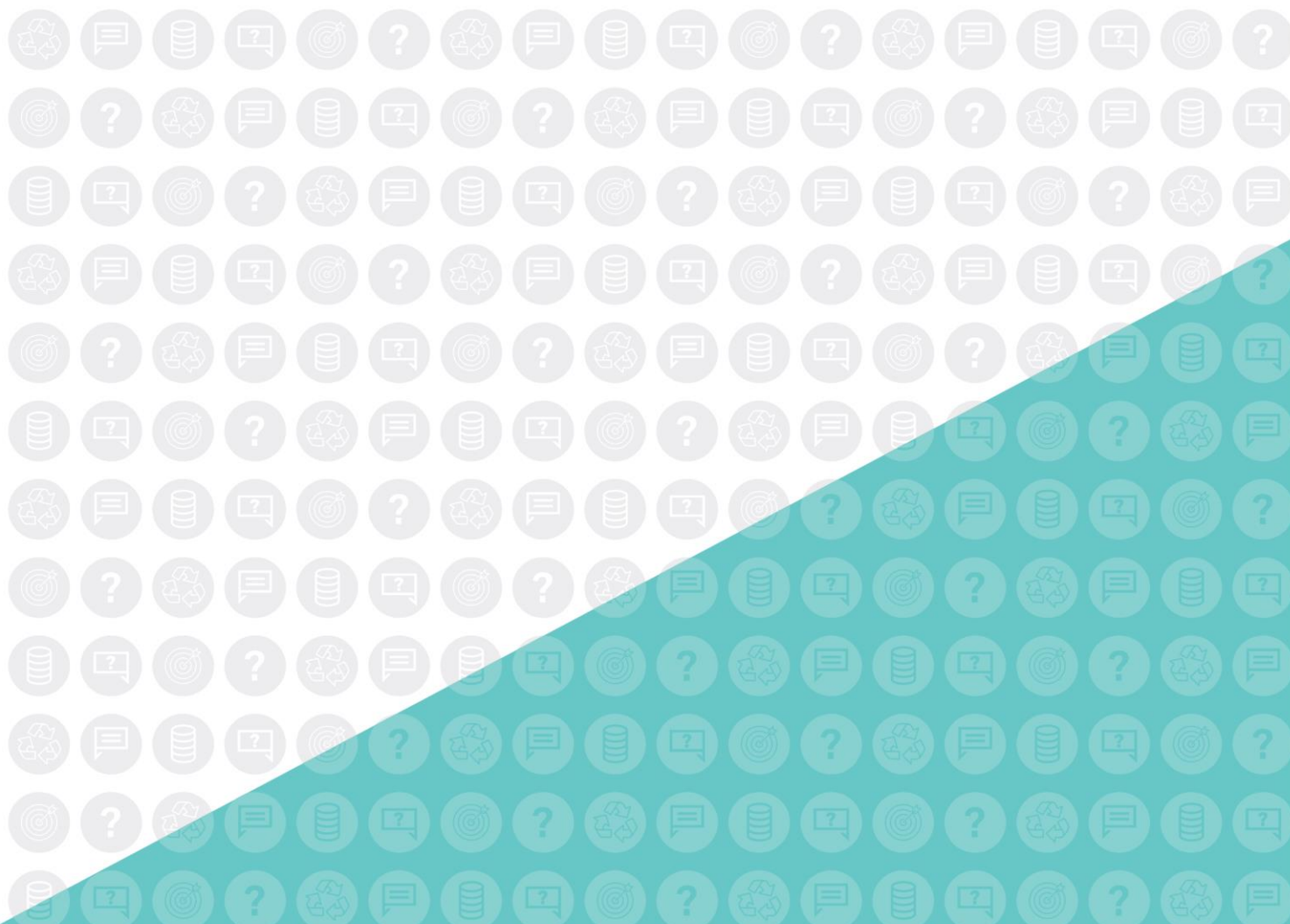




Australian Government
Department of Finance



Review of the *Lands Acquisition Act 1989*



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Executive Summary

Preface

The *Lands Acquisition Act 1989* (Cth) (**LAA**) is the key legislation used by the Commonwealth to acquire and dispose of interests in land. On 13 January 2020, the Minister for Finance announced¹ that the Government would undertake a review of the LAA (**LAA Review**) to ensure the LAA reflects modern community expectations and is in line with current public administration practices.

The Department of Finance released a Discussion Paper on 13 January 2020, with public submissions closing on 19 October 2020². The Department of Finance also undertook a series of consultations to inform the LAA Review.

This report (**Report**) sets out the findings of the LAA Review and proposes changes to improve and modernise the LAA and its administration, subject to the enactment of relevant legislation.

Context

For the purposes of the LAA, an interest in land is defined broadly to include any legal or equitable estate or interest in land; a restriction on the use of land; or any other right, charge or privilege over or in connection with land. The scope of acquisitions under the LAA is similarly broad and includes purchasing freehold or leasehold title, entering into a lease or licence (for example, leasing office accommodation) and acquiring access rights or easements.

In broad terms, the LAA establishes two methods for the Commonwealth to acquire an interest in land:

1. acquisition by agreement, with the terms and price mutually agreed by the Commonwealth and the interest holder ahead of the acquisition; and
2. acquisition by compulsory process, with compensation determined before or after the acquisition has taken place.

Data from the Department of Finance shows that over a period of 10 years the Commonwealth has undertaken approximately 20 compulsory acquisitions. In comparison, for the 2019-20 financial year alone, 12 acquisitions by agreement were reported to Finance plus 151 lease agreements (which are also classified as acquisitions by agreement).

As this data shows, most acquisitions under the LAA occur relatively quickly, with the level of compensation mutually agreed between the Commonwealth and the interest holder.

A significant driver behind the LAA Review is that compensation claims resulting from compulsory acquisitions have become more difficult to finalise in the small number of instances where the amount of compensation is determined after a compulsory acquisition. While these processes can be protracted and create significant uncertainty for landholders,

¹ <https://www.financeminister.gov.au/media-release/2020/01/13/review-lands-acquisition-act-1989>

² The closing date for submissions was extended due to disruption associated with the COVID-19 pandemic.

there is a perception they may provide landholders with access to higher levels of compensation than by mutually agreeing compensation before an acquisition.

The LAA Review seeks to ensure that there is sufficient scope for acquiring agencies to negotiate early agreement to compensation on just terms so that there is no perceived financial incentive to enter into drawn out negotiations after an acquisition.

ANAO Report

On 21 September 2020, after the LAA Review had commenced, the Australian National Audit Office (**ANAO**) released its performance audit on the *Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport* (**ANAO Report**).

While the ANAO Report did not make any findings or recommendations regarding the LAA or its administration, it has informed some LAA Review recommendations. The Department of Infrastructure has also initiated a series of reviews and investigations in response to the ANAO Report, which were not yet finalised when the LAA Review was completed.

Summary of review findings and recommendations

The LAA Review has been guided by four key principles:

- equity and fairness - ensuring affected interest holders are treated fairly (on 'just terms');
- timeliness - ensuring community expectations around public sector responsiveness are met;
- transparency - being appropriately accountable to Parliament and the public for the use of acquisition powers and the management of land assets; and
- value for money - ensuring expenditure of public money on interests in land, and the management of land as a public resource, represents value for money.

The Review has been informed by stakeholder feedback received through the public consultation process, as well as relevant Australian best practice. The Review found that the legislative framework of the LAA, coupled with the legislative requirements of the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**), is generally appropriate and provides suitable safeguards to ensure appropriate conduct and outcomes. The LAA provides appropriate protections to satisfy 'just terms' and protect the interests of taxpayers through a focus on market-value as the foundation for offers, the articulation of heads of compensation for compulsory acquisitions, and the implicit need for appropriate evidence to support these.

For this reason, the Review recommends a small number of targeted legislative amendments, supported by key policy and administrative changes, including additional guidance, to provide better support and greater clarity and certainty to interest holders and Commonwealth entities. These recommendations focus on strengthening the existing framework and its principles to remove ambiguity and uncertainty.

The Report makes 16 recommendations in total (refer to section *List of recommendations* for the complete list). The broad themes are outlined below.

Landholders – better support and greater certainty

While most acquisitions under the LAA occur relatively quickly and through mutual agreement, there are a relatively small number of compulsory acquisitions, with compensation negotiated after the acquisition, that take considerable time (sometimes up to a decade). Stakeholders reported that landholders involved in these processes feel unsupported, lack clarity about the process and the potential outcome and struggle to know where to begin in making a claim for compensation.

In response, the Review makes a number of recommendations focussed at further encouraging acquisitions by mutual agreement, better supporting landholders engaged in compulsory acquisitions, providing greater certainty about the range of matters that can contribute to an offer of compensation and delivering faster outcomes by setting timeframes.

Key recommendations include:

- Developing a citizen-centric case-management model to ensure that landholders have greater support, assistance and continuity through the acquisition process (**Recommendation 7**).
- Enabling more acquisitions to occur by mutual agreement, and allowing compensation negotiations to be resolved in a more timely manner, by:
 - providing greater scope for acquiring entities to negotiate a reasonable price that satisfies both just terms and value for money (**Recommendation 2**); and
 - clarifying how the heads of compensation for compulsory acquisitions can inform negotiations for an acquisition by agreement (where supported by appropriate evidence), where compulsory acquisition may otherwise be used, allowing a greater scope of matters to be negotiated by acquiring entities in this scenario (**Recommendation 5**).
- Providing simplicity, predictability and certainty to interest holders, and setting timeframes to ensure the earlier resolution of compensation following a compulsory acquisition, with the Commonwealth to make the first offer of compensation within six months and pay 100 per cent of the offer to the claimant at that time. (**Recommendation 8**).
- Increasing the solatium payment, which applies where the acquired interest includes a claimant's principal place of residence to a single lump sum of \$50,000 (currently approximately \$24,000), or \$75,000 for multigenerational family homes and/or where the principal place of residence and the primary business address are the same. This payment is provided in addition to other compensation that the interest holder is eligible for, recognising the additional impact of such acquisitions on the welfare of these interest holders (**Recommendation 9**).
- Providing greater clarity around the circumstances for the Commonwealth to engage an independent valuer and the mechanisms to resolve differences between valuations, including highlighting the importance of starting any price negotiations at market value and supporting valuations through the appropriate use of market data (**Recommendation 6**).

- Enabling the Minister for Finance, where a claimant has not accepted the Commonwealth's offer of compensation, to authorise the payment of an all-in compensation amount that satisfies both just terms and value for money in order to resolve the claim in a timely and cost-efficient way (**Recommendation 10**).
- Developing guidance on the taxation treatment of the various 'heads' of compensation to better support interest holders (**Recommendation 11**).
- Improving data capture and streamlined reporting to inform decision-making and ensure consistency in treatment for similar acquisitions and increased predictability for landholders (**Recommendation 14**).

Acquisitions and 'just terms'

Section 51(xxxi) of the Constitution enables the Commonwealth to acquire property on 'just terms' for any purpose in respect to which the Parliament has power to make laws. While this recognises that the Commonwealth will need to acquire land to deliver certain policy objectives for the community, Commonwealth legislation relating to property acquisition must ensure that interest holders are treated fairly.

'Just terms' does not mean that a landholder is able to block a valid exercise of the government's compulsory acquisition powers, but it does mean that the person must be fairly compensated for the acquisition.

The LAA Review heard from stakeholders that there is a lack of clarity about what constitutes just terms and the process to determine it. In response, the LAA Review recommends:

- Developing a citizen-centric case-management model to guide landholders through the acquisition process (**Recommendation 7**).
- Measures to encourage acquisitions to be resolved in a more timely manner and by mutual agreement, including providing greater scope for acquiring entities to negotiate a reasonable price and clarifying that a range of 'heads' of compensation (as specified under Part VII of the LAA) can inform negotiations for an acquisition by agreement, where supported by appropriate evidence, or evident from the circumstances (**Recommendations 2 and 5**).
- Setting timeframes to ensure the earlier resolution of compensation following a compulsory acquisition, with the Commonwealth to make the first offer of compensation within six months and pay 100 per cent to the claimant at that time. (**Recommendation 8**).
- Increasing the solatium payment, which applies where the acquired interest includes a claimant's principal place of residence to a single lump sum of \$50,000 (currently approximately \$24,000), or \$75,000 for multigenerational family homes and/or where the principal place of residence and the primary business address are the same. This recognises the additional impact of acquisitions that include a claimant's principle place of residence (**Recommendation 9**).
- Where a claimant has not accepted the Commonwealth's offer in a compulsory acquisition process, enabling the Minister for Finance to authorise a payment that suitably satisfies both just terms and value for money in order to settle the claim (**Recommendation 10**).

Value for money and proper use of public resources

Acquisitions under the LAA are procurements, and as such they need to comply with the Commonwealth Procurement Rules³ and the broader resource management framework in the PGPA Act. In particular, the PGPA Act requires that taxpayers' money is spent in a proper manner, which means that it is spent in a way that is efficient, effective, economical and ethical⁴. In Commonwealth procurement, this requirement is defined as achieving value for money⁵.

While the concept of **just terms** requires acquisitions under the LAA to adequately compensate landholders, **value for money** requires public money to be used in a proper manner to protect the interests of taxpayers. Where a price is mutually agreed with landholders, it is important that decision makers can clearly demonstrate that both 'value for money' and 'just terms' have been achieved.

To reinforce the need to ensure value for money and the proper use of public resources, the LAA Review recommends:

- Explicitly referencing the need for acquiring authorities to achieve value for money and comply with relevant legal frameworks, including the PGPA Act, when negotiating acquisitions by agreement (**Recommendation 4**).
- Enabling the Minister for Finance, where a claimant has not accepted the Commonwealth's offer of compensation, to authorise a payment that satisfies both just terms and value for money in order to resolve the claim in a timely and cost-efficient way (**Recommendation 10**).
- Providing additional guidance to clearly position acquisitions under the LAA within the broader resource management framework and to remind officials undertaking acquisitions under the LAA that they must comply with all existing legislative and policy obligations (**Recommendations 4 and 5**).
- Providing specific guidance around a range of matters that contribute to value for money, including factors that can be considered in determining a reasonable level of compensation, the valuation process and ethical conduct of acquisitions (**Recommendations 4, 5 and 6**).
- Improving data capture and streamlined reporting to inform decision-making, providing Government with more predictability on the expected costs of compensation payments (**Recommendation 14**).

Reasonable price

The LAA Review proposes introducing the concept of acquiring an interest in land at a 'reasonable' price. This term represents the need to consider both the landholder's needs, as reflected in 'just terms', and the taxpayers' interests, as reflected in 'value for money'.

The term 'reasonable' reflects the importance of considering the obligations across various legal frameworks when determining an appropriate price or compensation amount to ensure

³ Section 4.4 and 4.5 of the CPRs refer.

⁴ Section 15 (1) (a) of the PGPA Act

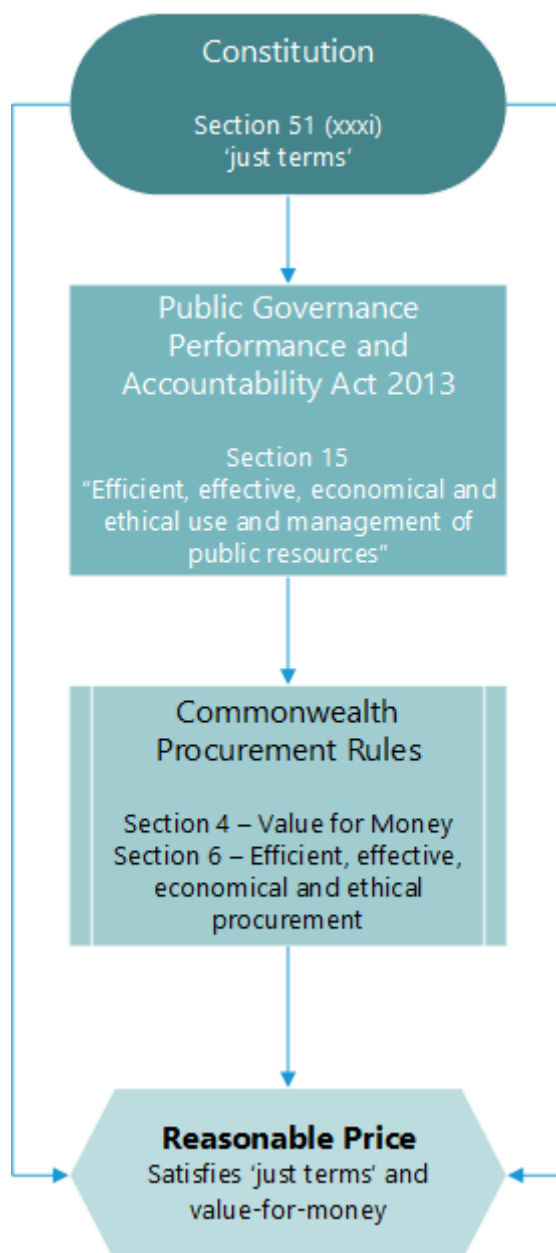
⁵ <https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules/value-money>

that not only is the Commonwealth justly compensating landholders affected by a compulsory acquisition, but is also providing assurance to taxpayers that taxpayer funds are being appropriately spent, including in the context of acquisitions by agreement. This includes providing taxpayers with confidence that transactions are occurring within the frameworks designed to guard against inefficient and inappropriate expenditure of public monies (PGPA Act and the Commonwealth Procurement Rules).

To establish the concept of a reasonable price or compensation amount, the LAA Review recommends:

- Introducing the concept of reasonable price into both the broader scope for agencies to negotiate acquisitions by agreement and the ability for the Finance Minister to authorise the payment of an all-in compensation amount to resolve a claim where a claimant has not accepted the Commonwealth's offer following a compulsory acquisition. Amendments to the LAA would include a specific and limited statutory meaning of 'reasonable price', which excludes common law notions of reasonableness (**Recommendations 2 and 10**).
- Developing guidance to support officials to better understand the heads of compensation that can be considered in negotiating an appropriate price, in a scenario where compulsory acquisition is inevitable, and other matters that may be considered in determining a reasonable price (**Recommendation 5**).
- Improved data capture and streamlined reporting on Commonwealth acquisitions and disposals will inform decision-making to ensure greater consistency and predictability of outcomes through providing access to past decisions in similar situations. (**Recommendation 14**).

Figure 1 - the link between just terms, value for money and a reasonable price



In addition to the broad themes identified above, a range of more specific issues were identified through the review and these are outlined below.

Public purpose

Currently, the scope of the term 'public purpose' under the LAA does not reflect modern public administration, where governments often facilitate the development of public infrastructure without holding the relevant land or operating the infrastructure, for example through public-private partnerships.

To correct this the LAA Review recommends modifying provisions of the LAA so that the scope of activity allowed for under the LAA is equal to that allowed for by section 51 (xxx) of

the Constitution. This would include changes to arrangements for the acquisition of land in a public park (**Recommendations 1 and 3**).

Property disposals: off-market and concessional sales

To help improve timeliness, the *Commonwealth Property Disposal Policy* should be updated to include expanded exceptions for off-market and concessional sales, including allowing for concessional sales for government-to-government transactions to facilitate land swaps. This would help to streamline transactions through consideration of factors in addition to market value, such as the strategic value of a property when undertaking a land swap.

(**Recommendation 12**).

Mining

The Review also heard from the mining sector, which expressed concern that the current complex and protracted application processes (with interactions with state and territory regimes) for access to Commonwealth land for mineral exploration and mining operations creates uncertainty and can add unnecessary administrative burden and cost for the sector. In order to support more efficient regulation of mineral exploration and mining operations on Commonwealth land, the Review has recommended that:

- approval processes for access to Commonwealth land be reviewed (in consultation with relevant entities, state and territory governments and the mining sector) to deliver fit-for-purpose arrangements supported by clear guidance;
 - regulations that align Commonwealth practice with state and territory mining laws be developed under the LAA, informed by the review in the above point;
 - the Minister for Finance be the sole decision maker for all applications for access to Commonwealth land for mining purposes; and
 - the Finance Minister's powers in relation to mineral exploration and mining operations on Commonwealth land be delegated to Commonwealth officials
- (**Recommendation 13**).

Reporting and delegations

Feedback from Commonwealth entities identified an opportunity to review the LAA delegations and reporting obligations to ensure they remain fit for purpose. Enhancing data collection can improve transparency and reduce the impost on entities responsible for reporting. Reviewing the LAA Instrument of Delegation with a view to reducing the impact of machinery-of-government changes and to identify opportunities to reduce administrative burden can contribute to more timely acquisition and disposal processes.

(**Recommendations 14 and 16**).

List of recommendations

Recommendation 1

To reduce ambiguity around acquisitions authorised under the LAA:

- The LAA should be amended so that the scope of the term ‘public purpose’ is equal to the scope of activity permitted by section 51 (xxxi) of the Constitution. This includes to allow an interest in land to be acquired, whether by agreement or by compulsory process, for the purposes of disposing of the interest in land to another party, where this facilitates an underlying Commonwealth purpose.

Recommendation 2

To encourage acquisitions to proceed by agreement and avoid protracted compensation processes, section 40 of the LAA (acquisitions by agreement) should be amended to provide acquiring authorities with broader scope to acquire an interest in land at a price that is reasonable, provided that the acquisition represents value for money for the Commonwealth, is on ‘just terms’ and complies with other relevant legislation including the PGPA Act, the Public Service Act and the Commonwealth Procurement Rules (CPRs).

Recommendation 3

- Section 40 of the LAA should be amended to enable interests in land to be acquired by agreement from state, territory and local governments, including acquisitions of interests in land in a public park. This includes:
 - adding an additional limb to s40(2) of the LAA to allow acquisition by agreement from other levels of government;
 - removing the words ‘other than land in a public park’ from section 40(1) of the LAA; and
- The LAA should be amended to repeal section 42, the requirement to obtain state or territory consent to compulsorily acquire an interest in land in a public park. The mechanism in section 46 for tabling and possible disallowance of the section 41 declaration should be retained.

Recommendations 4

To support officials and interest holders involved in undertaking Commonwealth acquisitions and disposals, it is recommended that the Department of Finance, in consultation with acquiring and disposing entities, develop a Resource Management Guide and appropriately targeted guidance materials covering a range of issues (some of which are addressed in separate recommendations).

Recommendation 5

To support acquiring authorities determine appropriate compensation, the Department of Finance should develop and publish principles and additional guidance, including on:

- the heads of compensation under Part VII of the LAA (Compensation for compulsory acquisition of interests in land);
- how the heads of compensation should inform negotiations on the amount to be paid under an acquisition by agreement process; and
- other matters that may be considered in determining a 'reasonable price'.

Guidance should provide clear reference to value-for-money, 'just terms', the PGPA Act, the CPRs, and other relevant legislation and policy.

Recommendation 6

To support the valuation process achieving the best outcome for all parties, it is recommended that the Department of Finance:

- amend the Commonwealth Property Management Framework (CPMF) to clarify when the Commonwealth should engage its own independent valuer when acquiring an interest in land.
- develop and publish principles and guidance addressing:
 - the valuations process, including advice on engaging valuers and the level of assurance that should be sought from the valuer;
 - when it is appropriate to encourage a valuers conference, including where valuations between parties differ, or at the request of the claimant; and
 - when it may be appropriate to share valuation information with claimants and how this option may be used to encourage faster claim resolution; and
 - making greater use of State and Territory Valuers-General and/or their pre-qualified panel of valuers to obtain valuations to support compensation offers.

Recommendation 7

To improve the experience for landholders, the Commonwealth should develop a citizen-centric approach to managing acquisitions, whether by agreement or by compulsory process, including:

- developing a policy to guide interactions with compensation claimants, building on current processes while having regard to analogous best practice compensation and dispute resolution processes;
- developing additional guidance on case management issues, in consultation with acquiring authorities with extensive acquisition experience and best practice from other jurisdictions, who have developed citizen-centric processes that can be leveraged across government; and
- updating the plain English guidance material that provides information to claimants on the acquisition process, including information on the different elements that may make up a compensation claim.

Recommendation 8

Recognising that the timely completion of compulsory acquisition compensation processes is in the best interests of all parties, the LAA should be amended to include appropriate timeframes, so that:

- as the first step towards resolving compensation following a compulsory acquisition process, the Commonwealth may make an offer of compensation to an interest holder within six months, with 100 per cent of the offer to be paid to the interest holder at the time the offer is made;
- following an initial Commonwealth offer, the interest holder has 12 months to either accept the Commonwealth's offer or make a counter-claim (which would also constitute a rejection of the Commonwealth's offer); and
- if no counterclaim is received within the 12-month period (and the time limit is not extended), the interest holder will be deemed to have accepted the Commonwealth's offer and the process will be complete.

Recommendation 9

To maintain fairness and equity with regard to the impact of acquisitions on the welfare of interest holders and other affected individuals, and to better align the Commonwealth's disadvantage payment with those of the states and territories: the LAA should be amended to increase the amount payable to interest holders as part of a disadvantage payment under a compulsory acquisition, where the acquired interest is the interest holder's principal place of residence to a single lump-sum payment of \$50,000, or \$75,000 for multigenerational family homes and/or where the principal place of residence and the primary business address are the same.

Recommendations 10

To encourage more timely resolution of claims following compulsory acquisitions, the LAA should be amended so that where the interest holder has not accepted the Commonwealth's offer, the Minister for Finance is authorised to agree an amount of compensation which represents 'just terms' and achieves value for money to resolve the claim. The matters taken into account by the Minister for Finance should have regard to risk management considerations, and to the Commonwealth's policy on handling monetary claims.

Recommendation 11

To improve equity and fairness for interest holders, the Department of Finance, in consultation with the Australian Taxation Office, should develop guidance on the taxation treatment of the various 'heads' of compensation in the hands of the interest holder, with regard to 'just terms', and further investigate taxation issues related to compensation paid to interest holders.

Recommendation 12

To support more efficient property disposal processes and outcomes the CPDP should be amended to:

- allow for land swaps between the Commonwealth and a state, territory or local government where they support government policy outcomes or shared policy objectives; and

- expand the exceptions for off-market and concessional sales under the Commonwealth Property Disposals Policy (CPDP) to allow for off-market disposals, where they are an efficient, effective, economical and ethical use of public resources:
 - to state, territory and local government, at an agreed value, including to facilitate transactions such as land swaps; and
 - at fair market value, as certified by an expert, to a private individual or organisation, where land is assessed as having no competitive market.

Recommendation 13

To support more efficient and fit for purpose regulation of mineral exploration and mining operations on Commonwealth land:

- The LAA should be amended to remove references to the ‘preserved’ provisions of the LAA 1955, and embed those provisions in section 124 of the LAA.
- Consistent with modern decision making practices, the Minister for Finance rather than the Governor-General should be the relevant decision maker.
- Regulations should be developed for the purposes of section 124 of the LAA.
- The Finance Minister’s powers in relation to mineral exploration and mining operations on Commonwealth land should be delegated to Commonwealth officials.
- The Department of Finance (in consultation with relevant entities, states and territories and the mining sector) should review approval and authorisation processes, and publish revised guidance material for the mining sector, in relation to access to Commonwealth land for mineral exploration and mining operations.

Recommendation 14

To improve accountability and transparency for acquisitions and disposals in Australia and overseas, and to ensure fit for purpose reporting:

- The Department of Finance should investigate improved data collection from entities and more targeted reporting mechanisms, including entities reporting on their websites or in their annual reports.

Recommendation 15

To improve timeliness and streamline administration, the LAA should be amended to:

- provide that the Minister for Finance (rather than the Governor-General) is the decision maker in section 122 of the LAA (‘Dedication for public purpose’); and
- repeal section 125(5) and the requirements to table acquisitions by agreement of overseas land in the Parliament.

Recommendation 16

To reduce the impact of machinery of government changes on entities exercising LAA delegations, and to clarify the LAA delegations as they apply to overseas land:

- The form of the LAA Delegation Instrument should be streamlined, and the instrument reviewed on a regular basis, to ensure that delegations remain fit for purpose.

1. Introduction

Background to the LAA Review

The LAA was enacted in 1989 following a review by the Law Reform Commission⁶. It has not been substantively reviewed or revised since then. When the LAA was first enacted, the Commonwealth was more likely to acquire suburban land for large projects such as airport expansions. Today, Commonwealth acquisitions can range from a small area of land to base a weather station, through to acquiring rural land to expand a neighbouring military base.

While most acquisitions under the LAA proceed smoothly and quickly, a small number of compulsory acquisitions have led to lengthy compensation negotiations that have been difficult to finalise, creating uncertainty for landholders and acquiring agencies.

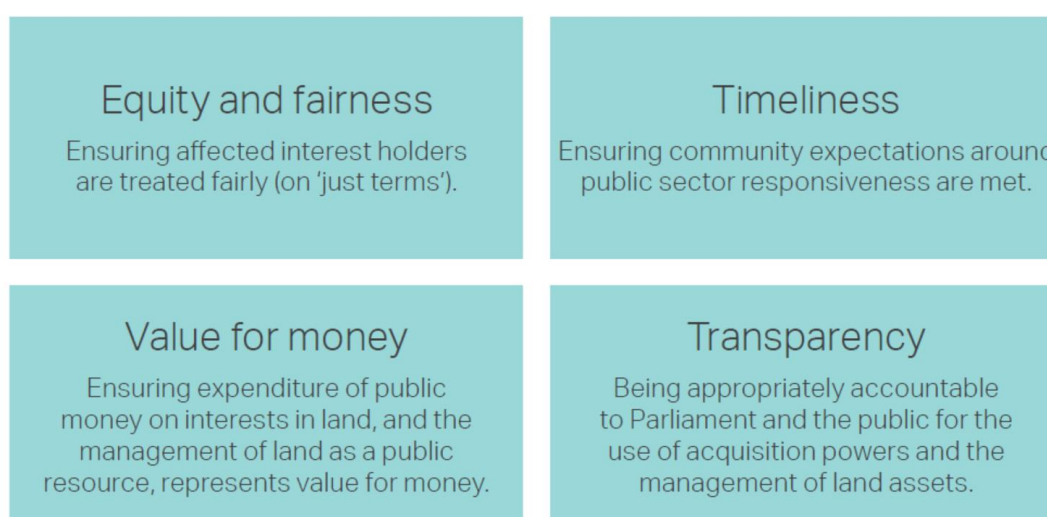
The LAA was amended in 2008 to allow the Minister for Finance to make an offer of compensation 12 months after a compulsory acquisition if no claim was received in the intervening period⁷, which was intended to 'expedite the acquisition process and ease the financial and administrative burden associated with the compensation process'. However, this provision has rarely been used.

The Government request a review of the LAA to consider how it could be improved to best support the Commonwealth and other interest holders into the future.

Methodology of the Review

Terms of Reference for the LAA Review are at Appendix 1.

The LAA Review has been guided by four key principles: equity and fairness, timeliness, value for money and transparency:



⁶ Now called the Australian Law Reform Commission. Law Reform Commission, *Lands Acquisition and Compensation* (1980)

⁷ Section 74A of the *Lands Acquisition Act 1989*

The LAA Review has been undertaken by the Department of Finance, overseen by an inter-departmental steering committee including senior representatives from the Department of Defence, the Department of Infrastructure, Transport, Regional Development and Communications, and the Attorney-General's Department.

A Discussion Paper was available on the Department of Finance website throughout the consultation period. In addition to the Finance Minister's media release, feedback was sought on the Discussion Paper in several ways. Advertisements calling for submissions were placed in a number of major newspapers on 17 January 2020, 27 March 2020 and again on 11 September 2020. The Department of Finance also directly contacted a number of stakeholders with an interest in the LAA, including current and past claimants.

The Department of Finance project team consulted with and received submissions from a range of stakeholders, including current and past claimants⁸, state and territory governments (including departments, which undertake land acquisitions), local governments, Law Societies, key industry bodies, Commonwealth departments that use the LAA and departments and agencies with policy responsibility for other areas relevant to property acquisition and management (e.g. native title).

Those stakeholders who indicated that they may have difficulty preparing a written submission were interviewed by telephone and then given the opportunity to confirm a written record of the discussion. Where permission to publish has been given⁹, submissions are available on the Department of Finance website¹⁰. A list of these submissions is at Appendix 2.

Public submissions and stakeholder consultation

The LAA Review has identified a range of findings and opportunities for improvement that are informed by relevant Australian best practice and stakeholder feedback on the LAA. Conversations and submissions were guided by the four key principles and the Discussion Paper published on the Department of Finance website.

All parties identified value in finalising compensation processes more quickly, noting the impacts on landholders as well as the costs to the Commonwealth associated with protracted processes.

The Department of Finance also considered the ANAO Report. While the ANAO Report did not make any findings or recommendations regarding the LAA or its administration, the Review found that there would be benefit in providing additional guidance to support acquiring authorities through the acquisition process and to assist agencies to conduct more rigorous and consistent valuation processes.

⁸ Arrangements were put in place where a claimant with a current claim wished to make a submission to the LAA Review in order to protect sensitive information.

⁹ Other than in a small number of cases where the Department of Finance considered that the submission contained personal information about someone other than the person who made the submission. In these instances, a request was put to the author to seek the third parties approval prior to publishing the submission. If this was not received the submission would not be published.

¹⁰ <https://www.finance.gov.au/publications/reviews/review-lands-acquisition-act-1989>

Specific findings and opportunities for improvement raised by stakeholders are outlined below.

Current and past claimants

Claimants reported that compulsory acquisition processes and subsequent compensation claims are stressful and disruptive, and that claims that take a long time to resolve may result in an individual or family feeling that their life is 'on hold' for several years. Claimants reported that managing a complex compensation claim is extremely time-consuming and impacts their wellbeing. Claimants are not paid for their time, and the current amount of Commonwealth solatium¹¹ payment (approximately \$24,000¹²) is inadequate to compensate for these impacts.

Claimants would value more continuity amongst the public servants they deal with and noted that work could be done to improve knowledge transfer to reduce the impact of turnover of contacts in acquiring entities. Some claimants noted that particular issues arise when the acquisition is of a large farming property, which may have been in a family for multiple generations. These issues include additional complexity in relation to valuation, difficulties associated with selling or relocating stock and challenges with packing up in a compressed timeframe.

In terms of compensation, a key theme was that the interest holder should not be left worse-off. This includes taking into consideration how compensation will be taxed once it has been received by the claimant.

While claimants are generally supportive of more acquisitions occurring by agreement and of the Commonwealth making the first offer of compensation, this is with the strong caution that the price or compensation offered must be a genuine and well-informed estimate. Claimants advised that an initial offer that is too low will undermine trust and there will be no prospect for early resolution, regardless of the order in which the steps in the process occur.

Law Societies and industry peak bodies

These stakeholders generally supported mandated process steps – for example, a minimum period of negotiation before proceeding with a compulsory acquisition, or mandated mediation in a compensation dispute. They were supportive of introducing time limits into the compensation process under the LAA. The 'heads' of compensation under the LAA were seen as satisfactory, but there was support for increasing the amount of solatium.

Some stakeholders noted that proper and reliable planning and appropriate funding of ongoing management for acquired land and associated projects is needed to ensure that projects are able to fulfil the purposes for which land is acquired and held. Some

¹¹ 'Solatium' (meaning 'solace', and sometimes referred to as 'compensation for disruption') is a legal term for a particular type of compensation which is payable to claimants when the property which is acquired is their primary residence. This type of compensation is payable under section 61 of the LAA (the LAA does not actually use the term 'solatium').

¹² Section 61 of the LAA states that an additional compensation amount of '\$10,000 (or that amount as indexed by section 126)' is payable when a dwelling occupied by the claimant is acquired by compulsory process. Section 126 provides for indexation based on the All Groups Consumer Price Index number (for all capital cities). The current approximately \$24,000 amount represents the cumulative effect of CPI indexation on the original \$10,000 across the period since 1989.

stakeholders suggested principles the government should apply to guide the type of land that is acquired and held by the Commonwealth.

Some stakeholders raised concerns that government policy, such as state governments introducing restrictions on land clearing in response to international agreements, may impede or restrict landholder's rights over their land and should be compensated for. This issue was considered outside of the scope of this review as it does not relate to acquisition or divestment of land.

In relation to mining, some stakeholders noted the difficulty in navigating the legal and administrative frameworks associated with access to explore or mine for resources on Commonwealth land.

Other levels of government

The LAA Review benefited from input from other levels of government, including New South Wales (NSW) and South Australia (SA), which reformed their compulsory acquisition laws recently. This input included perspectives on best practice in property acquisitions and disposals, valuation of interests in land and management of compensation claims. Although the methods used vary between jurisdictions, these stakeholders provided helpful insights into the challenges of seeking to manage impacts on landholders while also achieving value for money and fairness across a program of acquisitions. State, territory and local governments were supportive of measures to reduce 'red tape' around government-to-government property transactions.

Commonwealth departments and agencies

Commonwealth stakeholders support additional flexibility to encourage more acquisitions to occur by agreement, and to resolve compulsory acquisition compensation claims more quickly, with guidance as to what constitutes a reasonable price or compensation amount to support a 'just terms' outcome and meet value for money requirements. They also supported more guidance being provided in relation to valuation processes to support land acquisitions.

Like other levels of government, Commonwealth stakeholders support reducing 'red tape' around government-to-government property transactions, including in relation to public parks.

Commonwealth stakeholders support moving to a model where the Commonwealth makes an offer of compensation to claimants first, with the claimant then having a clear timeframe to respond (noting that this reduces the burden on the claimant compared to the current arrangement where the claimant claims first), but with flexibility for the claimant to submit an initial claim if they prefer.

A number of Commonwealth stakeholders support clarifying the meaning of 'public purpose' in the LAA. They are also keen to learn from state, territory and international best practice in acquiring property and managing compensation claims.

Some Commonwealth stakeholders indicated that they would be concerned if additional mandatory processes were introduced as Commonwealth acquisitions differ significantly across entities and flexibility is important to align with the unique circumstances surrounding

each acquisition (for example an acquisition for the purposes of a specific infrastructure project will be significantly different from one for defence training purposes).

In relation to disposals, Commonwealth stakeholders considered that off-market and concessional sales could be broadened to cover additional instances where these approaches lead to a value for money outcome, and noted that more guidance should be provided on affordable housing requirements. Commonwealth stakeholders were also generally supportive of modernising the provisions of the LAA dealing with overseas land and mining on Commonwealth land.

2. 'Public purpose'

All acquisitions under the LAA (both by agreement and by compulsory process) must be for a 'public purpose'. Public purpose is defined in the LAA as 'a purpose in respect of which the Parliament has powers to make laws'. This reflects the language in section 51(xxxi) of the Constitution, which is the source of the Commonwealth's power to make laws for the acquisition of property on just terms.

2.1 Current state under the LAA

Since the decision in *French v Gray Special Minister of State*¹³, there has been ambiguity about whether the acquisition of land by a Commonwealth authority can be for a 'public purpose' if the authority does not propose to use the land itself, but will instead transfer the land (or grant rights over it) to another party. For example, governments often facilitate the development of public infrastructure without themselves holding the relevant land or operating the infrastructure.

The High Court of Australia has also previously ruled¹⁴ that a public purpose cannot include merely depriving the landholder of the land. While in some circumstances, acquisition with the intention of transferring the land to another person or entity might not be appropriate, stakeholders generally agreed that it is appropriate for the Commonwealth to be able to acquire land in order to facilitate a public purpose.

2.2 Key Issues and Stakeholder Feedback

<p>Ambiguity around 'public purpose' undermines the Commonwealth's flexibility to appropriately plan, negotiate and acquire land.</p>	<p>Some stakeholders indicated that any ambiguity around the definition of 'public purpose', and whether proposed acquisitions are authorised by the LAA as having a 'public purpose', undermines the Commonwealth's flexibility to appropriately plan and to negotiate and acquire land. This can cause uncertainty for stakeholders and raises the possibility of acquisitions being found invalid even when parties mutually agree to the acquisition.</p>
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¹³ [2012] FCA 263

¹⁴ *Clunies-Ross v Commonwealth* [1984] HCA 65

<p>The compulsory acquisition powers should be extended beyond the Commonwealth</p>	<p>The Australian Mobile Telecommunications Association proposed that compulsory land acquisition powers within the LAA should be extended to telecommunications carriers as deliverers of essential services.</p> <p>This proposal was not pursued as it was deemed outside the scope of the Constitution head of power for the Commonwealth to acquire land on just terms.</p>
<p>Aligning the term ‘public purpose’ with the scope of activity permitted under section 51(xxxi) of the Constitution would better reflect modern public administration.</p>	<p>Generally, stakeholders considered that the scope of the term ‘public purpose’ under the LAA should be equal to the scope of activity permitted by section 51(xxxi) of the Constitution. The current interpretation of the scope of ‘public purpose’ under the LAA does not reflect modern public administration.</p> <p>For example, governments often facilitate the development of public infrastructure without themselves holding the relevant land or operating the infrastructure, for example through public-private partnerships.</p> <p>There may also be situations where there could be a public interest in depriving a particular landholder of a specific interest in land, for example, for national security reasons.</p>

2.3 ‘Public purpose’ - Proposed changes and recommendations

To improve **timeliness** and support **value for money** outcomes, the Review recommends that the LAA be amended so the scope of the term ‘public purpose’ under the LAA is equal to the scope of activity permitted by section 51(xxxi) of the Constitution.

Clarifying the scope of ‘public purpose’ for the purposes of the LAA would reflect modern public administration and provide further certainty around Commonwealth acquisitions. For example, in acquisition scenarios where an entity other than the Commonwealth will be using the acquired land to construct or operate infrastructure for a public purpose (for example, through a public-private partnership or privately-operated public infrastructure).

Recommendation 1

To reduce ambiguity around acquisitions authorised under the LAA:

- The LAA should be amended so that the scope of the term ‘public purpose’ is equal to the scope of activity permitted by section 51 (xxxi) of the Constitution. This includes to allow an interest in land to be acquired, whether by agreement or by compulsory process, for the purposes of disposing of the interest in land to another party, where this facilitates an underlying Commonwealth purpose.

3. Acquisitions

The LAA governs both acquisitions by agreement and acquisitions by compulsory process. Acquisitions by agreement by Commonwealth agencies are not simply matters for private negotiations. All Commonwealth acquisitions, whether by agreement or by compulsory process, are required to be undertaken for a 'public purpose'. Furthermore, additional obligation under the LAA mitigate against unfair outcomes, noting that Commonwealth agencies may leverage advantage by threatening to commence compulsory acquisition if the landholder does not agree to sell.

Acquisitions by mutual agreement are the Commonwealth's preferred approach and are usually simpler and faster than compulsory acquisitions. However, in some instances landholders considered that the compensation payable following a compulsory acquisition would be higher than a negotiated price for the same property, this may have the unintended consequences of encouraging landholders to commence time-consuming compensation processes.

Although the ANAO Report did not make any specific recommendations or findings in relation to the LAA, associated guidance or administration of the LAA by the Department of Finance, it did provide some key messages for all Government entities around procurement, specifically as it relates to the amount of compensation payable under the LAA. The Review recommends developing appropriately targeted guidance material covering a range of issues to support officials and interest holders involved in Commonwealth acquisitions and disposals.

3.1 Current state under the LAA

Currently, the LAA allows the Minister to authorise the acquisition of an interest in land¹⁵ by a Commonwealth authority by agreement¹⁶ in one of four circumstances:

1. a pre-acquisition declaration (**PAD**) in relation to the acquisition has been issued, become absolute and is in force. A PAD is the first step towards compulsory acquisition in a non-urgent situation¹⁷;
2. the Minister has given a certificate under section 24 in respect of the acquisition. A section 24 certificate is the first step towards compulsory acquisition in an urgent situation;
3. the interest is owned by the Commonwealth or a Commonwealth authority; or
4. the interest is 'available in the market'.

'Available in the market' has a special meaning under the LAA – it means that at least one of the following four criteria is satisfied:

¹⁵ Other than land in a public park, which cannot be acquired by agreement. This restriction is proposed to be removed – see section 0 of this Report.

¹⁶ In this Report, 'Minister' means the Minister who administers the LAA at the relevant time, currently the Minister for Finance.

¹⁷ A PAD may also be used in a by-agreement acquisition where there may be public concern in the acquisition, or there is a likelihood that the acquisition could move to a compulsory process if agreement is not reached.

 <p>The land is advertised as being available for sale or lease</p>	 <p>The land holder has offered the land for sale to the Commonwealth in response to a publicly-advertised request</p>
 <p>The land is listed with a real estate agent or property manager as being available for sale or lease</p>	 <p>The Minister has certified that the acquisition will be a 'standard commercial transaction'</p>

There may be technical reasons to proceed by compulsory acquisition rather than acquisition by agreement, even if the interest holder is willing to sell. An example is where the Commonwealth needs to 'create' an interest in land which does not currently exist, such as an easement¹⁸, in order to acquire that interest.

Where it is not possible to agree a price and acquire the interest in land by agreement, an acquiring agency may proceed with a compulsory acquisition. The main steps in a Commonwealth compulsory acquisition process (assuming a non-urgent scenario) are:

The Minister issues a PAD:	A PAD is the legal document which commences the compulsory acquisition process. It sets out key details about the acquisition including identifying the land, the interest(s) which are to be acquired and the proposed use of the land. The PAD is sent to known interest holders, published in the <i>Government Notices Gazette</i> and newspapers and registered with the state or territory Land Titles Office.
The PAD becomes 'absolute':	The PAD becomes absolute 28 days after it is published in the <i>Government Notices Gazette</i> (or, if a review process is commenced, 28 days after the review process is completed or exhausted). It is possible to switch to an acquisition by agreement after the PAD becomes absolute, but not after a section 41 declaration is made (see below).
The Minister issues a declaration under section 41 of the LAA:	<p>After the PAD becomes absolute, the Minister can make a declaration under section 41 of the LAA. The compulsory acquisition takes effect when the declaration is published in the <i>Government Notices Gazette</i> (and if practicable, in newspapers).</p> <p>There is no 'land sale contract' or similar agreement; the transfer of the interest in land takes effect by operation of law. A copy of the section 41 declaration is sent to known interest holders. It is not possible to switch to an acquisition by agreement after the Minister has issued a declaration under section 41 of the LAA.</p>

¹⁸ An easement is a right to use or cross land.

<p>The compensation process commences: 19</p>	<p>If an interest in land is acquired by compulsory process, affected interest holders are entitled to compensation. The LAA also provides for compensation for interest holders who are affected if a compulsory acquisition process commences but is not completed.</p>
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Another limitation on the acquisition of land for a ‘public purpose’ under the LAA relates to land in a public park. In the past, the acquisition of ‘park lands’ was a contentious issue that generated significant public concern. The current LAA restricts such acquisitions:

- It is not possible for the Commonwealth to acquire land in a public park by agreement from a state, territory or local government, even if the relevant government is willing to sell. Instead, a compulsory acquisition process is required.
- The Commonwealth cannot finalise²⁰ the compulsory acquisition of land in a public park unless the relevant state or territory provides consent (LAA section 42).
- Where land in a public park is acquired by compulsory process, the Minister is also required to table a copy of the compulsory acquisition declaration in Parliament where it is subject to possible disallowance (LAA section 46).

3.2 Key issues and stakeholder feedback

<p>Greater consistency between the financial outcomes of by agreement and compulsory acquisition processes may increase the willingness of landholders to utilise by agreement processes and lead to faster resolution</p>	<p>Stakeholders generally considered that acquisition by agreement is a better outcome than acquisition by compulsory process, as it is faster and less money is spent on advisors’ fees. Stakeholders also support the retention of checks and balances on acquisitions by agreement (for example, to ensure that the price is fair).</p> <p>Where acquisition by agreement is initially considered, but compulsory acquisition might be used if required, the LAA does not clearly allow for the price offered in the acquisition negotiations to include compensation elements, such as compensation for business disruption and relocation costs²¹. In turn, this may lead some landholders to push for compulsory acquisition due to the perception that compulsory acquisition provides them with a fairer outcome.</p> <p>Stakeholders were generally supportive of reforms which would enable more acquisitions to occur by agreement, but past claimants cautioned that unless the price offered by the Commonwealth authority is well-informed and reasonable, landholders will not accept the offer.</p>
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¹⁹ Section 78 of the LAA also allows for compensation to be agreed before the Minister issues a declaration under section 41

²⁰ Technically, the Minister cannot issue a section 41 compulsory acquisition declaration unless, and until, the state or territory consents.

²¹ Compare to *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), section 38.

<p>More guidance and oversight is needed to support the acquisition process and obtain more rigorous and consistent valuations</p>	<p>While the ANAO Report did not make any findings or recommendations regarding specific guidance materials, there would be benefit in additional guidance to support the acquisition process, for both acquiring authorities and landholders. This includes more guidance on valuation in a land acquisition context. Some stakeholders suggested prescribing multiple valuations from licensed real estate agents/valuers, and others were in favour of more guidance.</p> <p>Compared to some states and territories, the Commonwealth is a relatively infrequent user of compulsory acquisition powers and has not historically provided extensive guidance regarding compensation. Improved guidance would result in both improved transparency and a smoother experience for claimants.</p> <p>Commonwealth stakeholders support the provision of additional guidance to assist them through acquisitions and disposals processes.</p>
<p>The acquisition provisions of the LAA could place more emphasis on value for money</p>	<p>Commonwealth government stakeholders considered that the link between the LAA and the PGPA Act could be made more explicit. The PGPA Act provides that expenditure of public resources, including to acquire land, must be efficient, effective, economical and ethical.</p>
<p>Reducing ‘red tape’ around government-to-government transactions can encourage cooperation and innovation</p>	<p>Under the LAA, it is not currently possible for the Commonwealth to acquire land by agreement from a state, territory or local government unless there is a PAD or section 24 certificate in place, or the land is on the market or being acquired in a ‘standard commercial transaction’.</p> <p>Government-to-government property transactions may not be ‘standard’. For example, they may involve a state transferring land to the Commonwealth for nominal consideration for use in a joint project. Stakeholders considered that government-to-government transactions should be encouraged where they involve cooperation and innovation in pursuit of the public interest and there is equal bargaining power.</p>
<p>The Commonwealth could learn from state and territory best practice</p>	<p>Because states and territories undertake a higher volume of acquisitions, they were able to share advice in relation to improving experiences for claimants and more efficient claim management. Some examples include assigning a case manager to each claimant as a point of contact and to ensure better knowledge transfer when staff move on; and using mediation and having the government’s valuer and the claimant’s valuer participate in a conference to narrow down the range of matters which are disputed.</p>

<p>The provisions relating to public parks are unnecessarily restrictive.</p>	<p>Some stakeholders considered that the restrictions relating to acquisition of land in public parks are unnecessary and contrary to the principle that governments should be able to acquire any interest in land which they require for a public purpose, subject to 'just terms' compensation. These stakeholders considered that where both parties agree (for example, State and Commonwealth governments), the Commonwealth should be able to acquire by agreement. The requirement to table the declaration for compulsory acquisition of land in public parks²² in Parliament, where it can be disallowed, is considered to provide a sufficient degree of additional oversight in where land in a public park must be acquired for a 'public purpose'.</p>
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3.3 Acquisitions – Proposed changes and recommendations

To improve **equity and fairness**, **timeliness** and **value for money**, it is recommended that a Commonwealth authority may acquire land by agreement at a 'reasonable price', provided that the acquisition represents:

- a just terms outcome for the landholder; and
- a value for money outcome for the Commonwealth and the taxpayer, having regard to the PGPA Act requirement for public resources to be used in an efficient, effective, economical and ethical manner.

To support this, the LAA should be amended to include a specific and limited statutory meaning of 'reasonable price', which excludes common law notions of reasonableness.

The revised framework will include greater scope for acquiring entities to negotiate a 'reasonable price' and clarify that a range of 'heads' of compensation can be considered (as specified under Part VII of the LAA) where this is supported by appropriate evidence, or is evident from the circumstances. For instance, market value compensation may be supplemented by other elements such as severance loss, or disturbance costs.

Consideration of additional heads of compensation will not be relevant to most acquisitions by agreement including on-market transactions, government-to-government transactions and opportunistic acquisitions of properties which are independently listed for sale.

Market value will continue to be the foundational element of an offer (upon which other relevant elements will be added as applicable) and will be based on professional valuation assessments. Valuations will be anchored in market data on comparable properties, or based on other recognised methods of valuation to account for unique interests.

²² Section 46 of the *Lands Acquisition Act 1989*

Recommendation 2

To encourage acquisitions to proceed by agreement and avoid protracted compensation processes, section 40 of the LAA (acquisitions by agreement) should be amended to provide acquiring authorities with broader scope to acquire an interest in land at a price that is reasonable, provided that the acquisition represents value for money for the Commonwealth, is on 'just terms' and complies with other relevant legislation including the PGPA Act, the Public Service Act and the Commonwealth Procurement Rules (CPRs).

To improve **timeliness** and **value for money**, it is recommended that acquisitions of land from state, territory and local governments be allowed by agreement²³, at a price agreed by the two levels of government. Commonwealth authorities will continue to be subject to the PGPA Act in relation to these transactions, including the requirement to ensure that the transaction promotes the proper use and management of public resources and represents value for money. In this context, value for money could include the efficient and effective achievement of a policy or operational outcome and does not imply that the Commonwealth must pay full 'market value' for the land if another government is agreeable to some other arrangement, such as a land swap.

Recommendation 3

- Section 40 of the LAA should be amended to enable interests in land to be acquired by agreement from state, territory and local governments, including acquisitions of interests in land in a public park. This includes:
 - adding an additional limb to s40(2) of the LAA to allow acquisition by agreement from other levels of government;
 - removing the words 'other than land in a public park' from section 40(1) of the LAA; and
- The LAA should be amended to repeal section 42, the requirement to obtain state or territory consent to compulsorily acquire an interest in land in a public park. The mechanism in section 46 for tabling and possible disallowance of the section 41 declaration should be retained.

To improve **transparency** and **value for money**, it is recommended that the Department of Finance develop and publish additional guidance to assist Commonwealth authorities to undertake acquisition and disposal processes, including guidance on:

- probity, valuations, best-practice negotiations and ethical conduct;
- when to use acquisition by agreement and compulsory acquisition processes;
- developing acquisition and negotiation strategies; and
- guiding principles for determining compensation, including advice on drawing on the 'heads' of compensation under Part VII of the LAA.

²³ The existing provision allowing acquisition by agreement from the Commonwealth or a Commonwealth authority will also be retained.

Recommendations 4

To support officials and interest holders involved in undertaking Commonwealth acquisitions and disposals, it is recommended that Finance, in consultation with acquiring and disposing entities, develop a Resource Management Guide and appropriately targeted guidance materials covering a range of issues (some of which are addressed in separate recommendations).

Recommendation 5

To support acquiring authorities determine appropriate compensation, Finance should develop and publish principles and additional guidance, including on:

- the heads of compensation under Part VII of the LAA (Compensation for compulsory acquisition of interests in land);
- how the heads of compensation should inform negotiations on the amount to be paid under an acquisition by agreement process; and
- other matters that may be considered in determining a 'reasonable price'.

Guidance should provide clear reference to value-for-money, 'just terms', the PGPA Act, the CPRs, and other relevant legislation and policy.

Recommendation 6

To support the valuation process achieving the best outcome for all parties, it is recommended that the Department of Finance:

- amend the Commonwealth Property Management Framework (CPMF) to clarify when the Commonwealth should engage its own independent valuer when acquiring an interest in land.
- develop and publish principles and guidance addressing:
 - the valuations process, including advice on engaging valuers and the level of assurance that should be sought from the valuer;
 - when it is appropriate to encourage a valuers conference, including where valuations between parties differ, or at the request of the claimant; and
 - when it may be appropriate to share valuation information with claimants and how this option may be used to encourage faster claim resolution; and
 - making greater use of State and Territory Valuers-General and/or their pre-qualified panel of valuers to obtain valuations to support compensation offers.

To improve **equity and fairness** and **transparency** and the overall experience for landholders, the Commonwealth should formalise a policy to guide interactions with landholders when managing acquisitions, whether by agreement or by compulsory process. This policy should improve the experience for landholders and reduce the impact of potential acquisitions on landholders, including the impact of making public announcements about the intention to acquire land.

Recommendation 7

To improve the experience for landholders, the Commonwealth should develop a citizen-centric approach to managing acquisitions, whether by agreement or by compulsory process, including:

- developing a policy to guide interactions with compensation claimants, building on current processes while having regard to analogous best practice compensation and dispute resolution processes;
- developing additional guidance on case management issues, in consultation with acquiring authorities with extensive acquisition experience and best practice from other jurisdictions, who have developed citizen-centric processes that can be leveraged across government; and
- updating the plain English guidance material that provides information to claimants on the acquisition process, including information on the different elements that may make up a compensation claim.

4. Compensation processes for compulsory acquisition

The LAA sets out the steps that the Commonwealth must follow to acquire an interest in land compulsorily, including payment of compensation to ensure the interest in land has been acquired on 'just terms'. Under the LAA an interest holder can claim compensation from the Commonwealth as soon as their interest has been acquired by compulsory process²⁴. The acquisition takes effect from the date that the notice of compulsory acquisition is published in the *Gazette*. At this point the Commonwealth becomes the owner of the relevant interest in land by operation of law.

While some compensation claims are resolved quickly, others can take many years to be resolved. One feature of the LAA that may contribute to the delay in finalising claims is that there are no time limits imposed on interest holders to lodge a claim or to respond to a compensation offer made by the Commonwealth. By contrast, a number of jurisdictions, including those who have recently reformed their legislation (NSW, Victoria and SA), impose time limits on claims and responses to offers.

The LAA Review has heard from current and past interest holders that lengthy unresolved compensation claims have a major impact on the families and businesses involved. Interest holders find the process complex and time-consuming, putting their lives 'on hold' until their claim is resolved. Furthermore, some claimants advised that they didn't know where to begin in developing a reasonable claim, leading to feelings of helplessness.

Lengthy compensation claims can also result in the accumulation of significant legal costs and compounding interest payments, which are paid by the Commonwealth.

While structural reforms to the LAA to help reduce compensation timeframes are important, equally important are administrative reforms to reduce the burden and stress on interest holders.

Current state under the LAA

In terms of the compensation process, the two key steps are the *claim* and the *offer*. The *claim* is made by the interest holder and sets out the amount of compensation the interest holder considers they are entitled to receive. The LAA does not specify a time limit in which to lodge a claim.

The *offer* is the Commonwealth's offer to the interest holder of the amount of compensation which the Minister considers is appropriate, having applied the 'test' for just terms compensation set out in the LAA (discussed further below). When the first offer is made, the Commonwealth must pay no less than 90 per cent of the offered compensation²⁵. The Commonwealth can only make an offer²⁶:

- in response to a claim submitted by the interest holder; or

²⁴ Section 78 of the LAA also allows for compulsory acquisition, with compensation agreed prior to acquisition.

²⁵ Section 110 refers.

²⁶ It is also open to the Commonwealth to make an informal offer as part of negotiations with the interest holder.

- if 12 months have elapsed since the acquisition and no claim has been made.

An interest holder who receives an offer of an amount of compensation can either accept the offer, reject the offer or make a counter-offer. The LAA does not specify a time limit in which to respond to an offer. The Commonwealth can then make a final offer, which the interest holder can accept or reject.

If the Commonwealth and the interest holder agree to a compensation amount, they enter into a binding agreement. If they cannot agree, the LAA provides four mechanisms to externally determine the amount of compensation:

- **An expert:** If the Commonwealth and the interest holder agree, the question of the correct amount of compensation may be submitted to an expert whose determination is then binding.
- **An arbitrator:** If the Commonwealth and the interest holder agree, the question of the correct amount of compensation may be submitted to an arbitrator whose determination is then binding.
- **The Administrative Appeals Tribunal (AAT):** If the Commonwealth has given the interest holder a final offer, the interest holder may apply to the AAT for a review of the final offer. The AAT can confirm or vary the final offer.
- **The Federal Court:** After the Commonwealth makes an offer, either the Commonwealth or the interest holder may apply to the Federal Court to determine the correct compensation amount.

'Heads' of compensation payable under the LAA

An interest holder whose interest in land is acquired by compulsory process is entitled to receive an amount that will 'justly compensate' them for the acquisition, having regard to all relevant matters. Within this broad rule, there are particular types (often called 'heads') of compensation included in Section 55 of the LAA which may be included in the compensation amount for compulsory acquisitions, depending on the interest holder's situation.

The heads of compensation for compulsory acquisitions under the LAA are:

- **market value:** the market value of the interest in land on the day of acquisition, which is defined as 'the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer';
- **special value:** the value of any financial advantage, incidental to ownership of the interest in land and additional to market value, on the day of acquisition;
- **severance:** the reduction in the market value of any remaining land caused by its severance from the portion of the land acquired;
- **enhancement or 'injurious affection':** which applies where part of a property is acquired and the Commonwealth's activities on the acquired land have caused, or will cause, an increase or decrease in the market value of the remaining part of the

property. The total amount of compensation may be increased or decreased depending on the circumstances;

- **disturbance:** any loss, injury or damage suffered, or expense reasonably incurred as a direct, natural and reasonable consequence of the acquisition of the interest. This also includes losses or damages incurred as a direct result of issuing a PAD or section 24 certificate;
- **expectation of lease renewal:** where the interest in land is subject to termination or a time limit, the likelihood of continuation or renewal of the lease will be taken into consideration;
- **'solatium'**²⁷: an additional lump sum of \$24,000, payable where the interest which was acquired was a primary dwelling as compensation for intangible loss; and
- **professional costs:** any legal or other professional costs reasonably incurred in relation to the acquisition, including the costs of:
 - obtaining advice in relation to the acquisition, the entitlement to compensation, or the amount of compensation; and
 - executing, producing or surrendering any documents required by the Commonwealth.

The heads of compensation are similar (though not identical) across compulsory acquisition laws in all Australian jurisdictions.

The LAA recognises that it would be unfair to make interest holders wait until their compensation amount is finally agreed or determined before funds are actually paid. For example, the interest holder may need to purchase replacement land. Under the LAA, when the Commonwealth makes an offer of compensation, the Commonwealth is required to make an advance payment of no less than 90 per cent of the offer amount to the interest holder. The Commonwealth also has discretion to make an advance payment before an offer has been made.

In practice, the Commonwealth usually pays 100 per cent of the Commonwealth's estimate of the market value of the land to the interest holder shortly after the acquisition occurs, with any additional (disputed) component of market value and amounts for the other 'heads' of compensation then being the subject of the claim.

The LAA provides that compounding interest is payable by the Commonwealth on the amount of compensation that the Commonwealth is liable to pay, from the day of the acquisition until the day on which compensation is paid²⁸. For example, if the Commonwealth pays its initial estimate of compensation 6 months after the acquisition (whether or not a claim has been submitted), interest on that component will be payable across a 6-month period. If a claim is then made which results in an additional amount of compensation being paid 6 months later, interest on the additional amount will be payable across a 12-month

²⁷ See note 12.

²⁸ Except to the extent payment is delayed through a default or delay of the interest holder.

period. The interest rate is set by regulation and pegged to the Commonwealth Government 5-year bond rate.

4.1 Key issues and stakeholder feedback

<p>Time limits are needed to avoid protracted claims</p>	<p>Protracted claims were seen as a negative for both the government and interest holders. The absence of time limits, combined with reimbursement of reasonable professional fees (generally on an as-incurred basis) may mean that interest holder's advisors do not prioritise timely resolution of claims to the same extent they would if time limits applied.</p> <p>The majority of stakeholders supported the imposition of time limits on claims. However, if time limits are imposed, it becomes even more important that the burden on interest holders of managing the claim is minimised, and that information and support is available for interest holders to assist them to understand the 'heads' of compensation.</p> <p>Where there is a delay or dispute in identifying the interest holders who are entitled to compensation, it was seen as important that any time limit does not disadvantage such individuals or entities.</p>
<p>Commencing the process with an offer from the Commonwealth can reduce the burden on claimants</p>	<p>Stakeholders (including within the government) supported a model where the Commonwealth makes an offer of compensation to the interest holder, rather than waiting for the interest holder to make a claim. This was the model originally proposed by the Law Reform Commission, and is the model in NSW, Victoria, SA, NT and the ACT²⁹.</p> <p>Some stakeholders noted that, while the acquiring authority in a compulsory acquisition will typically have good information about market value at the time of the acquisition, information may be required from the interest holder in order to make an informed estimate of the other 'heads' of compensation. This dynamic is likely to be improved by the recommendation that Commonwealth authorities be empowered to consider how the heads of compensation should inform price negotiations, and that the Commonwealth develop a policy to guide interactions with interest holders.</p>

²⁹ In the ACT, the interest holder makes a 'standing claim' first but the Government makes the first offer of a compensation amount.

<p>There is no reason to hold back 10 per cent of the Commonwealth's estimate of compensation</p>	<p>The LAA currently provides that the Commonwealth must pay no less than 90 per cent of its compensation offer when the offer is made, although the Commonwealth often pays 100 per cent of the offer in practice. If the Commonwealth's offer represents the Commonwealth's genuine estimate of compensation, there is no reason to hold back 10 per cent.</p>
<p>The Commonwealth solatium payment is considered low compared to states and territories</p>	<p>At approximately \$24,000, solatium under the LAA is considered low compared to most other states and territories (compared with the lesser of 10% market value or \$50,000 in SA and up to \$75,000 in NSW). Past interest holders reported that relocating following a compulsory acquisition is highly disruptive, and managing a compensation claim is very time-consuming. There was consensus that the Commonwealth solatium amount needs to increase to address these impacts.</p>
<p>More flexibility to resolve claims on a value for money basis can result in better and more timely outcomes</p>	<p>Because the Commonwealth sometimes acquires unique properties without a broad range of comparators for valuation purposes, scenarios can arise where there is a large difference between the Commonwealth's estimate of compensation and the interest holder's estimate, which makes it difficult to resolve the claim.</p> <p>Making of an offer under the LAA is an exercise of a statutory function and not (in a legal sense) the settlement of a dispute, so the usual considerations in relation to reaching a fair settlement (for example, having regard to the Commonwealth's prospects of success and the costs of continuing the dispute³⁰) are not relevant under the LAA.</p> <p>Stakeholders considered that it would be beneficial to amend the LAA to enable the Minister to agree an all-in compensation amount with an interest holder in order to resolve a claim. This could include the usual considerations in relation to reaching a fair settlement.</p> <p>Some stakeholders suggested an approach whereby the Commonwealth should offer a fixed multiple of land value in order to resolve claims expediently. The Review considers that amending the LAA to provide acquiring authorities with the flexibility to acquire an interest in land at a price that is reasonable (Recommendation 2) is a more suitable approach, and will deliver a value-for-money outcome that has appropriate consideration for the specific situation.</p>

³⁰ See Appendix C of the *Legal Services Directions 2017*

<p>Taxation impacts on compensation payments can be varied and complex.</p>	<p>The interaction between tax laws and the 'heads' of compensation can be complex, and circumstances may arise where the taxation impact on compensation claims can be significant if tax is not considered early and appropriately factored into an interest holder's claim, and may well interfere with a 'just terms' outcome for interest holders. This can, in most instances, be avoided through early consideration of these impacts which can allow for a solution to be identified that will ensure a 'just terms' outcome for interest holders is achieved.</p>
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4.2 Proposed changes and recommendations

To improve **equity and fairness** and **timeliness**, it is recommended that the current compensation process following compulsory acquisitions be replaced with a new model, with the Commonwealth to make the first offer of compensation within 6 months (with 100 per cent of the offer to be paid to the interest holder at the time the offer is made). The interest holder would have 12 months to respond (after which the offer is deemed to have been accepted).

It should remain open for an interest holder to submit a claim prior to receiving the Commonwealth's first offer, should they wish to do so.

In the event that the Commonwealth is not aware that the interest holder has an interest in the land at the time a compulsory acquisition takes effect (and therefore does not make an offer), the 6 months should run from the date on which the Commonwealth accepts that the claimant has an interest in the land. Existing appeal rights in the event that the Minister does not accept that the interest holder has a basis for claim will be retained. If the offer is rejected, the Minister would continue to be able to make a final offer under section 76 of the LAA in order to resolve a claim.

Recommendation 8

Recognising that the timely completion of compulsory acquisition compensation processes is in the best interests of all parties, the LAA should be amended to include appropriate timeframes, so that:

- as the first step towards resolving compensation following a compulsory acquisition process, the Commonwealth may make an offer of compensation to an interest holder within six months, with 100 per cent of the offer to be paid to the interest holder at the time the offer is made;
- following an initial Commonwealth offer, the interest holder has 12 months to either accept the Commonwealth's offer or make a counter-claim (which would also constitute a rejection of the Commonwealth's offer); and
- if no counterclaim is received within the 12-month period (and the time limit is not extended), the interest holder will be deemed to have accepted the Commonwealth's offer and the process will be complete.

To improve **fairness and equity**, it is recommended that the LAA should be amended to increase the amount payable to interest holders as part of a disadvantage payment under a compulsory acquisition, where the acquired interest is the interest holder's principal place of residence to a single lump-sum payment of \$50,000 (indexed under section 126 of the LAA), or \$75,000 for multigenerational family homes and/or where the principal place of residence and the primary business address are the same. This change will more closely align with similar provisions in state and territory legislation (for example, the lesser of 10% market value or \$50,000 in SA, and up to \$75,000 in NSW). A lump-sum approach is recommended in favour of a percentage of market (property) value approach (with a capped upper limit), acknowledging that the scope of Commonwealth acquisitions extends across the country, that property value varies widely across different regions, and that property value should not limit a solatium payment.

Recommendation 9

To maintain fairness and equity with regard to the impact of acquisitions on the welfare of interest holders and other affected individuals, and to better align the Commonwealth's disadvantage payment with those of the states and territories: the LAA should be amended to increase the amount payable to interest holders as part of a disadvantage payment under a compulsory acquisition, where the acquired interest is the interest holder's principal place of residence to a single lump-sum payment of \$50,000, or \$75,000 for multigenerational family homes and/or where the principal place of residence and the primary business address are the same.

To improve **timeliness** and **value for money**, the Minister for Finance should be authorised to consider elements beyond the 'heads' of compensation (informed by similar considerations to those which typically apply in the handling of monetary claims against the Commonwealth) to help finalise protracted compensation claims.

Recommendations 10

To encourage more timely resolution of claims following compulsory acquisitions, the LAA should be amended so that where the interest holder has not accepted the Commonwealth's offer, the Minister for Finance is authorised to agree an amount of compensation which represents 'just terms' and achieves value for money to resolve the claim. The matters taken into account by the Minister for Finance should have regard to risk management considerations, and to the Commonwealth's policy on handling monetary claims.

To improve **equity and fairness** and **transparency**, guidance on the taxation treatment of various 'heads' of compensation in the hands of the interest holder should be developed. This guidance should include advice on general considerations in relation to the taxation impacts on compensation payments, including advice on how to seek professional advice and when this should occur.

Recommendation 11

To improve equity and fairness for interest holders, the Department of Finance, in consultation with the Australian Taxation Office, should develop guidance on the taxation treatment of the various 'heads' of compensation in the hands of the interest holder, with regard to 'just terms', and further investigate taxation issues related to compensation paid to interest holders.

5. Disposals

The LAA provides the legal basis for disposals, as well as for acquisitions, of land by Commonwealth entities. The relevant LAA provision for disposing of an interest in land, section 119, is supported by the Commonwealth Property Disposal Policy (**CPDP**)³¹. Land held by Commonwealth entities is a form of ‘public resource’ under the PGPA Act, and each authority has an obligation under that Act to manage the land it holds efficiently, effectively, economically and ethically. The CPDP assists Commonwealth entities to discharge this obligation.

The CPDP requires that Commonwealth property is held only where it contributes to government service delivery outcomes and ownership represents value for money. When a Commonwealth entity is considering disposing of land, the CPDP requires that it first ascertain whether any other Commonwealth entity has a use for the land (using a ‘Clearing House’ mechanism established by the Department of Finance for this purpose).

As part of the LAA Review, feedback on the CPDP was sought, including on whether there should be more scope for particular types of disposals – for example, for any disposal or swap of land (whether at fair market value or not) to a state, territory or local government – to occur on an off-market basis.

5.1 Current state under the LAA

The LAA provides that a Commonwealth entity must not dispose of interests in land without the written agreement of the Minister for Finance. The Minister for Finance has delegated the power to approve most types of disposals to a range of Commonwealth entities, which must comply with the CPDP.

While the default position is for surplus land to be sold on the open market at fair market value, off-market sales are allowed in limited circumstances with the approval of the Minister for Finance (with limited exceptions) and can only occur where:

- there is a former owner entitlement as defined under the LAA (the owner is to be given the right of first refusal at full market value);
- the sale is direct to a state, territory or local government and will either protect other Commonwealth property interests, facilitate Commonwealth or cooperative policy initiatives that could not otherwise be achieved through an open market sale, or will optimise broader Government outcomes including economic or social outcomes, such as increasing housing supply; or
- the sale is to a Corporate Commonwealth Entity, is in the Commonwealth’s interests, and is agreed by the relevant portfolio Minister and the Minister for Finance.

There are no provisions in the CPDP for an off-market sale direct to a private organisation or individual.

³¹ www.finance.gov.au/government/property-and-construction/commonwealth-property-disposal-policy

5.2 Key issues and stakeholder feedback

<p>Providing allowances for ‘land swaps’ between Commonwealth and state, territory and local governments can improve the efficiency of these transactions.</p>	<p>Acquiring authorities may receive a proposal relating to the simultaneous disposal of land and the acquisition of land by the acquiring authority. For example, a local council, which runs a facility adjacent to a Defence facility, may offer to help relocate the Defence facility to more suitable land in exchange for acquiring the land on which the Defence facility is situated. Currently, there is no provision to treat the acquisition and disposal as a single transaction, increasing the administrative burden on the acquiring authority and, at times, creating a distorted value for money assessment when the proposal is not considered holistically.</p>
<p>Allowances for off-market and concessional sales could be broadened to cover instances where these approaches lead to a value for money outcome.</p>	<p>While stakeholders generally support the continuing emphasis on open market, market value-based disposals under the CPDP, several instances were identified where off-market and/or concessional sales of property would represent value for money. Stakeholders supported expansion of the CPDP to allow for off-market disposal:</p> <ul style="list-style-type: none"> • to a state, territory or local government, whether or not for fair market value, including in the context of a City Deal³² or a land swap; and • at fair market value, as certified by an expert, of land for which there is no competitive market (e.g. sale of landlocked land to the owner of the surrounding land).
<p>Improved guidance around affordable housing requirements may improve consistency in execution of this policy requirement.</p>	<p>Where Commonwealth authorities are disposing of land which is suitable for housing, the CPDP requires that the disposal should include affordable housing initiatives, such as inclusionary zoning, where practical. Apart from affordable housing, the CPDP does not mandate the inclusion of other criteria relating to social and economic outcomes within the authority’s disposal strategy. Stakeholders indicated that the requirement in the CPDP to consider affordable housing outcomes would benefit from further guidance for disposing entities around the definition of affordable housing, what this process involves, and in what instances affordable housing outcomes should be pursued if there is no interest from state, territory and local governments.</p>

5.3 Proposed changes and recommendations

To improve **timeliness** and **value for money**, it is recommended that the exceptions for off-market and concessional sales be expanded under the CPDP, and that land swaps between

³² City Deals are a genuine partnership between the three levels of government and the community to work towards a shared vision for productive and liveable cities. For more details see: <https://www.infrastructure.gov.au/cities/city-deals/>

the Commonwealth and a state, territory or local government be permitted as single transactions.

Recommendation 12

To support more efficient property disposal processes and outcomes the CPDP should be amended to:

- allow for land swaps between the Commonwealth and a state, territory or local government where they support government policy outcomes or shared policy objectives; and
- expand the exceptions for off-market and concessional sales under the CPDP to allow for off-market disposals, where they are an efficient, effective, economical and ethical use of public resources:
 - to state, territory and local government, at an agreed value, including to facilitate transactions such as land swaps; and
 - at fair market value, as certified by an expert, to a private individual or organisation, where land is assessed as having no competitive market.

6. Mineral exploration and mining on Commonwealth owned land

Section 124 of the LAA enables regulations to be made to either prohibit or regulate mineral exploration and mining on Commonwealth owned land. Regulations may also be made to enable cooperative arrangements between the Commonwealth and the states and territories to facilitate these activities. Section 124(8) provides that if, on the day on which the LAA commences, there are no regulations in effect for the purposes of mining, then relevant sections of the former *Lands Acquisition Act 1955* (**LAA 1955**) would apply.

These regulations relating to mining were never made. As a result, all current mining activities are controlled by section 51 and sub-sections 53(2) and 2(A) of LAA 1955, which some stakeholders have observed is difficult to locate.

There is a general lack of clarity for state, territory and industry stakeholders in relation to accessing and using Commonwealth owned land for mineral exploration and mineral extraction. This can be exacerbated where the relevant land is occupied, but not owned, by the Commonwealth (e.g. the Commonwealth occupies land under lease or licence). Complex multilayered interactions between the LAA 1955 and state and territory mining legislation add to the challenges experienced by the mining sector and government agencies.

6.1 Current state under the LAA

6.1.1 Mining operations on Commonwealth-owned land

Section 51 of the LAA 1955 enables the Governor-General to authorise the grant of a lease or licence to a person to mine on Commonwealth-owned land.

Subject to exemptions and modifications prescribed (and no exemptions or modifications have been prescribed), the laws of the state in which the land is situated, relating to mining, will apply to the lease or licence authorised by the Governor-General. Neither section 51 nor related sections of LAA 1955 referred to land in a territory and so the position in relation to land located in the territories and applicability of territory law is unclear.

There is limited guidance available to both external stakeholders and Commonwealth entities about the process for applying for a Governor-General authorised lease or licence.

6.1.2 Mineral exploration on Commonwealth owned land

Subsections 53(2) and (2A) of the LAA 1955 allow the Minister for Finance to authorise access to Commonwealth owned land for mineral exploration³³. This power has not been delegated by the Minister.

There have been a number of applications in recent years for access to Commonwealth owned land for mineral exploration, and administrative arrangements have evolved to enable these applications to be considered.

³³ Section 53(2) of the LAA 1955

Commonwealth stakeholders include:

- the portfolio with primary responsibility for managing the relevant land;
- the Attorney-General's Department in relation to native title issues;
- the Department of Industry, Science, Energy and Resources in relation to minerals policy; and
- the Department of Agriculture, Water and the Environment in relation to environmental and heritage issues.

Feedback from the mining sector has been critical of these current arrangements due to a lack of clarity around the process, protracted application processes and the subsequent uncertainty this creates for the mining sector.

Further frustration is caused due to the interaction between Commonwealth and state and territory laws, including the complexity of these multilayered arrangements and the lack of clarity around how these laws interact. Each state and territory jurisdiction has its own mining legislation that may interact with the operation of section 51 and subsections 53(2) and (2A) of the LAA 1955, resulting in further complexity. For example, before issuing a Western Australia (WA) mining tenement over Commonwealth-owned land in WA, the relevant WA Minister must seek the concurrence of the Commonwealth Minister before the mining tenement may be granted by the WA Minister.³⁴

6.2 Key issues and stakeholder feedback

<p>The absence of Commonwealth regulations made for the purpose of prohibiting or otherwise regulating mineral exploration and mining operations on Commonwealth owned land has created uncertainty for the mining sector.</p>	<p>Stakeholders generally considered that current arrangements appeared to be <i>ad hoc</i> in nature and did not reflect section 124 of the LAA, as there are no Commonwealth regulations to prohibit or regulate exploration for minerals, the mining or recovery of minerals, and mining operations on Commonwealth owned land.</p> <p>Stakeholders were broadly in favour of improving the current arrangements through the development of appropriate regulations.</p>
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³⁴ s25A(2) of the *WA Mining Act 1978*

<p>The use of preserved provisions from the repealed LAA 1955 is difficult to navigate and inappropriate for contemporary Commonwealth administration.</p>	<p>Most stakeholders felt that the current arrangements of using the preserved provisions from the repealed LAA 1955 were confusing and difficult to navigate. Some stakeholders were frustrated that the text of LAA 1955, including subsections 53(2) and (2A), was not easily available and that the process required a level of legal nous to navigate.</p> <p>Some stakeholders suggested that the LAA be amended to include the relevant LAA 1955 provisions in the LAA.</p>
<p>The current split of decision-making between the Governor-General and the Minister is not consistent with modern administrative decision making practices.</p>	<p>The Governor-General's decision-making power under section 124 is inconsistent with other parts of the LAA, which have been updated over-time to reflect that the Minister for Finance is the appropriate Commonwealth decision-maker as the Minister responsible for the LAA.</p>
<p>There is a lack of publicly available guidance relating to the arrangements and processes for accessing Commonwealth-owned land for mineral exploration and mining.</p>	<p>Some stakeholders stated that the interaction between Commonwealth law and some state and territory laws can be confusing, making it difficult for applicants to understand what approvals are required and where they need to apply for them. Further, the need for multiple approvals can result in uncertainty for applicants and add unnecessary administrative burden and cost for the mining sector.</p>
<p>Where state and territory mining licences or permits exist, there may be uncertainty about the Commonwealth's powers to prohibit or otherwise regulate mineral exploration and mining operations on Commonwealth-owned land.</p>	<p>Some stakeholders considered that the possession of a state or territory licence should automatically guarantee they have access to the relevant Commonwealth land, and considered the making of regulations would help to clarify this situation.</p>

6.3 Proposed changes and recommendations

To improve **transparency**, **timeliness** and **equity and fairness**, the LAA Review recommends a number of actions to support more efficient and fit for purpose regulation of mineral exploration and mining operations on Commonwealth land.

Recommendation 13

To support more efficient and fit for purpose regulation of mineral exploration and mining operations on Commonwealth land:

- The LAA should be amended to remove references to the 'preserved' provisions of the LAA 1955, and embed those provisions in section 124 of the LAA.
- Consistent with modern decision making practices, the Minister rather than the Governor-General should be the relevant decision maker.
- Regulations should be developed for the purposes of section 124 of the LAA.
- The Minister's powers in relation to mineral exploration and mining operations on Commonwealth land should be delegated to Commonwealth officials.
- Finance (in consultation with relevant entities, states and territories and the mining sector) should review approval and authorisation processes, and publish revised guidance material for the mining sector, in relation to access to Commonwealth land for mineral exploration and mining operations.

7. Delegations and reporting

Section 139 of the LAA permits the Minister or the Attorney-General to delegate all or any of their powers and functions under the Act to a person appointed or engaged under the *Public Service Act 1999*, or a person who has executive authority in relation to the affairs of a Commonwealth authority, other than specific powers and functions specified in subsection 139(2) of the LAA. Importantly, the Minister may not delegate the power to declare an acquisition by compulsory process.

7.1 Current state under the LAA

A number of powers have been delegated to acquiring authorities and the Department of Finance by the Minister for Finance under the *Lands Acquisition Delegation 2020 (No. 2)* (the Delegation) relating to sections 40 (acquisition by agreement), 119 (disposals of interests in land), 123 (expungement of easements), and 125 (Minister to approve acquisition, disposal etc. of interests in overseas land).

Under the Delegation, delegates are required to provide a written statement about an acquisition or disposal of an interest in land to the Department of Finance no later than 14 days from exercising these powers under the LAA. This information is currently provided to the Department of Finance in paper-based forms and recorded in simple spreadsheets.

Similarly, requests for the Department of Finance to exercise delegations that enable entities to acquire or dispose of an interest in land, including certifying that an acquisition would be a normal commercial transaction (section 40(6) of the LAA), are paper-based.

The Delegation is currently structured with a detailed listing of all relevant entities and position titles, which can require updating in the event of a machinery of government change or entity restructure.

7.2 Key issues and stakeholder feedback

Key issues with the current LAA delegations and reporting arrangements identified through discussions with stakeholders were:

Current paper-based requests and reporting requirements are cumbersome and could be streamlined and modernised through the use of a web-portal.	Some stakeholders noted the existing requests and reporting process can be time consuming and there is opportunity to streamline and modernise this process to reduce the time taken to prepare requests and reports, and to increase the usefulness of this information.
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The LAA Instrument of Delegation is not always updated in a timely manner.	Some stakeholders noted that machinery-of-government changes and restructuring within entities often resulted in delegations that require updating and in some cases these updates were not always made in a timely manner. Some stakeholders noted that this can sometimes complicate the process of exercising powers under the delegations and require entities to seek further advice from the Department of Finance.
Delegations for the acquisition and disposal of overseas interests should be rationalised.	Consultations with the Department of Foreign Affairs' (DFAT) Overseas Property Office highlighted potential inconsistency around delegations, in particular when approval from the Finance Minister (or a delegate within the Department of Finance) is required for overseas transactions while responsibility for overseas property sits with DFAT.
The requirement to table before Parliament the acquisition by agreement of an interest in overseas land by an acquiring authority (within 15 sitting days of the acquisition taking effect) is administratively burdensome.	<p>Some stakeholders noted the difficulty in meeting the current requirements of providing Parliament with details of acquisitions of overseas interests within 15 sitting days of the acquisition taking effect, citing challenging conditions in international offices.</p> <p>Some stakeholders also noted that there is no threshold for tabling or reporting, meaning even very minor acquisitions (such as the licensing of a desk through to the leasing of residential accommodation) must be reported – creating a resourcing reporting burden within overseas posts.</p>

7.3 Proposed changes and recommendations

To improve the **timeliness** of administrative processes, the LAA Review recommends that the Department of Finance investigate and develop options for a central web-based portal to streamline requests, reporting and approvals. This would support gathering data related to the acquisition and disposal of interests domestically and overseas, and build upon existing systems and processes that the Department of Finance manages on behalf of the Commonwealth, including the Australian Government Property Register.

The LAA Review also recommends the requirement under section 125(5) of the LAA around tabling of overseas acquisitions be removed to reduce the administrative processes related to developing these reports. This recommendation aligns with the earlier 2008 amendments to remove tabling requirements for domestic acquisitions available in the market, which were designed to reduce red tape in the administration of the land acquisition activities as those acquisitions were already reported on AusTender. The Government would retain oversight of major acquisitions of overseas interests through alternative mechanisms, including where funding is sought to support capital works through the Budget process.

To improve **timeliness, transparency and accountability**, the LAA Review recommends that the delegation power in the LAA be modernised to more closely align to the delegation approach in the PGPA Act, which does not rely on naming specific positions within an entity,

and allows sub-delegation. The range of powers that currently may not be delegated should otherwise remain unchanged.

The delegations should be reviewed on a regular basis to ensure they remain fit for purpose.

Recommendation 14

To improve accountability and transparency for acquisitions and disposals in Australia and overseas, and to ensure fit for purpose reporting:

- Finance should investigate improved data collection from entities and more targeted reporting mechanisms, including entities reporting on their websites or in their annual reports.

Recommendation 15

To improve timeliness and streamline administration, the LAA should be amended to:

- provide that the Minister for Finance (rather than the Governor-General) is the decision maker in section 122 of the LAA ('Dedication for public purpose'); and
- repeal section 125(5) and the requirements to table acquisitions by agreement of overseas land in the Parliament.

Recommendation 16

To reduce the impact of machinery of government changes on entities exercising LAA delegations, and to clarify the LAA delegations as they apply to overseas land:

- The form of the LAA Delegation Instrument should be streamlined, and the instrument reviewed on a regular basis, to ensure that delegations remain fit for purpose.

Appendix 1 – Terms of Reference for the Review

The Government is undertaking a review of the LAA to ensure it:

- reflects community expectations around public sector responsiveness and timeliness;
- minimises delay and uncertainty in finalising compensation claims with affected parties; and
- minimises administrative costs and provides value for money.

The Review will consider the broad scope of operations and functions under the LAA, including administrative requirements. In doing so, it will consider matters such as, but not limited to:

- how the LAA can best support acquisition and disposal of land by the Commonwealth for public purposes in a way that is fair and efficient to all parties;
- whether the LAA legislation and associated guidance can be simplified to make it easier for all parties to understand and apply; and
- how best to balance the main objectives of the Act with modern public administrative and legal principles.

The review will be guided by the principles of:

- equity and fairness – ensuring affected interest holders are treated fairly (on ‘just terms’);
- timeliness – ensuring community expectations around public sector responsiveness are met;
- transparency – being appropriately accountable to Parliament and the public for the use of acquisition powers and management of land assets; and
- value for money – ensuring expenditure of public money on interests in land, and the management of land as a public resource, represents value for money.

Appendix 2 – List of submissions

The Department of Finance (Finance) with the assistance of an external legal adviser, Herbert Smith Freehills undertook comprehensive consultation to inform the Review of the *Lands Acquisition Act 1989* (the LAA) and subsequent reforms.

The consultation objectives were to:

- understand the experiences of users of the LAA;
- seek feedback on priorities and options for reform, including around practical implications;
- ensure any changes considered reflect an appropriate balance between the rights of the individual and public administration; and
- gather information on best practice from other jurisdictions.

The principles underpinning this Communications Strategy were:

- **Collaboration:** The Review and its objectives are supported by strong collaboration with entities to ensure the delivery of the best outcomes for government and citizens.
- **Engagement:** Communication is founded on transparency and mutual respect, with stakeholders able to convey their position fully and understand the impact of any proposed reforms.
- **Planning:** Communication is methodical and recorded. Planning documentation is agreed with relevant stakeholders to establish clear objectives, roles, and risks.

Following the Finance Minister's announcement of the Review, Finance published a Discussion Paper on the Department of Finance website³⁵ and invited public comment by submission. Follow-up consultation by the Review Team occurred as required.

The Discussion Paper summarised key aspects of the LAA and its administration and asked a number of questions to prompt discussion on reform options. The call for public submissions also encouraged respondents to raise other aspects of the LAA not covered in the Paper.

In general, the public consultation process sought feedback on:

- a. views on how the LAA and its administration is working; and
- b. what changes could be made to improve the LAA, particularly around the Review principles of equity and fairness; timeliness; transparency; and value for money.

Engagements

Over 30 engagements were held with a range of stakeholders including current and past claimants, law societies and other peak bodies, Commonwealth entities and other levels of government. These were formal meetings to discuss the Review, the discussion paper, and other matters relevant to the LAA.

³⁵ <https://www.finance.gov.au/publications/reviews/review-lands-acquisition-act-1989>

Submissions

30 submissions were received from a range of stakeholders. Consistent with the *Privacy Act 1988*, the submissions were only made available on the Department of Finance website where permission was provided. These include:

- Rowan Ramsay MP – Federal Member for Grey
- Sydney Harbour Association
- Town of Port Headland Office
- National Farmers Federation
- Queensland Law Society
- Claudia Tregoning
- Livingstone Shore Council
- Real Estate Institute of Australia
- Law Council of Australia
- ACT Law Society
- Australian Mobile Telecommunications Association
- TAS Legal
- Association of Mining and Exploration Companies