good faith requirement "takes into account the inherently coercive nature of the acquisition process" in which a landowner is "not a willing seller in any true sense of the word" even when they are willing to enter into an agreement.[57] The statutory duty is to act reasonably in the public interest but with due regard to the interests of the landowner[58] and to "…honestly try to reach agreement. [The parties] remain able to pursue their own interests within what is subjectively honest, rather than what is objectively reasonable".[59]

40. In Parliamentary discussions when the Report of the Lands and Agriculture Committee on the Public Works Bill 1980 was reported to the House, the Bill's requirement for negotiation was contextualised in the following terms:[60]

> …[the Bill] protects the right of the individual against the State … but it does not absolutely take away the right of the State or the local body. They have a final recourse, but that recourse can be exercised only after all other courses have failed.

41. Compulsory acquisition was described as "hang[ing] as an ogre [over the negotiation] … in that if they do not sell by negotiation it will be used".[61]

42. The statutory scheme and language of s 18(1)(d) indicate that negotiation is a critical part of the coercive acquisition process. Subsection 18(1)(d) requires the Minister to make "every endeavour" to negotiate, and

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[56] *Dromgool v Minister for Land Information* [2022] 24 ELERNZ 552 at [52]-[54]; *Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information* [2015] NZHC 1566 at [20]

[57] *Pryor v Minister of Land Information* [2015] NZHC 3117 at [9]

[58] *Deane v Attorney-General* [1997] 2 NZLR 180 at 191

[59] *Wellington City Council v Body Corporate 51702 (Wellington)* 3 NZLR 486 at [17]

[60] Hansard Vol 438 June-July 1981 at 1483

[61] Hansard Vol 438 June-July 1981 at 1486

negotiation must be "in good faith" as a precondition for taking land. Negotiation is not a merely operational or administrative step. It is not mere "legwork"[62] and should not properly be seen as an "administrative or supporting function".[63] It does not merely "support" the compulsory acquisition that may follow, it is a separate process that may avoid the need for compulsory acquisition altogether.

43. The word "negotiation" "implies a process which has as its object arriving at agreement".[64] In that sense, it differs from consultation, which involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, then deciding what will be done.[65] Negotiation has a very different meaning and a different process from consultation.[66]

44. It is inherent in the concept of negotiation that it involves offers and counter-offers (potentially multiple times given that by law, negotiation must continue for at least 3 months[67]). Each offer requires the offeree to make a decision on whether to accept, or what to counter-offer, effectively creating a decision tree with several ultimate outcomes possible. The options chosen foreclose branches of the decision tree.

45. The Court of Appeal accepted that good faith negotiations require more than just gathering information.[68] It accepted that negotiations are a fluid and path-dependent process, and that the way in which a person conducts negotiations may foreclose options along the way. But it did not consider this to mean that only the Minister or delegate can undertake negotiations. It found that while some proposals may be so unrealistic that they need not be considered in depth, where-as others will require more careful assessment,[69] this goes to how the negotiations are conducted, not to by whom they are conducted.[70] And it said:[71]

> …there may be certain matters which are so fundamental to the shape of the negotiation that they should be referred back to the relevant decision-maker along the way. Or, at the least, they should be expressly identified in any final report to the decision-maker as material decisions made in the course of the

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[62] High Court decision at [43]
[63] Court of Appeal decision at [119]
[64] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at page 676.
[65] *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC) at p 1124, cited in *Wellington International Airport Ltd* , above n 64 at page 675.
[66] *Wellington International Airport* Ltd, above n 64, at page 676.
[67] Section 18(2).
[68] At [115]
[69] At [115]
[70] At [116]
[71] At [117]

negotiation process that may have shaped the ultimate outcome (successful or unsuccessful).

46. Counsel assisting disagree. The Court of Appeal's reasoning illuminates the extent of discretion involved in conducting negotiations (the extent of "careful assessment" involved). Parliament's choice of functionary can itself be relevant context for interpretation: for example, by allocating a broadly expressed power to a public body with specialist expertise, Parliament has been taken to contemplate that wide policy considerations will be taken into account in the exercise of the power.[72] The allocation of the duty to negotiate to the Minister rather than, say, an independent negotiator, or a specific LINZ official, indicates Parliament's intention that it is the Minister' discretion that is brought to bear. The Court of Appeal found that the Minister or delegate must retain ultimate responsibility for undertaking good faith negotiations because a landowner's rights are affected by "the fact that negotiations have been attempted, potentially triggering s 18(2) and s 23".[73] But that is only one potential outcome: another outcome is agreement, and whether agreement is achievable depends (at least in part) on highly discretionary decisions made along the way.

47. Where a duty to *consult* arises, a decision-maker can consult directly, *or* through consideration of a fair, accurate and adequate report[74] provided to the decision-maker. However, the "report-based" form of consultation does not translate well to negotiation, because it can only ever be a report on the branch of the decision tree that was followed. That is why consideration of a report that provides a chronology of negotiations and parties' positions and reasons is not negotiation.

48. These features indicates that good faith negotiation is indeed a duty that is of such a character that it is intended to be carried out personally.[75] The Court of Appeal found no public law principle of general application had been identified that would require the Minister to negotiate personally or through an authorised representative.[76] It is the nature of negotiation, and particularly negotiation in good faith in the context of compulsory acquisition, that indicates its personal character, rather than a public law principle.

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[72] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [55]
[73] Court of Appeal decision at [114]
[74] *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) at 96 - 97, followed in *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 at [45].
[75] *Morrison*, above n 54, at page 82 – 83.
[76] Court of Appeal decision at [119]

49. Further, the language of the PWA distinguishes between powers conferred on the Minister that are for the Minister (or delegate) to exercise, and tasks to be undertaken by a third party. It is the Minister who is directed by s 18(1)(d) to "make every endeavour" to negotiate, where-as:

    a. a valuation is to be "carried out by a registered valuer" (s 18(1)(c));

    b. s 23(1)(a) empowers the Minister to "*cause* a survey plan" to be produced;

    c. the Minister "*or any person authorised* generally or particularly in writing by him" may apply to the Māori Land Court for an order under s 17 PWA.

50. Those distinctions indicates that where the PWA requires the Minister to do something, it is the Minister (or delegate) who is required to act, not a third party whom they cause to act. The PWA's linguistic distinctions in addressing these duties would not be necessary if all of these powers and duties were intended to be read as able to be carried out by the Minister or by someone else on their behalf. The Court of Appeal referred to the s18(1)(a) and (b) steps of lodging a notice of desire with the Registrar-General of Land[77] and service on the landowner of the Minister's notice of desire to acquire the land[78], both of which it said could validly be done by a suitably qualified and authorised person.[79] The PWA makes special provision for service of notices, including that they must be signed by or on behalf of the Minister.[80] A non-government employee without a valid delegation could not be engaged to provide the "service" of signing a notice on the Minister's behalf. Physical service of the Minister's signed notice, and lodging a notice with the Registrar-General, are distinguishable as they are fully administrative steps. The s 18 distinctions were not otherwise addressed by the Court of Appeal or the High Court.[81]

51. In *Re Solicitor General's Reference (No 1 of 2016)*, the Supreme Court considered whether a notice of driver license suspension that was both generated and served on a driver by a police officer satisfied the

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[77] Section 18(1)(b),
[78] Section 18(1)(a)
[79] Court of Appeal decision at [105]-[106].
[80] Section 4 PWA
[81] The High Court found that preliminary steps including obtaining valuations and negotiation require a level of expertise and resource that is likely to be outside the technical capability of the Minister. The Minister must engage with the information and ensure that they have all the critical information before them in making a decision. However the Minister is not required to personally undertake the negotiations and associated work (at [42]). That analysis overlooks the distinction in language between s 18(1)(d) and the other pre-acquisition actions.

requirement that "the Agency must give notice" in s 90(1) Land Transport Act 1998[82] (there was no question that the police office could serve the notice). The question was whether NZTA could meet this by causing a notice to be generated (by the police officer) rather than generating the notice itself. The Court held that there is no distinction between giving and serving the notice: notice is "given" by service of the required information. However it also considered the relevance of s 210, which sets out how notice that must be "given" or "made" under the Act may be delivered, and includes "causing it to be delivered".[83] The Director of NZTA was not required to give notice personally: he could act through departmental officers (under delegation or the *Carltona* principle, discussed below). The inclusion in s 210 of "causing" the notice to be delivered is what provided the "**additional** authority … to authorise service by **non-departmental** officials"[84] (our emphasis).

52. In the PWA context, that additional authority for non-departmental officials is provided for valuations, survey plans, and other third party tasks. In contrast, the PWA does not provide for the Minister to "cause to negotiate". The role remains with the Minister (unlike in Canada, as discussed below).

53. The Minister or delegate can seek assistance with, or receive services relating to, aspects of the negotiation. However, the core function and power of "negotiating in good faith" cannot be divided into a process undertaken by a service provider and a final decision by the Minister or delegate. Good faith negotiation is itself a process, and in this context is intended to be exercised or carried out personally by the Minister or delegate.

Good faith negotiation duties in other New Zealand statutes

54. We have considered how negotiation is addressed in other statutes. The Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA**") and RMA are the only New Zealand statutes we have identified that contain similar obligations to s 18(1)(d) PWA.

55. Schedule 2 of MACA specifies that negotiations between the Minister of Land Information and a customary marine title group are required when the Minister is tasked with deciding whether infrastructure proposed in a customary marine title area should be become a "deemed accommodated

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[82] *Re Solicitor General's Reference (No 1 of 2016)* [2017] NZSC 58.
[83] *Re Solicitor General's Reference* at [19].
[84] *Re Solicitor General's Reference*, above n 82, at [19]

activity.[85] Such decisions have significant implications for customary marine title holders, because they amount to a waiver of the holder's permission rights with respect to a deemed accommodated activity application.

56. If an applicant for resource consents for infrastructure cannot obtain the permission of a customary marine title group, it can seek the intervention of the Minister, who can waive the customary marine title group's permission rights. The applicant must provide the Minister with a description of the negotiations that have already taken place with the customary marine title group, and reasons why the applicant considers it cannot reasonably obtain the group's permission.[86] The Minister must then themselves negotiate in good faith with the customary marine title group in an attempt to compensate for the waiver of its permission rights,[87] and can only proceed to decide on the waiver and associated compensation if after 3 months negotiation has failed.[88] The Minister cannot simply rely on the applicant's chronology of its negotiation attempt.

57. Under the RMA, iwi authorities can invite local authorities to enter into a Mana Whakahono ā Rohe agreement.[89] The purpose of a Mana Whakahono ā Rohe agreement is:

> (a) to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and
>
> (b) to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

58. Section 58N RMA includes Guiding Principles to be applied when "initiating, developing, and implementing" a Mana Whakahono ā Rohe agreement. These include a requirement for the participating authorities to use "their best endeavours…to work together in good faith and in a spirit of co-operation" in initiating, developing, and implementing the agreement.[90]

59. A statutory requirement to negotiate in good faith (or similarly use best endeavours to work together in good faith) is placed on the Crown or other

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[85] Deemed accommodated activities are activities that meet the requirements of s 65 MACA
[86] Clause 3(f), Schedule 2 MACA
[87] Clause 6(c), Schedule 2 MACA
[88] Clauses 7 and 8, Schedule 2 MACA
[89] RMA, s 58O
[90] RMA, s 58N(d)

government body in very limited circumstances, namely where government decision-making will expropriate (in the case of the PWA and MACA) or define (in the case of Mana Whakahono ā Rohe) private property rights or Māori rights and interests in the natural environment. Private property rights and Māori rights and interests (including proprietary rights and interest) as enshrined in Te Tiriti o Waitangi are two of the central pillars of New Zealand law.[91]

60. These commonalities indicate that good faith negotiations are a critical duty intended to be exercised by the Minister or delegate personally when seeking to rely on compulsory acquisition powers, and not outsourced.

International approaches

61. We have also considered approaches to negotiation prior to compulsory acquisition in other jurisdictions.

62. The Expropriation Act 1985 of Canada which governs acquisition of private land for public works and purposes has a similar framework to the PWA, but provides for the opportunity to reach a negotiated compensation figure in a notably different way. The power to expropriate land is provided in Part 1 s 4(1) of the Act.[92] Once the Minister confirms their intention to expropriate land,[93] the Minister must make all people with an interest in the land an offer of compensation based on a written appraisal of the value of their interest.[94] If, after an offer of compensation has been made, the person and the Minister cannot agree on the amount of compensation, either the person or the Minister may serve a notice to negotiate settlement of the compensation.[95] The Minister must refer the matter to a negotiator appointed by the Attorney-General. The negotiator is a "suitable person" not employed in the public service.[96] The negotiator must, within 60 days after the day on which the notice to negotiate is served, report to the Minister his or her success or failure in the matter of the negotiation, and shall thereupon send a copy of his or her report to the person entitled to compensation.[97]

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[91] *WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) v Attorney General* [2024] NZSC 164 at [113]; *New Zealand Maori Council v A-G* 1 NZLR 641; *The New Zealand Māori Council v A-G* [2013] NZSC 6 at [11]

[92] There are some exceptions relating to first peoples land which cannot be expropriated without consent of the Governor in Council.

[93] Part 1 s 14

[94] Part 1 s 16

[95] Part 1, s 30

[96] Part 1 s 30 (3) and (4)

[97] Part 1 s 30(5)

63. The accredited supplier approach used by the respondent aligns more closely with the Canadian statutory framework than with the PWA.

64. In New South Wales, acquisition of private land for public works is managed by the Land Acquisition (Just Terms Compensation) Act 1991 (No 22) ("Just Terms Act"). Like the PWA the Just Terms Act provides for negotiation for acquisition by agreement before steps are taken to compulsorily acquire land.[98] However, unlike the PWA, entities other than the Minister of Land and Property[99] are empowered to acquire land and have a corresponding duty "to make a genuine attempt to acquire land by agreement for at least 6 months before giving a proposed [compulsory] acquisition notice.[100] These entities are referred to as an "authority of the State" and include a statutory body representing the Crown or any other authority authorised to acquire land by compulsory process.[101] For example, Transport NSW is an authority of State and has the power to acquire land for the purposes of the Roads Act 1993.[102]

65. The approach adopted by the respondent, whereby NZTA engages and works with TPG to effect the negotiation, and the respondent's characterisation of NZTA as a "Crown acquiring agency" aligns more to the NSW statutory framework than the PWA. There are no "acquiring agencies" under the PWA, only the Minister has that power.

Safeguards where statutory functions carried out by those outside government

66. Lastly, we have considered how New Zealand law governs statutory functions when carried out by persons outside government.

67. Provision was made in the State Sector Act 1988, and carried through into the PSA, for statutory functions to be delegated to third parties outside the Public Service. A Public Service chief executive may delegate a function or power to a person outside the Public Service, but that is subject to a series of constraints and procedures. The function or power must be clearly identified.[103] The Minister's prior written approval must be obtained.[104] The chief executive must satisfy themselves that any potential conflicts of interest will be avoided or managed.[105] The delegate must not subdelegate

[98] Just Terms Act, s 10A
[99] The Minister responsible for the Just Terms Act, Administrative Arrangements (Minns Ministry – Administration of Acts) Order 2023
[100] Just Terms Act, s 3, s 5, s 10A
[101] Just Terms Act, s 4
[102] Roads Act 1993, Part 12, see specifically s 177
[103] State Sector Act s 41(2A), PSA sch 6, cl 2(5)
[104] State Sector Act s 41(2A)(a), PSA sch 6, cl 2(5)(a)
[105] State Sector Act s 41(2A)(b), PSA sch 6, cl 2(5)(b)

the function or power.[106] The delegate must comply with all relevant statutory obligations and all relevant obligations in a code of conduct set by the Commissioner in relation to the performance of a delegated function or exercise of a delegated power.[107] Information held by the delegate in relation to the performance of the function or exercise of the power, is covered by the Official Information Act 1982.[108] The Ombudsmen Act 1975 applies to the delegate's performance of the function or exercise of the power.[109] Where a written document is used to inform a person of an action taken by a delegate, the document must state that the action was taken by a delegate outside the Public Service, give the delegate's name and office, and state that a copy of the instrument of delegation may be inspected at the chief executive's office.[110]

68. That power to delegate outside the Public Service was inserted by the State Sector Amendment Act (No 2) 2013. The Select Committee reporting on the Bill[111] commented that:[112]

> … allowing chief executives to delegate their functions and decision-making powers to another agency or to non-government service providers can be, in certain carefully-defined circumstances, an effective and efficient means of delivering government services. We expect the ability to be used selectively, and understand that this is the intention. We do however consider it vital that the ability to delegate be matched by safeguards…

And:[113]

> While we recognise that a chief executive would consider carefully, before making a delegation, any potential conflict of interest affecting a delegate, we consider it important to make this responsibility explicit … We intend this amendment to cover actual, apparent, or perceived conflicts of interest. We understand that it is standard legal practice to interpret "conflict" as covering all three situations.

69. The Court of Appeal said:[114]

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[106] State Sector Act s 41(2B), PSA sch 6, cl 2(7)
[107] State Sector Act s 41(2D), PSA sch 6, cl 2(9)
[108] State Sector Act s 41(2E), PSA sch 6, cl 3(1)
[109] State Sector Act s 41(2F), PSA sch 6, cl 3(2)
[110] State Sector Act s 41(4A), PSA sch 6, cl 2(12)
[111] Finance and Expenditure Committee, Report on the State Sector and Public Finance Reform Bill 2012 (55-2). The State Sector Amendment Bill (No 2) 2012 was divided from the State Sector and Public Finance Reform Bill (55-2) on 2 July 2013.
[112] Page 6
[113] Page 8
[114] At [108]

> The powers conferred on the Minister by the PWA and by the State Sector Act/Public Service Act to delegate functions do not mean that only persons with formally delegated powers can perform each and every task involved in performing the Minister's functions.

70. That is accepted. However, the express provision by Parliament of the power to delegate a statutory function or power outside the Public Service only where it is subject to the safeguards described above, indicates the importance of distinguishing between contracting a service provider to provide a service that is not a statutory function, and contracting a service provider to provide a service that is a critical component of a statutory function; thereby effectively delegating the function.

Practicality / skill

71. The Court of Appeal accepted the respondent's submissions that it would be "impractical" for the Minister or delegate to undertake the negotiations, and that LINZ may not have the skills required.[115] That proposition puts the cart before the horse. If the PWA requires the Minister or their delegate to negotiate, it will be necessary for LINZ to be resourced to, and employ officials with the skills to, negotiate. As set out by Winkelmann CJ in her dissenting judgment in *Dromgool v Minister for Land Information*[116] (our emphasis):

> … it is the Minister for Land Information who exercises this power of compulsory acquisition for the Crown, no matter which Ministry requires the land for Government work. In other words, no matter which Crown agency has objectives which require the acquisition of the land — by way of example, whether it be the Police, or the Ministry of Education — it is the Minister for Land Information who is empowered under the PWA to acquire the land. There is good reason for this. The decisions to be made involve the exercise of public power to acquire or take private property. **They involve appropriately onerous processes for the Ministry and have significant consequences for the landowner.**

The Carltona *principle and implied delegation powers*

72. For completeness we address the *Carltona*[117] principle and implied delegation powers, but submit that these are not presently relevant. The *Carltona* principle is that powers conferred on Ministers are intended by Parliament to be exercisable by the officers of their departments, and such

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[115] At [88]
[116] *Dromgool*, above n 56, at [123] (Winkelmann CJ dissenting judgment)
[117] *Carltona Limited v Commissioner of Works* [1943] 2 All ER 560 (CA)

exercises of power are constitutionally those of the Minister through devolution rather than strict delegation. The principle is based on administrative workability. It is still applied in New Zealand, despite our comprehensive pattern of express delegation provisions.[118] The existence of an implied power of delegation has also been recognised.[119] Neither scenario applies where a service is provided by a commercial entity that is external to the Public Service.

Relevance of TPG's engagement by NZTA

73. TPG was engaged by NZTA, not by the respondent. The Court of Appeal did not consider this raised any issues because the Project is a Government work for the purposes of the PWA,[120] and the Minister and NZTA (a Crown entity) are both acting for the benefit of the Crown, in accordance with their respective statutory functions.[121] The Court found that "it makes good practical sense for the acquiring agency responsible for a project to be closely involved in negotiations with landowners under s 18(1)(d)"[122] and that:

> [98] In circumstances where it is unobjectionable — and often, necessary — for an acquiring agency to be involved in negotiations, no significance attaches to whether an accredited supplier is retained by NZTA as acquiring agency, or by LINZ. No conflict of interest arises merely because the negotiator is retained by the acquiring agency.

74. The Court of Appeal was aware that there was a contractual relationship between NZTA and TPG under which TPG was retained to provide property-related services for the Project,[123] but the contract between NZTA and TPG was not before the Court.

Alignment of interests?

75. Counsel assisting submit that the interests of NZTA and the Minister do not entirely align in respect of negotiations about reaching agreement on acquisition of private land for a Government work. The consequence is

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[118] *Re Solicitor General's Reference (No 1 of 2016)*, above n 82, at [19]; *Borrowdale v Director-General of Health* [2021] NZCA 520.
[119] *Director of Public Prosecutions v Haw* [2007] EWHC 1931. The Court said that there is only a theoretical distinction between the *Carltona* principle and an implied power to delegate (at [33]).
[120] Court of Appeal decision at [35] and [91]
[121] Court of Appeal decision at [91]
[122] At [97]
[123] At [52]

that there was potential for TPG to be unable to discharge its obligations to both NZTA and the Minister.

76. The respective interests are determined by the entities' statutory functions and duties in relation to the delivery of State Highway Government works like the Project. NZTA's statutory objective is to "undertake its functions in a way that contributes to an effective, efficient, and safe land transport system in the public interest".[124] In meetings its objective and undertaking its functions NZTA "must" comply with the operating principles in s 96 Land Transport Management Act 2003 ("**LTMA**"). One principle is that the "Agency must…use its revenue in a manner that seeks value for money."[125]

77. The Minister's function is to "acquire any land, building, or structure required for a Government work", including settling purchase price and compensation, and acquiring or hiring personal property for the performance of any of their activities or undertakings.[126] This function must be exercised in accordance with the framework in Part 2 PWA including the statutory duty to act reasonably in the public interest but with due regard to the interests of the landowner.[127]

78. The financial starting point for negotiations under s 18 PWA is the "estimated amount of compensation", calculated based on "a valuation carried out by a registered valuer"[128] and in accordance with the provisions in Part 5 about compensation. However, negotiations can move on from that starting point.

79. At the project level the interests of the Minister and NZTA align. Both are contributing to the delivery of a Government work in accordance with their statutory functions and duties.[129] However, their interests do not align in respect of negotiations to reach agreement on the acquisition of private land for a Government work where NZTA is paying the compensation. This is because NZTA is subject to a statutory duty to use its finances in a way that seeks "value for money". In colloquial terms, it is out for the best financial deal it can get. The Minister is not subject to the same (or an equivalent) statutory duty. Their obligation is to use market value as a starting point for good faith negotiations to reach agreement on a compensation figure.

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[124] LTMA, s 94
[125] LTMA, s 96(1)(b)
[126] PWA, ss 4A and 16
[127] *Wellington City Council*, above n 59.
[128] PWA, s 18(1)(c)
[129] This is consistent with the findings of the Court of Appeal at [91]

80. The Minister does have general financial duties in under the Public Finance Act 1989 ("**PFA**") which governs the use of public financial resources.[130] [131] The PFA's starting point is that the Crown must not "not incur expenses or capital expenditure, except as expressly authorised by an appropriation, or other authority, by or under an Act" and must not spend public money except as expressly authorised by or under an Act.[132] Capital expenditure means the cost of assets, such as land, acquired or developed.[133] In this case the PWA provides for capital expenditure to acquire land for a Government work, and funds are allocated through an appropriation Act. For example, under the Appropriate (2024/2025 Estimates) Act 2024 both "Land" and "Transport" have funds allocated, as they do in the Appropriation (2025/2025 Estimates) Bill currently before the House.

81. Spending in pursuit of Government policy objectives must be undertaken in accordance with the principles of responsible fiscal management in s 26G PFA. These relevantly include "ensuring that the Crown's resources are managed effectively and efficiently."[134] The terms effectively and efficiently are not defined, but in ordinary language they mean "fit for service" and "competent, capable".[135] In the context of financial management these concepts are likely to capture seeking or achieving value for money, but they are not limited to value for money. What constitutes effective and efficient financial management will need to be determined in the context of a given negotiation. Efficient and effective financial management may in some circumstances see more being spent on compensation to reduce the quantum spent on settling disputes.

82. The different interests of NZTA and the Minister are reflected in the arrangements between each entity and TPG. The ASA between NZTA and TPG is a contract, which provides for TPG's performance to be measured against key performance indicators ("**KPIs**"). Linking work allocation and fees to performance based KPIs is done expressly to achieve NZTA's "value

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[130] PFA, s 1A(1)

[131] For completeness it is noted that there is nothing in Part 2 of the Constitution Act 1986 which relates to the Executive requiring Ministers to seek value for money.

[132] PFA, ss 4 and 5

[133] PFA, s 2 "capital expenditure means the costs of assets acquired or developed (including tangible, intangible, or financial assets and any ownership interest in entities, but excluding inventories)". "Asset means an asset that is defined, recognised, and measured in accordance with generally accepted accounting practice"

[134] PFA, s 26G. This principle reflects the purpose of the PFA which states that the PFA establishes (among other things) "lines of responsibility for effective and efficient management of public financial resources". The overarching method for achieving this is a detailed reporting framework.

[135] Pocket Oxford Dictionary, 4th Ed, pg 257

for money" operating principle.[136] Value for money is also to be obtained from the ASA "by ensuring acquisition of Properties is undertaken promptly and to programme".[137]

83. There is no reference in the Standards and Guidelines governing TPG's relationship with the Minister and LINZ, or in the document confirming TPG (via Terralink NZ Ltd) as an accredited supplier,[138] to negotiating in a way that seeks value for money.[139]

84. These differences mean that when undertaking negotiations for s 18(1)(d) purposes, TPG may not be able to discharge its obligations to NZTA and the Minister simultaneously. If negotiations turn towards a figure above market value this may conflict with TPG's contractual obligation (and NZTA's statutory duty) to seek value for money. If TPG focuses its negotiation efforts on seeking value for money, it is approaching the negotiation with an ulterior purpose to that set out in the PWA or more generally under the PFA.

Other ASA provisions

85. As a private sector entity, it was necessary for TPG to be engaged by NZTA under terms of contract: in the case, the ASA. The existence and terms of the ASA count against the proposition that the Minister or their delegate could properly "negotiate" by reviewing a summary of the negotiations. They also contradict the Court of Appeal's finding, made without the benefit of seeing the ASA, that LINZ had "control over the manner in which the negotiations were conducted".[140]

86. The terms of the ASA include obligations on TPG to assist with the preparation of, and then comply with, a Property Acquisition Strategy. The Strategy was to include "an outline of the recommended negotiation tactics to acquire" strategically significant properties.[141]

87. TPG's performance under the ASA is measured in terms of KPIs, including achievement of financial and programme targets. The "supplier consequence" if a KPI was not achieved was "work allocation, future contracts, portfolio scope, and renewals at risk".[142] Ongoing failure to

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[136] Clause 2.2.1 Table, item 4 under "Value for Money" heading **[302.0845]**
[137] Appendix 1, clause 1)f)i) **[302.0883]**
[138] **301.0388**
[139] **301.0362**
[140] Court of Appeal decision at [119]
[141] Appendix 2 clause 4)c)ii) **[302.0889]**
[142] Appendix 3 Acquisition KPI Matrix, p 70 **[302.0897]**

meet the standard required by NZTA for any KPI could be deemed a material breach of the Agreement[143] enabling termination by NZTA.[144]

88. It is inevitable that those features would influence TPG's approach to negotiations with landowners. Those features have the potential to be incompatible with an obligation to negotiate in good faith.

89. LINZ did not hold a copy of the contract between NZTA and TPG.[145] TPG's report to LINZ did not refer to the Property Acquisition Strategy or the KPI obligations and consequences. Neither did LINZ's briefings to the Minister. Accordingly, in purporting to "negotiate" by reviewing a chronology of negotiations undertaken by TPG, the respondent was missing critical pieces of the picture:

    a. the negotiation tactics agreed between NZTA and TPG and recorded in the Property Acquisition Strategy; and

    b. the contractual linkage of TPG's commercial interest in continuing to be an accredited supplier engaged by NZTA with the financial and programme-related outcomes of the negotiation (through the KPIs).

90. Those matters go to the "how" of the negotiation, but also the "who", as the Minister or LINZ would not be subject to the same commercial objective.

Summary

91. For those reasons, counsel assisting's answers to the Court's questions are as set out in paragraph 4 above.

Respondent's notice of intention to support the decision on other grounds

92. The respondent's Notice is to the effect that even if this Court finds the Court of Appeal was wrong the compulsory acquisition process is not fatally flawed because any defect or irregularity in the s 23 Notice has been superseded by the Environment Court's inquiry (which concluded that taking the appellants' land is fair, sound and reasonably necessary pursuant to s 24(7) PWA), and there can be no prejudice to the appellants nor basis to set aside the s 23 Notice in those circumstances. Counsel assisting disagree.

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[143] Clause 3.2.6 **[302.0847]**
[144] Clause 7.2.7.1(f) **[302.0881]**
[145] Email counsel for the respondent to counsel assisting dated 5 June 2025

93. The Pascoes lodged an objection to the notice of intention to take land, with the Environment Court, which considered their objection[146] in accordance with s 24(7)(d) PWA which provides:

> (7) The Environment Court shall—
>
> …
>
> (d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:"

94. The Court considered both the taking itself and the process enabling that taking.[147] With respect to process, the Court considered the Pascoes' key arguments relating to the simultaneous issue of notices under ss 18 and 110[148] and sufficiency of information provided by NZTA.[149] While the Pascoes' non-engagement with the TPG representative, Mr Billing, is referred to by the Court when discussing the provision of information, the Environment Court's inquiry did not directly address the question that is before this Court. The Court recorded that:[150]

> [91] … This issue was not argued in front of us and has been the subject of determination in the High Court (now under appeal, we understand). In any event, it is clear that following issue of the Notices the Pascoes would not engage with the person whom LINZ had advised was the Crown-accredited independent property consultant retained to work with them on acquisition matters.

95. The Environment Court's s 24(7)(d) decision was appealed.[151] The grounds of appeal[152] do not relate to the matter before this Court. The High Court records that it granted leave for the parties to file brief written submissions as to the relevance of the Court of Appeal decision that this appeal is from.[153] The High Court agreed with the Minister's submission that the Court of Appeal decision did not raise any issue which bore on the s 24(7)(d) appeal.[154] While the Pascoe's third and fourth grounds of appeal challenged "whether the good faith negotiations requirement was met",[155] the Court of Appeal proceeded on the basis that the issue of

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[146] *Pascoe v Minister for Land Information* [2024] NZEnvC 101
[147] At [62].
[148] At [15] to [79].
[149] At [80] to [95].
[150] At [90]-[91].
[151] *Pascoe v Minister for Land Information* [2025] NZHC 1782 at [29]
[152] Set out at [98]
[153] Because the Court of Appeal decision issued after the High Court hearing.
[154] At [47]
[155] At [161]

authority to negotiate was resolved by the relevant finding of the Court of Appeal (in the preliminary determinations appeal): the Minister may negotiate through an authorised representative such as TPG,[156] and:

> [167] Against this legal position, the Pascoes' argument that TPG was not adequately addressing their concerns and therefore they were entitled to raise the matters with the Minister directly to ensure a fair process, does not establish that the Environment Court erred by not placing weight on the Pascoes' communications with the Minister.

96. The Pascoes declined to negotiate with TPG. As a result, there was little if any negotiation during the relevant period between 31 August 2020 and 1 December 2020. As set out by the High Court:

> [29] Between July and November 2020, TPG made several unsuccessful attempts to contact the Pascoes to discuss purchase options and to arrange for a survey to be completed including marking areas of interest to the Pascoes. At this time, the Pascoes were writing directly to the Minister and LINZ regarding the legality of the Second s 18 Notice, the s 110 Notice and related delegation instruments. They requested the Minister's personal involvement in the s 18 negotiations, and that only a non-cadastral survey to define the construction footprint should occur on the land to inform the negotiations. The Minister declined to participate personally.

97. If they were correct in their view that they were entitled to negotiate with the Minister or Minister's delegate, they have been prejudiced by their (legitimate) actions in not negotiating with TPG.

98. For completeness, we note that negotiations prior to 31 August 2020 are not relevant to this issue. The High Court recorded that:

> [170] … it is the period of good faith negotiation from the service of the Second s 18 Notice on the Pascoes on 31 August 2020 to 1 December 2020 (which is the expiry of the three- month period) that is relevant.

Relief

99. Counsel assisting submit that the appeal should be allowed and the s 23 notice revoked on the basis that s 18(1)(d) has not been complied with.

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Sally Gepp KC / Madeleine Wright

[156] At [166]

Counsel assisting

List of Authorities

Legislation (NZ)	
1	Land Transport Management Act 2003, ss 94, 96
2	Marine and Coastal Area (Takutai Moana) Act 2011, Schedule 2
3	Public Finance Act 1989, ss 1A, 2 (definition of capital expenditure), 4, 5, 26G,
4	Public Works Act 1981 ss 4, 4A, 16, 17, 18, 23, 24, 110
5	Public Service Act 2020, Schedule 6
6	Resource Management Act 1991, ss 58O, 58N 186
7	State Sector Act 1988, s 41
8	Supreme Court Rules 2004, r. 5 and 40
Legislation (other)	
9	Expropriation Act 1985 (Canada), ss 4, 5, 10A
10	Land Acquisition (Just Terms Compensation) Act 1991 (No 22) (NSW), ss 4, 14, 16, 25, 30
11	Roads Act 1993 (NSW), Part 12, Division 1.
Judicial authorities	
12	*Air Nelson Ltd v Minister of Transport* [2008] NZAR 139
13	*Carltona Limited v Commissioner of Works* [1943] 2 All ER 560
14	*Deane v Attorney-General* [1997] 2 NZLR 180
15	*Dromgool v Minister for Land Information* [2022] 24 ELRNZ 552
16	*Erceg v Balenia Ltd* [2008] NZCA 535
17	*Morrison v Shire of Morwell* [1948] VLR 73
18	*Olliver Trustee Limited and St Heliers Capital Limited v Minister for Land Information* [2015] NZHC 1566
19	*Pascoe v Minister of Land Information* [2022] NZHC 3173

20	*Pascoe v Minister for Land Information* [2025] NZHC 1782
21	*Pascoe v Minister for Land Information* [2024] NZEnvC 101
22	*Pryor v Minister of Land Information* [2015] NZHC 3117
23	*Re Solicitor General's Reference (No 1 of 2016)* [2017] NZSC 58
24	*Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42
25	*Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486
26	*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671
27	*WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) v Attorney General* [2024] NZSC 164
Legislative history	
28	Hansard Vol 438 June-July 1981 at 1483
29	Finance and Expenditure Committee, Report on the State Sector and Public Finance Reform Bill 2012 (55-2) (excerpt).
Other authorities	
30	Pocket Oxford Dictionary, 4th Ed, pg 257

Chronology

Date	Event	Reference
24 April 1997	Terralink (predecessor of TPG) application for accreditation approved	301.0388
2016	NZTA engages TPG to undertake consultation for the Project	*Pascoe v Minister for Land Information* [2025] NZHC 1782 at [17]
Note: negotiations between 2016 and 30 August 2020 are not relevant negotiations for the purpose of the appeal (because the Section 18 Notice was served on 31 August 2020) but are included by way of background context		
2016 - 2018	TPG engage with the Pascoes as affected owners, discussing project updates, proposed land routes and land entry agreements and, later, land purchase options.	*Pascoe v Minister for Land Information* [2025] NZHC 1782 at [17]
26 February 2018	TPG recommends to Trevor Knowles, Manager of Clearances in the Regulatory Practice and Delivery Group at LINZ, to issue a notice of desire to acquire land under s 18 PWA.	*Pascoe v Minister for Land Information* [2025] NZHC 1782 at [19]
5 March 2018	First s 18 notice issued.	*Pascoe v Minister for Land Information* [2025] NZHC 1782 at [20]
14 March 2018	First s 18 notice served on the Pascoes.	201.0045
20 August 2018	TPG submits a report to LINZ recommending that the Minister issue a s 23 notice to the Pascoes	201.0046
13 November 2018 15 February 2019	LINZ recommends that Minister sign a s 23 notice	201.0046
11 March 2019	Minister decides not to sign the s 23 notice	201.0046
14 March 2019	First s 18 Notice lapses	201.0046
July 2019	Pascoes stop engaging with TPG on the basis that TPG has no authority to negotiate the purchase of their land and they wish to negotiate directly with the Minister or Minister's delegate	*Pascoe v Minister for Land Information* [2025] NZHC 1782 at [25]
2 July 2020	TPG recommends that LINZ issue a s 18 notice to acquire land	201.0046 302.0523
15 July 2020	LINZ decides to issue the s 18 notice	201.0047
23 July 2020	TPG provides the Pascoes with three purchase offers. No response received	*Pascoe v Minister for Land Information*

		[2025] NZHC 1782 at [27]
31 August 2020	Section 18 Notice is served on the Pascoes	**201.0047** **302.0579**
15 March 2021	TPG produce and submit to LINZ a report recommending issue of a notice under s 23 PWA	**201.0047** **302.0552**
Between 15 and 24 March 2021	Mr Knowles reviews the TPG report and decides the requirements of s 18(1)(d) have been met	**201.0047** **302.0783** **302.0806**
12 July 2021	Mr Knowles recommends that the Minister issue a notice of intention to take land under s 23	**201.0047 - 0050** **302.0783** **302.0806**
16 July 2021	The Minister signs the s 23 notice	**201.0050** **302.0795**
18 July 2021	Section 23 notice served on the Pascoes	**201.0050** **302.0795**
2 August 2021	The Minister signs a corrected s 23 notice	**201.0050** **302.0821**
4 August 2021	Corrected s 23 notice served on the Pascoes	**201.0050** **302.0821**