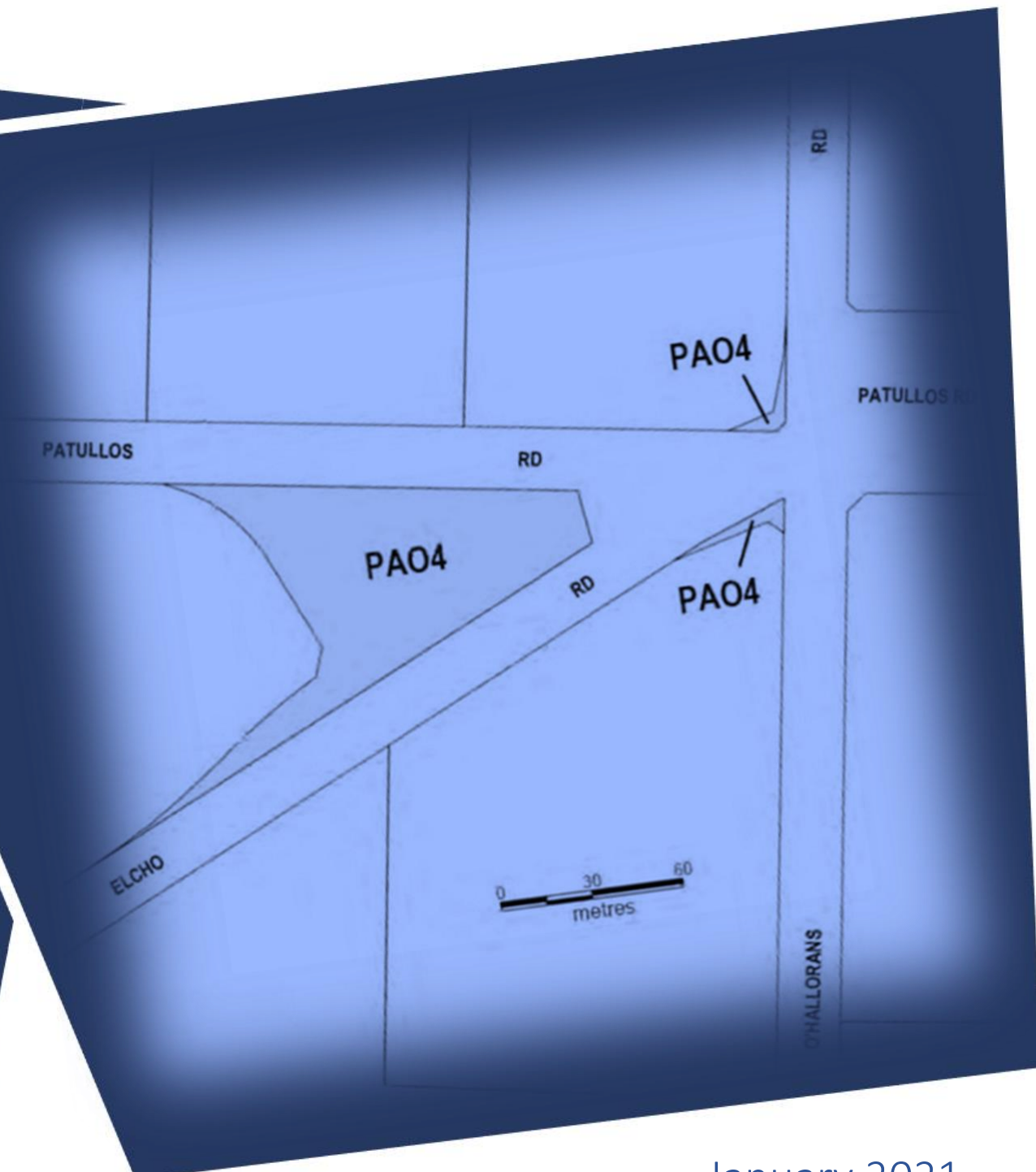


# Land Acquisition and Compensation Regulations 2021 Regulatory Impact Statement



**Disclaimer**

The Department of Justice and Community Safety and the State of Victoria and its contractors and employees do not guarantee that the publication is without flaw of any kind or is wholly appropriate for your particular purposes and therefore disclaims all liability for any error, loss or other consequence which may arise from you relying on any information in this publication. While every effort has been made to ensure the currency, accuracy, or completeness of the content we endeavour to keep the content relevant and reserve the right to make changes as required. The Department of Justice and Community Safety and the Victorian Government and this document's authors and presenters do not accept any liability to any person for the information (or the use of the information) which is provided or referred to in the report. This report is not legal or commercial advice and should not be relied upon for any such purpose.

This report was prepared for the Department of Justice and Community Safety by Regulatory Impact Solutions Pty Ltd.

## Glossary

|                             |  |
|-----------------------------|--|
| <b>current Regulations</b>  | Land Acquisition and Compensation Regulations 2010, which expire in June 2021  |
| <b>proposed Regulations</b> | Land Acquisition and Compensation Regulations 2021, which are proposed to commence from June 2021  |
| <b>Department</b>           | Department of Justice and Community Safety   |
| <b>LAC Act</b>              | <i>Land Acquisition and Compensation Act 1986</i>  |
| <b>Morris Report</b>        | <i>Land Acquisition and Compensation: Proposal for New Land Acquisition and Compensation Legislation – Report to the Minister for Planning</i> (Report, January 1983), a landmark report that resulted in the LAC Act 1986 and current regulatory arrangements |
| <b>PAO</b>                  | Public acquisition overlay   |
| <b>P&amp;E Act</b>          | <i>Planning and Environment Act 1987</i>   |
| <b>RIS</b>                  | Regulatory Impact Statement  |
| <b>VCAT</b>                 | Victorian Civil and Administrative Tribunal  |
| <b>VPP</b>                  | Victoria Planning Provisions   |

## Table of Contents

|   |           |
|---|-----------|
| <i>Executive Summary</i> .....  | 1         |
| <b>1</b> <i>Context</i> .....   | <b>9</b>  |
| 1.1 Acquiring land for public purposes .....  | 9         |
| 1.2 Land Acquisition and Compensation Act 1986.....   | 9         |
| 1.3 Land Acquisition and Compensation Regulations 2010 .....  | 13        |
| 1.4 Data on compulsory acquisitions .....   | 17        |
| 1.5 The current Regulations expire in 2021 .....  | 19        |
| 1.6 What problem do the Regulations address?.....   | 20        |
| <b>2</b> <i>What outcome is the Government aiming to achieve?</i> .....                             | <b>24</b> |
| 2.1 Objectives of compulsory acquisition .....  | 24        |
| 2.2 Objectives for this RIS .....   | 24        |
| <b>3</b> <i>Identification of options and assessment</i> .....                                      | <b>25</b> |
| 3.1 Prescribed forms .....  | 25        |
| 3.2 Acquisitions not requiring prior reservation for a public purpose .....                         | 28        |
| 3.3 Fee for lodgement of notice of intention with the Registrar of Titles.....                      | 32        |
| 3.4 Loans to dispossessed home owners.....  | 34        |
| <b>4</b> <i>Preferred option</i> .....  | <b>38</b> |
| 4.1 Summary of proposed Regulations .....   | 38        |
| 4.2 Impacts on competition and small business .....   | 38        |
| 4.3 Implementation.....   | 39        |
| 4.4 Evaluation.....   | 39        |
| <i>Appendix A: Compulsory acquisition in Victoria</i> .....   | <b>40</b> |
| <i>Appendix B: List of ‘Special Acts’</i> .....   | <b>41</b> |
| <i>Appendix C: Comparison of Victoria’s LAC Act to equivalent arrangements in other states</i> .... | <b>43</b> |
| <i>Appendix D: Process of amending planning schemes to reserve land for a public purpose</i> .....  | <b>44</b> |

## Executive Summary

The Land Acquisition and Compensation Regulations 2010 (the current Regulations) will sunset on 22 June 2021. These Regulations prescribe a number of things that are necessary or convenient for carrying out or giving effect to the operation of the *Land Acquisition and Compensation Act 1986* (LAC Act).

This Regulatory Impact Statement (RIS) was prepared on behalf of the Department by Regulatory Impact Solutions to facilitate public consultation on the proposed Land Acquisition and Compensation Regulations 2021 (the proposed Regulations), which will replace the current Regulations.

As part of preparing the proposed Regulations, Regulatory Impact Solutions Pty Ltd undertook preliminary consultation with and sought feedback from various stakeholders. This included 12 government authorities that collectively account for about 90 per cent of all compulsory acquisitions over the past ten years. The Victorian Government Land Monitor, Land Use Victoria, Victorian Government Solicitor's Office, and a number of law firms that have acted for government authorities or landholders in compulsory acquisition matters were also contacted for comment.

### The current Regulations

Each of the main elements in the current Regulations—which are proposed to continue in the proposed Regulations largely in the same form—are necessary for the LAC Act to operate effectively and efficiently, avoiding higher costs to the acquiring authorities and landholders, as well as promoting legal and administrative certainty. While the current Regulations deal mostly with procedural or 'machinery' matters, an inefficient or uncertain acquisition framework could indirectly delay or obstruct some public infrastructure projects.

Each of the elements of the proposed Regulations is set out below.

It is important to note that the matters that are required or authorised to be prescribed in Regulations do not affect the ability of authorities to acquire land or their decision about whether they will acquire land, or the right to compensation or the amount of compensation.

### Exemptions from reservation of land for a public purpose

An Authority must not commence to acquire any interest in land under the LAC Act unless the land has first been reserved for a public purpose. Reservation for a public purpose requires amendment to the relevant planning scheme—in general, this will involve placing a public acquisition overlay (PAO) over the land required.

When the LAC Act was introduced, it was considered that as a general principle only land that has previously been reserved for a public purpose should be compulsorily acquired. Noting that there can often be a long period between when an acquiring authority knows it will need to acquire land and when it actually acquires it, reservation has the benefits of limiting a landholder undertaking building or other works on land that is likely to be needed for a public purpose, allowing landholders to plan ahead with the knowledge that their land may be acquired, and bringing forward the point where a landholder may claim compensation for loss arising due to their land being earmarked for future acquisition.

Further, the reservation process also provides opportunities for affected landholders (and the public in general) to comment on the proposed use of the land and to have their views formally considered before a decision on the use of the land is made.

However, in recognition that reservation should not be required in every situation, a number of acquisitions are not required to reserve the land prior to acquisition. Some of these exemptions are

contained in the LAC Act itself, or in the relevant special Acts.<sup>1</sup> The current Regulations prescribe the following classes of land that do not require reservation:

- land to be acquired for a minor road widening or the deviation of a road, where the part of the land acquired and the impact on value of the property is less than 10 per cent
- acquisition of an easement that reduces value of the property by less than 10 per cent.

A high number of acquisitions fall into these categories: around 23 per cent of all compulsory acquisitions over the past decade have been easements, nearly all by water corporations who advise that nearly all of their easements fall within the exemption; around half of the compulsory acquisitions of local councils and around 15 per cent of compulsory acquisitions of VicRoads fall into the category of minor road widening or deviations.

These exemptions from the need to reserve land for a public purpose before acquisition are to ensure the acquisition process is efficient for ‘minor’ acquisitions. At the time the LAC Bill was being debated in Parliament in 1986, there was concern about what the requirement for reservation in a planning scheme would mean for “acquisitions on a small scale, for example, a splay corner required at an intersection, a limited road widening or a pipeline to be laid inside a property boundary.”<sup>2</sup> While it was considered that as a general principle only reserved land should be compulsorily acquired, it was recognised that there needed to be provision for cases where a prior reservation for a public purpose was not justified. The Morris Report specifically considered that easements were a type of acquisition that would be usually certified as not requiring reservation.<sup>3</sup>

Without these exemptions, Authorities would need to go through a lengthy process to reserve the land (amending a planning scheme usually takes a minimum of 6 months but can take up to 12 months or longer), or a separate administrative process to seek an exemption on a case-by-case basis, that would be time consuming and relatively costly compared to the proportion of a person’s land being acquired or affected. The exemptions are necessary for continued efficiency.

However, exempting an acquisition from the reservation requirement has an impact on landholders. The process to amend the planning scheme to reserve the land is in general the only opportunity a landholder will have to object to the acquisition and for these objections to be considered. While these objections may ultimately not prevent the acquisition, avoiding the need to reserve the land may deny the landholder an opportunity to be heard. In allowing any exemptions, the Government must balance the efficiency gains against this loss of opportunity.

There is no change proposed to the existing exemption categories.

The Department considered whether the threshold amounts (i.e., 10 per cent of area or value) should be changed. Any change to the thresholds is a subjective exercise, requiring judgement to balance the trade-off between efficiency of the acquisition process and the ability for landholders to be consulted through the reservation process. A lower threshold would result in more acquisitions needing to first amend planning schemes to reserve the land for a public purpose, which the Department believes would have limited value in the decisions to acquire land. A higher threshold would allow more land to be acquired without reservation, however as a greater proportion of a person’s land is acquired, it would become more important for those landholders to have the opportunity to be heard through a

---

<sup>1</sup> The LAC Act sets out the process for compulsory acquisitions but does not itself authorise any public authority to acquire land. The ‘special Act’ is the specific legislation for each public authority that authorises it to acquire land by compulsory process for a specific purpose.

<sup>2</sup> Legislative Council, Hansard 20 November 1986, page 1215.

<sup>3</sup> Stuart Morris, Land Acquisition and Compensation: Proposal for New Land Acquisition and Compensation Legislation – Report to the Minister for Planning (Report, January 1983). Note: the Morris Report advocated for the ability for the Attorney General to exempt the reservation requirement, but did not specifically anticipate classes of land being prescribed in Regulations for this purpose.

formal consultation process, as there is a higher likelihood that the acquisition will materially affect the enjoyment of their land.

In preliminary consultation with stakeholders, there were no views expressed that the thresholds were too high or too low. The Department therefore proposes to retain the current thresholds.

One water corporation suggested that the exemption could be expanded to also apply to acquisitions for the purpose of other utility infrastructure, such as water reservoirs, within the same limits of being less than 10 per cent of the land acquired and less than 10 per cent of the property's value. Other water corporations did not raise this, noting that the exemption already applies to easements (which comprise most of the compulsory acquisitions by water authorities), and that purchase of freehold land by water authorities is more likely to be done outside of the LAC Act (i.e., by negotiated agreement). Another Authority also suggested expanding the exemption to any 'minor project' (i.e., not limited to road widening or deviations). However, this may be difficult to define, and may lead to unintended misuse of the exemption. The Department notes that for particular types of projects there may already be exemptions provided under the respective special Acts. The Department therefore considers that if there is a need for an exemption in these circumstances, it may be more appropriate to consider exempting it under section 5(3) of the LAC Act on a case-by-case basis, rather than making a general exemption.

***Consultation questions:***

- *Do you think the current exemptions from the need to reserve land for minor acquisitions should be continued?*
- *Should the thresholds for exemptions (less than 10 per cent of land area and less than 10 per cent of value) be increased or decreased? If so, Why?*
- *Should the types of acquisition within the scope of the exemption be expanded, for example for water infrastructure or other projects? What would be the consequences of this?*

## Prescribed forms

The LAC Act authorises a number of forms to be prescribed in order to complete the steps under the Act. These are pro-forma notices that acquiring Authorities must complete, and statements of rights and obligations that are required to be given to affected landholders or other parties.

If the Forms were not prescribed, the notices and statements required by the Act would be time consuming for each acquiring authority to prepare. This would also lead to inconsistent use of notices that could give rise to confusion and potential errors. The clear intention of the Act is to have these Forms standardised to improve the effectiveness, efficiency and transparency of the Act. Having standard forms reduces compliance costs, as Authorities can use prescribed forms more easily than creating their own documents in each case. Standardised forms also ensure legal consistency and certainty, and the prescribed forms ensure all required information is included.

A number of changes are proposed to the prescribed forms:

- A general revision of the standard text to make them clearer and to improve instructions for completing the forms to ensure all relevant information about an acquisition is clearly set out. Some minor changes have been made to standard text that was not applicable in all acquisitions, and some changes were required due to changes in other legislation.
- The standard form for the notice of acquisition (known as Form 7) is proposed to require more information to be included about the nature of the interest being acquired, the legislation that authorises the acquisition, and the purpose of the acquisition. The changes will promote transparency as the notice is often the only way that the general public is made aware of the acquisition.

Consideration was given as to whether the forms for acceptance of an offer of compensation (Form 11) and a claim for compensation when an interest is not taken (Form 12) should continue to require the landholder to have the forms witnessed by a person authorised to witness to statutory declaration. Witnessing is useful as evidence that the landholder did sign the form, but beyond that, additional requirements for special witnesses or penalties for making false statements are considered no longer necessary. In general further documentary evidence will be required to substantiate any claims for compensation, either by the Authority, or by VCAT or the Supreme Court if the claim is disputed. The prescribed forms are a means to facilitate communication between a landholder and an Authority.

Therefore, the proposed Regulations retain the requirement for these forms to be witnessed, but will no longer require the witness to be someone able to witness statutory declarations. That is, these forms will be able to be witnessed by any adult person.

***Consultation questions:***

- *Do you have any comments on the proposed changes to the prescribed forms? Are there other improvements that could be made?*
- *Do you agree that acceptances of offers and claims for compensation should be able to be witnessed by any adult person, instead of only those able to witness statutory declarations? Could there be unintended consequences of this change?*

## Loans to home owners whose principal place of residence is compulsorily acquired

Compensation available under the LAC Act is intended to compensate a home owner whose principal place of residence is compulsorily acquired for the market value of the interest in the land, any special value to the home owner, any loss attributable to severance, any loss attributable to disturbance, enhancement or depreciation in value based on proposed changes in adjoining land, potential for solatium<sup>4</sup>, associated expenses necessarily incurred because of the acquisition (e.g., legal costs), and interest. The compensation is not merely the market value of the land being acquired, but usually a higher amount to ensure a person is not left any worse off after the acquisition. This includes taking into account disturbance and that the land is acquired without the landholder's consent.

However, the LAC Act recognises that there may be rare situations where the compensation paid is insufficient to enable a home owner whose principal place of residence is compulsorily acquired from purchasing a similar interest in land to be used as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land. It was anticipated this could occur, for example, where there was a large number of compulsory acquisitions occurring simultaneously in the same area, that may push up prices due to a temporary decrease in land supply and increase in land demand in that area.

The LAC Act provides a mechanism for an acquiring Authority to provide a loan to a home owner whose principal place of residence is compulsorily acquired in these circumstances. The Authority may grant a loan (with or without interest) of such amount as the claimant may reasonably require, in addition to the compensation payable, to enable the claimant to purchase such reasonably comparable accommodation.

---

<sup>4</sup> Solatium is a special payment as consolation for the emotional impact of having land acquired (i.e., to provide solace). It is defined as an amount "reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition" and takes account of factors such as the length of time a person has occupied the land, the age of the person, the number and circumstances of people living with the landholder on the property. An amount paid for solatium is limited to no more than 10 per cent of the market value of the land.



The ability to grant loans only applies where the market value of the claimant's interest in the land does not exceed the amount prescribed in Regulations, and the amount of the loan cannot exceed the difference between the market value and the prescribed amount. The current Regulations set the prescribed amount at \$500,000 for the purpose of eligibility for these loans.

These loans are rarely used. Consultation with a number of Authorities that comprise about 90 per cent of compulsory acquisitions over the past ten years indicated that only three loans have been provided during that period.

In the absence of a prescribed threshold in relation to loans to home owners whose principal place of residence is compulsorily acquired, the LAC Act would allow Authorities to make such loans—and allow VCAT and the Supreme Court to compel Authorities to provide such loans—regardless of the market value of the land being acquired. This was not the original intention of the Act, which was to have an upper limit on the value of land in order to ensure that the loans were targeted to cases of hardship.<sup>5</sup>

The Department believes the median house price for metropolitan Melbourne is a relevant guide to setting the threshold to give effect to the original intention of the LAC Act—that loans are used to assist those at the 'lower end' of the market. It is noted that this median house price is used as a reference for setting the threshold, with the knowledge that the median house price would tend to increase during the life of each set of Regulations, reducing the proportion of acquisitions that would remain eligible for the loans to less than the lower 50 per cent of house values. However, by using prices that relate to house prices in metropolitan Melbourne means that a higher proportion of houses in the rest of Victoria would fall under the threshold, as these tend to have lower median market values.

The median house price for Melbourne across all of 2019 was \$720,000. Median house prices rose during 2019 to \$770,000 in December 2019, but then fell to around \$725,000 by the June quarter 2020.<sup>6</sup> This is the latest available published data (as at December 2020), although it is likely that prices have fallen further during 2020. Changes in house prices are highly uncertain in the short term, but likely to generally increase over the next ten years. It is therefore proposed to set the threshold for the market value of a principal place of residence above which loans to home owners whose principal place of residence is compulsorily acquired, are not available at \$750,000.

An alternative approach could be to set the amount lower than the median metro Melbourne house price and include a mechanism in the Regulations for it to increase each year during the life of the Regulations. This could be achieved by using a formula that references data published each year by the Valuer-General, or other index that tends to increase over time (such as the Consumer Price Index). However, the Department considers this would be unnecessarily complex for a provision that is rarely used.

Consideration was also given as to whether there should be any prescribed amount at all—that is, to allow the loans to be used for acquisitions of any value, provided the other criteria are met. However, as parliament decided to retain a monetary threshold, prescribing an amount is aligned to the objective of the Act.

Consultation with acquiring Authorities suggests that raising the threshold to \$750,000 is not expected to see a material increase in the number of loans provided over the forthcoming ten years.

---

<sup>5</sup> The Second Reading Speech referred to this section being to assist “people whose properties are at the lower end of the market” (Assembly Hansard, 8 May 1986, page 2016). Since the commencement of the Act, the threshold has been periodically adjusted to maintain the availability of these loans to properties below average market prices.

<sup>6</sup> *Victorian Property Sales Report June 2020 quarter*—data from Valuer-General Victoria, published December 2020.

**Consultation question:**

- ***Is it reasonable to continue to set the threshold based on the median house price for metropolitan Melbourne? Is there another measure of market value that could be used?***

## Fee for lodgement of notice of intention to acquire land

An Authority must, without delay after the service of a notice of intention to acquire (or an amendment of such a notice), lodge with the Registrar of Titles notice in the form approved under the *Transfer of Land Act 1958* of the notice of intention to acquire or the amended notice together with the prescribed fee.

The current Regulations prescribe a fee of 4.4 fee units. In 2020-21, this equates to \$65.20. For 2019-20 (when the fee also equated to \$65.20<sup>7</sup>), total revenue collected by Land Use Victoria from this fee was around \$12,000. This fee is paid by the acquiring Authority (which is nearly always a government entity).

Under the base case—where there is no fee prescribed in the LAC Regulations—Land Use Victoria could still charge a fee for the lodgement of notices of intention to acquire land under the LAC Act. If there is no specific fee prescribed in the proposed LAC Regulations, Land Use Victoria has the ability to charge a ‘miscellaneous fee’ under the *Transfer of Land (Fees) Regulations 2016*. This miscellaneous fee would be charged in the base case. This miscellaneous fee is 6.65 fee units (currently \$98.50), higher than the fee amount prescribed in the current LAC Regulations.

To consider the appropriate fee amount, Regulatory Impact Solutions sought information from Land Use Victoria on its activities and costs in relation to notices of intention to acquire land under the LAC Act. Land Use Victoria advised that it does not separately measure the time and costs involved in performing its tasks under the LAC Act. This is because all relevant activities are performed by the same staff that process lodgements and other related tasks under a number of different Acts, particularly the *Transfer of Land Act 1958*. Given the small amount of revenue earned from the fee in the LAC Regulations, it was not reasonable to undertake an exercise to separately measure the time and costs of Land Use Victoria attributable to the LAC Act.

Instead, Land Use Victoria considered the nature of the tasks involved under the LAC Act, relative to other types of activities it performs under other legislation. Land Use Victoria considers that the current fee of 4.4 fee units is a reasonable estimate of the average cost of its activities related to notices of intention to acquire land.

General government policy is that fees should be set on a full cost recovery basis unless there is a compelling policy reason for departure from full cost recovery. Therefore, the Department considers the fee for lodgement of notices of intention to acquire land should be set at 4.4 fee units (currently \$65.20), the same as the current Regulations. The dollar amount of the fee will continue to be adjusted automatically in line with the annual determination by the Treasurer of the value of a fee unit under the *Monetary Units Act 2004*.

**Consultation question:**

- ***Do you have any comments on continuing to set the fee for lodgement of a notice of intention to acquire land at 4.4 fee units?***

---

<sup>7</sup> Usually, the amount of a fee unit is increased each year by the Treasurer to reflect general increases in prices in the economy. The value of fee units was not increased in 2020 in responses to the impact of the Covid-19 pandemic.

## Assessment of impacts on competition and small business

The proposed Regulations are not expected to restrict competition. They do not, directly or indirectly, prevent or limit the ability of businesses and individuals to enter and compete within any market, reduce choice of products, lead to higher prices, or reduce opportunities or incentives for businesses to invest and innovate.

Often, small businesses<sup>8</sup> may experience disproportionate effects from regulatory requirements for a range of reasons, including limited resources to interpret compliance requirements, or to keep pace with regulatory changes and the cumulative effect of different requirements. While it is understood that the impact of the proposed Regulations falls predominantly on individuals, accurate data is not available on the extent to which commercial properties and small businesses are affected. However, given the nature of the proposed Regulations, and recognising that small businesses would be compensated for the market value of land and losses incurred, the analysis in this RIS suggests that the proposed Regulations do not disproportionately affect small business.

## Implementation

As the proposed Regulations largely continue the current arrangements, no specific implementation plan is necessary. It is the responsibility of each individual acquiring authority to ensure that the Regulations are complied with for each acquisition. The Department will inform all acquiring authorities of the changes, particularly the revised standard forms and update online information for people whose land is proposed to be acquired, for general information, but also specific guidance on using the prescribed forms (e.g., getting documents witnessed).

## Evaluation

The proposed Regulations will sunset in 2031, at which point they will be reviewed in the context of remaking Regulations at that time.

The Department will evaluate the effectiveness of the Regulations by monitoring issues for which acquiring authorities may seek the advice of the Department, and by reviewing disputes in relation to individual acquisitions that are taken to VCAT or the Supreme Court.

The Department will continue to consult with Land Use Victoria and the Victorian Government Land Monitor to gather any insights on emerging trends in the use of compulsory acquisitions.

## Make a submission

Comments are invited on the proposed Regulations. The release of this RIS is to assist any interested parties to provide views or comments on the proposed Regulations.

All comments must be in writing and received by no later than **5:00 pm on Friday 12 February 2021**.

The preferred method of submission is via email to [lac.regulations@justice.vic.gov.au](mailto:lac.regulations@justice.vic.gov.au).

Submissions can also be mailed to:

Ms Anna Faithfull  
Deputy Secretary, Justice Policy and Data Reform  
Department of Justice and Community Safety  
GPO Box 4356  
Melbourne Vic 3001

---

<sup>8</sup> The ABS defines a small business as a business employing less than 20 people. ABS Cat. 1321.0

Before making the proposed Regulations, all submissions and comments received by the nominated deadline will be considered. If the Regulations are made, as proposed or with amendments, a statement of reasons will be published before the commencement of the Regulations.

All submissions will be treated as public documents unless requested to be confidential.

Copies of this RIS and the proposed regulations are available on the Engage Vic website: [engage.vic.gov.au/proposed-land-acquisition-and-compensation-regulations-2021](https://engage.vic.gov.au/proposed-land-acquisition-and-compensation-regulations-2021).

# 1 Context

## 1.1 Acquiring land for public purposes

Government authorities (or sometimes authorities carrying out functions formerly carried out by the government) from time to time need to acquire land that is privately owned. Many authorities have the power to compulsorily acquire land for a public purpose. These include a range of ministers, government departments, public authorities, utility service providers and municipal councils.

Land may be needed for a wide range of public purposes, such as the construction of roads and rail lines, and gas, electricity or water infrastructure. Land may also be required to provide space for hospitals, schools, public recreation and conservation.

An authority may require the whole land of a private landholder, or only a part of the land. An authority may require full ownership of the land (generally known as freehold interest or fee simple), or may only require a 'lesser' interest in the land (for example, an easement across a piece of land to allow for a pipeline or utility service).

An authority may obtain an interest in land either by purchasing it or by formal statutory acquisition. 'Compulsory' acquisition means that the land can be acquired despite the fact that the landholder may not consent to the acquisition.

Australian States have a Crown prerogative to compulsorily acquire land from private landholders.<sup>9</sup> At common law, there is no automatic right of compensation for the loss of an interest in land as a result of a compulsory acquisition by a state government.<sup>10</sup> However, since at least 1869, the Victorian Parliament has provided a legislative procedure to be followed should the government (or other approved entity) wish to acquire property compulsorily.

The challenge for the regulation of the compulsory acquisition process is to find a balance between the infringement of individual rights to land and the needs of the broader community.

## 1.2 Land Acquisition and Compensation Act 1986

The current legal framework that controls how land may be acquired for public purposes by compulsory process or agreement is the *Land Acquisition and Compensation Act 1986* (LAC Act).<sup>11</sup>

In order for the LAC Act to apply to a particular acquisition, each of the following must be met:

- an entity must be authorised to acquire land<sup>12</sup> compulsorily under separate legislation (the LAC Act is not limited to government agencies or government-owner entities, however, acquisition should be for a public purpose)
- that separate legislation must be expressed as being a 'special Act' for the purposes of the LAC Act
- that special Act must state that the entity is an 'Authority' for the purposes of LAC Act.

Prior to the introduction of the LAC Act, the state's powers in relation to compulsory acquisition were set out in many different pieces of legislation, which often provided inconsistent procedures. The

---

<sup>9</sup> Brown, D., 2009, *Land Acquisition: An Examination of the principles of law governing the compulsory acquisition or resumption of land in Australia* (6<sup>th</sup> ed), LexisNexis Butterworths, Australia, p. 13.

<sup>10</sup> *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399. This is unlike the Commonwealth Government, which has a constitutional requirement to only acquire property on 'just terms': Section 51(xxxi) of the Constitution of Australia.

<sup>11</sup> See Appendix A for further detail on the historical development of land acquisition legislation in Victoria. While enacted in 1986, the LAC Act came into operation on 29 November 1987: Government Gazette 25 November 1987 page 3224.

<sup>12</sup> Pursuant to section 38 of the *Interpretation of Legislation Act 1984*, 'land' includes buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.

purpose of a single Act to govern the process for use of compulsory acquisition powers included a need to provide a uniform procedure, supporting consistency, fairness, certainty and transparency.<sup>13</sup>

An authority can only compulsorily acquire land if the power to do so is set out in its governing legislation, which is deemed for such purpose to be a 'special Act'. In some cases, the special Act requires that the acquiring authority can only compulsorily acquire land with the consent of a relevant minister or the Governor in Council.

There are now around 40 special Acts that give authorities the power to acquire land through compulsory acquisition or agreement, the use of which is subject to the LAC Act.<sup>14</sup>

Theoretically, if any of the above dot points are not met, the LAC Act does not apply to the acquisition. This means, theoretically, that an entity could be given the power to compulsorily acquire land without reference to the LAC Act, in which case the uniform procedures and compensation would not apply.<sup>15</sup>

Acquisitions under the LAC Act do not occur immediately. There are a number of procedural steps that must be taken at defined time periods.

The LAC Act sets out:

- the process for acquiring an interest in land compulsorily or by agreement—viz. prior reservation of the land for a public purpose in a planning instrument, service of a notice of intention to acquire the interest in the land, lodgement of the notice of intention with the Registrar of Titles, acquisition by publication of notice of acquisition in the Victorian Government Gazette and publication in a daily newspaper, and service of a copy of the notice of acquisition and a statement of rights and obligations to all affected parties.
- the process for making and responding to offers of compensation, and obtaining agreement with the owner or occupier as to the terms on which it will enter into possession of the land.
- the principles for calculating compensation for the acquisition—viz., an amount that has regard to the market value of the interest in the land, any special value to the party, any loss attributable to severance, any loss attributable to disturbance, enhancement or depreciation in value based on proposed changes in adjoining land, potential for solatium, associated expenses necessarily incurred because of the acquisition (e.g., legal costs), and interest. Some matters are excluded from being considered. The Act also deals with compensation for losses incurred should an intended acquisition not proceed.
- the process for resolving disputes—either the acquiring authority or claimant may apply to VCAT for determination of a disputed claim, or refer a disputed claim to the Supreme Court of Victoria for determination.

Figure 1 on the following page sets out a brief overview of the acquisition process under the LAC Act. This is not every step set out in the Act, but the common steps that are directly relevant to this RIS.

---

<sup>13</sup> See Appendix A.

<sup>14</sup> Acts most commonly used for acquisitions include the Major Transport Project Facilitation Act 2009, Road Management Act 2004, Project Development and Construction Management Act 1994, Planning and Environment Act 1987, Local Government Act 1989, Water Act 1989. Other Acts with compulsory acquisition powers include Financial Management Act 1994, Education and Training Reform Act 2006, Gas Industry Act 2001, Electricity Industry Act 2001, Pipelines Act 2005 (relates only to easements), Cemeteries and Crematoria Act 2003, Casino Control Act 1991, Conservation, Forests and Lands Act 1987 (which covers acquisitions for the purposes of a number of Acts), Heritage Act 2017, Health Services Act 1988, legislation for universities, project specific legislation (e.g., Eastlink, Sale Station relocation). See Appendix B for a complete list of special Acts and acquiring authorities.

<sup>15</sup> Although, it would be expected that if the LAC Act is not referenced, the Act authorising the acquisition would provide alternative arrangements.

Other steps may also occur in some situations (e.g., referral to responsible authorities and local councils to provide information).

An important process not included in Figure 1 is where an Authority issues a statement that it does not intend to acquire land by compulsory process.<sup>16</sup> This statement can be issued on the volition of the Authority, for example if it desires to only purchase land via ordinary market processes and wants to remove the threat of compulsion from those negotiations.<sup>17</sup> This statement can also be issued by the Authority at the request of a landholder—where an Authority has commenced negotiations to purchase land, the landholder can formally request that the Authority either serve a notice of intention to acquire the land (triggering the formal process in the LAC Act) or issue a statement that it does not intend to acquire the land by compulsory process.<sup>18</sup> Where the statement is issued, the Authority may only acquire the land by agreement with the landholder; however the statement only has effect for 12 months.<sup>19</sup> After that time, the Authority may acquire the land compulsorily by moving directly to the notice of acquisition under the LAC Act—it does not need to first reserve the land<sup>20</sup> nor serve a notice of intention to acquire.

There may also be steps outside the LAC Act that must be followed, such as processes required by the individual special Act, or non-legislative requirements imposed through government policy, such as compliance with the *Victorian Government Land Transactions Policy and Guidelines* and approval by the Victorian Government Land Monitor.

---

<sup>16</sup> See section 7(1)(b) of the LAC Act.

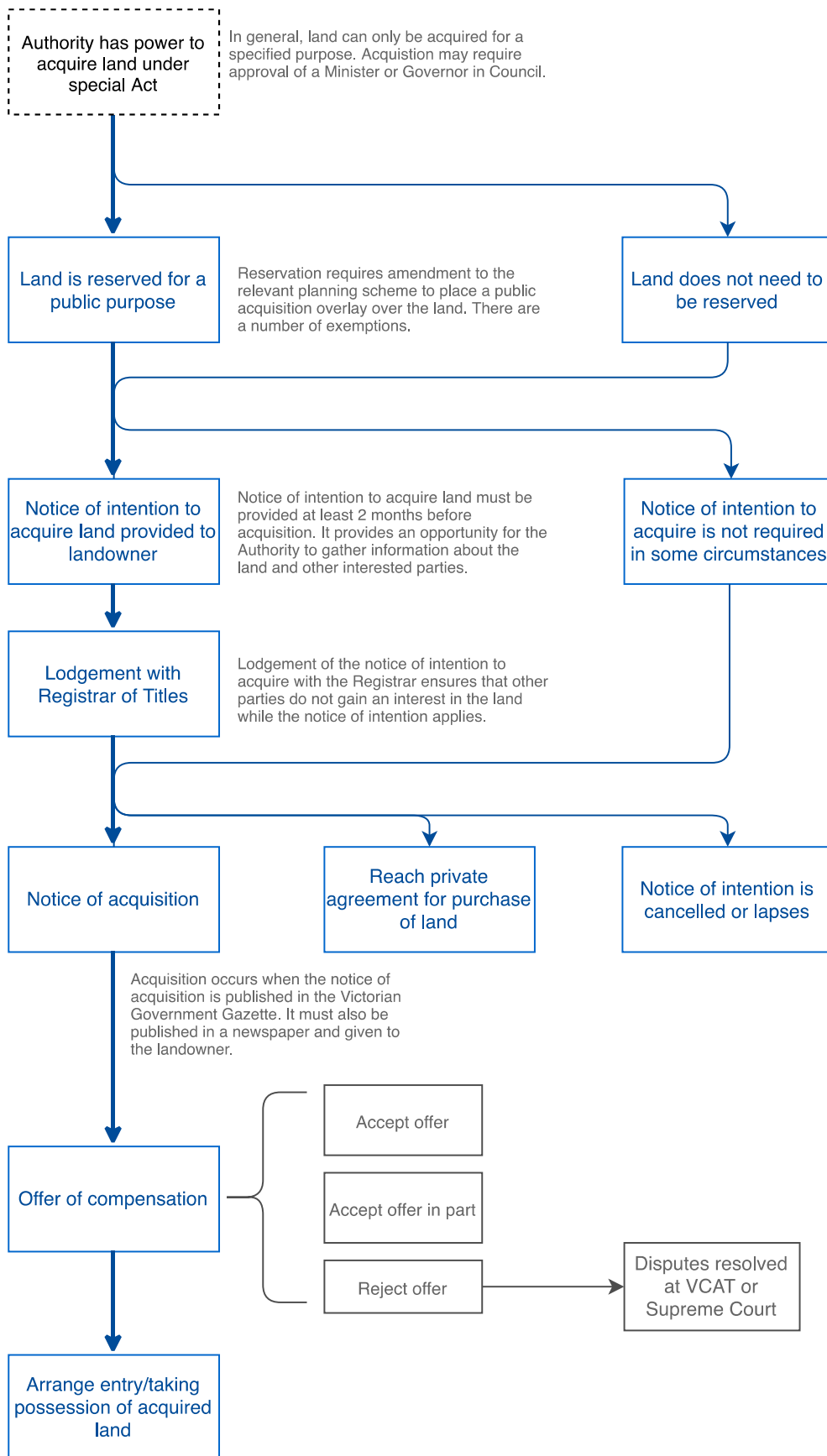
<sup>17</sup> See Morris Report (op. cit.) paragraph 412.

<sup>18</sup> See section 7(6) of the LAC Act.

<sup>19</sup> Although, some special Acts provide for a shorter period, and the Attorney-General may, after consulting the relevant portfolio Minister, revoke the statement earlier if in the public interest.

<sup>20</sup> See section 5(4) of the LAC Act.

**Figure 1: Outline of compulsory acquisition process**





## 1.3 Land Acquisition and Compensation Regulations 2010

The Land Acquisition and Compensation Regulations 2010 (the current Regulations) are statutory rules made under the LAC Act. These Regulations prescribe a number of things that are necessary or convenient for carrying out or to giving effect to the operation of the LAC Act. These fall into four categories set out below.

It is important to note that the matters that are required or authorised to be prescribed in Regulations do not affect the ability of authorities to acquire land or their decision about whether they will acquire land, or the right to compensation or the amount of compensation.

### 1.3.1 Prescribed forms

The LAC Act authorises a number of forms to be prescribed in order to complete the steps in Figure 1.

**Table 1: Prescribed forms in the current Regulations**

| LAC Act requirement   | Forms prescribed in the current Regulations  |
|---|--|
| <b><i>Intention to acquire land</i></b>   |  |
| If an Authority has commenced negotiations to acquire an interest in land, but not yet served a notice of intention to acquire the interest, a person with the interest in the land may by notice <b><i>in the prescribed form</i></b> require the Authority to, within 60 days, serve a notice of intention to acquire the interest; or to serve a statement that it does not intend to acquire the interest by compulsory process (s. 7(6)).  | <b>Form 3</b> sets out a pro-forma notice requesting the Authority to make the decision within 60 days.  |
| A statement under section 7(1)(b)—that an Authority does not intend to acquire an interest in land by compulsory process—must be accompanied by a statement <b><i>in the prescribed form</i></b> setting out the principal rights and obligations of that person (s. 7(1)(b)(ii)).  | <b>Form 2</b> sets out a standard statement in plain English of the rights and obligations of persons in relation to statements made under s. 7(1)(b).   |
| An Authority must serve a notice of intention to acquire an interest in land upon each person who has an interest in the land (s. 6). The notice of intention must specify, <b><i>in the prescribed form</i></b> , title particulars and description of land, the purpose for which the interest is required, the reasons why the land is suitable for that purpose, whether or not the land is reserved for a public purpose or exempt from reservation, the approximate date upon which the Authority wishes to take possession, and request certain information from the landholder (s. 8(1)). | <b>Form 1</b> sets out a pro-forma for this notice. It requires only the information that is specified in the Act.   |
| A notice of intention to acquire must be accompanied by a statement <b><i>in the prescribed form</i></b> setting out the principal rights and obligations under the LAC Act of persons interested in the land proposed to be acquired (s. 8(2)).  | <b>Form 4</b> sets out a standard statement to accompany notices of intention, setting out in plain English the rights and obligations of persons receiving the notice of intention. The prescribed statement also requires the Authority to name the special Act that grants the power of acquisition and assists in understanding the notice of intention. |
| A notice of intention to acquire lapses after 6 months (s. 16) unless extended by agreement (s. 17). However, within that time an Authority may decide to not proceed with the acquisition. If it so decides, it  | <b>Form 5</b> sets out a pro-forma statement to cancel a notice of intention. The form contains only the information required to clearly communicate the cancellation.   |

| LAC Act requirement   | Forms prescribed in the current Regulations  |
|---|--|
| <b><i>Intention to acquire land</i></b>   |  |
| must serve a statement cancelling the notice of intention to acquire upon all persons interested in the land (s. 15). The statement of cancellation must be <b><i>in the prescribed form</i></b> (s. 15(4)(a)).   |  |
| A statement to cancel a notice of intention must be accompanied by a statement <b><i>in the prescribed form</i></b> setting out the rights and obligations of persons upon whom a statement of cancellation is served. (s. 15(4)(b))  | <b>Form 6</b> sets out a standard statement setting out in plain English the meaning of the notice of cancellation and the person's rights in relation to it (i.e., claiming compensation).  |
| <b><i>Acquiring an interest in land</i></b>   |  |
| An Authority formally acquires an interest in land by causing a notice declaring that interest to be acquired to be published in the Government Gazette (s. 19). The notice to acquire must be <b><i>in the prescribed form</i></b> , and contain a description sufficient to identify the interest in land acquired and the land in which that interest subsists. (s. 21).   | <b>Form 7</b> sets out a pro-forma notice of acquisition, requiring the acquiring Authority to state the name of the Authority, the description of land, the description of the interest acquired, date, and authorisation.  |
| Within 14 days of the date of acquisition, the Authority must provide a copy of the notice to the affected landholders, with a statement <b><i>in the prescribed form</i></b> setting out the rights and obligations of the person whose interest has been acquired. (s. 22(b)).  | <b>Form 8</b> sets out a standard statement in plain English of the rights and obligations of persons receiving the notice.  |
| <b><i>Compensation</i></b>  |  |
| Within 14 days of the date of acquisition, the Authority must make an offer of compensation to the landholder. The Act sets out how the compensation offer should be determined and what information about the offer must be given to the landholder. The Act also requires that the offer be accompanied by a statement <b><i>in the prescribed form</i></b> setting out the principal rights and obligations of persons whose interests in land have been acquired (s. 31(4)(c)).   | <b>Form 10</b> sets out a standard statement in plain English of the rights and obligations of persons in relation to the offer of compensation. The current Form 10 also instructs the person how to respond to the offer under s. 33 of the Act.   |
| Within 3 months of receiving an offer of compensation, a person must respond to the offer by either accepting the offer, or accept in part subject to negotiating some elements. (s. 33). If an offer is rejected, or not responded to within 3 months, the matter is in dispute and referred to VCAT or the Supreme Court. Acceptance of an offer in full or in part must be <b><i>in the prescribed form</i></b> , and state the interest acquired and the person's entitlement to that interest, and (if applicable) details to support claim of a different compensation amount. (ss. 34 and 35). | <b>Form 11</b> sets out a pro-forma response to offer. This ensures that a person provides all relevant information required under the Act to make a formal response. It is in the form similar in effect to a statutory declaration (i.e., made subject to penalties for perjury and must be witnessed by authorised witnesses). (See s. 110(2) of the Act.)<br>Form 11 also allows a person to indicate that an offer is rejected, although there is no requirement to respond with a rejection. |
| Where a notice of intention to acquire has been served but the land is ultimately not acquired, or where land has been entered or occupied only temporarily, a person may claim compensation for pecuniary loss or expenses incurred (ss. 46, 47). A claim must be <b><i>in the prescribed form</i></b> , and state the amount of compensation claimed, the relevant  | <b>Form 12</b> sets out a pro-forma notice of claim, containing the information required under the Act. It is in the form similar in effect to a statutory declaration (i.e., made subject to penalties for perjury and must be witnessed by authorised witnesses).  |

| LAC Act requirement  | Forms prescribed in the current Regulations  |
|--|--|
| <b>Intention to acquire land</b>   |  |
| interest in the land, and details on the loss or expenses (s. 48(1)).  |  |
| An Authority must respond to a notice of claim (Form 12) within 3 months (s. 48(2)), accepting, rejecting, or making an alternative offer. The response must be accompanied by a statement <b>in the prescribed form</b> setting out the principal rights and obligations of persons entitled to make a claim (s. 48(4)).  | <b>Form 13</b> sets out a standard statement in plain English of the rights and obligations of persons in relation to claims for compensation when an interest is not acquired.  |
| An Authority or a person claiming compensation may apply to VCAT or refer the matter to the Supreme Court for determination (s. 80). A referral to the Supreme Court must be <b>in the prescribed form</b> (s. 82).  | <b>Form 16</b> sets out a pro-forma notice of referral.  |
| <b>Taking possession</b>   |  |
| Unless agreed otherwise, <sup>21</sup> an Authority can take possession of land used as a principal place of residence or business only after 3 months from acquisition (or sooner under exceptional circumstances). Possession of land not used as a principal place of residence or business can be entered immediately upon acquisition (subject to notice). (s. 26.) If an owner or occupier refuses to give up possession or hinders entry, the Authority may issue a warrant to the sheriff to enforce the possession (s. 28).   | <b>Form 9</b> sets out the form of warrant that must be used.<br>(Section 110 of the Act allows for the regulations to prescribe matters that are necessary or convenient for carrying out or giving effect to the Act.) |
| <b>Other processes</b>   |  |
| If relevant for the purposes of the special Act, an Authority may sometimes need to enter land, including to survey the land or take samples. To enter land, the Authority must serve a notice of intention to enter the land at least 7 days before entry, accompanied by a statement <b>in the prescribed form</b> setting out the rights and obligations of the occupier and owner (as the case may be) (s. 74(2)).   | <b>Form 14</b> sets out a standard statement in plain English of the rights and obligations of persons in relation to notices of entry.  |
| If relevant for the purposes of the special Act, an Authority may sometimes need to temporarily occupy land (not used primarily for residential purposes), including to take earth or other substances, deposit material on the land, take timber, use roads, manufacture materials, or erect workshops and sheds. To temporarily occupy land, the Authority must serve written notice at least 7 days before occupation. The notice must contain a statement <b>in the prescribed form</b> setting out the principal rights and obligations of the occupier and owner (as the case may be) (s. 75(4)(d)). | <b>Form 15</b> sets out a standard statement in plain English of the rights and obligations of persons in relation to notices of temporary possession.   |

<sup>21</sup> The Authority must diligently endeavour to obtain agreement with the owner or occupier as to the terms on which it will enter into possession of the land.

### 1.3.2 Circumstances where land need not be reserved for a public purpose

An Authority must not commence to acquire any interest in land unless the land has first been reserved by or under a planning instrument for a public purpose.<sup>22</sup> Reservation for a public purpose requires amendment to the relevant planning scheme—in general this will involve placing a public acquisition overlay (PAO) over the land required.<sup>23</sup>

There are a number of circumstances where acquisitions may proceed<sup>24</sup> without the land having been reserved for a public purpose:

- Some of these circumstances are listed in the LAC Act itself—Prior reservation is not required if the Authority is not required to serve a notice of intention to acquire that interest due to section 7(1)(a) or (b) of the LAC Act, for any land in an area in respect of which a declaration under section 172(2) of the *Planning and Environment Act 1987* (P&E Act) is made (land required for planning purposes), any land which is declared as special project land under section 201(3) of the P&E Act (for projects of state or regional significance), or any land that is to be acquired under a work-in-kind agreement within the meaning of Part 9B of the P&E Act.
- There are sometimes provisions in a special Act that allow an acquisition without the need to reserve the land—example include section 96 of the *Pipelines Act 2005*, section 128J of the *Casino Control Act 1991*, Schedule 5A of the *Road Management Act 2004*, *EastLink Project Act 2004* and section 118(2) of the *Major Transport Projects Facilitation Act 2009*.<sup>25</sup>
- The LAC Act provides a power for the Attorney General to recommend to the Governor in Council to certify that reservation is not required where reservation is unnecessary, undesirable or contrary to the public interest.<sup>26</sup>
- The LAC Act also provides that the reservation requirement does not apply in respect of prescribed land or land in a prescribed class of land.

The current Regulations prescribe the following classes of land that do not require reservation:

- land to be acquired for a minor road widening or the deviation of a road, where the area and value is less than 10 per cent
- acquisition of an easement that reduces value of the property by less than 10 per cent.

### 1.3.3 Prescribing the fee for the lodgement of notices with the Registrar of Titles

An Authority must, without delay after the service of a notice of intention to acquire (or an amendment of such a notice), lodge with the Registrar of Titles notice in the form approved under the *Transfer of Land Act 1958* of the notice of intention to acquire or the amended notice together with the prescribed fee.<sup>27</sup>

---

<sup>22</sup> Section 5(1) of LAC Act. This use of the term ‘reserved’ in this context is quite separate from its use in other legislation, such as the *Crown Land (Reserves) Act 1978* (where provision is made for Crown land to be reserved for certain purposes, and for its management) or the *Subdivision Act 1988*, which refers to land being set aside as a reserve.

<sup>23</sup> Clause 45.01 of Victoria Planning Provisions provides that the purpose of a PAO is “to identify land which is proposed to be acquired by a Minister, public authority or municipal council”, and to identify that body.

<sup>24</sup> A planning scheme may still need to be amended (or planning permit obtained) before the land can be used for its intended purpose; these exemptions only relate to whether reservation is required before the acquisition.

<sup>25</sup> There have been around 190 acquisitions under the *Major Transport Projects Facilitation Act 2009* since June 2010, or around 8 per cent of all compulsory acquisitions.

<sup>26</sup> During the period of the current Regulations (since 23 June 2010), the Governor in Council has certified 36 exemptions (covering at least 254 individual land parcels) from the requirements for prior reservation.

<sup>27</sup> Section 10(1) of LAC Act.

The current Regulations prescribe a fee of 4.4 fee units. In 2020-21, this equates to \$65.20.<sup>28</sup> For 2019-20 (when the fee also equated to \$65.20), total revenue collected by Land Use Victoria from this fee was around \$12,000 per year on average over the past ten years. This fee is paid by the acquiring Authority.

#### 1.3.4 Loans to home owners whose principal place of residence is compulsorily acquired

Compensation available under the LAC Act is intended to compensate home owners whose principal place of residence is compulsorily acquired for the market value of the interest in the land, any special value to the home owner, any loss attributable to severance, any loss attributable to disturbance, enhancement or depreciation in value based on proposed changes in adjoining land, potential for solatium, associated expenses necessarily incurred because of the acquisition (e.g., legal costs), and interest. The compensation is not merely the market value of the land being acquired, but usually a higher amount to ensure a person is not left any worse off after the acquisition including taking into account disturbance and the fact that the land is acquired without consent.

However, the LAC Act recognises that there may be rare situations where the compensation paid is insufficient to enable a home owner whose principal place of residence is compulsorily acquired from purchasing a similar interest in land to be used as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land. It was anticipated this could occur, for example, where there was a large number of compulsory acquisitions of low value homes occurring simultaneously in the same area, that may deplete the availability of low value housing stock in that area (or artificially push up prices), limiting the ability for such home owners to purchase comparable alternatives with their compensation.<sup>29</sup>

The LAC Act provides a mechanism for an acquiring Authority to provide a loan to a home owner whose principal place of residence is compulsorily acquired in these circumstances. The Authority may grant a loan (with or without interest<sup>30</sup>) of such amount as the claimant may reasonably require, in addition to the compensation payable, to enable the claimant to purchase such reasonably comparable accommodation.<sup>31</sup>

The ability to grant loans only applies where the market value of the claimant's interest in the land does not exceed the amount prescribed in Regulations, and the amount of the loan cannot exceed the difference between the market value and the prescribed amount. The current Regulations set the prescribed amount at \$500,000 for the purpose of eligibility for these loans.

These loans are rarely used. Consultation with a number of Authorities that comprise around 90 per cent of compulsory acquisitions over the past ten years indicated that only three loans have been provided by those Authorities in the past ten years.

### 1.4 Data on compulsory acquisitions

Most Authorities, and in particular local councils and water authorities, advise that most of their land acquisitions are not made under the LAC Act, but are done through buying properties advertised for sale or by negotiation directly with the landholders. Compulsory acquisition under the LAC Act is seen as a last resort where these other avenues are not successful.

---

<sup>28</sup> Most government fees are expressed in terms of a number of 'fee units'. The dollar value of each fee unit is set each year by the Treasurer under the *Monetary Units Act 2004*. For 2019-20 and 2020-21, the value of one fee unit is \$14.81.

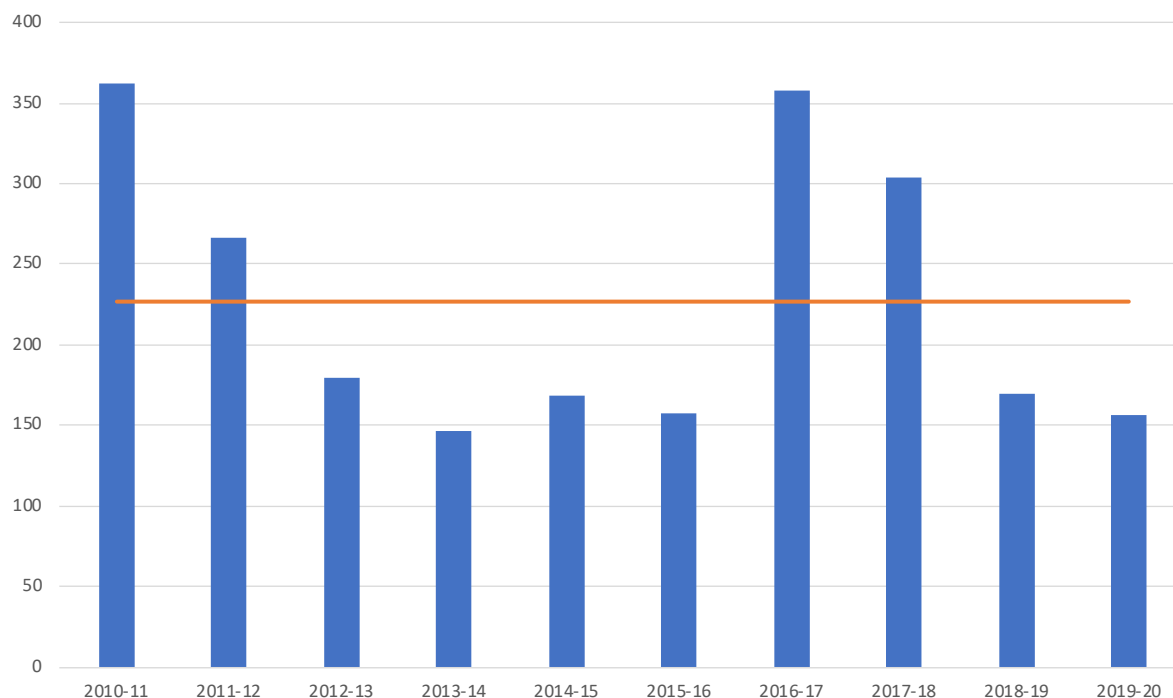
<sup>29</sup> Second Reading Speech, Assembly Hansard, 8 May 1986, page 2016. See also Morris Report (*op. cit.*) paragraphs 660-662.

<sup>30</sup> But the interest rate cannot exceed the rate determined by Order under the Act as applies to interest payable on compensation, which in turn must not exceed the rate of interest fixed under section 2 of the Penalty Interest Rates Act 1983. The rate of interest for the purposes of the LAC Act is currently 10% (the same as the rate fixed under the Penalty Interest Rates Act of 10% — see Gazette G44 11 Nov 1987, page 3036). The interest rate is not within the scope of the Regulations.

<sup>31</sup> Section 45(1) of LAC Act.

Since the commencement of the current Regulations on 23 June 2010, there have been approximately 2,350 notices of acquisition gazetted for acquisitions made under the LAC Act.<sup>32</sup> For the financial years 2010-11 to 2019-20, there have been on average around 230 notices of acquisition each year, although the number can vary widely year to year.

**Figure 2: Number of notices of acquisition gazetted under the current Regulations**



Most of these acquisitions (77 per cent) have involved acquiring the full title of the relevant land (fee simple/freehold and all other interests), while 23 per cent have been for the acquisition of easements (most of which are by water authorities<sup>33</sup>). Acquisition of leasehold interests comprised less than 1 per cent of notices, and there was 1 notice to acquire a caveator's interest.

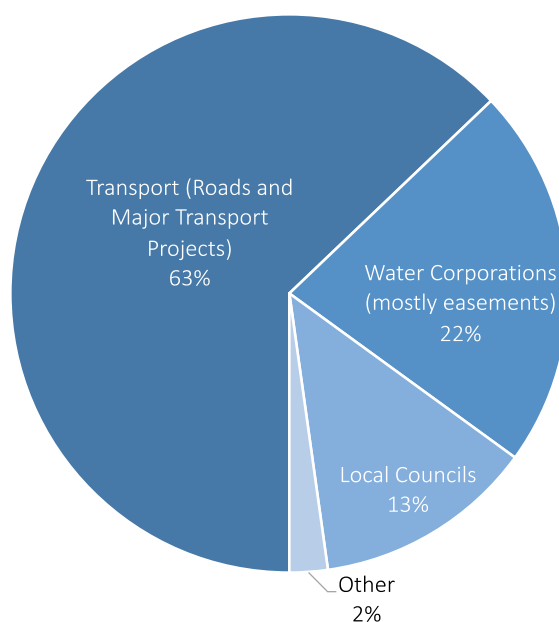
The majority of compulsory acquisitions are for transport purposes. Since June 2010, VicRoads has accounted for 41 per cent of all notices of acquisition, while other major transport projects have accounted for 21 per cent.<sup>34</sup>

<sup>32</sup> As at 3 December 2020. This data is based on a search of gazetted notices. It is possible that some notices were not identified by this search due to search function limitations or minor variations in the text used.

<sup>33</sup> Water corporations account for 94 per cent of all easements acquired across all authorities.

<sup>34</sup> In the past 10 years, major transport projects that have used compulsory acquisition include the North East Link, West Gate Tunnel, Level Crossing Removal, and Melbourne Metro Rail projects.

**Figure 3: Notices of acquisition by authority (2010-2020)**



Land Use Victoria advises that there have been 2,456 notices of intention to acquire land between 1 July 2010 and 30 June 2020. This number is slightly higher than the number of compulsory acquisitions, reflecting that following service of a notice of intention to acquire, the authority and landholder may reach agreement without the need to complete the compulsory acquisition process, or the notice of intention may lapse where an authority decides to not proceed with the acquisition. On average, there are around 20 notices that are cancelled or lapse each year.<sup>35</sup>

There is no aggregated data on how many acquisitions were exempted from the requirements to reserve land prior to acquisition due to the current Regulations. However, feedback from water corporations indicated that nearly all of their 520 acquisitions of easements did not require prior reservation. VicRoads advises that around 15 per cent of its acquisitions did not require reservation due to only a small proportion of the landholder's title being acquired for road widening or deviations, and local councils advise that up to half of their compulsory acquisitions were for minor road widening or deviations and therefore exempt from the reservation requirement.

## 1.5 The current Regulations expire in 2021

The *Subordinate Legislation Act 1994* requires that all statutory rules in Victoria automatically lapse after ten years. This is to ensure that the need for continued regulation is regularly re-examined and regulations remain fit for purpose.

The Land Acquisition and Compensation Regulations 2010 will sunset on 22 June 2021.<sup>36</sup>

This Regulatory Impact Statement (RIS) is being prepared to facilitate public consultation on the proposed Land Acquisition and Compensation Regulations 2021 (the proposed Regulations), which will replace the current Regulations.

The Subordinate Legislation Act requires that proposals for regulations that impose a 'significant economic or social burden on a sector of the public' must be formally assessed in a RIS, whether for new regulations or replacing existing ones. The RIS assessment process aims to ensure that the costs of the regulations are outweighed by the benefits, and that the regulatory proposal is superior to

<sup>35</sup> Note: a small proportion of cancellation notices only cancel part of the notice of intention.

<sup>36</sup> The current Regulations were originally scheduled to sunset in 2020 but were extended under the Subordinate Legislation (Land Acquisition and Compensation Regulations 2010) Extension Regulations 2020.

alternative approaches. While the proposed Regulations do not impose a significant compliance or administrative burden or impose direct financial costs, their connection to a process that significantly affects property rights warrants a RIS to carefully identify and assess the impacts of the proposed Regulations, and support informed and transparent decision making.

As required by the Subordinate Legislation Act, the assessment framework of this RIS:

- examines the nature and extent of the problem to be addressed
- states the objectives of the proposed Regulations
- explains the effects on various stakeholders
- assesses the costs and benefits of the proposed Regulations and compares their impacts to other feasible alternatives.

A further primary purpose of a RIS is to facilitate feedback from stakeholders on the proposed Regulations before they are made.

## 1.6 What problem do the Regulations address?

### 1.6.1 Are the Regulations still needed?

Each of the main elements in the current Regulations—which are proposed to continue in the proposed Regulations largely in the same form—are necessary for the LAC Act to operate effectively and efficiently, avoiding higher costs to the acquiring authorities and landholders, as well as promoting legal and administrative certainty. While the current Regulations deal mostly with procedural or ‘machinery’ matters, an inefficient or uncertain acquisition framework could indirectly delay or obstruct some public infrastructure projects.

#### *Standardised forms*

The procedures in the LAC Act are based on a number of standardised forms being prescribed. While prescribing forms is not strictly required for the Act to operate, if the Forms were not prescribed the notices and statements required by the Act would be time consuming for each acquiring authority to prepare and lead to inconsistent use of notices that could give rise to confusion and potential errors. The clear intention of the Act is to have these Forms standardised to improve the effectiveness, efficiency and transparency of the Act. Having standard forms reduces compliance costs, as Authorities can use prescribed forms more easily than creating their own documents in each case. Standardised forms also ensure legal consistency and certainty, and the prescribed forms ensure all required information is included.

#### *Exemptions from the need to reserve land before acquisition*

The current Regulations’ exemptions from the need to reserve land for a public purpose before acquisition are to ensure the acquisition process is efficient for ‘minor’ acquisitions—for example, road widening that requires only a small part of adjacent land, or easements (which may be for underground pipes or merely to facilitate access across land) that have a small impact on the value of the land. At the time the LAC Bill was being debated in Parliament in 1986, there was concern about what the requirement for reservation in a planning scheme would mean for “acquisitions on a small scale, for example, a splay corner required at an intersection, a limited road widening or a pipeline to be laid inside a property boundary.”<sup>37</sup> Without these exemptions, Authorities would need to go through a lengthy process to reserve the land (amending a planning scheme usually takes a minimum of 6 months but can take up to 12 months or longer), or a separate administrative process to seek an exemption on a case-by-case basis, that would be time consuming and relatively costly compared to

---

<sup>37</sup> Legislative Council, Hansard 20 November 1986, page 1215.



the proportion of a person's land being acquired or affected. The exemptions in the Regulations are necessary for continued efficiency.

#### *Fees for lodgement*

A fee for lodgement of notices of intention to acquire land with the Registrar of Titles is necessary to be prescribed to ensure that Land Use Victoria can recover the costs associated with its activities in relation to such notices. While the fee is paid for the lodgement of notices of intention to acquire land, there are a number of tasks performed by Land Use Victoria under the LAC Act:

- receiving notices of intention to acquire and recording this on the Register or make a map available for inspection (s. 10(2))
- recording amendments to notices (s. 10(3))<sup>38</sup>
- recording lapses and cancellations of notices (s. 10(5))<sup>39</sup>
- writing to proprietors upon lapsed or cancelled notices (s. 10(6))
- receiving and maintaining documents describing land not in a folio (s. 8(3)(b))
- notifying an Authority if it receives any document relating to dealings in land subject to a notice of intention to acquire (s. 12(2)).

All information must also be maintained and made available for inspection. General government policy is that fees should be set on a full cost recovery basis because it ensures that both efficiency and horizontal equity objectives are met.<sup>40</sup> Prescribing a fee for the lodgement of notices of intention to acquire is necessary to meet this policy.

#### *Loans to home owners whose principal place of residence is compulsorily acquired*

In the absence of a prescribed threshold in relation to loans to home owners whose principal place of residence is compulsorily acquired, the LAC Act would allow Authorities to make such loans—and allow VCAT and the Supreme Court to compel Authorities to provide such loans—regardless of the market value of the land being acquired. This was not the original intention of the Act, which was to have an upper limit on the value of land so that loans were targeted to cases of hardship.<sup>41</sup> The remaking of the Regulations is an appropriate time to revisit this prescribed amount to ensure the intended objective of the loans is met over the period 2021 to 2031.

### 1.6.2 Is there opportunity to improve the Regulations?

The Department of Justice and Community Safety has reviewed the current Regulations to ensure they are up to date and being used as intended. The Department believes there is scope to improve the Regulations in the following areas:

- The language in the prescribed forms should be updated to make them clearer where possible.
- Form 7 (notice of acquisition), as gazetted by authorities, often does not provide relevant information, particularly for the general public for whom the gazetted notice is often the only information about the acquisition that is published. Form 7 could better set out the interest being

---

<sup>38</sup> Amendments are rare, with only 12 amendments being notified between 2010 and 2020.

<sup>39</sup> Since June 2010, around 9 per cent of notices of intention to acquire (211) are cancelled or lapse.

<sup>40</sup> DTF, *Cost Recovery Guidelines*, 2013, page 7. *Efficiency* in the context of setting fees relates to the extent to which fees reflect the costs of the service or activity and whether this sends an appropriate price signal about the value of these activities. *Horizontal equity* means people who consume the same (amount of a) service, and/or give rise to the same level of regulatory costs, pay the same fee.

<sup>41</sup> The Second Reading Speech referred to this section being to assist “people whose properties are at the lower end of the market” (Assembly Hansard, 8 May 1986, page 2016). Since the commencement of the Act, the threshold has been periodically adjusted to maintain the availability of these loans to properties below average market prices.

acquired,<sup>42</sup> and clearly state the relevant legislation that authorises the acquisition and the purpose of the acquisition. This would assist in transparency. There have also been cases where authorities have changed the standard wording in the prescribed form—while this does not invalidate the effect of the notice<sup>43</sup>, it does raise concerns in terms of consistency and transparency, particularly where minor changes to the form may inadvertently affect how the interest in the land is described.

- The instructions for how to complete Form 11 (acceptance of offer of compensation) and Form 12 (claim for compensation when an interest is not acquired) make reference to a section in an Act that is no longer current. The Forms refer to section 107A of the *Evidence (Miscellaneous Provisions) Act 1958* (which dealt with who may witness a statutory declaration) as also being the people who may witness Forms 11 and 12. However, the *Oaths and Affirmations Act 2018* which came into operation on 1 March 2019, repealed section 107A of the Evidence (Miscellaneous Provisions) Act. The relevant section is now section 30(2) of the Oaths and Affirmations Act. However, as the Forms are not themselves a statutory declaration, this RIS examines whether any person should be allowed to witness the Forms, or whether the Forms need to be witnessed at all.

As part of this review, feedback was sought from various stakeholders. This included 12 government authorities that collectively account for about 90 per cent of all compulsory acquisitions over the past ten years, including the Department of Transport (including VicRoads), local councils and water corporations. The Department also consulted the Victorian Government Land Monitor, Land Use Victoria, Victorian Government Solicitor’s Office, and a number of law firms that have acted for government Authorities or landholders in compulsory acquisition matters. Views submitted included:

- Acquiring Authorities thought the prescribed forms are relatively easy to complete and are in general useful to provide consistent information to affected landholders. Some legal practitioners noted that in many cases landholders would seek legal or other professional advice. It was noted that in Form 1, the prescribed text and instructions on deleting unnecessary text in relation to the reasons why land might not have been reserved for a public purpose was sometimes unclear.
- Most acquiring Authorities thought the exemptions from the need to reserve land for a public purpose prior to acquisition remain appropriate and are well targeted. One water corporation suggested the exemption that relates for minor road widening could be expanded to include other minor acquisitions for utility infrastructure, such as water reservoirs, and another Authority also suggested it could be expanded to include other ‘minor projects’ not only for the purpose of roads.
- Land Use Victoria advised that the fee prescribed in the current Regulations is broadly sufficient to recover its costs in relation to activities under the LAC Act.
- No specific feedback or views on the loans threshold other than noting it has historically been updated when Regulations are remade to reflect changes in house prices. This in part reflects the ability to provide loans is rarely used.

Some stakeholders noted that when an Authority provides a statement that it does not intend to acquire land by compulsory process under section 7(1)(b) of the LAC Act, the Regulations prescribe a statement of rights and obligations to accompany that statement (Form 2), but do not prescribe a form for the statement itself. This is because the words in the LAC Act itself state that the statement

---

<sup>42</sup> Authorities appear to interpret this differently and provide inconsistent information. The importance of clearly identifying the interest being acquired was highlighted in *Obeid v Victorian Urban Development Authority* [2012] VSC 251 (18 June 2012).

<sup>43</sup> Strict compliance with prescribed forms is not necessary—section 53 of the *Interpretation of Legislation Act 1984* provides as follows: “Where a form is prescribed an Act or subordinate instrument for any purpose, any form in or to the like effect of the prescribed form shall, unless the contrary intention appears, be sufficient in law.”

of rights and obligations must be 'in the prescribed form', but no such requirement exists for the statement stating that the authority does not intend to acquire the land by compulsory process. Despite this, as noted above, statements that are to be 'in the prescribed form' can still be validly made even if no standard form has been prescribed. Further, section 100 of the LAC Act allows Regulations to prescribe any matter that is 'convenient to be prescribed' for carrying out or giving effect to the Act.

Similar comments were raised about notices of intention to enter land under section 74 of the LAC Act, and notices of intention to temporarily occupy land under section 75 of the LAC Act, both of which currently have no prescribed form, although both must be served with an accompanying statement of rights and obligations which are prescribed forms.

Therefore, this RIS considers whether additional forms should be prescribed to be used by an Authority when making a statement that it does not intend to acquire land by compulsory process, and for giving notices of intention to enter or temporarily occupy land.

## 2 What outcome is the Government aiming to achieve?

### 2.1 Objectives of compulsory acquisition

Broadly, the compulsory acquisition process may be viewed as attempting to balance individual rights against the greater good of the community.

Section 20 of the *Charter of Human Rights and Responsibilities Act 2006* states that:

“A person must not be deprived of his or her property other than in accordance with law.”

The current legislative framework for compulsory acquisition of land within Victoria—the *Land Acquisition and Compensation Act 1986*—was established to consolidate and codify the law relating to acquisition. At the time of its introduction, the stated objectives of the Act were to:<sup>44</sup>

- establish uniform practices in the course of compulsory or negotiated acquisition of land
- establish a system of land acquisition which is equitable to all landholders and which does not impose such burdens on Government so as to prevent proper planning and public sector activity
- ensure certainty in the practices of land acquisition
- encourage a co-operative rather than a confrontational relationship between Government and landholder
- establish a speedy system of resolution of disputes concerning acquisition of interests in land.

Parliamentary debate drew attention to the previous legislative framework being complex and intricate, with the new Act’s primary purpose to ensure the system of land acquisition is fair and equitable to affected landholders.<sup>45</sup> The development of the LAC Act was also framed within the context of increased expectations around administrative accountability and transparency.<sup>46</sup>

### 2.2 Objectives for this RIS

As the Regulations deal with a number of minor components (that have very little direct interaction with each other), there is no single overarching objective that applies to the Regulations. The objectives that relate to the different parts of the Regulations are as follows:

| Element of Regulations  | Objectives   |
|---|--|
| Exemptions from the requirement to reserve land for a public purpose prior to acquisition | <ul style="list-style-type: none"><li>• Efficiency of the acquisition process</li></ul>  |
| Prescribed forms  | <ul style="list-style-type: none"><li>• Efficiency of the acquisition process</li><li>• Promote uniform practices (including minimising scope for disputes), certainty and transparency</li><li>• Ensure private landholders are well informed of their rights and obligations</li></ul> |
| Loans to home owners whose principal place of residence is compulsorily acquired          | <ul style="list-style-type: none"><li>• Ensuring equity for home owners at the lower end of the market whose principal place of residence is compulsorily acquired</li></ul>   |

<sup>44</sup> Second Reading Speech on the Bill, Legislative Assembly, 8 May 1986 (Hansard, p 2013).

<sup>45</sup> Legislative Assembly Hansard, 29 October 1986, p. 1681.

<sup>46</sup> Morris Report (op. cit.) paragraph 310.

|                               |  |
|-------------------------------|--|
| Fees for lodgement of notices | <ul style="list-style-type: none"><li>• Ensuring that fees transparently reflect the cost of activities undertaken by the Registrar of Titles related to compulsory acquisitions</li></ul> |
|-------------------------------|--|



### 3 Identification of options and assessment

This Chapter considers each part of the proposed Regulations in turn, discussing the feasible options to address the problems and opportunities for change identified in the Chapter 1, and assessing which options are preferred.

#### 3.1 Prescribed forms

The procedures set out in the LAC Act anticipate on a number of standardised forms being prescribed.

If no standardised forms are prescribed in the Regulations, the procedures in the Act could still be undertaken, albeit parties preparing the relevant notices or statements would need to satisfy themselves of the information needed to be included in the notice or statement to meet the requirements of the Act. This is because it is recognised that a prescribed form is made with the object of setting out the format and providing a useful mode of giving information, but not essential to ensuring a notice gives the information required by the Act.<sup>47</sup> The Act would be read as if there is an implied 'if any' after the requirement that notices must be in a prescribed form.<sup>48</sup>

However, under the base case (where no forms are prescribed), it would be more time consuming for each acquiring authority to determine what information needed to be included in each notice or statement, there would be inconsistencies and risk of errors in the information provided, and a risk of notices not being valid.

With the LAC Act anticipating that these Forms will be prescribed, the clear intention of having these Forms standardised is to improve the effectiveness, efficiency and transparency of the Act. Having standard forms reduces compliance costs, as Authorities can use prescribed forms more easily than creating their own documents in each case. Standardised forms also ensure legal consistency and certainty, and the prescribed forms ensure all required information is included. This also assists landholders.

An alternative considered by the Department was to issue standardised pro-formas for Authorities to use, but they would not be mandated by being prescribed in the Regulations and therefore it would be up to each Authority to decide if they use them. An advantage of this approach would be that the pro-formas could be updated more easily if required. However, the Department considers that having a consistent approach across all compulsory acquisitions is important, given the significance of the process to the property rights of landholders. In compulsorily acquiring property without consent, the Department considers that it is important for the information provided to landholders be as complete and transparent as possible, and consistency helps achieve this.

The forms themselves create no new regulatory burden (other than as noted below). The information required to be entered into the forms is only what it required already by the Act.

However, there is scope to improve the forms to generally make them clearer, easier to use (to make sure the correct information is included by acquiring Authorities), and more transparent. The Department has undertaken a re-write of the forms for this purpose.

Aside from minor wording changes in most of the forms, a key change is proposed for the notice of acquisition (Form 7). It is proposed that this form, in addition to the information required to be

---

<sup>47</sup> *Rowson v McClure* and VCAT [2013] VSC 140 (27 March 2013)

<sup>48</sup> *Catlow v Accident Compensation Commission* [1989] VicRp 19; [1989] VR 214 (11 August 1988); citing *Downey v Pryor* [1960] HCA 49; (1960) 103 CLR 353, at 362; and *Denning v Insurance Commissioner of State Motor Car Insurance Office* [1966] VicRp 66; [1966] VR 471, at 476.

included by the LAC Act, also include information about the power of the authority to acquire the land (referencing the relevant special Act), the purpose of the acquisition, when the notice of intention to acquire was served (or the reasons why it was not served), and a more consistent approach to describing the interests being acquired. This additional information would impose no additional burden on the acquiring Authority (it is all information that is readily available), but would significantly improve the transparency of the notices (particularly for the general public, for whom the notice of acquisition is the only published information about the acquisition) and legal certainty.<sup>49</sup>

No further options in terms of the content of the forms is considered in this RIS. However, interested stakeholders may wish to comment on the proposed revised forms.

### 3.1.1 Witnessing of documents

Form 11 (acceptance of offer of compensation) and Form 12 (claim for compensation when an interest is not acquired) impose an additional regulatory burden by requiring these statements to be witnessed by someone authorised to witness statutory declarations. Completion of the form itself by the person entitled to compensation is a requirement of the LAC Act; only the requirements for a witness to the forms is an additional burden imposed by the current Regulations.<sup>50</sup>

Options for consideration for the proposed Regulations are:

- Option 1A: retain the current requirement for the statements to be witnessed by someone authorised to witness statutory declarations (the instructions in the form would be changed to refer to the new *Oaths and Affirmations Act 2018*)
- Option 1B: retain the current requirement that the statements be witnessed, but could be witnessed by any adult person
- Option 1C: remove the requirement that the statements must be witnessed.

The regulatory cost of the witness requirements is not large. The cost can be measured in terms of the additional time a person completing the form would need to spend to arrange for the form to be witnessed, plus the time of the witness to actually witness and sign the document. If the witness can be any person<sup>51</sup>, this is estimated at a combined additional time cost of 5 minutes relative to no witness requirement. If the witness must be a specialised witness (the same as for witnessing statutory declarations), the estimated combined additional time is 30 minutes, largely reflecting the time needed to visit another location such as a pharmacist, post office or police station.

There are many different ways to place a value on this additional time. The value to the person involved is the opportunity cost of having additional leisure time or option to do other income-generating activities. A common proxy value for this time is the current wage rate.<sup>52</sup> The current value for this is \$45 per hour.<sup>53</sup> This implies the total additional cost per annum associated with the witnessing of Forms 11 and 12 are \$1,300 under Option 1B and \$7,760 under Option 1A.<sup>54</sup>

---

<sup>49</sup> Previous claims as to whether acquisitions have been valid have involved uncertainty about the source of acquisition power (some authorities have multiple sources of power, but they have different requirements) (See *Mayberry v Mornington Peninsula Shire Council* [2019] VSC 623 (16 September 2019)), and dispute about what interests were actually acquired when the descriptions of interests in the notice was not sufficiently specific (See *Obeid v Victorian Urban Development Authority* [2012] VSC 251 (18 June 2012)).

<sup>50</sup> Section 110(2) of the LAC Act allows a regulation to require that some or all of the particulars required to be given in any prescribed form be “verified by statutory declaration or otherwise.”

<sup>51</sup> Likely to be another adult living in the same household.

<sup>52</sup> Victorian Regulatory Change Measurement Manual, November 2016: The current wage rate based on ABS average weekly earnings data should be used to value the time for individual’s leisure activities.

<sup>53</sup> Based on average weekly ordinary time earnings for full-time employees in Victoria, May 2020, of \$1712.50 (ABS 6302.0 13 August 2020); and an average of 38 hours ordinary time worked per week for full-time employees.

<sup>54</sup> These are the total costs for 345 forms that would need to be witnessed under each option per annum. This is based on the number of notices of acquisition of around 230 per year, increased by 50% to allow for those cases where there may be

This is a relatively small cost.

Witnessing documents that have legal consequences is important. A witnessed document provides an additional level of confidence, for example:

- of the identity of the signatory
- that the signatory has decision making capacity
- that there is no defect such as undue influence, duress or unconscionable conduct apparent in the transaction
- that the signatory is signing freely and voluntarily.

Documents like deeds and wills are required to be witnessed, but can be witnessed by any adult person. There are more stringent requirements for who can witness other documents such as affidavits, powers of attorney, statutory declarations, and mortgages. There are even further requirements around certification of the identity of people wanting to lodge or register dealings in land. Documents like statutory declarations have more stringent requirements because they are often relied on as evidence of statements made in them, and where there are significant penalties for making false statements.

Forms 11 and 12 deal with accepting an offer of compensation or providing details to an Authority about a claim for compensation. In general further documentary evidence will be required to substantiate any claims for compensation, either by the Authority, or by VCAT or the Supreme Court if the claim is disputed. The prescribed forms are a means to facilitate communication between a landholder and an Authority. Witnessing is useful as evidence that the landholder did sign the form, but beyond that, additional requirements for special witnesses or penalties for making false statements are considered no longer necessary.

Therefore, the proposed Regulations retain the requirement for these forms to be witnessed, but will no longer require the witness to be someone able to witness statutory declarations. That is, these forms will be able to be witnessed by any adult person.

### 3.1.2 Prescribing new forms for statements and notices required under the Act

The LAC Act provides that an Authority may serve on the landholder a statement in writing that it does not intend to acquire the land by compulsory process.<sup>55</sup> The Authority may make this statement on its own volition, or if formally requested by the landholder after negotiations have commenced it must either make such a statement or else serve a notice of intention to acquire the land.

The LAC Act requires this statement to be in writing, but otherwise there are no requirements on what the statement must contain. The current Regulations do not prescribe a standard form for this purpose.<sup>56</sup>

Similarly, there are currently no prescribed forms for notices of intention to enter land under section 74 of the LAC Act, or notices of intention to temporarily occupy land under section 75 of the LAC Act, although both must be served with an accompanying statement of rights and obligations which are prescribed forms. The LAC Act requires no particular information to be included in a notice of intention to enter land, although the LAC Act spells out specific information that a notice to temporarily occupy land must contain.

---

more than one person offered compensation under a single notice of acquisition, and a small number claiming compensation under Form 12.

<sup>55</sup> The effect of this statement only prevents the use of compulsory acquisition for 12 months (although some special Acts shorten this period) and the Attorney-General may, after consulting the relevant portfolio Minister, revoke the statement if in the public interest.

<sup>56</sup> Although the Regulations do prescribe a standardised statement of rights and obligations that must accompany the statement: s. 7(1)(b)(ii); Form 2 of the current Regulations.

The Department does not consider the lack of these statements and notices being prescribed forms is leading to any adverse outcomes. There is no further specific information that would need to be included beyond what is already set out in the LAC Act. It is also noted that the statement of principal rights that must accompany these statements and notices—which is also being updated in the new Regulations—already adequately explains the effect of the statement or notice. The Department considers that including additional prescribed forms for these purposes would be introducing additional complexity that is not needed to fix any existing problem. The Department therefore proposes to not prescribe any new forms for this purpose, although stakeholder views are invited on this matter.

**Consultation questions:**

- *Do you have any comments on the proposed changes to the prescribed forms? Are there other improvements that could be made?*
- *Do you agree that acceptances of offers and claims for compensation should be able to be witnessed by any adult person, instead of only those able to witness statutory declarations? Could there be unintended consequences of this change?*
- *Would it be beneficial to prescribe a standard form for when Authorities make a statement that it does not intend to acquire land by compulsory process? Or prescribing standard forms for notices of intention to enter or temporarily occupy land?*

### 3.2 Acquisitions not requiring prior reservation for a public purpose

Under the base case—where there are no prescribed classes of land in the Regulations that remove the requirement for prior reservation—minor acquisitions for road widening or easements that have only a minor impact on the value of properties would be required, under section 5(1) of the LAC Act, to obtain prior reservation for a public purpose in a planning scheme. Amending planning schemes can be a lengthy and costly process.

That said, there remains an ability under section 5(3) of the LAC Act for the Governor in Council to certify, on the recommendation of the Minister administering the LAC Act (currently the Attorney-General), that reservation is not required for particular land where it is determined that reservation is “unnecessary, undesirable or contrary to the public interest”. It is likely that, in most cases, the rationale for including exempt classes of land in the current Regulations would also support the granting of a certificate by the Governor in Council on the grounds of public interest if these classes of land were not prescribed in the Regulations. However, this would involve a considerable additional workload for the Department and the Minister to consider each exemption on a case-by-case basis. In the past ten years, the Governor in Council has made 36 certifications under section 5(3) of the LAC Act; but there have been around 800 acquisitions within the exemption in the current Regulations over the same period. Certifying each of these acquisitions individually would add substantial time and costs.

#### *Rationale for requiring reservation prior to acquisition*

When the LAC Act was introduced, it was considered that as a general principle only reserved land should be compulsorily acquired. As well as ensuring that any amendment meets the government’s planning principles and policies,<sup>57</sup> these requirements were designed to ensure that any person who may be affected by a proposed amendment (either as the owner or occupier of land which is to be

---

<sup>57</sup> The Morris Report argued that requiring formal reservation before a compulsory acquisition of land would also strengthen the planning process by ensuring greater co-ordination between specific purpose authorities and those responsible for overall land use planning.



the subject of changed planning scheme provisions) or who may be affected by changes on other land, is aware of the proposal and has the opportunity to make a submission about the proposal.

There can sometimes be a long period of many years between the recognition that an area will be needed for a public purpose and the actual acquisition of that land. Formal reservation prior to acquisition enables control of the use and development of land that will eventually be acquired, so that the acquiring authority is not faced with the need to compensate owners of buildings and works constructed on that land after the need for its acquisition has been recognised. Where land is subject to a public acquisition overlay (POA), all further use, development or subdivision of the land will generally require a planning permit. Permit applications must be referred to the acquiring authority.

The reservation requirement was also aimed at efficiency of the overall acquisition process. The report to government upon which the requirement was based (Morris Report<sup>58</sup>) recommended that the adoption of this requirement could serve to eliminate many preliminary legal steps to the compulsory acquisition process that were part of the acquisition process prior to the LAC Act. Because the reservation process resulted in designating particular land for a particular public purpose, there would be no need to continue to obtain the consent of the Governor in Council or Minister for Planning at the time of the acquisition if land was already reserved in a planning scheme or overlay.

Reservation also allows owners of land to plan in the knowledge that the land is proposed for eventual acquisition and can, in some cases, be compensated for subsequent loss. Compensation is payable only when a loss occurs (for example, the refusal of a planning permit on the ground that the land is required for a public purpose, or upon sale of the property).

Further, the reservation process also provides the landholder with additional opportunities to contest the decision to acquire their land,<sup>59</sup> through the consultation processes afforded under the *Planning and Environment Act 1987* (P&E Act).<sup>60</sup> The requirement for the reservation of land was included in the LAC Act when it was enacted in 1986 as a means of protecting the interests of persons whose interest in land would be affected by public acquisition.<sup>61</sup> The Morris Report noted that the reservation process provided the landholder with an opportunity to contest the decision to acquire the land and brought into play compensation provisions under the then applicable planning legislation giving a landholder relief before the land was ultimately acquired.

The P&E Act provides a number of opportunities in the process leading to the adoption and approval of a planning scheme amendment for persons to make submissions about the proposed amendment. In particular:

- section 21(1) provides that ‘any person’ may make a submission to the relevant planning authority about a planning scheme amendment (of which notice has been given under s. 19)<sup>62</sup>
- section 22 requires the planning authority to consider all submissions made on or before the date set out in the notice
- section 23(1) provides that after considering a submission which requests a change to the amendment, the planning authority must either change the amendment in the manner requested, refer the submission to a planning panel or abandon the amendment

---

<sup>58</sup> Morris 1983, op cit.

<sup>59</sup> This purpose was noted in the 1983 Morris Report (page 21), which was the foundation report for the new LAC Act.

<sup>60</sup> Planning schemes are amended under the Planning and Environment Act. This Act imports a raft of public participation opportunities and contemplates a lengthy process of consultation with, in particular, affected landholders.

<sup>61</sup> *Melbourne Water Corporation & Yarra Valley Water Corporation v Caligiuri* [2020] VSCA 16 (13 February 2020)

<sup>62</sup> Notice of a proposed amendment must be given to owners and certain occupiers of land who may be materially affected by the amendment: 19(1B). The amendment must be made available for inspection during office hours for any person to inspect: s 18.

- where a panel is appointed, it must consider all submissions referred to it and give a reasonable opportunity to be heard to, relevantly, any person who has made a submission referred to it.

The requirement for the reservation of land thus imports a raft of public participation opportunities and contemplates a lengthy process of consultation with, in particular, affected landholders. Further, where the amendment to a planning scheme involves reservation for a public purpose (as is the case required by the LAC Act), there are additional protections in the P&E Act for affected landholders.<sup>63</sup>

*The rationale for exemptions from this requirement*

When the LAC Act began, it was recognised that there was a need to provide for cases where a prior reservation for a public purpose should not be required.

Amendments to planning schemes can be lengthy. Even without the use of a Panel, the process can take around six months before the amendment is in place that would allow an acquiring Authority to commence the acquisition process under the LAC Act. If a Panel is required, this timeline can extend to more than nine months. (See Appendix D for an overview of the process for amending planning schemes.)

As well as time, the reservation process is costly. Fees for amendment of planning schemes can be up to \$45,000 (not including additional fees should a Panel be required).<sup>64</sup> While these fees may not be payable for all amendments that reserve land for a public purpose,<sup>65</sup> it reflects the typical costs to a planning authority of the work involved in preparing and adopting an amendment. There are costs to other public authorities that need to consider proposed amendments, and costs associated with the Minister for Planning's decisions. There are also costs to members of the public who spent time examining a proposed amendment and make a submission.

The LAC Act allows for a range of exemptions from the reservation requirements, recognising that the time and cost of the reservation process is in some cases undesirable. This may be because there has already been a separate process to determine the appropriate land to be used and consultation with affected landholders or the general public, making the process of amending the planning scheme prior to acquisition a duplication of effort. The ability for exemptions also recognises that there may be circumstances where the reservation process is 'unnecessary, undesirable or not in the public interest' to occur prior to acquisition. This might include where there is urgency in acquiring the land.

Of relevance for this RIS, the exemptions from the prior reservation requirement in the current Regulations are aimed at improving efficiency. Certain 'minor' acquisitions are thought to have only a small impact on the value of the landholder's interest in the land. The type of acquisitions that are exempted are limited to road widening or deviation of a road that requires less than 10 per cent of a person's land, or an easement over the land, that in most cases would not have a material impact on how the land can continue to be used by the landholder.

The Morris Report specifically considered that easements were a type of acquisition that would be usually certified as not requiring reservation.<sup>66</sup>

While other exemptions from the reservation requirement are considered on a case-by-case basis, or arise because of specific legislation, the exemptions in the current Regulations are based on a general

---

<sup>63</sup> For example, where the amendment provides for the reservation of land for a public purpose, there is no exception to the requirement to notify the owner of affected land that is available in other circumstances (s. 20(3)(a)(i)). Also, s. 19(5) provides that the failure of a planning authority to give notice does not prevent the adoption or approval of the amendment, however s. 19(6) means this does not apply to a failure to notify an owner of land about the preparation of an amendment which provides for the reservation of that land for a public purpose.

<sup>64</sup> Planning and Environment (Fees) Regulations 2016.

<sup>65</sup> Payment of fees depends on who is requesting the amendment and who is the relevant planning authority.

<sup>66</sup> Note: the Morris Report advocated for the ability for the Attorney General to exempt the reservation requirement, but did not specifically anticipate classes of land being prescribed in Regulations for this purpose.

assessment that the nature of the acquisitions within the scope of the exemption are of a kind and extent that make the reservation process unwarranted. In particular:

- Acquisitions that have only a small impact on the value of a property or require only a small part of the property are unlikely to have a significant impact on the landholders enjoyment of the property. The landholder is compensated under the LAC Act for the loss in value (and other impacts) but otherwise use of the property by the landholder is largely unaffected.
- For some types of acquisitions—in this case for road widening and easements for access to water infrastructure—consultation on the use of land for a public purpose is unlikely to result in any change to the land needed to be acquired for the project. While the reservation process may provide an opportunity for landholders to object to acquisition of their land, there will usually be no feasible alternatives for the public authority. There would be only limited public value in the reservation process in these circumstances. The requirement of the reservation process before these types of acquisitions is clearly not an efficient use of time or money.<sup>67</sup>

#### *Options for exempt classes of acquisitions*

The proposed Regulations continue to prescribe classes of land that may be acquired under the LAC Act without the land having been reserved for a public purpose prior to the acquisition.<sup>68</sup> These are limited to acquisitions of land required for road widening or deviation of a road, and for easements. They are further limited to acquisitions as defined in reference to the proportion of land affected and/or in reference to the value of the land.

The exemptions in the current Regulations are limited to:

- land to be acquired for a minor road widening or the deviation of a road, where the area of the land to be acquired is less than 10 per cent of the total area, and the total value of the interest in land to be acquired is less than 10 per cent of the value of the property
- acquisition of an easement that reduces value of the property by less than 10 per cent.

The Department considered whether the threshold amounts (i.e., 10 per cent of area or value) should be changed. Any change to the thresholds is a subjective exercise, requiring judgement to balance the trade-off between efficiency of the acquisition process and the ability for landholders to be consulted through the reservation process. A lower threshold would result in more acquisitions needing to first amend planning schemes to reserve the land for a public purpose, for which the Department believes would have limited value in the decisions to acquire land. A higher threshold would allow more land to be acquired without reservation, however as a greater proportion of a person's land is acquired, it would become more important for those landholders to have the opportunity to be heard through a formal consultation process, as there is a higher likelihood that the acquisition will materially affect the enjoyment of their land.

In preliminary consultation with acquiring Authorities and legal practitioners, there was no view expressed that the thresholds were too high or too low. The Department is not aware of undesired or unforeseen consequences arising from the current exemption thresholds. The Department therefore proposes to retain the current thresholds in the proposed Regulations.

One water corporation suggested that the exemption could be expanded to also apply to acquisitions for the purpose of other utility infrastructure, such as water reservoirs, within the same limits of being less than 10 per cent of the land acquired and less than 10 per cent of the property's value.

---

<sup>67</sup> While the exemption from the reservation requirement effectively removes the right of a landholder to be heard or object to a planned acquisition, this is not a denial of natural justice (see *Melbourne Water Corporation & Yarra Valley Water Corporation v Caligiuri* [2020] VSCA 16 (13 February 2020)).

<sup>68</sup> Note: a planning scheme may still need to be amended, or planning permit granted, before the land can be used for its intended public purpose. These exemptions only relate to whether this is required before the acquisition.

Other water corporations did not raise this, noting that the exemption already applies to easements (which comprise most of the compulsory acquisitions by water authorities), and that purchase of freehold land by water authorities is more likely to be done outside of the LAC Act (i.e., by negotiated agreement). Another Authority also suggested expanding the exemption to any ‘minor project’ (i.e., not limited to road widening or deviations). However, this would be difficult to define, and hence may lead to unintended misuse of the exemption. The Department notes that for particular types of projects there may already be exemptions provided under the respective special Acts.<sup>69</sup> The Department therefore considers that if there is a need for an exemption in these circumstances, it is more appropriate to consider the exemption under section 5(3) of the LAC Act on a case-by-case basis rather than making a general exemption.

**Consultation questions:**

- ***Do you think the current exemptions from the need to reserve land for minor acquisitions should be continued?***
- ***Should the thresholds for exemptions (less than 10 per cent of land area and less than 10 per cent of value) be increased or decreased? If so, Why?***
- ***Should the types of acquisition within the scope of the exemption be expanded, for example for water infrastructure or other projects? What would be the consequences of this?***

### 3.3 Fee for lodgement of notice of intention with the Registrar of Titles

Under the base case—where there is no fee prescribed under the Regulations—Land Use Victoria could still charge a fee for the lodgement of notices of intention to acquire land under the LAC Act. If there is no specific fee prescribed in the proposed LAC Regulations, Land Use Victoria has the ability to charge a ‘miscellaneous fee’ under the Transfer of Land (Fees) Regulations 2016.<sup>70</sup> This miscellaneous fee would be charged under the base case. This miscellaneous fee is 6.65 fee units (currently \$98.50), higher than the fee amount prescribed in the current Regulations.

All options considered in this RIS would charge a lower fee than the base case.

To consider the appropriate fee amount, Regulatory Impact Solutions sought information from Land Use Victoria on its activities and costs in relation to notices of intention to acquire land under the LAC Act. Land Use Victoria advised that it does not separately measure the time and costs involved in performing its tasks under the LAC Act. This is because all relevant activities are performed by the same staff that process lodgements and other related tasks under a number of different Acts, particularly the *Transfer of Land Act 1958*. Given the small amount of revenue earned from the fee in the LAC Regulations, it was not appropriate to undertake an exercise to separately measure the time and costs of Land Use Victoria attributable to the LAC Act.<sup>71</sup>

Instead, Land Use Victoria considered the nature of the tasks involved under the LAC Act, relative to other types of activities it performs under other legislation. The typical fee for other similar lodgements under the Transfer of Land Act is 3.32 fee units (currently \$49.20). Land Use Victoria advised that the time and effort involved in receiving and recording on the Register a notice of intention to acquire land under the LAC Act is broadly the same as receiving and recording notices under other Acts. However, unlike other Acts (which provide for a range of additional fees for

<sup>69</sup> For example, s. 118(2) of the *Major Transport Projects Facilitation Act 2009*, s. 96 of the *Pipelines Act 2005*, or projects of state or regional significance declared under s. 201(3) of the *Planning and Environment Act 1987*.

<sup>70</sup> Regulation 7 prescribes a fee for “lodgment with the Registrar of an instrument or application for which a fee is not specified in these Regulations or in any other Act or Regulation.” (‘instrument’ includes every document registered or capable of registration under the Transfer of Land Act or in respect of which any recording is, by this Act or any other Act, directed, required or permitted to be made in the Register—*Transfer of Land Act 1985*, section 4.)

<sup>71</sup> That is, the time and effort to undertake the measurement would be too high relative to the likely costs being measured.

subsequent activities), the fee prescribed in the LAC Regulations must also cover Land Use Victoria’s costs of additional related tasks; as noted in Chapter 1, these additional activities include recording amendments to notices, recording lapses and cancellations of notices, writing to proprietors upon lapsed or cancelled notices,<sup>72</sup> and notifying an Authority if it receives any document relating to dealings in land subject to a notice of intention to acquire. Therefore, the costs to Land Use Victoria of receiving a notice of intention to acquire land under the LAC Act are likely to be higher than registering a typical notice under other Acts. Land Use Victoria considers that the current fee of 4.4 fee units is a reasonable estimate of the average cost of its activities related to notices of intention to acquire land. Land Use Victoria considers that the ‘miscellaneous fee’ of 6.65 fee units under the Transfer of Land (Fees) Regulations 2016 would be too high.<sup>73</sup> The Department has relied on Land Use Victoria’s assessment of these costs in considering options for setting the appropriate fee.

The options considered are:

- Option 3A: align fee with the typical fee for other similar lodgements of notices under the Transfer of Land Act—3.32 fee units (currently \$49.20). This would likely only partially recover Land Use Victoria’s costs associated with the LAC Act (in the order of 75 per cent).
- Option 3B: retain the current fee of 4.4 fee units (currently \$65.20). This more likely reflects closer to a ‘full cost recovery’ option.
- Option 3C: prescribe the fee at zero (zero cost recovery).

General government policy is that fees should be set on a full cost recovery basis unless there is a compelling policy reason for departure from full cost recovery.<sup>74</sup> Assessed against the usual criteria for setting fees<sup>75</sup> of efficiency, effectiveness and equity,<sup>76</sup> Option 3B (full cost recovery) is preferred.

**Table 2: Assessment of cost recovery options**

| Option/Impact               | Base case<br>(Over-recovery)                            | Option A<br>(Partial recovery) | Option B<br>(Full cost recovery) | Option C (zero<br>cost recovery) |
|-----------------------------|---|--------------------------------|----------------------------------|----------------------------------|
| Impact on efficiency        | Does not achieve efficiency                             | Partially achieves efficiency  | Fully achieves efficiency        | Does not achieve efficiency      |
| Impact on effectiveness     | No material impact on effectiveness under all options   |                                |                                  |                                  |
| Impact on vertical equity   | No material impact on vertical equity under all options |                                |                                  |                                  |
| Impact on horizontal equity | Meets horizontal equity objective under all options     |                                |                                  |                                  |

As the fee is paid by government Authorities, ability to pay the fee (vertical equity) is not a relevant consideration. Nor is the impact of the fee on effectiveness of policy—there is no risk of non-compliance, and the fee (being at a mandatory step in the acquisition process) is unlikely to have any bearing on an Authority’s decision to undertake the acquisition.

<sup>72</sup> Land Use Victoria advise there are around 20 notices (9% of notices lodged) that lapse or are cancelled each year.

<sup>73</sup> The 2015 RIS for the Transfer of Land (Fees) Regulations 2016 did not provide a reason why the miscellaneous fee was set at that level. Presumably, the higher fee allows for unusual or infrequent types of instruments for which Land Use Victoria does not routinely process, and therefore likely to take more time to process.

<sup>74</sup> DTF, Cost Recovery Guidelines, 2013, page 7.

<sup>75</sup> Better Regulation Victoria, Guidance Note on Fees RISs, December 2019.

<sup>76</sup> *Efficiency* relates to the extent to which fees reflect the costs of the service or activity and whether this sends a price signal about the value of these activities. *Effectiveness* relates to the degree to which fees influence the underlying policy objectives of regulating this specific area. *Vertical equity* means people pay according to their ability to pay. This might be especially relevant if there are concerns that ‘high’ fees could limit the ability of people or organisations with limited capacity to pay to access a particular service or activity. *Horizontal equity* means people who consume the same (amount of a) service, and/or give rise to the same level of regulatory costs, pay the same fee.

The only distinguishing factor between the options is efficiency—that is, the extent to which the fee provides the correct price signal of the costs incurred by Land Use Victoria caused by the Authority’s decision to acquire land under the LAC Act. Price signals are usually important because they ensure that all costs are taken into account when making a decision to undertake an activity; and hence the total amount of activities undertaken does not exceed an optimum level. In this case, the decision to acquire land is unlikely to be affected by the fee for lodging notices of intention, making the decision insensitive to this ‘price signal’. Further, as the fee is paid almost entirely by government Authorities,<sup>77</sup> and the fee revenue is in any case returned to consolidated revenue, the need for a price signal is even weaker. However, setting a fee that reflects the full cost of the activity is an important part of government transparency on the use of public funds. Activities that give rise to costs for Land Use Victoria should be reflected in the total cost to taxpayers of the costs of acquiring the land for the particular public purpose.

Therefore, the Department considers the fee for lodgement of notices of intention to acquire land should be set at 4.4 fee units (currently \$65.20), the same as the current Regulations. The dollar amount of the fee will continue to be adjusted automatically in line with the annual determination by the Treasurer of the value of a fee unit under the *Monetary Units Act 2004*.

The proposed fee compares to the fee charged in other states: the fee in Tasmania is \$85.50; Western Australia’s fee for a comparable notice is \$178.20. NSW and South Australia do not require a fee for the equivalent lodgement, and Queensland has no equivalent lodgement requirement.

**Consultation question:**

- ***Do you have any comments on continuing to set the fee for lodgement of a notice of intention to acquire land at 4.4 fee units?***

### 3.4 Loans to home owners whose principal place of residence is compulsorily acquired

The base case—where there would be no prescribed threshold—would allow Authorities to provide loans to any home owners whose principal place of residence is compulsorily acquired, regardless of the value of the land being purchased. (The other eligibility would still apply—i.e., where compensation is inadequate to achieve similar accommodation, which is likely still very rare given how the compensation principles are intended to operate). It would remain only an option for Authorities to provide such loans; they are only compelled to provide loans if directed by VCAT or the Court (in their discretion in resolving disputes<sup>78</sup>).

There is no entitlement or right for a person to be provided such a loan, and Authorities are able to charge interest on the loan, which could be considerably higher than mortgage borrowing rates generally available.<sup>79</sup> It is reasonable to expect that should most home owners whose principal place of residence is compulsorily acquired wish to buy a new property for which the compensation is insufficient to fund, they could borrow from a bank rather than from an Authority. It is therefore difficult to say whether the lack of prescribed threshold would lead to more loans being offered.

---

<sup>77</sup> A small number of acquisitions are undertaken by private companies performing functions previously done by government, such as electricity and gas services. In the past ten years, there have been nine compulsory acquisitions by private companies, and a further five intended acquisitions that did not proceed as compulsory acquisitions. These private entities would be required to pay the prescribed fee for lodgement of notices with the Registrar of Titles, and the relevant principles of cost recovery would apply in these situations.

<sup>78</sup> VGSO is not aware of any such loans being directed by VCAT or the Supreme Court

<sup>79</sup> For example, interest could currently be charged at a rate of up to 10 per cent per annum.

A similar loan provision existed in the predecessor to the LAC Act. The *Lands Compensation Act 1958* was amended in 1973 to introduce the ability to provide such loans. At that time, the Act limited loans to acquisitions where the market value of the land acquired did not exceed \$35,000. This threshold was increased to \$75,000 in late 1976. The understood rationale for the loans was on the grounds that the person who has lost the most important asset acquired in the life of an average family should not be rendered unable to obtain a replacement home.<sup>80</sup>

When the LAC Act commenced in 1987, the need for such loans was somewhat reduced. The previous legislation involved assessing the market value of an acquired property at the time of notification (not acquisition) and did not include some other compensation elements that exist now, so it was more common prior to 1987 that the compensation paid was not sufficient to purchase an equivalent property at the time the compensation was paid.<sup>81</sup> Nevertheless, the ability to make such loans was continued in the current legislation, with the clear intention that the loans were to provide support for “people whose properties are at the lower end of the market”.<sup>82</sup>

The Morris Report review of land acquisition was the basis of the creation of the LAC Act suggested that the threshold be set at a value of \$100,000 “and tied to rising prices”.<sup>83</sup> The original Bill for the LAC Act provided that loans were to be available only for land with a market value that “did not exceed \$100,000 or such other amount as may be prescribed from time to time.” However, this was ultimately amended before the Bill was passed to not state any default amount in the Act, but refer only to the threshold being prescribed. At the time of the Act commencing, \$100,000 was in line with the *median* house price in metropolitan Melbourne. However, the first Regulations made under the LAC Act set the threshold at \$200,000.<sup>84</sup> This amount was well above both the average and median house prices in Melbourne at the time.

When the Regulations were remade in 1998, the amount prescribed was \$250,000. This amount was set to represent the *average*<sup>85</sup> cost of a standard principal residence in Melbourne at the time, which was above the median. In 2010 this prescribed amount was increased to \$500,000 to take into account rising residential property values over the intervening years, but the decision on the amount was based on the *median* house price in Melbourne.<sup>86</sup>

The following figure shows the median house price in metropolitan Melbourne, the average (mean) house price in Melbourne, and the average (mean) house price for all of Victoria for each year since the LAC Act began, and the threshold amounts that have been set in previous legislation or prescribed in successive LAC Regulations.

---

<sup>80</sup> Legislative Council Hansard 20 November 1986, page 1226.

<sup>81</sup> Although the previous legislation also required a person to have occupied the home for at least two years to be eligible for a loan, this requirement was removed in the LAC Act.

<sup>82</sup> Second Reading Speech, Assembly Hansard, 8 May 1986, page 2016.

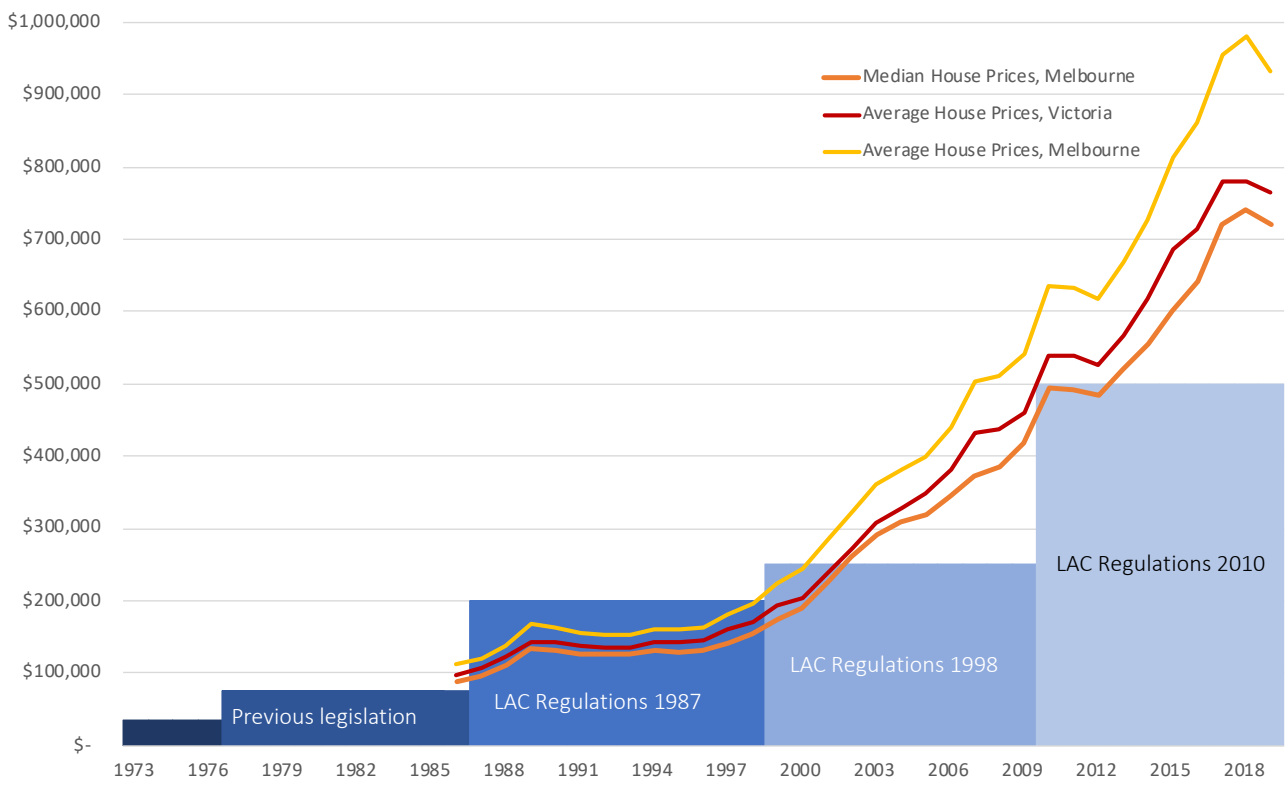
<sup>83</sup> Morris Report, *op cit*, at paragraph 662.

<sup>84</sup> Land Acquisition and Compensation Regulations 1987, regulation 22.

<sup>85</sup> ‘Average’ cost should be interpreted as the ‘mean’ house price – the sum of the value of properties divided by the number of properties.

<sup>86</sup> Regulatory Impact Statement for the Land Acquisition and Compensation Regulations 2010.

**Figure 4: House Prices and the Prescribed Amount in the Regulations**



Source: A Guide to Property Values Annual analysis of property sales data from Valuer-General Victoria, January – December 2019

The figure indicates that, while the intention of prescribing the threshold amount in Regulations was to allow the amount to be adjusted in line with rising house prices over time, there has never been a consistent benchmark used to determine which acquisitions should have an opportunity for such loans and which should not.

Notwithstanding this, the Department believes the median house price for metropolitan Melbourne is a relevant guide to setting the threshold to give effect to the original intention of the LAC Act—that loans are used to assist those at the ‘lower end’ of the market. It is noted that this median house price is used as a reference for setting the threshold, with the knowledge that the median house price would tend to increase during the life of each set of Regulations, reducing the proportion of acquisitions that would remain eligible for the loans to less than the lower 50 per cent of house values. However, by using prices that relate to house prices in metropolitan Melbourne means that a higher proportion of houses in the rest of Victoria would fall under the threshold, as these tend to have lower median market values.

An alternative approach could be to set the amount lower than the median metro Melbourne house price, and include a mechanism in the Regulations for it to increase each year during the life of the Regulations. This could be by using a formula that references data published each year by the Valuer-General, or other index that references price changes over time (such as the Consumer Price Index). However, the Department considers this would be unnecessarily complex for a provision that is rarely used.

Consideration was also given as to whether there should be any prescribed amount at all—that is, to allow the loans to be used for acquisitions of any value, provided the other criteria are met. Indeed, the Morris Report that led to the creation of the LAC Act opined that there was “really no need to set any maximum, as the grant of a loan is dependent upon the owner being unable to purchase comparable accommodation”, and the circumstances where comparable accommodation might be



unavailable naturally tended toward the lower end of the market. The examples of where the loans would have a function in the Morris Report and in the parliamentary debates focussed on large developments that involved acquisition of many properties at the same time, significantly reducing the availability of lower-prices properties in an area while having minimal impact on the availability of higher-prices properties.

Nevertheless, the parliament decided to retain a monetary threshold.<sup>87</sup> It is therefore proposed to use the current median house price for metropolitan Melbourne as the benchmark for setting the prescribed threshold in the proposed Regulations.

The above figure gives a median value for all of 2019 of \$720,000. Median house prices rose during 2019 to \$770,000 in December 2019, but then fell to around \$725,000 by the June quarter 2020.<sup>88</sup> This is the latest available published data (as at December 2020), although it is likely that prices have fallen further during 2020. Changes in house prices are highly uncertain in the short term, but likely to generally increase over the next ten years.

It is therefore proposed to set the threshold for the market value of a principal place of residence above which loans to home owners whose principal place of residence is compulsorily acquired, are not available at \$750,000.

Noting that only three such loans have been provided in the past ten years by the Authorities consulted to date, these Authorities indicated that raising the threshold to \$750,000 is not expected to see a material increase in the number of loans provided over the forthcoming ten years.

***Consultation question:***

- ***Is it reasonable to continue to set the threshold based on the median house price for metropolitan Melbourne? Is there another measure of market value that could be used?***

---

<sup>87</sup> It is noted that similar loans are provided for in the Northern Territory (see clause 11 of Schedule 2 of the *Lands Acquisition Act 1978* (NT)). No maximum amount is prescribed for eligibility of access to the loan, however the Minister may set a maximum of the loan on a case-by-case basis.

<sup>88</sup> *Victorian Property Sales Report June 2020 quarter*—data from Valuer-General Victoria, published December 2020.

## 4 Preferred option

### 4.1 Summary of proposed Regulations

The proposed Regulations:

- prescribe all the forms anticipated in the LAC Act to provide an easy and efficient way for Authorities and affected landholders to complete their obligations required by the LAC Act. Prescribing standardised forms that must be used for all acquisitions provides certainty, consistency and transparency. The forms for acceptance of offers of compensation and claims for compensation will no longer need to be witnessed by a person able to witness statutory declarations, but will be able to be witnessed by any adult person—this will result in a small reduction in the administrative burden of the Regulations
- continue to exempt certain classes of acquisitions from the need to reserve the land for a public purpose prior to acquisition under the LAC Act
- set the fee for lodgement of notices of intention to acquire land with the Registrar of Titles at 4.4 fee units (currently \$65.20)—the same as the current Regulations. This fee is paid by acquiring Authorities and amounts to around \$12,000 per year in total for all notices lodged. Land Use Victoria has advised the Department that this broadly covers its costs of processing the lodgement of notices and related activities under the LAC Act
- set the threshold for the market value of a principal place of residence above which loans to home owners whose principal place of residence is compulsorily acquired, are not available at \$750,000. This is an increase from the amount of \$500,000 prescribed in the current Regulations, reflecting the increase in the median house price in metropolitan Melbourne since the Regulations were last remade. Over the life of the Regulations, there is not expected to be any material change in the number of loans provided to home owners whose principal place of residence is compulsorily acquired, because of this change.

### 4.2 Impacts on competition and small business

Victoria is a party to the Competition Principles Agreement, which requires that any new primary or subordinate legislation should not restrict competition unless it can be demonstrated that the government's objectives can only be achieved by restricting competition and that the benefits of the restriction outweigh the costs. The Competition Principles Agreement requires that the analysis of all regulatory proposals consider whether the preferred option will restrict competition.

The proposed Regulations are not expected to restrict competition. They do not, directly or indirectly, prevent or limit the ability of businesses and individuals to enter and compete within any market, reduce choice of products, lead to higher prices, or reduce opportunities or incentives for businesses to invest and innovate.

Often, small businesses<sup>89</sup> may experience disproportionate effects from regulatory requirements for a range of reasons, including limited resources to interpret compliance requirements, or to keep pace with regulatory changes and the cumulative effect of different requirements. While it is understood that the impact of the proposed Regulations falls predominantly on individuals, accurate data is not available on the extent to which commercial properties are affected and therefore there are no available data on the degree to which small businesses are affected. However, given the nature of the proposed Regulations, and recognising that small businesses would be compensated for the market value of land and losses incurred, the analysis in this RIS suggests that the proposed Regulations do not disproportionately impact upon small businesses.

---

<sup>89</sup> The ABS defines a small business as a business employing less than 20 people. ABS Cat. 1321.0

### 4.3 Implementation

As the proposed Regulations largely continue the current arrangements, no specific implementation plan is necessary. It is the responsibility of each individual acquiring authority to ensure that the Regulations are complied with for each acquisition.

After the proposed Regulations are formally made, and before their commencement, the Department will:

- directly inform all acquiring authorities of the changes, particularly of the revised standard forms
- prepare instructions (guide) to acquiring authorities on how to complete forms
- provide online information for people whose land is proposed to be acquired, for general information, but also specific guidance on using the prescribed forms (e.g., getting documents witnessed).

### 4.4 Evaluation

The proposed Regulations will sunset in 2031, at which point they will be reviewed in the context of remaking Regulations at that time.

The Department does not have a regulatory or oversight role in relation to individual acquisition activities, and acquiring authorities are not required to report to the Department on acquisitions made under the Act. However, the Department will evaluate the effectiveness of the Regulations by monitoring issues for which acquiring authorities may seek the advice of the Department, and by reviewing disputes in relation to individual acquisitions that are taken to VCAT or the Supreme Court.

The Department will continue to consult with Land Use Victoria and the Victorian Government Land Monitor to gather any insights on emerging trends in the use of compulsory acquisitions.

If any new or amended 'special' legislation is proposed in the future that changes the nature or types of compulsory acquisitions allowed, the Department will review whether the Regulations remain fit for purpose.

## Appendix A: Compulsory acquisition in Victoria

### *A short history of compulsory acquisition in Victoria*

Unlike the Commonwealth Government, which has a constitutional requirement to only acquire property on ‘just terms’,<sup>90</sup> the States have a Crown prerogative to compulsorily acquire land without any rights to process or compensation.<sup>91</sup> At common law, there is no automatic right of compensation for the loss of an interest in land as a result of a compulsory acquisition.<sup>92</sup>

However, since at least 1869, the Victorian Parliament has provided a legislative procedure to be followed should the government (or other approved entity) wish to acquire property compulsorily.

### Compulsory acquisition of interests in land

|           |  |
|-----------|--|
| 1869      | Lands Compensation Statute 1869 commenced, based on the Land Clauses Consolidation Act 1845 enacted by the United Kingdom Parliament primarily to facilitate the acquisition of strips of land for railways, canals and roads and to provide compensation for such land.   |
| 1890-1928 | Principal legislation re-enacted in new Acts in 1890, 1915, and 1928. With the introduction of the motor car, along with the technologies that made electricity, water and gas possible for the ordinary householder, by the early 20 <sup>th</sup> century compulsory acquisition became more and more critical to the delivery of public infrastructure and social services. In the past, governments have also used compulsory acquisition powers to clear slums and improve sanitary conditions.   |
| 1958      | <p><i>Lands Compensation Act 1958</i> becomes the cornerstone of the statutory machinery, however acquisitions were still managed through a range of other legislative procedures including:</p> <ul style="list-style-type: none"> <li>• various Acts establishing particular authorities, such as the <i>State Electricity Commission Act 1958</i>, which generally set out the powers of each such body to compulsorily acquire an interest in land, and in some cases modified the principles for assessing compensation</li> <li>• the <i>Valuation of Land Act 1960</i> which sets out the relevant procedure for determining claims for compensation</li> <li>• notification of acquisition and registration of the acquiring authority as registered proprietor, such as the <i>Transfer of Land Act 1958</i></li> <li>• additional procedures, such as the <i>Local Government Act 1958</i>.</li> </ul> |
| 1986      | <p>All processes related to compulsory acquisition and compensation is brought together in the <i>Land Acquisition and Compensation Act 1986</i>, which provides uniform acquisition procedures. The LAC Act reforms, consolidates and codifies the law relating to land acquisition and compensation and establishes uniform practices.</p> <p>The new legislation followed the Australian Law Reform Commission report on Land Acquisition and Compensation (report No. 14) and the Report to the Minister for Planning on Land Acquisition and Compensation prepared by Mr Stuart Morris (the ‘Morris report’).</p>   |

<sup>90</sup> Section 51(xxxi) of the Constitution of Australia.

<sup>91</sup> *Minister of State for the Army v Dalziel* [1944] HCA 4; (1944) 68 CLR 261, 284: “the right to take to itself any property within its territory, or any interest therein, on such terms and for such purposes as it thinks proper, eminent domain being thus the proprietary aspect of sovereignty”.

<sup>92</sup> *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399. In Victoria, the Charter of Human Rights and Responsibilities states that “a person must not be deprived of his or her property other than in accordance with the law”. The Charter, however, by itself does not provide a right to compensation.

## Appendix B: List of ‘Special Acts’

| Power to acquire interest in land                               | Acquiring Authority  | Purpose for acquisition  |
|---|--|--|
| <i>Aboriginal Heritage Act 2006</i> , s. 31                     | Minister for Aboriginal Affairs  | Land that contains an Aboriginal place of cultural heritage significant  |
| <i>Casino Control Act 1991</i> : s. 128H                        | Minister for Gaming  | For purposes of the Melbourne Casino project or access to or within the Melbourne Casino area  |
| <i>Cemeteries and Crematoria Act 2003</i> : s. 31               | Minister for Health  | For cemeteries and crematoria purposes   |
| <i>Conservation, Forests and Lands Act 1987</i> : s. 13         | Secretary DELWP (but can be delegated)   | For the purposes of various Acts (conservation and productive use of the State’s lands, water, flora and fauna, fisheries)   |
| <i>Country Fire Authority Act 1958</i> : s. 21B                 | Country Fire Authority   | Purposes of prevention and suppression of fires (e.g. acquiring fire stations)   |
| <i>Crown Land (Reserves Act) 1978</i> : s. 5                    | Minister for Energy, Environment and Climate Change  | Reserving land for preservation and conservation purposes, public parks, gardens and ornamental plantations, and camping areas   |
| <i>Deakin University Act 2009</i> : s. 36                       | Minister for Higher Education  | For purposes of or in connection with the University.  |
| <i>Development Act 2003</i> : s. 42                             | Development Victoria   | Land required for declared projects  |
| <i>Docklands Act 1991</i> : s. 19                               | Development Victoria   | Development of Docklands area  |
| <i>EastLink Project Act 2004</i> : sections 34 and 47           | Head, Transport for Victoria   | For the purposes of the EastLink project   |
| <i>Education and Training Reform Act 2006</i> : s. 5.2.3        | Minister for Education   | Purposes of education and training   |
| <i>Electricity Industry Act 2000</i> : sections 86 and 87       | Section 86: a distribution, transmission or a generation company; Section 87: a generation company | Section 86: erecting or laying power lines and maintaining power lines<br>Section 87: generating electricity in the LaTrobe area   |
| <i>Federation University Australia Act 2010</i> : s. 36         | Minister for Higher Education  | For purposes of or in connection with the University   |
| <i>Financial Management Act 1994</i> : s. 54N                   | Minister for Finance   | Construction, completion or extension of any public works or for related purposes  |
| <i>Fire Rescue Victoria Act 1958</i> : s. 24A                   | Fire Rescue Victoria   | Fire prevention and suppression services and emergency prevention and response services  |
| <i>Forests Act 1958</i> : s. 38                                 | Minister for Energy, Environment and Climate Change  | Conservation and protection of State forests, preventing erosion, among other related purposes   |
| <i>Gas Industry Act 2001</i> : sections 142 and 143 (easements) | Sections 142: Minister for Energy. Section 143: a gas transmission or distribution company         | Construction or operation of a transmission pipeline or distribution pipeline  |
| <i>Health Services Act 1988</i> : s. 67                         | Minister for Health  | Purposes of a registered funded agency (e.g. public hospital, public health service, residential care service, among others).  |
| <i>Heritage Act 2017</i> : s. 241                               | Heritage Council   | For the purposes of protecting and conserving cultural heritage  |
| <i>Housing Act 1983</i> : s. 14                                 | Director of Housing  | Provision of public housing  |
| <i>Land Act 1958</i> : sections 103 and 209                     | Minister for Energy, Environment and Climate Change  | Section 103: draining swamps (including construction of canals, ditches, drains, channels, waterways, sewers, embankments and dams, among other things)<br>Section 209: providing access to Crown land |
| <i>La Trobe University Act 2009</i> : s. 36                     | Minister for Higher Education  | For purposes of or in connection with the University.  |
| <i>Local Government Act 2020</i> : s. 112                       | Municipal councils   | Performance of its functions (e.g. providing facilities for the local community and providing and maintaining local community infrastructure)  |

| Power to acquire interest in land  | Acquiring Authority   | Purpose for acquisition  |
|--|---|--|
| <i>Major Transport Projects Facilitation Act 2009</i> : sections 113 and 127 | Entity appointed as the project authority   | An approved project or collateral purpose relating to the approved project (i.e. for transport projects)   |
| <i>Marine Safety Act 2010</i> : s. 271                                       | Minister for Fishing and Boating  | For or in connection with, or as incidental to, the provision of a navigation aid for State waters   |
| <i>Mines (Aluminium Agreement) Act 1961</i> , s. 7A                          | Alcoa of Australia Pty Ltd  | For the purposes of an agreement to establish industry   |
| <i>Monash University Act 2009</i> : s. 36                                    | Minister for Higher Education   | For purposes of or in connection with the University   |
| <i>Murray-Darling Basin Act 1993</i> : s. 17                                 | Murray-Darling Basin Authority  | Works set out in the Murray-Darling Basin Agreement  |
| <i>Pipelines Act 2005</i> : s. 96  | Licensees under the Act   | Construction and operation of a pipeline.  |
| <i>Planning and Environment Act 1987</i> : sections 172 and 201              | Section 172: Minister for Planning, or the municipal council (or someone specified as the responsible authority for a planning scheme)<br>Section 201: Secretary of the Department of Transport <sup>93</sup> | Section 172: land required for the purposes of a planning scheme, land to be put to a more appropriate use in accordance with a planning scheme, or land required for a better use, development or planning of an area.<br>Section 201: special project land for a declared project of State or regional significance. |
| <i>Project Development and Construction Management Act 1994</i> : s. 20      | Minister or the statutory authority specified in the Order as the Minister/facilitating agency for the project  | For the purposes of a nominated project (as declared by Order published in the Government Gazette)   |
| <i>Road Management Act 2004</i> : clause 11 of Schedule 5                    | VicRoads  | Road management purposes   |
| <i>Royal Melbourne Institute of Technology Act 2010</i> , s. 36              | Minister for Higher Education   | For purposes of or in connection with the University   |
| <i>Sale Station Relocation and Development Act 1981</i> : s. 5               | State Transport Authority or the Council  | Relocation and development of Sale railway station land  |
| <i>State Electricity Commission Act 1958</i> : s. 103                        | State Electricity Commission of Victoria  | Land required for or in connection with its functions  |
| <i>Subdivision Act 1988</i> , s. 35  | Private owners  | Ability to acquire easements over their own land (leave must be granted by VCAT)   |
| <i>Swinburne University Act 2010</i> : s. 36                                 | Minister for Higher Education   | For purposes of or in connection with the University   |
| <i>University of Melbourne Act 2009</i> : s. 36                              | Minister for Higher Education   | For purposes of or in connection with the University   |
| <i>Victoria University Act 2010</i> : s. 36                                  | Minister for Higher Education   | For purposes of or in connection with the University   |
| <i>Transport integration Act 2010</i> , s. 36, s. 64G, s. 121                | Secretary, Department of Transport; Head of Transport for Victoria; VicTrack  | Transport functions under the Act  |
| <i>Water Act 1989</i> , s.23 and s. 130                                      | Minister for Water; Water corporations  | For the purposes of the water resources assessment program; For or in connection with water services   |

<sup>93</sup> Under a proposed amendment in the Project Development and Construction Management Amendment Bill 2020, the acquiring Authority for the purposes of s. 201 of the P&E Act will become the Secretary, Project Development, which will be the Secretary of the department declared as such. It is understood that once enacted, the Secretary to the Department of Jobs, Precincts and Regions (DJPR) will be declared as the Secretary, Project Development.

## Appendix C: Comparison of Victoria's LAC Act to equivalent arrangements in other states

**Table 3: Steps required to achieve acquisition**

|  | Victoria  | South Australia  | NSW   | Queensland   | Tasmania   | Western Australia  |
|--|---|--|---|--|--|--|
| <b>Legislation</b>                             | <i>Land Acquisition and Compensation Act 1986</i>   | <i>Land Acquisition Act 1969</i>   | <i>Land Acquisition (Just Terms Compensation) Act 1991</i>                    | <i>Acquisition of Land Act 1967</i>  | <i>Land Acquisition Act 1993</i>   | <i>Land Administration Act 1997 (Part 9)</i>   |
| <b>Requires reservation for public purpose</b> | Yes (with scope for limited exemptions)   | No   | No  | No   | No   | No   |
| <b>Pre-acquisition notification</b>            | Yes (2 months prior to acquisition), lodge notice of intention with the Registrar of Titles.  | Yes—at least 3 months prior to acquisition. Notice served upon the Registrar. Landholder has right to object (within 30 days) to intention to acquire, Authority has 14 days to respond, and refusal may be reviewed by SACAT. | Yes—90 days before acquisition (but can be shorter)                           | Yes—at least 30 days must be allowed for objections. After due consideration of objections, Authority may apply to the Minister for acquisition. | Yes—at least 30 days before compulsory acquisition. Notice to be lodged with Recorder of Titles.   | Yes—generally 60 days to allow for objections and consideration of objections. Copy of notice sent to Registrar of Titles or Registrar of Deeds. |
| <b>Acquisition</b>                             | Publish notice of acquisition in the Victoria Government Gazette and publish a copy in a newspaper. Provide a copy of the notice of acquisition and a statement of rights and obligations to all relevant parties | Publish notice of acquisition in government gazette, and in a newspaper, and served upon the affected landholders.   | Effected by gazettal, copy published in newspaper/website                     | Governor in Council notice published in the government gazette.  | Published in government gazette. Must be tables in parliament within 21 sitting days. Within 30 days must be lodged with Recorder of Titles. | Taking order must be registered.   |
| <b>Possession</b>                              | No sooner than 3 months after acquisition (and after 7 days' notice) (but can be sooner if certified by GIC, or by agreement) (s. 26)   | No sooner than 3 months after acquisition. Written notice must be given.   | After compensation paid. Plus up to 3 months for some residential properties. |  | Immediate right to possession.   | Possession as specified in the taking order.   |

## Appendix D: Process of amending planning schemes to reserve land for a public purpose

Section 6(2)(c) of the *Planning and Environment Act 1987* (P&E Act) provides that a planning scheme may “designate land as being reserved for public purposes”. To designate the acquisition area as reserved for public purposes, the planning scheme requires an amendment to show the acquisition area on the map showing the areas of land subject to a Public Acquisition Overlay (PAO).

This occurs under Part 3 of the P&E Act. There are a number of procedural steps that must be undertaken before the amendment is made. These include:

- The planning authority seeks authorisation from the Minister for Planning to prepare the amendment (within 10 business days)
- Preparation of the amendment, Explanatory Report and other required supporting documents (within 40 business days<sup>94</sup>)
- Provide a copy of the proposed amendment to the Minister for Planning, the relevant local council and other people specified by the Minister for Planning
- Give notice of the proposed amendment in writing to owners and occupiers of land that may be materially affected by the amendment<sup>95</sup>, other ministers, public authorities and municipal councils that may be materially affected by the amendment<sup>96</sup>, and other Ministers and public authorities prescribed in the Planning and Environment Regulations 2015. The notice is also published in the Government Gazette, in an appropriate newspaper. (Notice is given at least 10 business days after giving a copy to the Minister for Planning)
- Exhibit the proposed amendment for public inspection and received submissions on the amendment (The closing date for submissions must be not less than one calendar month after the date the notice is published in the Government Gazette)
- Consideration of all submissions on the proposed amendment
- If a submission requests a change to the proposed amendment, which is not agreed, the Authority must ask the Minister for Planning to establish a Panel. The Panel reviews all submissions and provide an opportunity to conduct a hearing to hear submitters. The Panel provides a report to the Authority. (Panel report must be provided 20-40 business days *after* the completion of hearings and receipt of any supplementary submissions)
- The planning authority makes a final decision on the amendment (within 60 business days of the closing date of submissions if there was no Panel, or 40 business days after receiving a Panel report)
- Once the planning authority has adopted the amendment, it must be submitted to the Minister for Planning for approval. (Submitted to Minister within 10 business days of adoption; Minister’s approval made within 40 business days)
- The amendment comes into effect once the notice of approval is published in the Government Gazette.

---

<sup>94</sup> Generally, an authority will undertake preliminary work on the amendment before seeking authorisation if this takes longer than 40 days.

<sup>95</sup> This includes anyone whose land is subject to changed controls under the amendment and might include owners and occupiers of adjoining or nearby land.

<sup>96</sup> This might include local bodies such as water and sewerage boards, the Environment Protection Authority and, in many cases, adjoining municipalities.



These steps are summarised in the following figure.

**Figure 5: Process for making an amendment to a planning scheme**

