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## Decision not to offer surplus PWA land back to a former owner was not lawful

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Navigating the Public Works Act 1981 (PWA) can be difficult for both landowners and the government agencies charged with developing public works, especially when divesting surplus land. Recently, the Court of Appeal provided some clarity about the obligation to offer surplus land to its former owner, when that former owner is a company which has been removed from the companies register.

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In *Aztek Limited v Attorney-General* [2020] NZCA 249, the Court of Appeal held that, even though the company former owner had been removed from the companies register, the chief executive of Land Information New Zealand (LINZ) should have enquired into the ability to make an offer to that company. The chief executive's decision, made in February 2011, that it would have been "impracticable" to sell the land to that company was set aside and the chief executive is now required to reconsider that decision.

The case relates to properties acquired from Aztek Limited for the "Avondale Extension" (later known as the Waterview tunnel project) by agreement in 2005. As Aztek's only significant asset was that land, the directors of the company had ceased filing annual returns and the company was removed from the companies register in March 2009. In November 2010, NZTA decided that the land was no longer required for the Avondale Extension and, on 21 February 2011, the chief executive of LINZ approved an offer-back exemption under section 40(2)(a) of the PWA. This section provides an exemption to the standard rule that land must be offered for sale to its former owner when it would be "impracticable" to do so. The reason given was that the company had been removed from the companies register.

Aztek was restored to the companies register in 2015 after the directors of the company discovered that the land had been declared surplus. The restoration of the company, in effect, brought it back to life as if it was never removed from the companies register.

The Court of Appeal relied on both the wording and purpose of section 40 of the PWA to decide that the chief executive of LINZ should have enquired with the

shareholder of the company as to whether it was possible for the company to be restored to the companies register in order to receive an offer of the land. That enquiry should have been made between the decision that the land was surplus and the decision that a sale to the former owner was “impracticable”. In this case, those decisions were made at the same time.

The Court relied on a number of previous decisions about the rights of former owners under the PWA and concluded that the PWA is designed to ensure that, so far as practicable, land is returned to the persons from whom it was acquired as “that is the right thing to do”. The Court held that, in this case, it was both reasonable and practicable to advise the shareholder of the company of the possibility of receiving an offer if the company was restored to the companies register.

This was a case where the company was closely-held, and the company had been removed from the companies register less than two years before the land became surplus. The reasonable performance of the chief executive’s duties could have resulted in the company being restored to the register in order to receive an offer in the months following the November 2011 decision that the land was surplus.

Restoration to the register is a relatively straightforward process under sections 328 to 331 of the Companies Act 1993 where the relevant ground for removal did not exist (generally, that the company had ceased to carry on business) and a useful provision in a variety of scenarios, both inside and outside of a liquidation.

The PWA remains a complex piece of legislation, which is well overdue for reform, with the rights and obligations of landowners and governmental agencies becoming more and more governed by caselaw. In this particular case, it is not yet known if an appeal to the Supreme Court will be sought by the Crown.

A number of our lawyers regularly provide advice on the PWA and one of our senior consultants, [John Greenwood](#), advised Aztek and its shareholder on this matter. If you would like further information about this or any other PWA matter, please contact one of our [property](#) lawyers. Our [corporate](#) team can also assist with restoration to the companies register or other company law matter.

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