

EXPLANATORY STATEMENT

Issued by Authority of the Minister for Finance

Lands Acquisition Act 1989

Lands Acquisition Regulations 2017

Legislative Authority

Under section 140 of the *Lands Acquisition Act 1989* (the Act), the Governor-General may make regulations, not inconsistent with the Act, prescribing matters either (i) required or permitted by the Act to be prescribed, or (ii) necessary or convenient for carrying out or giving effect to the Act.

Purpose

The purpose of the *Lands Acquisition Regulations 2017* (the Regulations) is to replace the *Lands Acquisition Regulations 1989* (the 1989 Regulations) which, by operation of section 50 of the *Legislation Act 2003*, are due to sunset on 1 April 2018.

Background

The Act is made under section 51(xxxi) of the Constitution, which provides:

- 51** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

.....

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;.....

The Act establishes a framework for the acquisition of interests in land by the Commonwealth and Commonwealth authorities, both by agreement and by compulsion. The Act also contains certain provisions relating to the disposal of interests in land owned by the Commonwealth and Commonwealth authorities.

Key elements of the scheme established by the Act include the following:

- Unless exemptions apply, the Commonwealth and Commonwealth authorities are required to follow the Act when acquiring property (section 21);
- Unless the land is available on the market, a pre-acquisition declaration (PAD) is required – although significant circumstances (urgency, and sensitivity of information) may warrant the waiver of the PAD requirement by the Minister (sections 22 and 24);

- A PAD must identify the acquiring authority, the land, the interest sought, and the public purpose justifying the acquisition. A public purpose must be within the Commonwealth Parliament's legislative powers (section 22, plus the definition of 'public purpose' in section 6);
- An impacted person may apply for reconsideration of a PAD, and then if unsuccessful seek review in the Administrative Appeals Tribunal (sections 26-33). Judicial review is also an option (major provisions at sections 127-130);
- Once a PAD is beyond challenge (or if the PAD requirement were waived by the Minister), an authority may then acquire the land by agreement or by compulsory process (sections 40 and 41). Subsection 41(1) allows the Minister to declare in writing that an interest is acquired by compulsory process. Various Ministerial powers in the Act have been delegated to persons occupying particular positions. However, paragraph 139(2)(e) provides the Minister is unable to delegate the subsection 41(1) power.
- Compulsory acquisition gives rise to an entitlement to compensation under Part VII of the Act, and there are other compensation provisions in the Act as well. There are administrative and judicial review mechanisms available under the Act concerning compensation entitlements; and
- Section 93 concerns matters under the Act before the Federal Court, and before the High Court exercising its jurisdiction under section 75 of the Constitution. In cases where either of those Courts considers that the application of the Act results in an acquisition being made *otherwise than on just terms*, that Court may make such orders as required to ensure the acquisition is on just terms.

The 1989 Regulations are made under section 140 of the Act and comprise the following:

- A list of Commonwealth authorities exempt from the operation of the Act (see paragraph (b) of the definition of Commonwealth authority contained in section 6);
- A list of specified transactions exempt from the operation of the Act (paragraphs 21(1)(b) and 117(1)(b));
- Interest payable on compensation due under the Act (subsections 91(2) and 115(2)); and
- A prescribed postal address for documents to be given to the Minister under the Act (subsection 137(1)).

The *Lands Acquisition Delegation 2016* (the Delegation) is made under section 139 of the Act and confers various Ministerial powers under the Act upon certain officers within the Department of Finance (Finance), and upon the occupants of nominated positions across the Australian Public Service and in various Commonwealth authorities (sections 5, 6 and 7 and Schedules 1, 2 and 3 of the Delegation).

The Delegation also contains directions to delegates outside Finance. When delegated powers are exercised, Finance is to be advised of the particulars of the transaction. Delegates are to have regard to the *Commonwealth Property Management Framework*, and related material (subsection 8(5) of the Delegation). Delegates within entities required to comply with the *Public Governance, Performance and Accountability Act 2013* must comply with the *Commonwealth Property Management Framework Lease Endorsement Process for Non-Corporate Commonwealth Entities* before entering into property leases with a whole-of-life cost exceeding \$30 million (or \$100 million for the Department of Defence)(subsection 8(6) of the Delegation).

Review

Following review, it has been decided to retain the system of regulations made under the Act. However the review exercise revealed a number of updates required to the current Regulations.

The terminology used concerning interest rates is well out of date, as is the prescribed address for service of documents. Henceforth, the interest to be payable under the Act is to be at the relevant rate set out in the table *Capital Market Yields – Government Bonds – Monthly – F2.1* published by the Reserve Bank of Australia. The Minister's prescribed postal address becomes 'Department of Finance, 1 Canberra Avenue, Forrest ACT 2603'.

The list of exempt entities was reviewed, as was the list of particular transactions which were also exempted. In most cases, the rationale for exemption had expired as either:

- The entities no longer existed;
- The entities had been privatised or otherwise sold to the private sector, and so were no longer 'Commonwealth authorities', meaning that exemption was unnecessary as the Act no longer applied; or
- In one case, the exemption itself had expired (this was an acquisition by the Commonwealth of a lease in the Northern Territory - the exemption had ceased by the end of March 2008).

Of the thirty exempt entities listed in the 1989 Regulations, only ten remain once expired and privatised/sold-off entities are removed. Similarly, of the seven categories of transaction exempted in the 1989 Regulations, only two remain following removal of entities which no longer exist or have been sold to the private sector. The two remaining classes of transaction concern defence housing.

As a result of the review occasioned by the sunseting regime contained in Part 4 of the *Legislation Act 2003*, the new regulations contain current interest rate terminology, Finance's present postal address, and a leaner and more focussed set of exemptions from the Act.

Consultation

Numerous entities were consulted, including the Australian Government Solicitor, and the Reserve Bank of Australia (as to its own exemption and in relation to interest rates). Each entity which remains exempt in the Regulations has been consulted and has requested its

exemption to continue. Each Department with policy responsibility for the exempt entities was also approached.

The Department of Defence and Defence Housing Australia were contacted about the exemption of certain defence housing transactions from the operation of the Act. Both were keen for this exemption to continue.

The Office of Best Practice Regulation (OBPR) was also consulted (OBPR reference: 22623) on the proposed new regulations. The OBPR considered that any amendments occasioned by the remaking of the 1989 Regulations would be minor in nature and that no Regulatory Impact Statement (RIS) was required.

Exemptions

The Regulations provides that the following authorities are to be exempt from the Act's operation:

- Australian Broadcasting Corporation;
- Australian Grape and Wine Authority;
- Australian Maritime Safety Authority;
- Australian National University;
- Australian Postal Corporation;
- Australian Securities and Investments Commission;
- Indigenous Business Australia;
- Indigenous Land Corporation;
- Reserve Bank of Australia; and
- Special Broadcasting Service Corporation.

In addition, the following categories of transaction are to be exempted:

- The acquisition by the Commonwealth of an interest in land (other than freehold), from Defence Housing Australia for defence housing purposes; and
- The disposal by the Commonwealth of an interest in land (other than a freehold), for defence housing purposes.

Each of the exempt entities listed above are independent, in terms of statutory function. Many also operate, at least in part, on a commercial basis. Consequently, it has been decided that compliance with the Act is not required, and thus exemption has been granted once more.

In relation to defence housing, there are large numbers of routine transactions between the Department of Defence and Defence Housing Australia which concern residential property. Exemption of these transactions from the operation of the Act removes a large administrative burden, and the resulting savings can be directed towards meeting the accommodation needs of Australia's military personnel and their families.

Consequences

Exemption from the operation of the Act ***does not mean*** an entity is immune from compulsory land acquisition under the Act. Most parcels of land in Australia not already

owned by the Commonwealth (or a related entity) are susceptible to compulsory land acquisition under the Act, so long as procedures are followed. A partial exception to this rule is contained in section 42: compulsory acquisition of an interest of land in a public park is not possible unless the relevant State or Territory government has consented.

Further, exemption from the operation of the Act **does not allow** the Commonwealth or a Commonwealth authority to avoid the Constitutional guarantee in section 51(xxxi) that any acquisition of property shall be on just terms: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 and *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201-2. See also the reference to section 93 of the Act referred to above.

Exemption from the operation of the Act **does mean** an entity is not required to comply with the notification requirement set out in the Delegation. Pre-acquisition declarations (PADs) are not needed. An exempt entity is able to conduct its real estate transactions in much the same manner as a private firm, so long as proper governance requirements are met, e.g. compliance with the *Public Governance, Performance and Accountability Act 2013*, if applicable. The same consequences flow from the exemption of certain defence housing transactions.

The Act will continue to apply to the remainder of lands acquisitions and disposals by the Commonwealth and Commonwealth authorities.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations are compatible with human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment A.

Details of the *Lands Acquisition Regulations 2017*

Section 1 – Name

This section provides that the name of the instrument is the *Lands Acquisition Regulations 2017*.

Section 2 – Commencement

This section provides that the Regulations are to commence the day after the instrument is registered.

Section 3 – Authority

This section provides that the Regulations are made under section 140 of the Act.

Section 4 – Repeal

This section provides that instruments specified in any Schedule to the Regulations are amended or repealed as specified in the Schedule.

Section 5 – Definitions

This section defines Act to mean the *Lands Acquisition Act 1989*.

Section 6 – Exempt authorities

This section lists the following authorities as being exempt from the operation of the Act:

- Australian Broadcasting Corporation;
- Australian Grape and Wine Authority;
- Australian Maritime Safety Authority;
- Australian National University;
- Australian Postal Corporation;
- Australian Securities and Investments Commission;
- Indigenous Business Australia;
- Indigenous Land Corporation;
- Reserve Bank of Australia; and
- Special Broadcasting Service Corporation.

Section 7 – Act does not apply to acquisitions of certain interest in land by the Commonwealth from Defence Housing Australia

This section provides that the Act does not apply to the acquisition by the Commonwealth of an interest in land, other than a freehold interest, in circumstances where the acquisition:

- (a) is from Defence Housing Australia; and
- (b) is for the purpose of providing housing to meet the operational needs of the Australian Defence Force.

Section 8 – Interest payable on compensation – interest other than mortgage interests

This section provides that the interest payable on compensation payable under subsection 91(2) is to be at the relevant rate set out in the table *Capital Market Yields – Government Bonds – Monthly – F2.1* published by the Reserve Bank of Australia.

Section 9 – Interest payable on compensation payable under Part VIII of the Act

This section provides that the interest payable on compensation payable under Part VIII of the Act is to be at the relevant rate set out in the table *Capital Market Yields – Government Bonds – Monthly – F2.1* published by the Reserve Bank of Australia.

Section 10 – Act does not apply to disposal of certain interests in land by the Commonwealth for defence housing

This section provides that the Act does not apply to a disposal by the Commonwealth of an interest in land, other than a freehold interest, in circumstances in which the disposal is for the purpose of providing housing to meet the operational needs of the Defence Force

Section 11 – Prescribed address for giving documents to Minister

This section sets out the address for giving documents to the Minister.

Schedule 1 – Repeals

The schedule states that the entire *Lands Acquisition Regulations 1989* are to be repealed.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Lands Acquisition Regulations 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Lands Acquisition Regulations 2017* is to replace the *Lands Acquisition Regulations 1989* which are due to sunset on 1 April 2018. The *Lands Acquisition Regulations 2017* contain updated information, and supplement the *Lands Acquisition Act 1989* (the Act) with the following details to permit its full operation:

- A prescribed address for giving documents to the Minister;
- Interest rates applicable to amounts of compensation payable under the Act; and
- Specified entities and transactions to remain exempt from the operation of the Act.

Exemption of specified entities and transactions from the operation of the *Lands Acquisition Act 1989* does not reduce or compromise the Constitutional guarantee that all property acquisitions are to be on just terms, as set out in section 51(xxxi) - see *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 and *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201-2. Exemption from operation of the *Lands Acquisition Act 1989* does not remove the requirement that property acquisitions and disposals be carried out according to law.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon. Senator Mathias Cormann
Minister for Finance**