



Australian Government
Department of Finance



Guidance to assist delegates in considering whether to exercise the Minister's right to issue a certificate under section 40(6) of the *Lands Acquisition Act 1989 (Cth)*

Contents

Summary	3
Background	3
Application of section 40(6) to the acquisition	4
When is an acquisition between parties dealing with each other on equal terms	5
Further assistance	7

Summary

Under the *Lands Acquisition Delegation 2024*, the Finance Minister has delegated to certain officials within agencies the power to certify that an acquisition of an interest in land would amount to a 'standard commercial transaction' in circumstances where the interest in land is not otherwise 'available in the market' for the purposes of s 40 of the *Lands Acquisition Act 1989* (LAA).

Delegates of the Finance Minister should have regard to this guidance before giving a certificate under s 40(6) of the LAA. This guidance provides information on:

- when a certificate under s 40(6) might be required
- the inquiries that an acquiring authority and a delegate should make before a certificate is given under s 40(6) and
- how to obtain further assistance in relation to this power.

Background

The acquisition of an interest in land by agreement is permitted under section 40 of the *Lands Acquisition Act 1989* (Cth) (LAA).

- Section 40(1) allows the Minister for Finance (Minister) to authorise the acquisition of an interest in land, other than land in a public park, by an acquiring authority for a public purpose.
- Section 40(2) sets out 4 circumstances where an acquisition of an interest in land by agreement is allowed. One of these circumstances – under section 40(2)(c) – is where 'the interest is available in the market'.
- Section 40(5) describes where an interest is 'available in the market'. One of those circumstances – under section 40(5)(d) – is where the Minister has certified under section 40(6) that the acquisition of the interest in land by agreement 'would be a standard commercial transaction'.
- Section 40(6) empowers the Minister to give a certificate stating that the acquisition of a particular interest by an acquiring authority 'would be a standard commercial transaction' where the Minister is satisfied that the acquisition would amount to a normal commercial transaction between parties dealing with each other on equal terms'.

The Minister's power to issue a certificate under s 40(6) is delegated to officers under section 6 of the *Lands Acquisition Delegation 2024* (Cth) (the Delegation). A delegate must determine whether the acquisition would 'amount to a normal commercial transaction between parties dealing with each other on equal terms' before exercising the Minister's delegated power.

Two consequences flow from a delegate issuing a certificate under section 40(6) certifying that the transaction would be a 'standard commercial transaction':

- the transaction is taken to be an acquisition of an interest that is available in the market and permitted to occur by section 40(2); and
- the requirement under section 40(3) to table a statement in each House of Parliament regarding the acquisition does not apply to the transaction – see section 40(3A).

To determine if a transaction meets the criteria of 'available in the market' for the purposes of section 40(6), delegates should consider the guidance material below and appropriately document a decision to certify the transaction as being a standard commercial transaction, including the reasons for making the certification.

Application of section 40(6) to the acquisition

Section 40(6) of the LAA allows the Finance Minister to certify that the acquisition of an interest in land by an acquiring authority, that does not otherwise meet the 'available in the market' test, as being an acquisition that would be a standard commercial transaction. To make this certification the dealing has to:

- amount to a normal commercial transaction; and
- be between parties dealing with each other on equal terms.

Delegates must consider these elements separately and if both criteria are satisfied, the delegate may certify the acquisition would be a standard commercial transaction under section 40(6).

Is it a normal commercial transaction?

Delegates must consider the nature of the transaction or dealing as a whole, not just the type of acquisition in isolation. While the type of acquisition may be a common or standard form of acquisition, say a contract for sale or lease, elements of or features of that transaction may stop it from being treated as a 'normal commercial transaction'.

Possible indicators that a transaction does not amount to a normal commercial transaction:

- The acquisition involves multiple or aggregated transactions that do not typically or regularly form part of the same acquisition or are not usually combined.
- The transaction is subject to conditions that require other government decisions to be made or Ministerial discretions applied.
- The transaction is for a value that is not characteristic of the interest being acquired or usual consideration.

The fact that a transaction incorporates one of the considerations listed above does not, in itself, mean that the transaction is not a 'normal commercial transaction' but does flag the need for more careful consideration of the transaction prior to determining it is a normal commercial transaction.

Examples of transactions that have been treated as 'normal commercial transactions'

Below are examples of transactions by acquiring authorities that regularly occur and are capable of being treated as normal commercial transactions.

Example 1

A Commonwealth entity proposes to lease or licence school classrooms at a peppercorn rental for non-exclusive use outside of normal school hours 1-2 times a week during the term. Leases or licences are common commercial transactions.

In this example, the school did not advertise the classrooms as being available for rent. Notwithstanding this, as the lease/licence allows use for a purpose connected with the delivery of a government-funded program at that school and it does not prevent the school from day-to-day use of that classroom, the fact that the Commonwealth entity is only paying a nominal fee does not preclude it from being treated as a 'normal commercial transaction', even if other groups may pay a commercial fee to use similar classrooms / facilities.

Example 2

A Commonwealth entity leases space in a building and for operational reasons needs to expand its footprint in that building. Leases or licences are common commercial transactions.

The entity is aware that another tenant in the building is about to vacate their office space and, before the space is advertised for lease, the entity negotiates a lease arrangement for a market facing rent on terms that are largely consistent with Commonwealth standard lease terms or commercial lease terms and aligns the length of the new lease with the remaining length of its existing lease. This situation could be certified as a 'normal commercial transaction'.

Example 3

A Commonwealth entity has approached private landowners and negotiated a long-term lease or licence to use part of their land to install and operate equipment that collects and transmits data used in the delivery of a government-funded service. The land was not advertised as being available for rent.

Such lease or licence arrangements can generally be considered normal commercial transactions even where they are long-term. This view is supported where the entity intends to pay market rent that compensates the owner for not being able to use that part of the land. It may also be a normal commercial transaction if less than market rent is paid and where the landowner is deriving some benefit from the government funded service and the agreed conditions are fair and reasonable.

When is an acquisition between parties dealing with each other on equal terms

As a starting point, the delegate should consider who the acquiring authority is dealing with and whether that party has sufficient expertise and/or resources to protect their own interests.

For example, if dealing with a party that is represented by a commercial property agent or legal practitioner or is an experienced commercial property owner or other government body, the risks that the dealing is between parties not on equal terms will reduce in practice.

On the flipside, if the acquiring authority is dealing with an individual property owner, a not-for-profit entity (e.g. a community group) where such parties are not being advised by commercial property agents or have legal representation, there is an increased risk that it could be, or at least perceived to be, a transaction that is not on equal terms.

The fact that a party is a 'willing seller' does not necessarily mean that the transaction is between parties dealing with each other on equal terms. The delegate should have regard to the substance of the transaction and more closely examine or question the nature of the negotiations to determine if the dealing is on equal terms.

Possible circumstances where there is an increased risk that the transaction may not be occurring between parties on equal terms include:

- If the acquiring authority is negotiating with a party who is not usually involved in property transactions or may be viewed as vulnerable when negotiating a transaction with the Commonwealth (e.g. an unrepresented party, an owner of a residential property, a party with reduced capacity or for whom English is a second language).
- If the transaction is on terms which are heavily balanced in favour of one party (e.g. the terms of the transaction are not typical in the market in respect of the nature of the interest being acquired, or would not have applied if the interest had been available in the market).

This does not mean that the delegate is prevented from certifying the transaction as being between parties dealing with each on equal terms where the Commonwealth has had to accept more onerous terms where the market is competitive in favour of the seller, or in the case of the lease where there is little vacancy resulting in more favourable terms for the lessor.

- Where there is a disparity in the financial circumstances of the entity that the Commonwealth is acquiring the interest from (e.g. the entity is in liquidation or administration, or the entity is reliant on funding by the Commonwealth or a State or Territory Government).

The delegate could then consider if other factors counteract any perception of inequality, for example, where legal advice was sought by the party or funded by the Commonwealth or where the terms of the transaction counteract the capacity concerns or are fair and reasonable.

Example 1

A Commonwealth entity approaches a state or local government entity to occupy part of a specialist facility that is owned or leased by that body. Both parties will derive a direct or indirect benefit from the Commonwealth entity's presence in the facility. The premises are not marketed as being for rent but there is space for the Commonwealth to occupy.

- The parties negotiate a licence or a MOU on Commonwealth standard terms and at a non-market rent which covers administrative costs and allows the Commonwealth use of shared facilities.
- While the licence / MOU is on terms that are perceived to favour the Commonwealth, this does not prevent it from being characterised as being on equal terms.

Example 2

A Commonwealth entity owns or leases a landlocked parcel of land and looks to acquire a right of access through a neighbouring parcel of land.

- The entity approaches the landowner by direct communication requesting to enter into an agreement.
- The negotiations are with an individual who is unrepresented and does not typically deal in property transactions.
- The entity can demonstrate that it has given consideration as to the reasonableness of the terms of the agreement and allowed the owner an opportunity to seek legal advice.

Note – it may be appropriate to offer for the owner’s reasonable legal costs to be met for this advice.

- These factors supported the delegate’s determination that the parties are dealing with each other on equal terms.

Further assistance

In circumstances where a scenario is borderline or it is unclear whether the circumstances would amount to a normal commercial transaction, entities may contact Finance for assistance at laa@finance.gov.au.

Where legal advice is required, entities are reminded of their obligations under the Legal Services Directions to consult with Finance.