



LandTasmania

*Land Acquisition Act 1993
Stakeholder and Community
Consultation Report and
Preferred Position*

July 2020

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Background

SUSTAINABLE DEVELOPMENT requires governments to provide public facilities and infrastructure that ensure health and welfare, safety and security, social and economic enhancement, and protection of the natural environment. An early step in the process of providing such facilities and infrastructure is the acquisition of the necessary land.

THE LAND ACQUISITION ACT 1993 is an essential legislative tool that enables an acquiring authority to acquire privately owned land necessary for the construction of new public infrastructure. It also provides the basis for determination of compensation arising from the acquisition of that land. The ability to compulsorily acquire land provides an acquiring authority with a strong degree of certainty that it can obtain the necessary land required for the provision of public infrastructure. In Tasmania the *Land Acquisition Act 1993* is administered by the Minister for Primary Industries and Water, Guy Barnett. Guy Barnett in turn has delegated the Valuer-General to manage the operation of the *Land Acquisition Act 1993* on her behalf, except the power to commence a compulsory acquisition.

An acquiring authority is a body that is empowered to purchase land under the *Land Acquisition Act 1993*. Normally it is a Crown body such as a government department or statutory authority, although sometimes it is a non-Crown body such as a one of the 29 Local Council, Tas Irrigation, TasWater or Aurora.

Government and non-Crown bodies perform a range of functions for public purposes, such as building new or upgrading existing infrastructure such as hospitals, schools, roads, dams, power lines and water pipelines. Such an acquisition may be for the whole property, part of a property or for an interest over a property such as an easement for a power line.

Whilst the *Land Acquisition Act 1993* details the specific process to be followed in relation to the compulsory acquisition of privately owned land, an acquiring authority will be authorised under other legislation to use the *Land Acquisition Act 1993* to acquire land. In most instances an acquiring authority will also be required to obtain the approval of the Minister for Primary Industries and Water to use the *Land Acquisition Act 1993* to commence a compulsory acquisition of land.

The *Land Acquisition Act 1993* authorises an acquiring authority to acquire land by either (1) section 9 purchase by agreement, (2) section 16 compulsory process by agreement, and (3) section 18 by compulsory process.

This review of the *Land Acquisition Act 1993* only concerns reviewing (a) electronic service delivery (b) affixing of the electronic signature to the Notice to Treat and the Notice of Acquisition.

Nature of the Restriction on Competition:

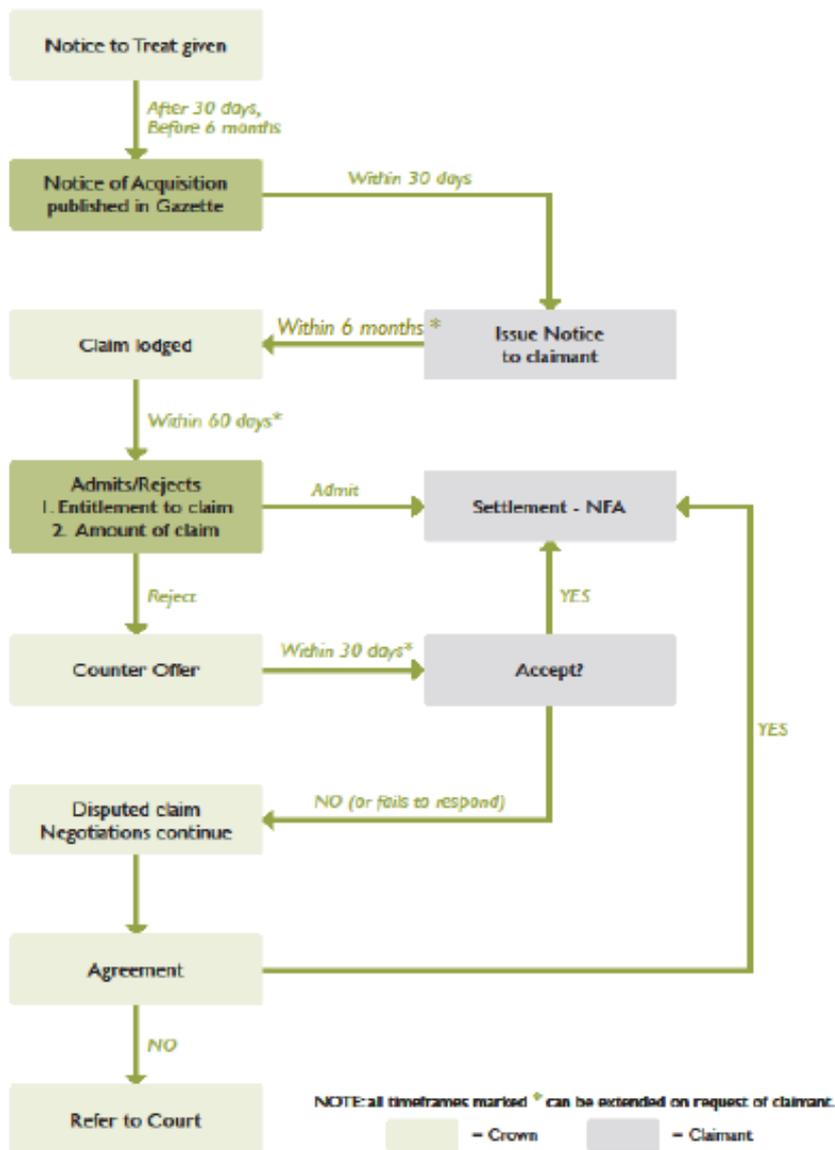
Governments, through legislation, intervene in markets for many reasons and in many ways. At one level, all such intervention affects competition and almost no regulatory activity is neutral in its implications for competition.

It is this Department's opinion that no part of the proposed amendments will restrict competition in any way, nor do the amendments have a significant negative impact on business.

Nine (9) primary issues were identified during the review process:

1. Section 11(c) – This amendment will update the Act to allow electronic signature on a notice to treat without the consent of the Recipient.
2. Sections 12 – This amendment will allow for electronic service and signature of the notices of withdrawal to be served electronically.
3. Section 18 (d) – This amendment will update the Act to allow electronic signature and service on the notice of acquisition.
4. Section 21(1) – This amendment will update the Act to allow for electronic signature and service without consent on the former owner after acquisition.
5. Section 36(d) – This amendment will allow for electronic signature and service of the claim for compensation.
6. Section 66(a)– This amendment will update the Act to allow electronic signature and service on the Public Trustee.
7. Section 81 – This amendment will update the Act to allow for electronic service under the Act.
8. Section 34 (3)(b) – This amendment will update the Act to include a 6 month provision for the service of the mortgagee of notice under section 21 or ss (3)
9. Section 21(2) – This amendment will update the Act to allow for an informed person on whom a notice is served, within 6 months after the notice is so served, to lodge a claim for compensation under the Act.

Land Acquisition - Tasmania



About this document

This document discusses each of the issues which were presented as proposals in the *Land Acquisition Act 1993 Issues Paper July 2020* which was distributed to stakeholders and general public for comment and support. The document states the original proposal from the *Issues Paper* and discusses the feedback that was received on each issue.

Important stakeholders were provided with a copy of this document electronically in early July 2020 and were also provided with the link to the Paper at <https://dpiipwe.tas.gov.au/land-tasmania/office-of-the-valuer-general/acts-administered-by-the-valuer-general/land-acquisition-act-amendments>

The purpose of this document is to provide the stakeholders with a summary of the preferred position, which having considered the feedback, and will now form the basis of the drafting instructions to be developed for the proposed new *Land Use Miscellaneous Bill 2020*.

Overview

Introduction

An *Issues Paper* was developed to present a number of issues and proposals to help inform proposed amendments to the *Land Acquisition Act 1993*. These issues have been identified through previous stakeholder consultation and by the office of the Valuer-General through its administration of the Act.

This Stakeholder and Community Consultation Report and Preferred Position summaries the outcome of the consultation process and provides a preferred position.

The Report will be distributed to stakeholders groups for information prior to commencing the drafting of new legislation.

Consultation Process

The objective of the consultation process was to engage with key stakeholders and interested members of the broader Tasmanian community to assess community opinion and generate constructive feedback.

The *Land Acquisition Act 1993, Issues Paper*, was distributed in July 2020 via email to a range of stakeholders having been identified as either contributing to the land acquisition process, or having an interest in the process. Including the 29 Municipal Councils, Tas Water, Aurora and Tas Irrigation as well as governmental departments including State Growth.

Consultation has been undertaken with the Law Society of Tasmania with no negative feedback received.

It is noted that the legislative amendments involve the exercise of amendments to functions, powers and obligations of the Valuer-General. The intention of the changes is to improve existing legislation, specifically non-contentious issues that do not have a negative impact on business, and which are unlikely to require

Stakeholders were invited to provide submissions on the proposals outlined in the issue paper, together with support or otherwise for the options proposed. The closing date for submissions was 16 July 2020.

Submissions

Two submissions were received in relation to the *The Land Acquisition Act 1993 Issues Paper 2020*.

The general consensus is that the amendments to the Act to enable electronic and service of documents will streamline the process significantly.

Recap of Proposed Amendments:

1. Add section 11(c) legislative amendment to allow for the use of electronic signature – Notice to Treat

Section 11 refers to the notice to treat. (1) An acquiring authority must – (a) take all reasonable steps to ascertain all owners of any land the authority proposes to take and the addresses of those owners; and (b) cause a notice to treat to be served on every owner so ascertained whose address has also been ascertained.

Section 80 of the Act provides that where the notices must be provided to be served on any person “ that notice or document is to be signed by the clerk of the authority or by the Minister as the case requires”.

Notices to treat must be served on landowners. A notice to treat must be served in a form approved by the Secretary and this at present requires manual signature. It is suggested that an additional clause be added to section 11 allowing for a notice to treat to be served on every owner so ascertained whose address has been ascertained by means of electronic communication with an electronic signature.

2. Proposed Amendment 2: Section 12 – Notice of Withdrawal

Section 12(4) of the Act refers to notice of withdrawal. An acquiring authority may withdraw a notice to treat by serving a notice of withdrawal. Where a notice of withdrawal is served on an owner as provided in this section, any other owner of the land, or a part of the land, to which the notice relates who is unknown, or whose address is unknown, to the acquiring authority is taken to have been served with a notice of withdrawal in respect of that land or part of the land, as the case may be.

It is suggested that this clause should be amended to allow for electronics communication with an electronic signature.

3. Proposed Amendment 3: Section 18 – Notice of Acquisition

Section 18(3) refers to the notice of acquisition. A notice of acquisition (a) is to be in a form approved by the Secretary and (b) is to specify the authorised purpose for which the land to which the notice relates is being taken; and (c) where the acquiring authority is not the Crown, is, to be signed on behalf of the authority by the clerk or the authority’s legal practitioner.

Section 80 of the Act provides that where the notices must be provided to be served on any person “ that notice or document is to be signed by the clerk of the authority or by the Minister as the case requires”. Notices of acquisition must be served on landowners. A notice of acquisition must be served in a form approved by the Secretary and this at present requires manual signature. It is suggested that an additional clause be added to allow for electronic communication with an electronic signature. The wording suggest that the Act contemplates that all Notices of Acquisitions are required to be signed.

4. Proposed Amendment 4: Section 21 – Notice to former owner after Acquisition.

Section 21 refers to notices to form owners after acquisition. An acquiring authority must within the period, of 30 days after a notice of acquisition is gazetted, serve on every former owner of the land taken.

It is suggested that an additional clause be added to allow for electronic communication with an electronic signature.

5. Proposed Amendment 5: Section 36 – Claim for Compensation

Section 36 refers to the claim for compensation. This amendment will allow for a person with an entitled claim for compensation to lodge that claim electronically with an electronic signature.

It is suggested that an additional clause be added to allow for electronic communication with an electronic signature.

6. Proposed Amendment 6: Section 66 – Public Trustee to represent unascertained owner.

Section 66 refers to serve on the Public Trustee. If an acquiring authority is unable to ascertain the existence or address, of an owner of subject land, the authority must serve on the Public Trustee any notice in respect of that land that it is required to serve on the owner.

It is suggested that an additional clause be added to allow for electronic communication with an electronic signature.

7. Proposed Amendment 7: Section 81 service of Notice and other Documents.

The *Land Acquisition Act 1993* (“the Act”) makes express provision for service of notices in s 81:

81. Service of notices and other documents

(1) A notice or other document is effectively served under this Act if –

(a) in the case of a natural person, it is –

(i) given to the person; or

(ii) left at, or sent by post to, the person's postal or residential address or place or address of business or employment last known to the person required by this Act to serve the notice or other document; or

(iii) sent by way of facsimile to the person's facsimile number; and

(b) in the case of any other person, it is –

(i) left at, or sent by post to, the person's principal or registered office or principal place of business; or

(ii) sent by way of facsimile to the person's facsimile number.

(2) A notice or other document required or permitted by this Act to be served on or given to –

(a) the Crown or the Minister, may be served or given by –

(i) leaving it at, or sending it by post to, the office of the Secretary; or

(ii) sending it by way of facsimile to the Secretary at that office; or

(b) an acquiring authority other than the Crown, may be served or given to the authority by –

(i) leaving it at, or by sending it by post to, the office of the authority or its principal office if there are more offices than one; or

- (ii) serving it on or giving it to, or sending it by post to, the clerk or the authority's legal practitioner; or
 - (iii) sending it by way of facsimile to that office, the clerk or the authority's legal practitioner.
- (1) A notice or other document served under this Act by sending it by post is served at the time when the letter is deposited in a post box or at a post office for delivery by post.

Express provision is made for how service of notices is to occur. Amendment is required of the Act for service of notices to occur in a manner other than the methods specified in s 80. Notices to treat must be served on landowners (see s 11(1)(b)). Service on the landowner is also required for notices of withdrawal under s 12 and for notices to former owners after acquisition under s 21. Service of notices on the Public Trustee is required where the owner cannot be ascertained under s 66. Claims for compensation also need to be served by landowners on the relevant authority pursuant to s 36(2)(d). Section 80 applies to all of these notices. Notices of acquisition are published in the Gazette rather than being served and so s 80 is not applicable so far as the notice of acquisition is concerned, or at least, not until after acquisition as provided by s 21. Preferred method of service is electronic.

8. Proposed Amendment – Section 34(3)(b) Amount of Compensation for Mortgage.

Section 34 (3)(b) – This amendment will update the Act to include a 6 month provision for the service of the mortgagee of notice under section 21 or 22(3).

This amendment adds certainty to the timeframe and makes wording consistent with the Land Acquisition Amendment Bill of 2019 which was proclaimed on 1 January 2020.

9. Proposed Amendment – Section 21(2) Notice to former owner after acquisition.

Section 21(2) provides that a notice referred to in subsection (1) (a) is to inform the person on whom it is served that the person, within 60 days after the notice is so served, is entitled to lodge a claim for compensation under the Act.

The time frame is extended from 60 days to 6 months.

This amendment adds certainty to the timeframe and makes wording consistent with the *Land Acquisition Amendment Bill 2019* which was proclaimed on 1 January 2020.

Feedback

Discussions: - Electronic Service

Tasman Council, Building & Development Service Manager, Melissa Geard's, submission was received on the 9th July 2020. Tasman Council supported the proposed amendments to the Act to enable electronic signature and service of documents. These amendments will streamline the process significantly.

Huon Valley Council, Director of Legal and Governance Services, Matthew Grimsey's, submission was received on the 9th July 2020. Huon Valley Council supported the proposed amendments to the Act stating that the amendments allow for the use and application of electronic signatures, and service of documents by electronic means, and reflect modern and efficient business and dealings with third parties.

Huon Valley Council noted concerns in relation to the ability to service a notice to treat under Section 11 by electronic means without any prior consent or knowledge of the receiver as suggested in Proposed Amendment 1: Section 11 and Proposed Amendment 7: Section 81.

Section 11 is the first time that an owner is formally notified in relation to the Act and enlivens a number of time frames and legal rights for the owner of the land. It is therefore important that there is certainty associated with service of the notice to treat.

The issue was clearly relevant in the case of the State of *Tasmania v Herlihy* [2019] TASSC 5 where the Court concluded that the State could not assume that the email was readily accessible or physically received by the respondent.

Establishing a presumption of service by email raises the potential for costs and litigation arising out of an acquisition being undertaken without the knowledge of the owner.

The ability to electronically serve the notice to treat is supported however this is perhaps the one circumstance where consent would be appropriate.

Response:

Herlihy's case might be used to argue that the landowner needs to know that they can refuse to give consent.

In the absence of amendment to the Act arguably a telephone call by the Acquiring Authority to the land owner obtaining consent to service a notice via email would be required.

Also, if, for example, there is no response at all to a notice to treat, there is no basis to infer consent.

Amendments are not being sought to presume service by email but rather to facilitate service by email.

The Office of the Valuer-General is the acquiring authority as such wishes to mitigate the potential for costs and litigation arising out of an acquisition.

Considerable interaction occurs between the Department of State Growth, other Acquiring Authorities and the Office of the Valuer-General and the Valuer with the landowner during the Acquisition process.

The simple Act of amending the legislation to allow electronic transaction will always be followed up with client interaction. A valuation will occur at the site. The Valuer will prepare a valuation brief for the instructing party. The Valuer will consider the letter of instruction, undertake a valuation of the land being acquired and undertake an assessment of compensation payable as a result of the acquisition. Considerable interaction occurs during this process with the land owner. The Valuation contained in the report will be undertaken on the basis of market value as defined in the International Valuation Standard Council and endorsed by the

Australian Property Institute and sets out the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

Discussions: - Electronic Signature:

Legislative amendment to allow for the use of electronic signature on notices to treat and notices of acquisition, without the consent of the recipient is the preferred option and was supported unequivocally.

Response:

At common law, electronic signatures are generally accepted and need a requirement to sign a document, so long as the electronic signature can be regarded, as a question of fact, to have conveyed the same representation as a traditional signature.

Provision for electronic signature is made in the *Electronic Signatures Act 2000*. Section 7 applies when a signature is required at law. With respect to notices of acquisition s 18(3) (c) the Act relevantly provides where the acquiring authority is not the Crown, [a notice of acquisition] is to be signed on behalf of the authority by the clerk or the authority's legal practitioner.

In *Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd* [2011] NSWSC 716, where the court wrote at [33]: As to the requirement for signing, there are two answers. "In my view the inclusion of the sender's name on the email amounted to 'signing' for the purpose of the clause. The requirement for signing is intended to identify the sender and authenticate the communication. This is sufficiently achieved in an email by the setting out of the sender's name together with the email address is dispatched. The name of the sender and his email address are readily and rapidly verifiable. Any other conclusion would produce a capricious and commercially inconvenient result that might have wide-reaching and unintended consequences in modern day trade and commerce".

Section 80 of the Act provides that where notices must be provided to or served on any person "that notice or document is to be signed by the clerk of the authority or by the Minister, as the case requires".

For Section 7(1)(b) you need a method to identify the person signing the document and to indicate the person's intention in respect of the information communicated in accordance. *The Electronic Transactions Act 2000* is based on uniform legislation. Provision equivalent to s 7 has been considered by courts in other jurisdictions. In *Russell's Solicitors v McArdle* [2014] VSC 287 the Victorian Supreme Court considered that a practical approach was required for the interpretation and application of the Victorian equivalent of s 7 (1)(a). It was held that the question whether a person has used a method of identification in a document and indicated a relevant intention about the information conveyed is one of fact. Similarly in *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 it was noted that the equivalent provision of s 7(1) (b) provided alternative methods to satisfy the requirements of identification and intention in s 7(1)(a). The question of whether there was a sufficient identity and intention in that case arose in circumstances where there had been a course of dealings in a property transaction, in which the vendor had been paying off prospective purchasers in an attempt to inflate the price of the property. The vendor attempted to deny the efficacy of an electronic signature on an offer that had been accepted by one of the purchasers. The court had no difficulty inputting an authentic electronic signature to the vendor.

From these authorities, the court will draw inferences about the intention of the signatory. It has all been observed that inferences will also be drawn about the requirements of s 7 (1) (c) for the consent of the recipient of the document.

It is noted that the person who affixes the electronic signature should be the person identified by the signature. It is contended that consent to the use of electronic signature is inferred if a party responds to a notice to treat by commencing negotiations or similar.

Appendix A: Submissions Received

The *Land Acquisition Act Issues Paper* was distributed to key stakeholders within Tasmania covering all those organisations and groups that have had an interest or role in the land acquisition process.

Organisation	Representation	Comment Received
Tasman Council	Melissa Geard, Building & Development Service Manager	9 July 2020
Huon Valley Council	Matthew Grimsey, Director Legal and Governance Services	9 July 2020