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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

LANDS ACQUISITION AMENDMENT BILL 2017

EXPLANATORY STATEMENT

**Presented by
Mr Mick Gentleman
Minister for Planning and Land Management**

EXPLANATORY STATEMENT

This explanatory statement relates to the Lands Acquisition Amendment Bill 2017 as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on the bill. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The *Lands Acquisition Act 1994* (the Act) provides the Territory Executive with the power, and prescribes the process, to compulsorily acquire interests in land in the ACT. As underlined in the General Outline of the Explanatory Memorandum for the Lands Acquisition Bill 1994, the Act is based on the following principles:

- open procedures in the acquisition of property
- public accountability of decisions to acquire property
- compensation for persons whose interest in property is acquired which recognises their interest, concerns and rights of appeal
- completing the acquisition of land expeditiously

Section 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cwth) (Self-Government Act) provides that the Legislative Assembly has no powers to make laws with respect to the acquisition of property otherwise than on just terms. Consistent with section 23 of the Self-Government Act, section 42 of the Act provides that a person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Executive in accordance with Part 6 in respect of the acquisition.

Section 45 of the Act details the general principles for calculating the amount of compensation, specifically that the compensation will justly compensate the person for the acquisition. Section 45(2) provides a non-exhaustive list of the matters to which regard must be had in assessing the amount of compensation, including:

- the market value of the interest in the land on the date of the acquisition; and
- any legal or other professional costs reasonably incurred by the person in relation to the acquisition.

Division 6.4 of the Act provides a process for:

- the person whose interest in land has been compulsorily acquired to apply for compensation (claimant);
- the Executive to accept or reject the application for compensation, and if accepted, the Executive to make an offer of an amount it considers the claimant is entitled to in accordance with Divisions 6.2 and 6.3;
- the claimant to accept or reject an offer for compensation, and if rejected for the Executive to reconsider the offer and to make a final offer; and
- if the claimant rejects the final offer, for it to be reviewed by ACAT.

Overview of the Bill

Timing issue with the current Lands Acquisition Act

The Lands Acquisition Act provides for compensation to be paid following the compulsory acquisition of an interest in land. As noted above, this is consistent with section 23(1)(a) of the Self-Government Act to the effect that the Legislative Assembly has no powers to make laws with respect to the acquisition of property otherwise than on just terms.

Currently the procedures for effecting a payment of compensation are triggered by the interest holder making a claim under section 56 of the Act. If the interest holder does not make a claim then no payment of compensation occurs. There is no time limit on the making of a claim by the landowner or other interest holder. It is possible for land to be acquired under the Act and there to be no follow up claim for compensation for several years afterwards or indefinitely. If the claimant does not make a claim it is not currently possible for the Territory to take any statutory action to bring this matter to a resolution.

This means that the Territory can potentially have a liability for compensation of an uncertain amount for an indefinite period. This is contrary to the need for timely payment of compensation to the holder of the relevant interest in land (interest holder) and contrary to the efficient administration of Territory finances and of the Lands Acquisition Act. The potential for significant claims to be made of an uncertain amount plus the uncertainty as to when they will be made can make financial planning and budget decision making difficult. Further, as the amount of compensation includes any relevant legal or other professional costs reasonably incurred by the person in relation to the acquisition, these costs could be on-going and increase each year indefinitely.

In addition, paying compensation signifies the end of the acquisition process. If the time period in which a claim for compensation can be made is indefinite, it is not consistent with one of the principles behind the making of the Act, specifically, completing the acquisition of land expeditiously to the benefit of the interest holder as well as the Territory.

How the bill achieves its purpose

The bill amends the Act to provide that if a person whose interest in land is acquired (interest holder) does not make a claim for compensation within three years of an acquisition then the Executive has the option of making an offer of compensation. Once the Executive makes the offer, a claim for compensation will no longer be able to be made under section 56 of the Act. This provides the Executive with a mechanism to effectively put a time limit on the making of a potential claim should it wish to do so. This is achieved principally through the introduction of new section 61A by clause 5 of the Bill.

The process for the subsequent negotiations about the offer made will be the same as they are now for an offer made in response to an initial claim. The interest holder may at any time after receiving the offer, accept or reject it. There is no time limit on accepting or rejecting. If rejected, the Executive then has two months to reconsider the offer and make a final offer. This final offer is subject to ACAT merit review.

Other transitional amendments relate to acquisitions of land that occurred before the commencement of the bill. In these circumstances, if a person does not make a claim for compensation within three years of the commencement of the bill, the Executive may make an offer of compensation and this offer will close off the ability to make a claim thereafter.

Consideration was given to imposing a time limit to the effect that if the claimant did not respond to an offer by the Executive within a specified period then the offer would be deemed to be a final offer. This approach was not taken on the basis that the proposed approach was sufficient in that there was not a significant history of non-response to Territory offers. This approach is consistent with the need for fairness and to ensure that the landowner has sufficient time to assess the offer and obtain any necessary professional advice. This is also consistent with the need to ensure that the landowner has some input into the compensation amount before the amount becomes settled, final. This also ensures that the Executive is accountable for its offer and the landowner has the right to seek review of any offer. This approach is also consistent with existing s62 which does not impose a time frame on claimant response to a Territory offer following an initial claim. This approach is also consistent with the Commonwealth *Lands Acquisition Act 1989*, which does not impose any time limit on a response by the landowner to an Executive offer of compensation.

Costs and Benefits

The proposal has the benefit of permitting the Executive to take formal action to help bring a compensation matter that has not progressed for some three years or more to a resolution. Once an offer is made by the Executive then the ability of the interest holder to initiate a claim will then cease and instead the process will move to the formal negotiation stage. This ability to “kick start” a stalled compensation process is consistent with the principles behind the Act noted above, that is, of resolving claims expeditiously. It is in the interest of both the interest holder and the Territory to have the matter of compensation settled expeditiously.

The mechanism for this is to permit the Executive to make a formal offer to trigger the compensation negotiations. This proposed mechanism is a limited, targeted measure which has the benefit of preserving key existing rights of interest holders entitled to compensation including:

- the right to consider a formal offer of the Executive and to take the required time to do this including obtaining further valuation and legal advice;
- request the Executive to consider an alternate compensation amount taking into account not just the market value of the property but also relevant personal loss and legal costs;
- the right to accept or reject a final offer by the Executive; and
- the right to seek ACAT merit review of a final offer (s104AA, 104AD and amended item 3 of Schedule 1 (clause 17)).

In permitting the Executive to intervene to seek a resolution of a stalled compensation matter, the measure will assist in limiting the potential for the compensation amount to increase year on year by the accumulation of legal and professional costs on the part of an interest holder.

Scrutiny of Bills Committee Principles

The following addresses the Scrutiny of Bills Committee principles.

(a) unduly trespass on personal rights and liberties;

The proposed measure will enable the Executive to make an offer of compensation to the interest holder in the absence of any claim being made during the three years following the compulsory acquisition of the relevant land through a declaration under section 33 of the Act. If the Executive does make such an offer after this three year period the interest holder will lose the right to make a claim for compensation under section 56 of the Act.

The loss of the right to make a claim under section 56 of the Act in this circumstance raises the issue of whether this amounts to a provision that unduly trespasses on personal rights and liberties. This provision does not unduly trespass on personal rights and liberties as the measure is a circumscribed, targeted measure that retains the existing key rights and obligations under the Lands Acquisition Act. Essentially, the measure does not remove the right of the interest holder to receive just terms compensation consistent with section 23 of the Self Government Act as noted above and does not remove the right of the interest holder to seek consideration of an alternate amount of the compensation through a negotiation process. Specifically, the following measures are retained:

- an offer of compensation by the Executive under new section 61A (clause 5) after the three year period must be consistent with the general principles on determining the amount of compensation, particularly the general principles in section 45 of the Act;
- the interest holder has the ability to assess the Executive offer and put forward an alternate sum back to the Executive for reconsideration under amended section 63 (clause 7,8). In other words the interest holder has the right to seek internal review of the Executive offer;
- the Executive must reconsider the offer if requested and make a final offer. The interest holder has the right to reject the final offer and seek ACAT merit review (s104AA, 104AD and amended item 3 of Schedule 1 (clause 15)); and
- Section 78 of the Act which specifically affirms the power of the Supreme Court or the High Court to review and revise an offer of compensation to ensure that it represents just terms compensation is retained.

(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

As noted above, the key operative measure of the Amendment Act is to enable the Executive to make an offer of compensation to the interest holder in the absence of any claim for compensation being made during the three years following the acquisition of the relevant interest in land (new section 61A, inserted by clause 5). If the Executive does make such an offer after this three year period then the interest holder will lose the right to make a claim for compensation under section 56 of the Act. Putting this another way, if no claim is made by the interest holder in the three years following acquisition, then the right to make a claim under section 56 following this period remains in place unless and until the Executive makes an offer of compensation under new section 61A which the Executive can make at any time

following this three year period. This raises the issue of whether the right to make a claim of compensation under section 56 is a right that becomes unduly dependant on the exercise of insufficiently defined administrative powers.

The right to make a claim under section 56 does not become unduly dependant upon insufficiently defined administrative powers, specifically the making of an offer under new section 61A (clause 5). This is for the following reasons.

The making of an offer of compensation under new section 61A (clause 5) is a proposed new administrative power that is clearly defined. Under new section 61A(1) the Executive is only able to make such an offer if satisfied that:

- The relevant interest in land has been acquired by compulsory process;
- Three years have past since the compulsory acquisition took effect through a section 33 declaration;
- The interest holder has to date not made a claim for compensation under section 56.

It is worth noting in particular that the Executive cannot make an offer of compensation during the three year period following the acquisition of land. This gives the interest holder ample time to assess the impact of the acquisition and obtain any necessary land valuation and legal advice and make a claim under section 56. The right to make a claim under section 56 is not extinguished by the proposed measure but is instead time limited. This right remains on foot for a minimum three year period following acquisition.

Further, any offer made under new section 61A in this circumstance must be made in accordance with the general principles for determining the amount of compensation as set out in Division 6.2, particularly section 45 and related provisions.

In this context it is also relevant to note that in exercising this power, the Executive must accompany a new section 61A (clause 5) offer with an internal review notice which sets out its reasoning and in particular sets out how the amount of compensation is worked out. The interest holder has the right to seek internal review of the offer that is has the right to consider the offer and put an alternate sum to the Executive for reconsideration. The final offer made by the Executive following the reconsideration is subject to ACAT merit review.

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

As noted above, the key operative measure of the Amendment Act is to enable the Executive to make an offer of compensation to the interest holder in the absence of any claim for compensation being made during the three years following the acquisition of the relevant interest in land. If the Executive does make such an offer after this three year period then the interest holder will lose the right to make a claim for compensation under section 56 of the Act. Putting this another way, if no claim is made by the interest holder in the three years following acquisition, then the right to make a claim under section 56 following this period remains in place unless and until the Executive makes an offer of compensation under new section 61A which the Executive can make at any time following the three year period. A decision of the

Executive to make an offer under new section 61A (clause 5) is not subject to ACAT merit review.

This raises the issue of whether the right to make a claim of compensation under section 56 is a right that under the Amendment Act becomes unduly dependant on the exercise of a non-reviewable decision.

The proposed measure does not make the right to make a claim of compensation under section 56 unduly dependant on the exercise of a non-reviewable decision. This is because the measure does not remove the right of the interest holder to seek consideration of an alternate amount of the compensation through the existing negotiation and ACAT merit review process. Specifically, the following measures are retained:

- an offer of compensation by the Executive under new section 61A (clause 5) after the three year period must be consistent with the general principles on determining the amount of compensation, particularly the general principles in section 45 of the Act;
- the interest holder has the ability to assess the Executive offer and put forward an alternate sum back to the Executive for reconsideration under amended section 63 (clause 7,8). In other words the interest holder has the right to seek internal review of the Executive offer;
- the Executive must reconsider the offer if requested and make a final offer. The interest holder has the right to reject the final offer and seek ACAT merit review; and

Section 78 of the Act which specifically affirms the power of the Supreme Court or the High Court to review and revise an offer of compensation to ensure that it represents just terms compensation is retained.

Further, the legal validity of a decision to make an offer of compensation under new section 61A would be subject to Supreme Court review under the *Administrative Decisions (Judicial Review) Act 1989*.

In addition, it should be noted that the Executive cannot make an offer of compensation under new section 61A (clause 5) during the three year period following the acquisition of land. This gives the interest holder ample time to assess the impact of the acquisition and obtain any necessary land valuation and legal advice and make a claim under section 56 should this be sought. The right to make a claim under section 56 is not extinguished by the proposed measure is instead time limited. This right remains on foot for a minimum three year period following acquisition.

(d) inappropriately delegate legislative powers;

The Bill does not delegate legislative powers.

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

The Bill does not insufficiently subject the exercise of legislative power to parliamentary scrutiny. Specifically, the bill does not establish new powers to create subordinate legislation or other legislative instruments.

Human rights

Human rights and the existing Lands Acquisition Act

The provisions for the compulsory acquisition of land in the Act and related measures necessarily engage with certain human rights protected under the Human Rights Act 2004 (HRA). This is because compulsory acquisition of land and consequent actions can have major impacts on a person's home, land or livelihood. The Act authorises actions that can result in the acquisition of land and the consequent loss of home, land or business premises and as such engages the section 11 human right "Protection of the Family and of children"; the section 12 human right of "Privacy and reputation" and the section 21 human right of "Fair trial".

Human right to protection of the family and children and to privacy and reputation

The proposed measure does not involve any change to the process for the compulsory acquisition of land or the vesting of acquired land in the acquiring authority. These measures are set out in the provisions in Parts 2 to 5 of the Act and no changes are made to any of these provisions. For this reason, the extent to which the proposed measure engages with the section 11 human right "Protection of the Family and of children" or the section 12 human right of "Privacy and reputation" is limited.

Notwithstanding the above, the proposed measure in so far as it relates to the compensation process could be said to engage the abovementioned rights. This is because the final quantum of compensation payable will determine the ability of the interest holder or family affected to recover from a land acquisition by acquiring a new home or new premises for a business or taking other action. It could be said that to the extent the measure impacts on the compensation process through the provision for an Executive offer of compensation under new section 61A (clause 5) it could be said to potentially amount to a limit on these rights.

The extent of such a limitation, if any, on these rights is minimal. This is because the proposed measure does not make any change to the acquisition process itself as noted above but also because the proposed measure does not make any change to the general principles for determining the quantum of compensation payable as set out in existing section 45 of the Act and related sections. The quantum of compensation that an interest holder is entitled to receive is not changed.

The extent of such a limitation, if any, is also minimal in light of the continued rights of the interest holder to input on the quantum of compensation, seek reconsideration of a section 61A offer from the Executive and seek ACAT merit review of any final offer which measures are consistent with existing provisions in the Act. These rights are set out in more detail below in connection with the human right to a fair trial.

For these reasons and for the reasons noted below in connection with the human right to a fair trial, to the extent that the proposed measure could be said to limit these rights it is suggested that the limits are reasonable and demonstrably justified and as such consistent with section 28 of the HRA.

Human right to a fair trial

It could be argued that the bill engages the right to fair trial under section 21 of the Human Rights Act 2004 (HRA). This is because the amendments set a time limit on the right to claim compensation for an acquisition of land. The proposed measure

will enable the Executive to make an offer of compensation to the interest holder in the absence of any claim being made during the three years following the compulsory acquisition of the relevant land. If the Executive does make such an offer after this three year period then the interest holder will lose the right to make a claim for compensation under section 56 of the Act.

However, section 28 of the HRA provides that an individual's rights may be subject to reasonable limits if those limits are demonstrably justified. The purpose of the bill is to create a mechanism to limit the time in which a claim for compensation can be made in order to enable claims to be settled expeditiously to the benefit of the Territory and the interest holder. As noted above, this gives greater certainty for the Territory in terms of financial planning and administration, and is consistent with the principle behind the making of the Act concerning the expeditious payment of compensation.

The time limit imposed by the bill is three years and this time limit is considered reasonable and justifiable in all the circumstances. This period of time is considered sufficient, for example, to enable an interest holder to assess the impact of the acquisition including the market and personal value of the interest in land and obtain any necessary valuation or legal advice to assist with this.

The existing Act as a whole is modelled on the Commonwealth *Lands Acquisition Act 1989* (Cwth). The Commonwealth Act includes a provision allowing an offer to be made if a claim is not made within 12 months of the acquisition (section 74A of the *Lands Acquisition Act 1989* (Cth)). This provision was inserted into the Commonwealth Act in 2008 by the *Lands Acquisition Legislation Amendment Act 2008* (Cwth). The proposed three year period is significantly longer than this period under the Commonwealth legislation.

Further it is also relevant that the interest holder has ample time to respond to any Executive offer made under new section 61A (clause 5). There is no arbitrary time limit on the making of such a response. This is to ensure that the interest holder has the ability to properly assess the offer and obtain any necessary valuation or legal advice in doing so. Further, this ensures that the compensation process cannot proceed to finalisation unless and until the interest holder has assessed the offer. In this sense a section 61A offer does not extinguish the right of the interest holder to have a say on the compensation amount. This also ensures that the Executive is accountable for its offer. This approach is consistent with existing s62 which does not impose a time frame on claimant response to a Territory offer following an initial claim. This approach is also consistent with the Commonwealth *Lands Acquisition Act 1989*, which does not impose any time limit on a response by the landowner to an Executive offer of compensation.

In this context, it is also relevant to note that the measure does not change the principles for determining the quantum of compensation that an interest holder is entitled to. An offer of compensation by the Executive under new section 61A after the three year period must be consistent with the general principles on determining the amount of compensation, particularly the general principles in section 45 of the Act.

Also as noted above, the following procedural rights are retained:

- the interest holder has the ability to assess the Executive offer and put forward an alternate sum back to the Executive for reconsideration under amended section 63. In other words the interest holder has the right to seek internal review of the Executive offer;
- the Executive must reconsider the offer if requested and make a final offer. The interest holder has the right to reject the final offer and seek ACAT merit review; and
- Section 78 of the Act which specifically affirms the power of the Supreme Court or the High Court to review and revise an offer of compensation to ensure that it represents just terms compensation is retained.

In conclusion, to the extent that the proposed new section 61A (clause 5) limits an individual's rights, the limits are reasonable and demonstrably justified and as such consistent with section 28 of the HRA.

Consistency with s23 of the Self-Government Act

Section 23(1)(a) of the Self-Government Act provides that the Legislative Assembly has no powers to make laws with respect to the acquisition of property otherwise than on just terms.

The bill does not seek to amend section 42 of the Act (Entitlement to compensation), rather it sets a time period by which a person may apply for compensation under section 56 of the act. If they do not apply, the Executive may offer compensation in accordance with Division 6.2. Therefore, the entitlement to compensation and that the compensation must be on just terms will continue in the Act's operation and be consistent with s23 of the Self-Government Act.

Provisions in detail

Clause 1 Name of Act

This clause names the Act as the *Lands Acquisition Amendment Act 2017* (Amendment Act).

Clause 2 Commencement

This clause provides that the Amendment Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause states that the Amendment Act amends the *Lands Acquisition Act 1994* (the Act).

Clause 4 Notification of compulsory acquisition declarations New section 38 (b)(ia) and (ib)

This clause amends section 38 of the Act by inserting new sections 38 (b)(ia) and (ib).

Section 33 of the Act provides for the Executive to make a declaration that an interest in land has been subject to compulsory acquisition. This final declaration follows on from a pre-acquisition declaration and related consultation and other steps under Division 4.1. A section 33 declaration has the effect that the relevant interest in land is at that point compulsorily acquired, that is, it is vested in the relevant acquiring authority.

Section 38 of the Act is about informing persons affected by a section 33 declaration that they may claim compensation. Under section 38, the Executive must send to persons affected a:

- copy of the section 33 declaration;
- notice including a statement that the person would appear to be entitled to compensation and related information; and
- compensation application form and other information.

New sections 38 (b)(ia) and (ib) add to the information that must be included in the section 38 notice. New section 38 (b)(ia) requires the section 38 notice to state that if the affected person does not make a claim within three years of the section 33 declaration taking effect, then the Executive can make an offer to the affected person of compensation. New section 38 (b) (ib) requires the notice to state that in the event that the Executive does make such an offer then the affected person will from that point on be unable to make a claim of compensation under section 56 of the Act.

Clause 5 New section 61A

This clause inserts new section 61A.

New section 61A is the central provision for the operation of the Amendment Act.

New section 61A gives the Executive the power to make an offer of compensation to a person whose interest in land has been acquired by compulsory process (through a section 33 declaration). The Executive can make such an offer if satisfied that the land has been acquired and the interest holder has not made a claim for compensation in the three years following the date of acquisition (the coming into force of a section 33 declaration).

New section 61A(2) provides that the offer of compensation must be in accordance with division 6.2 of the Act. This means that in making an offer, the Executive must have regard to the general principles set out in section 45 of the Act and related matters. This includes consideration of such matters as the market value of the interest, the value of the interest to the affected person, loss directly attributable to the acquisition and legal costs.

This provision applies to an *interest in land* that has been acquired by compulsory process other than a mortgage interest. The term *interest in land* is central to the Act as a whole. This term is defined in the dictionary to the Act as including, among other things, a legal or equitable interest in land as well as any other restriction, right, charge power or privilege over the land.

An offer from the Executive under new section 61A is an internally reviewable decision as a result of amended sections 104AA and 104AB (clauses 12 and 13). This reflects the fact that under amended section 62(1) (refer to clause 6) the person who receives a section 61A offer has the right to accept the offer or alternatively to reject the offer and put forward an alternate sum for reconsideration by the Executive under amended section 63 (clauses 7,8). As an internally reviewable decision, a section 61A offer must include an internal review notice as required by new section 104AB.

New section 61A(3) requires the internal review notice for a section 61A offer to include certain things. The notice must include a statement that the Executive is satisfied of the matters permitting it to make an offer and must also state how the amount of compensation is worked out.

New section 61A(4) provides that if an offer is made under new section 61A, then the recipient is not able to make a claim for compensation under section 56. This is the provision that effectively puts a time frame on the making of claims of compensation. If no claim of compensation is made for three years and the Executive makes an offer then in this case the affected person loses the right to initiate a claim. Importantly, the person does have the right to assess the offer made by the Executive and if it is not considered acceptable, to reject the offer and put forward an alternate sum to the Executive (refer to clause 6 and new section 62(1)). Under amended section 63 (clause 7,8), the Executive is required to reconsider its section 61A offer taking into account the alternative sum put forward and the principles in Division 6.2. Following the reconsideration, the Executive must make a final offer. The affected person has the right to seek ACAT merit review of the final offer (s104AA, clause 12, 104AD and amended item 3 of Schedule 1 (clause 15)). In other words the affected person has the right to seek an internal review of a section 61A offer and to seek ACAT merit review of the result of such a reconsideration.

New section 61A(5) defines the term *date of acquisition*. This means the day a section 33 declaration comes into force.

Section 116 of the Act gives the Executive the power to delegate any of its functions to a public servant or to “a person who has executive authority in relation to the affairs of a Territory authority”. This delegation power will apply to the proposed power of the Executive to make an offer of compensation under new section 61A if no claim for compensation is made under section 56 for three years following acquisition. The application of the section 116 delegation power to this new measure is consistent with the power to delegate other similar functions of the Executive.

It should also be noted that section 116(2) of the Act lists a number of excepted powers that cannot be delegated under section 116. The powers that cannot be delegated include powers such as:

- the ability to physically enter and occupy land (116(2)(a));
- effect urgent acquisition of land without a pre-acquisition declaration process (116(2)(b); reject a claim for compensation (116(2)(e)); and
- seek court authority for police to enter land and secure possession for the acquiring authority (116(2)(f)).

The Bill does not include the power to make an offer under new section 61A in this list of exceptions. This is appropriate because unlike the matters in the list of exceptions the power is not of a type that is similar to the already listed exceptions. The power does not create a right for the executive to occupy land or deny the payment of compensation or effect urgent acquisition. The proposed measure is not like these excepted powers in that it is a procedural measure to permit the “kick starting” of a stalled compensation process and the measure does not affect retained rights to negotiate a compensation sum, seek internal review and ACAT merit review.

New section 61A does not apply to a mortgage interest in land. The terms *mortgage*, *mortgagee*, *mortgagor* are defined in the dictionary to the Act. *Mortgage* is defined as a security over an interest in land securing the payment or repayment of money. This interest is excluded because the Act already contains particular means for progressing compensation negotiations in respect to mortgage interests and for determining the amount of compensation to the mortgagee. The process for determining the amount of compensation for the acquisition of a mortgage interest is set out in Division 6.4. Section 43 of the Act permits the Executive to write to a mortgagee or possible mortgagee requesting the mortgagee to make a claim for compensation in accordance with Division 6.4 or waive the right to compensation and to do so within 30 days. If no response is received the mortgagee is deemed to have waived the right to compensation (section 43 (3)). Should this occur, the mortgagee retains the right to seek payment of money owing under the security from the land owner (section 43 (4)(b)). In addition, under section 55 of the Act the Executive has the ability to write to the land owner seeking details of any mortgage interest. If no reply is received within 30 days, the land owner foregoes the right to dispute the amount due under a mortgage as agreed between the Executive and mortgagee (section 55 (2)).

Clause 6 Section 62

This clause removes existing section 62 and substitutes a new section 62.

Existing section 62 gives the interest holder the power to accept or reject an offer of compensation made by the Executive under section 59(1). If the interest holder rejects the offer, an alternate compensation sum can be put to the Executive for reconsideration (internal review) under section 63. Following reconsideration under section 63 the Executive must make a final offer. The interest holder can then accept or reject the final offer and can seek ACAT merit review of the final offer (s104AA, 104AD and item 3 of Schedule 1).

New section 62(1) applies this ability to accept or reject an Executive offer to an offer made under new section 61A (clause 5). New section 62(1) permits a person who receives an offer of compensation under new section 61A to accept the offer or reject the offer and put forward an alternate sum of compensation. The Executive must reconsider its section 61A offer taking into account the alternate sum and make a final offer following this reconsideration (amended section 63, clauses 7, 8). This section in effect permits a person to seek internal review of a section 61A offer.

New section 62(2) and the heading to new section 62 refers to a “person” rather than a “claimant”. This is necessary because new section 62 refers to both:

- a claimant who makes a claim for compensation under section 56 and
- a person who has not made a claim under section 56.

A person who is entitled to compensation but who has not made a claim under section 56 but is instead responding to a section 61A (clause 5) notice is not a “claimant” in this sense. For this reason new section 62 refers to the collective term “person” rather than “claimant”.

Refer also to clause 6 (amended section 62(2)), clauses 7, 8 (amended section 63), clause 9 (amended heading to section 64), clause 11 (amended section 76) and clause 15 (amended item 3 of Schedule 1). These make similar changes from “claimant” to “person” (among other matters).

Clause 7 Compensation for compulsory acquisition – Executive to reconsider offer and make final offer Section 63 (1)

This clause amends section 63 (1). Amended section 63(1) refers to *person* rather than *claimant*. For the reasons for this, refer to clause 6 on new section 62(2).

Clause 8 Section 63 (3)

This clause removes existing section 63 (3) and substitutes new section 63 (3).

Section 63 requires the Executive to reconsider its offer of compensation if the affected person has rejected the offer. This step will apply to a rejection of an offer under new section 61A. In its reconsideration, the Executive must take account of an alternate compensation sum put forward by the person and the general principles re the quantum of compensation and compensable matters set out in Division 6.2

principally section 45. Following the reconsideration, the Executive must make a final offer in the form of a reviewable decision notice (section 63 (2)). The final offer must be made within two months of the Executive receiving the notice of rejection from the affected person. The final offer is subject to ACAT merit review.

Section 63 (3) applies if no final offer is made within two months contrary to the requirement of section 62 (2). Section 63 (3) provides that in this circumstance the initial offer of the Executive is deemed to be a final offer and it is this deemed final offer which then becomes subject to ACAT merit review.

New section 63 (3) (a) and (3) (b) applies this approach to offers made under new section 61A (clause 5). This means that if the Executive makes a section 61A offer and it is rejected and the Executive fails to make a final offer following the rejection, then the initial section 61A offer is:

- deemed to be the final offer (new section 63 (3) (b));
- the internal review notice sent with the original new section 61A offer is deemed to be a reviewable decision notice (amended section 104AA (clause 12) and new section 61A (3) (clause 5);
- the interest holder has the right to seek ACAT merit review of the deemed final offer (amended section 104AA (clause 12), section 104AD and amended item 3 of Schedule 1 (clause 15).

Clause 9 Section 64 heading

This clause amends the heading to section 64. The amended heading refers to “person” rather than “claimant”. The reasons for this are set out in clause 6 and new section 62(2).

Clause 10 Advance payment on account of compensation accept or reject Executive’s final offer

This clause removes sections 70 (2) and 70 (3) and substitutes new sections 70 (2) and 70 (b).

Existing section 70 provides for advance payments of compensation to be made to a claimant in certain circumstances. These are payments made in advance of the finalisation of a compensation amount under division 6.5.

Existing 70 (2) requires the Executive to make an advance payment of compensation to a claimant if the Executive has accepted a claim and made an offer under section 59 in response to the claim. Existing section 70 (3) requires the amount of advance payment in conjunction with any earlier payment under section 70(1) to be not less than 90% of the sum offered by the Executive under section 59.

New sections 70 (2) and 70 (3) apply these requirements for advance payment to offers made under new section 61A (clause 5). This is consistent with the overall approach of the Amendment Act which is to provide that the processes following an offer under new section 61A are the same as the processes following an offer made under existing section 59 in response to an initial claim. In this and other respects there is no reason to draw a distinction between the two in relation to these consequent processes and it would be inequitable to do so.

Clause 11 Interest payable on compensation – interests other than mortgage interests
Section 76.

This clause amends existing section 76. Refer to clause 6 in relation to new section 62 (2) for the reasoning for this.

Clause 12 Definitions – pt 9A
Section 104AA, definition of *internally reviewable decision*

This clause amends section 104AA.

Amended section 63 (1) (clause 7) requires the Executive to reconsider its original offer under new section 61A taking into account the sum put by the interest holder under new section 62 (1) (clause 6).

Consistent with new section 62 (1), amended section 104AA provides that an offer of compensation under new section 61A (clause 5) is an internally reviewable decision. This in conjunction with amended section 104AB (clause 13) means that the Executive must issue an internal review notice with the offer. The required content of the internal review notice is as indicated in new section 61A (3) (clause 5).

Clause 13 Internal review notices
Section 104AB, except note.

This clause removes existing section 104AB and substitutes a new section 104AB.

New section 104AB requires the Executive to give an internal review notice to a person who has been offered compensation under new section 61A (clause 5).

Clause 14 New part 15

Clause 14 inserts new “Part 15 Transitional” into the Act including new sections 200, 201, 202.

New Part 15 sets out transitional arrangements consequent on the substantive provisions of the Amendment Act.

New section 200 defines *commencement day* for the purposes of New Part 15. Commencement day is the day section 3 of the Amendment Act commences.

New section 201 is the central, operative provision of this new Part 15. New section 201 applies to the situation where:

- an interest in land has been acquired by compulsory process before the commencement day; and
- no claim for compensation under section 56 has been made prior to commencement day.

New section 201 has the effect that the holder of the relevant interest in land has at least three years following commencement day to make a claim under section 56. If no claim is made within this time, then the Executive will acquire the ability to make an offer under new section 61A (clause 5). If the Executive does make a section

61A offer after this three year period, then the interest holder will from that point be unable to make a claim under section 56.

In this case, the interest holder will be in the same position as an interest holder to whom new section 61A (4) (clause 5) applies. This transitional provision then effectively puts a time frame on the making of initial claims of compensation.

Importantly, the interest holder does have the right to assess any offer made by the Executive under new sections 61A and 201 and if it is not considered acceptable, to reject the offer and put forward an alternate sum to the Executive (refer to clause 6 and new section 62 (1)). Under amended section 63 (clauses 7, 8), the Executive is required to reconsider its section 61A offer taking into account the alternative sum put forward and the principles in Division 6.2. Following the reconsideration, the Executive must make a final offer (new item 3 of Schedule 1, clause 15). The affected person has the right to seek ACAT merit review of the final offer. In other words, the affected person has the right to seek an internal review of a section 61A (clause 5) offer and to seek ACAT merit review of the result of such a reconsideration.

New section 202 provides that new Part 15 expires 4 years after the day it commences.

Clause 15 Reviewable decisions Schedule 1, item 3

This clause removes existing item 3 of Schedule 1 and substitutes new item 3 A, schedule 2). This amendment in conjunction with the existing definition of *reviewable decision* in amended section 104AA (clause 12) makes it clear that a final offer consequent on an offer by the Executive under new section 61A (clause 5) is subject to ACAT merit review.