

The Law Commission
Consultation Paper No 165

**TOWARDS A COMPULSORY
PURCHASE CODE:
(1) COMPENSATION**

A Consultative Report

London: TSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This Consultative Report, completed on 24 June 2002, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by e-mail to the above address, in any commonly used format.

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THE LAW COMMISSION

**TOWARDS A COMPULSORY
PURCHASE CODE:
(1) COMPENSATION**

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PART I

INTRODUCTION

TERMS OF REFERENCE

- 1.1 On 12 July 2001 the Lord Chancellor approved terms of reference for the Law Commission in the following terms:

To review the law (legislation, case law and common law rules) relating to compulsory purchase of land and compensation, with particular regard to

- (i) The implementation of compulsory purchase orders
- (ii) The principles for the assessment of compensation on the acquisition of land
- (iii) Compensation where compulsory purchase orders are not proceeded with
- (iv) Compensation for injurious affection

and to make proposals for simplifying, consolidating and codifying the law.

As part of the Review, the Law Commission will give priority to consideration of the rules relating to the disregard of changes in value caused by the scheme of acquisition.

BACKGROUND

CPPRAG Review

- 1.2 The reference arose out of a recommendation of the Compulsory Purchase Policy Review Advisory Group (“CPPRAG”), established by the Department of the Environment, Transport and the Regions (“DETR”). Their Final Report (referred to in this Report as the “CPPRAG Review”) was published in July 2000.¹
- 1.3 The CPPRAG Review commented that the law had become “an unwieldy and lumbering creature”; they found “the existing legislative base... complex and convoluted” and requiring simplification and codification.² The problem was seen

¹ *Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report* (July 2000). Its publication was announced in a Parliamentary Answer by the Minister (Nick Raynsford MP) on the 27th July 2000. The DETR published at the same time a report, by Gerald Eve and Co and the University of Reading, on the operation of the “Crichel Down” rules (the administrative rules under which, following compulsory purchase land surplus to requirements is offered back to the original owners). The Minister invited views on the two reports, which would be taken into account in preparing the government’s response.

² CPPRAG Review, p 7, para iii.

as lying partly in the fact that the legislation was derived from 1845³ or earlier, and that:

Even where the provisions of that Act have been subject to later amendment or re-enactment, the Victorian concepts and antiquated phraseology have often been carried forward, leading inevitably to difficulties in interpretation, or even comprehension.⁴

- 1.4 The CPPRAG Review made a number of recommendations for detailed improvements of the law. However, the first recommendation proposed a direct role for the Law Commission in preparing new legislation "consolidating, codifying, and simplifying the law".⁵ They added:

In framing the new statute, particular care should be taken to bring the language up to date and to standardise procedures except where that would create difficulties of its own. The new statute(s) should set out procedures as well as a clearly defined Compensation Code.

Law Commission – preliminary work

- 1.5 In December 2000, following discussion with the Law Commission, the DETR and the Lord Chancellor's Department ("LCD") approved terms of reference for a preliminary study to identify the likely features of such a project. In March 2001, the Law Commission published a preliminary paper ("the Scoping Paper"). This included a draft framework for a new Code, and discussion of the main issues and a suggested programme for further work.⁶ The Law Commission's proposals were generally accepted by the DETR, and were reflected in the terms of reference set out above.
- 1.6 A discussion paper relating to the priority issue identified in the Scoping Paper ("disregarding the scheme") was published in October 2001.⁷ It formed the subject of a seminar held at the Institute of Advanced Legal Studies in the same month, and led to a number of helpful written responses on this issue.⁸

³ The Lands Clauses Consolidation Act 1845 (largely re-enacted in the Compulsory Purchase Act 1965) remains the foundation of much of the law. Judges have commented on the difficulty of keeping "the primitive wording ... in some sort of accord with the realities of the industrial age": *Argyle Motors (Birkenhead) v Birkenhead Corporation* [1975] AC 99, 129 *per* Lord Wilberforce. The problem is not limited to the older enactments: see e.g. *Davy v Leeds Corporation* [1964] 3 All ER 390, 394, *per* Harman LJ, describing s 6 of the Land Compensation Act 1961 as "a monstrous legislative morass".

⁴ CPPRAG Review, para 20.

⁵ CPPRAG Review, para 24.

⁶ *Compulsory Purchase and Compensation: a Scoping Paper* (Law Commission, March 2001). The text is available on the Law Commission's web-site (www.lawcom.gov.uk).

⁷ *Compulsory Purchase and Compensation: Disregarding "the Scheme" – A Discussion Paper* (Law Commission, October 2001) (also on the Law Commission's web-site).

⁸ See Parts VI and VII and Apps 5 and 6 below, for discussion of this issue.

The DTLR Policy Statement

- 1.7 The Government's response to the CPPRAG Review and its proposals for reforming the law were contained in a Paper published in December 2001.⁹ It accepted that "the most basic step" in the process of modernisation would be to "consolidate, codify and simplify the legislation as soon as the opportunity arises" and undertook to work with the Law Commission to achieve this.¹⁰ It indicated that the Law Commission would be producing a Consultative Report setting out proposals to codify and consolidate the existing legislation. Detailed proposals were made in relation to most of the issues raised by the CPPRAG Review. Although further responses were invited on certain issues (see below), it is clear from the Minister's introduction that it was regarded as representing a firm policy statement on most matters.¹¹
- 1.8 The Paper identified four particular issues on which further responses were invited:
- (a) A time-limit for submitting compensation claims;
 - (b) A time-limit for reference of compensation disputes to the Lands Tribunal;
 - (c) Provision for appointment of an "independent complaints adviser";
 - (d) A statutory duty to provide accommodation works.

It also indicated that the Law Commission, in its Consultative Report, would be seeking views on a number of issues, including:

- (a) The principles relating to the disregard of the effects of "the scheme" in determining value;
- (b) The principles for assessing disturbance;
- (c) A consistent set of principles for determining compensation for severance/injurious affection where land is taken and where no land is taken;
- (d) Compensation where a compulsory purchase order is not implemented.¹²

⁹ *Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR, December 2001) (Referred to in this Report as the "Policy Statement"). It sets out "the Government's proposals for change" (pp 7-33); followed by an Appendix "Background to proposals and response to CPPRAG" (pp 39ff).

¹⁰ Policy Statement, pp 3 and 11.

¹¹ Policy Statement, foreword by Lord Falconer, Minister for Housing, Planning and Regeneration.

¹² *Ibid*, p 3.

The Law Commission's approach

- 1.9 This is in some respects an unusual Law Commission project. It does not fit naturally into any one of the normal categories - law reform, consolidation or statute law revision; but combines elements of all three. Furthermore, we have come in at a relatively late stage of the review. Most of the main policy issues relating to the substance of the law have already been examined in detail by CPPRAG and have been subject to public consultation; and the Government's conclusions have been made known. Apart from certain specific areas in which substantive issues remain to be settled, our principal task is that of sorting out, rather than reforming, the law.
- 1.10 This involves more than pure consolidation. The present statutory code is an amalgam of provisions, which have been developed over more than 150 years, and which have been supplemented by case law over the same period. Underlying it is a framework, which, as the CPPRAG Review concluded, is "basically sound".¹³ However, some parts of the code are redundant, others are ill-conceived or unduly complex, the language is often archaic, and much of the case-law is confused or conflicting.
- 1.11 Against this background, our task is to develop a coherent code, in modern form and language.¹⁴ The aim is to preserve the underlying principles, in so far as they are settled and accepted, to resolve the conflicts and to clear away the dead wood. The main purpose of this Consultative Report is to provide an opportunity for comments on the shape, style and content of the new Code, before submission to Parliamentary Counsel for detailed drafting.
- 1.12 In developing the draft Code, we have taken full account of the reforms proposed in the Policy Statement. Insofar as they represent firm policy conclusions following consultation, we do not see it as our task to reopen them. As indicated above, however, certain issues have been specifically identified in the Policy Statement as requiring further consideration and consultation. Others have emerged in the course of our work. In relation to those issues, we shall be making provisional recommendations, based on our own studies and research, but will be inviting comments on alternative options.

Preserving the balance

- 1.13 The Government's Policy Statement, therefore, sets the scene for our work. However, we have also had to address those issues on which the Policy Statement has expressed no view, or which it has left specifically for further consideration by the Law Commission. On those, our first task (not always easy) has been to work out the content of the present law. But we have also considered to what extent we should ourselves make proposals for substantive change.
- 1.14 The law has to balance the public interest in the use of compulsory purchase to promote necessary development, with the protection of the interests of individual

¹³ CPPRAG Review, p 7, para iii.

¹⁴ It is also to be remembered that the discussion in this Law Commission Report, and the policy on which it was based, can be taken into account by the courts in interpreting the resulting statute (see e.g. *Yaxley v Gotts* [2000] Ch 162, 182).

owners and occupiers. In the recent *Wildtree Hotels* case,¹⁵ Lord Hoffmann referred to the long history of debate over the balancing of public and private interests. Apparently conflicting judgments in the 19th century cases reflected differing opinions on questions of economic and social policy. Some judges put the emphasis on full compensation for all those adversely affected by public works; others on the need, in the public interest, for liability to be kept within narrow bounds.¹⁶

- 1.15 It is clear therefore that there can be no single “right” answer to the balance between private and public interests.¹⁷ A policy of providing more generously for those affected will increase costs for acquiring authorities, and may therefore detract from the public objective of promoting development. On the other hand, a more generous compensation regime may mitigate public resistance to a scheme, and thus achieve savings by reducing delay and procedural costs. The present law represents a compromise between those interests, developed over more than 150 years. In spite of several dramatic shifts of political direction over that period (as outlined in the next Part), a reasonably settled body of law has evolved on most issues. We have no reliable empirical evidence, which would enable us to reach a firm conclusion on the merits of any particular change to the present balance.
- 1.16 Accordingly, on issues not covered by the Policy Statement, our proposals for the new Code are based generally on codification rather than reform. This implies respect for the existing balance of competing interests, unless it produces obvious anomalies or unfairness.¹⁸ However, our review of the existing law has disclosed a number of issues on which the case for substantive change justifies further discussion. Examples are: what elements of value should be excluded under the “no-scheme rule”?¹⁹ Should compensation for injurious affection extend to loss of profits?²⁰ Should compensation for acquisition of rights be based solely on the diminution in the value of the land, or should it reflect in some way the market value of the right?²¹

¹⁵ *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1. The case was directly concerned with the rules for compensation for injurious affection where no land is taken; see Part IX below.

¹⁶ [2001] 2 AC 1, 8.

¹⁷ In Appendix 7 we refer to the discussion by Hutchison and Rowan-Robinson, “Utility wayleaves: a compensation lottery?” [2002] JPIF 159, where they identify five different approaches to compensation, in summary: (i) “utilitarian” – a small balance of advantage to encourage speedier settlement; (ii) “Rawlsian or justice as fairness” – those faced with expropriation should in fairness end up “marginally better off”; (iii) “financial equivalence”, by analogy with damages claims, the claimant should be as well off, but no better off, than before the acquisition; (iv) “householder’s surplus” – extra payment as a measure of solace to reflect loss of local ties etc. (the same may apply to businesses); (v) “redistribution of profit” – offering owners a share of the equity from the subsequent development. See Part VIII, paras 8.15-20 below.

¹⁸ Including potential conflict with the Human Rights Act 1998: see Part II, paras 2.18-23 below.

¹⁹ See Parts VI and VII below.

²⁰ See Part V, para 5.11; Part IX, para 9.22 and paras 9.78-79 below.

²¹ See Part VIII, paras 8.10-20 below.

- 1.17 On such issues, we are not at this stage making provisional proposals for change. Our proposals for the new Code reflect, except where otherwise stated, our best understanding of the existing law. Possibilities for further change are identified in the consultation questions. We will be inviting comments not only on the general merits of such changes, but also their potential costs and benefits. The responses will be taken into account in our final recommendations.

Comparative sources

- 1.18 In view of the relatively confined nature of our task, we have not conducted an extensive review of comparative sources.²² We have, however, been assisted by the studies carried out by law reform bodies in other Commonwealth countries. This country led the way in the 19th century by exporting the 1845 Act to many countries within the former British Empire, and, as will be seen, the case law of the Privy Council, in appeals from those countries, has played a central part in the development of the law. However, in more recent times, this country has lagged far behind others, notably Canada²³ and Australia,²⁴ in bringing the law into modern form.²⁵
- 1.19 Of particular value for our purpose has been the 1980 Report by the Australian Law Reform Commission on the Commonwealth legislation in that country. This takes account of English and Canadian law, as well as the laws of the individual Australian state legislatures. It also reviews the earlier Canadian studies. The Report led to legislation in 1989, which contains a useful model of a codified system of law.²⁶ Although there are significant differences in some aspects of Australian law, the ALRC discussion is of direct relevance and assistance on many of the issues we have had to consider.²⁷

²² We do, however, pay particular tribute to an extensive comparative study contained in a doctoral thesis by G M Erasmus, *Comparative Compensation Systems for Eminent Domain, Compulsory Purchase and Expropriation in the United States, England and South Africa, with particular reference to California* (D Phil Thesis, University of Oxford, 1994). This has been a useful check on some issues in this Consultative Report.

²³ *Report: The Basis of Compensation on Expropriation* (Ontario Law Reform Commission, 1967); *Report of the Royal Commission on Expropriation* (British Columbia Law Reform Commission, 1961-63, "Clyne Report"); *Report on Expropriation* (British Columbia Law Reform Commission, 1971).

²⁴ *Lands Acquisition and Compensation* (Australian Law Reform Commission, Report No 14, 1980) ("ALRC").

²⁵ We cite in the bibliography, App 9, relevant textbooks on Canadian and Australian law, to which we have referred to. We gratefully acknowledge the assistance we have derived from them.

²⁶ The LAA (Cth) 1989. Extracts from the Act are included in Appendix 4.

²⁷ The acquiring or taking of land by a sovereign power, or when authorised to do so by statute, is attributed varying labels in different legal systems. In some systems of law, such as in Canada, the word "expropriation" is used for what is known in other systems as "condemnation" (particularly in the United States of America) and in Australia generally as "resumption". The United Kingdom attaches the label of "compulsory acquisition" to this process. In the American system, the power of acquisition or taking is also referred to as "eminent domain". Canadian expropriation statutes either do not define their subject matter or use circular definitions. For instance, the Ontario Act 1990 defines "expropriate" as "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers..." and "expropriating authority" as "the Crown or person

- 1.20 Our preliminary studies suggested that we were unlikely to derive similar assistance from other developed systems of law, which lack the common 1845 source. However, as an example of a European system, we have considered the French Expropriation Code.²⁸ Generally, the French legal system is too different to be a useful source for what is, as we have explained, largely an exercise of codification. However, we will be making some reference to the French parallels, where relevant.

SCOPE OF THE PROJECT

Two stages

- 1.21 Within the constraints of time and resources, our approach has necessarily been selective. The considerations affecting the choice of subjects for inclusion were discussed in the Scoping Paper, and were taken into account in the Terms of Reference.
- 1.22 In agreement with the DTLR, we have decided, for the purposes of the Consultative Report, to consider the issues in the Terms of Reference in two stages. The first relates to items (ii) and (iv) in the Terms: in summary, the principles of compensation, including compensation for injurious affection where no land is taken. These issues are addressed in the present report, which concludes with proposals for a “Compensation Code”. We include a detailed review of the no-scheme rule (identified as a priority task in the Terms), and the other issues allocated to the Law Commission by the Policy Statement.²⁹ In order to avoid undue complexity in the basic Code, we have not at this stage undertaken a review of special categories of land, such as land of statutory undertakers, commons, minerals etc. These will need to be addressed once the form of the new Code is agreed.
- 1.23 The second stage will deal with the largely procedural issues raised by paragraph (i) of the Terms (implementation of CPOs), and also paragraph (iii) (abortive orders). This stage is unlikely to raise significant policy issues, beyond those addressed in the Policy Statement. The Law Commission’s task under this head is largely technical and mechanical. It is that of finding a way through the thickets of the 1965 Act, clearing away the dead wood, and extracting a coherent statement of the essential law.

Making and authorisation

- 1.24 The issues specifically identified in the Terms of Reference did not include the making and authorisation of compulsory purchase orders. This was for two

empowered by statute to expropriate land”. The Newfoundland Act 1990 simply states that “expropriated” means “expropriated in accordance with this Act” and the Canada Act 1985 defines “expropriated” as “taken by the Crown under Part 1”. In Australia, the LAA (Cth) does not use the term expropriation but instead refers to “acquisition by compulsory process” (s 41).

²⁸ See Code de l’expropriation pour cause d’utilité publique, Art L 13-15; R Chapus, *Droit administratif général*, Tome 2 (14th ed 2000); and J Ferbos & A Bernard, *Expropriation des biens* (1st ed 1998).

²⁹ Para 1.8 above.

reasons: first, the law was in reasonably coherent form, having been consolidated in the Acquisition of Land Act 1981; and, secondly, the involvement of Ministers at the authorisation stage was subject to challenge under the Human Rights Act 1998, in a case then pending before the House of Lords.³⁰ We suggested that the issue might be reviewed following the House of Lords decision.³¹

- 1.25 We will not be making detailed proposals on this issue, but it will be included in the subjects discussed in the Implementation Report. The decision of the House of Lords has confirmed the validity of the existing procedures. This makes it unnecessary to consider any radical alteration to the law, as set out in the 1981 Act. However, our further work has identified scope for improving and simplifying the 1981 law. It has also underlined the desirability of a consistent approach across the whole process of compulsory acquisition beginning with the making of the Order. For example, the proposals of the Policy Statement in relation to compensation for disturbance are directly linked to the statutory date of notification of the making of the Order, as are the proposals for compensation for abortive orders.³²

THE COMPENSATION CODE

- 1.26 In this Report we consider the contents of the Compensation Code. Before doing so, in **Part II**, we outline the background history, and the derivation and sources of the existing law. The following Parts develop a model for the new Code:

Part III - The Compensation Code - Introduction This Part outlines the features of the present law, and the policy guidelines given by the Policy Statement, and provides an overview of the new Code.

Part IV - Core Principles (1) In this and the next Part, we make proposals for the treatment in the Code of the basic principles, and the main heads of compensation. This Part covers market value and disturbance.

Part V - Core Principles (2) This Part covers principles of the compensation code relating to effects on retained land (severance and injurious affection; betterment); equivalent reinstatement; date for assessment; and incidental rules (prospects of lease renewal; illegal uses; enhancements with a view to increased compensation; and consistency).

Part VI - Disregarding the scheme This is a review of the problems arising from the no-scheme rule, taking account of the history discussed in Appendix 5. We also review the associated problem of planning assumptions.

³⁰ The subsequent decision is reported as *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

³¹ Scoping Paper, paras 37-40.

³² Policy Statement, p 23, para 4.4 (and App, para 3.8 which embraces losses and expenses flowing from unconfirmed or unimplemented orders).

Part VII – The new Code- Disregards and Assumptions We make proposals for a new set of statutory “disregard” rules, to replace the existing statutory and judicial rules; together with revised rules for planning assumptions.

Part VIII – Compensation- Related issues This covers other incidental matters, which need to be considered for possible inclusion in the Compensation Code.

Part IX - Injurious affection where no land is taken We discuss the existing law, under section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973; and make proposals for “merging” the two.

Part X – Repeals

Part XI - The Compensation Code- The Proposals

Part XII – Consultation Questions

Part XIII - Conclusion

1.27 The **Appendices** comprise:-

- (1) Glossary- Abbreviations of statutes;
- (2) A list of statutes conferring compulsory purchase powers;³³
- (3) Selected extracts from English statutes relating to compensation:
 - (a) Land Compensation Act 1961, sections 5, 6, 7, 9, 14, 15, 16, 17, 18, 21, 22 and Schedule I;
 - (b) Compulsory Purchase Act 1965, sections 7, 10 and 20(1)-(2);
 - (c) Land Compensation Act 1973, Part I, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18 and 19; Part IV, sections 45, 46, 50, 52 and 54;
 - (d) Acquisition of Land Act 1981, section 4.
- (4) Comparative material:
 - (a) An Australian Legislative Code:
 - (i) Land Acquisition Act 1989 (Cth), sections 52, 55, 56, 57, 58 and 60.

³³ Reproduced from the Butterworths Compulsory Purchase and Compensation Service (“Butterworths”), Division B, Chapter 1. F (and published with Butterworths Tolley’s kind permission).

- (b) Australian and Canadian material on injurious affection where no land is taken:
 - (i) Extracts from the Australian Law Reform Commission Report No 14: *Lands Acquisition and Compensation* (1980), chapter 11, paragraphs 305-312 and 319-332;
 - (ii) ALRC draft legislation: Draft Lands (Acquisition and Compensation) Bill, Part XIII- Compensation for Injurious Affection;
 - (iii) A Canadian example: Ontario Expropriations Act 1990, section 1(1).
- (5) The No-scheme rule - history;
- (6) The No-scheme rule – illustrative cases;
- (7) Compensation for acquisition of rights: article by N E Hutchison and J Rowan-Robinson;³⁴
- (8) Acknowledgements;
- (9) Bibliography.

³⁴ Published with kind permission from the authors.

PART II

THE EXISTING LAW

INTRODUCTION

- 2.1 In this Part we explain briefly the historical background against which the present law has developed, and the derivation and scope of the principal enactments. Although this Report is concerned particularly with compensation issues, it is important to see them against the development of compulsory purchase law generally. The history of the “no scheme” rule is discussed in more detail in Appendix 5.

HISTORICAL CONTEXT

The 1845 Act

- 2.2 The origins of the modern law are to be found in numerous private Acts, passed in the late 18th and early 19th centuries, authorising the construction of canals, railways and harbours.¹ These normally contained powers of compulsory acquisition, and provided procedures for implementation and determining compensation. Standard clauses were developed which were consolidated in the Land Clauses Consolidation Act 1845.² This did not itself confer the power of compulsory acquisition, which was derived from the private Act authorising the specific project (“the special Act”). However, after 1845, any Act authorising compulsory purchase was treated (unless otherwise provided) as incorporating the 1845 Act.³
- 2.3 The framework provided by the 1845 Act remained in place for most of the 19th century. A typical acquisition would be for the purposes of a utility (for example, a railway or water company) under powers contained in a private Act, usually promoted by a limited company. The cases established that compensation should be paid on the basis of “the value to the owner”.⁴ Compensation was usually assessed by a jury. The fact that the schemes were promoted for profit, rather than purely public motives, was reflected in the sympathetic treatment of dispossessed owners:

Compulsory acquisition of land to any great extent first took place in connection with the Railway development in the first half of the 19th century, and public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise

¹ For a concise account of the early history, see K Davies, *Law of Compulsory Purchase and Compensation*, (5th ed 1994) chapter 1.

² The 1845 Act was also exported throughout the former British Empire, and accordingly provided the basis for the development of the law in most common law countries. In some cases the principles of the cases were codified at an early stage (see e.g. the Indian Land Acquisition Act 1870). Decisions of the courts of other common law jurisdictions (notably Canada and Australia), as well as those of the Judicial Committee of the Privy Council, have made a vital and continuing contribution to the development of the law.

³ 1845 Act, s 1.

⁴ See App 5.

undertaken for profit rather than the interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventurers, led to sympathetic treatment by the tribunal which assessed the compensation payable to the owner...⁵

- 2.4 By the end of the 19th century and in the period up to the First World War, the role of public authorities became much more important. Local authorities had greatly extended functions in provision of public services, including housing, highways, and public health.⁶ To facilitate acquisitions for such purposes, and to avoid the need for a special Act for each project, compulsory powers were conferred by general Acts. Initially, authorisation of particular schemes was still subject to Parliamentary approval, by means of a “provisional order” procedure. But this was gradually replaced by the modern procedure, involving a compulsory purchase order confirmed by the relevant Minister.⁷ Implementation of the order and assessment of compensation continued to be governed by the 1845 Act.

The Scott Committee and the 1919 Act

- 2.5 The Scott Committee⁸ was established in 1918 to carry out an urgent review of the compensation laws in anticipation of the end of the war, and the likely need for acquisition by public authorities of large quantities of land “in the early stages of the Reconstruction period”.⁹ By this time the emphasis was on acquisition for public purposes, and the overriding rights of “the community”:

It ought to be recognised, and we believe is today recognised, that the exclusive right to the enjoyment of land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion, no landowner can, having regard to the fact that he holds his property subject to the right of the State to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value apart from compensation for injurious affection, &c

- 2.6 The Committee was concerned that the “value to the owner” concept had allowed “highly speculative elements of value” to be included.¹⁰ The Committee made a number of specific recommendations relating to compensation,¹¹ which were

⁵ Scott Report, para 8 (See para 2.5 below).

⁶ See e.g. Public Health Act 1875.

⁷ See e.g. Housing, Town Planning etc Act 1909. K Davies, *op cit*, paras 1.32-4.

⁸ See *Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes* (L. Scott QC, Chairman), Cd. 9229 (1918) (“the Scott Report”). His judgment (as Scott LJ) in *Horn v Sunderland BC* [1941] 2 KB 26 contains an illuminating discussion of the background to the 1919 Act.

⁹ Scott Report, para 5.

¹⁰ *Ibid*, para 8.

¹¹ The Committee’s first recommendation (not unlike that of the CPPRAG Review, 80 years later) was that “the Lands Clauses Acts are out of date... and should be repealed and replaced by a fresh Code”: *ibid*, para 6. Unfortunately, this was not implemented; most of the 1845 Act remains in force, and its extant provisions were re-enacted, with some re-

enacted as a set of six “rules” in section 2 of the Acquisition of Land Act 1919 (“the 1919 rules”), later replaced by section 5 of the Land Compensation Act 1961. The most significant was the introduction of the “market value” principle (rule (2)): compensation for the land taken should be based on “the market value as between a willing seller and a willing buyer”, with no special allowance for compulsory acquisition.¹² The 1919 Act also established a panel of official arbitrators to determine compensation disputes.¹³

From 1945 to 1961

- 2.7 The next significant developments came in the immediate aftermath of the Second World War. The dominance of the public sector in relation to the use of compulsory purchase powers was confirmed by the wide powers conferred on public authorities for post-war reconstruction, and the nationalisation of the public service providers (such as the railways). There were some limited procedural reforms. The Acquisition of Land (Authorisation Procedure) Act 1946 enacted a uniform procedure for making and confirmation of compulsory purchase orders. The Lands Tribunal Act 1949 established the modern Lands Tribunal, which took over the jurisdiction of the panel of official arbitrators.
- 2.8 The most dramatic change of policy was represented by the Town and Country Planning Act 1947 (“the 1947 Act”), under which planning control was extended to the whole country,¹⁴ and local authorities were given extensive powers to acquire land for comprehensive redevelopment.¹⁵ At the same time, all development value was expropriated by the State, resulting in land acquisitions being made at existing use value.¹⁶ A succinct summary was given by the Lord Chancellor in 1959:¹⁷

wording, in the Compulsory Purchase Act 1965, which forms the basis for most modern acquisitions.

¹² Scott Report, paras 8-9, given effect respectively by rules (2) and (1) of the 1919 rules. This did not affect the rules for compensation for disturbance or “any other matter not directly based on the value of land”: rule (6). Rule (3), requiring the disregard of value due to “special suitability”, is discussed in App 5.

¹³ 1919 Act, s 1. This procedure took the place of the various procedures under the 1845 Act, under which, depending on the amount and the choice of the claimant, compensation might be determined by two justices, by an arbitrator, or by a jury: 1845 Act, ss 22, 68.

¹⁴ Under pre-war planning legislation (see Town and Country Planning Act 1932), there was provision for the preparation by councils of planning schemes, under which land became subject to planning restrictions. The landowner whose land was injuriously affected by a planning scheme had a right to compensation for the diminution in value. Since the introduction of general planning control by the 1947 Act (even following the restoration of market-value compensation in 1959), the landowner is not entitled to compensation for such planning restrictions.

¹⁵ Similarly, the New Towns Act 1946 and the Town Development Act 1952 envisaged a central role for public authorities in promoting, and acquiring land for, development.

¹⁶ This scheme followed the recommendations of the *Uthwatt Committee on Compensation and Betterment* (Final Report, Cmd 6386, 1942). Its terms of reference had been “to make an objective analysis of the subject compensation and recovery of betterment in respect of public control and use of land”, with a view to making recommendations for action before the end of the war “to prevent the work of reconstruction thereafter being prejudiced”: see Corfield and Carnwath, *Compulsory Acquisition and Compensation* (1st ed 1978) pp 4-7.

¹⁷ Viscount Kilmuir LC: *Hansard* (HL) 14th April 1959, col 579 (introducing the 1959 Bill, which restored market value).

... the 1947 Act set up a new financial system, designed to solve once and for all the problems of compensation and betterment that prevented effective planning in the pre-war years. The State took over all development rights. Before anybody could carry out development, he had to buy back the right to develop by paying a development charge. Owners were to be compensated for the loss of the development values existing in 1947 out of a £300 million fund, and machinery was set up for the making and establishment of claims on the fund. It was assumed that, in these circumstances, land would be bought and sold in the market at existing use value. As a logical consequence of this it was provided that compensation for land bought compulsorily should be limited to existing use value.

2.9 This system was not a success. Continuing the same summary:

As is well known, the system did not work well in practice. The public found it difficult to understand and the development charge was regarded simply as a tax on development. The Conservative Government in the Town and Country Planning Acts of 1953 and 1954, therefore abolished development charge, so leaving owners of land free to realise the development value of their land provided that they could get planning permission...¹⁸

Even after abolition of development charge in 1954, compulsory acquisitions continued to take place at existing use value, plus a share of the 1947 compensation fund. Since this was based on 1947 development values, there was an ever-widening gap between compensation payments and prices at which land was being sold in the market.¹⁹

2.10 The market value principle for compensation was not fully re-established until 1959. The Town and Country Planning Act 1959 restored the principles established by the 1919 Act, but supplemented them with an elaborate set of provisions relating to disregard of associated development, and to planning assumptions, intended to take account of the comprehensive system of planning control introduced in 1947. The relevant provisions were in sections 2-9 of the Act.²⁰

2.11 The Land Compensation Act 1961 was a consolidation of the relevant parts of the 1919 Act and the 1959 Act. It became (as it remains today) the principal statute governing the assessment of compensation. However, significant aspects of compensation (notably, compensation for disturbance, and for severance or injurious affection) were not covered by the 1961 Act, and continued to be governed by the 1845 Act and cases under it.

¹⁸ *Ibid*, col 579.

¹⁹ See Corfield and Carnwath, *op cit*, p 13; also pp 28-9 (a historical summary of changes in the basis of compensation and fiscal impositions from 1845 to 1977).

²⁰ See App 5, paras A.53-54.

From 1961 until today

Towards privatisation

- 2.12 The following 15 years saw two further attempts²¹ by Labour Governments to take direct control of land development and deal with the perceived problem of betterment, but neither survived a change of Government. In one respect, however, the legacy of the 1947 Act survived. Development potential had ceased to be seen as an intrinsic right of land-ownership, the restriction or removal of which would attract compensation.²² Thus, even in cases where restriction would formerly have carried a right to compensation, the right could in effect be nullified by planning controls.²³
- 2.13 The first two terms of the Conservative Administration (from 1979) opened a new phase. The role of public authorities as direct providers of services or initiators of development was drastically reduced. Even where development schemes were initiated by public authorities they were usually in partnership with private developers.²⁴ Land acquisition powers were exercised with a view to handing the land over to the private developer, who might indemnify the authority against the cost. Privatisation resulted eventually in most of the major utilities passing into the hands of companies owned by private shareholders, and operated for profit (albeit subject to regulatory control). The Transport and Works Act 1992, which replaced the private Bill procedure for railway and other transport works, enabled any undertaking (public or private) to apply for compulsory powers for such projects.
- 2.14 The change of Government in 1997 did not result (uniquely in the post-war period) in a radical change of direction in terms of land or development policy. There are currently no proposals to take greater public control of development, or to tax development gains as such. The utilities remain privatised. Developments involving public authorities are likely to be carried out through some form of public/private partnership or private finance initiative. As in the 19th century, many compulsory purchase projects are likely to be financed, directly or indirectly, by private organisations, with a view to profit for their shareholders. From the public point of view, development appears to be seen as a desirable end in itself, without the need to secure direct public control, or to recoup the resulting betterment.

Legislative change

- 2.15 At the end of this period, most of the rules governing procedure and compensation remain as they were in 1961. The Compulsory Purchase Act 1965 re-enacted, without material change, the main extant provisions of the 1845 Act, but did not repeal that Act.²⁵ It is the principal Act governing the implementation of

²¹ The Land Commission Act 1967 (introducing Betterment Levy) and the Community Land Act 1974 (allied with Development Land Tax).

²² See *Belfast Corp v OC Cars Ltd* [1960] AC 49.

²³ *Westminster Bank Ltd v MHLG* [1971] AC 508 (highway widening); *Hoveringham Gravels Ltd v Secretary of State* [1975] QB 764 (ancient monument protection).

²⁴ Such schemes had become more common from the early 1970s: see the *Report of the Working Party on Local Authority/Private Enterprise Partnership Schemes* (HMSO, 1972).

²⁵ The “Lands Clauses Acts” are incorporated into some public statutes still in force (see App 2 below) and may also still be relevant to pre-1965 local and private Acts, so far as still operative.

compulsory purchase orders. It was supplemented in 1981 by the Compulsory Purchase (Vesting Declarations) Act 1981, which enabled orders to be implemented by a vesting declaration, as an alternative to the traditional notice to treat procedure.²⁶ The Acquisition of Land Act 1981 reproduced (again without substantive change) the 1946 Act and subsequent legislation, relating to the making and authorisation of orders.

2.16 The most substantial changes in this period were made by the Land Compensation Act 1973. This followed a “full scale review of the compensation code”.²⁷ In addition to numerous detailed amendments, there were some major innovations, including:

- (1) A new right to compensation for depreciation in the value of land due to “physical factors caused by the use of public works”;²⁸
- (2) A new category of payments for those displaced from land, including “home loss payments” and “farm loss payments”; and “disturbance payments” for those without compensatable interests;²⁹
- (3) A right to advance payment of 90% of the authority’s estimate of compensation;³⁰
- (4) Substantial extension of the rights of those affected by planning blight.³¹

2.17 Less significant amendments and additions, of a piecemeal nature, have been made by other Acts, including:

- (1) Local Government (Miscellaneous Provisions) Act 1976 (including provisions for compulsory acquisition of rights over land);
- (2) Local Government, Planning and Land Act 1980;
- (3) Planning and Compensation Act 1991.³²

²⁶ See paras 2.31-32 below.

²⁷ *Development and Compensation – Putting People First* (1972), Cmnd 5124, para 4.

²⁸ Land Compensation Act 1973, Pt I. See para 2.35 below.

²⁹ *Ibid*, Pt III. See para 2.35 below.

³⁰ *Ibid*, s 52. See para 2.35 below.

³¹ *Ibid*, Pt V. These are now incorporated in the Town and Country Planning Act 1990, ss 149ff, Sched 13. The Government proposes a new statutory power to enable that revised provision governing blight to be defined in regulations: Policy Statement, p 31, para 5.2. This issue is not within our current terms of reference.

³² This reflected in part proposals made in a report by the Royal Institution of Chartered Surveyors: *Compensation for Compulsory Acquisition* (RICS, 1989).

The Human Rights Act

- 2.18 The Human Rights Act 1998 requires existing compensation law to be interpreted and applied, as far as possible, in conformity with the European Convention of Human Rights.³³ Article 1 of the First Protocol provides:

Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of public international law.

- 2.19 As hitherto interpreted, this provision does not impose any specific standard of compensation. The general principle is that the property taken should be compensated by payment of an amount “reasonably related to its value”; but this does not “guarantee full compensation in all circumstances”, since “legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value”.³⁴
- 2.20 It is implicit in this statement, and in general principles of Convention law, that any departure from “full compensation” needs to be adequately justified by considerations of public interest, such as those mentioned, and must be reasonably proportionate to the aim pursued.³⁵ Further, the law must not discriminate unfairly as between different groups of property owner affected by the interference.³⁶
- 2.21 Also relevant is Article 6(1), which guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. In the recent *Alconbury* case, the House of Lords has held that the role of the Secretary of State in confirming compulsory purchase orders does not breach this principle, in view of the policy content of the issues involved, and the supervisory role of the High Court.³⁷ Lord Hoffmann explained the balance between democratic and legal accountability:

³³ Human Rights Act 1998, s 3.

³⁴ *Lithgow v UK* (1986) 3 EHRR 329, 371. See also *James v UK* (1986) 8 EHRR 123 (an unsuccessful attempt to challenge the valuation provisions of the Leasehold Reform Act 1967, as contrary to Art 1 of Protocol 1).

³⁵ See *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35, para 69 (“a fair balance”). See also Clayton and Tomlinson, *The Law of Human Rights* (1st ed 2000) para 18.82ff, for a review of Convention cases relating to the UK prior to the Human Rights Act. The term “full compensation” does not appear to be used in any precise sense; the term “full market value” is also used. Generally, the case law of the European Court of Human Rights on damages adopts the principle of equivalence (or *restitutio in integrum*), but does not lay down any consistent principles for assessment (see the Law Commission’s Report on *Damages under the Human Rights Act*, LC266).

³⁶ Article 14 prohibits discrimination in the enjoyment of Convention rights. In *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319, substantial damages were awarded for a breach of this Article, where remedial legislation, designed to correct a misapplication of planning law, excluded the applicant property owners, while applying to others in the same category.

³⁷ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

Importantly, the question of what the public interest requires for the purposes of art 1 of protocol 1 can, and in my opinion should, be determined according to the democratic principle – by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals. There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in art 1 of Protocol 1 that a taking of property must be ‘subject to the conditions provided for by law’. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.³⁸

2.22 This decision leaves some issues unresolved. Thus, there may be doubts over the Secretary of State’s role in determining appeals in respect of “certificates of appropriate alternative development”, which might be said to have no policy relevance in the real world, sufficient to satisfy the Secretary of State’s involvement.³⁹

2.23 Article 6 may also be breached if determination of compensation is unreasonably delayed.⁴⁰

THE LAW TODAY

2.24 The previous section outlined the historical development of the law. It will be helpful to conclude this Part by summarising the main sources of the law, as it stands before the present reform proposals, and to give an indication of the extent and nature of its use in practice.

Sources of the current law

2.25 The sources of the current law are most conveniently considered under separate heads:

- (1) Powers of compulsory purchase;
- (2) Making and authorisation;
- (3) Implementation;
- (4) Determination of compensation;
- (5) Compensation rules;

³⁸ *Ibid*, p 1412.

³⁹ Land Compensation Act 1961, ss 17-18. The planning authority (or an appeal to the Secretary of State) determines for compensation purposes the development that would have been appropriate in the absence of compulsory purchase. See further Part VII, paras 7.43-45 below.

⁴⁰ See e.g. *Guillemin v France* (1997) 25 EHRR 435.

(1) Powers of compulsory purchase

2.26 The vast majority of compulsory acquisitions are made under powers granted by numerous general Acts, for the purposes of functions of public authorities or utilities.⁴¹ It is not part of our terms of reference to review these powers. The Government has announced its intention to supplement them by new powers which would:

enable local planning authorities to exercise compulsory purchase powers for a full range of planning and regeneration purposes, including halting the physical, economic and/or social deterioration of an area.⁴²

2.27 Until recently it was common practice for transport and other similar undertakings to promote Private or Local Bills to authorise particular projects.⁴³ However, their use has become less important, since the Transport and Works Act 1992 enabled compulsory powers to be obtained without recourse to Parliament in most cases.

2.28 There appear to be no detailed, up to date statistics of the numbers of orders promoted under different powers. A 1995 study for the DETR showed an annual average of 255 orders over the preceding three and a half years, broken down between Housing, Planning, Local Roads, Trunk Roads and Motorways, and Public Utilities.⁴⁴ The figures relate solely to acquisition of land, as such. Thus, for example, the figures for public utilities do not include powers obtained for the acquisition of rights in land, such as wayleaves for electricity lines or easements for pipelines.⁴⁵

(2) Making and authorisation

2.29 The law relating to the making and confirmation of compulsory purchase orders is in the Acquisition of Land Act 1981, and regulations made under it.⁴⁶ The Act

⁴¹ A list of statutes conferring compulsory powers, taken from Butterworth's Compulsory Purchase and Compensation Service Division B, Chapter 1.F, is reproduced as Appendix 2 to this Report.

⁴² Policy Statement, p 13, para 2.10.

⁴³ For example: the Channel Tunnel Act 1987, the London Underground (Victoria) Act 1991, the London Docklands Railway Act 1991, the Croydon Tramlink Act 1994.

⁴⁴ City University Business School, *The Operation of Compulsory Purchase Orders* (DETR 1997) para 1.21. The figures show the following annual average proportions, based on the annual average of 255 orders, between the categories: Housing (86); Planning (58); Local Roads (94); Trunk Roads and Motorways (13); and Public Utilities (3).

⁴⁵ *Ibid*, para 1.5. CPPRAG commented on the "inconsistencies caused by the wide variations in the powers available to the different suppliers" and recommended further work to standardise them: *op cit*, para 209, 218. This issue has been examined in detail by Norman Hutchison and Jeremy Rowan-Robinson in two recent articles: "Utility wayleaves: time for reform" [2001] JPEL 1247; "Utility wayleaves: a compensation lottery?" [2002] JPIF 159. The latter article has been reproduced, with kind permission, in App 7.

⁴⁶ Compulsory Purchase of Land Regulations 1994, SI 1994, No 2145. Procedure at inquiries held under the Act is governed by rules made under the Tribunals and Inquiries Act 1971; see e.g. the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990, SI 1990, No 512.

contains separate (but substantially similar) sets of rules for orders promoted respectively by ministerial and non-ministerial authorities. It contains special rules for particular categories of land, such as land of local authorities or statutory undertakers, National Trust land or commons. It also contains an exclusive procedure for court challenges to the validity of orders.

2.30 The procedure in outline is as follows:

- (1) Authorisation of compulsory purchase is conferred by a compulsory purchase order, which is *made* by the acquiring authority and *confirmed* by the relevant Minister (“the confirming authority”).⁴⁷ The order must be in the prescribed form, including a description of the land by reference to a map, and a statement of the purpose for which the land is required.⁴⁸ Notices of the making of the order must be published in local newspapers, and served on owners and occupiers (other than tenants for less than a month).⁴⁹
- (2) All those served with, or entitled to service of, a notice (“statutory objectors”) have the right to object or make representations within the time specified by the notice. Other objections or representations may be received by agreement with the acquiring authority or at the discretion of the confirming authority. Objections may be disregarded if they relate exclusively to issues of compensation.⁵⁰ A public inquiry or hearing must be held for objections by statutory objectors, but is discretionary in other cases.⁵¹
- (3) After consideration of the objections, and the report of the inquiry or hearing, the order may be confirmed by the confirming authority, with or without modifications (but not, except by agreement, so as to extend the area of land taken).⁵² Notices of confirmation must be published, and served as under (1).⁵³
- (4) There is a statutory right to challenge the order on legal grounds in the Courts within 6 weeks of publication of the notice of confirmation.⁵⁴ Otherwise, the validity of the order is immune from challenge in legal proceedings.⁵⁵

⁴⁷ Acquisition Act, s 2. Ministerial orders follow a similar procedure, save that (instead of being “made” and then “confirmed”), they are initially “prepared in draft” and then (following publication and objections) “made”: *ibid*, Sched 1, para 1.

⁴⁸ The standard prescribed form is Form 1 in the Schedule to Compulsory Purchase of Land Regulations 1994, SI 1994, No 2154 (as amended by SI 1996, No 1008).

⁴⁹ Acquisition Act, ss 11, 12.

⁵⁰ *Ibid*, s 13(4).

⁵¹ *Ibid*, ss 13(2), 13(3).

⁵² *Ibid*, ss 13, 14.

⁵³ *Ibid*, s 15.

⁵⁴ *Ibid*, s 23.

⁵⁵ *Ibid*, s 25.

(3) Implementation

- 2.31 The procedures for implementing compulsory purchase orders, following confirmation are largely contained in the Compulsory Purchase Act 1965. In particular, this reproduces the equivalent provisions of the 1845 Act, with more recent amendments, relating to the notice to treat procedure and entry on land in advance of the determination of compensation. The alternative vesting declaration procedure is covered by the Compulsory Purchase (Vesting Declarations) Act 1981.
- 2.32 In the result, there are two alternative ways by which an acquiring authority may secure title to land, once the CPO has ministerial confirmation: by *notice to treat* and by *vesting declaration*.⁵⁶
- (1) The *notice to treat* procedure involves service of a statutory notice on each affected landowner to initiate the process of agreeing or determining compensation. Title does not pass to the authority until compensation (both eligibility and amount) has been settled, but the authority may take possession in the meantime by serving notice of entry.⁵⁷ The land is valued at the date of entry (or the date of determination of compensation if earlier) and interest runs from that date.
 - (2) The more recent *vesting declaration* procedure enables the authority, after confirmation, to make a declaration, vesting in itself title and authorisation to enter after expiry of a defined period (not less than 28 days) from the service of a notice on those affected. Title passes on the date so fixed, whether or not compensation has been settled.⁵⁸
- 2.33 The 1965 Act also contains provisions enabling the owner of land partly included within an order, to compel the purchase of the whole.⁵⁹ These have been supplemented by provisions of the Land Compensation Act 1973.⁶⁰

(4) Determination of compensation

- 2.34 The Land Compensation Act 1961 requires unresolved issues of compensation to be referred to the Lands Tribunal.⁶¹ The constitution and jurisdiction of the Tribunal, and procedures before it, are governed by the Lands Tribunal Act 1949, and rules made under it.⁶²

⁵⁶ The Policy Statement has accepted the CPPRAG recommendation that, in the interests of flexibility, both procedures should be retained: Policy Statement, p 54, para 2.28.

⁵⁷ 1965 Act, s 11(1).

⁵⁸ Compulsory Purchase (Vesting Declarations) Act 1981, s 4.

⁵⁹ 1965 Act, s 8.

⁶⁰ 1973 Act, s 53ff.

⁶¹ 1961 Act, s 1.

⁶² See Lands Tribunal Rules 1996, SI 1996, No 1022.

(5) Compensation rules

2.35 As indicated in the historical review, the law relating to compensation, as it exists today, represents a complex amalgam of statute law and judicial interpretation. The principal statutory sources are:

- (1) Land Compensation Act 1961:
 - (a) “1919 rules” (including market value principle, rules for compensation based on equivalent reinstatement etc);
 - (b) Disregard of value attributable to associated development on adjoining land;
 - (c) Planning assumptions, including provision for certificates of appropriate alternative development.
- (2) Compulsory Purchase Act 1965:⁶³
 - (a) Compensation for severance or injurious affection relating to land held with the land taken (s 7);
 - (b) Compensation for injurious affection caused by the works, where no land is taken, and compensation for interference with easements or restrictive covenants (s 10)⁶⁴;
 - (c) Treatment of short tenancies (s 20).
- (3) Land Compensation Act 1973:
 - (a) Compensation for depreciation caused by the use of public works (Part I);
 - (b) Extra payments for displacement from land (Home or Farm Loss Payments, Disturbance Payments (Part III));
 - (c) Advance payment of compensation (s 52).
- (4) Acquisition of Land Act 1981:

Disregard of new interests or works intended to enhance compensation (s 4(2)).

⁶³ Or, where it applies, the equivalent provisions of the 1845 Act (ss 63, 68, 121).

⁶⁴ The law in this respect is largely the result of judicial interpretation, which bears little relation to the words of section 10: see *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1: Part IX, para 9.20 below.

PART III

THE COMPENSATION CODE-

INTRODUCTION

INTRODUCTION

- 3.1 In this and the following Parts, we outline and discuss the general principles and rules governing the existing law of compensation. We consider how they might be incorporated into, or adapted for, the new Code. We distinguish those provisions which we would expect to reproduce in substance as at present, those where significant change is proposed in the Policy Statement, and those where detailed issues remain to be resolved. We also refer, where relevant, to the discussion of these principles in the Australian Law Reform Commission (“ALRC”) Report, and the Australian and Canadian Statutes.

THE EXISTING LAW

General principles

Equivalence and fairness

- 3.2 The underlying principle of statutory compensation for compulsory acquisition of land has been described as the “principle of equivalence”, that is:

... the right [of the owner] to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains a money payment not less than the loss imposed on him in the public interest, but on the other hand no greater.¹

More recent authorities put the emphasis on “fairness”:

... no allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be *compensated fairly and fully* for his loss. Conversely, and built into the concept of *fair compensation*, is the corollary that a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.² (emphasis added)

¹ *Horn v Sunderland Corp* [1941] 2 KB 26, 42, per Scott LJ. This is similar to the classic statement of the same principle as applied to common law damages: see *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, per Lord Blackburn.

² *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, 125, per Lord Nicholls.

Outline of existing rules

Standard heads of compensation

3.3 Compensation for the compulsory acquisition of land is traditionally assessed under four heads:

- (1) *Market value* - of the land subject to acquisition (“the subject land”);³
- (2) *Disturbance* - other loss not based on the value of land (typically removal expenses or temporary business losses);⁴
- (3) *Injury to retained land* -
 - (a) *Severance* - loss of value caused by the severance of the subject land from other land forming part of the same holding;⁵
 - (b) *Injurious affection* - loss in value caused to retained land by the works or their use.⁶

3.4 Although the compensation is assessed under these separate heads, it is regarded as a single global figure:

... the sum to be ascertained is in essence one sum, namely, the proper price or compensation payable in all the circumstances of the case.⁷

3.5 An alternative basis of assessment - *equivalent reinstatement* - is permitted, where the subject land is used for a purpose for which there is no general market (for example a church).⁸

Other rules

3.6 There are a number of other rules, derived from statute or case law:

- (1) The *date of assessment* is normally the date of entry by the authority (or, if earlier, date of determination of compensation);⁹

³ 1961 Act, s 5(2). See Part IV, para 4.15 below.

⁴ 1961 Act, s 5(6), preserving case law rules. See Part IV, para 4.20 below.

⁵ 1965 Act, s 7. See Part V below.

⁶ *Ibid.* Section 7 of the 1965 Act applies only where land has been acquired from the claimant. Section 10 provides separate rules for injurious affection where no land is taken (see Part V and Part IX below).

⁷ *Horn v Sunderland Corp* [1941] 2 KB 26, 34, CA, approved in *Hughes v Doncaster Council* [1991] 1 AC 382, 392, HL. There are special rules for tax purposes: see e.g. Taxation of Chargeable Gains Act 1992, s 245, which provides for apportionment between amounts of a capital and income nature (see Part VIII, para 8.51-52).

⁸ 1961 Act, s 5(5). See Part V, para 5.36 below.

⁹ See Part V, para 5.71 below. In the case of a vesting declaration, it is the date of vesting: see Part V, para 5.72.

- (2) Under the *no-scheme* principle compensation is to be assessed disregarding the scheme of acquisition;¹⁰
- (3) There are special rules for the *planning assumptions* to be made in valuing the land;¹¹
- (4) Increases in value due to *unlawful uses* must be disregarded;¹²
- (5) *Enhancements* carried out with a view to increased compensation are disregarded;¹³
- (6) Under the *betterment* rules, the compensation otherwise payable may be offset by an increase in value of adjoining land;¹⁴
- (7) There are separate rules for compensation for *injurious affection where no land is taken*.¹⁵

GOVERNMENT POLICY

3.7 The Policy Statement sets out the general approach, which the Government expects to be reflected in the new Code. It highlights the need for “simpler compensation arrangements, based on unambiguously defined principles”, to ensure that:

- (1) those from whom land is taken are restored, as far as possible, to the position they would have been in if there had been no compulsory purchase;
- (2) in addition to the value of the land taken, all those affected should be entitled to compensation for any and all of the actual losses which they can show that they have sustained as a result of an acquiring authority’s actions;
- (3) such an entitlement should apply irrespective of whether land is actually taken from the claimant for the scheme and even if the acquiring authority decides not to proceed after the compulsory purchase order has been confirmed; and
- (4) it is not appropriate for there to be any differentiation in entitlement solely as a result of the powers under which a particular order has been made.¹⁶

¹⁰ The statutory and case law history of the rule are examined in Appendix 5.

¹¹ 1961 Act, s 14ff. See Part VII, paras 7.31-32.

¹² 1961 Act, s 5(4). See Part V, para 5.59.

¹³ Acquisition of Land Act 1981, s 4. See Part V, para 5.64.

¹⁴ 1961 Act, s 7. See Part V, para 5.30.

¹⁵ 1965 Act, s 10; Land Compensation Act 1973, Part I; see Part V and Part IX below.

¹⁶ Policy Statement, para 4.2.

- 3.8 An important innovation is the proposal that the date of the initial notice of the making of the compulsory purchase order (which we will refer to in this Report as “the first notice date”¹⁷) should provide the trigger for the right to claim losses, whether or not the compulsory purchase proceeds:

... the date on which the acquiring authority notify those directly affected of the making of the compulsory purchase order should be defined as the date from which appropriate losses can be reimbursed and as the date from which such claimants have a duty to mitigate their losses. This should apply in relation to any actual and justifiable loss or expense irrespective of whether the relevant compulsory purchase order is subsequently confirmed or implemented. However, the defined date should be regarded as a baseline and, as CPPRAG pointed out, any particular loss should only be reimbursable from the date, thereafter, on which it is first incurred.¹⁸

- 3.9 In effect, the Policy Statement treats compulsory acquisition as a process,¹⁹ starting from the first notice of the making of the order (“the first notice date”) and ending with the date of entry (or earlier assessment of compensation) (“the valuation date”). Consistently with this approach, all losses resulting from the CPO process, starting from the first notice date, are in principle compensatable, whether or not the acquisition proceeds. The duty to mitigate also starts from that date.

- 3.10 The general intention is to achieve new legislation:

... to provide a single statutory Compensation Code giving effect to the Law Commission’s recommendations for achieving the principle that, in all cases, a claimant should [be] properly compensated for all the losses incurred as a direct result of the compulsory purchase order, with no differentiation according to the powers under which any particular order may be made, whether or not it is implemented and whether or not land is actually taken from the claimant.²⁰

- 3.11 In general, at least so far as relates to claimants from whom land is “actually taken,” this statement of principle represents no departure from the current law. The more detailed recommendations of the Policy Statement will be considered below as they arise. The issue of compensation for injurious affection, affecting those from whom no land is acquired, will be considered separately in Part IX. Our proposals for compensation where an order is not implemented (“abortive orders”) will form part of the next Consultative Report on “Implementation”.²¹

¹⁷ See Part II, para 2.30 above.

¹⁸ Policy Statement, App, para 3.8.

¹⁹ See *Prasad v Wolverhampton BC* [1983] Ch 333, 334; *Sheffield DC v Glossop Sectional Buildings Ltd* [1994] 2 EGLR 29, 31K-L Cf the discussion in *Shun Fung* [1995] AC 111, 136-139, *per* Lord Hope.

²⁰ Policy Statement, para 4.2.

²¹ See Part I, para 1.23 above.

THE NEW CODE – OVERVIEW

- 3.12 As presently envisaged, subject to consultation, the new Code will be designed to maintain the main features of the existing law, within a simpler and more logical structure. It will retain the basic features of the present law, including:
- (1) The overall principle of “fair compensation”;
 - (2) The traditional heads of compensation (market value, disturbance, severance/injurious affection), and the alternative of equivalent reinstatement.
- 3.13 The “no-scheme rule” will be rationalised and limited in scope; in summary:
- (1) The existing rules, statutory or judge-made, will be replaced by a new statutory statement of the rule;
 - (2) There will be a basic “disregard” rule, providing for the disregard of *increases* caused by the “project” for which the land is acquired;
 - (3) There will be separate provision for disregard of *decreases* in value caused by the project or related blight.²³
- 3.14 The rules relating to planning assumptions will be simplified, along lines consistent with the new “disregard” rule, but applying the “cancellation approach” (following the *Fletcher Estates* case²⁴), so that the retrospective effect of the rule will be limited to events subsequent to the first notice date. There will be a new certificate procedure (replacing section 17 of the 1961 Act). We invite views on whether the appeal against the local planning authority’s decision should be (as now) to the Secretary of State, or to the Lands Tribunal.²⁵
- 3.15 The present rules relating to compensation for injurious affection where no land is taken will be incorporated (in updated language, where necessary), but modified having regard to the proposals made by CPPRAG.
- 3.16 Other incidental issues will be addressed. Those for which we make proposals as part of the present project are:
- (1) Compensation for interference with rights;
 - (2) Compensation for acquisition of rights;
 - (3) Advance payments;
 - (4) Lands Tribunal extended jurisdiction;

²² Cf the discussion in *Shun Fung* [1995] AC 111, 136-139, *per* Lord Hope.

²³ In line with CPPRAG’s recommendation to retain an extended version of 1961 Act, s 9: see Part VII below.

²⁴ [2000] 2 AC 307: see App 5, para A.104.

²⁵ See Part VII, para 7.40 below.

- (5) Interest;

3.17 We explain our reasons for not including the following:

- (1) Tax;
- (2) Subsequent planning permissions;
- (3) Additional loss payments;
- (4) Disturbance payments;
- (5) Compensation for minor tenancies.

THE NEW CODE – CORE PRINCIPLES

3.18 In the following Parts, we discuss what we term the “Core principles” of compensation law, and make proposals for their treatment in the new Code. We consider them under the following headings:

- (1) Statement of right to compensation
- (2) Preliminary issues
- (3) Market value
- (4) Disturbance
- (5) Effects on retained land
 - (a) Severance and injurious affection
 - (b) Betterment
- (6) Equivalent reinstatement
- (7) Incidental rules
 - (a) Prospects of lease renewal, and effect of rehousing tenants
 - (b) Illegal uses
 - (c) Enhancements with a view to increased compensation
 - (d) Consistency and mitigation
- (8) Date for assessment
- (9) The no-scheme rule
- (10) Planning assumptions

- (11) Related issues
 - (a) Compensation for interference with rights
 - (b) Compensation for acquisition of rights;
 - (c) Advance payments
 - (d) Lands Tribunal extended jurisdiction
 - (e) Interest
 - (f) Tax

- (12) Matters not covered
 - (a) Subsequent planning permissions
 - (b) Additional loss payments
 - (c) Disturbance payments
 - (d) Compensation for minor tenancies

- (13) Injurious affection where no land is taken

3.19 Headings (1) to (4) will be considered in Part IV (Core principles (1)). Headings (5) to (8) will be considered in Part V (Core principles (2)). Headings (9) to (12) will be considered separately in the following three Parts: Part VI, VII and VIII. Heading (13) will be considered in Part IX.

PART IV

THE COMPENSATION CODE- CORE PRINCIPLES (1)

INTRODUCTION

4.1 In this Part we consider the following issues:

- (1) Statement of right to compensation
- (2) Preliminary issues
- (3) Market value
- (4) Disturbance

(1) STATEMENT OF RIGHT TO COMPENSATION

4.2 The starting point for the Code should be a simple statement that those interested in the subject land are entitled to compensation under the Act.

4.3 For example, section 52 of the Land Acquisition Act 1989 (Cth) (“LAA (Cth)”) of Australia provides:

Entitlement to compensation

A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition.

4.4 However, the Code also needs to take account of cases where the compensation is for adverse effects on an existing interest, rather than acquisition as such,¹ for example:

- (1) Acquisition of new rights;
- (2) Interference with existing easements and other rights;
- (3) Injurious affection where no land is taken.

These issues will be considered in later Parts.

¹ Cf Land Acquisition and Compensation Act 1986 (Vic) (“LACA (Vic)”), s 30, which confers a right provides on every person with an interest in land “that is divested or diminished by the acquisition of the interest to which that notice relates”. In Part IX (below), we propose that any injurious affection where no land is taken should be covered by an amended 1973 Act.

Proposal 1: Right to compensation

Subject to the provisions of the Code, any person from whom an interest, in existence at the date of notice to treat, is acquired by compulsory purchase, or whose interest in the subject land is diminished or adversely affected by or pursuant to compulsory purchase, is entitled to compensation assessed in accordance with the following rules.

(2) PRELIMINARY ISSUES

- 4.5 Three issues arise: first, whether there should be an express statement of the general objective of the Compensation Code; secondly, whether the traditional language describing the standard heads of compensation should be preserved; thirdly, whether compensation should continue to be treated as a “single global figure”.

(i) General objective

- 4.6 There is at present no statutory statement in the Act of the general principle of “fair compensation”, which is said to underlie the compensation rules.² Such a statement of principle could be used in interpreting and applying the more detailed rules. Alternatively, the Tribunal could be given a discretion to depart from the detailed rules in exceptional cases, in order to achieve “fair compensation”.
- 4.7 The latter approach is adopted by the Australian Commonwealth Act. The LAA (Cth), s 55(1) provides:
- (1) The amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will *justly compensate* the person for the acquisition.
 - (2) In assessing the amount of compensation to which the person is entitled, *regard shall be had to all relevant matters, including:* (emphasis added)

The individual heads of compensation (market value etc) are then set out. There is therefore a measure of discretion to depart from the standard heads to achieve “just compensation”.³

- 4.8 This provision followed the ALRC recommendation that, in addition to the standard list of the heads of compensation, there should be a “just compensation override”:

The list will specify the ingredients which, in the overwhelming majority of cases, will provide just compensation to the claimant.

² See para 4.2 above.

³ Cf the Victorian legislation: LACA (Vic), s 41 provides that “in assessing the amount of compensation...regard *must* be had to the following factors...” (emphasis added). The standard heads are then set out. There is no discretion to depart from them.

However, cases may arise where that list will provide a measure of compensation which in the opinion of the court is inadequate properly to compensate the loss. It is important, in terms of both constitutional validity and justice to the claimant, to provide a means whereby the court may increase the award of compensation to a figure which, in its opinion, will fully compensate the loss. With this in mind, it would be desirable to start the statutory list by a formula providing that the amount of compensation payable to a person who had an interest that has been divested, extinguished or diminished by the acquisition is such amount as will justly compensate the person in respect of the acquisition.⁴

- 4.9 The reference to “constitutional validity” in this passage is a reference to the constitutional requirement in Australia that laws for the acquisition of property should provide for “just terms”.⁵
- 4.10 There is no direct analogy in this country with the constitutional requirement for “just terms”,⁶ so that the comparison must be approached with caution. However, the recent affirmation by the Privy Council of the principle of “fair compensation” underlying the statutory scheme⁷ provides a firm basis for stating such a principle expressly in the new Code.
- 4.11 On balance, we do not think it right to follow the ALRC by expressly allowing a discretion to depart from the rules to achieve fair compensation (a “fair compensation override”). We think that would introduce an undesirable element of uncertainty, and would conflict with the objective of “unambiguously defined principles”.⁸ On the other hand, a statement of the principle of fair compensation by way of introduction to the detailed rules should help to ensure that they are construed liberally with that objective in mind.

(ii) Traditional terms

- 4.12 The Policy Statement makes no proposal to change the traditional headings under which compensation is assessed. It notes criticisms that some of the terms are archaic, but suggests that:

Any attempt to use different words would inevitably be tested in the courts to measure how far the new wording was intended to change their applicability.⁹

⁴ *Op cit*, ALRC, para 237. It followed a similar proposal by the Ontario Law Reform Commission, which was not adopted by the legislature there (*ibid*, para 227).

⁵ Section 51(xxxi) of the Australian Constitution gives Parliament the power to make laws for “the acquisition of property on just terms...” This has been interpreted as imposing an obligation to ensure that legislation “must affirmatively provide for just terms for such acquisition...”: *W H Blakeley Ltd v Commonwealth* (1953) 87 CLR 501, 521.

⁶ Nor is there any direct equivalent in the European Convention of Human Rights: see Part II, para 2.19 above.

⁷ See Part III, para 3.2 above.

⁸ See Part III, para 3.7 above.

⁹ Policy Statement, App, para 3.37 (referring to “severance” and “injurious affection”).

We agree. The general intention is substantially to reproduce, in codified form, the established principles. Therefore, there seems no good reason to change the traditional terms, unless one is able to offer other, more modern terms, which better express the underlying concepts. None of the comparisons we have considered offers any clearly preferable alternatives.¹⁰

(iii) Single global figure

- 4.13 As we have noted,¹¹ in spite of the separate heads under which compensation is traditionally assessed, it is said to represent “in essence one sum”. Historically, the rule was important in relation to tax law, which treated the compensation payment as a whole, as the price for sale of the land. However, this position has been modified by statute, which allows apportionment between capital and income elements.¹² It may also be significant in other respects. For example, the statute provides for interest to run on the whole compensation sum from the date of entry, and makes no distinction between the different elements.¹³
- 4.14 We think it is convenient to retain the established principle in the new Code.¹⁴ As a matter of drafting, this can be achieved by expressing the right to compensation as a right to “an amount”, to be achieved having regard to the detailed rules.¹⁵ We invite comments on any other practical implications of the rule, which need to be taken into account in the drafting of the Code.

Proposal 2: Heads of compensation

The right to compensation shall be a right to an amount (not less than nil), assessed in accordance with the principle of fair compensation, having regard to the following matters (as defined below): market value of the subject land; disturbance; injury to retained land (severance or injurious affection, less betterment); (where applicable) equivalent reinstatement.

Consultation issues

Do consultees agree that:

- (1) *The Code should include a statement of the objective of “fair compensation”?***

¹⁰ Although the ALRC proposed to retain the traditional terms (draft Bill cl 35(2), 82), they were abandoned in the 1989 Act, but without substituting any alternatives (LAA (Cth), s 55).

¹¹ See Part III, para 3.4 above.

¹² See Part VIII, paras 8.51-52 below.

¹³ See Part VIII, para 8.33 below.

¹⁴ See Part I, para 1.9 above.

¹⁵ Cf LAA (Cth), s 55(1).

(2) This should be expressed as principle of interpretation only (rather than as permitting the Tribunal any general discretion to depart from the detailed rules)?

(3) The right to compensation should be a right to a single (“global”) amount, assessed having regard to the detailed rules (market value, disturbance etc)?

(3) MARKET VALUE

Existing law

4.15 The “market value” rule was established by rule (2) of the 1919 rules, now 1961 Act, section 5(2):

The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.

Although the rule refers only to a “willing seller”,¹⁶ it is implicit that both parties are willing:

The compensation must be determined... by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded.¹⁷

4.16 There is some uncertainty as to whether rule (2) applies only to the valuation of the land which is being acquired, or whether it applies generally, wherever land value is relevant to the assessment of compensation. In our view, the latter is the correct interpretation. Section 5 is expressed in general terms as applying to “compensation in respect of any compulsory acquisition”, without referring to any particular head of compensation; and rule (2) refers to “the value of land” (not value of *the* land,¹⁸ or of “the relevant land”¹⁹). As we discuss below, this issue may have some practical implications for the scope of compensation for injurious affection.²⁰ In any event, it is desirable that the position should be clarified in the new Code, and that any exceptions to the “market value” principle are specifically identified.

¹⁶ The intention of the specific reference to a “willing seller” was to avoid compensation being increased by assumed reluctance on the part of the seller - the “old hypothesis of the unwilling seller and the willing buyer”: see *Horn v Sunderland Corp* [1941] 2KB 26, 40, *per* Scott LJ.

¹⁷ *Vyricherla Narayana Gajapativaju v The Revenue District Officer, Vizagapatan* (The “Indian case”) [1939] AC 302, 312, *per* Lord Romer.

¹⁸ The omission of “the” was noted by Lord Bridge in *Hughes v Doncaster Council* [1991] 1 AC 382, 393.

¹⁹ Cf 1961 Act, s 9, which refers to depreciation in value of “the relevant land”, defined (by s 39(2)) as the land subject to acquisition.

²⁰ Part V, paras 5.11-13 below.

- 4.17 Some of the Australian definitions are fuller than the 1961 Act. For example, section 56 of the LAA (Cth) provides:

For the purposes of this Division, the market value of an interest in land at a particular time is the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer.²¹

However, there is no suggestion in the cases that the different language implies a difference of substance.

Policy Statement

- 4.18 The retention of open market value is recommended by the Policy Statement, but to be applied more flexibly:

We have therefore come to the conclusion that open market value seems to present the fairest basis for assessing the compensation payable for the land taken. However, as previously mentioned, valuation cannot be an exact science and the application of the principles used to define open market value will always produce a range of figures. We would therefore wish to encourage acquiring authorities to consider whether there would be advantage in adopting a more flexible approach to negotiations on the open market value of any particular site within the limits set by such principles...²²

- 4.19 It is not clear from the Policy Statement how, as a matter of drafting, this “more flexible” approach is to be achieved. It appears to be seen principally as a matter of practice for authorities in negotiations. However, it may be assisted by the statutory expression of the overriding objective of fair compensation (as explained by our formulation in Proposal 2; and by a specific reference to both parties as “willing”, thereby emphasising the need to find a fair balance between the interests of both.

Proposal 3: Market value

(1) “Market value” of any land means the amount (not less than nil) which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

(2) Except as otherwise provided, for the purpose of any provisions of the Code which depend on the value of land (including any reduction or increase in the value of land), value means “market value” as so defined.

²¹ The language seems to be based on the classic statement by Isaacs J in *Spencer v Commonwealth* (1907) 5 CLR 418, 441: “To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration.” The “willing” but “not anxious” seller is sometimes referred to in the UK cases: see e.g. *IRC v Clay* [1914] 3 KB 466, 478; *Glass v IRC* 1915 SC 449, 465.

²² Policy Statement, App, para 3.15.

Consultation issues

Do consultees agree that:

- (1) “Market value” should be defined as the amount for which the land might be sold by a willing buyer to a willing seller?**
- (2) The market value test should apply (except as otherwise stated) to any provisions of the Code depending on the value of land?**

(4) DISTURBANCE

Existing law

Sources of the law

- 4.20 The right to compensation for disturbance is not in terms conferred by statute. It was derived from cases under the 1845 Act, which treated such personal loss as part of the “the value to the owner” or “the fair price of the land”.²³ It was preserved, following the introduction of the “market value” test under rule (2), by what is now section 5(6) of the 1961 Act:

The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

For the purposes of the present Report, it is unnecessary to do more than summarise some of the main points derived from the case law.²⁴

- 4.21 The principles considered below are applicable to those who have compensatable interests in the subject land. The 1973 Act introduced provision for similar payments to occupants without compensatable interests, covering the reasonable expenses of removal, and business losses.²⁵

General principle

THE TRADITIONAL TEST

- 4.22 An often cited statement of the rule is that in *Harvey v Crawley DC*:

Any loss sustained by a dispossessed owner which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance provided first that it is not too remote and, second, that it is the natural and reasonable consequence of the dispossession of the owner.²⁶

²³ See *Horn v Sunderland Corp* [1941] 2 KB 26 at pp 32, 45.

²⁴ For a more detailed treatment, see Butterworths, *op cit*, para E-2022ff.

²⁵ 1973 Act, ss 37-8. See Part VIII, para 8.81 below.

²⁶ *Harvey v Crawley DC* [1957] 1 QB 485, *per Romer LJ*.

- 4.23 The application of this rule to business losses was explained by the Privy Council in the leading case of *Director of Buildings and Land v Shun Fung Ironworks*:²⁷

Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, prima facie his loss will be measured by the value of the business as a going concern.²⁸

- 4.24 It is to be noted that this head of compensation is not confined to “disturbance” in the narrow sense (that is, the financial effects of displacement), but covers any other losses properly attributable to the acquisition, “not directly based on the value of land”.²⁹ In practice, the word “disturbance” has been used in a broad sense, to include such general financial consequences. This usage seems to follow the leading judgment of Scott LJ in *Horn v Sunderland Corporation*, where he used the term disturbance “for brevity” to describe those elements of “value to the owner”, in addition to market value, which were preserved by rule (6) of the 1919 rules.³⁰

TYPICAL HEADS OF CLAIM

- 4.25 Disturbance losses may take many forms. Typical examples are:

- (1) Moving house (removal costs, adaptation of furnishings, etc);
- (2) Relocating a business (cost of search for new premises, removal costs, adaptation of new premises, temporary loss of profits, partial loss of goodwill etc.);
- (3) Where the business cannot be relocated, value of the business on a “total extinguishment” basis (including value of goodwill, closure costs etc.);

²⁷ [1995] 2 AC 111. See Part IV, para 4.27 below.

²⁸ [1995] 2 AC 111, 124.

²⁹ For example, professional fees, or additional tax liabilities (see para 4.25 below). Loss of a service contract with a company was compensated for under this head: *Wrexham Maelor Borough Council v MacDougall* [1993] 2 EGLR 23. A recent example is *Ryde International plc v London Regional Transport* LT 6.2.01 (ACQ/147/2000) in which the Tribunal allowed a claim (under rule 5(6)) for holding costs, in the form of additional interest charges, resulting from delayed sales of properties blighted by the threat of acquisition. Conversely, pre-acquisition losses relating to unimplemented rent reviews, being based on the value of the land, are compensatable (if at all) as part of market value under rule (2): see *Green Motor Holdings v Preseli Pembrokeshire DC* [1991] 1 EGLR 211, LT.

³⁰ [1941] 2 KB 26, 43. This judgment is of particular authority, since Scott LJ (as L Scott QC) had been Chairman of the Committee whose report led to the 1919 Act (see para 2.5 above).

- (4) Legal and professional fees;³¹
- (5) Additional tax liabilities.³²

Relocation or extinguishment

- 4.26 This issue requires fuller discussion, since it was identified by the Policy Statement as one for consideration by the Law Commission.³³ Generally, where the subject land is occupied for business purposes, the owners of the business will be willing and able to relocate it, and this will be the cheaper option for the authority. In some cases, however, there may be an issue whether compensation is to be assessed on a “relocation” or “total extinguishment” basis.
- 4.27 This was the main issue in the *Shun Fung* case.³⁴ The relevant questions were explained by Lord Nicholls:

Three principal questions arise on relocation claims. (1) Can the business be relocated, or has it effectually been extinguished? Most businesses are capable of being relocated, but exceptionally this may not be practicable: for example, another suitable site may not exist. If the business is not capable of being relocated, then perforce compensation will have to be assessed on the extinguishment basis. (2) Does the claimant intend to relocate? The claimant must have reached a firm decision to relocate his business, and he must be reasonably assured that he will be able to do so. (3) Would a reasonable businessman relocate the business?³⁵

- 4.28 In *Shun Fung* the relocation claim failed, under both the first and the third tests. The latter requires some comment. On this aspect, the facts of the case were unusual, in that the assessed compensation on a relocation basis was almost four times that on a total extinguishment basis.³⁶ In normal circumstances, the disparity is unlikely to be so great. However, (in a passage headed “no rigid limitations”) Lord Nicholls made clear that the mere fact that “relocation” compensation would exceed that for “total extinguishment” would not of itself rule out the claim:

A businessman may spend large sums of money in setting up a new business. Before the business has time to prove itself, his premises are acquired compulsorily. Having no profit record, the business may be

³¹ *London County Council v Tobin* [1959] 1 All ER 649.

³² See *Alfred Golightly & Sons v Durham CC* (1981) 260 EG 1045. See further Part VIII, para 8.59 below.

³³ See para 4.49 below.

³⁴ The subject land was a steel-works in Hong Kong; compensation on a relocation basis (to China, in the absence of a suitable site in Hong Kong) was substantially higher than a valuation based on the total extinguishment of the business.

³⁵ *Shun Fung*, *op cit*, at p 128.

³⁶ HK\$519, as awarded by the Court of Appeal on the relocation basis; compared to HK\$131m, awarded by the Tribunal on a total extinguishment basis: *ibid*, pp115-6. (The Privy Council in substance restored the Tribunal’s award). The disparity was attributable to a number of factors, some peculiar to the Hong Kong situation, including the fact that the only practicable relocation site was in China.

worth little. The compensation payable on an extinguishment basis would be paltry. But a reasonable businessman, spending his own money might consider it worthwhile incurring expenditure in fitting out new premises nearby and continuing his business there. Fairness requires that in such a case the claimant should be entitled, in respect of the disturbance of his business, to his reasonable costs incurred in the removal of his business and in setting it up again at the new property.³⁷

THE “REASONABLE BUSINESSMAN” TEST

- 4.29 The answer was held to depend on how “a reasonable businessman using his own money” would behave in the circumstances. The disparity between the two figures would be relevant, in that the greater the disparity, the greater the need to examine the basis of the claim:

In such a case, the tribunal or court will need to scrutinise the relocation claim with care, to see whether a reasonable businessman having adequate funds of his own might incur the expenditure...Compensation is not intended to provide a means whereby a dispossessed owner can finance a business venture which, were he using his own money, he would not countenance. However, when considering these matters the tribunal or court might allow itself a moderate degree of latitude in approving as reasonable the relocation of a family business...³⁸

- 4.30 On the facts of the case, in the Tribunal’s view, the project was not economically feasible by ordinary commercial standards, because the estimated return on the required capital investment fell short of what a reasonable businessman would require for such a project.³⁹ For this reason, the Privy Council agreed with the Tribunal that the claimant was not entitled to claim on the relocation basis:

He would not be so entitled because a reasonable businessman would not take this course. The acquiring authority cannot be expected to be responsible for expenses which no reasonable businessman would incur.⁴⁰

- 4.31 It may be observed that this test is more precise, and possibly more restrictive, than that applied by the Court of Appeal in comparable cases. The test has been expressed as one of overall reasonableness, rather than by reference to a specific commercial test. Thus, in one case, it was said that the issue should be decided:

... according as it was *reasonable or unreasonable* for the appellants in the circumstances, having been deprived of their existing business

³⁷ *Shun Fung, op cit*, at p 127B-D.

³⁸ *Ibid*, at p 127G-H, approving Wells J in *Commissioner of Highways v Shipp Bros Pty Ltd* (1978) 19 S.A.S.R. 215, 222.

³⁹ *Ibid*, p 131A-E. The return fell “far short of the return an investor would expect for a China project with its attendant risks.” This view was supported by the fact that Shun Fung’s parent company, which had adequate funds, had not been willing to fund the project on its own merits, but only if it received sufficient compensation.

⁴⁰ *Ibid*, p 131G.

premises, to substitute other business premises and transfer their business to the substituted premises.⁴¹ (emphasis added)

- 4.32 More recently, in upholding the Lands Tribunal's refusal to award compensation on a reinstatement basis⁴² for the acquisition of the Festiniog railway,⁴³ Ormerod LJ commented:

...if an undertaking in question is a business undertaking, then the question of the relation between the cost of reinstatement and the value of the undertaking is relevant and may be paramount in considering *the question of reasonableness*...

Having decided on the evidence that the undertaking was a business one, [the Tribunal] realised that the cost of the proposed reinstatement was out of all proportion to the value of the undertaking, and in those circumstances felt bound to come to the conclusion that reinstatement was *not a reasonable basis of compensation*.⁴⁴ (emphasis added)

- 4.33 Arguably, such an approach allows the Tribunal greater flexibility to take into account the reasonable interest of a dispossessed owner in carrying on an established business (which may have been his main occupation and livelihood), even where it might not be justified by ordinary commercial considerations, as applied to a new project. Lord Nicholls himself accepted that the “reasonable businessman” test needs to be applied flexibly, and that the degree of the disparity of cost was an important factor. He was prepared to allow “a moderate degree of latitude” in relation to a family business.⁴⁵ Accordingly, in our provisional proposal below, we prefer a test of “reasonableness”, rather than one tied to the “reasonable businessman”.

Other disturbance issues

FAILURE TO MITIGATE

- 4.34 As in the case of common law damages, the compensation may be reduced if the claimant has failed to mitigate his loss:

⁴¹ *A & B Taxis Ltd v Secretary of State of Air* [1922] 2 KB 328, 342, *per* Atkin LJ (a case relating to war compensation).

⁴² Under the “equivalent reinstatement” rule, 1961 Act, s 5(5). See Part V, para 5.36 below.

⁴³ *Festiniog Railway Co v Central Electricity Generating Board* (1962) 13 P&CR 248.

⁴⁴ *Ibid*, at 258, citing (*inter alia*) the *A & B Taxis* case (above).

⁴⁵ In the context of smaller businesses, his endorsement of the reasoning of Wells J in the *Shipp* case is significant. As Wells J said (p 222), in such cases:

“the court is not assessing the standing of the subject business in the market as a possible investment; it is determining whether the claimant is acting reasonably in seeking to transplant his business.... Their business may represent more than just a means of getting a living – it may represent too their chosen way of life. Even though conventional accounting practice could represent such a company as making only small profits, the salary and wages received, and other direct and indirect benefits derived from the company may provide the shareholders with satisfactory emoluments, and reasonably inspire in them a determination to carry on elsewhere which the Court should endorse...”

The law expects those who claim recompense to behave reasonably. If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure. Expressed in other words, losses or expenditure incurred unreasonably cannot sensibly be said to be caused by, or be the consequence of, or be due to the resumption.⁴⁶

4.35 The onus lies on the authority to establish a failure by the claimant to mitigate.⁴⁷

PERSONAL CIRCUMSTANCES

4.36 In a case in 1965, the Court of Appeal held that where a claimant was unable to re-establish his business, and thereby mitigate his loss, because of ill health, he could not claim compensation for the total extinguishment of goodwill.⁴⁸ The state of his health was not caused by the acquisition, and was regarded as an extraneous consideration.

4.37 This rule was strongly criticised. For example, a Justice report commented:

We believe that it is right in such circumstances to draw an analogy with the liability which arises with regard to personal injury in the law of tort, whereby the wrongdoer is required to take his victim as he finds him, and to suffer the greater liability if that victim should possess an egg-shell skull...[T]he personal circumstances of the claimant, such as age and state of health, [should] be taken fully into account.⁴⁹

4.38 The rule was mitigated by statute in 1973, by giving traders over 60, in certain circumstances, a statutory right to claim compensation on the basis of total extinguishment, even where relocation might be possible.⁵⁰ In other cases, the rule remains.

⁴⁶ *Shun Fung* (above), at 126.

⁴⁷ *Lindon Print Ltd v West Midlands CC* [1987] EGLR 200, LT.

⁴⁸ *Bailey v Derby Corporation* [1965] 1 ALL ER 443.

⁴⁹ Justice Report: *Compensation for Compulsory Acquisition and Remedies for Planning Restrictions (1969) together with a Supplemental Report*, (Stevens, London, 1973), para 41; cited with approval by the ALRC: see para 4.46 below.

⁵⁰ 1973 Act, s 46(1) provides that, where the sole trader, partners or major shareholders of a business up to a specified annual rateable value (currently set at £24,600 or less), are more than 60 years old on the date of displacement, compensation may be assessed on the assumption that it is not reasonably practicable to relocate. The claimant is required to give undertakings that he will not dispose of the goodwill, or engage in any other business of the same kind within the area defined by the authority: s 46(3).

PRE-ACQUISITION LOSSES

- 4.39 The *Shun Fung* case established that losses incurred from the time of the announcement of the proposed acquisition, even though preceding the date of acquisition or entry, could be included in the claim:

... losses incurred in anticipation of the resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption.⁵¹

- 4.40 It seems that this basis of claim is confined to the threat of acquisition as such (as in the *Shun Fung*), rather than loss due to blight caused by the authority's proposals in general. For example, the declining profits of a corner shop in an area blighted by redevelopment proposals may be attributable to the "scheme", but not necessarily to the acquisition, or threat of acquisition, of the individual shop itself. Before *Shun Fung*, the Scottish Court of Session took a relatively narrow view, when disallowing a claim by a shop-owner for losses due to comprehensive development of a surrounding area:

It is dispossession caused by the taking of lands which gives rise to compensation, not the threat of dispossession or the effects of publication of plans for the execution of the works.⁵²

Since *Shun Fung*, it is clear that loss due to "the threat of dispossession" may be claimed,⁵³ but it is uncertain how far the consequences of the wider scheme may be taken into account.

PRESUMPTION OF VALUE FOR MONEY

- 4.41 Disturbance compensation is not normally payable for the cost of new premises, even if they are more expensive. There is a presumption of "value for money", that is, that any extra costs will be reflected in improvements which represent value for money in the hands of the claimant.⁵⁴ However, that presumption is rebuttable. Thus, in *J A Bibby & Sons Ltd v Merseyside County Council*,⁵⁵ it was held that increased operating costs were a possible head of claim, but such a claim would only succeed where it was shown that there was no reasonable alternative to

⁵¹ *Ibid*, p137. The company was informed that the land was to be used as part of a New Town, but the actual resumption did not take place until four years later. In the meantime, the business was run down in anticipation of resumption. The resulting losses were led to be "due to" resumption and so compensatable.

⁵² *Emslie v Aberdeen DC* [1994] 1 EGLR 33, 38, *per* Lord President Hope.

⁵³ See e.g. *Ryde International plc v London Regional Transport* LT 6.2.01 (ACQ/147/2000) (loss due to delayed sales of properties blighted by the threat of acquisition).

⁵⁴ See *Service Welding Ltd v Tyne & Wear County Council* (1979) 38 P&CR 352, CA where Bridge LJ said: "... there is a presumption in law, albeit a rebuttable presumption, that the purchase price paid for the new premises is something for which the claimant has received value for money. . . . If the claimant has made a bad bargain and has paid a great deal more for the new premises to which he is moving than they are really worth, that is not something for which the acquiring authority can properly be charged."

⁵⁵ (1979) 39 P&CR 53, CA.

accepting the increased costs, and that the claimants were in no better position than they were previously.⁵⁶

- 4.42 The cost of structural adaptations or additions may be disallowed on the same basis;⁵⁷ or a deduction may be made to reflect the improvement.⁵⁸

CONSISTENCY

- 4.43 The disturbance claim must be consistent with the basis of the claim for value of the land. So, if the site is valued as having potential for development which would involve displacing the business in any event, no separate claim can be made for disturbance⁵⁹ (The same principle applies to other heads of compensation, such as severance.⁶⁰ Accordingly, it will be expressed as a separate rule in the Code⁶¹).

“Disturbance” in other jurisdictions

- 4.44 Disturbance is an accepted part of compensation in most other common law jurisdictions, although not always under that name. Sometimes the right is expressed in the statute; sometimes it is simply treated in the cases as part of the “value to the owner”.⁶² Statutory formulations vary from a simple statement of principle to a more detailed list.⁶³
- 4.45 An example of a simple statement of principle is in the LAA (Cth). The word “disturbance” is not used in the Act, although it was used in the ALRC Draft Bill. Section 55(2)(c) allows a claim for:

any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, *including any circumstances peculiar to the person*, suffered or incurred by the person as a direct, natural and reasonable consequence of:

⁵⁶ The claim in *Bibby* failed before the LT and the CA because the claimants were unable to prove that they had not derived benefit from the increased expenditure.

⁵⁷ See eg. *Smith v Birmingham Corp* (1975) 29 P&CR 265, LT.

⁵⁸ *Tamplin's Brewery Ltd v County Borough of Brighton* (1971) 22 P&CR 746, LT.

⁵⁹ *Horn v Sunderland Corp* [1941] 2 KB 26.

⁶⁰ See Part V, para 5.3 below.

⁶¹ See para 4.68 below.

⁶² See *Commonwealth v Milledge* (1953) 90 CLR 157. For a review of the pre-1980 Australian statutes, see ALRC, *op cit*, para 241, pages 122-123.

⁶³ Some Australian statutes have more detailed statements of some of the elements of the disturbance. See e.g. Land Administration Act 1997 (WA), s 241(6), which requires regard to be had to “the loss or damage, if any, sustained by the claimant by reason of” identified items, including “removal expenses”; “disruption and reinstatement of a business”; “halting of building works” (including abortive architect’s fees or quantity surveyor’s fees); and “any other facts which the acquiring authority or the court considers it just to take account in the circumstances of the case”. An equal variety of formulations is found in the Canadian statutes. An example is the Canadian Expropriation Act 1985, which contains a general statement of the normal principle, but offers the alternative of a percentage allowance, not exceeding 15% of the market value, if the relocation costs are difficult to estimate or determine.

- (i) the acquisition of the interest; or
- (ii) the making or giving of the pre-acquisition declaration...
(emphasis added)

4.46 This wording follows the recommendation of the ALRC. The italicised words were designed to ensure that personal circumstances could be taken into account, following criticism of the *Bailey* case.⁶⁴ The ALRC agreed with that criticism:

Age or ill health might have forced the owner to retire in any case. However, but for the acquisition, he would have been able to sell the business as a going concern. Also the acquisition may hasten retirement. Continuing to carry on an established business is very different from re-establishing in a new location, particularly for the elderly and infirm. In determining compensation for disturbance, the court should have regard to circumstances peculiar to the claimant.⁶⁵

4.47 Express provision is made for legal costs: LAA(Cth), s 55(2)(e):

(e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of:

(i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and

(ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Secretary to the Attorney-General's Department... requires.

4.48 There is also a statutory statement of the “consistency” principle⁶⁶ under section 57:

Where the market value of an interest in land acquired by compulsory process is assessed upon the basis that the land had potential to be used for a purpose other than the purpose for which it was used at the time of acquisition, compensation shall not be allowed in respect of any loss or damage that would necessarily have been suffered, or expense that would necessarily have been incurred, in realising that potential.

Policy Statement

4.49 The Policy Statement gives strong support for a statutory statement of the right to compensation for disturbance. It proposes new legislation:

- (1) to define general principles for assessing disturbance so as to include all actual costs and losses which are incurred reasonably and justifiably, are

⁶⁴ See para 4.36 above.

⁶⁵ ALRC, *op cit*, para 245, pages 125-126.

⁶⁶ Based on *Horn v Sunderland Corp*: see para 4.43 above.

not too remote and represent a natural and reasonable consequence of the dispossession (Law Commission);

- (2) to codify the principles established in case law with regard to relocation v extinguishment (Law Commission), and to confirm the current age-related provisions;
- (3) to provide that all appropriate professional fees (surveyors, lawyers and accountants) should be paid on a reasonable costs basis.⁶⁷

4.50 In relation to the first, it favours a general “broad but unequivocal” expression of the principle, thereby retaining “the flexible and common sense approach which has long been established by case law...,” rather than a statement of specific heads of compensation:⁶⁸

It seems obvious... that any attempt to specify in statute the specific matters for which disturbance compensation might be considered could never be comprehensive and so would be of no benefit. Indeed, it could be counter-productive if it were to inhibit acquiring authorities from adopting a pragmatic approach.⁶⁹

4.51 On the second issue, the principal problem is identified as that of determining what should be regarded as “reasonably practicable”. The Law Commission is asked to consider this issue taking account of, in particular, the criteria established in the *Shun Fung* case. It is accepted that it may not always be appropriate to base compensation on “the least cost to the acquiring authority”. Subject to the Commission’s views, it is suggested that there may be case for:

...relying on the flexibility provided by a statement of qualitative principles accompanied by the scope for the determination of any particularly difficult case on its own merits, if necessary by the Lands Tribunal.⁷⁰

⁶⁷ Policy Statement, p 28, para 4.16. Professional fees should be paid “on the basis of the actual expenditure reasonably incurred”, replacing (in the case of surveyors) the *Ryde’s Scale*: (1996) (published by the Valuation Office Agency on behalf of the Department of the Environment, now the DTLR) p 26, para 4.14 and App, paras 3.58-62. The *Ryde’s Scale* is a scale of charges (based on the amount of compensation) used by most acquiring or compensating authorities for assessing the amount of surveyor’s fees to be reimbursed to the claimant in respect of services of a surveyor in preparing, negotiating and settling the claim for compensation. It is not mandatory and has no statutory status, but the acquiring/compensating authorities will not normally depart from it except if it is agreed that a quantum meruit fee (which the Scale recognises may occasionally be appropriate) should be paid.

⁶⁸ Policy Statement, App, para 3.52. The same rule would apply to “those who are directly affected but have no interest in the land”, currently provided for by LCA 1973, s 37: see Part VIII, para 8.81 below.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, App, paras 3.53-57.

4.52 As already explained, the Report proposes a fixed starting point for disturbance compensation, the date of the first notice of the order.⁷¹

4.53 There are other points of detail in the Policy Statement:

- (1) Business loss should not be ruled out merely because the business has ceased operating before the date of possession;⁷²
- (2) Compensation may include elements of both relocation and extinguishment;⁷³
- (3) The statement of principles should include provision to offset adverse tax consequences of the acquisition:

... in line with current case law,⁷⁴ we consider that the statement of the principles to be applied in assessing compensation should include provision for any additional tax incurred as a direct result of the compulsory acquisition of a claimant's land, as well as the cost of any loan incurred solely, and justifiably, in order to be able to acquire land in time to benefit from capital gains roll-over relief.⁷⁵

Discussion

4.54 Generally, the Policy Statement gives a clear lead as to the content and form of the provisions for disturbance. Certain issues require further discussion:

- (1) Wording of the causation test;
- (2) Failure to mitigate;
- (3) Personal circumstances;
- (4) The test of "reasonableness" in relation to relocation versus extinguishment;
- (5) Partial relocation;
- (6) Starting date for disturbance compensation;

⁷¹ See Part III, para 3.8 above.

⁷² Policy Statement, App, para 3.55. This proposal gives effect to the existing law as stated in *Glossop Sectional Buildings Ltd v Sheffield Development Corporation* [1994] 2 EGLR 29, CA. That case related to a claim under the 1973 Act, s 46 (see para 4.38 above), but the reasoning appears to be of general application, and is consistent with *Shun Fung* (see paras 4.39-40 above). Although the claimant vacated before the notice of entry, this was due to "the whole process of acquisition," and therefore the cost was properly claimed: p 31K-L.

⁷³ Policy Statement, App, para 3.56. This is accepted under the existing case law: see e.g. *Tamplin's Brewery v Brighton CBC* (1971) 22 P&CR 746.

⁷⁴ Citing *Alfred Golightly & Sons Ltd v Durham CC* (1981) 260 EG 1045. See Part VIII, para 8.59 below.

⁷⁵ Policy Statement, para 4.16, and App, para 3.63.

(7) Other points of detail.

(1) Causation

4.55 The first proposal in the Policy Statement follows the traditional test, which allows compensation for any loss which flows from a compulsory acquisition:

... provided, first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner.”⁷⁶

In the LAA (Cth) the equivalent test refers, more concisely, to the “direct, natural and reasonable consequence of” the acquisition.

4.56 The use of the word “direct” in this context was in fact contrary to the recommendation of the ALRC, which was concerned that it might result in too narrow an approach.⁷⁷ However, it is difficult to see that the use of the word “direct”, instead of “not too remote”, makes a material difference.⁷⁸ As Lord Nicholls said, in the *Shun Fung* case, precision in the language of causation is difficult to achieve:

The familiar and perennial difficulty lies in attempting to formulate clear practical guidance on the criteria by which remoteness is to be judged in the infinitely different sets of circumstances which arise. The overriding principle of fairness is comprehensive, but it suffers from the drawback of being imprecise, even vague, in practical terms. The tools used by lawyers are concepts of chains of causation and intervening events and the like. ‘Reasonably foreseeable’, ‘not unlikely’, ‘probable’, ‘natural’, are among the descriptions which are or have been used in particular contexts. Even the much maligned epithet ‘direct’ may still have its uses as a limiting factor in some situations.⁷⁹

4.57 Against this background, it seems unnecessary and possibly confusing to over-complicate the definition of causation. We shall use the expression “fairly attributable” as sufficiently encompassing the principles discussed by Lord Nicholls.⁸⁰

⁷⁶ *Harvey v Crawley DC* [1957] 1 QB 485, 494, *per* Romer LJ.

⁷⁷ ALRC, *op cit*, page 123-124, para 242: “For example, is the cost of buying new curtains or carpets really a loss resulting directly from acquisition?”

⁷⁸ See *A & B Taxis* (above) at p 336, *per* Bankes LJ. See also the examples of “direct” and “indirect” consequences, given by Denning LJ in *Harvey v Crawley DC* (above) at p 493.

⁷⁹ [1995] 2 AC 111, 126 D-E. Earlier he had referred to “losses fairly attributable to the taking of (the) land...” *ibid*, p 125 D.

⁸⁰ Cf 1973 Act, ss 37-38 (which provide a statutory disturbance payment for those without compensatable interests who are “displaced...in consequence of” compulsory purchase) refers simply to loss sustained “by reason of the disturbance of (the trade) consequent upon...having to quit the land.” This has been accepted as generally equivalent to disturbance under the 1961 Act: see e.g. *Prasad v Wolverhpton BC* [1983] Ch 333, 353-4.

(2) Failure to mitigate

- 4.58 As noted by Lord Nicholls,⁸¹ the claimant's duty to mitigate is implicit in the ordinary principles of causation. However, for completeness it may be desirable to include a specific statement in the Code. This will also make clear that the duty to mitigate runs from the first notice date⁸² and the burden of proof of the failure to mitigate is on the acquiring authority.⁸³ Although most relevant to disturbance, it could in principle be relevant in other contexts (for example, equivalent reinstatement, or temporary loss caused to retained land). Accordingly, it will be covered by a separate Proposal in the new Code (see Part V, para 5.70 below).

(3) Personal circumstances

- 4.59 The Policy Statement proposes the retention of the special concession in the 1973 Act for traders over 60 years old. While we accept that proposal, we see force in the ALRC's criticism of the *Bailey* case. We propose provisionally that the statute should expressly allow for the personal circumstances of the claimant to be taken into account. The retention of the special 1973 rule should be without prejudice to that general position.

(4) Reasonableness and relocation

- 4.60 The Policy Statement proposes that the case law principles with regard to relocation should be "codified", but then suggests that this should take the form of a statement of "qualitative principles", allowing flexibility in particular cases. As already noted,⁸⁴ the most recent authoritative statement in case law is in *Shun Fung*, where the tests were expressed as three questions:

- (1) Can the business be relocated, or has it effectively been extinguished?
- (2) Does the claimant intend to relocate?
- (3) Would a reasonable businessman relocate the business?

- 4.61 However, as we have explained, the facts of the case were unusual, because of the problems of relocating a steel works in Hong Kong and the wide disparity between the bases of compensation. It does not appear to be an issue which gives rise to frequent problems in this country. In view of the wide variety of situations which may arise, it is important to avoid too prescriptive a test. As the Policy Statement itself points out, in relation to the general test for disturbance, this can be counter-productive if it inhibits a pragmatic approach to individual cases.

⁸¹ See para 4.34 above.

⁸² As proposed in the Policy Statement. See Part III, paras 3.8-9 above.

⁸³ See para 4.35 above.

⁸⁴ See para 4.27 above.

- 4.62 Accordingly, our provisional view is that a detailed statement of the rules for relocation versus extinguishment is unnecessary.⁸⁵ However, it would be helpful to confirm that compensation on the relocation basis may be allowed, even if it exceeds that on extinguishment. For the reasons discussed earlier,⁸⁶ we think the “reasonable businessman” test, as applied in *Shun Fung*, may be unduly restrictive for the generality of cases. We provisionally propose, as the test, whether relocation is “reasonable in all the circumstances”, including any personal to the claimant.

(5) Partial relocation

- 4.63 The Policy Statement suggested a need to make clear that compensation may include elements of both relocation and extinguishment. This is already accepted in the case law.⁸⁷ However, it ties in with an issue raised by CPPRAG and the Policy Statement in relation to injurious affection.⁸⁸ This is the lack of compensation for the replacement of agricultural buildings, made necessary by severance, where the cost is not adequately reflected by compensation based on reduction in market value.⁸⁹ The Policy Statement suggests that this is more appropriately dealt with as part of compensation for disturbance.⁹⁰
- 4.64 We agree. We see no reason in principle why such costs should not be included within the scope of disturbance in proper cases, nor why this concession should not be extended to non-agricultural businesses. It would be helpful for this to be made clear, by providing that disturbance may include the reasonable costs of such replacements, where required to continue a business on the retained land. The overriding test of “fairness” should ensure that it is not allowed to result in double compensation. However, we think that this should be treated as an exception to the normal, and therefore dependent on the Tribunal being satisfied that it is reasonable in the circumstances of the case.

(6) Starting date

- 4.65 We agree that the starting date for compensation will be as proposed by the Policy Statement. We propose to define this as “the first notice date”, as mentioned earlier in the Report.⁹¹

(7) Other points of detail

- 4.66 Other matters for which the Policy Statement⁹² proposes specific provision are:

⁸⁵ It is to be remembered that the discussion in this Law Commission Report, and the policy on which it was based, can be taken into account in interpreting the resulting statute (see e.g. *Yaxley v Gotts* [2000] Ch 162, 182).

⁸⁶ See para 4.33 above.

⁸⁷ See e.g. *Tamplin’s Brewery v Brighton CBC* (1971) 22 P&CR 746 (cost of replacing a bottling plant, which was part of an industrial undertaking, was allowed as disturbance, subject to deduction to reflect “new for old”).

⁸⁸ See Part V, para 5.22 below.

⁸⁹ CPPRAG Review, para 129(ii). This possible unfairness was highlighted in the *Cook v Secretary of State* (1973) 27 P&CR 234, LT. (See Part V, paras 5.9 and 5.22 below).

⁹⁰ Policy Statement, App, para 3.39.

⁹¹ See Part III, para 3.8 above and Part XI, (A) General definitions, below.

- (1) Professional fees;
 - (2) Businesses ceasing to operate before date of entry;
 - (3) Extra tax burdens and loan costs arising from acquisition.
- 4.67 We agree that there should be express provision in relation to (1), given that a change of practice is proposed.⁹³ The others are matters covered by existing case law, where no change is proposed. For the reasons already discussed in Part I, we see no purpose in spelling out such matters of detail, unless there is an intention to change the existing law. The issue of tax is discussed in more detail in Part VIII.
- 4.68 On the other hand, although not dealt with in the Policy Statement, the “consistency principle” should, we think, be set out in the statute. Since “disturbance” is to be expressed as a separate head of compensation, rather than as simply an aspect of “value to the owner”, it needs to be made clear that there should be consistency between the different heads. The LAA (Cth) provides a model.⁹⁴ (see Part V, para 5.69 below).

Proposal 4: Disturbance

(1) “Disturbance” means any monetary loss or expense, not directly based on the value of land, suffered or incurred by the claimant and fairly attributable to displacement⁹⁵ in consequence of the compulsory acquisition of the subject land;

(2) Without prejudice to the generality of (1), in assessing compensation for disturbance, the following rules apply:

(a) All relevant circumstances are to be taken into account, including any circumstances personal to the claimant;

(b) Disturbance includes the amount of any legal or other professional costs reasonably incurred by the claimant in connection with the acquisition;

(c) Where compensation is claimed on the basis of the relocation of a business from the subject land, compensation on the relocation basis shall not be refused solely because it exceeds the compensation which would be payable on the extinguishment basis,⁹⁶ unless, in the opinion of

⁹² See paras 4.49(3) and 4.53(1) and (3) and n 67 above.

⁹³ By no longer automatically applying the Ryde’s Scale: n 67 above.

⁹⁴ Para 4.47 above. This will need to extend also to other heads of compensation.

⁹⁵ Cf Land Compensation Act 1973, Part III, ss 29, 34 and 37.

⁹⁶ See generally the *Shun Fung* case [1995] 2 AC 111. The “relocation basis” assumes that the owners of the business are able to relocate it; compensation will normally cover the costs of relocation and any temporary losses. The “extinguishment basis” assumes that the business is closed down; compensation is based on the value of the business. In most cases, relocation will be the preferable option for both parties; but provision needs to be made for those cases

the Tribunal, it is unreasonable in all the circumstances (including the cost to the authority and the value of the business to the claimant) to assume relocation of the business;

(d) Compensation for disturbance may, if the the Tribunal so determines, include costs reasonably incurred in replacing buildings, plant or other installations (whether or not on the land acquired) where (i) they are required for a business to be continued on the retained land; (ii) the need for replacement is fairly attributable to the acquisition, and is reasonable in all the circumstances ((having regard to the cost to the authority and to the likely benefit to the claimant); (iii) the cost is not adequately reflected in any other head of compensation; but (iv) subject to such deduction (if any) as the Tribunal may determine should be made to reflect any improvement in the facilities so obtained over those replaced;

(e) Compensation for disturbance is not payable for loss or expense suffered or incurred before the first notice date;

(f) Where a claimant who was not in occupation of the subject land incurs incidental charges or expenses in acquiring, within one year of the date of entry, an interest in other land in the United Kingdom, those charges and expenses may be claimed as disturbance;⁹⁷

(3) Without prejudice to (2)(a), the rights of traders over 60 years of age to claim compensation on the total extinguishment basis, in the circumstances defined by the 1973 Act, s 46, will be preserved in the new Code.

Consultation issues

(1) Do consultees agree that:

(a) The term “disturbance” is a suitable shorthand for all heads of compensation currently assessed under rule (6) (of 1961 Act, s 5)? If not, what term should be used?

(b) Compensation under this head should (as now) exclude any loss “directly based on the value of land”?

(2) The matters to be taken into account should include “circumstances personal to the claimant”?

where the claimant wishes to relocate, even though total extinguishment would be the cheaper option for the authority.

⁹⁷ This is intended to reproduce 1961 Act, s 10A.

- (3) In determining, on the displacement of a business, whether compensation should be on the “relocation” or “extinguishment” basis:**
- (a) Should the test be a simple test of “reasonableness”, rather than the “reasonable businessman” test (as explained in the Shun Fung case)?**
 - (b) Is it unnecessary for the Code to prescribe the circumstances in which compensation on either basis will be regarded as reasonable?**
- (4) Should there be:**
- (a) Specific provision for compensation to include costs reasonably incurred in replacing buildings, plant or other installations needed for a business, if fairly attributable to the acquisition, and not adequately reflected in other heads?**
 - (b) If so, do consultees agree that:**
 - (i) The right should apply to all types of business (not simply agricultural);**
 - (ii) The right should apply whether the buildings are on the land subject acquisition or on retained land?**

PART V

THE COMPENSATION CODE- CORE PRINCIPLES (2)

INTRODUCTION

5.1 Here, we consider other rules which form part of the core principles of the Compensation Code:

- (1) Effects on retained land
 - (a) Severance and injurious affection
 - (b) Betterment
- (2) Equivalent reinstatement
- (3) Incidental rules
 - (a) Prospects of lease renewal and effect of rehousing tenants
 - (b) Illegal uses
 - (c) Enhancements with a view to increased compensation
 - (d) Consistency and mitigation
- (4) Date of assessment

(1) EFFECTS ON RETAINED LAND

5.2 Where the dispossessed owner has other land in the vicinity, its value may be adversely affected by the compulsory acquisition, or by the works for which the land is acquired (severance or injurious affection); or its value may be enhanced by them (betterment). We discuss below the existing law, and our proposals for the new Code.

(a) Severance and injurious affection

Existing law

STATUTE

5.3 The right of the dispossessed owner to compensation for severance or injurious affection is conferred by the 1965 Act, section 7,¹ which provides that in assessing compensation:

¹ Following 1845 Act, s 63.

... regard shall be had... to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.²

In the earlier cases this was sometimes treated as simply one aspect of arriving at the “value to the owner” of the subject land.³ However, more recent authority treats it as a distinct category of compensation.⁴

5.4 Although the wording of the section treats severance as a form of injurious affection, in practice they are distinguished:

- (1) Severance is loss suffered by the separation of the land acquired from land held with it, where the joint holding conferred additional value or advantage;⁵
- (2) Injurious affection is loss caused to the retained land by the works or use of the land acquired for the statutory purpose.⁶

5.5 Prior to the 1973 Act, compensation could be claimed under this section only in respect of injury resulting from activities on the land actually acquired from the claimant. Thus, for example, an owner, whose land was taken for construction of a road, could only claim for adverse effects caused by the use of that part of the road on the land taken from him.⁷ The 1973 Act changed the position by providing that, in such a case, compensation for injurious affection should be assessed by reference to the whole of the works.⁸

² The “severance” may be horizontal or vertical. Thus, a claim was allowed where a railway company was authorised to acquire the subsoil only, and the value of the surface was diminished: *City and South London Railway Co v United Parishes of St Mary Woolnoth and St Mary Woolchurch Haw* [1905] AC 1. The section is applied, with modifications, to cases where new rights are acquired by local authorities under the Local Government (Miscellaneous Provisions) Act 1976: s 13 (see Part VIII, para 8.12 below). There is an equivalent provision for minor interests, for which no notice to treat is required (see Part VIII, para 8.83 below): 1965 Act, s 20(2).

³ See Cripps, *Compulsory Acquisition of Land* (11th ed 1962) para 4-254, citing *Walker v Ware, Hadham and Buntingford Ry* (1866) LR 1 EQ 195.

⁴ See e.g. *Horn v Sunderland Corp* [1941] 2 KB 26, 42.

⁵ For example, parts of a farm severed by a motorway, which increases the cost of working; loss of land from the “safe area” of a rifle club, which was essential to the use of the remainder for rifle practice (*Holt v Gas, Light and Coke Co* (1872) LR7QB 728); damage to the development potential of the retained land (*Abbey Homesteads Ltd v Secretary of State for Transport* [1982] 2 EGLR 198).

⁶ For example, interference with access to retained land for building purposes (*R v Brown* (1867) LR 2 QB 630); noise, dust and loss of privacy caused by a new road (*Buccluch (Duke) v Metropolitan Board of Works* (1872) LR 5 HL 418).

⁷ *Edwards v Minister of Transport* [1964] 2 QB 134.

⁸ 1973 Act, s 44.

- 5.6 Compensation for injurious affection where no land is taken is dealt with separately, under 1965 Act, section 10.⁹

A SINGLE HOLDING

- 5.7 The case law establishes that land for which the claim is made must be “held with” the land which is taken. However, this means no more than that the pieces of land should be so related that “the possession and control of each gives an enhanced value to them all”,¹⁰ or that “the unity of ownership conduces to the advantage or protection of the property as one holding”.¹¹ The pieces of land need not be contiguous with each other, nor be held in the same title.¹²

ACCOMMODATION AND MITIGATION WORKS

- 5.8 In practice, an acquiring authority will seek to limit the adverse effects and consequent compensation. For example, the effects of severance may be mitigated by providing bridges, or alternative accesses. Such works are normally referred to as “accommodation works”, although this is not a term used by the statute. Noise and visual intrusion may be lessened by noise barriers or tree planting. The 1973 Act took this practice a stage further, by imposing a duty on authorities to carry out noise mitigation works in circumstances defined by regulations;¹³ and by conferring powers to acquire land, and carry out works, for the purpose of mitigation generally.¹⁴ Similar mitigation powers may be conferred by other Acts for particular purposes, for example highways.¹⁵ Such provisions will be left unaffected by the new Code.

MEASURE OF COMPENSATION

Loss of land value

- 5.9 Compensation is payable for damage “by reason of other retained land of [the claimant] being less valuable to him.”¹⁶ The measure of compensation, therefore, is the amount by which the retained land is diminished in value by the severance or injurious affection, and does not include other forms of loss, such as relocation costs.¹⁷ Thus, for example, where an owner sought to mitigate the effects of

⁹ See Part IX below.

¹⁰ *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153, per Lord Watson.

¹¹ *Ibid*, p 175, per Lord Macnaughten. As he observed, such a condition seems to be implicit in the section, since “otherwise the owner could hardly sustain injury by reason of the execution of the works on the land taken”: *ibid*.

¹² *Oppenheimer v Minister of Transport* [1942] 1 KB 242. Cf Highways Act 1980, s 261 (para 5.29 below).

¹³ 1973 Act, s 20; Noise Insulation Regulations 1975, SI 1975, No 1763.

¹⁴ 1973 Act, ss 26-7.

¹⁵ Highways Act 1980 ss 246, 282.

¹⁶ *Hoveringham Gravels Ltd v Chiltern DC* (1978) 35 P&CR 295, 305, CA. The Court held that the wording of s 7 (having regard to the words “or otherwise injuriously affecting *that other land*”) made clear that diminution in land value was the sole criterion under the section.

¹⁷ *Ibid*. See Butterworths, *op cit*, para E-2510.

severance, by constructing new farm buildings to replace those cut off by a road, his compensation was still based on the reduced value of the land, not on the cost of the replacement buildings.¹⁸

- 5.10 On the other hand, compensation is not limited to reduced value due to matters which would be the subject of damages for nuisance, but includes, for example, reduction due to loss of privacy.¹⁹ The “consistency principle” applies in this context, as in relation to disturbance.²⁰ Thus, if the land being acquired is valued on a basis which assumes severance from the retained land, for example for some alternative development, that element of severance should not be the subject of compensation.²¹

Market value

- 5.11 There is a possible question whether the value of the retained land is to be assessed by reference exclusively to *market* value. As has been seen, the value of the acquired land for the purposes of the 1845 Act was treated as the “value to the owner”, rather than simply market value.²² This was generously interpreted so as to enable account to be taken of loss of profits, and other matters now treated as “disturbance”. It has been suggested that the same approach, applied to severance and injurious affection, might allow such losses on retained land to be taken into account. Thus the last edition (1962) of Cripps’ standard work on Compulsory Acquisition of Land suggested that depreciation of land value need not be the only criterion, where the severance was such as to “cause to the owner disturbance in his present enjoyment of the land”; the principle of “value to the owner” should allow a more flexible approach.²³
- 5.12 However, since then the *Hoveringham Gravels* case has established that depreciation in the value of land is indeed the only criterion under section 7.²⁴ As we have already noted, rule (2) is expressed in general terms, as applying to the “value of land” for compensation purposes.²⁵ It is contrasted with rule (6), which allows a departure from market value in relation to any matter “not directly based on the value of land”. Compensation under section 7, in the light of the *Hoveringham Gravels* case, is a matter directly based on the value of land. In our

¹⁸ *Cook v Secretary of State for the Environment* (1973) 27 P&CR 234, LT.

¹⁹ *Buckleuch (Duke) v Metropolitan Board of Works* (1872) LR 5 HL 418.

²⁰ See Part IV, para 4.43 above.

²¹ See *R A Vine (Engineering) Ltd v Havant BC* [1989] 2 EGLR 15 and *BP Petroleum Developments Ltd v Ryder* [1987] 2 EGLR 233.

²² See para 4.20 above.

²³ Cripps, *op cit*, para 4-283. Reference was made, as illustration, to *Caine v Middlesex CC* (1952) 3 P&CR 283, LT; but there was no discussion of the principle in that case.

²⁴ See Part V, para 5.9 above.

²⁵ See Part IV, para 4.15 above.

view, therefore, diminution in market value²⁶ is the only test, and there is no room for a more flexible rule based on “value to the owner”.²⁷

- 5.13 The view we have expressed above, on the application of the market value test to this head of claim, is not clearly stated in any of the cases.²⁸ Further, our discussions with practising valuers suggest that, on occasions, claims based on loss of profits for retained land are advanced successfully in negotiations with acquiring authorities.²⁹ The new Code should make the position clear, one way or the other.

Other valuation rules

- 5.14 There are similar uncertainties or inconsistencies about the application, under section 7, of some of the other rules which apply to valuation of the subject land.³⁰ There seems little doubt that rule (4), excluding value attributable to illegal uses, would be held to apply also to claims under section 7.³¹ Other provisions of the 1961 Act are specifically applied only to the “relevant land”, that is, the land subject to acquisition.³² On the other hand, it has been held by the Tribunal that the *Pointe Gourde* rule (or “no-scheme rule”³³) does apply to the valuation of the retained land, so that the loss must be assessed by comparing the value of the land after the work, with its value in “the no-scheme world.”³⁴ This issue is discussed further in Part VII below.

²⁶ Which may include diminution in rental value, in relation to temporary effects: see Part IX, para 9.22 below (*Wildtree Hotels* case).

²⁷ It may be noted that the Scott Committee (which preceded the 1919 Act – see Part II, para 2.5 above) thought that damage for injurious affection should be limited to loss of market value. However, this was part of a separate set of proposals dealing with injurious affection, whether or not land was acquired; these were not carried into the legislation.

²⁸ See e.g. Butterworths, *op cit*, para E-2510.

²⁹ An approach founded apparently upon lack of clarity in the statutory provisions and a feeling that, as a matter of fairness, any loss directly caused by the taking of land should be compensated.

³⁰ Cf Part I of the 1973 Act (compensation for injury to land caused by the use of the works), where specific provision is made to apply rules (2) to (4) of the 1961 Act: 1973 Act s 4(4), see Part IX, para 9.43 below.

³¹ Cf *Hughes v Doncaster Council* [1991] 1 AC 382; see para 5.59 below.

³² For example, s 9 (excluding depreciation due to indications of the threat of compulsory purchase); ss 14ff (planning assumptions). The “relevant land”, as defined by s 39(2), excludes the retained land.

³³ See Part VI below.

³⁴ See *Clarke v Wareham and Purbeck RDC* (1972) 25 P&CR 423, LT (no compensation paid for retained land affected by a new sewage works, because, in the no-scheme world, similar consequences would have followed from improvements to the existing works). Cf *English Property Corp v Kingston LBC* (1998) 77 P&CR 1, 11, where Morritt LJ declined to apply the *Pointe-Gourde* rule to the retained land, because there was “no scheme for the acquisition” of that land.

“Before and after” valuation

- 5.15 In principle, it seems, the reduction in value of the retained land should be assessed separately from the value of the land taken.³⁵ However, in practice a “before and after method” is sometimes used. This involves comparing the overall value of the complete holding before the taking, with the value of what remains thereafter. In some cases it may be thought to produce a fairer result, which better accords to the principle of equivalence.³⁶

Subsequent events

- 5.16 The valuation must take account, not only of the use at the valuation date, but also of the depreciation due to anticipated use of the public works.³⁷ The Lands Tribunal has held that, for this purpose, it is permissible for the Tribunal to have regard to knowledge of subsequent events, at least to confirm what was anticipated at the valuation date.³⁸ If, however, as we have suggested, the true test is one based on market value then, in principle, the only relevant information is that which would have been available to the market at the valuation date.³⁹

Comparisons

- 5.17 The Australian LAA(Cth) s 55(2)(a) contains a statutory statement of the right to compensation for damage to the retained land:

(iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and

(iv) where the acquisition has the effect of severing the acquired interest from another interest, any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired.

³⁵ See *South Eastern Railway v London CC* [1915] 2 Ch 252, CA; *Hoveringham Gravels v Chiltern DC* [1978] 35 P&CR 295; *Abbey Homesteads Ltd v Secretary of State* [1982] 2 EGLR 198; *English Property Co v Kingston RBC* (1998) 77 P&CR 1.

³⁶ See Denyer-Green, *op cit*, p 231. The “before and after” valuation approach involves valuing the *whole* property before severance and then deducting from that valuation figure the value of the land *retained* after severance. The difference in value represents the landowner’s loss. This negates the problem (inherent in the concurrent valuation approach) of having to compensate for the loss of marriage value in the two plots of land. The “before and after” approach appears to be accepted practice in Australia (see ALRC, *op cit*, para 240).

³⁷ *Rockingham Charity v R* [1922] 2 AC 315. The Privy Council has held that in doing so a school could claim compensation for depreciation in value of the land it retained by virtue of an anticipated legal user of the acquired land as a railway shunting yard. At the time of assessing compensation, the land was as yet little used.

³⁸ *Bolton MBC v Waterworth* (1979) 37 P&CR 104. The Court of Appeal (42 P&CR 289) found it unnecessary to express a view on the point.

³⁹ The Lands Tribunal purported to apply the so-called “*Bwllfa*” principle (from *Bwllfa and Merthyr Dare Steam Railways v Pontypridd Waterworks Co* [1903] AC 426). However, the wording of the statute in that case was different: see the discussion at Part IX, para 9.42 below (in relation to Part I of the 1973 Act).

5.18 Paragraph (iii) appears to be the direct equivalent of severance under section 7 of the 1965 Act. Paragraph (iv) covers the same grounds as injurious affection under section 7, where the value of the retained land is reduced, but also betterment where the value is increased.⁴⁰ The test is clearly based on the market value of the land affected, and excludes other possible losses, such as loss of profits. This followed the recommendation of the ALRC, which thought that allowing claims for loss of profits would create a less certain test.⁴¹

5.19 Similar illustrations can be found in Canada. The Canadian Federal Act of 1985⁴² also limits the claim to the effect on market value, but provides specifically for a form of “before and after” valuation:

(1) The amount of the decrease in value, if any, of the remaining property of an owner is the value of all of his interests in land immediately before the time of the taking of the expropriated interest,... minus the aggregate of

(a) the value of the expropriated interest; and

(b) the value of all his remaining interests in land immediately after the time of the taking of the expropriated interest...

5.20 By contrast the Ontario Act 1990 allows a claim, not only for any “reduction in market value” to the retained land caused by the acquisition, or by the construction or use of the works, but also for:

Such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute.⁴³

Policy Statement

5.21 The response supports the existing arrangements for compensation under these heads, “subject to rectification of the anomalies identified by CPPRAG and others”. It expects “more detailed recommendations” by the Law Commission.⁴⁴

5.22 Three particular points were highlighted by the CPPRAG report:⁴⁵

⁴⁰ Betterment under the UK statutes is dealt with below (para 5.27ff). The LAA(Cth) departs in this respect from the recommendations of the ALRC, which proposed separate provision for injurious affection (whether or not land was acquired) (see Part IX, para 9.57 below, and App 4); but none for betterment, which it thought should be dealt with by taxation (see para 5.31 below).

⁴¹ See the discussion in relation to injurious affection where no land is taken (Part IX, para 9.62 below)

⁴² The Expropriation Act R.S.C. 1985, c.E-21.

⁴³ The complete section (which deals also with injurious affection where no land is taken) is reproduced in App 4 below. The retained land is defined as “lands of which the use is enhanced by unified ownership with those acquired”.

⁴⁴ Policy Statement, App, paras 3.37-8.

⁴⁵ CPPRAG Review, paras 126-9.

- (1) The lack of provision for temporary loss caused to a business on the retained land during the works (for example, noise and dust, obstruction of access, and “general deterrent effect on customers”). It proposed that the claim for injurious affection should extend to:

Any damage caused to the claimant’s business carried out on the retained land if that results from the same factors as those which have caused the injurious affection to the value of his land so long as that does not result in any duplication of compensation.⁴⁶

- (2) The lack of compensation for the replacement of agricultural buildings, made necessary by severance, where the cost is not adequately reflected by compensation based on reduction in market value.⁴⁷ The Policy Statement suggests that this is more appropriately dealt with as part of compensation for disturbance.⁴⁸
- (3) The uncertainty over “before and after” calculations. CPPRAG suggested that specific provision should be made for the use of “before and after” valuations where “in the Lands Tribunal’s opinion, it is appropriate to do so.”⁴⁹

Discussion

5.23 We note that, in respect of permanent loss (apart from the issue of agricultural buildings), there is no proposal to change the existing basis of assessment, which depends on the value of the land.

5.24 We agree generally with the particular points raised by CPPRAG, subject to the following:

- (1) Temporary loss is not excluded under the present rules. A similar issue arose in the *Wildtree Hotels* case,⁵⁰ in relation to injurious affection where no land is taken. It was held that a temporary diminution in value caused by the works should be the subject of compensation, so far as reflected in reduced rental value.
- (2) We agree that the “anomaly” in relation to the treatment of agricultural buildings should be corrected. As the Policy Statement suggests, and as we have already proposed, it is more naturally included under the Disturbance rules.⁵¹

⁴⁶ *Ibid*, para 129(i). The earlier text suggests that this should include “any loss of profits and costs caused as a direct result of the execution of the works..”: para 126.

⁴⁷ *Ibid*, para 129(ii). This possible unfairness was highlighted in *Cooke v Secretary of State for the Environment* (see above).

⁴⁸ Policy Statement, App, para 3.39.

⁴⁹ CPPRAG Review, para 129(iii).

⁵⁰ *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1. See Part IX, para 9.22 below. The CPPRAG Review was written before the House of Lords decision clarified the position.

⁵¹ Part IV, paras 4.63-64 above.

- (3) We agree that there should be provision for “before and after” valuation (based on market value). We do not think it should depend on the exercise of discretion by the Lands Tribunal, since the issue may be agreed without reference to the Tribunal. We provisionally propose that this method should be available at the option of the claimant.
- 5.25 As we have noted above, there is a possible issue as to how far this part of the Code should allow account to be taken of personal losses, such as loss of profits, in addition to any reduction in the market value of the retained land. We think the position should be clarified in the new Code. (A similar issue arises in relation to injurious affection where no land is taken.⁵²) In line with our understanding of the present law, we propose that the loss under this head should be limited to loss of market value (including, where appropriate, loss of rental value).
- 5.26 However, we have noted that in practice a more flexible rule may be applied. There is no similar limitation in the law of damages for nuisance, under which any consequential loss may be taken into account, subject to the ordinary rules of remoteness.⁵³ The Ontario Act provides a model for a more generous basis of compensation. We invite views on the desirability, and financial effects, of extending the basis of compensation in this respect.

(b) Betterment

Introduction

- 5.27 Betterment is not a current statutory term, but it is one frequently used to describe the enhancement in private land values resulting from public works.⁵⁴ As explained earlier in this Report, there has been a long history of attempts by legislation to recoup “betterment” within the planning system generally, the most ambitious being that embodied in the 1947 Act itself.⁵⁵ These appear now to be of no more than historical interest. In the present context, we are concerned with the more limited issue of enhancement in the value of land held with the land subject to compulsory acquisition.

Existing law

- 5.28 Where the claimant owns other land, which shows an increase in value as a result of the acquiring authority’s scheme, there may be a requirement for the amount of the increase to be deducted from the compensation otherwise due. A deduction for betterment can only be made under specific statutory authority.⁵⁶

⁵² See Part IX, para 9.22 below.

⁵³ See *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836, 840.

⁵⁴ One modern definition of “betterment” is “the enhancement in the value of land resulting from the actions or decisions of central or local government or by a statutory body or from the expectations of such actions or decisions” (*The Land Problem – A Fresh Approach*, RICS 1975).

⁵⁵ See Part II, para 2.8 above.

⁵⁶ *S E Ry Co v LCC* [1915] 2 Ch 252.

- 5.29 An example of such a provision, in relation to highway schemes, is found in section 261 of the Highways Act 1980:

...in assessing the compensation payable in respect of the compulsory acquisition of land by a highway authority...

the Lands Tribunal-

(a) shall have regard to the extent to which the remaining contiguous lands belonging to the same person may be benefited by the purpose for which the land is authorised to be acquired.

- 5.30 In relation to acquisitions by other authorities, the 1961 Act, section 7 is a more complicated provision directed to a similar purpose in relation to increased value on “adjacent or contiguous land”.⁵⁷

Comparisons

- 5.31 The ALRC recommended against any statutory provision for deduction of betterment. It concluded that increases in value on retained land should be dealt with by taxation, to ensure equity between those whose land was taken and other landowners.⁵⁸

- 5.32 This recommendation was not followed. The LAA (Cth), following earlier legislation,⁵⁹ makes allowance for increases, as well as decreases, in the value of adjoining land. The valuer is required to take into account:

where the acquisition has the effect of severing the acquired interest from another interest, *any increase* or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired;⁶⁰ (emphasis added)

Policy Statement

- 5.33 The CPPRAG Review recommended that “betterment” should be set off only against compensation for severance or injurious affection.⁶¹ The Policy Statement expressed agreement with this proposal.⁶²

⁵⁷ The full text of s 7 is in App 3. An example of the application of s 7 can be seen in *Wilson v Liverpool Corp* [1969] RVR 741, LT. The facts are summarised in App 6 (the betterment aspect was not considered by the CA). Note the references to “contiguous land”, or “adjacent or contiguous land”, which are more restrictive than the test under the 1965 Act, s 7: see para 5.7 above.

⁵⁸ *Op cit*, para 333ff.

⁵⁹ Lands Acquisition Act 1955 (Cth), s 23(1)(c).

⁶⁰ LAA(Cth), s 55(2)(a)(iv): see App 4.

⁶¹ CPPRAG Review, paras 121-124. They also called for a clearer definition of “adjacent land” in this context, and for confirmation that the onus to prove betterment would rest on the authority: *Ibid*.

⁶² Policy Statement, para 4.12.

Discussion

- 5.34 This proposal, which we provisionally adopt, represents a significant change from the treatment of betterment under the existing law. The claimant will be able to retain the advantage of any enhancement of his adjoining land, in addition to the market value of the land taken, and any compensation for disturbance.⁶³ It will only become relevant to the extent that he has a basis for claiming compensation for severance or injurious affection to other land. Accordingly, in the new Code it seems logical to link these provisions as a set of rules relating to compensation for effects on retained land.
- 5.35 CPPRAG recommended that there should be a clearer definition of “adjacent land”⁶⁴ for this purpose, but did not indicate what particular problems they had in mind.⁶⁵ As has been seen, the expression “held with”, in the context of severance, has a well-established meaning, but a narrower definition (limited to “contiguous land”) has been used in the context of betterment.⁶⁶ We see no reason to limit the definition, since the real test is not the nature or location of the land, but whether the land is damaged or enhanced by the acquisition. However, we invite views as to the desirability of a more detailed definition.

Proposal 5: Injury to retained land

(1) Compensation for injury to retained land is to be assessed having regard to the following so far as applicable, assessed (subject to (5) below) at the valuation date:

(a) “Severance”, defined as the amount of any reduction in the market value of any interest of the claimant in any retained land, attributable to its severance from the subject land;

(b) “Injurious affection”, defined as the amount of any reduction in market value of any interest of the claimant in the retained land attributable to the nature of, or the carrying out of, the relevant project;⁶⁷

(c) “Betterment”, defined as any increase in the market value of the retained land attributable to the nature of, or the carrying out of, the relevant project;

(d) The “relevant project” shall have the same meaning as in Proposal (8) below.

⁶³ Thus, in *Wilson v Liverpool Corp* (See n 57 above, and App 6), the claimant would not have suffered a deduction for the enhanced value received for adjoining land on a private sale.

⁶⁴ See n 61 above.

⁶⁵ *Ibid.*

⁶⁶ See paras 5.7, 5.29-30 above.

⁶⁷ The wording is derived from s 55(2)(a)(iv) of the LAA (Cth), which was based on recommendations of the ALRC: *op cit.*

(2) Compensation under this Proposal is to be assessed by taking the amount of any severance or injurious affection, and deducting the amount of any betterment (save that the total shall not be less than nil);

(3) In assessing injurious affection or betterment, regard is to be had to the effects of the whole of the works comprised in the relevant project, whether on the subject land or elsewhere;⁶⁸

(4) If the claimant so requires, the amount due under this Proposal is to be assessed by calculating the difference at the valuation date between (a) the market value of the subject land and the retained land taken together (disregarding any diminution due to the relevant project) and (b) the market value of the retained land on its own (taking account of any effect on that value of the relevant project).

(5) Where the injury for which compensation is claimed under this proposal is temporary in nature, injurious affection shall be assessed by reference to any reduction in letting value of the retained land during the relevant period, or such other method as the Tribunal may consider appropriate.

Consultation issues

(1) *Under the existing law:*

(a) *Is compensation for injurious affection assessed solely by reference to diminution in market value? If not, what other factors are taken into account?*

(b) *How, if at all, is temporary loss taken into account?*

(c) *By reference to what valuation date is compensation assessed?*

(d) *Do the present rules give rise to any other problems needing to be addressed in the new Code?*

(2) *How should the issues (a) to (d) be dealt with in the new Code?*

(3) *In particular, what problems or additional costs would be caused for authorities, if compensation under these heads were to include compensation for loss of profits?*

(4) *Should express provision be made (as we propose) for assessment under these heads to be based on a “before and after” valuation of the holding? If so, should it be mandatory, or (as we propose) at the option of the claimant?*

⁶⁸ The latter words are intended to preserve the effect of 1973 Act, s 44, which reversed previous case law under which only the works on the subject land could be taken into account.

(5) Should the “retained land” be limited to land “contiguous” to the subject land?

(2) EQUIVALENT REINSTATEMENT

Existing law

- 5.36 The right to compensation on the basis of “equivalent reinstatement” is confirmed by section 5 rule (5) of the 1961 Act:

Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.

The relevant date for assessing compensation is the date on which the reinstatement work could reasonably have been commenced.⁶⁹

- 5.37 Where the preconditions in rule (5) are satisfied the principle of equivalent reinstatement operates as an exception to the rule (2) market value approach. But its application is a matter for the discretion of the Lands Tribunal, which must first be satisfied as to three key ingredients:

- (1) would the land have continued to be “devoted to a [particular] purpose”;
- (2) does that purpose cause the land to have “no general demand or market”; and
- (3) is there genuine intention to reinstate elsewhere?

- 5.38 “Devoted to a purpose” in this context has been construed by the courts on several occasions. It is clear that the words are designed to go beyond a mere statement of present actual use or purpose: they import the need to ascertain the intended purpose of the building or structure⁷⁰ (although it appears that the building does not have to have been specifically designed for that use or purpose). The use of the premises for the devoted purpose must, however, be one to which they had been

⁶⁹ *Birmingham City Corpn v West Midland Baptist (Trust) Association Inc* [1970] AC 874, 899C.

⁷⁰ See *Aston Charities Trust v Stepney Corpn* [1952] 2 QB 642, CA where it was held that a temporary interruption of a charitable purpose did not amount to abandonment of that purpose (even though the actual use for that period was as storage). In *Zoar Independent Church Trustees v Rochester Corpn* [1975] QB 246, CA a chapel had to be vacated because of a collapsed roof and the small congregation (who relocated) did not feel justified in effecting repairs with an acquisition pending. It was held that the chapel remained devoted to a public worship purpose (which would have been resumed but for the acquisition). In essence the test is: at the time of notice to treat is there genuine intention to continue the purpose?

deliberately and voluntarily devoted.⁷¹ The purpose itself should not be construed in too narrow a way.⁷²

- 5.39 “No general demand or market for land for that purpose” imports a factual test.⁷³ The House of Lords has held that only the word “demand” is qualified by “general”, and that “land” means any land and not just the subject land. So, in the context of a livestock market, rule (5) applied even though there was some demand, but that demand was intermittent rather than general.⁷⁴
- 5.40 It has been found, therefore, that equivalent reinstatement compensation is payable on acquisition of premises used (for example) as a playhouse theatre,⁷⁵ for religious purposes,⁷⁶ for charitable purposes⁷⁷ or as a club⁷⁸ - although each of these decisions turned on its own facts. But a multi-partner veterinary practice failed the test.⁷⁹
- 5.41 Genuineness of intention to reinstate elsewhere is determined purely factually. The claimant must have both the ability to reinstate⁸⁰ and the intention so to do.⁸¹
- 5.42 Because operation of rule (5) is discretionary, even where the statutory conditions are satisfied, the Tribunal may refuse to award compensation on this basis if the costs of reinstatement are disproportionate.⁸² There is no statutory provision for any deduction for the improved quality of the new building.⁸³

Comparisons

- 5.43 Similar provisions are found in the Australian codes. LAA(Cth) 1989 s 58 gives a right to compensation based on reinstatement, where the subject land is used for a purpose “other than the carrying on of a business”, and there is no general demand for land used for that purpose. It is to be noted that under this model the equivalent reinstatement basis is a matter of right rather than discretion.

⁷¹ *Central Methodist Church, Todmorden v Todmorden Corpn* (1959) 11 P&CR 32.

⁷² *Trustees of the Manchester Homeopathic Clinic v Manchester Corporation* (1970) 22 P&CR 241: homeopathic clinic held to be for purpose of medical consultation, diagnosis and treatment.

⁷³ *Sparks (Trustees of Hunslet Liberal Club) v Leeds City Council* (1977) 34 P&CR 234, LT.

⁷⁴ *Harrison and Hetherington Ltd v Cumbria County Council* (1985) 50 P&CR 596, HL.

⁷⁵ *Trustees of the Nonentities Society v Kidderminster Borough Council* (1970) 22 P&CR 224.

⁷⁶ *Zoar Independent Church Trustees* [1975], *op cit*.

⁷⁷ *Aston Charities Trust* [1952], *op cit*.

⁷⁸ *St John's Wood Working Men's Club v LCC* (1947) 150 EG 213.

⁷⁹ *Wilkinson v Middlesborough Borough Council* (1981) 45 P&CR 142, CA.

⁸⁰ *Festiniog Rly Co v Central Electricity Board* (1962) 13 P&CR 248, CA, 260 *per* Harman LJ.

⁸¹ *Edge Hill Light Rly Co v Secretary of State for War* (1956) 6 P&CR 211, LT, where the claim failed on intention to reinstate even though there was no general demand or market.

⁸² *Festiniog Rly Co* (1962), *op cit*. See also the discussion at Part IV, para 4.32 above.

⁸³ There is Lands Tribunal authority for making a deduction to reflect the cost of repairs which would have been necessary to the replaced building: *Cunningham v Sunderland CBC* (1963) 14 P&CR 208 (referred to in the Policy Statement. See para 5.47 below).

5.44 The ALRC recommended that there should be provision for taking into account the improved value of the new building.⁸⁴ This is given effect in the section, under which compensation is based on the greater of the market value on the day of acquisition and the “net acquisition cost”, which is defined by a formula:

(3) The net acquisition cost, in relation to the interest in the new land, is the amount calculated in accordance with the formula:

$$CA + E - FI$$

Where

CA is the amount of the cost, or the likely cost, to the person of the acquisition of the interest in the new land;

E is the amount of the expenses and losses incurred, or likely to be incurred, by the person as a result of, or incidental to, ceasing to use the old land and commencing to use the new land for the same purpose; and

FI is the present value of any real and substantial saving in recurring costs (relating to land or an interest in land) gained by the person as a result of the relocation.

5.45 The LACA (Vic) s 42 achieves the same effect more simply, by providing that the cost of acquiring the new interest and the costs of relocation are to be adjusted -

by subtracting from the amount so ascertained the amount, if any, by which the claimant has improved, or is likely to improve, the claimant's financial position by the relocation.

Compensation on this basis is expressed in discretionary terms, without stating by whom the discretion is exercisable.⁸⁵

Policy Statement

5.46 The Policy Statement appears to envisage the continuation of the existing law. It rejects a CPPRAG recommendation that the onus should be put on the owner to prove that ordinary compensation would be insufficient to allow relocation.⁸⁶ It notes CPPRAG's concerns that:

compensation should only be paid on an equivalent reinstatement basis if to do so would represent reasonable value for money or because there are strong social or public policy reasons for maintaining the displaced activity.

However, the response suggests it would be unreasonable to place the burden “entirely” on the claimant because of “the subjective nature of the factors to be considered”; and that accordingly:

⁸⁴ ALRC, *op cit*, para 259.

⁸⁵ LACA (Vic) s 42: “there may be taken into account...” an amount assessed on the reinstatement basis.

⁸⁶ Policy Statement, App, para 3.23.

...the final decision needs to be based on a balanced assessment of the facts and arguments presented by both parties.⁸⁷

- 5.47 It is accepted that “some element of betterment is likely to be inescapable”, since “the quality and intrinsic value of the new premises will normally be higher than that of the older buildings which are being replaced”.⁸⁸ However, there is no proposal for any reduction.⁸⁹ The new Code should make clear that:

professional fees and interest should be paid on the same basis and from the same date as for all other compensation claims.⁹⁰

- 5.48 Finally it is suggested that, by tying this issue to the decision of the Lands Tribunal, the 1961 Act may provide an excuse for procrastination by an intransigent authority. It should be made clear that compensation on this basis is not dependent on the Lands Tribunal, recourse to which should be a last resort.⁹¹

Discussion

- 5.49 The Policy Statement does not propose any significant change to the existing rules, which seem to have worked reasonably well.
- 5.50 We have noted above the line of cases interpreting the existing wording of rule 5, including such expressions as “devoted to a purpose” and “no general demand or market”. It would be possible to attempt a fuller definition, attempting to codify and clarify the effect of these cases. However, we think this could complicate the rule unnecessarily. By following the existing wording (as in the proposal below), it will be made clear that the existing judicial interpretations are generally to be followed.
- 5.51 As noted above, the version of the rule in LAA (Cth) excludes business uses. We do not see any justification for a similar exception in the new Code. It would be a significant restriction on the English rule. For example, it would exclude such uses as the playhouse theatre and the livestock market, which have been allowed in the earlier cases.⁹² It could also lead to arbitrary distinctions. Many specialised institutions, which are run as businesses, may have premises which it is difficult to replace in the normal market, and for which fair compensation may require something other than the ordinary market value approach.

⁸⁷ *Ibid*, App, para 3.24.

⁸⁸ *Ibid*, App, para 3.25.

⁸⁹ Reference is made to *Cunningham v Sunderland CBC* (1963) 14 P&CR 208, LT, for the proposition that a deduction can be made for the cost of necessary repairs to the building to be demolished. The Policy Statement (App, para 3.25) comments that compulsory deduction of the sum required to repair an existing building could “make it impossible to restore the activity or use” on another site; and that “where such a situation arises, it may be necessary to ignore the condition of the building being acquired.”

⁹⁰ Policy Statement, App, para 3.27.

⁹¹ *Ibid*, App, para 3.28.

⁹² See paras 5.39-40 above.

- 5.52 A rule allowing a deduction for enhanced premises, along the lines of the Australian models,⁹³ might be more in accordance with a strict application of the principle of equivalence. However, as the Policy Statement says, it might frustrate the purposes of awarding compensation on this basis, if the owner is unable to finance the shortfall. No such deduction is normally made in assessing common law damages, in cases where the replacement of premises is held to be the proper measure of the loss.⁹⁴
- 5.53 We note the Policy Statement's reference to the desirability of a "balanced assessment". However, we do not take this as intended to widen the discretion given to the Tribunal, nor to require any other legislative change. The Tribunal can be relied on to carry out a balanced assessment of the relevant evidence, in the light of the statutory criteria. Although the rule is expressed in discretionary terms, the cases show that the discretion is in practice a limited one. If the criteria in the rule are satisfied, including that of bona fide intention to relocate, the claimant can normally expect the rule to be applied. The only exception supported by the cases is where the cost of doing so is shown to be unreasonable (as explained in the *Festiniog Railway* case⁹⁵).
- 5.54 Accordingly, we propose that the new rule should in general follow the wording of the existing rule. However, in the interests of certainty, it would be useful to define further (in accordance with the position as explained above) the circumstances in which compensation may be refused, where the criteria are otherwise satisfied; and to make clear that an award on this basis can (and should where the criteria are satisfied) be made by the authority at the request of the claimant, without recourse to the Tribunal.

Proposal 6: Equivalent reinstatement

(1) Subject to (2), where (a) the subject land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and (b) reinstatement in some other place is genuinely intended, compensation shall (at the option of the claimant) be assessed on the basis of the reasonable cost of equivalent reinstatement.

(2) Compensation on this basis may be refused by the Tribunal, if satisfied that it is in all the circumstances unreasonable, having regard to the cost to the authority and to the likely benefit to the claimant).

(3) Compensation on the equivalent reinstatement basis shall, at the election of the claimant, be paid in the circumstances set out in 1973 Act, s 45 (dwellings especially adapted for the disabled).

⁹³ Compare the *Tamplin* case (Part IV, para 4.63 above), where such a deduction was made in relation to replacement of a bottling plant.

⁹⁴ See *Harbutts v Wayne Tank Co* [1970] 1 QB 447, 473, *per* Widgery LJ.

⁹⁵ See Part IV, para 4.32 above.

Consultation issues

Do consultees agree that:

- (1) The existing rule (5) for equivalent reinstatement should be reproduced in the new Code in substantially its existing form? If not, what changes, or further definitions are required?**
- (2) The nature and extent of the discretion to refuse compensation on this basis should be set out in the Code (as proposed in proposal 6(2))?**
- (3) No specific provision should be made for a deduction for any increased value of the new premises?**

(3) INCIDENTAL RULES

5.55 Under this head we consider rules for:

- (a) Prospects of lease renewal and effect of rehousing tenants
- (b) Illegal uses
- (c) Enhancements with a view to increased compensation
- (d) Consistency and mitigation

(a) Prospects of lease renewal and effect of rehousing tenants

5.56 In assessing compensation under any of the heads, account will be taken, in the absence of provision to the contrary, of any limitations (in time or otherwise) on the interest, and the prospect of removing those limitations.⁹⁶

5.57 LAA(Cth) section 55 (2)(d) provides for there to be taken into account:

if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted;

To provide certainty and for the avoidance of doubt a similar provision should be included in the new Code.

5.58 The Code should also reproduce, in simple form, the effect of section 50 of the 1973 Act which is designed to ensure that compensation is not increased or decreased by the rehousing obligations of the authorities concerned: see App 3.

⁹⁶ Section 39(1) of the Landlord & Tenant Act 1954, which required the right to a new business tenancy under that Act to be excluded in assessing compensation, was repealed by 1973 Act s 47. Accordingly, the prospect of a renewal can now be taken into account.

(b) Illegal uses

Existing law

5.59 Rule (4) in section 5 of the 1961 Act is as follows:

Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account

The rule applies to the assessment of compensation for disturbance,⁹⁷ and, it seems also to apply to severance and injurious affection.⁹⁸

Comparisons

5.60 Similar provisions are found in Australian and Canadian legislation, but in simplified form.⁹⁹ For example LAA (Cth) provides:

60 In assessing compensation, there shall be disregarded:

(b) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law;

5.61 Commenting on the English rule, the ALRC thought that it was sufficient to refer to uses contrary to law, and that references to detriment to health and uses restrained by a court were otiose.¹⁰⁰ It quoted Professor Todd, commenting on the Canadian provisions:¹⁰¹

These sections clearly exclude value resulting from the illegal use of property for such purposes as gambling and prostitution. Unquestionably even without such statutory provisions the courts would exclude such value on the general ground of public policy.

In practice the more common instances of illegal uses are those which are contrary to municipal by-laws, particularly those relating to zoning. For example, the owner of residence zoned for a single family dwelling cannot claim an increase in capital value on account of revenue derived from an 'illegal suite' even though there may be evidence that buyers in the market would pay almost as much for such a residence as for one with a 'legal suite'.

Policy Statement

5.62 CPPRAG recommended abolition of the rule, on the grounds that it might unfairly exclude the value of relatively innocuous uses, which might reasonably be expected

⁹⁷ *Hughes v Doncaster BC* [1991] AC 382, reversing [1990] 1 WLR 945 CA.

⁹⁸ See para 5.3 above.

⁹⁹ See App 4; and ALRC, *op cit*, para 253.

¹⁰⁰ ALRC, *op cit*, para 253.

¹⁰¹ Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed 1976), pp 146-7.

to continue. They thought that market value would in practice reflect the likelihood of an unlawful use being permitted to continue.¹⁰² The Policy Statement rejected this view:

we recognise, and agree with, the view expressed by most respondents that it would be wrong for an owner to be compensated on the basis of the value of any illegal activity. We therefore intend to retain an updated and simplified form of the Rule (4) provision.¹⁰³

We provisionally propose that the Code should retain a simplified version of the rule. We would, however, be interested in views as to whether there should be any exceptions to the general rule, for example where the breach is unintentional, or is technical and could be easily remedied.

(c) Enhancements with a view to increased compensation

Existing law

- 5.63 The owner is free to deal with his property, and to grant new interests, following the date of notice to treat. However, case law has established the general rule that the burden of compensation cannot be increased after that date, by the creation of new interests on the subject land, or any retained land.¹⁰⁴
- 5.64 The Acquisition of Land Act 1981, section 4 protects against changes of interests, or works carried out, before or after notice to treat, if they were unnecessary and effected with a view to enhance compensation:

The Lands Tribunal shall *not take into account* any interest in land, or any enhancement of the value of any interest in land, by reason of any building erected, work done or improvement or alteration made, whether on the land purchased or on any other land with which the claimant is, or was at the time of the erection, doing or making of the building, works, improvement or alteration, directly or indirectly concerned, if the Lands Tribunal is satisfied that the creation of the interest, the erection of the building, the doing of the work, the making of the improvement or the alteration, as the case may be, was *not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.* (emphasis added)

Comparisons

- 5.65 The South African Expropriation Act 1975, section 12(5)(d) provides:

In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely-

...

¹⁰² CPPRAG Review, para 119.

¹⁰³ Policy Statement, App, para 3.20.

¹⁰⁴ *Mercer v Liverpool St Helens Ry Co* [1903] 1 KB 652; see Butterworths, *op cit*, para D [369].

- d. improvements made after the date of notice or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;

5.66 Australian rules exclude extra value due to changes done without consent of the acquiring authority. Thus, LAA(Cth) s 60(d) excludes:

any increase in the value of the land caused by the carrying out, after a copy of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest was given to the person, of any improvements to the land, unless the improvements were carried out with the written approval of the Minister.¹⁰⁵

Policy Statement

5.67 The need for statutory rules is recognised by the Policy Statement:

the new legislation will also need to take account of other factors, including changes in the interests and the possibility that the nature of the fixed assets may change during the period between notice to treat and the date of taking possession for reasons which have nothing to do with the compulsory purchase order and for which the acquiring authority should not therefore have to accept financial responsibility.¹⁰⁶

Discussion

5.68 The present rules seem not to have created difficulties but could be simplified. The common law and statutory provisions could be brought together. However, in relation to the statutory exclusion (which is concerned with deliberate attempts to increase compensation) the need to satisfy the Tribunal should be retained. There seems to be no reason to introduce a requirement for consent of the acquiring authority, as in the LAA(Cth). Our provisional proposal is given below.

(d) Consistency and mitigation

5.69 In the discussion of disturbance we referred to the principle that the claim must be consistent with the basis of the claim for value of the subject land.¹⁰⁷ If the subject land is valued as having potential for development which would involve displacing the business in any event, no separate claim can be made for disturbance. Likewise with severance: if the land being acquired is valued on some basis which assumes severance from the retained land, for example for some alternative development, that element of severance should not be the subject of compensation.¹⁰⁸ We

¹⁰⁵ Similarly, the LACA (Vic), s 43(1) requires disregard of development of a durable nature, or dispositions of land, unless consent of the authority has been obtained.

¹⁰⁶ Policy Statement, App, para 3.5.

¹⁰⁷ See Part IV, para 4.43 above.

¹⁰⁸ See Part V, paras 5.9-10 above and cases cited.

propose that the principle of consistency should be expressed as one of the incidental rules, and we have framed a proposal accordingly.

- 5.70 As already noted, the duty to mitigate arises principally in the context of disturbance, but could also be relevant to other heads, such as equivalent reinstatement and injurious affection.¹⁰⁹ We propose an incidental rule.

PROPOSAL 7: INCIDENTAL RULES

(1) Where an interest is limited as to time or may be terminated by another person, regard shall be had (in assessing compensation for that or any other interest in the subject land) to the likelihood (in the absence of the relevant project) of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be, or would have been, granted.¹¹⁰

(2) Where the subject land comprises a dwelling-house, there shall be left out of account any increase or reduction in the compensation otherwise payable, which is attributable to the fact that the authority (or any other public authority) have provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant (under the 1973 Act, s 39 or otherwise).¹¹¹

(3) There shall be disregarded any increase in the value of the land caused by its use in a manner, or for a purpose, contrary to law.¹¹²

(4) There shall be disregarded:

(a) any new interests created over the subject land, or the retained land, between the date of notice to treat and the valuation date, in so far as they would increase the amount of compensation otherwise payable by the authority;¹¹³

(b) without prejudice to (a), any enhancements (by creation of interests, or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.¹¹⁴

(5) Where the market value of an interest in the subject land is assessed on the basis that the land had potential to be developed or used for a purpose

¹⁰⁹ See Part IV, para 4.58 above.

¹¹⁰ Based on LAA (Cth), s 55(2)(d), and 1973 Act, ss 47-8.

¹¹¹ Cf 1973 Act, s 50.

¹¹² Based on LAA (Cth), s 60(b).

¹¹³ This gives effect to a judicial rule: see *Mercer v Liverpool St Helens Ry Co* [1903] 1 KB 652.

¹¹⁴ Based on Acquisition of Land Act 1981, s 4.

other than the purpose for which it was occupied at the valuation date, compensation shall not be allowed under other heads (disturbance or injury to retained land) in respect of loss or damage that would necessarily have arisen in realising that potential.¹¹⁵

(6) If it is shown that the claimant has failed (since the first notice date) to take action reasonably open to him to mitigate his loss, the compensation otherwise payable shall be reduced by the amount of such loss as could have been avoided by taking such action when it was reasonable to do so.¹¹⁶

Consultation issues

- (1) *In relation to proposal 7(3), should there be any exception to the principle that unlawful uses are disregarded (for example, where the breach is technical or unintentional, and easily remedied)?***
- (2) *If so, how should the exception be defined?***
- (3) *Do consultees have any other comments on the incidental rules as proposed above?***

(4) DATE FOR ASSESSMENT

Background

Procedures

- 5.71 As we have seen,¹¹⁷ the normal form of compulsory purchase procedure begins with the making of an order by the authority, and service of notice on owners. Following confirmation of the order by the relevant Minister, the order is implemented by service of notice to treat on those interests which the authority wishes to acquire. This is the prelude to the process of agreeing compensation, or referring it to the Lands Tribunal for determination. In the meantime, the authority may take possession by serving a notice of entry under the 1965 Act, section 11. Interest on the full amount of compensation, once determined, will run from the date of possession until payment.¹¹⁸
- 5.72 Under the alternative vesting declaration procedure, the authority, instead of serving notice to treat, makes a declaration vesting title in itself at a specified date.¹¹⁹ Compensation is then assessed, and interest paid, as though the authority had served a notice to treat on the date of execution of the declaration, and had

¹¹⁵ Based on LAA (Cth), s 57.

¹¹⁶ The “duty to mitigate” is most relevant to disturbance (see *Shun Fung* case [1995] 2 AC at 126), but could in principle apply to other heads of claim.

¹¹⁷ See Part II, para 2.30 above.

¹¹⁸ See Part VIII, para 8.33 below.

¹¹⁹ See Part II, para 2.32 above.

taken possession, following notice of entry, on the date of vesting.¹²⁰ This applies, apparently, even if actual possession takes place at a later date.¹²¹

Valuation date

- 5.73 The current statutes give limited guidance as to which of these various dates is to be taken as the date for assessing compensation. Until 1969, it was generally accepted that the date of notice to treat was the critical date for most valuation purposes. The interests to be acquired were fixed at that date, and that was the date for assessing their values. In 1969, however, the House of Lords established, contrary to that practice, that values were to be assessed as at the date of possession by the authority, or (if earlier) the determination or agreement of compensation.¹²² (This will be referred to in this discussion as “the valuation date”). The Policy Statement proposes no change in this respect.¹²³
- 5.74 There are two particular issues which were left unresolved by that decision, and on which the law remains uncertain:
- (1) Does the date of notice to treat still “fix” the nature and extent of the interests to be acquired?
 - (2) In arriving at the single compensation figure, should any adjustment be made to those heads of claim (such as disturbance) which may be assessed by reference to a different date?

Fixing of interests

THE PRESENT LAW

- 5.75 Following the *West Midland Baptist* case, there was some uncertainty as to whether the date of notice to treat continued to apply in determining the nature and extent of the interests to be valued. It seemed clear, in any event, that the *physical* state of the land, for valuation purposes, should be taken as it stood at the valuation date. Thus, if a building on the land is destroyed by fire between the date of notice to treat and the date of entry, it will not be taken into account in assessing compensation.¹²⁴

¹²⁰ Vesting Declarations Act 1981, s 10(1).

¹²¹ See *Birrell Ltd v City of Edinburgh DC* (1982) SLT 363.

¹²² *Birmingham Corp v West Midland Baptist Association* [1970] AC 874. The case was directly concerned with compensation on the equivalent reinstatement basis under rule (5) (see above), but the House of Lords found it necessary first to consider the correct valuation date under rule (2). Notice to treat was deemed to have been served on the Association, the owners of “The People’s Chapel”, on August 14th 1947, but reinstatement did not become possible until April 30th 1961 at which date the cost of reinstatement was much higher. The House of Lords held that the cost of reinstatement should be assessed as at date on which the reinstatement work could reasonably have been commenced: *ibid*, p 899C.

¹²³ Policy Statement, para 4.3.

¹²⁴ *West Midland Baptist* case (above) at p 899, disapproving *Phoenix Assurance Co v Spooner* [1905] 2 KB 753.

5.76 However, it was less clear what happened if the nature of the interests changed between notice to treat and the date of entry. The problem arose chiefly in relation to properties subject to tenancies which came to an end, between the date of notice to treat and the date of possession. There were conflicting decisions of the Lands Tribunal.

5.77 Thus, for example, *Banham v Hackney LBC*¹²⁵ concerned a house which, at the date of notice to treat, was subject to a tenancy but by the date of entry was vacant, the landlord having terminated the tenancy. Commenting on the *West Midland Baptist* case, the President said:

The true view would seem to be that interests as well as values must be taken as at the date of entry unless the owner has done something which so altered the interests as to increase the burden of compensation on the acquiring authority.

The landlord's interest was taken at its vacant possession value. By contrast, in *Lyle v Bexley LBC*,¹²⁶ where the tenants had been re-housed by the authority between the notice to treat and the notice of entry, it was held that the house should be valued as it stood at the date of notice to treat, that is, subject to the tenancies.¹²⁷

5.78 A detailed analysis, made in 1986, of these and other conflicting decisions favours the former view as better serving the principle of equivalence:

... the decided cases suggest that a result which accords with the principle of equivalence will normally result from a rule that interests subsisting at the date of the notice to treat should be valued on the basis of their nature or extent at the valuation date... [However] the rule should not be rigidly adhered to if to do so in any particular case would produce a result at odds with that principle...¹²⁸

This view does not appear to have been questioned in reported cases in the sixteen years since then, and it also accords to that in recent text-books.¹²⁹ We therefore propose that it should be the basis of the new Code.

CHANGES BETWEEN NOTICE TO TREAT AND ENTRY

5.79 We have commented above on the rules protecting the authority against increased compensation due to the grant of new interests after notice to treat, or improvements for the purpose of increasing compensation.¹³⁰ These rules, subject

¹²⁵ (1970) 22 P&CR 922.

¹²⁶ (1972) RVR 318. It appears that *Banham* was not cited.

¹²⁷ The fact that the enhanced value was due to the authority's action in rehousing the tenants is an obvious point of distinction on the merits. However, this was not something which could be disregarded under the "no-scheme rule", since that has been held to apply to valuation only, not to the ascertainment of the interests: see App 5, para A.84.

¹²⁸ Young and Rowan-Robinson, "Compensation for compulsory purchase: equivalence and the date for fixing interests.": [1986] JPL 727, 743.

¹²⁹ See e.g. Butterworths, *op cit*, para D-368.

¹³⁰ See paras 5.63-4 above.

to any modifications made in the light of our recommendations, will continue to apply, but as exceptions to the general rule requiring the matter to be looked at by reference to the valuation date. Similarly, we will be proposing elsewhere that the “no-scheme rule” in its new form will apply in relation to the ascertainment of the interests to be valued.¹³¹ Thus there will be left out of account any changes in the nature or extent of the interests which are attributable to the scheme of acquisition. This will operate as a further exception to the general rule.

5.80 These qualifications should meet the concerns expressed in the Policy Statement:¹³²

...the new legislation will also need to take account of other factors, including changes in the interests¹³³ and the possibility that the nature of the fixed assets may change during the period between notice to treat and the date of taking possession for reasons which have nothing to do with the compulsory purchase order and for which the acquiring authority should not therefore have to accept financial responsibility” .¹³⁴

Different heads of compensation

5.81 As we have explained, although divided into separate heads for the purposes of assessment, compensation is treated as a single, global figure, representing the “value to the owner” of the land at the valuation date.¹³⁵ This applies, even though some elements of the global figure will represent expenditure or losses incurred at different times, whether before or after the valuation date. It may seem anomalous for all these elements to be treated as part of a single sum, on which interest runs from a single date.

DISTURBANCE

5.82 Typical is compensation for disturbance, which may represent loss of profits, from the first threat of compulsory purchase until the date of effective re-establishment on a new site. The former may be some years before the valuation date, the latter some years afterwards.¹³⁶ Similarly, removal expenses, and other allowable heads of the disturbance claim, may be incurred at different times. In theory, one would expect there to be some established mechanism to enable all such items to be adjusted (upwards or downwards) to represent the equivalent sums at the common

¹³¹ Contrary to the *Rugby Water Board* case: see Part VII, para 7.7 below.

¹³² Policy Statement, App, para 3.5.

¹³³ The footnote refers to the fact that s 4(2) of the Acquisition of Land Act 1981 already deals with improvements or the creation of new interests undertaken with a view to obtaining increased compensation.

¹³⁴ “For example, leases might end and the identified fixtures revert to landlords, or the fixtures might be destroyed or damaged and the claimant able to recover his losses from insurance.”: n 63 of the Policy Statement, App, para 3.5.

¹³⁵ See Part III, para 3.4 above.

¹³⁶ See e.g. *Shun Fung* (Part IV, para 4.28 above) where the Privy Council upheld a claim for loss of profits was allowed, dating from five years before the valuation date; the relocation claim, as upheld by the Hong Kong Court of Appeal, assumed effective relocation thirteen years after the valuation date.

valuation date. However, there appears to be no clear guidance in the cases, nor any consistent practice among valuers.

- 5.83 The problems was touched on in the *West Midland Baptist* case. Lord Reid, when discussing the previous use of the date of notice to treat as the valuation date for the subject land, referred to inconsistencies in relation to other heads of claim:

... there is little or no indication that [the date of notice to treat] was regarded as applicable to the other elements in an owner's claim. These might include costs of removal, loss of profit or other consequential losses and there appears to be no suggestion in the authorities that these elements in the value of the land to the owner must be valued as at the date of the notice to treat. The *actual costs or losses* following on actual dispossession¹³⁷ have been taken, and that appears to be the accepted practice today with regard to claims under rule 6.¹³⁸

Later in the same speech, having established that date of possession, rather than the date of notice to treat, should be taken as the valuation date, he said:

Sometimes possession is taken before compensation is assessed. Then it would seem logical to fix the market value of the land as at that date *and to take actual consequential losses as they occurred then or thereafter*, provided that the dispossessed owner had acted reasonably. But if compensation is assessed before possession is taken, *taking the date of assessment* can I think be justified because then either party can sue for specific performance and the promoters obtain a right to the land, as if there had been a contract of sale at that date.¹³⁹ (emphasis added)

Although the second sentence does not refer specifically to disturbance losses, the implication appears to be that they also will be “taken” as at the date of assessment, since they are in theory part of the “price” for the hypothetical contract, on which either party can sue for specific performance. In summary, losses up to the valuation date should be assessed as they occur; losses thereafter should be assessed as at the valuation date. Lord Reid said nothing about adjusting the figures to a common date.¹⁴⁰

OTHER HEADS

- 5.84 There are other examples. Compensation for injurious affection to retained land may relate, not to permanent reduction in land value, but to temporary loss of

¹³⁷ The words “following on actual dispossession” need to be qualified, since the *Shun Fung* case established that losses *before* the dispossession could be claimed, if caused by the threat of acquisition: see Part IV, para 4.39 above.

¹³⁸ [1970] AC at p 896 H.

¹³⁹ *Ibid*, p 899 C.

¹⁴⁰ In *Shun Fung*, the figures for future profits were “discounted back” to the valuation date, and future costs of relocation were “adjusted for inflation” (p123D-G). We understand, though it is not clear from the report, that the figures for past losses were correspondingly adjusted forward.

rental value, during the period of the works,¹⁴¹ which necessarily follow the taking of possession of the land on which the works are to take place. Nonetheless, it is still treated as part of a single amount of compensation, on which interest runs from the date of possession.¹⁴²

- 5.85 The same rule as to the running of interest applies on a claim for equivalent reinstatement, where compensation is based on the cost of rebuilding on a new site, and the cost may have been incurred before or after the valuation date. For example, in one case relating to a church, possession was taken in 1974, but works to provide the replacement church did not start until 1980. Between 1980 and 1986, the council made stage payments although the church mission achieved practical reinstatement by moving into the new church in 1982. The Court held that the mission could recover interest in accordance with s 11(1) of the 1965 Act on the full amount of compensation from the time of entry in 1974.¹⁴³

A PRACTICAL APPROACH

- 5.86 The Policy Statement proposes to retain the general rule that values are taken at the valuation date, as defined in the *West Midland Baptist* case. Disturbance losses will be taken as they arise, beginning from the first notice date. That date will be “regarded as a baseline” and “any particular loss should only be reimbursable from the date, thereafter, on which it is first incurred”.¹⁴⁴
- 5.87 Neither the CPPRAG Review nor the Policy Statement address the theoretical problem of relating all these figures to a single date (at least for interest purposes). However, our researches suggest that this is not a serious problem in practice. Our review of the cases and our discussions with valuers indicate that it is unusual for any specific steps to be taken to adjust figures to a common date.¹⁴⁵ Market value of the subject land is assessed at the valuation date, and the other heads are assessed as they arise. Interest is payable on the global sum as from the date of entry. Any theoretical inconsistencies can be seen as part of the “swings and roundabouts” in what is inherently an imprecise exercise.
- 5.88 We see no need therefore for the Code to lay down detailed rules governing the individual heads of claim. The valuer will be required to have regard to those detailed rules in arriving at a global figure of “fair compensation”. It will be a matter for valuation expertise as to how best to achieve that on the facts of any

¹⁴¹ See e.g. *Wildtree Hotels v Harrow London BC* [2001] 2 AC 1; Part IX, para 9.20 below. Although the case related to compensation for injurious affection where no land is taken (under 1965 Act, s 10), a similar claim could arise as part of the compensation for acquisition of land (under *ibid*, s 7).

¹⁴² Cf 1973 Act, s 63, by which compensation for injurious affection where no land is taken runs from the date of claim.

¹⁴³ *Halstead v Manchester City Council* [1998] 1 EGLR 1, CA. (The Court observed that the mission did not receive any windfall; it was dispossessed between the date of entry until reinstatement and during that period had neither the land nor its value.) The Australian Federal Court reached a similar conclusion under LAA (Cth) s 58(2): *Hubertus Rifle Club v Commonwealth* (1995) 130 ALR 447.

¹⁴⁴ Policy Statement, App, para 3.8. See Part III, para 3.8 above.

¹⁴⁵ *Shun Fung* (see n 137 above) was probably exceptional, both in the amounts involved and the length of time over which they had to be assessed.

individual case. We welcome comments of consultees on whether they agree with this analysis.¹⁴⁶

Equivalent reinstatement

- 5.89 It is necessary to comment in more detail on the appropriate date for assessing compensation under rule (5). The present law, as established by the *West Midland Baptist* case,¹⁴⁷ is that the claim should be assessed on the basis of costs and values at the date that when reinstatement became reasonably practicable. The Policy Statement proposes a change in this respect. Having referred to CPPRAG's endorsement of the case-law on this issue, it continues:

We agree that a consistent and realistic date needs to be defined for determining the amount payable and propose that it should be *whichever is the earlier of the date on which the acquiring authority acquire ownership of the property, either in law or equity, or the date on which the authority takes possession of it.*¹⁴⁸ (emphasis added)

- 5.90 From our discussions with DTLR, we understand that this proposal is intended to add precision to the *West Midland Baptist* case. The intention is to define the earliest date at which it would be certain that the acquisition would go ahead, and therefore at which it would be feasible for the claimant to commit resources necessary to begin reinstatement.
- 5.91 However, we are not convinced that this test represents an improvement on the existing law. It is less flexible than that adopted in *West Midlands Baptist*, and more likely therefore to depart from reality. The commencement of works, in practice, will rarely coincide precisely with the taking of possession by the authority. It may be earlier or later, depending on the circumstances, and sometimes on the particular arrangements made with the authority. On balance we have decided to opt provisionally for the *West Midlands Baptist* approach in our proposal, but we invite comment from consultees on the merits of the alternative favoured by the DTLR.

Proposal 8: Date of assessment

(1) Save as otherwise provided, and subject to Proposal 7(4) above and Proposals 9 and 10 below, interests will be valued as they stand at the “valuation date”, at values prevailing at that date, and in the context of the planning and other circumstances prevailing at that date.

(2) Where compensation is assessed on the basis of equivalent reinstatement, it will be assessed by reference to the the date at which reinstatement became reasonably practicable.

¹⁴⁶ The relevant dates for application of the no-scheme rule, and for planning assumptions, will be considered separately in Part VII below.

¹⁴⁷ See para 5.75 above.

¹⁴⁸ Policy Statement, App, para 3.26.

Consultation issues

Do consultees agree:

- (1) In relation to interests in existence at the date of notice to treat, the valuation date should be taken as the date for fixing the nature and extent of the interests?**
- (2) The date for equivalent reinstatement should be defined as the date at which reinstatement could reasonably begin (in accordance with the present West Midlands Baptist approach)? Or, alternatively, should it be based on making an assessment at whichever is the earlier of (i) the date on which the acquiring authority acquire ownership of the property, in law or equity, or (ii) the date on which the authority takes possession of it?**
- (3) There is no need for any specific provision for fixing the date of other heads of compensation, or adjusting them to a common date?**
- (4) Notwithstanding (3), interest should (as now) run on the total amount of the compensation from a single date (the date of possession)?**

PART VI

THE NO-SCHEME RULE – HISTORY

INTRODUCTION

The “no-scheme rule”

- 6.1 It is an established principle of compensation law that compensation “cannot include an increase in value which is entirely due to the scheme underlying the acquisition.” This rule, following the name of the case from which this formulation is taken, is often called the “*Pointe Gourde* rule”.¹ The rule requires the disregard of decreases in value caused by the scheme, as well as increases in value.² In other words, the value must be assessed “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition”.³
- 6.2 Although the rule was developed by the Courts, its effect has been reproduced, or reflected, in a number of provisions now contained in the Land Compensation Act 1961. They are sections 5(3) (“special suitability”);⁴ section 6 (disregard of changes in value due to actual and prospective development);⁵ section 9 (depreciation due to prospect of acquisition);⁶ sections 14-16 (planning assumptions); and section 17ff (certificates of appropriate alternative development).⁷
- 6.3 Strictly speaking the term *Pointe Gourde* rule is only apt for the judicial (or “common law”⁸) version of the rule, as opposed to the various statutory versions. Furthermore, as will be seen, there is room for debate whether the *Pointe Gourde* formulation is, or should be taken as, an accurate statement even of the judicial rule. Accordingly, we have preferred to use the term “no-scheme rule” as a convenient shorthand for all the various manifestations of the rule, both statutory and non-statutory.

¹ *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565 PC, at p 572, per Lord MacDermott.

² *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426.

³ *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 per Lord Hope. This hypothetical state of affairs is usually referred to as “the no-scheme world”.

⁴ This was derived from the 1919 Act, giving effect to recommendations of the Scott Committee: see App 5.

⁵ This is one of a complex group of provisions (ss 6-8) dealing with the disregard of different categories of development on adjoining land. Sections 7-8 deal with increases in value of adjacent land. The background and general effect of section 6 (formerly, s 9(2) of the 1959 Act) is described in App 5.

⁶ This also comes from the 1959 Act, although based on a provision in the 1947 Act.

⁷ These provisions, in their current form, are set out in App 3.

⁸ The term “common law rule” is sometimes used to describe the principle developed in the cases. However, since compensation is an entirely statutory creation, it is perhaps more accurate to treat the rule as one of interpretation of the word “value” in the relevant statutes: see *Rugby Water Board v Shaw-Fox* [1973] AC 202, 214, per Lord Pearson. To maintain the distinction, therefore, we shall refer to the “judicial” and “statutory” versions of the rule.

The concept

- 6.4 The concept is reasonably simple. For example, a railway scheme may cause blight and reduced land values while it is being planned and constructed. Conversely, the prospect of its use once completed will give the land enhanced value to the promoter (as compared to its existing use value), and may also result in higher land values in the area, for example near new stations. The no-scheme rule says that land acquired by the authority for the project should be bought at values which reflect neither the blight nor the enhancement.
- 6.5 The rule was originally developed by the Courts in the 19th century, as part of the principle that compensation should be based on the “value to the owner”, rather than its value for the promoter’s scheme. This was relatively easy to apply in the early cases where the increased value depended on the use of statutory powers only available to the promoter,⁹ and where the enabling statute usually defined the scope of the project. However, this simple model was not readily adapted to the more complex schemes, and more general statutory powers, which became the norm in the last century, particularly following the radical reform of the planning system in 1947. After 150 years of evolution, the present law is a complex mixture of statutory and common law rules, with many unresolved conflicts and inconsistencies.

The policy issues - overview

- 6.6 The apparent simplicity of the concept has meant that the policy reasons for it have rarely been discussed in the cases. Furthermore, although the rule was developed in relation to the disregard of the *increases* in value, it was assumed without discussion that disregard of *decreases* was simply the other side of the same coin. In neither case is it obvious how far, in policy terms, the rule should extend. Before embarking on a detailed discussion, it might be helpful to outline briefly the main issues which will be considered in this Part.
- 6.7 Disregard of *increases* in value is for the protection of the acquiring authority. There seem to be two distinct policy reasons. The first is to protect statutory authorities from having to pay artificially inflated prices to acquire land or rights necessary for their functions. For example, if an essential sewer has to go along a particular route, the landowner should not be able to exploit the public need to extract an inflated price. However, it does not follow that the interest of the authority should be disregarded altogether, so that he only gets existing use value, particularly where the acquisition is for purposes which are partly commercial. Some modern statutes (for example, relating to compulsory wayleaves for telecommunications) acknowledge that, although the landowner cannot be allowed to frustrate the public purpose, he should get a fair value, based on what would be arrived at in negotiations between a willing purchaser and a willing vendor.
- 6.8 The second reason arises typically where an authority is acquiring land as part of a wider redevelopment scheme, in which it is investing public funds by way of improvements to infrastructure (such as roads and sewers). The no-scheme rule

⁹ See *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37 (where some graveyards were acquired by the authority, for use, with statutory authority, to construct a new street and buildings).

ensures that the wider scheme is disregarded, so that the authority is able to acquire the land for the scheme at values which are not inflated by its own investments.

- 6.9 There are two main problems. First, it becomes necessary to construct a hypothetical “no-scheme world”, which may involve a speculative exercise of “rewriting history”. Second, the wider the “scheme” is drawn, the more the potential for unfairness between those whose land is acquired and those in the same area who retain their land. Under the modern system of planning control, those whose land is not acquired will see the benefits of any local improvements to infrastructure reflected in the enhanced value of their land, without having to pay any special tax or development charge for that enhancement. Should the person whose land is compulsorily acquired be worse off in that respect?
- 6.10 When one turns to *decreases* in value, the object is protection of the landowner, and the policy issues are quite different. It is common that, in the period before the compulsory acquisition, land values in the area will have been “blighted” by the authority’s plans. Most people would accept that when the land is acquired it should be at the unblighted value. In this case, the policy reasons would suggest a wide application of the rule, looking beyond the immediate acquisition. Thus, a small corner shop in an area, affected by plans for redevelopment over some years, may have seen its turnover drastically reduced as people have been relocated from the area under the wider scheme. When the corner shop itself comes to be compulsorily acquired, fairness would seem to require that compensation be assessed disregarding the effects of the whole scheme, not just the effects of the threat to the shop itself.
- 6.11 There is another quite distinct problem in relation to the protection of the landowner. This concerns the question of planning permission. Where land has been allocated in the local plan for acquisition for a public scheme, for example a highway, it is likely that permission would be refused for any other form of valuable development on that land. To this extent the owner of the land is disadvantaged as compared to his neighbours, who may have received planning permission for residential or commercial development. The present law acknowledges that disadvantage by allowing the dispossessed owner to claim the value of any permission which would reasonably have been expected to be granted in the absence of the compulsory purchase.
- 6.12 Here the issues are rather different. In the first place, there is a question as to whether he should have the benefit of such assumption. If his land had been allocated as Green Belt, there would have been no question of compensating him for being worse-off than neighbours whose land was allocated for housing. Under modern planning law, such windfall benefits are accepted as part of the system. Arguably, therefore, the planning position should be taken as it is in the real world. Secondly, if one accepts that some such assumptions should be made, what should be their limits? By the time the land is acquired for the road, the adjoining land may have been developed in a way which makes it impossible to develop the reserved strip for any valuable use. In such a case should the valuer be required to imagine what would have happened if there had never been any proposal for a road, which in some cases may force him to re-write history over many years?
- 6.13 The history of the law of compensation discloses several attempts to grapple with these intractable issues, in cases or statute. It shows that there is no simple answer,

and probably no likelihood of a wholly rational answer. The present law represents a somewhat muddled compromise solution. Our approach in preparing the new code is to extract from the existing law what seems to us a reasonably coherent and workable version of the existing rules. We shall explain that approach in the next Part. In this Part we examine in rather more detail the policy issues which we have summarised, and provide an opportunity for consultees to express views on them. We also consider whether commercial organisations (including privatised utilities) using compulsory powers should have the benefit of the same rule as public authorities.

THE DEVELOPMENT OF THE RULE

Historical review

6.14 In the Appendix, we examine the history of the rule in detail, and draw comparisons with similar rules in other jurisdictions. Knowledge of this history is important, both to understand the present law, including the genesis of the present statutory rules, and to provide a firm policy basis for the new Code.

6.15 We here summarise the main conclusions from that historical review:

- (1) The no-scheme rule has not been subject to a full review by the House of Lords in the 40 years since the restoration of the market value basis of compensation in 1959.¹⁰ The present law rests on Court of Appeal authority, which was based on limited analysis of either the statutes or the earlier authorities.¹¹ Those earlier authorities included two conflicting Court of Appeal judgments from 1909 (in *Lucas*),¹² and two apparently conflicting decisions of the Privy Council (the *Indian* case and *Pointe Gourde*).¹³ The recent decision in *Fletcher Estates*¹⁴ suggests that, if the scope of the no-scheme rule were now to come before the House, it would be sympathetic to an argument which sought to restrict its more speculative features.
- (2) The clearest, and most authoritative, statement of the rule, which the Privy Council apparently intended to adopt in *Pointe Gourde*, is probably that of Lord Buckmaster in *Fraser v City of Fraserville* (1917).¹⁵ What is to be excluded is “any advantage due to the carrying out of the scheme for which the property is compulsorily acquired”. That was said in the context of projects, whose extent was identified by the statute or statutory instrument by which they were authorised, the only factual issue being

¹⁰ The fullest citation of authorities was in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202; but the issue in that case was a narrow one: whether the rule applied to the fixing of interests (see App 5, para A.14).

¹¹ Starting from *Wilson v Liverpool Corp* [1971] 1 WLR 302, discussed in App 5, paras A.73-77 and App 6, paras A.2-5.

¹² See App 5, para A.14.

¹³ See App 5, paras A.34 and A.39.

¹⁴ App 5, para A.104.

¹⁵ [1917] AC 187.

whether or not they were to be treated as a single “scheme” for the purposes of the rule. The ambit of the rule has been extended and obscured by its rewording by the Privy Council in *Pointe Gourde*, referring to “the scheme *underlying* the acquisition”, and its interpretation in later cases, notably which have treated the extent of the “scheme” as a pure issue of fact.

- (3) As for the statutory versions, rule (3) of the 1919 Act¹⁶ has been so narrowly interpreted as to have little practical effect. In any event, the problems to which it was directed, so far as they still exist, seem to be adequately met by the judicial version of the rule. Rule (3) seems to have become effectively redundant.¹⁷
- (4) Section 9, originally derived from the 1947 Act, requires disregard of *decreases* in value attributable to an “indication” of the prospect of compulsory purchase. It provides protection against blight caused by the prospect of compulsory acquisition. It was not originally related to the no-scheme rule, but can be seen as a reasonable extension of it. It is less easy to support its use, as in the second *Jelson* case,¹⁸ as a foundation for additional planning assumptions not supported by the provisions of the 1961 Act dealing specifically with that issue.¹⁹
- (5) The other statutory versions date from 1959, re-enacted in the 1961 Act. Section 6 of the 1961 Act appears to have been a genuine attempt to give some shape to the no-scheme rule within the new planning system established by the 1947 Act. It took account of the different circumstances in which compulsory purchase orders might be made, by distinguishing between those for self-contained projects; and those related to more extensive designations, such as comprehensive development areas or new towns. The application of the rule in each case was defined by strict statutory limits. However, because of the uncertainty and complexity of the drafting, literal interpretation was largely abandoned in the cases, and instead section 6 was assimilated to the judicial rule, and treated as part of a single, widely stated principle.²⁰
- (6) Most of the provisions of the 1961 Act relating to planning assumptions, other than section 17 (certificates of appropriate alternative development), have proved anomalous or ineffective. Section 17, as interpreted in *Fletcher Estates*, provides a firm basis for developing a single and exclusive set of rules for planning assumptions in the new Code.²¹

¹⁶ Now 1961 Act, s 5(3)

¹⁷ App 5.

¹⁸ See App 5, para A.82.

¹⁹ App 5, para A.103.

²⁰ App 5, para A.68.

²¹ App 5, para A.104-5.

Consultation issues

- 6.16 Arising out of the historical review, we highlight five general issues which need to be addressed in considering the form of the no-scheme rule in the new Code:
- (1) What should be the preferred version of the existing rule?
 - (2) Should the rule (in some form) be reproduced in the new Code?
 - (3) Should the acquiring body's purpose be entirely disregarded?
 - (4) How should the scope of "the scheme" be identified?
 - (5) Should there be special rules for "ransom strips"?
- 6.17 In this Part we discuss, and seek the views of consultees on, these issues, before we move, in the next Part, to outline our provisional proposals for the new Code.
- 6.18 We also raise a separate issue, not directly relevant to the no-scheme rule, but covered by the same group of provisions in the 1961 Act: the rules for "third schedule rights".

(1) THE PREFERRED VERSION OF THE RULE

Variety of formulations

- 6.19 Our review of the history has shown that the "no-scheme" rule, though said to be well-established, has appeared in many different formulations. It is useful to start by seeking to identify a "preferred version" of the rule, which can be used with or without adaptation as a basis for its successor in the new Code. The following are examples, from cases or statutes, of some of the different versions of what the valuer has to disregard:

- (1) the "scheme underlying the acquisition",²²
- (2) the "very scheme of which the resumption forms an integral part",²³
- (3) "the scheme for which the land is proposed to be acquired together with the underlying proposal..."²⁴
- (4) "the execution of the undertaking for or in connection with which the purchase is made",²⁵

²² *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendant of Crown lands* [1947] AC 565, at p 572.

²³ *Melwood Units v Commissioner of Main Roads* [1979] AC 426 PC, at p 434 per Lord Russell (citing *Pointe Gourde*). See also the leading Canadian case – *Fraser v R* [1963] SCR 455: "the amount... must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an *integral part of the scheme* devised by that authority." (p 472, per Ritchie J).

²⁴ *Fletcher Estates*, at p 322H per Lord Hope.

²⁵ *In re South Eastern Rly Co and LCC's Contract, South Eastern Railway Co v LCC* [1915] 2 Ch 252, at p 258.

- (5) the “project on the part of the authority concerned to acquire the land...for some purpose for which it was authorised to acquire it”;²⁶
- (6) “the carrying out of, or the proposal to carry out, the purpose for which the land was acquired”;²⁷
- (7) “a purpose to which [the land] could be applied only in pursuance of statutory powers”;²⁸
- (8) “the fact that compulsory powers have been obtained...”²⁹

Three competing views

6.20 Underlying these differences, but rarely addressed in the cases, is a tension between three entirely different interpretations of the scope of the rule:

- (1) Version (8), derived from the *Indian* case,³⁰ is the narrowest. Under that version, the purpose of the acquisition is not ignored; the valuer simply disregards the fact that the acquisition is compulsory, but he takes account of what the authority would have paid in friendly negotiations to acquire the land for the same purpose.
- (2) Version (1), taken from the *Pointe Gourde* case, as interpreted in later cases, starting with *Wilson v Liverpool Corporation*, is the widest. The valuer disregards, not only the purpose of the particular acquisition, but also the “underlying scheme”, which may extend to the planning history over a much wider area, and dating back many years.
- (3) Versions (2)³¹ to (7) occupy the middle ground. Under these versions, one disregards altogether the immediate project for which the acquisition is made (not merely the element of compulsion), but not the underlying planning history.

6.21 As we have noted in the historical review, the first version (based on the *Indian* case) is hard to reconcile with *Pointe Gourde*, and the authorities since then.³² If that analysis is accepted, the choice is between interpretations (2) (the “underlying scheme” approach) and (3) (which we shall refer to as the “immediate project” approach).

²⁶ *Birmingham DC v Morris & Jacombs* [1977] 33 P&CR 27, 33-34.

²⁷ LAA (Cth) s 60(c).

²⁸ 1961 Act, s 5(3).

²⁹ *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302. A commonly used shorthand is “the *Indian* case”.

³⁰ See App 5, para A.34.

³¹ Version (2) and (3) use the word “scheme”, but in contexts which give it a much narrower emphasis than version (1).

³² See App 5. In *Waters v Welsh Development Agency* (June 2002), the Court of Appeal treated the difference between the *Indian* case and *Pointe Gourde* as turning on their different facts.

Competing approaches

Problems of the “underlying scheme”

- 6.22 There seems an inherent fallacy in the “underlying scheme” formulation. It assumes that there is a single identifiable scheme “underlying” each compulsory acquisition. The reality is that, once you look beyond the immediate project, there will often be a complex planning history, affecting the general area and the immediate locality, all of which may have contributed to the particular acquisition proposal. There is no purely “factual” criterion by which a rational decision can be made as to which of these is to be treated as “the underlying scheme”.

Two contrasting cases

- 6.23 Two modern cases illustrate this point:
- (1) In *Bird & Bird v Wakefield MDC*,³³ the compulsory purchase order, relating to some 30 acres, was promoted by the District Council for the purpose of industrial development. The order land fell within an area of some 770 acres for which the County Council were proposing plans for investment in reclamation and redevelopment, but without any specific proposals for compulsory purchase. The Court of Appeal confirmed the Tribunal’s finding that the relevant scheme included the county council’s plans, even though they did not “provide for” compulsory acquisition; it was enough that they were part of the “underlying scheme”;³⁴
 - (2) In *Bolton MBC v Tudor Properties*,³⁵ the Council had compulsorily acquired freehold land in the Tonge Valley on the outskirts of Bolton for leisure development by a selected development partner. The Council argued that the underlying scheme went back to the initial regeneration project for the Tonge Valley area, begun in 1980, which included public infrastructure and reclamation works carried out in the 1990s at public expense; the increases in value due to these improvements should be disregarded.³⁶ The Tribunal and the Court of Appeal rejected this argument:³⁷ the scheme was limited to the leisure development, preparation for which began in 1995.
- 6.24 It is difficult to see any major difference of substance between the cases, to justify the different results. However, because the question was treated as one of fact, the Court of Appeal in the latter case did not find it necessary to comment on the

³³ [1978] 2 EGLR 16.

³⁴ See the comments on the decision of the Court of Appeal in *Waters v Welsh Development Agency* (June 2002).

³⁵ [2000] RVR 292.

³⁶ The difference in values was substantial. If the improvements were disregarded, the land, on the council’s valuation, would be worth £250,000; with the improvements, at least £1.2m (the claimant’s figure was £6.145 m).

³⁷ The Tribunal gave three reasons: first, the improvements were not dependent on the development of the subject site; secondly, the objectives for the leisure development site were expected to be achieved by the private sector assembling the land through negotiation; thirdly, both expert witnesses appeared to have preferred the narrower scheme.

apparent discrepancy, nor to lay down any guidance for the Tribunal for future cases.³⁸

Staged schemes

- 6.25 Similar problems arise where the immediate project is an extension to a previous development: is the “scheme” limited to the extension or does it include the original development? For example, in a Canadian case³⁹ the construction of a railway spur line gave the adjoining land potential for industrial use. When part of that land was later acquired for an extension to the spur line, the issue arose whether its industrial value had to be disregarded as due to the same scheme. It was held the scheme was limited to the extension:

... the company had to pay more... because it chose to take two bites at the cherry. The first bite increased the market value of the owner’s land and accordingly the cost of the second bite was based on that increased value.⁴⁰

The immediate project approach

- 6.26 The “immediate project” approach avoids some of these problems. For example, if attention had been directed to the immediate project in *Bird & Bird*, the result would have been different; the “scheme” would have been limited to the District Council’s industrial development. Conversely, in the *Bolton* case, there would have been the same result; the immediate project was the leisure development, not a regeneration of the whole Tonge valley. In the Canadian case, the immediate project was simply the railway extension. The narrower approach limits the area of inquiry, and is likely therefore to produce a more consistent approach, and to limit the need to rewrite history.
- 6.27 There remains the choice between the different forms of the narrower interpretation. None is, or can be, wholly precise. As we have seen, the word “scheme” is capable of narrower or wider applications. Its superficially attractive derivative, the “no-scheme world”, has perhaps led to undue emphasis on the construction of make-believe alternative histories. In any event, if we are attempting to replace all the existing versions of the rule, it is probably better to move away from the most popular current term. The word “purpose”, as in the Australian model, has the advantage of being forward-looking. It could also provide a direct link with the statutory purpose of the acquisition, which has to be identified in the compulsory purchase order itself.⁴¹ However, it is potentially ambiguous: the statutory purpose may be identified in narrow or wide terms (for example, a particular housing development project, or, more generally, “residential development”).

³⁸ Mummery LJ’s judgment contains a helpful summary of the present state of the case law. However, in the circumstances of that case, he regarded the issue as simply one of fact for the Tribunal.

³⁹ *CNR v Palmer* [1965] 2 Ex CR 305.

⁴⁰ Todd, *op cit*, p 150.

⁴¹ See Part II, para 2.30 above.

- 6.28 On the whole, we prefer the word “project”, which seems to us to direct attention to a particular, future development on a single, identifiable site, of which the acquired land will form an integral part.⁴² The link with the statutory purpose is also emphasised by the form in which it is used in version (5): “a project [of the authority] to acquire the land for some purpose for which it was authorised to acquire it”. The rule requires disregard of changes due to the actual or prospective carrying out of that project.

The preferred version

- 6.29 We invite responses of consultees, in the light of the historical review, to the following question:

(A) Do consultees agree with our provisional view as to the preferred version of the existing rule: that is, that there are to be disregarded changes in value attributable to the prospect of, or the carrying out of, the project for which the authority is authorised to acquire the land?

(2) SHOULD THE RULE (IN ANY FORM) BE REPRODUCED IN THE NEW CODE?

General considerations

Precedent

- 6.30 As we have seen, the no-scheme rule, in some form, has been an established part of the law of this country for over 100 years. It is also reproduced in some form in all the systems we have considered from other common law jurisdictions. Furthermore, our discussions with those practising in the field have not suggested that there is any general wish for radical change. The pressure is, not for removal of the rule, but for greater clarity and simplicity.

A planned event

- 6.31 Support for this view can also be drawn from a consideration of what compensation is for, in reality rather than theory. In theory, it can be said, compensation is for the effects of a *single event*, the compulsory taking of land. Compensation makes good the damage caused by that taking, just as damages for personal injury make good the damage caused by another *single event*, such as a traffic accident. On this view, one would judge the position at the moment of dispossession. Compensation for the land taken would represent the difference between its values, immediately before and immediately after the acquisition. Each of those values would be assessed taking account of all the surrounding circumstances at that moment, including the adverse or beneficial effects, actual or potential, of the authority’s previous activities and future proposals.
- 6.32 However, this narrow interpretation does not accord with common sense. Unlike a traffic accident, compulsory acquisition is a planned event. The actual dispossession is realistically seen as the culmination of a planned process,

⁴² Cf the approach of the Court of Appeal in *Waters v Welsh Developments Agency* (June 2002) which turned on the special facts of the case, in particular the close link with development within an urban development area (case 4A in 1961 Act, Sched 1).

beginning not later than the first formal step in the statutory procedure. Thus it is the consequences of that process, and of the planning proposal, of which the taking is “an integral part”,⁴³ that need to be assessed to arrive at the true loss.

- 6.33 The recent leading cases have adopted that realistic approach, and show that to do so is essential to avoid anomaly and unfairness. Thus, in relation to compensation for disturbance, in the *Shun Fung* case, it would have caused serious injustice if compensatable losses had been confined simply to the consequences of the dispossession by resumption, rather than (as was held) the threat of dispossession.⁴⁴ Similarly, in relation to planning assumptions under section 17 of the 1961 Act (in *Fletcher Estates*), it was necessary, in order to make the provision workable, to read the statutory reference to the proposal to acquire, as encompassing also the underlying planning proposal.⁴⁵
- 6.34 Thus the principle of treating the acquisition and the underlying proposal together as a single “scheme” is valid, and supported by long-established case-law in this country and elsewhere. The problem is in defining the boundaries of that scheme.

Justification in the cases

- 6.35 We have already touched on the possible policy reasons for the rule.⁴⁶ The history discussed in the appendix shows that the no-scheme rule, as originally developed, was directed to *increases* in value, real or speculative, attributable to the statutory powers available to the authority for the development of the subject land. The usual justification given for the rule is that the value should be the “value to the owner”, not to the authority:

Consequently you must not take into account the special need for the land which the authority has and which moved it to obtain compulsory powers. That would be in effect to make it pay for those powers.⁴⁷

However, the application of this reasoning in the modern planning framework has never been examined in any detail.⁴⁸ Nor has there been any considered response to Lord Romer’s powerful advocacy, in the *Indian* case, of a market value approach, which treats the acquiring authority as a willing purchaser in the market.⁴⁹

- 6.36 As we have said, it seems to have been assumed that application of the rule to *decreases* due to the scheme followed automatically, as simply a mirror image of the

⁴³ See para 6.19(2) above.

⁴⁴ See Part IV, para 4.39 above.

⁴⁵ [2000] 2 AC 307, 322H. See para 6.15(6) above.

⁴⁶ Paras 6.7-11 above.

⁴⁷ See e.g. *Rugby Water Board v Shaw-Fox* (above) at p 252H, per Lord Cross, referring to the “earliest reported statements” of the rule in *Ossalinsky* in 1883 (see App 5, para A.14). Cf Lord Simon (dissenting) at *ibid* p 241F.

⁴⁸ See under issue (4) below (para 6.54 ff).

⁴⁹ See under issue (3) below (para 6.42 ff).

application to increases.⁵⁰ In the Discussion Paper,⁵¹ we questioned that assumption. Our subsequent work and discussions have confirmed those doubts.⁵²

Decreases in value

- 6.37 In relation to decreases in value caused by the scheme, the policy case for some form of rule seems relatively clear. The rule seeks to protect the dispossessed owner from the effects of blight. He is the unwilling victim,⁵³ not the promoter, of the scheme. He is required to give up his land for the public purpose; he should not be doubly injured by having to accept a blighted value. Thus, for example, in valuing a corner shop, compulsorily acquired in an area blighted by a redevelopment scheme, fairness requires that the adverse effects of the overall scheme on the value and profitability of the shop should be disregarded, not just the threat of acquisition of the shop itself.
- 6.38 Recognition of the need for a rule to protect the dispossessed owner against such blight was not originally related to the no-scheme rule. It seems to date back to a provision of the 1947 Act, which was re-enacted in expanded form in section 9 of the 1961 Act.⁵⁴ As we shall see, CPPRAG recommended that this rule should be retained, and extended. We do not understand this proposal to be controversial. We shall consider it in more detail in the next Part.

Increases in value

- 6.39 In the Discussion Paper,⁵⁵ we suggested that in a modern code there were two principal policy justifications for the rule for disregarding increases in value:
- (1) To protect a statutory authority from having to pay an artificially inflated price for performance of its public functions, where the choice of land is constrained by the nature of the function;⁵⁶

⁵⁰ See *Melwood Units v Commissioner of Main Roads* [1979] AC 426 PC, p 434, where it was simply asserted, without discussion, that the same principle applied “in reverse”.

⁵¹ Discussion Paper, paras 5.6-8.

⁵² Note also that in *Merced Irrigation Dist. v Woolstenhulme* (1971) 4 Cal.3d 478, the California Supreme Court did not accept that the rules applicable to “project enhancement” could be applied directly to depreciation: see App 5, para A.122 below.

⁵³ We assume the typical cases where there is no element of wrongdoing by the land-owner; cf cases where compulsory acquisition is used as a threat, e.g. to encourage performance of house repair obligations: *Varsani v Secretary of State for the Environment* (1980) 40 P&CR 345, QBD.

⁵⁴ App 5, para A.82.

⁵⁵ Discussion Paper, para 5.8.

⁵⁶ Another consideration is the technical difficulty of valuation, in relation to uses for which there is no normal market: see the discussion in *Mercury Communications Ltd v London & India Dock Investments Ltd* (1993) 69 P&CR 135 (App 6). This becomes still more complex, if the development is part of a much larger network. For example, is a site for an individual electricity pylon to be valued in isolation, or by reference to a proportion of the value of the grid of which it forms part? Similar issues in the context of rating of public utilities were addressed, first by use of the “profits basis”, and subsequently by use of statutory formulae: see *Halsbury’s Laws* 4th ed vol 39(1) (Rating and Council Tax) para 701.

- (2) To facilitate urban regeneration projects, and similar comprehensive planning schemes promoted by public authorities, by protecting them from increases in value caused by their own activities (such as land assembly and infrastructure improvements).⁵⁷

In each case, the justification for departing from the strict market value approach is that the increases in value are brought about, not by the operation of the ordinary market, but by action carried out in the public interest.

- 6.40 Responses to the Discussion Paper have tended to confirm this general appraisal. However, it leaves open a number of questions as to how far such objectives justify a departure from the strict market approach. Those questions are discussed under the next two headings.

Case law or statute

- 6.41 We cannot avoid the question whether to reproduce the no-scheme rule in some form. If nothing is said about it, then existing case law will be relied on to apply the judicial version of the rule, by way of interpretation of the new Code.⁵⁸ If the rule is to be retained in any form, we have no doubt that, in view of the uncertainty created by the different statutory and judicial versions, it should be in the form of a new provision, or set of provisions, in substitution for all existing versions. Our provisional view is that there should be such specific provision, rather than leaving the issue to further judicial development. Accordingly, we ask:

(B) Do consultees agree (a) that a statement of the no-scheme rule (however named) should in principle be reproduced in the new Code; and (b) that it should be in the form of a new provision, or set of provisions, in substitution for all existing versions.

(3) SHOULD THE ACQUIRING BODY'S PURPOSE BE ENTIRELY DISREGARDED?

The case for "equivalence"

- 6.42 This issue is highlighted by the difference between version (8), based on the *Indian* case, and all of the other versions. The Privy Council in the *Indian* case ruled that, in assessing market value, the acquiring body's proposals were relevant, to the extent that they would have resulted in an enhanced price in friendly negotiations. The only "scheme" to be disregarded was the compulsory nature of the acquisition. The authority had to be imagined as a "willing purchaser", disregarding only "the disinclination of the vendor to part with his land and the

⁵⁷ We referred to the 1991 Urban Task Force report, which spoke of concern that actions taken by public authorities to redevelop could result in "sharp increases in land and property values", and that compensation should be based on the prevailing market value immediately before the announcement of the plans (*Towards an Urban Renaissance: Final Report of Urban Task Force*, pp 228-31).

⁵⁸ See para 6.3 above.

urgent necessity of the purchaser to buy”.⁵⁹ That rule applied even where “the only possible purchaser of the potentiality” was the acquiring authority.⁶⁰

- 6.43 The preferred version of the rule, however, excludes the acquiring authority altogether from the hypothetical market, and disregards the enhanced value which it might offer. Arguably, this is a departure from the “principle of equivalence”.⁶¹ The market value of land, in a private sale, is not limited to its existing use, in its existing surroundings. It depends on the potential of the land for exploitation, by development or sale, for other uses, and the prospect of enhanced value arising from improvements in the area. Thus, a private developer, acquiring land for a project, does not expect to be able to buy it at existing use value; the price will take account of the development potential. The mere fact that the enhanced value is attributable to the developer’s own scheme does not change the position. “Equivalence” should, arguably, put an acquiring authority in the same position.

Privatised utilities

- 6.44 The issue is given added significance by the changing balance between public and private interests in the use of compulsory purchase. In the Discussion Paper, we drew attention to the fact that, since privatisation, many “public” services are now provided by privately owned, profit-making bodies, and suggested that in this respect we have come back “full circle” to the position of the 19th century railway companies.⁶² In the light of the responses, we accept that this may be an over-simplification. Although privately owned, the modern utility companies perform the same essential public service as the nationalised bodies; public ownership has been replaced by public regulation, which controls standards of performance and prices.
- 6.45 Nonetheless, the commercial element in such activities, even though regulated by statute, is recognised in some of the statutory schemes governing compensation for exercise of compulsory powers. For example, the Telecommunications Act 1984, which gives operators powers to lay cables in private land, provides that the compensation shall be governed by:

... such terms with respect to the payment of consideration... as it appears to the court would be fair and reasonable if the agreement had been given willingly....⁶³

In a case concerning *Mercury Communications*, it was held that this required the court to exercise “subjective judicial opinion” as to the price which would have been arrived at in friendly negotiations, applying an approach similar to that in the

⁵⁹ *Indian case* [1939] AC 302, 312.

⁶⁰ *Ibid*; see App 5, para A.36. But note that in *Waters v Welsh Development Authority* (June 2002), the Court of Appeal treated the narrower definition of the scheme in the *Indian case* as depending on the particular facts of that case.

⁶¹ See Part IV, para 4.16 above.

⁶² Discussion paper, para 2.14.

⁶³ Telecommunications Act 1984, Sched 2, para 7(1)(a).

Indian case.⁶⁴ However, there is little consistency in the different statutes, as we explain in Part VIII, when dealing with compensation for the acquisition of rights.⁶⁵

- 6.46 This is not a new issue. Rule (3) of the 1919 rules was designed to exclude enhanced value attributable to the exercise of statutory powers. However, it is noteworthy that, in its original version, it did not extend to statutory bodies “trading for profit”. It was not until the 1961 Act that it was altered to apply to all bodies exercising compulsory powers.⁶⁶ Thus, in the present rule no distinction is made between privatised utilities operating for profit, and public authorities. However, a recent review for the Scottish Executive has reopened the issue, by suggesting that privatised utilities should be required to obtain a “public interest certificate”, if they wish to continue to benefit from the application of rule (3).⁶⁷ Although it is open to question whether rule (3) itself is a suitable means of achieving the purpose of this suggestion,⁶⁸ a similar result could be achieved by a restriction on the scope of the new no-scheme rule. We invite views on this question.

Commercial interests

- 6.47 In any event, compulsory acquisitions will differ widely in the extent to which they are driven by primarily commercial motives. An example of mixed public and commercial motives is where land is compulsorily acquired by a local authority under the Planning Acts,⁶⁹ with a view to assembling a site to hand over to a commercial developer, who may be funding the costs and taking the bulk of the profit. More predominantly commercial is a case where an industrial concern is acquiring land under the Transport and Works Act for a link from its factory to a railway. In such a case, there may be a public *interest* sufficient to justify compulsory powers (removing heavy traffic from the roads); but the project is essentially commercial rather than public in nature.
- 6.48 Such issues can cause controversy. For example, Barry Denyer-Green notes that during the passage of the Channel Tunnel Bill in 1987, there were objections to the application of the ordinary rules to land acquired for commercial purposes:

Some of the land taken under the Act was to be used for commercial activities in the hands of commercial companies; desirable for the success of the tunnel but not strictly essential for its construction. Many of the affected land owners considered that their compensation

⁶⁴ *Mercury Communications Ltd v London & India Dock Investments Ltd* (1993) 69 P&CR 135, 144, 156 (Judge Nigel Hague QC). The facts are summarised in App 6.

⁶⁵ See Part VIII, para 8.15 below, referring to the “Compensation lottery”.

⁶⁶ See App 5, para A.93 ff.

⁶⁷ *Review of Compulsory Purchase and Land Compensation*: Scottish Executive Central Research Unit 2001 (The review does not address the problems in the application of the rule, which we have discussed in App 5).

⁶⁸ Our reasons for regarding rule (3) as effectively “redundant” are given in App 5, para A.94.

⁶⁹ See Town and Country Planning Act 1990, ss 226, 233.

should, contrary to the normal rule, reflect the value of the strictly commercial aspects of the project.⁷⁰

- 6.49 Similarly, in the recent *Waters* case, the President referred to the attractions of the approach taken in the *Indian* case, where the acquiring authority is “a commercial utility rather than an arm of central or local government”.⁷¹ Although the owner of such land should not be able to frustrate the public purpose, or hold the authority to ransom, that does not require compensation to be limited to existing use value.
- 6.50 The issue is not whether compulsory powers should be available for such purposes. The Policy Statement noted and rejected an argument that compulsory powers should not be available as a means to enhance profits of private companies:

As CPPRAG pointed out, such arguments seem to be based on a misunderstanding of the fact that *no* acquiring body can exercise its compulsory purchase powers simply to enhance its profits and without establishing that such action is necessary *in the public interest*. Indeed, it was for such public welfare reasons that the first compulsory purchase powers were granted, - to privately owned companies, - for the development of railways and other major infrastructure schemes during the nineteenth century.⁷²

- 6.51 However, it does not follow that the compensation rules should be the same irrespective of the ultimate purpose of the acquisition. Where the effect of the compulsory purchase is to transfer the development potential of land from one private interest to another, there may be no obvious reason why, under the market value principle, the value of that potential should be excluded.

A wider issue

- 6.52 We have already identified our “preferred” version of the existing rule. We recognise, however, that this may be said to imply a departure from a strict market-value approach (and arguably from “equivalence”), as well as a departure from *one* interpretation of the no-scheme rule, as approved by the Privy Council (in the *Indian* case). The question whether to return to the approach of the *Indian* case - in all or some cases (and, if so which) - raises wider policy issues than it seems possible or appropriate for us to address in the present project.
- 6.53 We invite the views of consultees on the following questions:

(C) Should the no-scheme rule, in its application to increases in value, be modified so as to enable regard to be had to the amount which the acquiring body itself would have paid in friendly negotiations (in accordance with the *Indian* case):

(a) In all cases?

⁷⁰ Denyer Green, *op cit*, p 19.

⁷¹ See App 5, para A.90.

⁷² Policy Statement, App, para 1.4.

(b) In cases where the acquisition is for purposes of a “commercial” nature?

(c) In no cases?

If the answer is (b), then:

(i) How and by what criteria should such “commercial” cases be defined?

(ii) Do consultees favour a “public interest certificate” mechanism (as proposed in the Scottish Executive Review⁷³)?

(4) WHAT IS THE SCOPE OF THE SCHEME?

6.54 Also linked to the first issue, but in this case to the choice between the preferred rule and version (1), is the problem of defining the scheme, in space and time, in the context of the modern planning framework.

The pre-1947 cases

6.55 This was not a significant problem in the cases before the 1947 Act. Most of the early cases related to single projects, which were clearly defined by the enabling statute. In some cases, the issues were a little more complex, but there was still a direct link with the scope of specific statutory powers. Thus, for example:

- (1) In *Cedars Rapids*,⁷⁴ three separate “subjects”, which were to be linked by the authority’s hydro-electric works, were treated as part of a single “scheme” along with the connecting works in the river-bed; but the whole scheme was governed by specific statutory powers.
- (2) In *Fraser*,⁷⁵ there was an issue whether two related statutory projects (the reservoir and the falls) were to be treated as one scheme or two. Although the Privy Council categorised this issue as one of “fact”, it was a very narrow one. There was no suggestion that the factual inquiry could extend beyond the scope of the authorising statutory instruments.
- (3) In *Pointe Gourde* itself,⁷⁶ the issue was treated by the Privy Council as foreclosed by a finding in the Case; but it seems that there was a single instrument under the relevant Ordinance, authorising acquisition of land for both the quarry and the naval base.

⁷³ Para 6.46 above.

⁷⁴ [1914] AC 569. See App 5, para A.24.

⁷⁵ [1917] AC 187. See App 5, para A.27.

⁷⁶ See App 5, para A.39.

Wilson and after

- 6.56 The issue became much more important under the modern system in which the particular acquisition is usually made under general, more flexible powers of acquisition, exercised within a broader planning framework. A particular compulsory purchase order is more likely to be linked to wider proposals, not necessarily dependent on compulsory purchase, or on any specific statutory authorisation. Such a case was *Wilson v Liverpool Corporation* (1971) where compulsory powers were needed for only a quarter of the overall development project, the remainder being on land acquired by agreement and developed under an ordinary planning permission.⁷⁷
- 6.57 In that, and subsequent cases, the Courts continued to treat the identification of the scheme as an issue of fact, entrusted to the Tribunal, and not reviewable short of perversity.⁷⁸ However, the issue had become much more open-ended than in the pre-1947 cases, since there ceased to be any need for a direct link with a specific statutory authorisation. This was, in one sense, a natural development. Under modern powers, there is no necessary identity between a particular compulsory purchase order, and the project of which it forms part. Compulsory purchase is often confined, as in *Wilson*, to those parts which cannot be acquired by agreement. It would be odd if that factor were to alter the basis on which compensation were assessed.
- 6.58 On the other hand, by adopting the *Pointe Gourde* formula (the “underlying scheme”) the open-ended nature of the inquiry was widened still further. Apart from the uncertainty of the test, this creates two practical problems. First, the wider the scheme is drawn, the more the room for speculation, and the need for “rewriting history”. Secondly, the more the scheme extends beyond the area subject to compulsory acquisition, the greater the potential for unfairness: as between those dispossessed by the acquisition, who are deprived of any enhancement of land value due to the scheme; and others, in the same area, who retain their land, and are able to sell in the open market at values reflecting that enhancement.⁷⁹
- 6.59 It is right, however, to note that even under our preferred approach,⁸⁰ the result, on the facts of *Wilson*, would probably have been the same. There was a single development project, covered by a single permission, for the whole 391 acres, and the whole area could properly have formed the subject of a single compulsory purchase order. The area of the actual order was dictated purely by the authority’s lack of success in negotiating its purchase, and did not reflect a difference in the purpose of the acquisition. The apparent unfairness arose, not from differential treatment of land within that area, but from the fact that the development gave

⁷⁷ Cf *Rugby Water Board v Shaw-Fox* (above) at *ibid* p 241F: Lord Simon (dissenting) suggested that the “scheme” in that case included the planning permission underlying the compulsory purchase order.

⁷⁸ *Wilson v Liverpool Corporation* [1971] 1 WLR 302 (see App 5, para A.73); *JA Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159, 163A-B per Buxton LJ.

⁷⁹ See Keith Davies’ comment on *Wilson v Liverpool Corp*; App 5, para A.77(4).

⁸⁰ See para 6.28 above.

enhanced value to land outside the development area, which the dispossessed owners within it could not enjoy.

Variety of projects

6.60 This problem is magnified when one bears in mind the variety of projects which may have to be considered, for example:

- (1) The size may vary from a small site, say, for a school; through to a vast complex, such as an airport, to a complete new town;
- (2) It may be a self-contained project; or (in the case, for example, of an airport) may have complex associated infrastructure requirements, such as highway and railway links, sewage treatment plants etc;
- (3) The project may be limited to one locality; or be part of a linear project extending over a large distance (for example, a railway, motorway or pipeline); or part of a national network (such as a telecommunications network);
- (4) It may be a single project or one developed in stages (whether in accordance with a pre-conceived plan, or by subsequent additions or modifications);
- (5) It may be a minor addition to a much larger project (for example a new side road link to a motorway);
- (6) It may be a new initiative, or a new stage in a wider scheme which has been developed over many years (for example, a new reclamation project within the Docklands Development area, a motorway widening scheme, an extension to an established new town).
- (7) The different parts of the project may be included in one compulsory purchase order, or may be the subject of separate orders under different powers; and the orders may be promoted as part of the same proceedings, or separately.

6.61 Furthermore, in any of these cases, an individual compulsory purchase order may comprise the whole of the area needed for the project; or that needed for a particular stage of the project; or simply isolated parcels of land needed to complete a development site, the bulk of which has already been acquired.

The planning framework

The 1959 Act

6.62 An alternative approach is to follow the early cases, by linking the definition of the scheme to a statutory source. This was the approach of the 1959 Act (now section 6 of the 1961 Act).⁸¹ It linked the statutory version of the rule directly to areas or designations defined by or under the Planning Acts. Case 1 was confined to the

⁸¹ App 5, para A.59.

area of the particular compulsory purchase order. The other Cases extended it to cover specific statutory designations, such as comprehensive development areas, and new towns. This reflected the philosophy of the 1947 Act, under which such statutory designations were expected to provide the framework for most of the major development projects for which compulsory powers might be needed. The planning system which gave effect to this philosophy remained largely intact at the time of the 1959 Act.

- 6.63 Such a statutory link was in principle a faithful reflection of the no-scheme rule as originally developed. However, it proved too rigid for the planning system as it then evolved. As *Wilson* showed, Case 1 was too narrow; it gave unjustifiable significance to the area of the particular order, regardless of the circumstances in which it came to be so drawn. Conversely, the other cases were too broad, and unlimited in time. For example, on an acquisition within a new town area, the effects of the designation had to be disregarded, if the particular project could be said to be “in the course of the development” of the new town, however limited the scope of the particular project, and however long after the original. This led to unrealistic demands for re-writing history, and to potential unfairness, as between those subject to compulsory purchase, and those (also within the designated area) able to sell in the private market.

Certifying the planning project

- 6.64 It would be possible to adapt and extend Case 1 of the 1961 Act, so as to be consistent with the preferred rule, but providing greater certainty. The main problem arises where a particular compulsory purchase order relates, not to the whole site of a single, self-contained project, but to only part of the area required for the project. This was the case in *Wilson*. Since it is the authority in such cases which is seeking to argue for a wider area than the area of the order itself,⁸² there is no reason why it should not be required to make its position clear in the order itself.
- 6.65 The authority is already required to state in the compulsory purchase order the “purpose” of the acquisition.⁸³ It would be possible to make that requirement more specific, where the authority wishes the acquisition to be treated (for compensation purposes) as part of a “project” extending beyond the boundaries of the particular order. In such case, it could be required to certify that fact in the order, and specify the nature and extent of that project (in space and time). This definition of the project would provide a starting-point for determining what is to be disregarded in the assessment of compensation.
- 6.66 Although such a definition could be made binding on the authority itself, there would need to be an opportunity for challenge by the owner. This might be regarded as an appropriate issue for the confirmation inquiry, which would enable the scope of the “project” to be settled by the confirming authority at the outset. However, this might have the effect of delaying a decision on the order itself by introducing issues more relevant to the compensation stage. If so, the owner

⁸² Where the landowner wishes to claim for blight caused by a wider “scheme”, will be able to rely on the extended versions of s 9: see Part VII, para 7.27 below.

⁸³ See Part II, para 2.30 above.

should (as now) be able to challenge the authority's identification of the project before the Lands Tribunal. We invite comments on this issue.

The new planning system

6.67 Any statutory variation of the preferred version of the rule must take account of the modern planning framework, including the Government's current proposals, as set out in the recent Green Paper.⁸⁴

6.68 The present hierarchy of structure, local and unitary development plans is to be replaced by a new single level of plan known as a "Local Development Framework". This will comprise a "statement of core policies" setting out the local authority's strategy in promoting and controlling development, together with

... more detailed action plans for smaller local areas of change, such as urban extensions, town centres and neighbourhoods undergoing renewal.⁸⁵

One category of action area would include "area master plans":

... comprehensive plans for a major area of renewal or development covering design, layout and location of new houses and commercial development supported by a detailed implementation programme.⁸⁶

6.69 The Planning Green Paper does not spell out in any detail the extent to which compulsory purchase is expected to assist these objectives. This issue is touched upon in the Compulsory Purchase Policy Statement, which was published at the same time. It draws parallels with the functions of Urban Development Corporations (which were one of the cases specified by the 1961 Act section 6).⁸⁷ However, the intention is not, it seems, to rely on specific designations,⁸⁸ but rather:

to make a radical change in new legislation by replacing the powers in section 226 (of the Town and Country Planning Act 1990) by a new provision which would define a full range of planning and regeneration purposes, including halting the physical, economic and/or social deterioration of an area, for which a local planning authority could use its compulsory purchase powers.⁸⁹

6.70 In seeking confirmation for an order, the acquiring authority will have to establish that the public interest in acquiring the land outweighs private rights, and to show

⁸⁴ See "Planning: Delivering a fundamental change" (DTLR 2001) ("The Planning Green Paper").

⁸⁵ *Ibid*, para 4.8.

⁸⁶ *Ibid*, para 4.14.

⁸⁷ Policy Statement, App para 1.8.

⁸⁸ It is possible that the new "action plans", (proposed in the Planning Green Paper para 4.13ff) may be intended, among other things, to identify specific areas for compulsory purchase.

⁸⁹ Policy Statement, App, para 1.9.

why they need the land and “in broad terms the purpose for which it will be used.”⁹⁰ Two suggested options for this purpose are:

(i) a policy based approach – by reference to the core policies in the authority’s Local Development Framework (as proposed in the Planning Green Paper), or those in the Community Strategy;

(ii) through the designation of sites in action plans adopted as part of the Local Development Framework (see Planning Green Paper). If the proposals for rapid adoption and review of such plans proposed in the Green Paper are adopted, this would provide an obvious means of establishing a clear rationale for the compulsory acquisition...⁹¹

A further option is that the Secretary of State might have power to specify by order the matters to which he will have regard in deciding whether to confirm section 226 orders. The Policy Statement invites further suggestions.⁹²

Linking the compensation rules to the planning system

6.71 The Commission is not directly concerned in this aspect of the Government’s proposed reforms. However, it is desirable that, in drawing-up detailed proposals for this new planning regime, thought should be given to its relationship to the compensation rules. For example, it would be possible to provide for the new powers to be exercised, in appropriate cases, by reference to development proposals, or special development zones,⁹³ identified in an action plan. Where the acquisition is within such a zone, compensation would be assessed disregarding any increases in value attributable to carrying out, within a defined period, the purposes of the development zone.

6.72 Detailed consideration of such ideas must await the Government’s final decision on the form of the new planning system, and of the associated compulsory purchase powers.

Defining the scheme in the new Code

6.73 On balance, notwithstanding the difficulties discussed above, we think that the preferred rule provides a generally fair and workable basis for defining the scheme. Although the rule has to be applied to a wide variety of types of project, there are advantages in simplicity. An over-complex set of rules is likely to bring its own problems (as the 1961 Act shows).

⁹⁰ *Ibid*, App, para 1.16.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ In France, such zones are referred to as *zones d’aménagement différé* (ZAD), where special compensation rules apply; a measure of equivalence, as between dispossessed owners and others, is achieved by giving the authority pre-emption rights (at prices fixed by reference to the compensation rules) over any land sold privately within the ZAD: see Acosta and Renard *Urban Land and Property Markets in France*, UCL, 1993, pages 46-48.

6.74 Indeed, notwithstanding the theoretical problems, we have gained the impression from our discussions that the application of the rule does not generally cause concern or difficulty. The cases which have reached the courts tend to be extreme examples, in which one of the obstacles has been the uncertain interaction of the various versions of the rule.⁹⁴ Replacement of this statutory clutter with a simple statement of the preferred rule could do much to remove the uncertainty. Commonwealth experience appears to support the view that, under such a statement, defining the scheme does not give rise to frequent controversy.

6.75 Our provisional view, therefore, is that the preferred rule⁹⁵ provides a suitable basis for defining the scheme in the new Code. However, we also see merit in requiring the authority, in cases where it wishes to contend for a wider scheme than the area of the particular order, to define its version of the scheme in the order itself. Such a proposal would need to be linked with the statutory provisions relating to the making of orders, which are not part of the present reference.⁹⁶

6.76 Accordingly, we invite views on the following:

(D) Do consultees agree with our provisional proposal that:

(1) In the new Code, the preferred rule (in a statutory form) should be used as the basis for defining the “scheme”?

(2) Alternatively, or in addition, should consideration be given to either of the following:

(a) Where an authority is promoting the compulsory purchase order for the purposes of a project including land other than that comprised in the order, the authority should be required (for valuation purposes) so to certify in the order, identifying the nature and extent of the project?

(b) If so, should the owner’s right of challenge be:

(i) At the confirmation stage (by objection to the confirming authority) or

(ii) Before the Lands Tribunal?

(3) Should provision be made, in the Government’s proposed new planning framework, to enable the definition of the “project” for compensation purposes to be linked (where appropriate) to development proposals, or development zones, identified in Action Area plans?

⁹⁴ See e.g. the *Ozanne* case: App 5, para A.107.

⁹⁵ See para 6.28 above.

⁹⁶ See Compulsory Purchase of Land Regulations 1994: Part II, para 2.30 above.

(5) RANSOM STRIPS

The problem

- 6.77 Finally, under this section, we draw attention to a related issue, discussed in the historical review,⁹⁷ that is the application of the no-scheme rule to acquisitions of land for access for larger development areas, where the opportunities for access are limited by physical or planning factors. The law appears to be that, in such cases, the owner of the land required for the access will normally be able to claim, as part of the compensation, a share of the development value released. The no-scheme rule does not exclude it, because the value is not dependent on development of the larger area by a public authority, but would apply equally if the land were developed privately.
- 6.78 Although the law is apparently settled, its application in practice can cause uncertainty and difficulties of valuation, and the figures arrived at can seem somewhat arbitrary. The choice of the appropriate access for a major development will usually be based on both physical and planning factors, and may be the subject of special financing agreements between the developer and the relevant authorities, including provision for compulsory purchase of the necessary land. It is may be impossible for the parties to judge in advance the likely cost of the access arrangements.⁹⁸

Other examples

- 6.79 The problems generally arise in relation to road access, but in theory they could arise in relation to connections to other essential services. However, the law does not appear to be consistent in this respect. In many cases, where all that is needed is a wayleave or easement, it appears to be accepted that the owner should be compensated simply for any actual damage, and not for the loss of his negotiating position. In some cases, on the other hand, a share of market value is expressly permitted.⁹⁹
- 6.80 A parallel may also be drawn with the compensation rules relating to projects which breach existing rights over the subject land, such as restrictive covenants.¹⁰⁰ In the real world, the owner of a restrictive covenant preventing development has a strong negotiating position, represented by his ability to frustrate a valuable development. In some cases such a right has been held to be worth as much as 50% of the development value.¹⁰¹ However, there is no rule that such an amount is recoverable as compensation, following a compulsory purchase order. The normal rule is that no compensation is payable until the interference takes place, and that the

⁹⁷ See App 5, para A.106ff.

⁹⁸ App 5, para A.109.

⁹⁹ See *Hutchison and Rowan-Robinson*, *op cit.* App 7.

¹⁰⁰ See Part VIII below, para 8.3

¹⁰¹ See *SJC Construction Co v Sutton LBC* (1975) 29 P&CR 322. However, the true basis of that decision is uncertain: cf *Surrey CC v Bredero* [1993] 1 EGLR 159.

valuation is based on diminution in value of the claimant's land, not a share of the authority's profits.¹⁰²

A policy issue

- 6.81 Again this raises an issue of policy, not so far addressed by CPPRAG or in the Government Policy Statement. In the Discussion Paper, we suggested that the law was now settled, and made no proposals for change. However, some of the responses to the Paper have identified this as an important issue which requires attention in the new Code.
- 6.82 It would be possible to provide that, where land is required solely for access or otherwise for provision of services to serve other new development, the compensation should exclude any element based on the value of the new development. However, the details would require careful consideration. It might be desirable to limit the provision to cases certified by the authority as of special importance to the planning of the area. It might also be appropriate to "sweeten the pill" for the dispossessed owner, by providing some uplift to compensation based purely on existing use value.¹⁰³
- 6.83 Our present view is that no such departure from the ordinary rule is justified. However, we invite views on the following questions:

(E) Should provision be made that:

(1) In defined circumstances, where land is required solely for access or otherwise for provision of services, to serve other new development, the compensation should exclude any element based on the value of the new development?

(2) If so, (a) how should those circumstances be defined, and (b) to what qualifications should they be subject (e.g. a defined uplift to existing use value)?

¹⁰² *Wrotham Park Settled Estates v Hertsmere BC* [1993] 2 EGLR 15. See discussion in Part IX below (Injurious affection where no land is taken).

¹⁰³ For example, where the land is agricultural land, a lower limit of twice agricultural value would provide an incentive to sell, and provide certainty, without being likely to add unduly to the overall cost of the project.

PART VII

THE NEW CODE - DISREGARDS AND ASSUMPTIONS

INTRODUCTION

- 7.1 In this Part we consider what rules, relating to disregard of the “project” (our preferred term¹) and planning assumptions, should be included in the new Code. We first consider what, if anything, can be salvaged from the existing statutory rules, and what should be repealed without replacement. We summarise the relevant recommendations of CPPRAG. We then discuss in more detail the key issues and make provisional proposals, first for disregarding the project, and secondly for planning assumptions. Finally, we refer to the provisions of the 1961 Act dealing with “Third Schedule rights”, and propose their repeal without replacement.

THE EXISTING RULES

Clearing the decks

- 7.2 The conclusions of the historical review (summarised in the previous Part) leave us in no doubt that, as a first step, we should recommend the repeal of all the existing statutory rules relating to the no-scheme rule. The new statutory version should be in the form of a set of new rules, drawing selectively on such parts of the existing rules as have proved of value. The Code should state expressly that the new rules supersede all the existing versions, including the judicial versions of the rule.²
- 7.3 For the reasons discussed in the Appendix, we think that the following provisions of the 1961 Act have no place in the new Code, and we provisionally propose their repeal, without replacement:³

Section 5(3) (“special suitability”)

Sections 6 to 8 (disregard of changes in value actual and prospective development)⁴

Section 15(3) –(4) (“third schedule rights”)⁵

Section 16 (planning assumptions derived from the development plan)

¹ See Part VI, para 2.28-9 above

² Care will be needed in the drafting to ensure that the effect of the *Indian* case, as an authority on the meaning of “market value”, is preserved: see Part VI, para 6.42-3 above.

³ See the detailed discussion of these provisions in Appendix 5.

⁴ Sections 7-8 deal with increases in value of adjacent land (“betterment”). Proposals for restricting and simplifying the betterment rules have already been discussed: see Part V, para 5.27 above.

- 7.4 The following provisions, again in the light of the Appendix, we think justify consideration for possible inclusion in modified form in the new Code:

Section 9 (disregard of depreciation due to prospect of compulsory acquisition)

Sections 14-15 (other than 15 (3)-(4)) (assumptions as to planning permission)

Sections 17-22 (certificate of appropriate alternative development)

We shall examine them in more detail as they arise in the following discussion.

THE CPPRAG REVIEW

- 7.5 The CPPRAG Review commented on the no-scheme rule, and the related statutory provisions. The main points made in the Review were:

- (1) *Disregarding the scheme* The CPPRAG Review included a section under the heading “Changes in value caused by the effects of the scheme”, which considered the judicial version of the no-scheme rule, along with sections 5(3) and 6 of the 1961 Act.⁶ The Review acknowledged the uncertainty of the existing law, particularly where a single major scheme is being carried out in stages. The group made no detailed recommendations, treating the issue as dependent on a “fundamental” policy decision by Ministers whether to retain the “no-scheme” principle. However, they recommended that, if the rule were to be retained:
 - (a) A decision should be made “whether to retain the existing rule by disregarding the scheme from its inception or to change to the approach of imagining that the scheme has been cancelled at the date of the valuation”;⁷
 - (b) A single statutory provision should apply to all compulsory purchase schemes and should subsume the current provisions of rule (3).⁸
- (2) *Changes in value resulting from the threat of compulsory acquisition* Under this head, the Review considered section 9 of the 1961 Act, and noted that there had been “no arguments in principle” against it. It recommended its retention and extension to “embrace indications that adjoining or adjacent land may be compulsorily acquired.”⁹ It thought that any “practical

⁵ These are not directly related to the no-scheme rule; our reasons for recommending repeal are discussed in at paras 7.47-49 below.

⁶ CPPRAG Review, para 98.

⁷ The “cancellation approach” was approved by the House of Lords, in relation to certificates under section 17, in the *Fletcher Estates* case: App 5, para A.104.

⁸ CPPRAG Review, para 106.

⁹ The reference to “indications” is drawn from the wording of section 9 of the 1961 Act (which deals with disregard of depreciation due to prospect of acquisition by authority

valuation problems” could be addressed through dispute resolution procedures.¹⁰

- (3) *Planning assumptions* The CPPRAG Review recommended that planning assumptions should be governed by a simplified section 17 procedure, which would replace sections 14 to 16. The appeal to the Secretary of State would be retained. The procedure should be extended to cover “the whole of the land forming part of the scheme of acquisition”. There should be a clearly identifiable “relevant date”, which “should not be fixed at a point too far into the negotiations”; but too early a date would be “more likely to give rise to speculation about possible alternatives”. The date could be linked to the date for determining the no-scheme position for valuation purposes.¹¹

7.6 The DTLR Policy Statement did not express any view on this topic. Comment on the policy issues was deferred pending the Law Commission Consultative Report, and consultation on our proposals.¹² We shall take the CPPRAG suggestions into account, where they arise, in the following discussion.

THE CONTENT OF THE NEW CODE

General approach

7.7 In the light of the discussion in the previous Part, it seems to us that the new rules should be directed at three main objectives:

- (1) for the protection of the authority, against having to pay a price inflated by its own regeneration activities or its own special location requirements, a rule requiring the disregard of *increases* in value attributable to the public project for which the acquisition is made;
- (2) for the protection of the landowner, a rule requiring the disregard of *decreases* in value (or “blight”) attributable to the threat of the project and related activities of the authority;
- (3) for the assistance of both parties and the Tribunal, a provision for defining the *planning status* of the land, that is, the permissions, actual or assumed, that are to be taken into account in the valuation.

possessing CPO powers). It extends the disregard rule. Broadly, the rule is that no account is to be taken of any depreciation of acquired land value attributable to the fact that an indication has been given that the land is to be acquired by a public authority.

¹⁰ CPPRAG Review, paras 107-8 (Dispute resolution procedures are not within the scope of the Law Commission’s present terms of reference).

¹¹ CPPRAG Review, para 117. They thought that the extended section 17 procedure would also provide a reason for dispensing with the assumption (1961 Act s 15(1)) that permission would be granted for the authority’s own development. They saw “little justification” for this, in circumstances where permission would not have been granted apart from the “scheme”: *ibid*, para 110.

¹² See Part I, para 1.8.

- 7.8 More generally, the rules should, as far as possible, be clear and coherent. Further, they should leave valuers and the Tribunal with their feet on the ground in the real world, rather than force them to make unrealistic flights into a world of make-believe.

Provisional proposals

- 7.9 We set out our provisional proposals, below. The main points are as follows:

Defining the “scheme” or “project”

- 7.10 As explained in the previous Part, a particular problem is uncertainty over the scope of the “scheme”. We contrasted the development of the existing law in a period when most compulsory acquisitions were authorised by special Acts for particular projects, with modern acquisitions under general statutes. We propose to discard the word “scheme”, as too imprecise and carrying too much historical baggage.
- 7.11 We take as our starting-point a more precise definition of the “relevant project”, which is supported by existing authority.¹³ The definition is intended to provide an analogy with the scope of the project which might in the past have been the subject of a special Act. It is intended to direct attention to a particular project for which the acquisition of the subject land is authorised, and of which the works or uses on the subject land will be an integral part.
- 7.12 Such a definition, without any further elaboration, would in our view be a considerable improvement on the present law. There would remain a factual issue, to be decided by the Tribunal in case of dispute, as to the scope of the “project” in any particular case; but this would fall to be decided by a single statutory test, rather than the variety of statutory and judicial versions which exist at present. This is the basis of Proposal 9 below.

Should the project be defined in the order documents?

- 7.13 As an alternative, we have considered whether it would be possible or desirable to seek greater certainty at an earlier stage. We have already noted¹⁴ that, in the provisions introduced by the 1959 Act, the matters to be disregarded in relation to an ordinary compulsory purchase order (not related to a wider statutory designation) were confined to the area of the order itself. It would be possible to build on that in the new Code, by providing a presumption that the “project” is confined to the area of the particular order, and that it was initiated on the first notice date.¹⁵
- 7.14 The onus would be put on the authority, if it wished to argue for a wider project, to define in the order documents the nature and scope of the project, and the resolution which authorised it. The date of that resolution would then be treated as

¹³ See *Birmingham D C v Morris & Jacombs Ltd* (1977) 33 P&CR 27, noted in Part VI, para 6.19 above.

¹⁴ Part VI, paras 6.62-63; App 5, paras A.59-62.

¹⁵ For “the first notice date” see Part III, para 3.8 above.

the “project initiation date” (in place of the first notice date). To limit the need to “re-write history”, it could be provided that the project initiation date would be whichever was the later of the resolution date and a date (say) three years before the first notice date.

- 7.15 We have considered whether it might be desirable to allow the authority’s definition of the project to be the subject of objections at the same time as objections to the principle of the order, so that it could be determined by the Secretary of State (or other confirming authority) at the time the order itself is confirmed. The advantage again is that of narrowing the issues at an early stage. It may also be said that the scope of the “project” is more a matter of planning judgment, than of valuation expertise, and therefore appropriate to be considered at the confirmation inquiry. The disadvantage may be thought to be that the confirmation process could be unnecessarily complicated and delayed, by introducing issues which are of practical relevance only to compensation.
- 7.16 Even if the Secretary of State were not to be formally involved in this way, the Department could have a role in providing guidance to authorities in defining the project, and in encouraging early mediation in cases of dispute.
- 7.17 Under this alternative, the Proposal might include the following additional provisions after the definitions:

(2A) (i) If the authority wishes to contend that the relevant project extends to land other than the subject land, they shall include in the notice of the order a statement (in prescribed form) certifying that fact, defining the nature, extent and purpose of that project, and the date of the resolution of authorising that project;

(ii) Where such a statement is included in the order, its contents may be challenged by the claimant (but not the authority) on the hearing of a reference to determine compensation;

(iii) Subject to (ii), in any proceedings before the Tribunal:

(a) The relevant project shall be as defined in the statement under (i);

(b) The cancellation assumption shall be applied taking (instead of the first notice date) the later of the resolution date defined under (i) and the date three years before the first notice date;

(c) If no statement is served, it will be assumed (against the authority, but not the claimant) that the relevant project is confined to the area of the compulsory purchase order, and began on the first notice date.

[As an alternative to (ii), an interested person could have the right to challenge the statement by objection to the confirming authority, within the time prescribed for objections to the order, and the decision of the confirming authority would then be binding on both parties before the Tribunal.]

Cancellation assumption

- 7.18 To provide further certainty, we provisionally propose to apply the “cancellation assumption”. This is based on the “cancellation approach”, which the House of Lords confirmed as the correct approach when determining appropriate alternative development (under 1961 Act s 17¹⁶). Although the House was not there directly concerned with the “no-scheme rule”, it emphasised the difficulty of trying to “reconstruct the planning history of an area on the assumption that the proposal had never come into existence at all.”¹⁷ The “cancellation approach”, as applied in that case, required it to be assumed that the proposal underlying the compulsory purchase order was cancelled on the date of the “proposal to acquire” (equivalent to the “first notice date”).
- 7.19 We would propose a similar approach. However, we have discussed above the alternative of allowing the authority to define a wider project, and an earlier initiation date, in the order documents. If that approach were adopted, the cancellation approach would be applied at the project initiation date (or, if later, three years before the first notice date)

No other statutory project for the same purpose

- 7.20 In any event, in our provisional view, it is, or should be, implicit in the cancellation approach that the valuer also assumes that there would have been no other project under statutory powers to meet the same need.¹⁸ The potential problem is illustrated by *Margate Corp v Devotwill*,¹⁹ where it was held that the Tribunal had not only to disregard the particular road scheme, but also to consider what other scheme might have emerged in the no-scheme world to meet the same purpose. In relation to road schemes, the legislature intervened by requiring it to be assumed that “no highway would be constructed to meet the same or substantially the same need...”²⁰
- 7.21 In our view, the same thinking should be applied generally. Thus, any increase or decrease in value due both to the particular proposal, and to any other statutory proposal to meet the same need, should be excluded. On the other hand, the possibility (where appropriate) of a similar *private* project can be taken into account in the valuation.²¹

¹⁶ See para 7.29 below.

¹⁷ *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307, 323

¹⁸ See *Grampian Council v Secretary of State* [1983] 1 WLR 1340, 1345.

¹⁹ [1970] 3 All ER 864.

²⁰ Planning and Compensation Act 1991, s 70 (inserting new subsections (5)-(8) into section 14 of the 1961 Act).

²¹ The same objective lay behind the Scott report’s recommendation, which led to rule (3) of the 1919 rules: see App 5, paras A.31-33.

Increases in value

- 7.22 For the protection of the authority, we propose a straightforward statement of the rule, requiring disregard of any *increase* in value caused by the “relevant project”, assessed on the cancellation assumption. This in our view will provide adequate protection against increases due either to the authority’s own investments in land assembly or infrastructure improvements, or to its special location requirements. It will thus meet the reasonable objectives of both the judicial version of the no-scheme rule, and of rule 5(3) of the 1961 Act.

Decreases in value

- 7.23 As explained in Appendix 5,²² the 1961 Act recognised the need for protection against decreases in value, by including a provision derived originally from the 1947 Act:

9. No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of... allocation in the current development plan, or by any other means) an indication has been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

- 7.24 The “relevant interest” in this context means the interest acquired under a notice to treat, and the “relevant land” means the land in which that interest subsists.²³ Thus, the rule appears to be directed simply to the effects of the threat to a particular owner, rather than the effects of the “underlying scheme”, or even of the compulsory purchase order (which may include other ownerships). On a literal interpretation, therefore, section 9 appears narrower than any of the other versions of the no-scheme rule.

- 7.25 However, in the second *Jelson* case,²⁴ the Court of Appeal overcame this apparent limitation, by a wide interpretation of the word “indication”, which in effect equated it to the “scheme” under the judicial version of the rule. Similarly, in the *Melwood Units* case (1979), the Privy Council, when confirming that the judicial no-scheme rule applied to decreases in value caused by the scheme, referred to section 9 of the 1961 Act as “merely reflecting the law”.²⁵

- 7.26 As CPPRAG, pointed out, if the intention is to protect against blight linked to the authority’s proposals, it may be unfair to the owner to limit the rule to indications related to the immediate purchase. In some cases, the blight may be caused directly by a threat to acquire the site of a particular business.²⁶ More often, however, the depreciation in value is due to general blight caused by the prospect of a project affecting a whole area, of which the threat to the particular owner is a small part. In this respect, CPPRAG’s recommendation seems too narrow. They

²² App 5, para A.82.

²³ 1961 Act, s 39.

²⁴ *Jelson Ltd v Blaby District Council* (1977) 34 P&CR 77, CA; see App 5, para A.103 .

²⁵ *Melwood Units Ltd v Main Roads Commissioner* [1979] AC 426, 435E: see App 5, para A.103.

²⁶ E.g. *Shun Fung, op cit*: see Part IV, para 4.40 above.

proposed extending the rule to indications that “adjoining or adjacent land may be compulsorily acquired”. Yet, the extent to which the project involves compulsory acquisition may not be the critical factor. The project may involve works, or the prospect of works, on land already in the ownership of the authority, or land over which it is able to acquire the necessary rights by agreement.

- 7.27 We propose, therefore, that the landowner will be protected by a wide rule requiring disregard of any diminution in value or reduced profits caused by the project itself or any advance “indication” of the project. Furthermore, it seems logical to link this rule, which is in substance concerned with protection against “blight” caused by the authority’s plans, to the provisions for “statutory blight” under the Town and Country Planning Act 1990 (or any replacement of those provisions).²⁷ The Policy Statement proposes a new regime for statutory blight, to be introduced by statutory instrument.²⁸ This would provide a good opportunity to link the compensation provisions with the statutory blight regime, as part of a coherent set of provisions for protection against loss due to blight.

Blight and purchase notices

- 7.28 The basic rule needs to be adapted for cases where the acquisition is forced on the authority, and there is therefore no “purpose” as such:

- (1) *Blight notices* The forced acquisition in these cases is directly linked to the blighting effect of an allocation or other proposal of the authority. It is reasonable therefore for any reduction in value caused by that allocation or proposal to be disregarded.
- (2) *Purchase notices* The object of such notices is to relieve the owner of a burden, by giving him the right to sell to the authority land which is incapable of reasonably beneficial use following a planning decision. Given this objective, there is no obvious reason why it should be attributed more value for compensation purposes than it has in reality. The land should be valued as it is, without any disregards.²⁹

- 7.29 Accordingly, our provisional proposals for the new no-scheme rule are as follows:

PROPOSAL 9: DISREGARDING THE PROJECT

(1) The existing rules, statutory or judge-made, relating to disregard of “the scheme” will be replaced by a new statutory set of rules, by reference to the “relevant project”;

(2) In this and the following proposal:

²⁷ Town and Country Planning Act 1990, s 149, sched 13. Owners of land “blighted” by inclusion within areas selected for certain categories of public development (for example, land allocated for public proposals in development plans, or land defined for highway schemes) are, subject to detailed rules, enabled to require the purchase of their land by means of a “blight notice”. There are 23 different categories defined by Schedule 13.

²⁸ Policy Statement, para 5.1.

²⁹ Thus following the approach of the Court of Appeal in *Morris & Jacombs* rather than *Jelson*.

(a) **“The relevant project”**: means the project for the purpose of which the authority has been authorised (under the applicable statute) to acquire the subject land;

(b) **“Planning status”**: means the planning permissions, actual or assumed, relating to the subject land or other land, to be taken into account for the purpose of assessing compensation;

(c) **“The cancellation assumption”**: means the assumption that the relevant project was cancelled on the first notice date, with no prospect of that, or any other project to meet the same or substantially the same need, being carried out thereafter under statutory powers;³⁰

(d) **“Planning hope value”**: means any increase in value of the subject land derived from the prospect of planning permissions being granted at a date subsequent to the valuation date;

(e) **“Blighted land”**: means land falling within one of the categories of planning proposals defined by Schedule 13 of the Town and Country Planning Act 1990 (or any replacement thereof);

(f) Any reference to the value of land includes a reference to the profitability of a business on that land;

[(2A) (i) If the authority wishes to contend that the relevant project extends to land other than the subject land, they shall include in the notice of the order a statement (in prescribed form) certifying that fact, defining the nature, extent and purpose of that project, and the date of the resolution of authorising that project;

(ii) Where such a statement is included in the order, its contents may be challenged by the claimant (but not the authority) on the hearing of a reference to determine compensation;

(iii) Subject to (ii), in any proceedings before the Tribunal:

(a) The relevant project shall be as defined in the statement under (i);

(b) The cancellation assumption shall be applied taking (instead of the first notice date) the later of the resolution date defined under (i) and the date three years before the first notice date;

(c) If no statement is served, it will be assumed (against the authority, but not the claimant) that the relevant project is

³⁰ Cf the “cancellation approach”: *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307. See also *Grampian RC v Secretary of State for Scotland* [1983] 1340, 1345-6; and 1961 Act ss 5-8.

confined to the area of the compulsory purchase order, and began on the first notice date.

As an alternative to (ii), an interested person could have the right to challenge the statement by objection to the confirming authority, within the time prescribed for objections to the order, and the decision of the confirming authority would then be binding on both parties before the Tribunal.]³¹

(3) In assessing compensation there shall be disregarded:

(a) any *increase* in value of the subject land fairly attributable to the carrying out of, or the proposal to carry out, the relevant project;

(b) any *decrease* in value of the subject land fairly attributable (i) to the carrying out of, or the proposal to carry out, the relevant project, or (ii) to any prior indication of the proposal to carry out that project, or (iii) to the subject land being within a category of “blighted land”;

(4) The increase to be disregarded under (3) shall be assessed by comparing the value of the land at the valuation date with the value as it would have been at that date on the cancellation assumption.

(5) The following rules apply where land is treated as having been subject to compulsory purchase, under procedures initiated by the claimant (“deemed compulsory purchase”):

(a) If the deemed compulsory purchase follows service of a blight notice³² under the Town and Country Planning Act 1990, the relevant project shall be determined by reference to the planning proposal (as defined in Section 149 and Schedule 13 of that Act) by which the land became blighted land;

(b) In any other case (including the service of a purchase notice under section 137 of that Act), the relevant project shall be assumed to be the service by the claimant of the notice which initiated the procedure;

(c) In either case the “first notice date” shall be taken as the date of service of the notice which initiated the procedure;

(6) Nothing in this proposal shall be taken as altering (for valuation purposes) the planning status of the subject land or any other land.

Consultation issues

(F) We invite views of consultees generally on the above provisional proposals, including in particular:

³¹ See discussion at paras 7.13-7.17 above.

³² As defined in Town and Country Planning Act 1990, s 149(5).

(i) Do they agree that all existing versions of the no-scheme rule should be replaced by a single statutory set of rules?

(ii) Do they agree with our proposed definition of the “relevant project” as the basis of the new rules?

(iii) Do they agree with our proposal to apply the “cancellation approach” in this context?

(iv) Would they favour the suggested alternative for defining the “project” at the time of the order (para 7.17 above); if so, should the authority’s definition of the project be open to challenge (a) at the time of confirmation of the order, by objection to the confirming authority, or (b) only before the Tribunal, at the time of the determination of compensation?

PLANNING STATUS

General approach

“Planning status” defined

7.30 In this proposal we address the problem of defining the “planning status” of the land for valuation purposes. We use that term to describe the planning permissions, actual or assumed, relating to the subject land or other land, to be taken into account for the purpose of assessing compensation (see Proposal 9(2) above).

The 1961 Act

7.31 The 1961 Act contains elaborate provisions to define the permissions, actual or assumed, which are to be taken into account in the valuation. The rules appear to exhibit some ambivalence, as to whether the planning status of the land is to be taken as it is in the real world, or is to be reconstructed in a hypothetical “no-scheme world”.

7.32 Thus, on the one hand, regard is to be had to any *actual* permissions for development of any site which includes the subject land (whether or not those permissions would have been granted apart from the scheme); and permission is to be assumed for the authority’s own development. On the other hand, 1961 Act section 17 introduces a hypothetical element, by providing a procedure which enables permission to be assumed for developments which would have been permitted in the absence of the proposal for compulsory purchase.

Planning status as a fixed factor

7.33 We think that, in this respect, the approach of the 1961 Act can be defended.³³ It seems right in principle to treat the actual planning status of the land as a fixed factor, not subject to the “no-scheme” test. This is consistent with the modern planning system, under which planning permission runs with the land, and, in

³³ Cf the contrary view of CPPRAG: para 7.5(3) above.

general, there is no provision for recoupment of planning gains or compensation for planning losses. In the post 1947 Act world, the landowner is not normally entitled to compensation for the adverse economic consequences of planning allocations (for example, if his land is in the green belt), any more than he is charged for the benefits (for example, allocation as a shopping centre).³⁴

- 7.34 Furthermore, this approach of treating planning as a fixture, subject to limited exceptions, restricts the possible area of speculation. Thus, for example, in the *Wilson* case,³⁵ permission was assumed for residential development on the subject land in accordance with the authority's proposal.³⁶ Without that assumption, the Tribunal would have had to embark on a wholly speculative inquiry, to find out what would have happened to the planning of the area, if the authority had not selected it for its own residential scheme.
- 7.35 However, the fact that permission was assumed for residential development, did not prevent the disregard (under the *Pointe Gourde* rule) of the added value given to the subject land by the prospect of *implementation* of the permission by the authority (including infrastructure improvements etc). Thus, existing law maintains a distinction between the value attributable to planning permission for the project, which is assumed to run with the land, and value attributable to public investments in that project, which are disregarded. In our provisional view, this is a valid distinction, which should be maintained in the new Code.
- 7.36 On the other hand, at the more detailed level, the section 17 certificate procedure recognises the perceived unfairness of depriving an owner of the value of a potential development site, because it has been selected to meet a public need, such as for a school, as compared to his immediate neighbours who have the advantage of permission for private development.

Planning status in the new Code

7.37 Accordingly, the main points of our proposals are as follows:-

- (1) The claimant will be able to claim the benefit of any actual permissions in existence at the valuation date, in addition to an assumed permission for the authority's development.
- (2) Further, he or she may claim the benefit of an assumed permission for any alternative development which would have been permitted if the land had not been proposed for compulsory acquisition. This will be assessed in accordance with the "cancellation assumption" as explained above; that is,

³⁴ Under pre-war planning legislation, there was provision for the preparation by councils of planning schemes, under which land became subject to planning restrictions. The landowner whose land was injuriously affected by a planning scheme had a right to compensation for the diminution in value. Since the introduction of general planning control by the 1947 Act (even following the restoration of market-value compensation in 1959), the landowner is not entitled to compensation for such planning restrictions.

³⁵ *Wilson v Liverpool Corporation* [1971] 1 WLR 302: see App 6.

³⁶ There was also an actual permission granted on Mr Wilson's own application, but that also followed from the approval of the authority's proposal.

one imagines the position as if the proposal to acquire and the underlying project were cancelled at the first notice date.

- (3) These assumptions will not be limited, as now, to the subject land. This can cause arbitrary and unrealistic distinctions between the assumed planning status of that and any surrounding land which is relevant to the valuation.
- (4) The claimant will have the option of seeking an advance determination of this issue by a procedure similar to the section 17 Certificate procedure (“planning status certificate”). Under this, a decision is made by the local planning authority, which is then taken into account by the Tribunal. However, in recognition of the hypothetical nature of the exercise, the rules are more flexible than under the 1961 Act; thus:-
 - (a) The application need not be confined to the precise area of the subject land (which will have been selected by the authority for the purposes of its project, and may not represent a sensible site for alternative development);
 - (b) The certificate will give only “general indications” of the conditions or obligations likely to be imposed. In the real world these would be subject to detailed negotiations between developer and planning. It is unrealistic and wasteful of resources to require such detail in a hypothetical exercise. It will be for the Tribunal, where relevant, to hear evidence and reach a view as to the likely effect of such requirements on value.

7.38 The intention is that the rules for establishing planning status, actual or assumed, should be an exclusive code. This represents a departure from the present law where it is possible for different decisions to be reached under the statutory rules and under the judicial version of the no-scheme rule.

Date of assessment

7.39 Use of the first notice date is consistent with the present rules applying to section 17 certificates under the 1961 Act. The Act provides alternative dates for reverse procedures, such as purchase notices (date of deemed notice to treat) and offers to purchase (date of offer).³⁷ The same rules can be applied under the new Code. A positive certificate should (as now) remain binding. However, we would propose that a negative certificate should be open to review by the Tribunal, in the light of changes in planning policy or physical circumstances (so far as consistent with the no-scheme rule) up to the valuation date.

Appeals

7.40 At present the appeal against such a decision lies to the Secretary of State. We have included this as a possible option. However, we have also included an alternative option of appeal to the Lands Tribunal. This seems to us likely to be a

³⁷ 1961 Act, s 22(2).

more efficient use of resources, and may also be more consistent with the principles of the Human Rights Act 1998, at least where a Government Department is the acquiring authority:-

EFFICIENCY

- 7.41 At present there is a right of appeal to the Secretary of State, which takes a form similar to a planning appeal. This may result in a duplication of work, since even if the Secretary of State confirms the planning authority's decision to issue a negative certificate, it is not binding on the Tribunal.
- 7.42 There seems to be no real need for the Secretary of State to be involved. It may be useful to retain the role of the Inspectorate, in cases where complex planning issues may arise, together with the possibility of a local inquiry. Regulations could provide (with the agreement of the Chief Planning Inspector) for the actual decision to be made by an inspector under procedure analogous to the present local inquiry (with delegated authority from the Tribunal, instead of the Secretary of State). Alternatively, arrangements could be made (under existing procedures) for the Tribunal to sit with a planning inspector as assessor.

HUMAN RIGHTS

- 7.43 In any event, the provision for appeal to the Secretary of State against decisions under section 17 may need to be reviewed under the Human Rights Act 1998. Article 6(1) of the Convention guarantees a right to a fair hearing by an independent tribunal in the determination of civil rights. The Secretary of State is not an independent tribunal in that sense. His apparent lack of independence is particularly noticeable in cases where the acquiring authority is a Government Department. For example, in *Fletcher Estates*³⁸ where the land had been acquired by the Secretary of State for Transport, the local authority had granted to the owner a certificate for residential development, but this was overruled on appeal by the Secretary of State for the Environment. Thus, the Secretary of State appeared to be judge in his own cause.
- 7.44 In the recent *Alconbury* case, it was held that the Secretary of State's role in determining planning appeals and confirming compulsory purchase orders, even if he has a financial interest,³⁹ is consistent with Article 6(1) because he has a direct interest in the policy issues involved, and the legality is supervised by the High Court.⁴⁰ However, his role in appeals on section 17 certificates is not directly comparable. These have no policy significance in the real world, and are simply a part of the process of determining compensation.

³⁸ [2000] 2 AC 307.

³⁹ The Crown had a direct financial interest in one of the cases (on land owned by the Ministry of Defence). It was held that this did not invalidate the procedure as a whole, given the availability of judicial review: [2001] 2 WLR at para 130 (Lord Hoffmann), para 197 (Lord Hutton); cf para 55 (Lord Slynn), para 64 (Lord Nolan) where it was suggested that objections, based on the Secretary of State's financial interest, while insufficient to disqualify him *in limine*, might become relevant to a challenge to the validity of the final decision.

⁴⁰ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

7.45 On the other hand, in a recent case,⁴¹ the Court of Appeal advocated a flexible approach, in the light of the *Alconbury* decision, in applying Article 6 to different factual circumstances. Arguably, the procedure for appeal to the Secretary of State can be justified by the objective of replicating “real-life” planning procedures, and the control provided by the High Court on points of law is sufficient protection to satisfy the Convention. However, the position is uncertain.

7.46 Accordingly, our proposals are as follows:

PROPOSAL 10: PLANNING STATUS

(1) The following rules will apply for the purpose of determining planning status at the valuation date:

(a) Account is to be taken of any planning permissions in existence at the valuation date (on the subject land or any other land);

(b) Planning permission is to be assumed (so far as not in existence at the valuation date) such as would permit the carrying out of the relevant project (on the subject land and any other land comprised in the project);

(c) Planning permission is to be assumed for any development (on the subject land or any other land) such as would reasonably have been expected to be granted not later than the valuation date, on the cancellation assumption;

(d) No other assumptions are to be made as to the existence of any planning permissions at the valuation date, but this rule does not prevent account being taken of any planning hope value.

(2) For the avoidance of doubt, in relation to any permission assumed under this Proposal:

(a) the assumption that permission has been granted does not of itself imply any assumption that work has been or will be carried out, or expenditure incurred, in implementing the permission;

(b) regard shall be had to any costs or expenses which would reasonably have been expected to be incurred in obtaining or implementing the permission; or in complying with any conditions, obligations or requirements to which the permission was, or would reasonably have been expected to be, subject.

(3) For the purpose of determining the permission or permissions to be assumed under (1)(c) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority

⁴¹ *Begum v Tower Hamlets LBC* [2002] 2 All ER 668. The Court held that review by the housing authority of its own decisions under the homeless persons legislation, subject only to appeal on points of law to the County Court, complied with Article 6.

for a “planning status certificate”, in accordance with the following rules (and “procedural regulations” to be made by statutory instrument):

(a) A planning status certificate is a certificate stating the opinion of the local planning authority as to the development (if any) on the land comprised in the application for which planning permission would reasonably have been expected to be granted on the cancellation assumption;

(b) The application for a certificate may relate to the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant);

(c) The certificate should include:

(i) Where permission would reasonably have been expected at some future date, an indication of the date;

(ii) A general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject;

(d) Either:⁴²

(A) There shall be a right of appeal against the certificate to the Secretary of State, by either the claimant or the authority (based on the present right under 1961 Act, s 18ff); or

(B) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to procedural regulations, and any time-limits there laid down; the regulations will give the Tribunal a wide discretion as to the timing and nature of the hearing of the appeal, having regard to any related compensation reference; in particular the Tribunal may direct:⁴³

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the

⁴² These are put forward as alternative options for the Code, depending on which avenue of appeal is adopted (see the accompanying notes).

⁴³ Under the present rules, which give a right of appeal to the Secretary of State, there is provision for the validity of his decision to be challenged on legal grounds in the High Court: 1961 Act, s 23. This would be unnecessary under this proposal, since the Tribunal’s decision would be subject to the ordinary right of appeal to the Court of Appeal.

inspector be given delegated power to determine the appeal on behalf of the Tribunal;

(e) In determining compensation:

(i) the Tribunal must take account of any permission, which is to be assumed in accordance with the planning status certificate;

(ii) in deciding (under the above rules) whether any other permission is to be assumed at the valuation date, it must have regard to any contrary opinion expressed in the certificate;

(f) Regulations may provide for the certificate procedure to be applied (with or without modifications) to special cases, including:

(i) where an offer is made by the authority, before the first notice date, to negotiate for the purchase of an interest in land which is, or may be, subject to compulsory purchase;⁴⁴

(ii) where a claimant is absent from the United Kingdom or cannot be traced.⁴⁵

Consultation issues

We invite consultees' views generally on the above proposals. In particular:

(1) Do consultees agree that (a) permissions existing at the valuation date should be taken into account (whether or not they would have been granted apart from the project) (b) permission should be assumed for development in accordance with the authority's proposals?

(2) In relation to the proposed "planning status certificate":

(a) Do consultees agree that the applicant should be permitted to include (as we propose) the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant); if not, how should the application area be defined?

(b) Do consultees consider (i) that the existing right of appeal to the Secretary of State should be retained or (ii) that the local planning authority's decision should be subject to appeal to the Lands Tribunal, which may, at the discretion of the Tribunal, be dealt with in advance of, or at the same time as, other valuation issues; and, in the former case, may be delegated to a planning inspector?

⁴⁴ Cf 1961 Act, s 22(2)(c).

⁴⁵ Cf 1961 Act, s 19.

THIRD SCHEDULE RIGHTS

- 7.47 It is convenient to deal here with 1961 Act, section 15(3) and (4), even though not directly related to the no-scheme rule. They are concerned with planning assumptions to be made, in assessing compensation, based on so-called “Third Schedule rights”.⁴⁶
- 7.48 This concept dates back to the 1947 Act, under which the rights to carry out certain categories of minor development, listed in the Third Schedule to that Act, were treated as falling within the “existing use” of land. They were subject to compensation if the land were compulsorily acquired, and, in some cases, even if permission for such development was merely refused. The concept survived the restoration of market value, and still exists, in much restricted form, in the Town and Country Planning Act 1990.⁴⁷
- 7.49 The survival of these rights in the 1961 Act seems an unnecessary complication. Our provisional proposal is to simply to repeal section 15(3) and (4),⁴⁸ without replacement.

Do consultees agree that 1961 Act section 15(3) and (4) (“third schedule rights”) should be repealed without replacement?

⁴⁶ Following the 1991 Act (see below), the only categories which remain relevant, for compensation purposes under the 1961 Act, are para 1 (rebuilding or alteration of existing buildings, subject to no more than 10% increase) and para 2 (use of a single house as two houses). These “rights” are distinct from the actual permissions granted for certain forms of minor development (such as house extensions) granted by development order (under 1990 Act s 58(1)(a)); as actual permissions, they will be reflected in compensation under 1961 Act s 14(2).

⁴⁷ Schedule 3 has to be read subject to the conditions specified in Schedule 10. The right to compensation on a refusal of planning permission was repealed by Planning and Compensation Act 1991, s 31, following a Consultation Paper (“Compensation Provisions in the Town and Country Planning Acts” – DoE 1989), which described these provisions as “rarely used and increasingly anachronistic”.

⁴⁸ Section 15(4) excludes cases where compensation has previously been paid under a removal or discontinuance order.

PART VIII

COMPENSATION- RELATED ISSUES

INTRODUCTION

8.1 In this Part we consider certain incidental issues which might be thought appropriate for inclusion in the Compensation Code. Those for which we make proposals as part of the present project are:

- (1) Compensation for interference with rights;
- (2) Compensation for acquisition of rights;
- (3) Advance payments;
- (4) Lands Tribunal extended jurisdiction;
- (5) Interest on compensation.

8.2 We explain our reasons for not including the following:

- (6) Tax;
- (7) Subsequent planning permissions;
- (8) Additional loss payments;
- (9) Disturbance payments;
- (10) Compensation for minor tenancies.

(1) COMPENSATION FOR INTERFERENCE WITH RIGHTS

Easements and covenants

8.3 In this section we are concerned with the effect of works carried out by the authority on land (“the servient tenement”),¹ which is subject to an easement (such as a right of way) or a restrictive covenant (for example, a restriction on building work) in favour of land owned by the claimant (“the dominant tenement”). In such a case, the authority’s work may interfere with the easement or breach the covenant, in a way which would, apart from statutory authority, give rise to a claim for an injunction or damages at common law. Under the present law, the authority does not need to acquire or extinguish the right; nor is any notice to treat² required. Instead, the claimant has a right to compensation, if and when the interference or breach takes place. Compensation is governed by section 10 of

¹ The land may have been acquired compulsorily or by agreement: *Re Elm Avenue, New Milton, ex p New Forest DC* [1984] 1 WLR 1398.

² See Part II, para 2.32 above.

the 1965 Act, under the same rules as for injurious affection where no land is acquired.³

8.4 The courts have held the following rights (amongst others) to be compensatable interests under these rules:

- (1) private rights of way;⁴
- (2) obstruction of rights of light;⁵
- (3) prescriptive rights of support;⁶
- (4) rights of access from private land to the public highway.⁷

8.5 Compensation is based on the diminution (if any) in value of the dominant tenement. Arguments that the compensation should reflect a share of any development value released on the servient tenement,⁸ were rejected by the Court of Appeal in *Wrotham Park Settled Estates v Hertsmere Borough Council*.⁹

8.6 Under these rules, the authority itself may, subject to paying compensation, lawfully interfere with the rights by virtue of its statutory powers.¹⁰ However, it seems that (subject to any special statutory provision) the rights as such are not extinguished. They remain binding on the title (in effect in suspension) and may affect successor owners if the authority in due course disposes of the land.¹¹

³ See Part IX below.

⁴ *Glover v North Staffordshire Rly* (1851) 16 QB 912; *Ford v Metropolitan Rly* (1886) 17 QBD 12; *Furness Rly v Cumberland Building Society* (1884) 52 LT 144; *Barnard v Great Western Rly* (1902) 86 LT 798.

⁵ *Eagle v Charing Cross Rly* (1867) LR 2 CP 638; *Re London, Tilbury and Southend Rly v Gowers Schools* (1889) 24 QBD 326; *Clark v London School Board* (1874) LR 9 Ch 120.

⁶ *Metropolitan Board of Works v Metropolitan Rly* (1868) LR 3 CP 612.

⁷ Where, for example, access is made steeper and less convenient through releveling: *Caledonian Rly v Walker's Trustees* (1882) 7 App Cas 259; or is wholly or partly obstructed: *R v Wallasey Local Board* (1869) LR 4 QB 351; or is reduced in width: *Beckett v Midland Rly* (1867) LR 3 CP 82.

⁸ Following cases in other contexts: see e.g. *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798 (damages in lieu of injunction); *SJC Construction Co v Sutton London Borough Council* [1975] 1 EGLR 105 (modification of restrictive covenant under Law of Property Act 1925, s 84).

⁹ [1993] 2 EGLR 15.

¹⁰ See *Re Elm Avenue, New Milton, ex parte New Forest District Council* [1984] 1 WLR 1398; also *Ayr Harbour Trustees v Oswald* (1883) 8 AC 623, HL; *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No.2)* [1972] 2 All ER 1073.

¹¹ See *Marten v Flight Refuelling Ltd* [1962] Ch 115 (Wilberforce, J) (restrictive covenant, affecting land acquired under compulsory powers, enforceable against a successor using the land for a purpose outside the statutory purpose). See Denyer-Green, *op cit*, p 115, where it is suggested that the payment of compensation provides protection from claims against a successor to the authority, arising out of the same interference but not otherwise.

Discussion

- 8.7 This issue is not discussed in the CPPRAG Review or the Policy Statement. It is open to question whether it is appropriate in this context to apply the rules for injurious affection where no land is taken. Although the right is not acquired or extinguished as such, the effect from the owner's point of view is very similar. He is deprived of the potential value of an interest in the subject land, which, in the absence of statutory intervention, he would have been able to turn to account in negotiations with anyone wanting to develop that land. It seems somewhat anomalous, therefore, to equate him with a person from whom no land is acquired.
- 8.8 Furthermore, the rule restricting compensation to the damage (if any) suffered by the dominant tenement may be thought to conflict with the principle of equivalence. Arguably, the owner's loss is not confined to that damage, but also includes the price that he could have negotiated for release of the right in private negotiations with a developer of the servient tenement.¹² That represents the "market value" of the right, to which he would be entitled under rule (2)¹³ if this were treated as an acquisition of land. However, the restrictive rule has been affirmed recently, after detailed consideration of the case law, by the Tribunal and the Court of Appeal in the *Wrotham Park* case. Furthermore, a similar rule has been applied to compensation for release of covenants under section 84 of the Law of Property Act 1925.¹⁴ As will be seen below, a similar issue arises in respect of acquisition of new rights.
- 8.9 Our proposals for the new Code reflect our understanding of the existing law. However, we invite views on whether there should be a separate right to compensation for interference with rights (not linked to the rules for injurious affection); and whether it should include compensation for loss of the "market value" of the right, as discussed in the previous paragraph.

Proposal 11: Interference with easements etc.

(1) Where the carrying out of the purpose for which the subject land is acquired results in interference with, or breach of, any easement, restrictive covenant or other right affecting the subject land, which is attached to other land, compensation shall be payable under this Proposal.

¹² For example, a percentage of development value as would apply to acquisition of a "ransom strip" under the practice approved in *Stokes v Cambridge CC* (1961) 13 P&CR 77 (App 5, para A.106; Part VI, para 6.80 below).

¹³ See Part IV, para 4.15 above.

¹⁴ See *Surrey County Council v Bredero* [1993] 1 EGLR 159, a case involving a breach of covenant, where the Court of Appeal held that diminution in value of the claimant's land was the true measure of damages in an action at law (not equity), and the damages should not relate to the profits earned by the contract breaker. Section 84(1) of the Law of Property Act 1925 gives power to the Lands Tribunal to discharge or modify restrictive covenants affecting land in certain circumstances. The applicant has to pay to any person entitled to the benefit of the restriction either a) a sum to make up for any loss or disadvantage suffered in consequence of the discharge or modification or b) a sum to make up for any effect which the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it.

(2) Compensation under this proposal shall be assessed by reference to the reduction (if any) in the market value of the land to which the right is attached, so far as attributable to such interference or breach.¹⁵

Consultation issues

(1) Do consultees agree that compensation for interference with easements or other rights should be separated from the rules for compensation for injurious affection where no land is taken?

(2) In any event, on what basis should compensation be assessed? In particular:

(a) Should compensation be based (as now) solely on diminution in the market value of the land to which the right is attached; or

(b) Should it reflect the “market value” of the right itself (that is, the amount which would have been paid for release of the right in negotiating between willing parties)?

(2) COMPENSATION FOR ACQUISITION OF RIGHTS

Introduction

8.10 A statutory power to acquire land does not of itself confer power to acquire new rights in the land. Apart from special provision in the Act, such a power authorises the acquisition of *existing* interests, not the creation of *new* interests.¹⁶ However, there are many statutes which confer powers to acquire new rights, particularly in relation to the requirements of utilities, for example for electricity lines or sewers. The rules relating to the acquisition of rights will vary depending on the nature of the acquiring body, and in particular whether what is required is an easement or a wayleave.

8.11 It is not possible or appropriate for these issues to be addressed in detail in the present project, which is concerned with establishing a standard Code. CPPRAG recommended that further work should be undertaken, in consultation with the various utilities and their sponsoring departments, to standardise as far as possible the arrangements for acquisition of rights and assessment of compensation.¹⁷ The issue is not addressed in the DTLR Policy Statement, but work is said to be continuing.¹⁸ Pending such a detailed review, it is appropriate that the Code should

¹⁵ This is intended to reproduce the effect of 1965 Act, s 7, as applied to interference with such rights: see *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798. It is to be noted that s 7 also applies to works on land acquired by agreement (see *Re Elm Avenue, New Milton* [1984] 1 WLR 1398); further provision will be needed, in this Code or elsewhere, to ensure that this effect is preserved. Issues relating to the continued existence of the rights following payment of compensation will be considered in the Law Commission’s Consultation Report on Implementation.

¹⁶ *Sovmots Investments Ltd v Secretary of State* [1979] AC 144.

¹⁷ CPPRAG Review, para 218.

¹⁸ Policy Statement, para 1.4.

include a standard provision for compensation for acquisition of rights, while recognising that it may be disapplied or modified by statutes dealing with particular subjects.

- 8.12 A possible model for acquisition of rights is in the Local Government (Miscellaneous Provisions) Act 1976, section 13. This applies only to compulsory purchase powers exercised by local authorities.¹⁹ Where a local authority could be authorised to acquire land compulsorily for any purpose, it may be authorised to acquire for that purpose “such new rights as are specified in the order.”²⁰ The Act sets out the modifications to be made to the 1965 Act, and the other enactments dealing with compensation. These provide a suitable starting-point for the new Code.

Right to compensation under the 1976 Act

- 8.13 The 1976 Act provides generally that the enactments dealing with compensation are to apply “with the necessary modifications”.²¹ More detailed guidance can be found in Schedule 1, which makes specific modifications of the 1965 Act. Section 7(1) (compensation for injurious affection) as modified reads:

In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to *the extent, if any, to which the value of the land over which the right is purchased is depreciated by the purchase* but also to the damage, if any to be sustained by the owner of the land *by reason of injurious affection* of other land of the owner by the exercise of the right.²² (emphasis added)

The first group of words in italics replace the words “the value of the land to be purchased by the authority” in the 1965 Act. Thus it seems clear that the basic measure of compensation is the depreciation in value of the land over which the right is acquired, not a notional market value of the new right.²³ Furthermore, the second group of words in italics replaces a reference to both “severance” and “injurious affection” in the 1965 Act. Accordingly, compensation for severance is apparently excluded.²⁴ It is not clear why this should be so, unless it is assumed

¹⁹ As defined in Local Government (Miscellaneous Provisions) Act 1976, s 44.

²⁰ *Ibid*, s 13(1).

²¹ *Ibid*, s 13(3)(c).

²² *Ibid*, Sched 1, para 6.

²³ See Denyer-Green, *op cit*, p 238-9, giving as an illustration *Turriss Investments Ltd v CEGB* (1981) 195 EG 489, LT (similar powers under the electricity Acts). Similarly, the Australian LAA (Cth), section 55 has a special provision for the acquisition of new rights, compensation being based on “the loss suffered by the person because of the diminution of the person’s interest in land.”

²⁴ Similarly, 1965 Act, s 20 (compensation for short term tenants- see para 8.84ff below) is modified so as to give the tenant the same right to compensation as on the acquisition of land, but “taking into account only the extent (if any) of such interference with such interests as is actually caused, or is likely to be caused, by the exercise of the right in question”.

that, in the context, there is no practical distinction between severance and injurious affection.

- 8.14 On the other hand, it seems that section 5(6) of the 1961 Act (which preserves the rules for compensation for disturbance) is intended to apply, as one of the “enactments relating to compensation for compulsory purchase”.²⁵

“A compensation lottery”

- 8.15 The limited compensation rights given by the 1976 Act are similar to those given by a number of other statutes which confer compulsory powers to acquire easements. For example, the Gas Act 1986 gives compulsory powers to public gas transporters to acquire pipeline easements. Compensation, as under the 1976 Act, is limited to the amount of depreciation in the value of the land through which the new right is acquired.²⁶
- 8.16 Other statutes are more generous. For example, the statute may require “full compensation to any person who has sustained damage” due to the works; such words have been interpreted as allowing a claim for loss of profits caused by obstruction to a garage during construction of a sewer.²⁷ Alternatively, it may go further and require the payment of “consideration” for the grant. Thus, the Telecommunications Act 1984, which confers rights to lay cables in private land, provides that the compensation shall be governed by:

Such terms with respect to the payment of consideration... as it appears to the court would be fair and reasonable if the agreement had been given willingly.²⁸

This was held to require an element of “subjective judicial opinion”, not restricted by the compulsory purchase rules.²⁹

- 8.17 These, and other variations on the theme, have been examined recently in a valuable study by Norman Hutchison and Jeremy Rowan-Robinson.³⁰ They rightly describe the current law as “a compensation lottery”. They also comment on the results of their interview survey, which suggested that

²⁵ Preserved by 1976 Act, s 13(3)(c).

²⁶ See Gas Act 1986 (as amended by Gas Act 1995) s 9, Sched 3 (applying s 7 of the 1965 Act, as modified).

²⁷ See *Leonidis v Thames WA*. [1979] 2 EGLR 8, applying Public Health Act 1936, s 278. It is uncertain whether the same result would be achieved under the current legislation (Water Industry Act 1991, Sched 12, paras 2, 3): see Denyer-Green, *op cit*, pp 407-8.

²⁸ Telecommunications Act 1984, Sched 2, paras 5, 7.

²⁹ *Mercury Communications Ltd v London & India Dock Investments Ltd* (1993) 69 P&CR 135, 144, 156 (Judge Nigel Hague QC). The facts and the conclusions in this case are summarised in App 6 below.

³⁰ *Utility wayleaves: a compensation lottery*, [2002] JPIF 159, updating their previous work published in the RICS Research Paper *Utility wayleaves: a legislative lottery* (Dec 2000). It is reproduced in App 7 below.

There is too little experience of contested claims arising from compulsory access to be clear just how far these measures actually differ in *practice* and how they affect valuation.³¹

To provide further illustrations and a basis for discussion, we reproduce the article in full in Appendix 7 (with the kind consent of the authors).

- 8.18 As they say, a critical issue, which is one of political choice, is whether the landowner should be paid some form of “consideration” for the wayleave or easement, or whether he should simply be entitled to the “financial equivalent of his loss”. Their researches showed that voluntary settlements commonly included an element of consideration. A percentage of market value is used reflecting, in part, the gain to the utility-promoter. On this issue they conclude:

The authors believe that an element of consideration would be consistent with the privatisation of utilities. It would also be consistent with the position which applied in the nineteenth century before the utilities were brought into the public sector. It is arguably also fair that those affected should receive some recognition beyond their financial loss; and experience in practice suggests that there could be advantages for the utilities in terms of a speedy settlement.³²

- 8.19 The Policy Statement indicates that work is proceeding within Government on this issue. We cannot anticipate the conclusions of that work. CPPRAG recognised the practical problem of basing payments on “actual or projected profits or risks associated with specific schemes”; and that it might result in some claimants receiving “disproportionate benefits. On the other hand, they said the legislation should “avoid being too prescriptive” in defining the market value of access rights.³³

- 8.20 Our provisional Proposal, in producing a standard Code, is to adopt the existing model of the 1976 Act (based on the depreciation in value of the land). We recognise, however, that for voluntary acquisitions, in many cases, a more generous approach is adopted. We therefore raise specific consultation questions on the possible alternatives, and their financial and practical consequences.

Proposal 12: Acquisition of rights

Where the interest acquired is a right over land (including a newly created right):

- (i) The value of the right shall be assessed by reference to the depreciation, if any, in the market value of the land over which the right is acquired;**

³¹ *Ibid*, p 166.

³² *Ibid*, p 174.

³³ CPPRAG Review, para 214.

- (ii) **Other heads of compensation (disturbance, injurious affection but not severance) shall be allowed under the ordinary rules (see above).**

Consultation issues

- (1) **Should the compensation for acquisition of new rights be assessed:**

(a) **As now by reference to the diminution in the value of land or,**

(b) **By reference to the “market value” of the right (that is, the amount which would have been paid for grant of the right between willing parties)?**

- (2) **Should compensation for severance be allowed? If so, in what circumstances could it arise (other than those covered by injurious affection)?**

(3) ADVANCE PAYMENTS

Existing law

8.21 The 1973 Act gives the dispossessed owner a right to an advance payment from the authority on account of compensation, pending final agreement or determination.³⁴ The request must be made in writing, and be supplemented by such particulars as the authority reasonably require to make an estimate of compensation. The amount of the advance payment is 90 per cent of the authority’s estimate (unless an amount has been agreed between the parties). Payment must be made not later than three months from the date of the request, or (if later) on the date of the taking of possession.³⁵ If, when compensation is determined, the advance payment is too high, the excess must be repaid.³⁶

8.22 The 1973 Act contains other detailed rules which it is unnecessary to set out here. In addition amendments were made by the 1991 Act, including provision for the payment of accrued interest on the amount by reference to which the advance payment is calculated.³⁷ Two points on the detailed rules may be noted:

- (1) By section 52(6) the authority’s obligation to make an advance payment does not apply if there is an outstanding mortgage exceeding 90% of the authority’s estimate of compensation; and if the mortgage is less than 90% the authority can reduce the payment by the amount they think will be needed to redeem the mortgage
- (2) There is no specific provision for enforcement of the duty to make an advance payment.

³⁴ 1973 Act, s 52.

³⁵ *Ibid*, ss 52(2)-(4). If the authority subsequently have reason to revise the estimate upwards, they can be required to make a further advance payment: *ibid*, 52(4A).

³⁶ *Ibid*, s 52(5).

³⁷ *Ibid*, s 52A.

Policy Statement

- 8.23 The Policy Statement, in line with recommendations of CPPRAG, proposes that the machinery for enforcing the duty should be strengthened:

We agree that claimants must not be unduly disadvantaged by being subjected to protracted delays before receiving any actual payment following the date of taking possession. We therefore intend to impose a duty on acquiring authorities to notify each claimant on the date of taking possession of his right to claim... There may also be a case for providing a means of ensuring that advance payments, once requested, are actually made by authorities. This is a matter to which the Law Commission will be giving further thought.³⁸

- 8.24 The Policy Statement did not accept a CPPRAG suggestion that the Lands Tribunal should be given a discretionary power to determine the amount of the advance payment:

... it could simply amount to requiring the Lands Tribunal to consider the same issues twice-over; and... it may not always be practicable for the Lands Tribunal to make a fair assessment in advance of other decisions on substantive matters associated with the claim. It does not therefore seem to represent a sensible use of the Lands Tribunal's resources.³⁹

- 8.25 It was also proposed to amend section 52(6) to enable the authority, with the agreement of the owner and mortgagee, to make the advance payment direct to the mortgagee.

The new Code

- 8.26 The provisions of section 52 and 52A should be included in the new Code, subject to amendment of section 52(6) as proposed by the Policy Statement.
- 8.27 In the absence of any specific machinery for enforcement, there is in principle a right to seek judicial review in the High Court.⁴⁰ However, this may seem unduly elaborate for what is usually a local issue, requiring a local, quick, and economical remedy. Furthermore, where the problem is the authority's failure to make an estimate, either at all, or at a reasonable level, the High Court's powers do not allow it to set the amount. It can only require the authority to make an estimate, or quash an estimate which is found to be wholly unreasonable.⁴¹
- 8.28 There is no easy answer to this problem. If the Lands Tribunal is not to be used, the only obvious alternative is the County Court. It could be given statutory power, on application by the claimant, to enforce the authority's obligations in

³⁸ Policy Statement, App para 3.67.

³⁹ *Ibid*, para 3.68.

⁴⁰ Arguably, an ordinary action may also be available, at least where the authority has made its estimate (so that the amount is fixed), and is simply delaying payment: cf *Trustees of Dennis Rye Ltd v Sheffield City Council* [1998] 1 WLR 840 (action to enforce duty to pay improvement grant).

⁴¹ In accordance with "*Wednesbury*" principles: see *APPH v Wednesbury Corp* [1948] 1 KB 223.

respect of advance payments. It would probably not be appropriate for the County Court to take over the task of making an estimate, which would not be a normal role for the Court, and would be likely to require detailed expert evidence. However, it could exercise a supervisory role similar to judicial review, not only to require payment once an estimate had been made, but also to review the “reasonableness” of the estimate. Furthermore, it could adjourn the proceedings to allow a revised estimate to be made. Thus, although it would not be making the estimate itself, it could in practice bring considerable pressure on the authority to comply with its duty under the Act.

- 8.29 The County Court would not be unsuitable for such a review function. It already exercises a form of judicial review jurisdiction in certain housing matters.⁴² It also has a more general jurisdiction to grant “appropriate remedies” for breaches of the Human Rights Act 1998.⁴³ This may cause it to be involved in disputes relating to the process of compulsory purchase, quite apart from any specific jurisdiction. For example, as we have noted above, undue delay in providing compensation for compulsory purchase may give rise to a breach of the Act.⁴⁴ A power to supervise the machinery for advance payment of compensation would be consistent with that role.

Proposal 13: Advance payments

The claimant shall be entitled to an advance payment on account of compensation and interest, in accordance with sections 52 and 52A of the 1973 Act (which will be incorporated into the Code), subject to the following:

(i) Section 52(6) will be amended so that, whether or not the mortgage exceeds 90% of the authority’s estimate, the authority shall, if so requested by the owner and mortgagee, make the advance payment direct to the mortgagee;

(ii) Where it is shown that the authority has delayed unreasonably in making such a payment, or that the estimate on which the payment was based was unreasonably low,⁴⁵ the County Court may, on the application of the claimant, may make such interim or final orders (including imposing time-limits), as are necessary to enforce the authority’s obligations under this proposal.

⁴² See Housing Act 1996, section 204, which makes provision for an appeal on “a point of law”. The nature of this review, in the context of the Human Rights Act 1998, was discussed by the Court of Appeal in *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306; see also *Runa Begum v Tower Hamlets LBC* [2002] 2 All ER 668.

⁴³ Human Rights Act 1998, s 8. CCR Pt 7, para 7(ii).

⁴⁴ See Part II, para 2.23 above.

Consultation issue

Do consultees agree that the County Court should have jurisdiction (as proposed above) to review and enforce the performance of the authority's duties in relation to advance payments? If not, what alternative mechanism would be appropriate?

(4) LANDS TRIBUNAL EXTENDED JURISDICTION

Overlapping claims

- 8.30 We mention here a procedural issue on which reform could be useful. Rights to compensation for injurious affection (whether under section 7 or section 10 of the 1965 Act) arise only in respect of the *lawful* use of statutory powers. If the relevant damage results from those powers being exceeded, the proper remedy is a common law claim. However, as we have explained, the boundary is far from clear.⁴⁶ It is undesirable that the claimant should be left uncertain as to the proper forum, or that the same facts should have to be litigated separately.

Extended jurisdiction

- 8.31 Since some of the members of the Lands Tribunal are also qualified to sit as judges, it may be possible to make administrative arrangements to combine a hearing before the Lands Tribunal with a hearing of the Court (under the same member/judge). We understand that this is sometimes done.
- 8.32 However, we think it would be useful to clarify the position by giving the Lands Tribunal jurisdiction to deal with any claim (common law or statutory) relating to damage to land or the use of land, where it arises out of substantially the same facts as a compensation claim already before the Tribunal. Defining the cases in which this would be appropriate, and the procedure to be followed, could be left to procedural rules.

Proposal 14: Lands Tribunal jurisdiction

The Lands Tribunal shall have jurisdiction (subject to procedural rules) to determine any claim (common law or statutory) relating to damage to land or to the use of land, where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal.

Consultation issue

Do consultees agree that the Lands Tribunal should have extended jurisdiction as proposed to deal with a common law claim arising out of the same facts as a compensation claim already before the Tribunal?

⁴⁵ The word “unreasonably” is intended to be interpreted in accordance with judicial review principles; the County Court is not expected itself to take over the function of making the estimate.

⁴⁶ See Part IX, Para 9.16 above.

(5) INTEREST ON COMPENSATION

Existing law

Compensation for compulsory purchase

- 8.33 Where an acquiring authority takes possession of land before agreeing compensation, the compensation ultimately awarded carries interest from the date of entry until the date of payment.⁴⁷ Where the procedure is by notice to treat and notice of entry,⁴⁸ interest will run from the date on which possession is first taken of any land included in the notice of entry, even if actual possession is taken in stages.⁴⁹ Under the vesting declaration procedure, interest is payable from the date of vesting.⁵⁰
- 8.34 Where an advance payment of compensation is made, normally an amount equal to 90% of the authority's estimate,⁵¹ there must be a payment at the same time of the accrued interest on that amount.⁵² There is also provision for interest to be paid annually on the difference between the authority's estimate and the amount of any advances, as long as the accrued interest exceeds £1,000.⁵³

Injurious affection where no land has been taken

- 8.35 As explained in the previous Part, compensation for injurious affection where no land is taken may be payable, either (for the effect of the works) under section 10 of the 1965, or (for the effects of use) under Part I of the 1973 Act. In the former case, interest runs from the date of the claim.⁵⁴ Under Part I of the 1973 Act, interest runs from the date of service of the notice of claim, or (if later) the "first claim day".⁵⁵

⁴⁷ 1965 Act, s 11(1). No distinction is made for this purpose between the different heads of compensation (e.g. value of the land, disturbance or severance). Furthermore, it seems that the same rule applies to compensation assessed on the "equivalent reinstatement" basis (see para above), even if actual reinstatement is delayed for some years after entry: *Halstead v Manchester City Council* [1998] 1 EGLR 1, CA. Entry to the land was effected in 1974 but works to provide the single replacement church did not start until 1980. Between 1980 and 1986, the council made stage payments although the church mission achieved practical reinstatement by moving into the new church in 1982. The Court held that the mission could recover interest from the time of entry in 1974. This was seen as compensation for the fact that between 1974 and 1982 it had neither the land nor its value. Interest on "disturbance payments" under s 37 of the 1973 Act (see para below) runs from the date of "displacement": *ibid*, s 37(6).

⁴⁸ See Part II above, para 2.32.

⁴⁹ *Chilton v Telford Development Corporation*. [1987] 1 WLR 872 (a case on the equivalent provisions of the New Towns Act 1965, Sched 6, para 4).

⁵⁰ Vesting Declarations Act, s 10.

⁵¹ Under 1973 Act, s 52.

⁵² *Ibid*, s 52A(2).

⁵³ *Ibid*, s 52A(5).

⁵⁴ 1973 Act, s 63.

⁵⁵ 1973 Act, s 18(1), as amended by Local Government, Planning and Land Act 1980, s 112(4) (substituting the words "first claim day" for "the beginning of the claim period").

Other rights to compensation

- 8.36 In considering any revision of the rules relating to interest, it needs to be borne in mind that similar issues arise in relation to numerous other statutory provisions giving rights to compensation. Section 80 of the Planning and Compensation Act 1991 made comprehensive provision for interest on compensation under a number of provisions listed in Schedule 18 to the Act. These include claims, for example, under the Ancient Monuments and Archaeological Areas Act 1979, Land Drainage Act 1991, Highways Act 1980, Building Act 1984, Water Industry Act 1991, Town and Country Planning Act 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990. Depending on the nature of the right, interest may be payable from the date of the claim, the date of the loss, or some other date (as specified in the schedule).

Prescribed rate

- 8.37 Under each of the statutory provisions considered above, interest is payable at “the prescribed rate”.⁵⁶ The current interest rate, as so prescribed,⁵⁷ is 0.5 per cent per annum below the “standard rate”.⁵⁸ The “standard rate” is defined in terms of the base rates quoted by “the reference banks”⁵⁹ for the day preceding entry, and each subsequent “reference day” until payment.⁶⁰ Thus, a simple rate of interest is imposed, marginally lower than the base rates of the largest banks.

Power of the Lands Tribunal to award interest

- 8.38 Apart from any specific statutory provision, the Lands Tribunal can exercise the discretion conferred by section 49 of the Arbitration Act 1996, applied by rule 32 of the Lands Tribunal Rules.⁶¹ This gives a wide discretion to award simple or compound interest from such date and at such rate as the Tribunal thinks just in the circumstances of each case. However, section 49 applies “subject to any enactment that prescribes a rate of interest.”⁶² It seems clear therefore that the

The “first claim day” is 12 months after the date on which the works are first used: see Part IX, para 9.40 above.

⁵⁶ 1961 Act, s 32.

⁵⁷ Acquisition of Land (Rate of Interest after Entry) Regulations 1995, SI 1995, No 2262 (as amended by SI 1998, No 1129).

⁵⁸ *Ibid*, reg 2. The “standard rate” is: (a) the base rate quoted by reference banks and effective on the reference day most recently preceding the day on which the entry onto the land has been made or, where that day is a reference day, such reference day; and (b) the base rate quoted by reference banks and effective on each subsequent reference day preceding payment of compensation.

⁵⁹ I.e. the seven largest institutions, as defined by, *ibid*, reg 2(5); where different rates are quoted by different banks, the fourth highest is taken: *ibid*, reg 2(3).

⁶⁰ *Ibid* reg 2(2). The “reference days” are the last days of March, June, September, and December: reg 2(7).

⁶¹ Lands Tribunal Rules 1996, SI 1996, No 1022, as amended by SI 1997, No 1965.

⁶² *Ibid*, r 32(b).

general power cannot be used to supplement interest payments in the cases to which the 1961 Act prescribed rate applies.⁶³

8.39 We have no evidence as to how or in what circumstances the Tribunal currently exercises the discretion, and in particular whether compound interest is ever awarded. The circumstances in which it is required to use section 49 are probably very rare, given the wide range of claims to which (since the 1991 Act) the prescribed rate applies. The *Aslam* case⁶⁴ provides an example of the application of the previous discretion under the Arbitration Act 1950. The case related to compensation for a discontinuance order, made before the prescribed rate was applied to such cases by section 80 of the 1991 Act. The Court of Appeal held that, in those circumstances, the Tribunal should have exercised its discretion to award interest. It directed that interest should be “at the Commercial Court rate”, which appears to imply 1% above bank rate.⁶⁵ This compares to 0.5% below bank rate, under the 1961 Act (see above). As far as appears from the published report of *Aslam*, there was no discussion of this apparent discrepancy.

Proposals for change

CPPRAG

8.40 CPPRAG recommended that the basis for paying interest on the compensation payable should be reviewed, with a view to:

- (1) allowing payment of compound interest and revising the threshold of £1,000 for annual payments;
- (2) bringing the basis on which the rate of interest payable is prescribed more closely into line with the rates of interest which a claimant could have obtained if he had received full payment and deposited that sum in a bank or building society;
- (3) providing for interest to be payable on *all* reasonable professional fees, including legal fees, from the date on which the relevant work was undertaken for the claimant by the professional adviser.⁶⁶

8.41 They thought that the present arrangements could amount to a “penalty on the claimant for the late payment of compensation by the acquiring authority”.⁶⁷ Their “main concern” was that:

⁶³ See *Aslam v South Bedfordshire DC* [2001] RVR 65 (relating to the previous rules, applying Arbitration Act 1950, which allowed the award of simple, but not compound, interest). It was held that where the prescribed rate applies, “there is no discretion in the tribunal to refuse interest, or to award interest for some lesser period or at some other rate” (*ibid*, para 43, *per* Chadwick LJ).

⁶⁴ *Ibid*.

⁶⁵ The expression “Commercial Court rate” has no defined legal meaning. However, the normal practice of the Commercial Court is to make an award at “bank rate or minimum lending rate or equivalent plus 1%”: see *Dubai Aluminium Co Ltd v Salaam* [1999] 1 LILR 415, 465, *per* Rix J.

⁶⁶ CPPRAG Review, page 68, para 179.

Claimants should not be compelled to accept a lower rate of interest than that which they could have obtained if they had received full payment and deposited that sum in a bank or building society.⁶⁸

Policy Statement

- 8.42 The Policy Statement appears to accept the view of CPPRAG that the current prescribed rates amount, in effect, to “a penalty on the claimant for the late payment of compensation”:

Furthermore, the evolution of statute and case law relating to interest payments in respect of other matters, - including professional fees and loans incurred to meet disturbance and other costs and losses, - has resulted in a convoluted situation which does not always provide for the claimant to be fully recompensed for his loss.⁶⁹

- 8.43 However, it was noted that the CPPRAG recommendations could involve

a significant increase in an acquiring authority’s costs, unless measures were introduced in parallel to ensure that claimants could not benefit by adopting deliberate delaying tactics to increase the amount of interest payable. A careful balance would need to be struck...⁷⁰

- 8.44 Before a final decision, it was thought advisable to await the outcome of the Law Commission’s separate project, examining the power of the courts to award compound interest.⁷¹

- 8.45 However, there was seen to be “a more pressing need to clarify in the statute the basis on which interest should be payable on fees and taxes (including VAT)”. The Law Commission was invited to consider this as part of the present project.⁷²

Comment

- 8.46 As explained above, we are considering separately (not limited to land compensation) the possible extension of powers of courts and tribunals to award compound interest. CPPRAG’s views on the adequacy of the prescribed rates will be subject to further consideration by Government in the light of that review. Their concerns gain some support from a comparison of the prescribed rate with the “commercial rate”, which was thought appropriate in the *Aslam* case.⁷³ We assume that the £1,000 threshold for annual payments will be reviewed at the same time.

⁶⁷ *Ibid*, para 176.

⁶⁸ *Ibid*, para 177.

⁶⁹ Policy Statement, App, para 3.72.

⁷⁰ Policy Statement, App, para 3.74.

⁷¹ See *Law Commission’s Eighth Programme of Law Reform* (Report 274 - published on 23.10.01), page 10. The Consultation Paper on compound interest is due out later in 2002.

⁷² Policy Statement, page 29, para 4.20.

⁷³ See para 8.39 above.

- 8.47 A simple increase of the prescribed rate can be achieved by amended regulations under the 1961 Act, and does not require primary legislation. Any more general restructuring of the present “convoluted” arrangements will need to take account of rights to interest on the many other comparable forms of compensation, reviewed in the 1991 Act.⁷⁴
- 8.48 So far as concerns the specific issues raised in relation to interest on professional fees, and other matters, we do not at present have any detailed information as to the scale or precise nature of the problems in practice. Accordingly, our proposals for the Code at this stage simply reproduce the effect of the present legislation. However, we invite views and evidence on specific problems in relation to different categories of compensation.

Proposal 15: Interest

Interest on compensation, in respect of the compulsory purchase of any land on which entry has been made before payment of compensation, shall be paid from the date of entry at such rate as may be prescribed from time to time under 1961 Act, s 32 or any replacement.⁷⁵

Consultation issues

Are there any particulars in relation to the award of interest which require to be addressed in the new Code, for example relating to:

- (1) Professional fees (including VAT);***
- (2) Loans incurred to meet disturbance costs;***
- (3) Any other specific items of cost?***

INCIDENTAL ISSUES NOT IN THE CODE

(6) TAX

Introduction

- 8.49 Our terms of reference do not require us in terms to address the subject of taxation. However, we mention it for the sake of completeness. There are two possible issues:

- (1) Under tax law, what special rules (if any) should apply to the assessment for tax compensation for compulsory purchase?

⁷⁴ See para 8.36 above.

⁷⁵ The rates prescribed under 1961 Act, s 32 are applied under a number of other statutes (see para 8.36 above). It is open for consideration whether it is preferable to retain that section, or replace it in the new Code, making such consequential amendments as are necessary. A

- (2) Under compensation law, if the tax assessment of the compensation leads to an increased or reduced liability to tax, as compared to the position in the absence of compulsory purchase, how, if at all, should the difference be reflected in compensation?
- 8.50 The first issue, as one of tax law, would not naturally fall within the scope of a statutory compensation code. The latter is an issue of compensation law, and therefore some comment is appropriate.

Existing law

Tax rules

INCOME AND CAPITAL TAXES

- 8.51 As has been explained, notwithstanding the separate heads under which it is assessed, compensation for compulsory purchase is treated as a single global figure, representing the price for acquisition of the land.⁷⁶ Until 1965, accordingly, it was treated for tax purposes as a single capital payment.⁷⁷ One consequence was that no income tax was payable, even though assessment included elements of an income nature, such as temporary loss of profits.⁷⁸ However, following the introduction of capital gains tax in 1965, special rules were introduced to enable an apportionment to be made between the capital and income elements of compensation, and for each element to be taxed appropriately.⁷⁹
- 8.52 The modern rules are contained in the Taxation of Chargeable Gains Act 1992, sections 245 to 248.⁸⁰ Section 245 provides for the total compensation to be apportioned between capital, which is subject to capital gains tax, and income, which is taxed as a trading receipt. Thus, for example:
- (1) Amounts attributable to loss on stock, temporary loss of profits, temporary loss of goodwill and expenses are treated as income, and, as such subject to income or corporation tax.⁸¹
 - (2) Compensation for permanent loss of profits and permanent loss of goodwill is treated as a capital sum subject to capital gains tax.⁸²

decision on this point should in any event await the forthcoming Law Commission's Report on the award of Compound Interest, which may affect the form of any replacement.

⁷⁶ See Part III, para 3.4 above.

⁷⁷ *IRC v Glasgow & S.W. Ry Co* (1887) 12 App Cas 315 (compensation for loss of business was subject to stamp duty, as part of the "consideration for the sale").

⁷⁸ *West Sussex CC v Rought* [1957] AC 403 (Inland Revenue confirmed that there was no liability for income tax on payments for temporary disturbance: see pp 405, 412).

⁷⁹ Finance Act 1965, s 22, Sched 6, para 21(4); Finance Act 1969, Sched 19 para 11. For analysis of these provisions, see *Stoke-on-Trent City Council v Wood Mitchell* [1980] 1 WLR 254

⁸⁰ See also Revenue Statement of Practice SP8/79 of 18th June 1979.

⁸¹ See Revenue Statement of Practice SP8/79. The practice not only applies to disturbance. It also applies in "compensation cases where no interest is acquired (e.g. compensation due to damage, injury or exploitation of land, or to the exercise of planning control)": Revenue Statement of Practice SP8/79, paragraph 3.

- (3) Compensation payments in respect of injurious affection and severance to retained land⁸³ are treated as sums received on a part disposal of the retained land, and subject to capital gains tax.⁸⁴

“Roll-over relief”, subject to certain exceptions, is available where the compensation is applied to the purchase of other land within a defined period.⁸⁵

STAMP DUTY

- 8.53 Stamp duty is also chargeable on a conveyance or transfer of sale.⁸⁶ This is also calculated by reference to the total amount of compensation payable. Thus it includes any sums payable for severance and injurious affection⁸⁷ as well as disturbance.⁸⁸
- 8.54 For acquisitions following a notice to treat, conveyance does not occur until compensation has been settled (by agreement or determination), even if entry has been taken at an earlier date. Stamp duty is therefore payable on the total contractual amount of the compensation on registration of the conveyance, as with voluntary property transactions.
- 8.55 Where acquisition follows a general vesting declaration, stamp duty must be settled when the transfer of title is registered. Where compensation has not yet been determined, stamp duty is payable calculated by reference to the market value prior to execution of the general vesting declaration of the estate or interest which has been so vested, even if the compensation finally may differ. The Stamp Office requires this estimate to be made by a qualified valuer and endorsed by an officer of the acquiring authority.

Compensation rules

- 8.56 Compensation law has had to adjust to reflect the changes in tax law. Before the advent of the rules for apportionment between capital and income, the House of

⁸² *Ibid.*

⁸³ See Part V, para 5.9 above.

⁸⁴ Section 245(2), TCGA 1992: “In any case where land or an interest in land is acquired ... from any person and the compensation or purchase price includes an amount in respect of severance of the land comprised in the acquisition or sale from other land in which that person is entitled in the same capacity to an interest, or in respect of that other land being injuriously affected, there shall be deemed for the purposes of this Act to be a part disposal of that other land”.

⁸⁵ 1992 Act, s 247. In effect, to the extent that the proceeds of the disposal are applied in the replacement of the asset, the disposal and acquisition are treated as neutral for tax purposes, and liability is deferred until a further disposal: *ibid*, s 247(2). The period is 4 years, beginning 12 months before the disposal: *ibid*, s 152(3), applied by s 247(5).

⁸⁶ Finance Act 1999, Sch 13, Part I, s (1). Section 2 states that: “Duty under this Part is chargeable by reference to the amount or value of the consideration for the sale.” Changes to the law relating to stamp duty are proposed in the Finance Bill 2002.

⁸⁷ In a Scottish case, *Glenrothes Development Corpn v IRC* [1994] STC 74, it was held that stamp duty was payable on the total consideration (in this case, it included VAT).

⁸⁸ See *IRC v Glasgow and South Western Rly Co* (1887) 12 App Cas 315.

Lords held in *West Suffolk CC v W Rought Ltd*,⁸⁹ that the amount of the disturbance claim for temporary loss of profits had to be reduced, by an amount representing the income tax which would have been payable if they had actually been earned.

8.57 However, in a case in 1980, under the new rules, the Court of Appeal held that no adjustment should be made.⁹⁰ The Court considered that the effect of the new rules for apportionment was:

...to free the compensation for temporary loss of profits of its capital nature and enable it to be treated for what it in truth is, namely a trading receipt.⁹¹

8.58 *Rought's* case was distinguished on the basis that there had been a clear statement by the Revenue that, under the then rules, no tax was payable on the temporary disturbance element. The new rules, by contrast, were designed to enable an apportionment to be made for tax purposes, between the capital and income elements. In the absence of a clear statement by the Revenue, any attempt to anticipate the amount of the tax, by some form of adjustment, risked causing injustice. Accordingly, the compensation should be paid in full, and the claimant left to account for such amount as might subsequently be found due by way of tax.⁹²

8.59 In two more recent cases, the Lands Tribunal was faced with the opposite issue: whether compensation should be *increased* to reflect a liability for tax which would, or might, not have arisen in the absence of compulsory purchase:-

(1) In *Alfred Golightly Ltd v Durham CC* (1980),⁹³ the acquisition was of a former colliery site, and part of the compensation was attributable to value of the minerals recoverable from the spoil heaps. At that time, development land tax was payable on that element of value, and had to be deducted from the compensation.⁹⁴ If the minerals had been worked, the amount realised would have been exempt from development land tax.⁹⁵ The Tribunal held that an additional amount should be paid to compensate for the additional tax so payable.⁹⁶

⁸⁹ [1957] AC 403.

⁹⁰ *Stoke-on-Trent City Council v Wood Mitchell* [1980] 1 WLR 254.

⁹¹ *Ibid*, p 263.

⁹² *Ibid*, pp 259, 262-3.

⁹³ [1980] EGD 632 (V G Wellings QC and W M Hall FRICS)

⁹⁴ Development Land Tax Act 1976, s 39. Development Land Tax was abolished in 1985: Finance Act 1985, s 93.

⁹⁵ *Ibid*, s 17.

⁹⁶ *Ibid*, p 657. It had been conceded by the Council that, as a general rule, compensation was payable for a "loss in the nature of a tax liability" (following *Taylor v O'Connor* [1971] AC 115); and that, if payable at all in this case, it would come under Land Compensation Act 1961, s 5(6) ("any other matter not directly based on the value of land"): *ibid*, p 656.

- (2) In *Harris v Welsh Development Agency*,⁹⁷ the acquisition was of a business property. Although the claimant relocated the business, he incurred a substantial liability to capital gains tax on the disposal to the acquiring authority, and sought to make it good as an additional item of compensation under Rule (6). The Tribunal rejected the claim holding (a) that rule 5(6) had no application, because the Capital Gains Tax liability was a matter “directly based on the value of land”; (b) that there was no sufficient causal link, and the loss was too remote.⁹⁸ The Tribunal distinguished *Golightly*, noting the concessions made in that case,⁹⁹ and the factual differences:

[In *Golightly*] the county council were required to deduct the whole of the DLT and the claimant was required to suffer tax that, in the absence of the acquisition, it would not have incurred. In this current reference, however, the effect of the forced sale was not to remove an exemption to tax, but to turn into an actual liability what already existed as a contingent liability. The effect of the sale was to bring forward an existing future liability.¹⁰⁰

- 8.60 The view, expressed in *Harris*, that increased liability was outside rule (6) as a matter based “directly on the value of land” seems questionable. In the context of section 5 of the 1961 Act, the word “direct” seems to be referring to the direct application of compensation rules (as in rule (2)); here the direct cause was the tax statute.¹⁰¹ On the factual grounds, however, the decision can be supported, and is distinguishable from *Golightly*, where there was a clear loss of a specific tax exemption. In this respect it is also consistent with the earlier cases on reduced tax liability, under which potential tax liability was relevant only where the nature and extent of the reduction were unambiguously established.
- 8.61 In summary, it seems that, where the tax position is clear, and the Tribunal can identify a specific increase or reduction in tax liability resulting from the compulsory purchase, compensation will be adjusted accordingly. Otherwise, compensation will be assessed without reference to potential tax liability, which will be a matter to be resolved with the Revenue in due course.

⁹⁷ [1999] 3 EGLR 207 (Peter Clarke FRICS).

⁹⁸ [1999] 3 EGLR at pp 222-3. Under (b), the Tribunal held that the CGT liability was attributable to the claimant’s “position in relation to the property”, rather than the acquisition; and that the loss was “incapable of accurate assessment”, because at worst it was the acceleration of a contingent liability which would have arisen at an unknown time in the future. The Tribunal rejected (on the facts) a further contention by the authority, that the claimant had failed to mitigate his loss by arranging the relocation in such a way as to attract roll-over relief.

⁹⁹ See n 97 above.

¹⁰⁰ [1999] 3 EGLR at p 222.

¹⁰¹ See also Denyer Green, *op cit*, p 344.

Policy Statement

Policy issues

8.62 CPPRAG drew attention to certain perceived problems in relation to tax:

- (1) The timing of compulsory purchase orders and long delays in settling compensation claims might have an adverse effect on a claimant's tax liability;
- (2) The present rules, under which compensation sums are treated as either sums representing income or sums representing capital, and taxed accordingly, might mean that income that would be received over a number of tax years is treated as received in the year, and therefore taxed at a higher rate than would otherwise have been the case.¹⁰²
- (3) In the case of the receipt of capital gains, the availability of rollover relief may be prejudiced. In view of the delay in settling compensation claims, consideration should begin to fixing liability to capital gains tax by reference to an earlier date than that on which the landowner is held to have disposed of his interest in the property.

They recommended that the Inland Revenue be invited to reconsider their practice in relation to compulsory purchase compensation.¹⁰³ No special problems were mentioned in respect of stamp duty.

8.63 The Policy Statement did not accept that any change was needed:

Having reviewed the impact of current taxation rules on those from whom land is being acquired, as recommended by CPPRAG, we have come to the conclusion that no changes are required to the tax laws. However, in line with current case law, we consider that the statement of the principles to be applied in assessing compensation should include provision for any additional tax incurred as a direct result of the compulsory acquisition of a claimant's land, as well as the cost of any loan incurred solely, and justifiably, in order to be able to acquire land in time to benefit from capital gains roll-over relief.¹⁰⁴

8.64 In the Appendix, it was made clear that this would be achieved by "advice" to make clear that compensation under rule (6) "is intended to include any additional tax incurred as a direct result of the compulsory acquisition of a claimant's land."¹⁰⁵ We assume that such advice would be agreed with the Inland Revenue.

¹⁰² They referred to *Golightly* as showing that additional compensation might be paid in such a case.

¹⁰³ CPPRAG Review, page 69, paras 185 and 186.

¹⁰⁴ *Ibid*, page 27, para 4.16. The "current case law" is a reference to *Golightly*: see Policy Statement, App, para 3.63 (no reference was made to *Harris*).

¹⁰⁵ *Ibid*, App, para 3.63.

Consultation issues

- (1) Do consultees agree that (as proposed by the Policy Statement) additional tax liabilities arising out of the compulsory purchase can be satisfactorily met by the law of disturbance, supplemented by advice agreed with the Revenue.**
- (2) If not, what provision should be made in the Code for such tax liabilities?**
- (3) Are there any other tax issues arising out of the law of compensation which should be addressed in the new Code?**
- (4) We would welcome specific examples of any problems experienced in practice.**

(7) SUBSEQUENT PLANNING PERMISSIONS

Existing law

- 8.65 Part IV of the 1961 Act contains a complex set of provisions dealing with compensation where planning permission for additional development is granted after compulsory acquisition. The provisions were first enacted in the 1959 Act (section 18), recast in the 1961 Act, repealed by the Land Commission Act 1967, and were then re-enacted with modifications by the Planning and Compensation Act 1991.¹⁰⁶ The following is only a short summary of the main points.
- 8.66 Section 23 applies where an interest was acquired (either compulsorily or sold voluntarily to an authority having CPO powers) and within 10 years of the “date of completion”¹⁰⁷ a planning decision is made granting consent for “additional development” on the subject land.¹⁰⁸ If the compensation or consideration was less than the amount which the interest would now command, the person to whom compensation or the purchase price was payable is entitled to claim the difference.
- 8.67 The additional compensation is an amount equal to the difference between the “principal amount of compensation”¹⁰⁹ actually paid, and that which would have been payable in pursuance of a notice to treat served on the relevant date,¹¹⁰ if the new planning decision had been made before that date; and the permission

¹⁰⁶ 1991 Act, s 66 and Sched 14.

¹⁰⁷ Being the date, in relation to an acquisition or sale of an interest in land, “on which the acquisition or sale is completed by the vesting of that interest in the acquiring authority”: 1961 Act, s29(1).

¹⁰⁸ Certain categories are excluded: see the list of excepted acquisition powers in s 23(3) and the excepted developments listed in s 29(1). Permissions granted by development order are excluded: s 25.

¹⁰⁹ The “principal amount of compensation” includes (with some exceptions) any compensation for disturbance, severance or injurious affection: see Sched 3 paras 1-3.

¹¹⁰ Defined in s 29(1) as “in relation to a compulsory acquisition of an interest in land, . . . the date of service of the notice to treat and, in relation to a sale of such an interest by agreement, . . . the date of the making of the contract in pursuance of which the sale was affected.”

granted by it had been in force on that date.¹¹¹ The ordinary procedures relating to determination of questions of disputed compensation (under Part I) apply.¹¹²

The CPPRAG Review

8.68 The CPPRAG Review indicates that the Advisory Group:

[H]eard nothing to suggest that this provision has given rise to any particular difficulties, anomalies or unfairness, and it does not seem unreasonable for the original landowner to benefit from any change in the purpose for which his land had been taken.

8.69 However, the Group mentioned (but appeared to form no conclusion or suggestion) that a policy decision was needed on former landowners having the benefit of permissions resulting from the acquiring authority's intervention. The Group felt, in any event, that the "cut-off date of 10 years needed further thought", although it did not indicate whether adjustment should be up or down.¹¹³

Policy Statement

8.70 The DTLR Policy Statement is silent on this issue.

Discussion

8.71 This complicated set of provisions has a curious history. Having been repealed in 1967, it was revived as part of a set of piecemeal reforms in 1991. The main change was the extension of the qualifying period from 5 to 10 years.¹¹⁴ Thus, a relatively recent policy decision has been made by Parliament to reintroduce this extended right after a lapse of nearly a quarter of a century. That in itself was an unusual step for the legislature to take. Further, as CPPRAG observe, there appears to be no evidence of concern by public or practitioners relating to the mechanism. CPPRAG accordingly recommended its retention.

8.72 On the other hand, we find this right to additional compensation somewhat anomalous. Compensation under the ordinary rules is intended to reflect the full market value of the land at the valuation date, with all its present and future potential, including any hope value for future development. The claimant is then free to use the money for alternative investments (any delay in payment being compensated by interest). There is no obvious reason why he should be treated as though he had retained his investment in the acquired land, until any potential value had become a certainty. No such expectation would arise on an ordinary sale in the private market, in the absence of a specific provision in the contract of sale for "clawback" of future development value.

¹¹¹ If the original landowner has died, or some other event has occurred whereby the right to compensation would thereupon have vested in some other person, then the compensation right will be treated as having devolved to persons claiming under him: 1961 Act, s 23(4).

¹¹² 1961 Act, s 23(6).

¹¹³ CPPRAG Review, para 118.

¹¹⁴ See s 23(1)(a) as re-enacted in 1991 Act Sch 14 Pt 4; cf the version of the same provision in the 1961 Act.

- 8.73 There is a further possible anomaly, not expressly remarked upon by CPPRAG. CPPRAG suggested elsewhere that there should be no automatic right to an assumed permission for the development to be carried out by the acquiring authority, unless it would have been available in the no-scheme world.¹¹⁵ However, there is no similar qualification to the right to compensation for subsequent permissions. The former owner gains the benefit of the new permission, whether or not it would have been granted apart from the authority's scheme. CPPRAG thought it "not unreasonable" that the owner should benefit from any change in the purpose for which his land is acquired. But if he is not entitled to benefit from the original purpose, it is hard to see why his position should be better if the purpose is changed.
- 8.74 As a matter of detail, it is to be noted that this provision was drafted before the *West Midlands Baptist* case (1969) established that values should be taken at the date of entry or determination of compensation ("the valuation date"), rather than the date of *notice to treat*.¹¹⁶ The 1991 re-enactment made no change in this respect. Thus it retains, for example, references to a hypothetical planning decision immediately before the date of notice to treat. The more appropriate time for judging the position, arguably, would be the valuation date. If the provision is to be retained in any form, the precise drafting will need to be reviewed to remedy such detailed points.¹¹⁷
- 8.75 For the above reasons, we make no proposal to reproduce these provisions in the new Code. However, we invite views on whether the rule should be retained, and if so in what form; we would particularly welcome evidence (with examples) of how much it is used in practice and with what financial consequences.

Proposal 16: Subsequent planning permissions

1961 Act, s 23 (compensation where permission for additional development is granted after acquisition) will be repealed.

Consultation issues

Views are invited on the following:

- (1) Do consultees agree that provisions for compensation for subsequent permissions (1961 Act, Part IV) should be repealed without replacement?***
- (2) If not, what changes should be made to the detailed rules; in particular:***

¹¹⁵ See Part VII, para 7.5(3) above. However our own proposals retain this assumption: para 7.37.

¹¹⁶ See Part V, para 5.75 above.

¹¹⁷ Another point of detail is the lack of any provision for a permission granted after the relevant date but before the completion date: see Denyer-Green, *op cit*, p 206.

- (a) ***Should the claim be limited to any new permissions which are not dependent on the scheme for which the authority originally acquired the land?***
 - (b) ***Should the present period of 10 years be changed? If so, to what period, and why?***
 - (c) ***Are any other changes needed (for example, to relate the provisions to the “valuation date” as established by case-law since the 1961 Act)?***
- (3) *To what extent are these provisions used in practice? (We would welcome examples of individual cases, and any statistical information about the number of cases in which section 23 has been invoked, and with what financial consequences.)***

(8) ADDITIONAL LOSS PAYMENTS

Existing law

- 8.76 The 1973 Act, in sections 29ff, provides for home loss payments to be payable to those displaced from dwellings by compulsory purchase, or other public projects,¹¹⁸ if they have been in occupation by virtue of a qualifying interest or right for at least one year. The amount of the payment for an “owner’s interest”¹¹⁹ is 10% of the market value, up to a maximum of £15,000; and in other cases £1,500.¹²⁰
- 8.77 Sections 34ff give a right to farm loss payments for owners or tenants displaced from agricultural land of more than 0.5ha. The amount is a payment “equal to the average annual profit derived from the use for agricultural purposes of the agricultural land” computed by reference to the profits for the three years before displacement.¹²¹

Policy Statement

- 8.78 The Government accepted the CPPRAG recommendation that all those who have land compulsorily taken from them should receive a payment in recognition of that fact:

While we reject the concept of a premium payable on top of open market value as an element in the valuation of the land being acquired, we do consider it right that those who have had their property taken from them should receive an additional “loss

¹¹⁸ Such as the initiation of development on land previously acquired, or making of an order for possession on certain grounds under the Housing Act 1985: see 1973 Act, s 29.

¹¹⁹ That is, a freehold, or lease, for more than 3 years (s 30(7) applying Acquisition Act, s 7).

¹²⁰ The Policy Statement (para 3.19) notes that the rates payable were last increased in 1991; it is intended, as an interim measure, to amend to bring them into line with current values.

¹²¹ 1973 Act, s 35.

payment” in recognition of the physical and psychological upheaval which that causes.¹²²

- 8.79 The new scheme would be in substitution for the existing home-loss and farm-loss payments. The details of the “loss-payment” scheme would be defined in secondary legislation, subject to consultation:

However, our current thinking is that the percentage payable would be linked to the current home-loss payment regime which, within the specified thresholds, is 10% of open market value. The new payment regime would include provisions for residential tenants and specific provisions to take account of the fact that small businesses tend not to hold the freehold of their sites.¹²³

- 8.80 Since these proposals are currently being developed by the DTLR, we have not at this stage included them in our own proposals for the draft Code. We would expect appropriate provision to be incorporated in due course.

(9) DISTURBANCE PAYMENTS

- 8.81 Section 37 of the 1973 Act confers rights to “disturbance payments” in certain circumstances on a lawful occupier, who is displaced as a result (inter alia) of acquisition of land by an authority possessing compulsory powers, and who has no compensatable interest in the land.¹²⁴ The amount of the disturbance payment is defined by the Act,¹²⁵ and is broadly equivalent to the amount which would have been paid for disturbance under the compulsory purchase code.¹²⁶

- 8.82 Neither CPPRAG nor the Policy Statement mentioned any need for reform of these provisions. They apply not only on compulsory purchase, but also on purchase by agreement by a public authority, and in other cases, such as dispossession in consequence of a housing order.¹²⁷ In these circumstances, they do not naturally form part of the basic compensation Code, and there seems no reason to propose their inclusion in the present project.

(10) MINOR TENANCIES

Existing law

Notice to treat

- 8.83 Section 20 of the 1965 Act embodies a special procedure for dealing with an occupant of the land “having no greater interest than as tenant for a year or from

¹²² Policy Statement, para 4.7.

¹²³ *Ibid*, App, para 3.18.

¹²⁴ I.e. an interest for which he is entitled (or would be if the acquisition were compulsory) to compensation under any other enactment: s 37(2)(b).

¹²⁵ 1973 Act, s 38(1).

¹²⁶ See e.g. *Prasad v Wolverhampton BC* [1983] Ch 333.

¹²⁷ 1973 Act, s 37(1). “Housing order” is defined by, *ibid*, s 29(7), and includes (for example) demolition and closing orders under the Housing Act 1985.

year to year”.¹²⁸ Such a person is not entitled to notice to treat. The authority may simply await the expiry of the contractual term, or serve notice to quit under the contract.¹²⁹ In that case, there is no right to compensation under the 1965 Act, although there may be a right to a “disturbance payment” under the 1973 Act.¹³⁰ Section 20 enables possession to be required in advance of the contractual date, by means of a specific demand by the authority and the payment or tender of compensation.¹³¹

8.84 The Act defines the heads of compensation to which a tenant is entitled in such cases -

- (1) the value of the unexpired term or interest in the land;
- (2) “any just allowance which ought to be made to him by an incoming tenant”;
- (3) “any loss or injury he may sustain”,¹³² and
- (4) if part only of the holding is taken, compensation for severance or injurious affection.¹³³

8.85 As originally enacted, the section required to be left out of account any right of a business tenant to a new tenancy under the Landlord and Tenant Act 1954.¹³⁴ This was amended in 1973, so that now the rights of both business and agricultural tenancies to statutory protection have to be taken into account.¹³⁵

Vesting declaration

8.86 The vesting declaration procedure also has special rules for land subject to a “minor tenancy”¹³⁶ or “a long tenancy which is about to expire”.¹³⁷ In respect of

¹²⁸ See App 3 for the parts of s 20 relevant to compensation. It is derived from 1845 Act, s 121. The section is headed “tenants at will etc”, which is not a very helpful description of its content. We have taken the term “minor tenancies” from the equivalent provision in relation to vesting declarations (see below).

¹²⁹ See *Newham LBC v Benjamin* [1968] 1 WLR 964, CA, for a modern explanation of the procedure.

¹³⁰ 1973 Act, ss 37-8.

¹³¹ 1965 Act, s 20(4). There must be a specific demand, even if notice to treat has in fact been served (see the *Newham* case, above).

¹³² 1965 Act, s 20(1).

¹³³ *Ibid*, s 20(2).

¹³⁴ 1965 Act, s 20(5), applying Landlord and Tenant Act 1954, s 39.

¹³⁵ 1973 Act, ss 47-48.

¹³⁶ Defined as “a tenancy from year to year or any lesser interest”: Vesting Declarations Act 1981, s 2(1).

¹³⁷ In summary, a tenancy having at the vesting date such period (longer than a year) as specified in the GVD: *ibid*, s 2(2).

such interests, the vesting declaration does not give the authority a right to immediate possession.¹³⁸ Instead, section 9 provides:

(2) The right of entry conferred by section 8(1) above shall not be exercisable in respect of that land unless, after serving a notice to treat in respect of that tenancy, the acquiring authority have served on every occupier of any of the land in which the tenancy subsists a notice stating that, at the end of such period as is specified in the notice (not being less than 14 days) from the date on which the notice is served, they intend to enter upon and take possession of such land as is specified in the notice, and that period has expired.

(3) The vesting of the land in the acquiring authority shall be subject to the tenancy until the period specified in a notice under subsection (2) above expires, or the tenancy comes to an end, whichever first occurs.

8.87 There are no special rules for compensation.

Discussion

8.88 We have seen no suggestion that the substance of these arrangements for minor interests should be altered materially. Their advantage is that the acquiring authority does not have to trouble at the outset with lesser interests, which may expire before possession is required, or, if not, may be better dealt with by informal arrangements for relocation. The authority is thus free to handle those issues as and when it becomes necessary to do so. The vesting declaration procedures also give discretion to define the remaining length of expiring tenancies, which are to be excluded.

8.89 The heads of compensation in the 1965 Act are expressed in terms dating from the 1845 Act, and could usefully be updated. However, they do not appear to differ substantially from the ordinary principles of compensation.

8.90 Thus no major issue of principle appears to arise. However, it is desirable not only to modernise the language of the 1965 Act, but probably also to amalgamate the relevant parts of the two procedures into a single set of provisions. We consider that this will best be done as part of our forthcoming review of Implementation, when we will be seeking to rationalise generally the procedures for notices to treat and vesting declarations.

¹³⁸ Nor is there a “constructive notice to treat”: Vesting Declarations Act 1981, s 7(1)(i).

PART IX

INJURIOUS AFFECTION WHERE NO LAND IS TAKEN

INTRODUCTION

Background

- 9.1 The construction and use of public works on land subject to compulsory purchase may cause financial injury to neighbouring owners and occupiers, whether or not any land is taken from them. It may reduce the value of their land, or cause loss of profits. Such losses are normally described as “injurious affection”. As has been explained, the rules for assessment of compensation, where land is compulsorily acquired, include provision for compensation for “severance or injurious affection” to any retained land.¹ Although assessed under a separate head, this is treated as part of a global sum for acquisition of the subject land.²
- 9.2 A different set of rules applies to injurious affection where no land is taken. Strictly speaking, these rules are not part of the law of compulsory purchase. The loss is due to the public works, not to compulsory purchase as such. Indeed, it is usually irrelevant to the person claiming, whether or not the works are on land which has been compulsorily acquired from someone else. The rights to compensation extend to works on land acquired by agreement.³
- 9.3 Historically, however, these rules were derived from the compulsory purchase statutes,⁴ and have generally been treated as part of the same body of law. In addition, there is considerable overlap with the rules for injurious affection where land is taken, and potential inconsistencies between the two sets of rules need to be addressed.⁵ Furthermore, as we saw in the previous Part, the same rules are applied to public works which contravene rights (such as restrictive covenants or easements) attached to adjoining land, where the effect on the owner is much the same as compulsory purchase.⁶ Accordingly, it is appropriate for these rules to be considered as part of the present project.
- 9.4 As has been seen, the general principles in the Policy Statement were expressed in wide terms:

... all those affected should be entitled to compensation for any and all of the actual losses which they can show that they have sustained as a result of an acquiring authority’s actions;

¹ Compulsory Purchase Act 1965, s 7; see Part V, para 5.3 above.

² See Part III, para 3.4 above.

³ See para 9.7 below.

⁴ Formerly 1845 Act, s 68, now 1965 Act, s 10.

⁵ Unjustified differences may also have implications under the Human Rights Act 1998; see para 9.69 below.

⁶ See Part VIII, para 8.7 above.

such an entitlement should apply *irrespective of whether land is actually taken from the claimant for the scheme ...*⁷ (emphasis added)

- 9.5 We do not understand this general statement as intended to pre-empt our review of this issue. When referring to the specific issue of compensation where no land is acquired, the Policy Statement noted that the CPPRAG recommendations on this issue were being considered by the Law Commission. It made clear that the Government looked to the Law Commission to make proposals “to provide adequate and appropriate compensation” for those from whom no land is acquired.⁸
- 9.6 Our conclusion will be that this part of our recommendations is better dealt with as a separate subject from the law relating to compulsory purchase. We shall be proposing that the relevant law is “merged” into an amended and expanded version of the 1973 Act Part I.

Sources of the law

- 9.7 The modern law has two statutory sources. The first is section 10 of the Compulsory Purchase Act, 1965, derived from the 1845 Act. As interpreted by the Courts, this provides a limited right to compensation for depreciation in the value of neighbouring land, caused by the *construction* of the authorised works, but not for that caused by their *use*.⁹ The principles are now settled, having been recently clarified and re-stated by the House of Lords (*Wildtree Hotels v Harrow London BC*).¹⁰ The same rules apply to works on land acquired by agreement.¹¹
- 9.8 The other source is more modern. Part I of the Land Compensation Act 1973 provides a self-contained code, under the heading “Compensation for depreciation caused by use of public works”. As the heading implies, the right is not dependent on compulsory acquisition of any land. The 1973 Act followed a “full scale review of the compensation code” by Government, the findings of which were given in a White Paper (“Development and Compensation-Putting People First”).¹² It also seems to have been strongly influenced by a report published by Justice,¹³ which drew particular attention to the unsatisfactory gap in the existing law due to the exclusion of damage for *use* of the works.¹⁴

⁷ Policy Statement, para 4.2; see Part III, para 3.7 above.

⁸ *Ibid*, para 4.22.

⁹ See para 9.23 below.

¹⁰ [2001] 2 AC 1. The facts of the case are summarised at para 9.20 below.

¹¹ *Re Elm Avenue, New Milton, ex p New Forest DC* [1984] 1 WLR 1398.

¹² Cmnd 5124 (Oct 1972).

¹³ Justice Report: *Compensation for Compulsory Acquisition and Remedies for Planning Restrictions together with a Supplemental Report* (Stevens, London, 1973) (“the Justice report”). The 1973 publication included an initial report prepared in 1969, and a supplemental report prepared in 1972, shortly before the Government White Paper. The reports were prepared by a specialist sub-committee of the Administrative Law Committee of Justice, under the chairmanship of David Widdicombe Q.C.

¹⁴ *Ibid*, para 55.

Layout of this Part

- 9.9 In the following sections, we discuss first the rules of the 1965 Act relating to damage caused by works (paragraphs 9.10 to 9.24) and then those of the 1973 Act relating to damage caused by use (paragraphs 9.25 to 9.49). We then consider the proposal by CPPRAG (paragraphs 9.50 to 9.56), and the treatment of the same issues in Australia and Canada (paragraphs 9.57 to 9.64). Finally, we discuss the issues and make our recommendations (paragraphs 9.65 to 9.84).

EXISTING LAW - OUTLINE

(1) Damage caused by the works

- 9.10 The statutory basis of the right to compensation is the 1965 Act, section 10:

(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.

(2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds.

- 9.11 As has been frequently observed in the cases, subsection (1) gives little clue as to the content of the substantive right. It appears procedural, but it has been treated as creating a right to compensation, subject to four conditions (sometimes referred to as the “*McCarthy* rules”¹⁵):

- (1) Injurious affection must be the consequence of the lawful exercise of statutory powers, otherwise the remedy is action in the civil courts;
- (2) The injurious affection must arise from that which will give rise to a cause of action if done without the statutory authority for the relevant scheme of works;
- (3) The damage or injury for which compensation is claimed must be in respect of some loss of value of the land of the claimant;
- (4) The loss or damage to the claimant’s land must arise from the execution of the works and not from the authorised use of the lands compulsorily acquired following completion of the works.¹⁶

¹⁵ After the leading case, *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. Although the principles were established in that case, the House of Lords did not state the “rules” as such, and the formulations vary in the cases.

¹⁶ This formulation is taken from Counsel’s submissions, adopted by the Court of Appeal in *Clift v Welsh Office* [1999] 1 WLR 796, 801. He added a fifth rule: “(5) The amount of compensation must be ascertainable in accordance with the general principles which apply

- 9.12 Rules (2) and (4) distinguish compensation under section 10 of the 1965 Act from that under section 7 (injurious affection where some land is taken). Compensation under that section does not depend on establishing a common law right of action, nor is it confined to damage caused by execution of the works.¹⁷
- 9.13 As already noted, these principles were recently re-affirmed by the House of Lords (albeit in a slightly different formulation) in *Wildtree Hotels v Harrow London BC*.¹⁸ It is unnecessary, therefore, to review in any detail the extensive, and often conflicting, case-law on the subject. However, some brief comments on the four conditions will set the scene for the later discussion.

(1) Lawful exercise of statutory powers

- 9.14 The remedy is provided for injury for which the claimant would have had a right of action at common law, but for which immunity is provided by the statutory authority. If injury is caused by unauthorised work or work improperly or negligently performed, it will not be within statutory powers and there is no claim for compensation under the 1965 Act. The claimant must seek a remedy at common law.¹⁹
- 9.15 Although this rule is well established, it may give rise to difficult questions of demarcation. The boundary between what is, and what is not, authorised, is not always clear-cut. Thus, for example, the statutory immunity depends on the powers being exercised without “negligence”:

that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of others.²⁰

- 9.16 This does not necessarily equate to “negligence” as it is understood in other contexts.²¹ Thus, where a claim is based on injury to neighbouring land caused by arguably “negligent” working practices of the authority’s contractors, it may be almost impossible to say where the line is crossed between what is authorised and what is not. In practice, the Tribunal is likely to be unsympathetic to a plea by an authority of its own negligence as an answer to a claim for compensation under a

to damages in tort.” However, the rules are more usually expressed as four rules (the fifth, no doubt, being treated as implicit): see e.g. CPPRAG Review, para 193.

¹⁷ See Part IV, para 5.9-10 above.

¹⁸ [2001] 2 AC 1.

¹⁹ *Imperial Gaslight and Coke Co v Broadbent* (1859) 7 HLC 600; *Wildtree Hotels* (above) p 7F.

²⁰ *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011G.

²¹ See e.g. *Colac Council v Summerfield* [1893] AC 187. A drain laid by the council under statutory powers had flooded causing damage to the claimant’s land. Although there was an allegation of “negligence” in the pleadings, and a finding to that effect by the jury, the Privy Council held that this could not be relied on by the council to defeat or limit the claim for statutory compensation. Since the case had been conducted throughout on the basis that the claim was within the statute, the reference to “negligence” had to be seen in that context, and could not be read as an allegation of excess of statutory powers (p 191 *per* Lord Watson).

statute.²² In theory, however, that distinction may be critical to whether the claim should be brought in the Lands Tribunal or in the ordinary courts. In Part VIII, we have made a proposal to extend the Lands Tribunal's jurisdiction to mitigate this problem.

(2) Actionable apart from the statute

- 9.17 This is the corollary of (1). The claimant is not put in a better position under the statute than he would have been at common law. An owner of land may use his land in many ways which depreciate the value of adjoining land, but he will not be liable for damages unless he infringes the legal rights of the adjoining owner. Similarly, a statutory authority is not bound, under this section, to pay compensation for acts for which a private owner of land would not have been liable.
- 9.18 Again, however, difficult questions of demarcation may arise. For example, where the injury arises from something which would be regarded as a public nuisance at common law, the claim may fail unless "special" or "particular" damage can be shown. As was explained in *Wildtree Hotels*:

... a public nuisance, such as an interference with the use of a public highway, is a wrong to the public as a whole and the ordinary common law remedy was a prosecution on indictment. To support an action for damages, the plaintiff has to prove that he suffered particular damage greater than that suffered by members of the public in general. This rule offers considerable scope for dispute on the facts and some of the decisions on injurious affection reflect different judicial views on what amounts to particular damage.²³

- 9.19 The rule also results in a very narrow limit to any claim arising out of the effects of temporary construction works. The common law has always recognised that, in the ordinary course of events, some disturbance to neighbouring occupiers is the inevitable consequence of such activities. This was explained in the leading case, *Andreae v Selfridge & Co Ltd*:

... when one is dealing with temporary operations, such as demolition and re-building, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification, and there can be no dispute about it, that in respect of operations of this character, such as demolition and building, if they are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is

²² See *Uttley v The Local Board of Health for the District of Todmorden* (1874) 44 LJCP 19. In *Welsh Water Development Authority v Burgess* (1974) 28 P&CR 378, 381, Ormrod LJ (citing *Colac*) said that the cases cited gave "no support" to the suggestion that the authority could plead its own negligence in answer to a claim for compensation under the statute (in that case, the Land Drainage Act 1930, s 34). However, it is doubtful whether the Privy Council, in *Colac*, was seeking to lay down any general principle beyond the facts of the case.

²³ [2001] 2 AC at p 7D.

caused to neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it.²⁴

9.20 The practical result is illustrated by the *Wildtree Hotels* case, itself. The claimants were owners of a hotel adjacent to land acquired under compulsory purchase by a local authority for the purposes of a five-year road improvement scheme. They claimed under section 10, on the grounds that the obstruction or closure of roads and pavements leading to the hotel during the work, together with the noise, dust and vibration emanating from the site, had "injuriously affected" their land, by causing a diminution in the rental value of the hotel during the work and for a period of time thereafter. The claim for noise, dust and vibration was rejected by the House of Lords, because it had not been shown that a common law claim would have succeeded under the *Andrae* criteria. Lord Hoffmann noted the lack of previous authority supporting such a claim, which he attributed to the difficulty of finding any "daylight" between the two applicable rules:

Actionability at common law... depends upon showing that the building works were conducted without reasonable consideration for the neighbours. On the other hand, immunity from liability arising out of the construction of works authorised by statute is subject to a condition that the undertaker will "carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons"... I am reluctant to say that no claim for dust, noise or vibration can escape this dilemma because one cannot foresee all cases. But the argument seems to me very compelling and I would normally expect it to apply.²⁵

9.21 This case can be contrasted with another recent case, *Clift v Welsh Office*,²⁶ where there was more than "discomfort and inconvenience". The claim arose out of major highway works, on land close to the claimants' property. The claim was for physical damage, including the cost of repairing wall and ceiling cracks, and "making good the effects of dust and mud on external and internal decorations".²⁷ The Tribunal's award was upheld by the Court of Appeal. The *Andrae* case was distinguished:

As *Clerk & Lindsell's* description of the tort of private nuisance shows,²⁸ the category of private nuisance which consists of interference with one's neighbour in the comfortable and convenient enjoyment of his land is quite separate and distinct from the category which consists of causing actual damage to his land. ... when one is dealing with temporary and normal operations, such as demolition and building, there are good reasons why, as a matter of policy, the law should expect neighbours to put up with a certain amount of discomfort and inconvenience, provided that precautions are taken to see that the nuisance is reduced to a minimum. However, we see no

²⁴ [1938] Ch 1, 5-6, per Sir Wilfred Greene MR.

²⁵ [2001] 2 AC at p 13C.

²⁶ *Clift v Welsh Office* [1999] 1 WLR 796.

²⁷ *Ibid*, p 803 B-D.

²⁸ *Clerk & Lindsell on Torts*, (17th ed 1995), p 891, para 18-05.

sufficient reason why, as a matter of policy, the law should expect a neighbour to put up with actual physical damage to his property in such circumstances.²⁹

(3) Damage to land

- 9.22 It is clearly established that compensation is payable for depreciation in the value of land, not for business losses or personal suffering or inconvenience.³⁰ In *Wildtree Hotels*, the House of Lords held that this rule did not limit the claim to loss of the capital value of the affected property. In cases where compensation was payable for temporary interference with the affected land (such as by the obstruction to access in that case), a reduction in the letting value of the land was sufficient to sustain the claim, even where the capital value, after the conclusion of the works, would be unaffected:

The claimant is simply entitled to compensation for the damage to his land. Obviously if one is considering damage of which the effects will continue for some time into the future, such as the permanent deprivation of light or a right of way, it is sensible to take a valuation date and capitalise the value of the future loss at that date. But in respect of damage which has occurred in the past, there seems to me no reason why one should not calculate the effect which it has had upon the value of the land in the sense of reducing its letting value in the open market while the damage continued.³¹

Loss of profits might be relevant, but only to the extent that loss of profitability affected the value of the interest in the land.³² The reference in this passage to the “open market” seems to imply that in this context, as in relation to injurious affection where land is taken, land value is equated with market value.³³

(4) Damage from execution, not use

- 9.23 Following *Hammersmith Railway Co v Brand*,³⁴ it is settled law that this provision does not give a right to claim compensation for the depreciation in value of land caused by the use to which the works are put.
- 9.24 The facts of the case illustrate the effect of the rule. The company constructed a railway on land near the respondent’s house, no land having being acquired from the respondent for this purpose. A claim for compensation was made against the company, inter alia, in respect of the vibration, noise and smoke caused by passing trains. No physical damage had been caused to the respondent’s property but it was accepted that the working of the railway had the effect of permanently devaluing it. A jury awarded the compensation. The House of Lords held that no

²⁹ *Clift v Welsh Office* (above) at pp 805-6, per Sir Christopher Slade.

³⁰ *Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation* [1975] AC 99.

³¹ [2001] 2 AC at p 16 G-H.

³² *Ibid*, p 18 C.

³³ See discussion at Part V, para 5.11 above.

³⁴ (1869) LR 4 HL 171.

compensation was payable, because the loss arose from the authorised use, not the works.

(2) Damage caused by use

Background to the 1973 Act

- 9.25 As noted above, Part I of the Land Compensation Act 1973 was designed to mitigate the perceived injustices of the narrow interpretation of section 10, under the *McCarthy* rules. To understand the format of the new rules, it is helpful to refer to the studies which preceded it.³⁵
- 9.26 As we have stated, this issue was considered by Justice. In its initial 1969 report, Justice accepted that a distinction should be maintained between injurious affection as part of compensation for the taking of land (under 1965 Act, section 7), and injurious affection where no land was taken. However, it saw injustice in the rule excluding damage due to subsequent use of the statutory works. It proposed that the law should be amended, so that compensation would be paid to any person suffering damage to his property (whether due to works or use), if it would constitute an actionable nuisance at common law, were the damage not authorised by statute.³⁶
- 9.27 In 1972, at a time when Government proposals were thought to be imminent, Justice published a supplemental report modifying its earlier proposals.³⁷ The authors were not satisfied that the suggested rule, based on whether the damage would constitute an actionable nuisance at common law, was workable. In particular, they referred to:

...the difficulty of fitting many of the larger kinds of public works, such as highways into the common law concept of nuisance.

Instead, the majority of the Sub-Committee thought that there should be a statutory listing of certain public works and activities to be treated as actionable nuisances for the purposes of compensation for injurious affection.³⁸

- 9.28 The Government's White Paper, published in October 1972,³⁹ referred to a "full scale review" of the compensation code, which had been carried out.⁴⁰ The aim of the White Paper was to achieve a "better balance" for the individual:

³⁵ Criticisms of the McCarthy rules have a long history. The Scott Committee in 1919 (see Part II, para 2.5 above) thought that a distinction, depending on whether or not land was acquired from the claimant, was indefensible (Scott Report, para 48). However, its proposals for a unified, discretionary system were not adopted.

³⁶ Justice Report: *Compensation for Compulsory Acquisition and Remedies for Planning Restrictions together with a Supplemental Report* (Stevens, London, 1973), paras 52-56.

³⁷ See Justice Report, *ibid*, paras 100-3. The Justice report also refers to a 1971 Memorandum by the Law Society, and recommendations of the Roskill Commission (on the Third London Airport) as to compensation in connection with the development of airports: para 100.

³⁸ *Ibid*, para 119; the list would include "highways, airports, railways and hovertracks, sewage works, power stations, penal institutions and possibly institutions for persons of unsound mind". A minority of the sub-committee preferred a solution defining standards which if infringed would give rise to a right of compensation: *ibid*, para 120.

...the time has come when all concerned with development must aim to achieve a better balance between provision for the community as a whole and the mitigation of harmful effects on the individual citizen. In recent years this balance in too many cases has been tipped against the interests of the individual. A better deal is now required for those who suffer from desirable community developments. The Government is determined to provide this better deal.⁴¹

- 9.29 The White Paper dealt with a number of topics, including injurious affection. It outlined the scheme subsequently embodied in Part I of the 1973 Act. The new right to compensation was to be available to owners and occupiers of residential property and “owner-occupiers of farms and small businesses”.⁴²

Land Compensation Act 1973, Part I

- 9.30 The provisions of Part I are complex. For present purposes, an outline of the main points is sufficient.

THE BASIS OF CLAIM

- 9.31 In summary, the right to compensation arises where: (a) the value of the claimant’s interest in land has been depreciated; (b) the depreciation is caused by “physical factors”; (c) the physical factors are caused directly by the use of “public works”; (d) the use of the public works is immune from an action in nuisance; (e) the claimant’s interest qualifies; (f) the claimant makes his claim at the correct time and in the correct manner; and (g) the compensation claim exceeds £50.⁴³
- 9.32 The basic rules are set out in section 1:
- (1) “Physical factors” are defined as “noise, vibration, smell, fumes, smoke, and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance”.⁴⁴
 - (2) The source of the physical factors “must be situated on or in the public works the use of which is alleged to be their cause”. Where, however, the physical factors are caused by aircraft arriving at or departing from an aerodrome, the aerodrome is to be treated as their cause (even if the aircraft are outside the aerodrome’s boundaries).⁴⁵

³⁹ *Development and Compensation-Putting People First*, Cmnd. 5124, HMSO, London, 1972.

⁴⁰ The results of this Review do not appear to have been published.

⁴¹ *Development and Compensation- Putting People First*, *op cit*, page 1, para 5.

⁴² *Ibid*, para 23. No reason was given for excluding other categories of property.

⁴³ See generally Butterworths, *op cit*, para F [302].

⁴⁴ 1973 Act, s 1(2). Physical factors involving vehicles on the highway, or accidents involving aircraft, are excluded: s 1(7).

⁴⁵ 1973 Act, s 1(5).

- (3) “Public works” are defined as “any highway, any aerodrome and any works on land (not being a highway or aerodrome) provided or used in the exercise of statutory powers”.⁴⁶
- (4) In respect of the use of public works other than highways, compensation is not payable unless immunity from an action in nuisance is conferred on the use of the works (expressly or impliedly) by an enactment relating to those works.⁴⁷
- (5) The “relevant date” is defined, in the case of a highway, as the date on which it is first open to public traffic, and in the case of other public works as the date on which they are first used after completion.⁴⁸

9.33 By section 9, a right to compensation may also arise following certain alterations or changes of use of existing public works (including highways), if they cause depreciation of value due to those physical factors and the depreciation would not have been caused but for the alterations or change of use. The circumstances in which such a claim can be made are:

- (a) the carriageway of a highway has been altered after the highway has been open to public traffic;
- (b) any public works other than a highway have been reconstructed, extended or otherwise altered after they have been first used; or
- (c) there has been a change of use in respect of any public works other than a highway or aerodrome.⁴⁹

In respect of the use of highways, compensation is payable if the claim relates to noise or vibration directly arising from alteration to a particular section of the highway.⁵⁰

PERSONS QUALIFYING FOR COMPENSATION

9.34 The claimant must own a qualifying interest in a dwelling or land before the relevant date:

Dwellings

9.35 A qualifying interest in land which is a dwelling is called an ‘owner’s interest’ defined⁵¹ as the freehold or a tenancy of which not less than three years remain

⁴⁶ 1973 Act, s 1(3).

⁴⁷ 1973 Act, s 1(6).

⁴⁸ 1973 Act, s 1(9).

⁴⁹ 1973 Act, s 9(1).

⁵⁰ See *Williamson v Cumbria County Council* (1994) 68 P&CR 367.

⁵¹ 1973 Act, s 2(3)(a).

unexpired at the date of claim. There are special provisions for tenants who are entitled to enfranchisement.⁵²

Land other than dwellings

- 9.36 Where the claimant's land is not a dwelling, the claimant must be an 'owner-occupier'⁵³ and the land must either be an agricultural unit or have an annual value which is less than the 'prescribed amount', which is the same as that prescribed for the purposes of the blight provisions of the Town and Country Planning Act 1990.⁵⁴ The current amount prescribed for England and Wales is £24,600.⁵⁵

Special interests

- 9.37 A mortgagee may make a claim without prejudicing the mortgagor's right to make a claim, but if he does so, no compensation is payable in respect of the depreciation in value of his own interest; he can only claim in respect of the mortgagor's interest. The compensation will be paid to the mortgagee who must apply it as if it were the proceeds of sale.⁵⁶
- 9.38 If the interest in the land is held by trustees, and the person beneficially entitled under the trust is entitled to occupy the land, occupation is regarded as occupation by trustees and so they are entitled to compensation.⁵⁷ A person who acquired an interest by inheritance is eligible to claim even though he inherited after the 'relevant date', provided the person from whom he inherited had a qualifying interest before that date.⁵⁸

THE CLAIM

- 9.39 The notice of claim must contain the particulars required by section 3(1), including details of the claimant's interest, and the amount of compensation claimed.⁵⁹
- 9.40 The normal rule is that no claim may be made until the "first claim day", that is, 12 months after the first use of the works.⁶⁰ As an exception, if the claimant has, in that period, made a contract to sell the property,⁶¹ he may submit the claim before

⁵² See the Leasehold Reform Act 1967, Part I and Leasehold Reform, Housing and Urban Development Act 1993, Part I.

⁵³ 1973 Act, s 2(3)(a), defined by s 2(5).

⁵⁴ 1973 Act, s 2(3), (5), (6).

⁵⁵ Town and Country Planning (Blight Provisions) (England) Order 2000, SI 2000, No 539. For Wales, see Town and Country Planning (Blight Provisions) (Wales) Order 2000, SI 2000, No 1169.

⁵⁶ 1973 Act, s 10(1).

⁵⁷ 1973 Act, ss 10(2), (4).

⁵⁸ 1973 Act, s 11.

⁵⁹ 1973 Act, s 3(1). Failure to provide all the particulars may result in dismissal of the claim: see *Fennessy v London City Airport Ltd* (1995) 31 EG 76, LT (Claim invalid, because the amount claimed was given as "more than £50", without further quantification).

⁶⁰ 1973 Act, s 3(2). The 12 months run from the "relevant date" defined in ss 1(9), 9(2).

⁶¹ Or, except in the case of a dwelling, a contract for the grant of a tenancy.

the first claim date, and before the disposal; but compensation will not be payable before the first claim day.⁶² There is no provision for the claim to be amended, although there appears to be nothing to prevent a claim being withdrawn, and a substitute claim submitted.⁶³

ASSESSMENT OF COMPENSATION

- 9.41 The compensation is based on the depreciation to the value of the land due to the physical factors caused by the use of the public works.⁶⁴ The valuation is made with reference to prices current on the “first claim day”, defined as the day next following the expiration of 12 months after the relevant date.⁶⁵ Account is taken of the facts known at that date, and any intensification that may then reasonably be expected of the use of the works in the state in which they are at that date.⁶⁶ Account is also to be taken of the benefit of any soundproofing works carried out or available under this Act or other enactments.⁶⁷
- 9.42 The statutory test is based on use of the works “as it exists on the first claim day”, and on any intensification which may *then* be reasonably expected. Accordingly, no account can be taken of evidence, subsequently available to the Lands Tribunal, of the actual intensification. The Tribunal so decided in *Dhenin v Department of Transport*.⁶⁸ That case related to noise disturbance due to the M25. It was argued for the claimant that evidence of actual use could be taken into account, under the so-called *Bwillfa* principle.⁶⁹ The Tribunal held that the wording of the Act did not permit that approach; but added:

It is doubtful if the legislature could have foreseen the special circumstances that arise, as in this case, where a motorway is constructed over a number of years in a series of sections some of which, although open to traffic, lie more or less fallow until they are connected to other sections of the motorway.⁷⁰

⁶² 1973 Act, s 3(3).

⁶³ This may cause problems if there has been a change of ownership in the meantime: see para 9.53 below (CPPRAG Review, para 203).

⁶⁴ 1973 Act, s 4(2). When the claim relates to an alteration, compensation is based on the “depreciation that would not have been caused but for (the alteration)”: s 9(2).

⁶⁵ 1973 Act, s 3(2).

⁶⁶ 1973 Act, s 4(2).

⁶⁷ 1973 Act, s 4(3).

⁶⁸ (1990) 60 P&CR 349, LT. Cf *Bolton MBC v Waterworth* (1979) 37 P&CR 104, discussed at Part V, para 5.16 above.

⁶⁹ See *Bwillfa and Merthyr Dare Steam Collieries v Pontypridd Waterworks* [1903] AC 426, HL. In that case it was held that, in assessing “full compensation” under the Waterworks Clauses Act 1847, the arbitrator should “avail himself of all the information at hand at the time of making his award... Why should he listen to conjecture on a matter which has become established fact?...” (*per* Lord MacNaughten, at p 431).

⁷⁰ (1990) 60 P&CR at p 349 (C Mallett FRICS). The difference was substantial: the award was 6% (£7,500) of the agreed value; using actual figures, the Tribunal would have accepted the claimant’s estimate of 20% (£25,000): *ibid*, pp 352-3.

- 9.43 The value of the claimant's interest must be assessed (a) by reference to the nature of the interest and the condition of the land as subsisted on the date of the service of the claim; and (b) in accordance with rules (2) to (4) of the 1961 Act, section 5.⁷¹ However, there must be left out of account any part of the value which is attributable to any building or extension which is first occupied, or to any change of use, after the relevant date.⁷² Denyer-Green explains the general approach to valuation:

The approach taken in most of the decided cases is to establish a "no-scheme world" value of the affected property, and then make a judgment as to the proper percentage depreciation that can be attributed to physical factors. The second step must be more of a matter of judgment and opinion than the [first] step which can be based on established valuation methods....⁷³

- 9.44 There is to be set off against the claim any increase in the value for the claimant's interest in: (a) the land to which the claim relates; or (b) other 'contiguous or adjacent' land, to which he is entitled in the same capacity on the relevant date, which is attributable to the existence of or the use or prospective use of the public works.⁷⁴
- 9.45 In addition to compensation, the claimant is entitled to reasonable valuation or legal expenses in connection with the claim.⁷⁵
- 9.46 The general rule is that the valuation is based on the existing use of the property.⁷⁶ Accordingly, it is to be assumed that no permission would be granted for development of the land; and any existing permissions, so far as they relate to development which has not been carried out, are disregarded.⁷⁷

OTHER RULES

- 9.47 If compensation has been paid, or is payable under the 1973 Act, no subsequent claims can be made in relation to the same works and the same land or any part of that land. However, in respect of a dwelling house, this does not prevent separate claims in respect of the freehold and any tenancy.⁷⁸

⁷¹ 1973 Act, s 4(4).

⁷² 1973 Act, s 4(5).

⁷³ Denyer-Green, *op cit*, p 368. As illustration, he cites *Maile v West Sussex County Council* [1985] RVR 52, LT.

⁷⁴ 1973 Act, s 6.

⁷⁵ 1973 Act, s 6.

⁷⁶ 1973 Act, s 5. Permission is, however, assumed for certain limited categories of development, defined by reference to Schedule 3 to the Town and Country Planning Act 1990 ("development not constituting "new development"); this is a complication which could probably be dispensed with in any new Code: cf 1961 Act, s 15(3). See part VII, para 7.47 above)

⁷⁷ 1973 Act, s 5(4).

⁷⁸ 1973 Act, s 8.

- 9.48 If part of a person's land is acquired for the purposes of any public works and that person is entitled to compensation in respect of any retained land under section 7 of the 1965 Act for injurious affection and severance, then that person shall not be entitled to any compensation under the 1973 Act in relation to a claim made after the date of service of the notice to treat.⁷⁹
- 9.49 Compensation is payable by the 'responsible authority' which in respect of a highway is the appropriate highway authority, and in relation to other public works is the person managing them.⁸⁰

PROPOSALS FOR CHANGE

The CPPRAG Review

- 9.50 The CPPRAG report made recommendations in relation to both sets of provisions. The report was written before the House of Lords decision in *Wildtree Hotels*, and took account of the judgment of the Court of Appeal⁸¹ (later reversed) which had disallowed compensation under section 10 for temporary damage. The report stated:

...in certain cases the right to be compensated under section 10 has resulted in an inferior substitute for those of the common law rights, such as the right to bring an action in nuisance. In particular, we draw attention to rule (3) of the McCarthy Rules, that requires the damage or loss suffered by a claimant to be an injury to land and not a personal injury or an injury to trade... The rule may cause particular injustice where the construction of public works (such as a highway) on neighbouring land extends over a prolonged period, causing a landowner to suffer damage or loss from noise, dust and vibration. Such damage may also be significant, particularly if the landowner's use of his land is for a trade or business which is affected by such disturbance...⁸²

- 9.51 It recommended that:

...the legislation should be amended to provide that compensation entitlement should be extended to include interference with land from non-physical factors, and any entitlement to compensation should include temporary losses sustained by the landowner.⁸³

- 9.52 With regard to the 1973 Act, CPPRAG said:

...as with section 10 of the 1965 Act, the correct basis for entitlement to compensation under Part I of the 1973 Act should continue to be by way of analogy with common law actions which are not available to the landowner who has suffered loss. We believe that these

⁷⁹ 1973 Act, s 8.

⁸⁰ 1973 Act, s 1(4).

⁸¹ [1999] QB 634.

⁸² CPPRAG Review, para 196.

⁸³ *Ibid*, para 197.

provisions command general support. However, we also consider that this objective could have been achieved much more simply than by the provisions of Part I of the 1973 Act if section 10 of the 1965 Act had been amended so as to make it clear that it also provides compensation for the **use** of public works. We therefore feel that, although Part I of the 1973 Act has existed for over 25 years, consideration should be given when drafting any **new** statute as to whether a merger of section 10 with Part I might not be simpler to operate and easier for all to understand.⁸⁴

9.53 CPPRAG also identified a number of detailed points on which modification was thought desirable:⁸⁵

- (1) Consideration should be given to allowing traffic predictions based on the position at the valuation date (normally the first anniversary of the opening of the works) to be revised in the light of any figures available at the hearing.⁸⁶ However, it was acknowledged that this would be “a strong disincentive to early settlement”.
- (2) There should be power to revise the claim retrospectively. This would avoid the need to withdraw and resubmit the claim, which can cause problems on a change of ownership.⁸⁷
- (3) Claims should be permitted by a claimant who satisfied the ownership qualification at the relevant date, even if he has sold before the first claim date (since he is likely to have suffered the effect of the depreciation, in a reduced purchase price).
- (4) Practical problems could arise in relation to alterations to the works, especially where there is a succession of alterations.⁸⁸ The case of *Davies v Mid-Glamorgan CC*⁸⁹ was given as an example. However, CPPRAG offered no specific suggestions as to how the Act could be modified in this respect.

9.54 More generally, they also asked for consideration to be given to repealing the provisions in Part I of the 1973 Act which restrict compensation to the existing use value of the claimant’s interest.⁹⁰ They also proposed that the limit (£24,600), on

⁸⁴ *Ibid*, para 202.

⁸⁵ *Ibid*, para 203.

⁸⁶ Thus remedying the difficulty which arose in the *Dhenin* case: see para 9.42 above.

⁸⁷ See para 9.40 above. CPPRAG gave two examples of problems: (a) “if the sum claimed is revised and a new claim is required to be submitted, a change of ownership will prevent both the original claimant and the new purchaser from submitting a claim”; (b) “there is also a problem where a property was owned by a husband and wife at the relevant date but, perhaps through divorce, is owned by only one of them at the date of the service of the claim.”

⁸⁸ CPPRAG Review, para 203.

⁸⁹ [1979] 2 EGLR 158. That case related to the effects of alterations to Cardiff airport. The works were carried out in three stages, and the issue was whether they were to be treated as one operation, giving rise to a single claim (valued at £1,600), or three separate claims (totalling £700). The Tribunal held that it was one scheme, and awarded £1,600.

⁹⁰ CPPRAG Review, para 204 (1973 Act, ss 4(5), 5(4)).

the rateable value of business premises for which compensation could be claimed under the 1973 Act, should be removed.⁹¹

9.55 The overall recommendation of CPPRAG was expressed as follows⁹²:

The group recommends that, in the case of landowners from whom no land is taken, compensation should be assessed on the basis that, but for statutory authority, landowners could recover damages at common law for any loss they have suffered. Furthermore, the group also recommends that:

(i) consideration should be given to merging the provisions of section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973;

(ii) a land-owner's compensation entitlement under section 10 of the Compulsory Purchase Act 1965 should be extended to include interference with his land from non-physical factors and any temporary losses sustained as a direct result of the scheme;

(iii) consideration should be given to repealing those provisions in Part I of the Land Compensation Act 1973 which restrict compensation to the existing use value of the claimant's interest or limit the right to compensation by reference to the value of the land.

The Policy Statement

9.56 As already noted, the DTLR Policy Statement did not specifically adopt the CPPRAG proposals, but indicated that this was a matter under consideration by the Law Commission.⁹³

COMPARATIVE MATERIAL

9.57 The issue has also been the subject of detailed consideration in other common law countries. We have been much assisted by the comprehensive review of Australian, English and Canadian law carried out in 1980 by the Australian Law Reform Commission.⁹⁴ The ALRC's discussion of the issues (including the cost implications) and their proposals for reform,⁹⁵ together with relevant extracts from the proposed draft Bill,⁹⁶ are reproduced in Appendix 4 to this Report.

9.58 In reading the ALRC discussion, it needs to be borne in mind that in Australian federal law, there was at the time no equivalent to section 10 of the 1965 Act, and therefore no provision for compensation, even for damage caused by the works.

⁹¹ *Ibid*, para 205. (1973 Act, s 2(3)(b)).

⁹² *Ibid*, para 206.

⁹³ Policy Statement, para 4.22.

⁹⁴ ALRC, chapter 10 ("Injurious affection: shreds and patches") and chapter 11 ("Injurious affection and enhancement: a new approach").

⁹⁵ ALRC, *op cit*, paras 305-312, 319-332.

⁹⁶ *Ibid*, Draft Bill, Clauses 82-92.

Their proposals accordingly dealt with both works and use.⁹⁷ In the event, their recommendations on injurious affection were not adopted by the legislature in 1989. The Land Acquisition Act of that year includes compensation for injurious affection where land is acquired,⁹⁸ but not otherwise. As appears from the ALRC review, the position in the legislation of the various Australian states was something of a patchwork.⁹⁹ None of the statutes reviewed by the ALRC had anything comparable to the extended rights given by the 1973 Act in this country. As we understand it, that remains the position.

- 9.59 A similar patchwork exists in Canada. In most Canadian jurisdictions, the criteria for injurious affection where no land is taken are based on the English rules, derived from the 1845 Act.¹⁰⁰ The issues were studied in detail in three reports, all of which made proposals for change.¹⁰¹ However, the response from the various legislatures was limited. Of these three, only in Ontario did the Commission's report lead to legislation.¹⁰²

Australia

- 9.60 The ALRC, like CPPRAG, started from the basis that in principle injurious affection on a partial taking, and where there is no taking, should be treated in the same way:

The only contrary argument is that it is only by reason of the use of the *acquired* land that the government authority is able to do the acts which cause the injury and that it is therefore appropriate to treat an owner from whom the land has been acquired as being in a special position. However, the factual situation resulting from the public work is more important.¹⁰³

- 9.61 The ALRC proposed a scheme which would have a list of factors (divided into "construction factors" and "use factors"), but reference would also be made to the law of nuisance:

The solution is to underpin the legislation by referring to the law of nuisance, but to add a list to avoid doubt. This will allow the courts

⁹⁷ *Ibid*, para 309.

⁹⁸ See LAA (Cth) 1989, s 55(2)(a)(iv): App 4.

⁹⁹ ALRC, *op cit*, page 153, para 287.

¹⁰⁰ Todd, *The Law of Expropriation and Compensation in Canada*, pp 329, 369. The rules were reaffirmed by the Supreme Court of Canada in *R v Loiselle* (1962) 35 DLR (2d) 274, 276.

¹⁰¹ Ontario Law Reform Commission, *Report: The Basis of Compensation on Expropriation*, 1967, pages 46-49; British Columbia Law Reform Commission, *Report of the Royal Commission on Expropriation*, 1961-63 ("Clyne Report"), pages 114-119; British Columbia Law Reform Commission, *Report on Expropriation*, 1971, page 159.

¹⁰² Ontario Expropriations Act 1990, s 1(1), reproduced in Appendix 4(iii) to this Report. The recommendation implemented in the Ontario Act was also adopted by the New Brunswick Expropriation Act 1973, s1 and the Nova Scotia Expropriation Act 1973, s 3(1)(h)(ii) now the Nova Scotia Expropriation Act 1989. See Todd, *op cit*, pp 330-331.

¹⁰³ ALRC, *op cit*, para 307.

to apply it to new situations and to adapt the compensation entitlement to developments in the law of nuisance.¹⁰⁴

- 9.62 It was noted that the list included two factors, loss of air and overshadowing, which would not ordinarily give rise to an action:

They are losses which may be caused by a private development, as much as a public one, but there is generally a better opportunity to resist adverse private development than public development. This distinction justifies their inclusion.¹⁰⁵

“Loss of view”, on the other hand, was excluded because of difficulties of assessment.¹⁰⁶

- 9.63 Compensation would be based on loss of value of land. The ALRC rejected the proposal (reflected in the Ontario legislation – see below) that compensation should extend to personal or business losses. It thought that loss of profitability would normally be reflected in the reduced value of the land, which would be relatively easy to prove. “Inquiries into the extent and cause of business losses are likely to be lengthy, complex and expensive.”¹⁰⁷

Canada

- 9.64 The Ontario Act 1990 (reproduced in Appendix 4(iii)) is of particular interest, since it enacts, in a single section, rules relating to injurious affection both where land is taken and where it is not. For the most part it preserves the established distinction between the two. Where no land is taken, compensation is limited to that for which a claim would lie at common law in the absence of the statute. The statute also preserves the 1845 Act rule that, where no land is taken, compensation for the effects of *use* is excluded. However, unlike the 1845 Act, the Ontario Act allows a claim for “personal and business damages” in addition to loss of land value.

DISCUSSION

- 9.65 The issues can be considered under the following headings:

- (1) General approach
- (2) The common law analogy
- (3) Loss of profits

¹⁰⁴ The listed factors were: noise, vibration, smell, smoke, fumes, artificial lighting, discharge of substances, heat, gas, vapour, loss of air, overshadowing, and “loss of support, restriction or prevention of access between the relevant land and a public road, waterway or seashore”: *ibid*, para 326. In addition, the definition should include any other thing for which, in the relevant state, there would be a right of action for nuisance by an owner of land against the owner or occupier of other land: *ibid*.

¹⁰⁵ *Ibid*, para 326.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, para 311.

- (4) Other CPPRAG proposals
- (5) A “merged” Code

(1) General approach

Conflicting policies

9.66 We referred earlier in this Paper to Lord Hoffmann’s discussion, in the *Wildtree Hotels* case,¹⁰⁸ of the inconsistencies in the development of the law in this area, due to differing opinions on questions of economic and social policy.¹⁰⁹ As we said, there is no single “right” answer. Any solution will be a compromise between different policy objectives, and is likely to attract dissent from some quarters.

The 1973 reforms

9.67 We have also referred to the history of the studies which preceded the 1973 reforms. It shows, not surprisingly, that there were similar differences of view in what was a prolonged and thorough public debate. The resulting legislation, as the White Paper said, represented a balanced compromise “between provision for the community as a whole and the mitigation of harmful effects on the individual citizen”.¹¹⁰ The recent view of CPPRAG was that those provisions “command general support”.¹¹¹

9.68 The ALRC’s review of other common law jurisdictions in 1980 showed that the 1973 Act was relatively generous in comparative terms. Its own proposals for a more comprehensive scheme were not adopted. Our researches have not disclosed any later statutes, in Australia or elsewhere, which have gone as far as, let alone further than, the 1973 Act.

Human rights

9.69 As we have explained, the Convention lays down no specific rules for compensation.¹¹² There have been suggestions that the less favourable treatment accorded to those from whom no land is taken is incompatible with the rules against arbitrary discrimination.¹¹³ This argument is most persuasive when one compares the position of someone whose land immediately adjoins the works, but loses no land; and a neighbour in exactly the same position, but a small corner of whose land happens to be crossed by part of the works. The latter is compensated

¹⁰⁸ [2001] 2 AC at p 8.

¹⁰⁹ See Part I, para 1.14 above.

¹¹⁰ Para 9.28 above.

¹¹¹ CPPRAG Review, para 202.

¹¹² See Part II, para 2.19 above.

¹¹³ European Convention of Human Rights, Art 14. See Michael Barnes QC, *Essential Human Rights*, Wilberforce Chambers, chapter 4, *Public Authorities and Land Compensation*, page 80, para 4.32.

for all the effects of the works,¹¹⁴ but the former's rights are restricted to those discussed in this Part.

- 9.70 As has been seen, the merits of the distinction between the two situations has been subject to a long-running debate, well before the Human Rights Act 1998.¹¹⁵ The preservation of the distinction in the present legislation follows detailed discussion, both within and without Government, in the period before the 1973 Act. On balance, however, for the reasons given in the next paragraph, we think that there is a justifiable distinction in principle, which would enable the present rules to withstand any challenge under the Human Rights Act.¹¹⁶
- 9.71 In the case of the person from whom land is acquired, the issue is the price to be paid for what is taken. The rules are designed to arrive at a fair price, having regard to the value to the owner. In negotiating that price, the owner is entitled to expect the effects on his other land to be taken into account. In the case of the adjoining owner, there is no question of negotiating a price for what is taken. The closest analogy is with the common law rights of any landowner in relation to unreasonable use of his neighbour's land. Thus, the difference of approach represents a genuine difference in the nature of the claim. However, we invite other views of consultees on this issue.

Change must be justified

- 9.72 Thus, our consideration of potential reforms starts from what is in substance (if not form, as regards the 1965 Act) a modern, and relatively generous, framework of law, which is reasonably well regarded. Except so far as a strong case for change can be made out, therefore, our general approach would be to confine ourselves to a consolidation (including, where necessary, re-statement, in modern form) of the existing law.

(2) The common law analogy

- 9.73 CPPRAG's first recommendation was that:

Compensation should be assessed on the basis that, but for statutory authority, landowners could recover damages at common law for any loss they have suffered...¹¹⁷

¹¹⁴ See Part V, para 5.3 above.

¹¹⁵ The Scott Committee in 1919 rejected the distinction (para 9.25, n 35 above); Justice in 1969 supported its retention, as did the Government in the 1972 White Paper (para 9.26-9 above); the ALRC rejected it, but were not supported by the legislature (para 9.63 above); the distinction is preserved in the Ontario legislation (para 9.64 above).

¹¹⁶ Article 1 of the First Protocol (See Part II above) is directed principally to the "depreciation" of property, although it may also apply to "control of use": see *Sporrong v Sweden* (1982) 5 EHRR 35. Claims for interference with enjoyment of property by the effects of public works or use may arise under Article 8 (right to a home): see e.g. *Lopez Ostra v Spain* (1994) 20 EHRR 277; *Hatton v UK* (2002) 34 EHRR 1. See also *Marcic v Thames Water* [2002] 2 All ER 55; [2002] EWCA Civ 65.

¹¹⁷ CPPRAG Review, para 206.

- 9.74 As has been seen, the starting point of Justice in 1969 was very similar. In our view, however, they were right to move away from that position. It is highly artificial to use the common law of nuisance as a basis for assessing damages from activities for which there is no common law parallel. The common law of nuisance has not had to cater for uses such as motorways, railways, and airports, since they are invariably constructed and operated under statutory powers, which give immunity from action. Thus the concept of “reasonable user”, which is the “very essence” of the law of nuisance,¹¹⁸ has not been developed to cater for those activities. The problem does not arise to the same extent in relation to the construction period. The impact of construction works is at least similar in kind to that of major private developments, although, as CPPRAG observed, it may be more protracted.
- 9.75 It follows that an attempt to model the law of compensation on the common law analogy, at least in relation to the use of public works, would be likely to create uncertainty. The 1973 Act, which does not depend on establishing nuisance in the common law sense, provides a more certain and reliable basis.
- 9.76 A separate point arises in relation to injury caused by construction works. The common law analogy, as applied in *Wildtree Hotels*, has the result that compensation is in practice unavailable for non-physical injury, such as nuisance from noise, dust or vibration. As CPPRAG observed, and as the *Wildtree Hotels* case illustrates, this may cause serious hardship where the works are substantial and extended over a long period. A departure from the approach of the *Andreae* case may be justified when dealing with public works, on the basis that in practice they are more likely to be of a substantial scale.
- 9.77 Furthermore, this is not a limitation which applies to injurious affection where land is taken (under section 7). In that case the right to compensation applies to any diminution in value caused by the works. As a comparison of the *Wildtree Hotels* and *Clift* cases shows¹¹⁹, the distinction may be highly artificial and difficult to apply in practice in valuation. We propose to adopt the list of “physical factors” identified by the 1973 Act. However, we provisionally propose to retain the restriction to circumstances which would give rise to claims at common law, since a change in this respect might add significantly to the cost of works. We invite views.

(3) Loss of profits

- 9.78 A case can be made for including compensation for loss of profits, as proposed by CPPRAG. As we have noted, their recommendation was made at a time when it was thought that no claim could be made for temporary damage, even as reflected in rental value. To that extent, their concern was met by the House of Lords in *Wildtree Hotels*. As has been seen, the Justice recommendations were based on land value, as were those of the ALRC, which considered that it would provide a simpler and more certain basis of claim. A different view was taken in Ontario,

¹¹⁸ *Miller v Jackson* [1977] QB 966, 980, per Lord Denning MR; see *Clerk & Lindsell* paras 18-29.

¹¹⁹ See paras 9.20-1 above.

where “personal and business damages” may be included, but only where they could have been claimed at common law.¹²⁰

- 9.79 The same issue arises in respect of injurious affection under section 7 of the 1965 Act (where land is taken). There again the settled position is that the claim is based on reduction in land value, not loss of profits.¹²¹ For the same reasons as discussed in that context,¹²² our proposals for the new Code reflect our understanding of the present law. However, we invite views on the desirability and financial consequences of allowing personal and business loss to be claimed.

(4) Other CPPRAG proposals

- 9.80 As noted above, the CPPRAG Review also recommended (1) that the rateable value limit, and the existing use restriction, should be removed;¹²³ and (2) that consideration should be given to “merging” section 10 and Part I of the 1973 Act.
- 9.81 Removal of the rateable value limit would be an important extension of the rights under the 1973 Act. Discrimination on the basis of rateable value of business premises is difficult in principle to justify, since the consequences of the scheme may be equally or more serious for those concerned in larger enterprises.¹²⁴ We also see force in CPPRAG’s criticism of the existing use restriction. However, both proposals would add to the costs to the acquiring authority, and therefore raise policy issues on which the Government has yet to express a view. We include these as provisional proposals, but invite views on the merits and likely costs of such changes.

(5) A “merged” Code

- 9.82 It is not clear precisely what CPPRAG had in mind when recommending “merger”. However, we think there would be merit in treating this subject as a separate topic from that of compensation for compulsory purchase. As has been seen, the existing rights to compensation are dependent, not on compulsory acquisition, but on public works. The 1973 Act is a modern and reasonably effective code, so far as it goes, but is limited to the effect of “use”. The simplest and most logical approach would be to expand it to include provision dealing with the effect of the works, based on section 10 of the 1965 Act, but updated. Our provisional proposal gives effect to this.
- 9.83 A more radical alternative would be a completely new and unified set of rules, covering the effect of both construction and use, and dealing with injurious affection, whether or not land is taken. The new rules could either preserve some of the existing distinctions (as in the Ontario Act), or could provide a uniform

¹²⁰ See para 9.64 above.

¹²¹ See Part V, para 5.12 above. In practice, we understand reduction in market value and loss of profit are sometimes claimed under s 7 of the 1965 Act (see para 5.13 above).

¹²² See Part V, paras 5.25-26 above.

¹²³ CPPRAG Review, para 206.

¹²⁴ Arguably, such discrimination may offend Article 14 of the European Convention of Human Rights: see Part II, para 2.20 above.

approach, as in the ALRC's draft legislation.¹²⁵ We invite views on the merits of either approach.

- 9.84 We note the other suggestions made by CPPRAG to address perceived anomalies in the 1973 Act. We do not propose to make specific comments at this stage. If, following consultation, it is decided that Part I of the 1973 Act should be retained in any form, it would be desirable to review it in detail, to remove such anomalies, and if possible to simplify the structure.

Proposal 17: Compensation for effects of public works

Part I of the Land Compensation Act 1973 will be expanded and amended to provide a complete code for compensation for injurious affection where no land is taken:

(1) A new provision of the 1973 Act (to replace 1965 Act, s 10) will confer a right to compensation where the market value of an interest in land is depreciated by “physical factors” caused by the *construction* of “public works”,¹²⁶ but only to the extent that a claim would have arisen at common law apart from the immunity conferred by the statute.

(2) The 1973 Act, Part I (compensation for depreciation due to the use of public works) will be retained, subject to the following:-

(a) Repeal of:

(i) section 2(3) and (6) (rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units);

(ii) section 4(5) (existing use only);

(iii) section 5 (requirement to assume that no permission would be granted for new development).¹²⁷

(b) Other detailed amendments proposed by CPPRAG to be reviewed following consultation.

Consultation issues

(1) *Do consultees agree that the new law:*

(a) *Should be based substantially on the existing law in 1965 Act section 10 (in modernised form, following the Wildtree Hotels case) and Part I of the 1973 Act; and*

¹²⁵ See Appendix 4.

¹²⁶ “Physical factors” and “public works” will be defined as in 1973 Act, s 1.

¹²⁷ Section 5(3) which, exceptionally allows permission to be assumed for so-called “Third Schedule” development, would become redundant.

- (b) That it should take the form of an amended version of Part I of the 1973 Act (rather than being included in the Code for compensation for compulsory purchase)?**
- (2) Alternatively, what should be the basis of the provisions in the new Code? (For example, do consultees favour a scheme along the lines of the ALRC proposals in App 4(ii))?**
- (3) Should compensation be limited to diminution in market value of the affected land? If not what other matters should be included (for example, loss of profits)?**
- (4) Should compensation for the effect of “physical factors” due to construction of the works be restricted to circumstances for which a claim would have arisen at common law?**

PART X

REPEALS

PROPOSAL 18

We have not concluded a detailed review of the current legislation to identify the full extent of consequential repeals and amendments. At this stage the following is a list of existing provisions which would be directly affected. The Proposals mentioned in this Report are to replace the following existing statutory provisions, which will accordingly be repealed:

LAND COMPENSATION ACT 1961

ss 5-9, 10A, Sched 1 (rules for determining amount of compensation)

ss 14-16 (planning assumptions)

ss 17-22 (certificates of appropriate alternative development)

ss 23-30, Sched 3 (compensation for additional development)

COMPULSORY PURCHASE ACT 1965

s 7 (compensation for severance etc)

s 10 (injurious affection where no land is taken)¹

LAND COMPENSATION ACT 1973

s 2(3) and (6) (rateable value limit of £24,600)²

s 4(5) (existing use only)³

s 5 (requirement to assume that no permission would be granted for new development)⁴

s 44 (injurious affection by the whole of the works)⁵

s 45 (disturbance provisions for the disabled, and over 60s)⁶

ss 47-8 (continuation of business and agricultural tenancies)⁷

¹ Also the equivalent provisions of the 1845 Act (ss 63 and 68).

² See Proposal 17(2)(a)(i).

³ See Proposal 17(2)(a)(ii).

⁴ See Proposal 17(2)(a)(iii).

⁵ See Proposal 5(3).

⁶ See, respectively, Proposals 6(3) and 4(3).

s 50 (compensation where occupier is rehoused)⁸

s 51 (designation in new town for public development)⁹

ss 52, 52A (advance payment)¹⁰

ACQUISITION OF LAND ACT 1981

s 4 (disregard of enhancements)¹¹

LAND COMPENSATION ACT 1961

The remaining provisions of the Land Compensation Act 1961 will be subject to review. They are:

ss 1-4 (Determination of disputed compensation)¹²

s 11 (land of statutory undertakers)

s 12 (outstanding right to compensation for refusal of permission)¹³

s 31 (withdrawal of notices to treat)¹⁴

s 32 (rate of interest after entry)¹⁵

ss 33-42 (miscellaneous and interpretation)¹⁶

Consultation issue

Do consultees have any comments on the proposed repeals?

⁷ See Proposal 7(1).

⁸ See Proposal 7(2).

⁹ This complicated provision is linked to 1961 Act s 6, which is to be repealed without replacement.

¹⁰ See Proposal 13.

¹¹ See Proposal 7(4)(b).

¹² The President of the Lands Tribunal has proposed that ss 2-4 should be repealed and replaced (so far as necessary) by rules and practice directions: see Law Commission's Scoping Paper (March 2001), para 46-7.

¹³ This section, which is related to obsolete provisions for compensation under the Town and Country Planning Act 1947, can probably be repealed.

¹⁴ To be considered as part of the Law Commission's Implementation Report.

¹⁵ See Proposal 15.

¹⁶ To be considered at the stage of detailed drafting.

PART XI

THE COMPENSATION CODE – THE PROPOSALS

INTRODUCTION

- 11.1 We set out below our provisional Proposals for the matters to be included in the new Compensation Code. We have done this in the form of draft “Proposals”, in order to give a sense of the shape of the new Code. However, it must be emphasised that the formulation of these Proposals is intended solely to give an indication of the proposed content of the Code; the detailed drafting will be a matter for Parliamentary Counsel in due course. Where, however, we have derived these formulations from sources other than the main provisions of the existing statutory provisions, we have indicated the source in a footnote.
- 11.2 The draft proposals are set out under the following main headings:
- (a) General definitions
 - (b) Core principles
 - (c) Project disregard and planning status
 - (d) Miscellaneous rules
 - (e) Injurious affection where no land is taken.
 - (f) Repeals

(A) GENERAL DEFINITIONS

In these proposals, the following terms are used as here defined:

“Compulsory purchase”: means the compulsory purchase of any land under powers conferred by or under any statute;

“The authority”: means the minister, authority or other person authorised to acquire land by compulsory purchase;

“The claimant”: means a person claiming, or entitled to claim, compensation under this Code;

“Subject land”: means any land of the claimant which is subject to compulsory purchase;

“Retained land”: means any interest of the claimant in land (not subject to compulsory purchase) which, at the date of notice to treat, was held with¹ the claimant’s interest in the subject land;

“First notice date”: means the date on which notice of the making of the compulsory purchase order is first required to be published or served, in accordance with the requirements of the relevant Act;²

[See Part IV, para 4.65]

“Date of notice to treat”: means the date of the notice required (under 1965 Act, s 5) to be served, following confirmation of the compulsory purchase order, on owners of interests which the authority wishes to acquire; or the date of a “deemed notice to treat” under other procedures (such as the vesting declaration procedure³).

“Valuation date”: means the date on which the authority takes possession of the subject land (or, under the vesting declaration procedure, the vesting date⁴), or (if earlier) the date of agreement or determination of compensation.

[See Part V, paras 5.73-5.74]

(B) CORE PRINCIPLES

PROPOSAL 1: RIGHT TO COMPENSATION

Subject to the provisions of the Code, any person from whom an interest, in existence at the date of notice to treat, is acquired by compulsory purchase, or whose interest in the subject land is diminished or adversely affected by or pursuant to compulsory purchase, is entitled to compensation assessed in accordance with the following rules.

[See Part IV, para 4.2-4.4]

PROPOSAL 2: HEADS OF COMPENSATION

The right to compensation shall be a right to an amount (not less than nil), assessed in accordance with the principle of fair compensation, having

¹ The requirement that the retained land should be “held with” the subject land is established by case law under 1965 Act, s 7. It means simply that the pieces of land should be so related that “the possession and control of each gives an enhanced value to them all”: *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153, *per* Lord Watson.

² Cf 1961 Act, s 22(2)(a), which adopts a similar definition, as the date of the “proposal to acquire” (for the purposes of certificates of appropriate alternative development). In most cases, the requirements to give notice of the making of the order are in the Acquisition of Land Act 1981, or regulations made thereunder: see 1981 Act, s 11, and Compulsory Purchase of Land Regulations 1994, SI 1994, No 2145.

³ See Vesting Declarations Act 1981, s 7(3), by which the 1961 Act is applied “as if” a notice to treat had been served on the date of execution of the vesting declaration; this is referred to as a “deemed” notice to treat (cf *ibid*, s 10(3); 1961 Act, s 22(2)(b)). “Deemed” notices to treat also arise under the purchase notice and blight notice procedures: Town and Country Planning Act 1990, ss 143(1), 154(2).

⁴ See Vesting Declarations Act 1981, s 10.

regard to the following matters (as defined below): market value of the subject land; disturbance; injury to retained land (severance or injurious affection, less betterment); (where applicable) equivalent reinstatement.

[See Part IV, paras 4.6-4.14]

PROPOSAL 3: MARKET VALUE

(1) “Market value” of any land means the amount (not less than nil) which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

(2) Except as otherwise provided, for the purpose of any provisions of the Code which depend on the value of land (including any reduction or increase in the value of land), value means “market value” as so defined.

[See Part IV, paras 4.15-4.19]

PROPOSAL 4: DISTURBANCE

(1) “Disturbance” means any monetary loss or expense, not directly based on the value of land, suffered or incurred by the claimant and fairly attributable to displacement⁵ in consequence of the compulsory acquisition of the subject land;

(2) Without prejudice to the generality of (1), in assessing compensation for disturbance, the following rules apply:

(a) All relevant circumstances are to be taken into account, including any circumstances personal to the claimant;

(b) Disturbance includes the amount of any legal or other professional costs reasonably incurred by the claimant in connection with the acquisition;

(c) Where compensation is claimed on the basis of the relocation of a business from the subject land, compensation on the relocation basis shall not be refused solely because it exceeds the compensation which would be payable on the extinguishment basis,⁶ unless, in the opinion of the Tribunal, it is unreasonable in all the circumstances (including the cost to the authority and the value of the business to the claimant) to assume relocation of the business;

⁵ Cf Land Compensation Act 1973, Part III, ss 29, 34 and 37.

⁶ See generally the *Shun Fung* case [1995] 2 AC 111. The “relocation basis” assumes that the owners of the business are able to relocate it; compensation will normally cover the costs of relocation and any temporary losses. The “extinguishment basis” assumes that the business is closed down; compensation is based on the value of the business. In most cases, relocation will be the preferable option for both parties; but provision needs to be made for those cases where the claimant wishes to relocate, even though total extinguishment would be the cheaper option for the authority.

(d) Compensation for disturbance may, if the Tribunal so determines, include costs reasonably incurred in replacing buildings, plant or other installations (whether or not on the land acquired) where (i) they are required for a business to be continued on the retained land; (ii) the need for replacement is fairly attributable to the acquisition, and is reasonable in all the circumstances ((having regard to the cost to the authority and to the likely benefit to the claimant); (iii) the cost is not adequately reflected in any other head of compensation; but (iv) subject to such deduction (if any) as the Tribunal may determine should be made to reflect any improvement in the facilities so obtained over those replaced;

(e) Compensation for disturbance is not payable for loss or expense suffered or incurred before the first notice date;

(f) Where a claimant who was not in occupation of the subject land incurs incidental charges or expenses in acquiring, within one year of the date of entry, an interest in other land in the United Kingdom, those charges and expenses may be claimed as disturbance;⁷

(3) Without prejudice to (2)(a), the rights of traders over 60 years of age to claim compensation on the total extinguishment basis, in the circumstances defined by the 1973 Act, s 46, will be preserved in the new Code.

[See Part IV, paras 4.20-4.68]

PROPOSAL 5: INJURY TO RETAINED LAND

(1) Compensation for injury to retained land is to be assessed having regard to the following so far as applicable, assessed (subject to (5) below) at the valuation date:

(a) “Severance”, defined as the amount of any reduction in the market value of any interest of the claimant in any retained land, attributable to its severance from the subject land;

(b) “Injurious affection”, defined as the amount of any reduction in market value of any interest of the claimant in the retained land attributable to the nature of, or the carrying out of, the relevant project;⁸

(c) “Betterment”, defined as any increase in the market value of the retained land attributable to the nature of, or the carrying out of, the relevant project;

⁷ This is intended to reproduce 1961 Act, s 10A.

⁸ The wording is derived from s 55(2)(a)(iv) of the Lands Acquisition Act 1989 (Cth) (“LAA (Cth)”), the Australian federal statute, which was based on recommendations of the Australian Law Reform Commission (“ALRC”) Report, No 14 (1980).

(d) The “relevant project” shall have the same meaning as in Proposal (8) below.

(2) Compensation under this Proposal is to be assessed by taking the amount of any severance or injurious affection, and deducting the amount of any betterment (save that the total shall not be less than nil);

(3) In assessing injurious affection or betterment, regard is to be had to the effects of the whole of the works comprised in the relevant project, whether on the subject land or elsewhere;⁹

(4) If the claimant so requires, the amount due under this Proposal is to be assessed by calculating the difference at the valuation date between (a) the market value of the subject land and the retained land taken together (disregarding any diminution due to the relevant project) and (b) the market value of the retained land on its own (taking account of any effect on that value of the relevant project).

(5) Where the injury for which compensation is claimed under this proposal is temporary in nature, injurious affection shall be assessed by reference to any reduction in letting value of the retained land during the relevant period, or such other method as the Tribunal may consider appropriate.

[See Part V, paras 5.2-5.35]

PROPOSAL 6: EQUIVALENT REINSTATEMENT

(1) Subject to (2), where (a) the subject land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and (b) reinstatement in some other place is genuinely intended, compensation shall (at the option of the claimant) be assessed on the basis of the reasonable cost of equivalent reinstatement.

(2) Compensation on this basis may be refused by the Tribunal, if satisfied that it is in all the circumstances unreasonable, having regard to the cost to the authority and to the likely benefit to the claimant.

(3) Compensation on the equivalent reinstatement basis shall, at the election of the claimant, be paid in the circumstances set out in 1973 Act, s 45 (dwellings especially adapted for the disabled).

[See Part V, paras 5.36-5.54]

⁹ The latter words are intended to preserve the effect of 1973 Act, s 44, which reversed previous case law under which only the works on the subject land could be taken into account.

PROPOSAL 7: INCIDENTAL RULES

(1) Where an interest is limited as to time or may be terminated by another person, regard shall be had (in assessing compensation for that or any other interest in the subject land) to the likelihood (in the absence of the relevant project) of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be, or would have been, granted.¹⁰

(2) Where the subject land comprises a dwelling-house, there shall be left out of account any increase or reduction in the compensation otherwise payable, which is attributable to the fact that the authority (or any other public authority) have provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant (under the 1973 Act, s 39 or otherwise).¹¹

(3) There shall be disregarded any increase in the value of the land caused by its use in a manner, or for a purpose, contrary to law.¹²

(4) There shall be disregarded:

(a) any new interests created over the subject land, or the retained land, between the date of notice to treat and the valuation date, in so far as they would increase the amount of compensation otherwise payable by the authority;¹³

(b) without prejudice to (a), any enhancements (by creation of interests, or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.¹⁴

(5) Where the market value of an interest in the subject land is assessed on the basis that the land had potential to be developed or used for a purpose other than the purpose for which it was occupied at the valuation date, compensation shall not be allowed under other heads (disturbance or injury to retained land) in respect of loss or damage that would necessarily have arisen in realising that potential.¹⁵

(6) If it is shown that the claimant has failed (since the first notice date) to take action reasonably open to him to mitigate his loss, the compensation

¹⁰ Based on LAA (Cth), s 55(2)(d), and 1973 Act, ss 47 – 8.

¹¹ Cf 1973 Act, s 50.

¹² Based on LAA (Cth), s 60(b).

¹³ This gives effect to a judicial rule: see *Mercer v Liverpool St Helens Ry Co* [1903] 1 KB 652.

¹⁴ Based on Acquisition of Land Act 1981, s 4.

¹⁵ Based on LAA (Cth), s 57.

otherwise payable shall be reduced by the amount of such loss as could have been avoided by taking such action when it was reasonable to do so.¹⁶

[See Part V, paras 5.56-5.70]

PROPOSAL 8: DATE OF ASSESSMENT

(1) Save as otherwise provided, and subject to Proposal 7(4) above and Proposals 9 and 10 below, interests will be valued as they stand at the “valuation date”, at values prevailing at that date, and in the context of the planning and other circumstances prevailing at that date.

(2) Where compensation is assessed on the basis of equivalent reinstatement, it will be assessed by reference to the the date at which reinstatement became reasonably practicable.

[See Part V, paras 5.71-5.91]

(C) PROJECT DISREGARD AND PLANNING STATUS

PROPOSAL 9: DISREGARDING THE PROJECT

(1) The existing rules, statutory or judge-made, relating to disregard of “the scheme” will be replaced by a new statutory set of rules, by reference to the “relevant project”;

(2) In this and the following proposal:

(a) “The relevant project”: means the project for the purpose of which the authority has been authorised (under the applicable statute) to acquire the subject land;

(b) “Planning status”: means the planning permissions, actual or assumed, relating to the subject land or other land, to be taken into account for the purpose of assessing compensation;

(c) “The cancellation assumption”: means the assumption that the relevant project was cancelled on the first notice date, with no prospect of that, or any other project to meet the same or substantially the same need, being carried out thereafter under statutory powers;¹⁷

(d) “Planning hope value”: means any increase in value of the subject land derived from the prospect of planning permissions being granted at a date subsequent to the valuation date;

¹⁶ The “duty to mitigate” is most relevant to disturbance (see *Shun Fung* case [1995] 2 AC at 126), but could in principle apply to other heads of claim.

¹⁷ Cf the “cancellation approach”: *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307. See also *Grampian RC v Secretary of State for Scotland* [1983] 1340, 1345-6; and 1961 Act ss 5-8.

(e) “Blighted land”: means land falling within one of the categories of planning proposals defined by Schedule 13 of the Town and Country Planning Act 1990 (or any replacement thereof);

(f) Any reference to the value of land includes a reference to the profitability of a business on that land.

[(2A) (i) If the authority wishes to contend that the relevant project extends to land other than the subject land, they shall include in the notice of the order a statement (in prescribed form) certifying that fact, defining the nature, extent and purpose of that project, and the date of the resolution of authorising that project;

(ii) Where such a statement is included in the order, its contents may be challenged by the claimant (but not the authority) on the hearing of a reference to determine compensation;

(iii) Subject to (ii), in any proceedings before the Tribunal:

(a) The relevant project shall be as defined in the statement under (i);

(b) The cancellation assumption shall be applied taking (instead of the first notice date) the later of the resolution date defined under (i) and the date three years before the first notice date;

(c) If no statement is served, it will be assumed (against the authority, but not the claimant) that the relevant project is confined to the area of the compulsory purchase order, and began on the first notice date.

***As an alternative to (ii), an interested person could have the right to challenge the statement by objection to the confirming authority, within the time prescribed for objections to the order, and the decision of the confirming authority would then be binding on both parties before the Tribunal.]*¹⁸**

(3) In assessing compensation there shall be disregarded:

(a) any increase in value of the subject land fairly attributable to the carrying out of, or the proposal to carry out, the relevant project;

(b) any decrease in value of the subject land fairly attributable (i) to the carrying out of, or the proposal to carry out, the relevant project, or (ii) to any prior indication of the proposal to carry out that project, or (iii) to the subject land being within a category of “blighted land”;

¹⁸ See Part VII, paras 7.13 to 7.17 for discussion of this alternative mechanism.

(4) The increase to be disregarded under (3) shall be assessed by comparing the value of the land at the valuation date with the value as it would have been at that date on the cancellation assumption.

(5) The following rules apply where land is treated as having been subject to compulsory purchase, under procedures initiated by the claimant (“deemed compulsory purchase”):

(a) If the deemed compulsory purchase follows service of a blight notice¹⁹ under the Town and Country Planning Act 1990, the relevant project shall be determined by reference to the planning proposal (as defined in Section 149 and Schedule 13 of that Act) by which the land became blighted land;

(b) In any other case (including the service of a purchase notice under section 137 of that Act), the relevant project shall be assumed to be the service by the claimant of the notice which initiated the procedure;

(c) In either case the “first notice date” shall be taken as the date of service of the notice which initiated the procedure;

(6) Nothing in this proposal shall be taken as altering (for valuation purposes) the planning status of the subject land or any other land.

[See Parts VI and VII, paras 7.1-7.28]

PROPOSAL 10: PLANNING STATUS

(1) The following rules will apply for the purpose of determining planning status at the valuation date:

(a) Account is to be taken of any planning permissions in existence at the valuation date (on the subject land or any other land);

(b) Planning permission is to be assumed (so far as not in existence at the valuation date) such as would permit the carrying out of the relevant project (on the subject land and any other land comprised in the project);

(c) Planning permission is to be assumed for any development (on the subject land or any other land) such as would reasonably have been expected to be granted not later than the valuation date, on the cancellation assumption;

(d) No other assumptions are to be made as to the existence of any planning permissions at the valuation date, but this rule does not prevent account being taken of any planning hope value.

¹⁹ As defined in Town and Country Planning Act 1990, s 149(5).

(2) For the avoidance of doubt, in relation to any permission assumed under this Proposal:

(a) the assumption that permission has been granted does not of itself imply any assumption that work has been or will be carried out, or expenditure incurred, in implementing the permission;

(b) regard shall be had to any costs or expenses which would reasonably have been expected to be incurred in obtaining or implementing the permission; or in complying with any conditions, obligations or requirements to which the permission was, or would reasonably have been expected to be, subject.

(3) For the purpose of determining the permission or permissions to be assumed under (1)(c) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for a “planning status certificate”, in accordance with the following rules (and “procedural regulations” to be made by statutory instrument):

(a) A planning status certificate is a certificate stating the opinion of the local planning authority as to the development (if any) on the land comprised in the application for which planning permission would reasonably have been expected to be granted on the cancellation assumption;

(b) The application for a certificate may relate to the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant);

(c) The certificate should include:

(i) Where permission would reasonably have been expected at some future date, an indication of the date;

(ii) A general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject;

(d) Either:²⁰

(A) There shall be a right of appeal against the certificate to the Secretary of State, by either the claimant or the authority (based on the present right under 1961 Act, s 18ff); or

(B) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to

²⁰ These are put forward as alternative options for the Code, depending on which avenue of appeal is adopted (see the accompanying notes).

procedural regulations, and any time-limits there laid down; the regulations will give the Tribunal a wide discretion as to the timing and nature of the hearing of the appeal, having regard to any related compensation reference; in particular the Tribunal may direct:²¹

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated power to determine the appeal on behalf of the Tribunal;

(e) In determining compensation:

(i) the Tribunal must take account of any permission, which is to be assumed in accordance with the planning status certificate;

(ii) in deciding (under the above rules) whether any other permission is to be assumed at the valuation date, it must have regard to any contrary opinion expressed in the certificate;

(f) Regulations may provide for the certificate procedure to be applied (with or without modifications) to special cases, including:

(i) where an offer is made by the authority, before the first notice date, to negotiate for the purchase of an interest in land which is, or may be, subject to compulsory purchase;²²

(ii) where a claimant is absent from the United Kingdom or cannot be traced.²³

[See Part VIII, paras 7.30-7.45]

(D) MISCELLANEOUS RULES

PROPOSAL 11: INTERFERENCE WITH EASEMENTS ETC.

(1) Where the carrying out of the purpose for which the subject land is acquired results in interference with, or breach of, any easement, restrictive covenant or other right affecting the subject land, which is

²¹ Under the present rules, which give a right of appeal to the Secretary of State, there is provision for the validity of his decision to be challenged on legal grounds in the High Court: 1961 Act, s 23. This would be unnecessary under this proposal, since the Tribunal's decision would be subject to the ordinary right of appeal to the Court of Appeal.

²² Cf 1961 Act, s 22(2)(c).

²³ Cf 1961 Act, s 19.

attached to other land, compensation shall be payable under this Proposal.

(2) Compensation under this proposal shall be assessed by reference to the reduction (if any) in the market value of the land to which the right is attached, so far as attributable to such interference or breach.²⁴

[See Part VIII, paras 8.3-8.9]

PROPOSAL 12: ACQUISITION OF RIGHTS

Where the interest acquired is a right over land (including a newly created right):

(i) The value of the right shall be assessed by reference to the depreciation, if any, in the market value of the land over which the right is acquired;

(ii) Other heads of compensation (disturbance, injurious affection but not severance) shall be allowed under the ordinary rules (see above).

[See Part VIII, paras 8.10-8.20]

PROPOSAL 13: ADVANCE PAYMENTS

The claimant shall be entitled to an advance payment on account of compensation and interest, in accordance with sections 52 and 52A of the 1973 Act (which will be incorporated into the Code), subject to the following:

(i) Section 52(6) will be amended so that, whether or not the mortgage exceeds 90% of the authority's estimate, the authority shall, if so requested by the owner and mortgagee, make the advance payment direct to the mortgagee;

(ii) Where it is shown that the authority has delayed unreasonably in making such a payment, or that the estimate on which the payment was based was unreasonably low,²⁵ the County Court may, on the application of the claimant, may make such interim or final orders (including imposing time-limits), as are necessary to enforce the authority's obligations under this proposal.

[See Part VIII, paras 8.21-8.29]

²⁴ This is intended to reproduce the effect of 1965 Act, s 7, as applied to interference with such rights: see *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798. It is to be noted that s 7 also applies to works on land acquired by agreement (see *Re Elm Avenue, New Milton* [1984] 1 WLR 1398); further provision will be needed, in this Code or elsewhere, to ensure that this effect is preserved. Issues relating to the continued existence of the rights following payment of compensation will be considered in the Law Commission's Consultation Report on Implementation.

²⁵ The word "unreasonably" is intended to be interpreted in accordance with judicial review principles; the County Court is not expected itself to take over the function of making the estimate.

PROPOSAL 14: LANDS TRIBUNAL JURISDICTION

The Lands Tribunal shall have jurisdiction (subject to procedural rules) to determine any claim (common law or statutory) relating to damage to land or to the use of land, where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal.

[See Part VIII, paras 8.30-8.32]

PROPOSAL 15: INTEREST

Interest on compensation, in respect of the compulsory purchase of any land on which entry has been made before payment of compensation, shall be paid from the date of entry at such rate as may be prescribed from time to time under 1961 Act, s 32 or any replacement.²⁶

[See Part VIII, paras 8.33-8.48]

PROPOSAL 16: SUBSEQUENT PLANNING PERMISSION

1961 Act, s 23 (compensation where permission for additional development is granted after acquisition) will be repealed.

[See Part VIII, paras 8.65-8.75]

(E) INJURIOUS AFFECTION WHERE NO LAND IS TAKEN

PROPOSAL 17: COMPENSATION FOR EFFECTS OF PUBLIC WORKS

Part I of the Land Compensation Act 1973 will be expanded and amended to provide a complete code for compensation for injurious affection where no land is taken:

(1) A new provision of the 1973 Act (to replace 1965 Act, s 10) will confer a right to compensation where the market value of an interest in land is depreciated by “physical factors” caused by the *construction* of “public works”,²⁷ but only to the extent that a claim would have arisen at common law apart from the immunity conferred by the statute.

(2) The 1973 Act, Part I (compensation for depreciation due to the *use* of public works) will be retained, subject to the following:-

(a) Repeal of:

(i) section 2(3) and (6) (rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units);

(ii) section 4(5) (existing use only);

²⁶ The rates prescribed under 1961 Act, s 32 are applied under a number of other statutes (see para 8.36 above). It is open for consideration whether it is preferable to retain that section, or replace it in the new Code, making such consequential amendments as are necessary. A decision on this point should in any event await the forthcoming Law Commission's Report on the award of Compound Interest, which may affect the form of any replacement.

²⁷ “Physical factors” and “public works” will be defined as in 1973 Act, s 1.

(iii) section 5 (requirement to assume that no permission would be granted for new development).²⁸

(b) Other detailed amendments proposed by CPPRAG to be reviewed following consultation.

[See Part IX]

(F) REPEALS

PROPOSAL 18: REPEALS

REPEALS

(1) The above provisions are to replace the following existing statutory provisions, which will accordingly be repealed:

Land Compensation Act 1961

ss 5-9, 10A, Sched 1 (rules for determining amount of compensation)

ss 14-16 (planning assumptions)

ss 17-22 (certificates of appropriate alternative development)

ss 23-30, Sched 3 (compensation for additional development)

Compulsory Purchase Act 1965

s 7 (compensation for severance etc)

s 10 (injurious affection where no land is taken)²⁹

Land Compensation Act 1973

s 2(3) and (6) (rateable value limit of £24,600)³⁰

s 4(5) (existing use only)³¹

s 5 (requirement to assume that no permission would be granted for new development)³²

s 44 (injurious affection by the whole of the works)³³

²⁸ Section 5(3) which, exceptionally allows permission to be assumed for so-called “Third Schedule” development, would become redundant.

²⁹ Also the equivalent provisions of the 1845 Act (ss 63 and 68).

³⁰ See Proposal 17(2)(a)(i).

³¹ See Proposal 17(2)(a)(ii).

³² See Proposal 17(2)(a)(iii).

³³ See Proposal 5(3).

- s 45 (disturbance provisions for the disabled, and over 60s)**³⁴
- ss 47-8 (continuation of business and agricultural tenancies)**³⁵
- s 50 (compensation where occupier is rehoused)**³⁶
- s 51 (designation in new town for public development)**³⁷
- ss 52, 52A (advance payment)**³⁸

Acquisition of Land Act 1981

- s 4 (disregard of enhancements)**³⁹

REVIEW

(2) The remaining provisions of the Land Compensation Act 1961 will be subject to review; they are:

- ss 1-4 (Determination of disputed compensation)**⁴⁰
- s 11 (land of statutory undertakers)**
- s 12 (outstanding right to compensation for refusal of permission)**⁴¹
- s 31 (withdrawal of notices to treat)**⁴²
- s 32 (rate of interest after entry)**⁴³
- ss 33-42 (miscellaneous and interpretation)**⁴⁴

[See Part X]

³⁴ See, respectively, Proposals 6(3) and 4(3).

³⁵ See Proposal 7(1).

³⁶ See Proposal 7(2).

³⁷ This complicated provision is linked to 1961 Act s 6, which is to be repealed without replacement.

³⁸ See Proposal 13.

³⁹ See Proposal 7(4)(b).

⁴⁰ The President of the Lands Tribunal has proposed that ss 2-4 should be repealed and replaced (so far as necessary) by rules and practice directions: see Law Commission's Scoping Paper (March 2001), paras 46-7.

⁴¹ This section, which is related to obsolete provisions for compensation under the Town and Country Planning Act 1947, can probably be repealed.

⁴² To be considered as part of the Law Commission's Implementation Report.

⁴³ See Proposal 15, and note thereto.

⁴⁴ To be considered at the stage of detailed drafting.

PART XII

CONSULTATION QUESTIONS

GENERALLY

Consultees are invited to comment on any aspect of the provisional proposals, both from the legal point of view, and from the point of view of practicality and cost. Without prejudice to that general invitation, we have identified the following as matters likely to give rise to differing views, and as ones on which we would welcome specific answers.

PROPOSAL 2: HEADS OF COMPENSATION

Do consultees agree that:

- (1) The Code should include a statement of the objective of “fair compensation”?***
- (2) This should be expressed as principle of interpretation only (rather than as permitting the Tribunal any general discretion to depart from the detailed rules)?***
- (3) The right to compensation should be a right to a single (“global”) amount, assessed having regard to the detailed rules (market value, disturbance etc)?***

PROPOSAL 3: MARKET VALUE

Do consultees agree that:

- (1) “Market value” should be defined as the amount for which the land might be sold by a willing buyer to a willing seller;***
- (2) The market value test should apply (except as otherwise stated) to any provisions of the Code depending on the value of land?***

PROPOSAL 4: DISTURBANCE

(1) Do consultees agree that:

- (a) The term “disturbance” is a suitable shorthand for all heads of compensation currently assessed under rule (6) (of 1961 Act, s 5)? If not, what term should be used?***
 - (b) Compensation under this head should (as now) exclude any loss “directly based on the value of land”?***
- (2) The matters to be taken into account should include “circumstances personal to the claimant”?***
 - (3) In determining, on the displacement of a business, whether compensation should be on the “relocation” or “extinguishment” basis:***

- (a) ***Should the test be a simple test of “reasonableness”, rather than the “reasonable businessman” test (as explained in the Shun Fung case)?***
- (b) ***Is it unnecessary for the Code to prescribe the circumstances in which compensation on either basis will be regarded as reasonable?***
- (4) ***Should there be:***
 - (a) ***Specific provision for compensation to include costs reasonably incurred in replacing buildings, plant or other installations needed for a business, if fairly attributable to the acquisition, and not adequately reflected in other heads?***
 - (b) ***If so, do consultees agree that:***
 - (i) ***The right should apply to all types of business (not simply agricultural);***
 - (ii) ***The right should apply whether the buildings are on the land subject acquisition or on retained land?***

PROPOSAL 5: INJURY TO RETAINED LAND

- (1) ***Under the existing law:***
 - (a) ***Is compensation for injurious affection assessed solely by reference to diminution in market value? If not, what other factors are taken into account?***
 - (b) ***How, if at all, is temporary loss taken into account?***
 - (c) ***By reference to what valuation date is compensation assessed?***
 - (d) ***Do the present rules give rise to any other problems needing to be addressed in the new Code?***
- (2) ***How should the issues (a) to (d) be dealt with in the new Code?***
- (3) ***In particular, what problems or additional costs would be caused for authorities, if compensation under these heads were to include compensation for loss of profits?***
- (4) ***Should express provision be made (as we propose) for assessment under these heads to be based on a “before and after” valuation of the holding? If so, should it be mandatory, or (as we propose) at the option of the claimant?***
- (5) ***Should the “retained land” be limited to land “contiguous” to the subject land?***

PROPOSAL 6: EQUIVALENT REINSTATEMENT

Do consultees agree that:

- (1) The existing rule (5) for equivalent reinstatement should be reproduced in the new Code in substantially its existing form? If not, what changes, or further definitions are required?***
- (2) The nature and extent of the discretion to refuse compensation on this basis should be set out in the Code (as proposed in proposal 6(2))?***
- (3) No specific provision should be made for a deduction for any increased value of the new premises?***

PROPOSAL 7: INCIDENTAL RULES

- (1) In relation to proposal 7(3), should there be any exception to the principle that unlawful uses are disregarded (for example, where the breach is technical or unintentional, and easily remedied)?***
- (2) If so, how should the exception be defined?***
- (1) Do consultees have any other comments on the incidental rules as proposed above?***

PROPOSAL 8: DATE OF ASSESSMENT

Do consultees agree:

- (1) In relation to interests in existence at the date of notice to treat, the valuation date should be taken as the date for fixing the nature and extent of the interests?***
- (2) The date for equivalent reinstatement should be defined as the date at which reinstatement could reasonably begin (in accordance with the present West Midlands Baptist approach)? Or, alternatively, should it be based on making an assessment at whichever is the earlier of (i) the date on which the acquiring authority acquire ownership of the property, in law or equity, or (ii) the date on which the authority takes possession of it?***
- (3) There is no need for any specific provision for fixing the date of other heads of compensation, or adjusting them to a common date?***
- (4) Notwithstanding (3), interest should (as now) run on the total amount of the compensation from a single date (the date of possession)?***

PROPOSAL 9: DISREGARDING THE PROJECT

(A) Do consultees agree with our provisional view as to the preferred version of the existing rule: that is, that there are to be disregarded

changes in value attributable to the prospect of, or the carrying out of, the project for which the authority is authorised to acquire the land?

(B) Do consultees agree (a) that a statement of the no-scheme rule (however named) should in principle be reproduced in the new Code; and (b) that it should be in the form of a new provision, or set of provisions, in substitution for all existing versions.

(C) Should the no-scheme rule, in its application to increases in value, be modified so as to enable regard to be had to the amount which the acquiring body itself would have paid in friendly negotiations (in accordance with the Indian case):

(a) In all cases?

(b) In cases where the acquisition is for purposes of a “commercial” nature?

(c) In no cases?

If the answer is (b), then:

(i) How and by what criteria should such “commercial” cases be defined?

(ii) Do consultees favour a “public interest certificate” mechanism (as proposed in the Scottish Executive Review)?

(D) Do consultees agree with our provisional proposal that:

(1) In the new Code, the preferred rule (in a statutory form) should be used as the basis for defining the “scheme”?

(2) Alternatively, or in addition, should consideration be given to either of the following:

(a) Where an authority is promoting the compulsory purchase order for the purposes of a project including land other than that comprised in the order, the authority should be required (for valuation purposes) so to certify in the order, identifying the nature and extent of the project?

(b) If so, should the owner’s right of challenge be:

(i) At the confirmation stage (by objection to the confirming authority) or

(ii) Before the Lands Tribunal?

(3) Should provision be made, in the Government’s proposed new planning framework, to enable the definition of the “project” for compensation purposes to be linked (where appropriate) to

development proposals, or development zones, identified in Action Area plans?

(E) Should provision be made that:

(1) In defined circumstances, where land is required solely for access or otherwise for provision of services, to serve other new development, the compensation should exclude any element based on the value of the new development?

(2) If so, (a) how should those circumstances be defined, and (b) to what qualifications should they be subject (e.g. a defined uplift to existing use value)?

(F) We invite views of consultees generally on the above provisional proposals, including in particular:

(i) Do they agree that all existing versions of the no-scheme rule should be replaced by a single statutory set of rules?

(ii) Do they agree with our proposed definition of the “relevant project” as the basis of the new rules?

(iii) Do they agree with our proposal to apply the “cancellation approach” in this context?

(iv) Would they favour the suggested alternative for defining the “project” at the time of the order (para 7.17 above); if so, should the authority’s definition of the project be open to challenge (a) at the time of confirmation of the order, by objection to the confirming authority, or (b) only before the Tribunal, at the time of the determination of compensation?

PROPOSAL 10: PLANNING STATUS

We invite consultees’ views generally on the above proposals. In particular:

(1) Do consultees agree that (a) permissions existing at the valuation date should be taken into account (whether or not they would have been granted apart from the project) (b) permission should be assumed for development in accordance with the authority’s proposals?

(2) In relation to the proposed “planning status certificate”:

(a) Do consultees agree that the applicant should be permitted to include (as we propose) the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant); if not, how should the application area be defined?

(b) Do consultees consider (i) that the existing right of appeal to the Secretary of State should be retained or (ii) that the local planning authority’s decision should be subject to appeal to the Lands Tribunal, which may, at the discretion of the Tribunal, be dealt with in advance

of, or at the same time as, other valuation issues; and, in the former case, may be delegated to a planning inspector?

PROPOSAL 11: INTERFERENCE WITH EASEMENTS ETC.

- (1) Do consultees agree that compensation for interference with easements or other rights should be separated from the rules for compensation for injurious affection where no land is taken?**
- (2) In any event, on what basis should compensation be assessed? In particular:**
 - (a) Should compensation be based (as now) solely on diminution in the market value of the land to which the right is attached; or**
 - (b) Should it reflect the “market value” of the right itself (that is, the amount which would have been paid for release of the right in negotiating between willing parties)?**

PROPOSAL 12: ACQUISITION OF RIGHTS

- (1) Should the compensation for acquisition of new rights be assessed:**
 - (a) As now by reference to the diminution in the value of land or,**
 - (b) By reference to the “market value” of the right (that is, the amount which would have been paid for grant of the right between willing parties)?**
- (2) Should compensation for severance be allowed? If so, in what circumstances could it arise (other than those covered by injurious affection)?**

PROPOSAL 13: ADVANCE PAYMENTS

Do consultees agree that the County Court should have jurisdiction (as proposed above) to review and enforce the performance of the authority’s duties in relation to advance payments? If not, what alternative mechanism would be appropriate?

PROPOSAL 14: LANDS TRIBUNAL JURISDICTION

Do consultees agree that the Lands Tribunal should have extended jurisdiction as proposed to deal with a common law claim arising out of the same facts as a compensation claim already before the Tribunal?

PROPOSAL 15: INTEREST

Are there any particulars in relation to the award of interest which require to be addressed in the new Code, for example relating to:

- (1) Professional fees (including VAT);**

- (2) Loans incurred to meet disturbance costs;**
- (3) Any other specific items of cost?**

TAX

- (1) Do consultees agree that (as proposed by the Policy Statement) additional tax liabilities arising out of the compulsory purchase can be satisfactorily met by the law of disturbance, supplemented by advice agreed with the Revenue.**
- (2) If not, what provision should be made in the Code for such tax liabilities?**
- (3) Are there any other tax issues arising out of the law of compensation which should be addressed in the new Code?**
- (4) We would welcome specific examples of any problems experienced in practice.**

PROPOSAL 16: SUBSEQUENT PLANNING PERMISSION

Views are invited on the following:

- (1) Do consultees agree that provisions for compensation for subsequent permissions (1961 Act, Part IV) should be repealed without replacement?**
- (2) If not, what changes should be made to the detailed rules; in particular:**
 - (a) Should the claim be limited to any new permissions which are not dependent on the scheme for which the authority originally acquired the land?**
 - (b) Should the present period of 10 years be changed? If so, to what period, and why?**
 - (c) Are any other changes needed (for example, to relate the provisions to the “valuation date” as established by case-law since the 1961 Act)?**
- (3) To what extent are these provisions used in practice? (We would welcome examples of individual cases, and any statistical information about the number of cases in which section 23 has been invoked, and with what financial consequences.)**

PROPOSAL 17: COMPENSATION FOR EFFECTS OF PUBLIC WORKS

- (1) Do consultees agree that the new law:**
 - (a) Should be based substantially on the existing law in 1965 Act section 10 (in modernised form, following the Wildtree Hotels case) and Part I of the 1973 Act; and**

- (b) ***That it should take the form of an amended version of Part I of the 1973 Act (rather than being included in the Code for compensation for compulsory purchase)?***
- (2) ***Alternatively, what should be the basis of the provisions in the new Code? (For example, do consultees favour a scheme along the lines of the ALRC proposals in App 4(ii))?***
- (3) ***Should compensation be limited to diminution in market value of the affected land? If not what other matters should be included (for example, loss of profits)?***
- (4) ***Should compensation for the effect of “physical factors” due to construction of the works be restricted to circumstances for which a claim would have arisen at common law?***

PROPOSAL 18: REPEALS

Do consultees have any comment on the proposed repeals?

IMPACT OF PROPOSALS

Do consultees have any comments on the likely impact of our proposals if they were to be enacted? We would welcome consultees’ feedback on both practical effect and cost-benefit impact (with tangible examples where available).

PART XIII

CONCLUSION

IMPACT OF OUR PROPOSALS

- 13.1 The proposals in this Consultative Report flow from the work undertaken by CPPRAG in its Fundamental Review and the response from Government in its Policy Statement published late last year. Those documents (together with our specific Terms of Reference) provide the framework for the Commission's task. As indicated at the outset we intend to produce two reports under the banner 'Towards a Compulsory Purchase Code': this first report on Compensation and a second on Implementation.

Policy Statement

- 13.2 The Government in its document assessed the likely financial implications of the changes proposed. In setting the context for both implementation and compensation changes the paper says:

The cost of implementing the proposals set out in this policy statement will be partially influenced by the extent to which the revised procedures, accompanied by a fairer and more clearly defined compensation code, result in acquiring authorities making increased use of their compulsory purchase powers. Furthermore, the extent to which any such cost has to be borne by the public sector will depend on the degree to which the availability of more efficient compulsory purchase powers makes replacement schemes more attractive as investment opportunities for private sector bodies working in partnership with acquiring authorities.¹

- 13.3 Focussing on compensation changes the Government's view is that:

A clearly defined, and better understood, compensation code should help to reduce the amount of professional time needed to negotiate compensation settlements. Clear but flexible statements of principles can be expected to reduce the number of cases which need to be referred to the Lands Tribunal and the courts, as both claimants and acquiring authorities will have a better idea of what particular elements of the compensation package are intended to cover and of the basis on which they should be calculated. . . .²

- 13.4 The paper goes on to accept that:

Against such potential savings, it has to be accepted that . . . some of the proposals intended to make the compensation package fairer are also likely to increase the amount payable to some of those whose property is acquired. For example, the proposal that provision for disturbance payments should be expressed in legislation as a

¹ Policy Statement, App, para 6.1.

² App, para 6.4.

statement of principles is likely to widen the range of costs and losses which can be recompensed. However, we are satisfied that additional expenditure can be justified in terms of equity and regard for the human rights of those whose private property is directly affected by schemes for the public good.³

The Law Commission's proposals

13.5 The Government asked us to have particular regard to the following:

- (1) Construction of a single Compensation Code which will achieve the principle that “in all cases, a claimant should [be] properly compensated for all the losses incurred as a direct result of the compulsory purchase order”. That approach will not differentiate between particular CPO powers used, implementation or lack of it, and whether or not land has been taken.
- (2) Clarification of the extent to which CPO valuations should take account of (or disregard) the effects of the scheme underlying the proposal, and whether valuations should take account of development potential of the subject land.
- (3) Clarification of the rules relating to compensation for severance/injurious affection (where land is taken) and the ensuring of parity of treatment between those from whom some land is taken and those from whom none is taken.
- (4) Clarification of the principles relating to payment of compensation for disturbance (including, for business activities, the determining of the need for relocation or extinguishment), which principles will ensure reimbursement for all costs and losses genuinely incurred as a direct consequence of the dispossession.
- (5) Provision of a mechanism whereby eligible claimants can require acquiring authorities to make advance payments without delay where an estimate has been made.
- (6) Consideration of the issue of the award of compound interest on late compensation payments (linked to our separate examination of the power of the courts to award such interest) and, more particularly, clarification of the basis for interest payments on fees and taxes.
- (7) Provision for compensation for losses incurred where (after the first notice date) compulsory purchase orders are abandoned, withdrawn, quashed or not confirmed. [This work will feature in our second consultative report on Implementation].

13.6 We indicate below in broad terms the likely consequences of reform:

³ App, para 6.5

- (1) We propose a Compensation Code which should operate as a single and self-contained mechanism. We believe that if Parliament were to enact such a Code it would make the rules relating to identification of interests and assessment of compensation sums far more accessible and comprehensible. That will benefit professional advisers, acquiring authorities, businesses and individuals. Clarity and lack of ambiguity should reduce time expended on interpretation, facilitate and expedite negotiated settlements and reduce the number of contentious matters to be resolved by the Lands Tribunal. A more equitable and transparent set of rules should provide claimants (both businesses and individual citizens) with compensation solutions which feel fairer and are delivered more efficiently. As a consequence, there should be a cost saving both for public authorities and for claimants who are affected by compulsory purchase proposals.

- (2) Clarification of the no-scheme rule (both as to increases and decreases in value) should assist valuers in the computation of global compensation packages by reducing the complexity of the formulae and the range of variables which need to be addressed. That should produce time and cost savings for both claimants and authorities. A focussed and narrower definition of the no-scheme rule will mean that the element of disregard in some compensation claims will be reduced and, in consequence, payments in appropriate cases may be more generous. It is impossible, however, to generalise about the overall impact of our proposals in this area except to say that more generous and transparent compensation assessment should encourage earlier settlement of claims and reduce the attendant costs.

We also believe that clarification of the rules relating to planning assumptions will simplify the certification process for local planning authorities and for the Lands Tribunal. If our suggestion relating to consolidation of the Lands Tribunal's jurisdiction in this field were to be accepted (making the Tribunal a single point of contact for appeal) we believe that would bring a measure of saving to some claimants in time and cost.

- (3) Clarification and rationalisation of the rules relating to injurious affection should ensure that the rules relating to damage caused by construction, and damage caused by use of works, will more comprehensible in modern form. Those rules relating to damage caused by construction (whether or not land has been taken) will be put on a similar footing. This should ensure more equitable treatment for claimants. There may be a case for putting all the rules on a single basis (as suggested by CPPRAG), and we specifically consult on this issue.

- (4) We seek to clarify the rules relating to disturbance. Change in this field, refining the test for relocation and replacing the "reasonable businessman" test, taken together with the changes proposed by Government should produce fairer outcomes. The proposal relating to the cost of replacing business-related buildings on relocation following severance obviously will have some financial impact but should provide benefit to business owners and the staff they employ.

- (5) A mechanism to expedite the payment of advance compensation will put acquiring authorities under some pressure but that is consistent with the Government's desire for compulsory purchase procedures to be accelerated in the interests of improved economic regeneration and for the effects of dispossession on owners to be mitigated. We anticipate that there will probably be a balancing out of costs to authorities.
 - (6) At this stage we make no proposal relating to the payment of compound interest pending completion of our more wide-ranging review in this area. There is already in place statutory mechanism for the uprating of simple interest.
 - (7) Abortive CPOs and the compensation consequences will be addressed in our Implementation report.
- 13.7 We have summarised our initial thoughts on possible impact but we specifically ask in our Consultation Questions for consultees' views on the issue.

CONSULTATION

- 13.8 The Commission hopes to publish its second Consultative Report on Implementation issues by Autumn 2002. This first report deals with the self-contained issues of Compensation: eligibility and assessment. The consultation period for this report will run in parallel with the work on the second topic. We hope at the end of this project to bring together our response to consultees' comments and our recommendations for a Unified Code in a Final Report by early 2003.
- 13.9 Consultees are invited to comment on the specific consultation questions framed in this Report and the Proposals as we have outlined them. As indicated previously we would value comment both from a legal point of view and from a practical and cost-benefit viewpoint. Details of where comments should be sent can be found on the inside front cover of this document.

APPENDIX 1

GLOSSARY- ABBREVIATIONS OF STATUTES

ENGLISH STATUTES

- '1845 Act'** – Land Clauses Consolidation Act 1845
- '1946 Act'** – Acquisition of Land (Authorisation Procedure) Act 1946
- '1961 Act'** – Land Compensation Act 1961
- '1965 Act'** – Compulsory Purchase Act 1965
- '1972 Act'** – Local Government Act 1972
- '1973 Act'** – Land Compensation Act 1973
- '1976 Act'** – Local Government (Miscellaneous Provisions) Act 1976
- '1980 Act'** – Local Government, Planning and Land Act 1980
- 'Acquisition Act'** – Acquisition of Land Act 1981
- 'Vesting Declarations Act'** – Compulsory Purchase (Vesting Declarations) Act 1981
- '1990 Act'** – Town and Country Planning Act 1990
- '1991 Act'** – Planning and Compensation Act 1991
- '1992 Act'** – Transport and Works Act 1992
- '1998 Act'** – Human Rights Act 1998

AUSTRALIAN STATUTES

- 'LAA (Cth)'** – Land Acquisition Act 1989 (Cth)
- 'LACA (Vic)'** – Land Acquisition Act 1989 (Vic)
- 'LAA (WA)'** – Land Administration Act 1997 (WA)

CANADIAN STATUTES

- 'Canadian Expropriation Act 1985'** – Expropriation Act R.S.C. 1985, c. E-21
- 'Ontario Act 1990'** - The Ontario Expropriations Act R.S.O. 1990, c. E-26

APPENDIX 2

LIST OF STATUTES CONFERRING COMPULSORY PURCHASE POWERS

Reproduced with kind permission from Butterworths. Source: Butterworths Compulsory Purchase and Compensation Service, Division B, Chapter 1.F

N.B. Except where stated, the 1961 and 1965 Acts apply to assessment of compensation.

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Local Authorities-general				
Local Government Act 1972	A principal council (s 270) A distinct council (on behalf of parish or community council)	s 121 s 125	Any purpose for which authorised to acquire land For any of the functions of a parish or community council where that council has been unable to purchase land by agreement under s 124 of the Act	
Local Government (Miscellaneous Provisions) Act 1976	A local authority (s 44)	s 13	Acquisition of 'new rights' in or over land for any purpose for which authorised to acquire land	
Agriculture, forestry and food				
Agriculture Act 1947	The Minister of Agriculture, Fisheries and Food	s 83 s 84 s 86	Agricultural research, experiment and demonstration To ensure full and efficient use of agricultural land To control the subdivision of agricultural units	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Forestry Act 1967	The Minister of Agriculture, Fisheries and Food	s 40	Land suitable for afforestation or for any purpose connected with forestry (s 39)	The procedure for making a compulsory purchase order under this Act is set out in Sch 5, Pt I, and the CPA 1965 is incorporated subject to modifications in Sch 5, Pt III
Food Act 1984	A local authority	S 110	For purposes of the Act	The power of compulsory purchase under s110 does not apply to the power to acquire an existing market undertaking under s 50 of the Act
Airports and aviation				
Civil Aviation Act 1982	The Civil Aviation Authority The Secretary of State	s 42 s 44 s 49	For the performance of its functions Power to obtain rights over land to secure safe and efficient use for civil aviation purposes etc For purposes of providing or improving any highway which is to be provided or improved in pursuance of an order under s 48(1)	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Airports Act 1986	A Relevant Airport Operator	s 59(1) s 59(3), (4)	Acquisition of land for any purpose connected with the performance of the operator's functions Applies Civil Aviation Act 1982, s 44, to any relevant airport operator	
Education				
Education Reform Act 1988	The Education Assets Board	s 201	Where a local education authority has made a disposal in contravention of s 137 of the Act consisting in the grant or disposal of any interest in land, to compulsory acquire that interest	
Further and Higher Education Act 1992	The Education Assets Board	s 40	Where a local education authority has made a disposal in contravention of s 39 of the Act consisting in the grant or disposal of any interest in land, to compulsory acquire that interest	
Education Act 1996	A local education authority	s 530	For purposes of any school or institution which is, or is to be, maintained by local education authority, or otherwise required for its purposes under Act	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Energy				
Atomic Energy Authority Act 1954	The United Kingdom Atomic Energy Authority	s 5	For the performance of its functions	
Opencast Coal Act 1958	The Coal Authority	s 4	Facilitating the working of coal by opencast operations	Compulsory rights 'orders' granted under s 4 give temporary rights of occupation and use of land
Gas Act 1965	A public gas transporter (Gas Act 1995, Sch 4, para 7(1))	s 13	Compulsory purchase of land or rights in connection with wells, boreholes and shafts	
Gas Act 1986	A public gas transporter (Gas Act 1995, Sch 3)	s 9(3) and Sch 3 (As amended by the Gas Act 1995, Sch 3)	General duty of public gas transporter set out in s 9(1)	
Electricity Act 1989	License holder	s 10 and Sch 3	For any purpose connected with carrying on its licensed activities	
Environment-al protection				
Water Resources Act 1991	The Environment Agency	s 154 s 156 s 168(4) s 182	Required by the Agency for the purposes of, or in connection with, the carrying out of its functions Acquisition of land for fisheries purposes Acquisition of land pursuant to a 'compulsory works order' (s 168(1)) Acquisition of mineral rights	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Fire service				
Fire Services Act 1947	A fire authority	s 3(5)	For purposes of its functions	
Highways and traffic				
Highways Act 1980	A highway authority, being the Secretary of State of a local highway authority	ss 239-240 s 241 s 242 s 243 s 244 s 245	Acquisition of land in connection with construction, improvements etc of highways Acquisition of land between improvement line and boundary of street Acquisition of land for execution of works in connection with certain bridges Acquisition of land for cattle grids etc Acquisition of land for road ferries Acquisition of land for buildings etc needed for discharge of functions of highway authority	s 238(1) provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement s 238 provides that acquisition may be by compulsion or by agreement

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
		s 246(1)	Acquisition of land for mitigating adverse effects of constructing or improving highway	s 238 provides that acquisition may be by compulsion or by agreement
		s 250(1)	Acquisition of rights over land by creating new rights as well as acquiring existing rights	
		s 250(2)	Acquisition of 'exchange land', where acquiring common, open space or allotment	
Road Traffic Regulations Act 1984	A local authority	s 40	For purposes of providing parking spaces	
Housing				
Housing Act 1985	A local housing authority	s 17(3)	For provision of housing accommodation under Pt II of the Act	
		s 243	Within a 'housing action area', for purposes of securing or assisting in securing the improvement of the housing accommodation in the area as a whole, the well-being of persons residing in the area, and the proper and effective management and use of that accommodation (s 239(2))	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
	A county council	s 300(3) s 29	Purchase of houses liable to be demolished or closed pursuant to order under ss 264-265 Provision of accommodation for employees of county councils	By s 29(2), a county council may acquire land 'in the same way' as local housing authority under this part of the Act (ie s 17)
Housing Associations Act 1985	A county council The housing corporation in England, or the Secretary of State in Wales (Government of Wales Act 1998, Sch 16, para 24(2))	s 34(1) s 88(1)	Acquisition of land for erection of housing by housing association, where the district council are unwilling to acquire the land For purposes of selling or leasing the land to a registered social landlord or unregistered self-build society, or itself providing dwellings or hostels	County council may exercise powers of district council under Pt II of the Housing Act 1985
Housing Act 1988	A housing action trust	s 77	For purposes of achieving its objective and performing its function	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Local Government Housing Act 1989	A local housing authority (s 100(1)) and Housing Act 1985, ss 1 and 2)	s 93	Within a 'renewal area', for purposes of improvement or repair of premises, the proper and effective management and use of housing accommodation, and the well-being of persons residing in the area (s 93(3))	
Land drainage				
Land Drainage Act 1991	An internal drainage board A district council, London borough or the Common Council of the City of London	s 62(1) s 62(2)	Any purpose in connection with performance of functions For purposes of ss 14-17 and 66 of the Act	
Military and defence				
Defence Act 1842 (For later Acts which have amended and extended these provisions, see <i>Halsbury's Statutes</i> Vol 3 (Armed Forces) Part 6 (Acquisition and Use of Land))	The Secretary of State for Defence	ss 16 and 19	Lands, buildings, or other hereditaments wanted for the service of the ordnance department, or for the defence of the realm	The ALA 1981 does not apply

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Military Lands Act 1892 (For later Acts which have extended these provisions, see <i>Halsbury's Statutes</i> Vol 3 (Armed Forces) Part 6 (Acquisition and Use of Land))	The Secretary of State for Defence	s 1(1)	For the military or naval purposes of Her Majesty's armed forces	s 2 incorporates the Lands Clauses Acts and applies the provisional order procedure
	A territorial, auxiliary and volunteer reserve association	s 1(2)	For the military purposes of Her Majesty's armed forces	s 2 incorporates the Lands Clauses Acts and applies the provisional order procedure
	A county council	s 1(3)	On behalf of TAVRA for the military purposes of Her Majesty's armed forces	ALA 1981 procedures apply by virtue of ALA 1981, s 1(2)
Civil Defence Act 1948	The Secretary of State	s 4	For purposes of civil defence	
Land Powers (Defence) Act 1958	The Secretary of State for Trade and Industry	s 13	Land for construction of oil installations for defence of the realm	Procedure set out in Sch 2
Miscellaneous				
Smallholdings and Allotments Act 1908	A borough council, district council or parish council	s 25	For providing allotments	See s 39 for procedure. The ALA 1981 is applied by ALA 1981, s 1(2)
Smallholdings and Allotments Act 1926	The district council	s 4	For providing smallholdings	Contrast the powers of a county council: see Agriculture Act 1970, ss 38(b), 48(2)

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Coast Protection Act 1949	A coast protection authority	s 14	Acquisition of land required for carrying out of coast protection work, or for protection of which it is proposed to carry put such work (s 4)	
Prison Act 1952	The Secretary of State	s 36	Acquisition of land required for the alteration, enlargement or rebuilding of a prison, or establishment of a new prison, or for any other purpose connected with the management of a prison	
London County Council (General Powers) Act 1963	A council of an Inner London borough (s 4 and the London Government Act 1963, s 1(1)(a))	s 8	A council may create and acquire such 'licences, rights or easement in, on, under or over any land' for the purposes of any street 'improvement' (as defined in s 4)	The council must make an order under s 8 which is then confirmed by the Secretary of State
City of London (Various Powers) Act 1967	The Corporation of the City of London	s 17	For provision of a city walkway, or for the extension or improvement of a city walkway	
Post Office Act 1969	The Post Office	s 55	Acquisition of land required for, or in connection with, the exercise of its powers	
Greater London Council (General Powers) Act 1989	A borough council (s 3)	s 22	For purposes of laying out or rendering suitable for a walkway any way or place, or for extending or improving a walkway	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Courts Act 1971	The Secretary of State	s 28 and Sch 3, para 3	Acquisition from local authority of premises which had been wholly or mainly used as a court which was abolished under the Act	
Slaughterhouses Act 1974	A local authority (s 34)	s 30	For purposes of Pt I of the Act (other than those of s 14)	
Refuse Disposal Amenity Act 1978	A county council or district council	s 7	Acquisition of land for any purposes of Act	
Animal Health Act 1981	A local authority (s 50)	s 55	Acquisition of land for provision of wharves for landing etc of imported or other animals, and for use for burial of carcasses etc and for any other purpose of the Act	
Industrial Development Act 1982	The Secretary of State	s 14	Acquisition of land to provide or facilitate provision of premises in any 'development area' or 'intermediate area' as defined by s 18	
Food Act 1984	A local authority	s 110	Acquisition of land for the purposes of the Act	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
National Health Service and social services				
Service Act 1977	The Secretary of State A local social services authority	s 87(1) s 87(3)	For the purposes of the Act For the purposes of the Act	
National Health Service and Community Care Act 1990	A National Health Service trust	s 5 and Sch 2, para 26	For purposes of its functions	
Pipelines				
Pipe-lines Act 1962	A person proposing to place a pipeline across land	s 11 s 12	Land for pipeline construction Rights over land for pipeline construction	For procedure and compensation see Schs 2 and 3 and CPA 1965, s 37 For compensation see s 14
Police				
Metropolitan Police Act 1886	The Police Receiver	ss 2 and 4(11)	Construction of police buildings	See Road Traffic Regulations Act 1984, s 97(5), in relation to traffic wardens

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Local Government Act 1972	A police authority	s 121	Any purpose for which authorised to acquire land	A police authority under the Police Act 1964, s 3, is deemed to be a 'principal council' for the purposes of s 121: see Local Government Act 1972, 146A(1)(b)
Ports, harbours and shipping				
Harbours Act 1964	A harbour authority	s 14 and Sch 2	A harbour revision order may confer on harbour authority power to acquire land by compulsion for purpose of its being used as the site of works, or for some other purpose of the harbour (Sch 2, para 7)	
Docks and Harbours Act 1996	A harbour authority (s 50(1) and the Harbour Act 1964, s 57(1))	s 36	References to a harbour in s14 of and Sch 2 to the Harbours Act 1964, shall include references to an 'inland clearance depot' (s 36(4))	
Transport Act 1981	Associated British Ports	s 8 and Sch 3, para 19	For purposes of its business	
Public transport				
Transport Act 1962	The British Railways Board or the British Waterways Board	s 15	For the purposes of their business	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
London Regional Transport Act 1984	London Regional Transport	s 3(9) and Sch 2, paras 4-16	For the purposes of their business	
Transport and Works Act 1992	A person authorised by a works order	s 1 and Sch1, para 3	For construction or operation of a railway, tramway, trolley vehicle system, or guided transport system	ALA 1981 does not apply
Channel Tunnel Rail Link Act 1996	The Secretary of State	ss 4 and 5	Acquisition of land in connection with provision of Channel Tunnel Rail Link	
Regional, urban and rural development				
Welsh Development Agency Act 1975	The Welsh Development Agency	s 1(7)(b)	For purposes of WDA specified in s 1(3)	S 21A and Sch 4 (both as inserted by Government of Wales Act 1998, Sch 13) define the power conferred by s 1(7)(b)
Development of Rural Wales Act 1976	The Development Board for Rural Wales	ss 4(1) and 5 (repealed, subject to transitional provisions, by the Government of Wales Act 1998, Sch 18, Pt IV)	For purposes of enabling Board to discharge its general functions under the Act	Where land is within a New Town or associated with the area of a New Town, the procedure in Sch 3, Pt III applies. In all other cases the ALA 1981 procedure applies

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Miscellaneous Financial Provisions Act 1983	The Development Commission	s 1(4), (5)	Anything conducive or incidental to the discharge of its functions	
Leasehold Reform, Housing and Urban Development Act 1993	The Urban Regeneration Agency (s 158) (known as 'English Partnerships')	s 162(1)	For purpose of securing regeneration of land in England	Sch 20 deals with modifications to the ALA 1981, and with various other matters relating to land and rights over land
Regional Development Agencies Act 1998	A regional development agency (s 41)	s 20	For the purposes of an RDA as set out in s 4 of the Act, or for purposes 'incidental' thereto (s 20(1))	
Telecommunications				
Telecommunications Act 1984	A public telecommunications operator authorised by the Secretary of State	s 34	Required by a Public Telecommunications operator in connection with establishment or running of system	
Town and country planning				
National Parks and Access to Country side Act 1949	A local planning authority for a National Park	s 12(4) s 13(8)	Provision of accommodation, meals, refreshments, camping spaces and parking places Improvement of waterways for purposes of open-air recreation	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
	The Nature Conservancy Council for England or the Country side Council for Wales	ss 17 and 18	Establishment and maintenance of nature reserves	
	A local planning authority	s 76	Public access to land for open-air recreation	
	The Secretary of State	s 77	Public access to land for open-air recreation	
	A local planning authority	s 89(5)	Planting of trees	
	A local authority	s 89(5)	Treatment of derelict land	
Caravan Sites and Control of Development Act 1960	A local authority	s 24(5)	To provide sites where caravans may be bought	
Countryside Act 1968	The Countryside Agency or the Countryside Council for Wales	s 4(3)(a)	To make and carry out, or promote the carrying out, for any experimental scheme designed to facilitate the enjoyment of the countryside etc	
	A local authority	s 7(4)	To provide a country park	
		s 9(5)	Acquisition of land near common land required in the interests of persons resorting to the common land for open air recreation	
		s 10(4)	To provide camping sites for holiday and recreation purposes	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Ancient Monuments and Archaeological Areas Act 1979	The Secretary of State	s 10	Acquisition of ancient monument for purposes of its preservation	
Local Government Planning and Land Act 1980	An urban development corporation	s 142	Land in urban development area; land adjacent to such an area if required for purposes connected with discharge of function; for provision of services in connection with discharge of functions	
	A local highway authority	s 143	Construction or improvement of road needed in connection with urban development area	
New Towns Act 1981	A New Town development corporation	s 10	Land within area of New Town; land adjacent to such an area if required for purposes connected with discharge of functions; for provision of services for the purposes of the New Town	The procedure for making a compulsory purchase order under this Act is set out in Sch 4, Pt I
	A local highway authority	s 11(1)	Construction or improvement of road needed in connection with New Town	The procedure for making a compulsory purchase order under this Act is set out in Sch 4, Pt I and II

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
	The Secretary of State	s 11(2)	Construction or improvement of road needed in connection with New Town	The procedure for making a compulsory purchase order under this Act is set out in Sch 4, Pt III
Town and Country Planning Act 1990	A local authority (s 226(8)) or a joint planning board (s 244)	s 226	Acquisition of land which is suitable for and required in order to carrying out of development etc, or is required in order to achieve proper planning of area	
	The Secretary of State	s 165	Acquisition of land where a blight notice has been served in respect of land, the land falls within paras 7-9 of Sch 13, and the relevant development corporation for the New Town or the relevant urban development corporation, has not been established	
		s 228	Acquisition of land necessary for the 'public service' (s 228(5)); or for the public service and to meet proper planning of area or to secure best of most economic development or use of land	

Authorising Act	Body with compulsory purchase powers	Section	Purpose	Comment
Planning (Listed Buildings and Conservation Areas) Act 1990	A county council, county borough, district council, London borough council, English Heritage, joint planning board or Broads Authority (the appropriate authority s 47(7)) The Secretary of State	s 47(1)(a) s 47(1)(b)	If reasonable steps are not being taken to preserve a listed building If reasonable steps are not being taken to preserve a listed building	
Environment Act 1995	A National Park authority	s 65(7) and Sch 8 s 70 and Sch 9	Various Various	Sch 8 gives a National Park authority various powers in relation, inter alia, to land Sch 8 gives a National Park authority various powers in relation, inter alia, to land
Water, sewerage and rivers				
Water Industry Act 1991	A water undertaker or sewerage undertaker (s 219(1))	s 155 s 188 and Sch 14	Required by undertaker for purposes of, or in connection with, the carrying out of its functions Acquisition of mineral rights	In relation to minerals etc Sch 14 has effect instead of the ALA 1981, Sch 2
Transport and Works Act 1992	A person authorised by a works order	s 3 and Sch 1, para 3	Construction of an inland waterway, or the carrying out of works which interfere with rights of navigation	ALA 1981 does not apply

APPENDIX 3

SELECTED EXTRACTS FROM ENGLISH STATUTES RELATING TO COMPENSATION

LAND COMPENSATION ACT 1961

5 Rules for assessing compensation

Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:

- (1) No allowance shall be made on account of the acquisition being compulsory:
- (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise:
- (3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from . . .¹ the requirements of any authority possessing compulsory purchase powers:²
- (4) Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account:
- (5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:
- (6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land:

¹ The words “the special needs of a particular purchaser” were deleted by the Planning and Compensation Act 1991, Sch 15, para 1.

² “Authority possessing compulsory purchase powers” means “any person or body of persons who could be or have been authorised to acquire an interest in land compulsorily...”: s 39(1).

and the following provisions of this Part of this Act shall have effect with respect to the assessment.

6 Disregard of actual or prospective development in certain cases

(1) Subject to section eight of this Act,³ no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if-

- (a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of the land; and
- (b) (where the circumstances are those described in one or more of paragraphs 2 to 4B in the said first column) the area or areas referred to in that paragraph or those paragraphs had not been defined or designated as therein mentioned.

(2) The provisions of Part II of the First Schedule to this Act shall have effect with regard to paragraph 3 and so far as applicable paragraph 3A of Part I of that Schedule and the provisions of Part III of that Schedule shall have effect with regard to paragraph 4A.

(3) In this section and in the First Schedule to this Act-"the land authorised to be acquired"-

- (a) in relation to a compulsory acquisition authorised by a compulsory purchase order or a special enactment, means the aggregate of the land comprised in that authorisation, and
- (b) in relation to a compulsory acquisition not so authorised but effected under powers exercisable by virtue of any enactment for defence purposes, means the aggregate of the land comprised in the notice to treat and of any land contiguous or adjacent thereto which is comprised in any other notice to treat served under the like powers not more than one month before and not more than one month after the date of service of that notice;

"defence purposes" has the same meaning as in the Land Powers (Defence) Act 1958;

and any reference to development of any land shall be construed as including a reference to the clearing of that land.

7 Effect of certain actual or prospective development of adjacent land in same ownership

(1) Subject to section eight of this Act, where, on the date of service of the notice to treat, the person entitled to the relevant interest is also entitled in the same

³ Section 8 provides for adjustment, on a subsequent acquisition of the adjacent land, of any allowance for increase or decrease in value made on the earlier acquisition.

capacity to an interest in other land contiguous or adjacent to the relevant land, there shall be deducted from the amount of the compensation which would be payable apart from this section the amount (if any) of such an increase in the value of the interest in that other land as is mentioned in subsection (2) of this section.

(2) The said increase is such as, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the relevant development as would not have been likely to be carried out if the conditions mentioned in paragraphs (a) and (b) of subsection (1) of section six of this Act had been satisfied; and the relevant development for the purposes of this subsection is, in relation to the circumstances described in any of the said paragraphs, that mentioned in relation thereto in the second column of the said Part I, but modified, as respects the prospect of any development, by the omission of the words "other than the relevant land", wherever they occur.

8 Subsequent acquisition of adjacent land and acquisition governed by enactment corresponding to s 7

[Not reproduced]

9 Disregard of depreciation due to prospect of acquisition by authority possessing compulsory purchase powers

No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of . . . allocation of other particulars contained in the current development plan, or by any other means) an indication had been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

14 Assumptions as to planning permission

(1) For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections fifteen and sixteen of this Act as are applicable to the relevant land or any part thereof shall [(subject to subsection (3A) of this section)] be made in ascertaining the value of the relevant interest.

(2) Any planning permission which is to be assumed in accordance with any of the provisions of those sections is in addition to any planning permission which may be in force at the date of service of the notice to treat.

(3) Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed.

[(3A) In determining—

(a) for the purpose referred to in subsection (1) of this section whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land; or

- (b) whether any of the assumptions mentioned in section 16 of this Act (but not section 15) are applicable to the relevant land or any part thereof,

regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part III of this Act.]

(4) For the purposes of any reference in this section, or in section fifteen of this Act, to planning permission which is in force on the date of service of the notice to treat, it is immaterial whether the planning permission in question was granted—

- (a) unconditionally or subject to conditions, or
- (b) in respect of the land in question taken by itself or in respect of an area including that land, or
- (c) on an ordinary application or on an outline application or by virtue of a development order,

or is planning permission which, in accordance with any direction or provision given or made by or under any enactment, is deemed to have been granted.

[(5) If, in a case where—

- (a) the relevant land is to be acquired for use for or in connection with the construction of a highway, or
- (b) the use of the relevant land for or in connection with the construction of a highway is being considered by a highway authority, a determination mentioned in subsection (7) of this section falls to be made, that determination shall be made on the following assumption.

(6) The assumption is that, if the relevant land were not so used, no highway would be constructed to meet the same or substantially the same need as the highway referred to in paragraph (a) or (b) of subsection (5) of this section would have been constructed to meet.

(7) The determinations referred to in subsection (5) of this section are—

- (a) a determination, for the purpose of assessing compensation in respect of any compulsory acquisition, whether planning permission might reasonably have been expected to be granted for any development if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers, and
- (b) a determination under section 17 of this Act as to the development for which, in the opinion of the local planning authority, planning permission would or would not have been granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.

- (8) The references in subsections (5) and (6) of this section to the construction of a highway include its alteration or improvement.]⁴

15 Assumptions not directly derived from development plans

- (1) In a case where—
- (a) the relevant interest is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for development of the relevant land or part thereof, and
 - (b) on the date of service of the notice to treat there is not in force planning permission for that development,

it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, such as would permit development thereof in accordance with the proposals of the acquiring authority.

- (2) For the purposes of paragraph (b) of the preceding subsection, no account shall be taken of any planning permission so granted as not to enure (while the permission remains in force) for the benefit of the land and of all persons for the time being interested therein.

[(3) Subject to subsection (4) of this section, it shall be assumed that, in respect of the relevant land or any part of it, planning permission would be granted—

- (a) subject to the condition set out in Schedule 10 to the Town and Country Planning Act 1990, for any development of a class specified in paragraph 1 of Schedule 3 to that Act; and
- (b) for any development of a class specified in paragraph 2 of Schedule 3 to that Act.]

(4) Notwithstanding anything in subsection (3) of this section—

- (a), (b) [. . .]
- (c) where, at any time before the said date, an order was made under section twenty-six of the said Act of 1947, in respect of the relevant land or any part thereof, requiring the removal of any building or the discontinuance of any use, and compensation became payable in respect of that order under section twenty-seven of that Act, it shall not by virtue of the said subsection (3) be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for the rebuilding of that building or the resumption of that use.

⁴ Subsections 14(5)-(8) were added by the Planning and Compensation Act 1991, s 64, following the decision of the House of Lords in *Margate Corp v Devotwill* [1970] 3 All ER 864: see App 5, para A.80 below.

(5) Where a certificate is issued under the provisions of Part III of this Act, it shall be assumed that any planning permission which, according to the certificate, [would have been] granted in respect of the relevant land or part thereof, [if it were not proposed to be acquired by any authority possessing compulsory purchase powers] would be so granted, but, where any conditions are, in accordance with those provisions, specified in the certificate, only subject to those conditions and, if any future time is so specified, only at that time.

16 Special assumptions in respect of certain land comprised in development plans

(1) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of a site defined in the current development plan as the site of proposed development of a description specified in relation thereto in the plan, it shall be assumed that planning permission would be granted for that development.

(2) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which—

- (a) is development for the purposes of that use of the relevant land or that part thereof, and
- (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.

(3) – (5) [Not reproduced]

(6) Where in accordance with any of the preceding subsections it is to be assumed that planning permission would be granted as therein mentioned—

- (a) the assumption shall be that planning permission would be so granted subject to such conditions (if any) as, in the circumstances mentioned in the subsection in question, might reasonably be expected to be imposed by the authority granting the permission, and
- (b) if, in accordance with any map or statement comprised in the current development plan, it is indicated that any such planning permission would be granted only at a future time, then (without prejudice to the preceding paragraph) the assumption shall be that the planning permission in question would be granted at the time when, in accordance with the indications in the plan, that permission might reasonably be expected to be granted.

(7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.

(8) In this section “land subject to comprehensive development” means land which consists or forms part of an area defined in the current development plan as an area of comprehensive development.

Part III Certification by planning authorities of appropriate alternative development

17 Certification of appropriate alternative development

[(1) Where an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers, either of the parties directly concerned may, subject to subsection (2) of this section, apply to the local planning authority for a certificate under this section.]

(2) [If the authority proposing to acquire the interest] have served a notice to treat in respect thereof, or an agreement has been made for the sale thereof to that authority, and a reference has been made to the Lands Tribunal to determine the amount of the compensation payable in respect of that interest, no application for a certificate under this section shall be made by either of the parties directly concerned after the date of that reference except either—

- (a) with the consent in writing of the other of those parties, or
- (b) with the leave of the Lands Tribunal.

(3) An application for a certificate under this section—

- (a) shall state whether or not there are, in the applicant’s opinion, any classes of development which, either immediately or at a future time, would be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers and, if so, shall specify the classes of development and the times at which they would be so appropriate;
- (b) shall state the applicant’s grounds for holding that opinion; and
- (c) shall be accompanied by a statement specifying the date on which a copy of the application has been or will be served on the other party directly concerned.

(4) Where an application is made to the local planning authority for a certificate under this section in respect of an interest in land, the local planning authority shall, not earlier than twenty-one days after the date specified in the statement mentioned in paragraph (c) of subsection (3) of this section, issue to the applicant a certificate stating either of the following to be the opinion of the local planning authority regarding the grant of planning permission in respect of the land in question, if it were not proposed to be acquired by an authority possessing compulsory purchase powers, that is to say—

- [(a) that planning permission would have been granted for development of one or more classes specified in the certificate (whether specified in the application or not) and for any development for which the land is to be acquired, but would not have been granted for any other development;
- or

- (b) that planning permission would have been granted for any development for which the land is to be acquired, but would not have been granted for any other development,

and for the purposes of this subsection development is development for which the land is to be acquired if the land is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for that development.]

(5) Where, in the opinion of the local planning authority, planning permission would have been granted as mentioned in paragraph (a) of subsection (4) of this section, but would only have been granted subject to conditions, or at a future time, or both subject to conditions and at a future time, the certificate shall specify those conditions, or that future time, or both, as the case may be, in addition to the other matters required to be contained in the certificate.

(6) For the purposes of subsection (5) of this section, a local planning authority may formulate general requirements applicable to such classes of case as may be described therein; and any conditions required to be specified in the certificate in accordance with that subsection may, if it appears to the local planning authority to be convenient to do so, be specified by reference to those requirements, subject to such special modifications thereof (if any) as may be set out in the certificate.

(7) In determining, for the purposes of the issue of a certificate under this section, whether planning permission for any particular class of development would have been granted in respect of any land, the local planning authority shall not treat development of that class as development for which planning permission would have been refused by reason only that it would have involved development of the land in question (or of that land together with other land) otherwise than in accordance with the provisions of the development plan relating thereto.

(8) [. . .]

(9) On issuing to one of the parties directly concerned a certificate under this section in respect of an interest in land, the local planning authority shall serve a copy of the certificate on the other of those parties.

[(9A) In assessing the compensation payable to any person in respect of any compulsory acquisition, there shall be taken into account any expenses reasonably incurred by him in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 of this Act where any of the issues on the appeal are determined in his favour).]

(10) – (11) [Not reproduced]

18 Appeals against certificates under s 17

(1) Where the local planning authority have issued a certificate under section seventeen of this Act in respect of an interest in land,—

- (a) the person for the time being entitled to that interest, or
- (b) any authority possessing compulsory purchase powers by whom that interest is proposed to be acquired,

may appeal to the Minister against that certificate.

(2) On any appeal under this section against a certificate the Minister shall consider the matters to which the certificate relates as if the application for a certificate under section seventeen of this Act had been made to him in the first instance, and shall either confirm the certificate, or vary it, or cancel it and issue a different certificate in its place, as he may consider appropriate.

(3) Before determining any such appeal the Minister shall, if any such person or authority as is mentioned in paragraph (a) or paragraph (b) of subsection (1) of this section so desires, afford to each such person or authority and to the local planning authority an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose.

(4) Where an application is made for a certificate under section seventeen of this Act, and at the expiry of the time prescribed by a development order for the issue thereof (or, if an extended period is at any time agreed upon in writing by the parties and the local planning authority, at the end of that period) no certificate has been issued by the local planning authority in accordance with that section, the preceding provisions of this section shall apply as if the local planning authority had issued such a certificate containing such a statement as is mentioned in paragraph (b) of subsection (4) of that section.

(19) – (20) [Not reproduced]

21 Proceedings for challenging validity of decision on appeal under s 18

(1) If any person aggrieved by a decision of the Minister under section eighteen of this Act or the local planning authority desires to question the validity of that decision on the ground that it is not within the powers of this Act or that any of the requirements of this Act or of a development order or of [the Tribunals and Inquiries Act 1992 (or any enactment replaced thereby)], or rules made thereunder have not been complied with in relation to it, that person or authority may, within six weeks from the date of the decision, make an application to the High Court, and the High Court—

- (a) may by interim order suspend the operation of the decision until the determination of the proceedings;
- (b) is satisfied that the decision is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with the said requirements, may quash the decision.

(2) Subject to subsection (1) of this section, the validity of a decision on an appeal under section eighteen of this Act shall not be questioned in any legal proceedings whatsoever.

(3) Nothing in this section shall affect the exercise of any jurisdiction of any court in respect of any refusal or failure on the part of the Minister to give a decision on an appeal under section eighteen of this Act.

22 Interpretation of Part III

(1) In this Part of this Act “the parties directly concerned”, in relation to an interest in land, means the person entitled to the interest and the authority by whom it is proposed to be acquired.

(2) For the purposes of sections seventeen and eighteen of this Act, an interest in land shall be taken to be an interest proposed to be acquired by an authority possessing compulsory purchase powers in the following (but no other) circumstances, that is to say—

- (a) where, for the purpose of a compulsory acquisition by that authority of land consisting of or including land in which that interest subsists, a notice required to be published or served in connection with that acquisition, either by an Act or by any Standing Order of either House of Parliament relating to petitions for private bills, has been published or served in accordance with that Act or Order; or
- (b) where a notice requiring the purchase of that interest has been served under any enactment, and in accordance with that enactment that authority are to be deemed to have served a notice to treat in respect of that interest; or
- (c) where an offer in writing has been made by or on behalf of that authority to negotiate for the purchase of that interest.

First Schedule

ACTUAL OR PROSPECTIVE DEVELOPMENT RELEVANT FOR PURPOSES OF SECTIONS 6 & 7

PART I DESCRIPTION OF DEVELOPMENT

<i>Case</i>	<i>Development</i>
1. Where the acquisition is for purposes involving development of any of the land authorised to be acquired.	Development of any of the land authorised to be acquired, other than the relevant land, being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired.
2. Where any of the relevant land forms part of an area defined in the current development plan as an area of comprehensive development.	Development of any land in that area, other than the relevant land, in the course of the development or redevelopment of the area in accordance with the plan.
3. Where on the date of service of the notice to treat any of the relevant land forms part of an area designated as the site of a new town by an order under the New Towns Act 1965 .	Development of any land in that area, other than the relevant land, in the course of the development of that area as a new town.
3A. Where on the date of service of notice to treat any of the relevant land forms part of an area designated as an extension of the site of a new town by an order under the New Towns Act 1965 becoming operative after the date of the commencement of New Towns Act 1966.	Development of any land included in that area, other than the relevant land, in the course of the development of that area as part of a new town.
4. Where any of the relevant land forms part of an area defined in the current development plan as an area of town development.	Development of any land in that area, other than the relevant land, in the course of town development within the meaning of the Town Development Act 1952.
4A. Where any of the relevant land forms part of an area designated as an urban development area by an order under section 134 of the Local Government, Planning and Land Act 1980.	Development of any land other than the relevant land, in the course of the development or redevelopment of that area as an urban development area.
4B. Where any of the relevant land forms part of a housing action trust area established under Part III of the Housing Act 1988.	Development of any land other than the relevant land in the course of the development or re-development of the area as a housing action trust area.

[Part II and III of the First Schedule contain special provisions, respectively, for New Towns and Urban Development Areas]

COMPULSORY PURCHASE ACT 1965

7 Measure of compensation in case of severance

In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.

10 Further provision as to compensation for injurious affection

(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.

(2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds.

(3) Where this Part of this Act applies by virtue of [Part IX of the Town and Country Planning Act 1990] reference in this section to the acquiring authority shall be construed in accordance with [section 245(4)(b) of that Act].

20 Tenants at will etc

(1) If any of the land subject to compulsory purchase is in the possession of a person having no greater interest in the land than as tenant for a year or from year to year, and if that person is required to give up possession of any land so occupied by him before the expiration of his term or interest in the land, he shall be entitled to compensation for the value of his unexpired term or interest in the land, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain.

(2) If a part only of such land is required, he shall also be entitled to compensation for the damage done to him [by severing] land held by him or otherwise injuriously affecting it.

(3) – (6) [Not reproduced]

LAND COMPENSATION ACT 1973, PART I: COMPENSATION FOR DEPRECIATION CAUSED BY USE OF PUBLIC WORKS

1 Right to compensation

(1) Where the value of an interest in land is depreciated by physical factors caused by the use of public works, then, if—

- (a) the interest qualifies for compensation under this Part of this Act; and
- (b) the person entitled to the interest makes a claim [after the time provided] by and otherwise in accordance with this Part of this Act,

compensation for that depreciation shall, subject to the provisions of this Part of this Act, be payable by the responsible authority to the person making the claim (hereafter referred to as “the claimant”).

(2) The physical factors mentioned in subsection (1) above are noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance.

(3) The public works mentioned in subsection (1) above are—

- (a) any highway;
- (b) any aerodrome; and
- (c) any works or land (not being a highway or aerodrome) provided or used in the exercise of statutory powers.

(4) The responsible authority mentioned in subsection (1) above is, in relation to a highway, the appropriate highway authority and, in relation to other public works, the person managing those works.

(5) Physical factors caused by an aircraft arriving at or departing from an aerodrome shall be treated as caused by the use of the aerodrome whether or not the aircraft is within the boundaries of the aerodrome; but, save as aforesaid, the source of the physical factors must be situated on or in the public works the use of which is alleged to be their cause.

(6) Compensation shall not be payable under this Part of this Act in respect of the physical factors caused by the use of any public works other than a highway unless immunity from actions for nuisance in respect of that use is conferred (whether expressly or by implication) by an enactment relating to those works or, in the case of an aerodrome and physical factors caused by aircraft, the aerodrome is one to which [section 77(2) of the Civil Aviation Act 1982] (immunity from actions for nuisance) for the time being applies.

(7) Compensation shall not be payable under this Part of this Act in respect of physical factors caused by accidents involving vehicles on a highway or accidents involving aircraft.

(8) Compensation shall not be payable under this Part of this Act on any claim unless the relevant date in relation to the claim falls on or after 17th October 1969.

(9) Subject to section 9 below, “the relevant date” in this Part of this Act means—

- (a) in relation to a claim in respect of a highway, the date on which it was first open to public traffic;
- (b) in relation to a claim in respect of other public works, the date on which they were first used after completion.

2 Interests qualifying for compensation

(1) An interest qualifies for compensation under this Part of this Act if it was acquired by the claimant before the relevant date in relation to the claim and the requirements of subsection (2) or, as the case may be, subsection (3) below are satisfied on the date on which notice of the claim for compensation in respect of that interest is served.

(2) If and so far as the interest is in land which is a dwelling, the said requirements are—

- (a) that the interest is an owner’s interest; and
- (b) where the interest carries the right to occupy the land, that the land is occupied by the claimant in right of that interest as his residence.

(3) If and so far as the interest is not in such land as aforesaid, the said requirements are—

- (a) that the interest is that of an owner-occupier; and
- (b) that the land is or forms part of either—
 - (i) a hereditament the annual value of which does not exceed the prescribed amount; or
 - (ii) an agricultural unit.

(4) In this section “owner’s interest” in relation to any land, means the legal fee simple therein or a tenancy thereof granted or extended for a term of years certain of which, on the date of service of the notice of claim in respect thereof, not less than three years remain unexpired.

(5) In this section “owner-occupier”, in relation to land in a hereditament, means a person who occupies the whole or a substantial part of the land in right of an owner’s interest therein and, in relation to land in an agricultural unit, means a person who occupies the whole of that unit and is entitled, while so occupying it, to an owner’s interest in the whole or any part of that land.

(6) In this section “the prescribed amount” means the amount for the time being prescribed for the purposes of [section 149(3)(a) of the Town and Country Planning Act 1990] (interests qualifying for protection under planning blight provisions) and “annual value” and “hereditament” have the meanings given in [section 171] of that Act taking references to the date of service of a notice under [section 150] of that Act as references to the date on which notice of the claim is served.

(7) This section has effect subject to sections 10(4), 11 and 12 below.

(8) . . .

3 Claims

(1) A claim under this Part of this Act shall be made by serving on the responsible authority a notice containing particulars of—

- (a) the land in respect of which the claim is made;
- (b) the claimant's interest and the date on which, and the manner in which, it was acquired;
- (c) the claimant's occupation of the land (except where the interest qualifies for compensation without occupation);
- (d) any other interests in the land so far as known to the claimant;
- (e) the public works to which the claim relates;
- (f) the amount of compensation claimed;
- (g) any land contiguous or adjacent to the land in respect of which the claim is made, being land to which the claimant was entitled in the same capacity (within the meaning of section 6 below) on the relevant date.

(2) Subject to the provisions of this section and of sections 12 and 14 below, no claim shall be made [before the expiration of twelve months from the relevant date; and the day next following the expiration of the said twelve months is in this Part of this Act referred to as "the first claim day".]

(3) Subsection (2) above shall not preclude the making of a claim in respect of an interest in land before [the first claim day] if—

- (a) the claimant has during the said twelve months made a contract for disposing of that interest or (in so far as the interest is in land which is not a dwelling) for the grant of a tenancy of that land; and
- (b) the claim is made before the interest is disposed of or the tenancy is granted;

but compensation shall not be payable before [the first claim day] on any claim made by virtue of this subsection.

(4) Where notice of a claim has been served on a responsible authority, any person authorised by that authority may, on giving reasonable notice, enter the land to which the claim relates for the purpose of surveying it and ascertaining its value in connection with the claim; and any person who wilfully obstructs a person in the exercise of the powers conferred by this subsection shall be guilty of an offence and liable on summary conviction to a fine not exceeding [level 1 on the standard scale].

(5) Where compensation is payable by a responsible authority on a claim there shall be payable by the authority, in addition to the compensation, any reasonable

valuation or legal expenses incurred by the claimant for the purposes of the preparation and prosecution of the claim; but this subsection is without prejudice to the power of the Lands Tribunal . . . in respect of the costs . . . of proceedings before the Tribunal by virtue of section 16 below.

4 Assessment of compensation: general provisions

(1) The compensation payable on any claim shall be assessed by reference to prices current on [the first claim day].

(2) In assessing depreciation due to the physical factors caused by the use of any public works, account shall be taken of the use of those works as it exists on [the first claim day] and of any intensification that may then be reasonably expected of the use of those works in the state in which they are on that date.

(3) In assessing the extent of the depreciation there shall be taken into account the benefit of any relevant works—

(a) which have been carried out, or in respect of which a grant has been paid, under section 20 below, section 15 of the Airports Authority Act 1965 [section 29A of the Civil Aviation Act 1971] [, section 79 of the Civil Aviation Act 1982] or any corresponding local enactment [or under any provision of a scheme operated by a person managing an aerodrome which provides for the payment of sound-proofing grants in respect of buildings near the aerodrome];

(b) which have been carried out under section 23 or 27 below;

and it shall be assumed that any relevant works which could be or could have been carried out, or in respect of which a grant could be or could have been paid, under any of the provisions mentioned in paragraph (a) above have been carried out but, in a case where the authority having functions under that provision have a discretion whether or not to carry out the works or pay the grant, only if they have undertaken to do so.

[In paragraph (a) above “sound-proofing grants”, in relation to any buildings, means grants towards the cost of insulating those buildings or parts of those buildings against noise.]

(4) The value of the interest in respect of which the claim is made shall be assessed—

(a) subject to subsection (5) below, by reference to the nature of the interest and the condition of the land as it subsisted on the date of service of notice of the claim;

(b) subject to section 5 below, in accordance with rules (2) to (4) of the rules set out in section 5 of the Land Compensation Act 1961;

(c) if the interest is subject to a mortgage or to a contract of sale or to a contract made after the relevant date for the grant of a tenancy, as if it were not subject to the mortgage or contract.

(5) In assessing the value of the interest in respect of which the claim is made there shall be left out of account any part of that value which is attributable to—

(a) any building, or improvement or extension of a building, on the land if the building or, as the case may be, the building as improved or extended, was first occupied after the relevant date; and

(b) any change in the use of the land made after that date.

(6) . . .

5 Assessment of compensation: assumptions as to planning permission

(1) The following assumptions shall be made in assessing the value of the interest in respect of which the claim is made.

[(2) Subject to subsection (3) below, it shall be assumed that, in respect of the land in which the interest subsists (“the relevant land”) or any part of it, planning permission would be granted—

(a) subject to the condition set out in Schedule 10 to the Town and Country Planning Act 1990, for any development of a class specified in paragraph 1 of Schedule 3 to that Act; and

(b) for any development of a class specified in paragraph 2 of Schedule 3 to that Act.]

(3) Notwithstanding subsection (2) above—

(a), (b) . . .

(c) where an order has been made under [section 102 of or paragraph 1 of Schedule 9 to the said Act of 1990], in respect of the relevant land or any part thereof, requiring the removal of any building or the discontinuance of any use, and compensation has become payable in respect of that order under [section 115] of that Act, it shall not by virtue of the said subsection (2) be assumed that planning permission would be granted, in respect of the relevant land or any part thereof, as the case may be, for the rebuilding of that building or the resumption of that use.

(4) It shall be assumed that planning permission would not be granted in respect of the relevant land or any part thereof for any development other than such development as is mentioned in subsection (2) above; and, if planning permission has been granted in respect of the relevant land or any part thereof for such other development, it shall be assumed that the planning permission has not been granted in so far as it relates to development that has not been carried out.

(5) In this section any expression which is also used in [the said Act of 1990] has the same meaning as in that Act and references to any provision of that Act include references to any corresponding provision previously in force.

(6) . . .

6 Reduction of compensation where land is benefited

(1) The compensation payable on a claim shall be reduced by an amount equal to any increase in the value of—

- (a) the claimant's interest in the land in respect of which the claim is made; and
- (b) any interest in other land contiguous or adjacent to the land mentioned in paragraph (a) above to which the claimant was entitled in the same capacity on the relevant date,

which is attributable to the existence of or the use or prospective use of the public works to which the claim relates.

(2) Sections 4 and 5 above shall not apply to the assessment, for the purposes of subsection (1) above, of the value of the interest mentioned in paragraph (a) of that subsection.

(3) Where, for the purpose of assessing compensation on a claim in respect of any interest in land, an increase in the value of an interest in other land has been taken into account under subsection (1) above, then, in connection with any subsequent acquisition to which this subsection applies, that increase shall not be left out of account by virtue of section 6 of the Land Compensation Act 1961 or taken into account by virtue of section 7 of that Act or any corresponding enactment, in so far as it was taken into account in connection with that claim.

(4) Subsection (3) above applies to any subsequent acquisition, not being an acquisition of the land in respect of which the claim is made, where either—

- (a) the interest acquired by the subsequent acquisition is the same as the interest previously taken into account (whether the acquisition extends to the whole of the land in which that interest previously subsisted or only to part of that land); or
- (b) the person entitled to the interest acquired is, or directly or indirectly derives title to that interest from, the person who at the time of the claim mentioned in that subsection was entitled to the interest previously taken into account;

and in this subsection "the interest previously taken into account" means the interest the increased value of which was taken into account as mentioned in the said subsection (3).

(5) For the purposes of this section a person entitled to two interests in land shall be taken to be entitled to them in the same capacity if, but only if, he is entitled—

- (a) to both of them beneficially; or
- (b) to both of them as trustee of one particular trust; or
- (c) to both of them as personal representative of one particular person;

and in this section references to a person deriving title from another person include references to any successor in title of that other person.

(6) In subsection (3) above “corresponding enactment” has the same meaning as in section 8 of the said Act of 1961.

(7) . . .

7 Exclusion of minimal compensation

Compensation shall not be payable on any claim unless the amount of the compensation exceeds £50.

8 Other restrictions on compensation

(1) Where a claim has been made in respect of depreciation of the value of an interest in land caused by the use of any public works and compensation has been paid or is payable on that claim, compensation shall not be payable on any subsequent claim in relation to the same works and the same land or any part thereof (whether in respect of the same or a different interest) except that, in the case of land which is a dwelling, this subsection shall not preclude the payment of compensation both on a claim in respect of the fee simple and on a claim in respect of a tenancy.

(2) Where a person is entitled to compensation in respect of the acquisition of an interest in land by an authority possessing compulsory purchase powers, or would be so entitled if the acquisition were compulsory, and—

- (a) the land is acquired for the purposes of any public works; and
- (b) that person retains land which, in relation to the land acquired, constitutes other land or lands within the meaning of section 63 of the Lands Clauses Consolidation Act 1845 or section 7 of the Compulsory Purchase Act 1965 (compensation for acquisition to include compensation for injurious affection of other land retained),

then, whether or not any sum is paid or payable in respect of injurious affection of the land retained, compensation shall not be payable under this Part of this Act on any claim in relation to those works made after the date of service of the notice to treat (or, if the acquisition is by agreement, the date of the agreement) in respect of any interest in the land retained.

(3) Subsection (2) above applies whether the acquisition is before, on or after the date on which this Part of this Act comes into force (hereafter referred to as “the commencement date”) and, where it is on or after that date, the public works for the purposes of which the land is acquired shall be taken to be those specified in the relevant particulars registered under subsection (4) below.

(4) Where on or after the commencement date an authority possessing compulsory purchase powers acquires land for the purposes of any public works and the person from whom the land is acquired retains land which, in relation to the land acquired, constitutes other land or lands within the meaning of the sections mentioned in subsection (2) above, the authority shall deposit particulars of the land retained and the nature and extent of those works with the council of the district or London borough [or Welsh county or county borough] in which the land retained is situated; . . .

[(4A) Any particulars deposited pursuant to subsection (4) above shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the council with whom any such particulars are deposited shall be treated as the originating authority as respects the charge thereby constituted.]

(5) In a case in which compensation for injurious affection fell or falls to be assessed otherwise than in accordance with section 44 below, subsection (2) above shall not preclude the payment of compensation under this Part of this Act in respect of depreciation by public works so far as situated elsewhere than on the land acquired.

(6) Where after a claim has been made in respect of any interest in land the whole or part of the land in which that interest subsists is compulsorily acquired, then, if—

- (a) the value of that land has been diminished by the public works to which the claim relates; but
- (b) the compensation in respect of the compulsory acquisition falls to be assessed without regard to the diminution,

the compensation in respect of the acquisition shall be reduced by an amount equal to the compensation paid or payable on the claim or, if the acquisition extends only to part of the land, to so much of the last-mentioned compensation as is attributable to that part.

(7) Without prejudice to the foregoing provisions of this section, compensation shall not be payable in respect of the same depreciation both under this Part of this Act and under any other enactment.

(8) . . .

9 Alterations to public works and changes of use

(1) This section has effect where, whether before, on or after the commencement date—

- (a) the carriageway of a highway has been altered after the highway has been open to public traffic;
- (b) any public works other than a highway have been reconstructed, extended or otherwise altered after they have been first used; or
- (c) there has been a change of use in respect of any public works other than a highway or aerodrome.

(2) If and so far as a claim in respect of the highway or other public works relates to depreciation that would not have been caused but for the alterations or change of use, this Part of this Act shall, subject to subsection (3) below, have effect in relation to the claim as if the relevant date (instead of being the date specified in section 1(9) above) were—

- (a) the date on which the highway was first open to public traffic after completion of the alterations to the carriageway;

- (b) the date on which the other public works were first used after completion of the alterations; or
- (c) the date of the change of use,

as the case may be.

(3) Subsection (2) above shall not by virtue of any alterations to an aerodrome apply to a claim in respect of physical factors caused by aircraft unless the alterations are runway or apron alterations.

(4) Where a claim relates to such depreciation as is mentioned in subsection (2) above the notice of claim shall specify, in addition to the matters mentioned in section 3 above, the alterations or change of use alleged to give rise to the depreciation; and if and so far as the claim relates to such depreciation—

- (a) section 6 above shall have effect as if the increase in value to be taken into account were any increase that it would not have been caused but for the alterations or change of use in question,
- (b) subsection (1) of section 8 above shall not preclude the payment of compensation unless the previous claim was in respect of depreciation that would not have been caused but for the same alterations or change of use, and subsection (2) of that section shall not preclude the payment of compensation unless the works for which the land was acquired were works resulting from the alterations, or works used for the purpose, to which the claim relates.

(5) For the purposes of this section the carriageway of a highway is altered if, and only if—

- (a) the location, width or level of the carriageway is altered (otherwise than by re-surfacing); or
- (b) an additional carriageway is provided for the highway beside, above or below an existing one;

and the reference in subsection (2) above to depreciation that would not have been caused but for alterations to the carriageway of a highway is a reference to such depreciation by physical factors which are caused by the use of, and the source of which is situated on, the length of carriageway which has been altered as mentioned in paragraph (a) above or, as the case may be, the additional carriageway and the corresponding length of the existing one mentioned in paragraph (b) above.

(6) In this section “runway or apron alterations” means—

- (a) the construction of a new runway, the major re-alignment of an existing runway or the extension or strengthening of an existing runway; or

(b) a substantial addition to, or alteration of, a taxiway or apron, being an addition or alteration whose purpose or main purpose is the provision of facilities for a greater number of aircraft.

(7) For the avoidance of doubt it is hereby declared that references in this section to a change of use do not include references to the intensification of an existing use.

10 Mortgages, trusts of land and settlements

(1) Where an interest is subject to a mortgage—

(a) a claim may be made by any mortgagee of the interest as if he were the person entitled to that interest but without prejudice to the making of a claim by that person;

(b) no compensation shall be payable in respect of the interest of the mortgagee (as distinct from the interest which is subject to the mortgage);

(c) any compensation which is payable in respect of the interest which is subject to the mortgage shall be paid to the mortgagee or, if there is more than one mortgagee, to the first mortgagee and shall in either case be applied by him as if it were proceeds of sale.

(2) Where the interest is [subject to a trust of land] the compensation shall be dealt with as if it were proceeds of sale arising under the trust.

(3) Where the interest is settled land for the purposes of the Settled Land Act 1925 the compensation shall be treated as capital money arising under that Act.

(4) Where an interest in land is vested in trustees (other than a sole tenant for life within the meaning of the Settled Land Act 1925) and a person beneficially entitled (whether directly or derivatively) under the trusts is entitled or permitted by reason of his interest to occupy the land, section 2 above shall have effect as if occupation by that person were occupation by the trustees in right of the interest vested in them.

(5) . . .

11 Interests acquired by inheritance

(1) So much of section 2(1) above as requires an interest qualifying for compensation under this Part of this Act to have been acquired by the claimant before the relevant date shall not apply to any interest acquired by him by inheritance from a person who acquired that interest, or a greater interest out of which it is derived, before the relevant date.

(2) For the purposes of this section an interest is acquired by a person by inheritance if it devolves on him by virtue only of testamentary dispositions taking effect on, or the law of intestate succession or the right of survivorship between joint tenants as applied to, the death of another person or the successive deaths of two or more other persons.

(3) For the purposes of subsection (2) above a person who acquires an interest by appropriation of it in or towards satisfaction of any legacy, share in residue or other share in the estate of a deceased person shall be treated as a person on whom the interest devolves by direct bequest.

(4) Where an interest is settled land for the purposes of the Settled Land Act 1925 and on the death of a tenant for life within the meaning of that Act a person becomes entitled to the interest in accordance with the settlement, or by any appropriation by the personal representatives in respect of the settled land, subsection (2) above shall apply as if the interest had belonged to the tenant for life absolutely and the trusts of the settlement taking effect after his death had been trusts of his will.

(5) Subsection (4) above shall apply, with any necessary modifications, where a person becomes entitled to an interest on the termination of a settlement as it would apply if he had become entitled in accordance with the terms of the settlement.

(6) . . .

12 Tenants entitled to enfranchisement or extension under Leasehold Reform Act 1967

[Not reproduced]

12A Tenants participating in collective enfranchisement, or entitled to individual lease extension, under Part I of Leasehold Reform, Housing and Urban Development Act 1993

[Not reproduced]

13 Ecclesiastical property

[Not reproduced]

15 Information for ascertaining relevant date

(1) The responsible authority in relation to a highway or other public works shall keep a record and, on demand, furnish a statement in writing of—

- (a) the date on which the highway was first open to public traffic, or was first open to public traffic after completion of any particular alterations to the carriageway of the highway;
- (b) the date on which the public works were first used after completion, or were first used after completion of any particular alterations to those works;
- (c) in the case of public works other than a highway or aerodrome, the date on which there was a change of use in respect of the public works.

(2) A certificate by the Secretary of State stating that runway or apron alterations have or have not been carried out at an aerodrome and the date on which an aerodrome at which any such alterations have been carried out was first used after completion of the alterations shall be conclusive evidence of the facts stated.

(3) In this section references to alterations to the carriageway of a highway, to runway or apron alterations and to a change of use shall be construed in the same way as in section 9 above; and subsection (1) above shall not apply unless the date in question falls on or after the commencement date.

16 Disputes

(1) Any question of disputed compensation under this Part of this Act shall be referred to and determined by the Lands Tribunal . . .

(2) No such question arising out of a claim made before [the first claim day] shall be referred to [the Tribunal] before the beginning of [that day].

17 Action for nuisance following unsuccessful claims where responsible authority have disclaimed statutory immunity

Where, in resisting a claim under this Part of this Act, a responsible authority contend that no enactment relating to the works in question confers immunity from actions for nuisance in respect of the use to which the claim relates, then if—

- (a) compensation is not paid on the claim; and
- (b) an action for nuisance in respect of the matters which were the subject of the claim is subsequently brought by the claimant against the authority,

no enactment relating to those works, being an enactment in force when the contention was made, shall afford a defence to that action in so far as it relates to those matters.

18 Interest on compensation

1) Compensation under this Part of this Act shall carry interest, at the rate for the time being prescribed under section 32 of the Land Compensation Act 1961, from—

- (a) the date of service of the notice of claim; or
- (b) if that date is before [the first claim day], from the beginning of the claim period,

until payment.

(2) . . .

19 Interpretation of Part I

(1) In this Part of this Act—

“the appropriate highway authority” means—

- (a) except where paragraph (b) below applies, the highway authority who constructed the highway to which the claim relates [or any other authority to which the functions of that authority in relation to that highway are transferred by virtue of the Local Government Act 1985] [or the Local Government (Wales) Act 1994];

- (b) if and so far as the claim relates to depreciation that would not have been caused but for alterations to the carriageway of a highway, the highway authority who carried out the alterations [or any other authority to which the functions of that authority in relation to that highway are transferred by virtue of [either of those Acts]];

“claim” means a claim under this Part of this Act and “the claimant” means the person making such a claim;

...

“commencement date” means the date on which this Part of this Act comes into force;

[“the first claim day” has the meaning given in section 3(2) above;]

“highway” includes part of a highway and . . . means a highway or part of a highway maintainable at the public expense as defined in [section 329(1) of the Highways Act 1980] . . .

...

“public works” and “responsible authority” have the meaning given in section 1 above;

“the relevant date” has the meaning given in sections 1(9) and 9(2) above.

(2) For the purposes of sections 2(1), 11(1) and 14(2) above an interest acquired or disposed of, or a tenancy granted, pursuant to a contract shall be treated as acquired, disposed of or granted when the contract was made.

[(2A) For the purposes of the Limitation Act 1939, a person’s right of action to recover compensation under this Part of this Act shall be deemed to have accrued on the first claim day.]

(3) In the application of this Part of this Act to a highway which has not always since 17th October 1969 been a highway maintainable at the public expense as defined above—

- (a) references to its being open to public traffic shall be construed as references to its being so open whether or not as a highway so maintainable;
- (b) for references to the highway authority who constructed it there shall be substituted references to the highway authority for the highway;

and no claim shall be made if the relevant date falls at a time when the highway was not so maintainable and the highway does not become so maintainable within three years of that date . . .

(4) . . .

**LAND COMPENSATION ACT 1973, PART IV: COMPULSORY PURCHASE.
ASSESSMENT OF COMPENSATION**

45 Compensation for acquisition of dwelling specially adapted for disabled person

(1) This section applies to the assessment of compensation in respect of the compulsory acquisition of an interest in a dwelling which—

- (a) has been constructed or substantially modified to meet the special needs of a disabled person; and
- (b) is occupied by such a person as his residence immediately before the date when the acquiring authority take possession of the dwelling or was last so occupied before that date.

(2) The compensation shall, if the person whose interest is acquired so elects, be assessed as if the dwelling were land which is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose.

46 Compensation for disturbance where business carried on by person over sixty

(1) Where a person is carrying on a trade or business on any land and, in consequence of the compulsory acquisition of the whole of that land, is required to give up possession thereof to the acquiring authority then if—

- (a) on the date on which he gives up possession as aforesaid he has attained the age of sixty; and
- (b) on that date the land is or forms part of a hereditament the annual value of which does not exceed the prescribed amount; and
- (c) that person has not disposed of the goodwill of the whole of the trade or business and gives to the acquiring authority the undertakings mentioned in subsection (3) below,

the compensation payable to that person in respect of the compulsory acquisition of his interest in the land or, as the case may be, under section 121 of the Lands Clauses Consolidation Act 1845 or section 20 of the Compulsory Purchase Act 1965 (tenants from year to year etc) shall, so far as attributable to disturbance, be assessed on the assumption that it is not reasonably practicable for that person to carry on the trade or business or, as the case may be, the part thereof the goodwill of which he has retained, elsewhere than on that land.

(2) In subsection (1) above “the prescribed amount” means the amount which on the date mentioned in that subsection is the amount prescribed for the purposes of [section 149(3)(a) of the Town and Country Planning Act 1990] (interests qualifying for protection under planning blight provisions) and “annual value” and “hereditament” have the meaning given in [section 171] of the Act taking references to the date of service of a notice under [section 150] of that Act as references to the date mentioned in subsection (1) above.

(3) The undertakings to be given by the person claiming compensation are—

- (a) an undertaking that he will not dispose of the goodwill of the trade or business, or, as the case may be, of the part thereof the goodwill of which he has retained; and
 - (b) an undertaking that he will not, within such area and for such time as the acquiring authority may require, directly or indirectly engage in or have any interest in any other trade or business of the same or substantially the same kind as that carried on by him on the land acquired.
- (4) If an undertaking given by a person for the purposes of this section is broken the acquiring authority may recover from him an amount equal to the difference between the compensation paid and the compensation that would have been payable if it had been assessed without regard to the provision of this section.
- (5) This section shall apply to a trade or business carried on by two or more persons in partnership as if references to the person by whom it is carried on were references to all the partners and as if the undertakings mentioned in subsection (3) above were required to be given by all the partners.
- (6) This section shall apply to a trade or business carried on by a company—
- (a) as if subsection(1)(a) above required—
 - (i) each shareholder, other than a minority shareholder, to be an individual who has attained the age of sixty on the date there mentioned; and
 - (ii) each minority shareholder to be an individual who either has attained that age on that date or is the spouse of a shareholder who has attained that age on that date; and
 - (b) as if the undertakings mentioned in subsection (3)(b) above were required to be given both by the company and by each shareholder.

In this subsection “shareholder” means a person who is beneficially entitled to a share or shares in the company carrying voting rights and “minority shareholder” means a person who is so entitled to less than 50 per cent, of those shares.

(7) This section shall apply in relation to any disturbance payment assessed in accordance with section 38(1)(b) above as it applies in relation to the compensation mentioned in subsection (1) above, and shall so apply subject to the necessary modifications and as if references to the giving up of possession of land to the acquiring authority in consequence of its compulsory acquisition were references to displacement as mentioned in section 37 above.

(8) . . .

50 Compensation where occupier is rehoused

(1) The amount of compensation payable in respect of the compulsory acquisition of an interest in land shall not be subject to any reduction on account of the fact that the acquiring authority have provided, or undertake to provide or arrange for the provision of, or another authority will provide, residential accommodation under any enactment for the person entitled to the compensation.

(2) In assessing the compensation payable in respect of the compulsory acquisition of an interest in land which on the date of service of the notice to treat is subject to a tenancy, there shall be left out of account any part of the value of that interest which is attributable to, or to the prospect of, the tenant giving up possession after that date in consequence of being provided with other accommodation by virtue of section 39(1)(a) above; and for the purpose of determining the date of reference to which that compensation is to be assessed the acquiring authority shall be deemed, where the tenant gives up possession as aforesaid, to have taken possession on the date on which it is given up by the tenant.

(3) Subsection (1) above shall apply in relation to any payment to which a person is entitled under Part III of this Act as it applies in relation to the compensation mentioned in that subsection taking references to the acquiring authority as references to the authority responsible for making that payment.

(4) Subsection (2) above shall apply in relation to a case where a notice to treat is deemed to have been served by virtue of [Part III of the Compulsory Purchase (Vesting Declarations) Act 1981] . . . (general vesting declarations) as it applies in relation to a case where a notice to treat is actually served.

52 Right to advance payment of compensation

(1) Where an acquiring authority have taken possession of any land the authority shall, if a request in that behalf is made in accordance with subsection (2) below, make an advance payment on account of any compensation payable by them for the compulsory acquisition of any interest in that land.

(2) Any request under this section shall be made by the person entitled to the compensation (hereafter referred to as “the claimant”), shall be in writing, shall give particulars of the claimant’s interest in the land (so far as not already given pursuant to a notice to treat) and shall be accompanied or supplemented by such other particulars as the acquiring authority may reasonably require to enable them to estimate the amount of the compensation in respect of which the advance payment is to be made.

(3) Subject to subsection (6) below, the amount of any advance payment under this section shall be equal to 90 per cent. of the following amount, that is to say—

- (a) if the acquiring authority and the claimant have agreed on the amount of the compensation, the agreed amount;
- (b) in any other case, an amount equal to the compensation as estimated by the acquiring authority.

(4) Any advance payment under this section shall be made not later than three months after the date on which a request for the payment is made in accordance with subsection (2) above or, if those three months end before the date on which the acquiring authority take possession of the land to which the compensation relates, on the date on which they take possession as aforesaid.

[(4A) Where, at any time after an advance payment has been made on the basis of the acquiring authority’s estimate of the compensation, it appears to the acquiring authority that their estimate was too low, they shall, if a request in that

behalf is made in accordance with subsection (2) above, pay to the claimant the balance of the amount of the advance payment calculated as at that time.

(5) Where the amount, or aggregate amount, of any payment under this section made on the basis of the acquiring authority's estimate of the compensation exceeds the compensation as finally determined or agreed, the excess shall be repaid; and if after any payment under this section has been made to any person it is discovered that he was not entitled to it, the amount of the payment shall be recoverable by the acquiring authority.]

(6) No advance payment shall be made on account of compensation payable in respect of any land which is subject to a mortgage the principal of which exceeds 90 per cent. of the amount mentioned in subsection (3) above; and where the land is subject to a mortgage the principal of which does not exceed 90 per cent. of that amount, the advance payment shall be reduced by such sum as the acquiring authority consider will be required by them for securing the release of the interest of the mortgagee.

(7) Any advance payment on account of compensation in respect of an interest which is settled land for the purposes of the Settled Land Act 1925 shall be made to the persons entitled to give a discharge for capital money and shall be treated as capital money arising under that Act.

(8) [Before] an acquiring authority make an advance payment under this section on account of compensation in respect of any interest in land they shall deposit with the council of the district or London borough [or Welsh county or county borough] in which the land is situated particulars of the payment [to be made], the compensation and the interest in land to which it relates; . . .

[(8A) Any particulars deposited pursuant to subsection (8) above shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the council with whom any such particulars are deposited shall be treated as the originating authority as respects the charge thereby constituted.]

(9) [Where a local land charge is registered in the appropriate local land charges register pursuant to subsection (8A) above and the advance payment to which the charge relates is made to the claimant, then if thereafter he] disposes of the interest in the land to, or creates an interest in the land in favour of, a person other than the acquiring authority, the amount of the advance payment [together with any amount paid under section 52A] shall be set off against any sum payable by the authority to that other person in respect of the compulsory acquisition of the interest disposed of or the compulsory acquisition or release of the interest created.

(10) Where an advance payment has been made under this section on account of any compensation—

(a) section 76 of the Lands Clauses Consolidation Act 1845 and section 9 of the Compulsory Purchase Act 1965 (refusal of owner to convey on tender of compensation) shall have effect as if references to the compensation were references to the balance thereof remaining unpaid; . . .

(b) . . .

(11) Where the acquiring authority, instead of taking possession of any land, serve a notice in respect of that land under [section 583 of the Housing Act 1985] (notice authorising existing occupier to continue in occupation where house acquired for housing purposes) this section shall have effect as if they had taken possession of the land on the date on which the notice is served.

(12) This section shall apply to compensation for the compulsory acquisition of a right over land as it applies to compensation for the compulsory acquisition of an interest in land, and shall so apply with the necessary modifications and as if references to taking possession of the land were references to first entering it for the purpose of exercising the right.

(13) . . .

54 Effect of counter-notice under section 53

(1) If the acquiring authority do not within the period of two months beginning with the date of service of a counter-notice under section 53 above agree in writing to accept the counter-notice as valid, the claimant or the authority may, within two months after the end of that period, refer it to the Lands Tribunal; and on any such reference the Tribunal shall determine whether the claim in the counter-notice is justified and declare the counter-notice valid or invalid in accordance with its determination of that question.

(2) Where a counter-notice is accepted as, or declared to be, valid under subsection (1) above the acquiring authority shall be deemed—

(a) to be authorised to acquire compulsorily, under the enactment by virtue of which they are empowered to acquire the land in respect of which the notice to treat was served, the claimant's interest in the land to which the requirement in the counter-notice relates; and

(b) to have served a notice to treat in respect of that land on the date on which the first-mentioned notice to treat was served.

(3) A claimant may withdraw a counter-notice at any time before the compensation payable in respect of a compulsory acquisition in pursuance of the counter-notice has been determined by the Lands Tribunal or at any time before the end of six weeks beginning with the date on which the compensation is so determined; and where a counter-notice is withdrawn by virtue of this subsection any notice to treat deemed to have been served in consequence thereof shall be deemed to have been withdrawn.

(4) Without prejudice to subsection (3) above, the power conferred by section 31 of the Land Compensation Act 1961 to withdraw a notice to treat shall not be exercisable in the case of a notice to treat which is deemed to have been served by virtue of this section.

(5) The compensation payable in respect of the acquisition of an interest in land in pursuance of a notice to treat deemed to have been served by virtue of this section shall be assessed on the assumptions mentioned in section 5(2), (3) and (4) above.

(6) Where by virtue of this section the acquiring authority become, or will become, entitled to a lease of any land but not to the interest of the lessor—

- (a) the authority shall offer to surrender the lease to the lessor on such terms as the authority consider reasonable;
- (b) the question of what terms are reasonable may be referred to the Lands Tribunal by the authority or the lessor and, if at the expiration of three months after the date of the offer mentioned in paragraph (a) above, the authority and the lessor have not agreed on that question and that question has not been referred to the Tribunal by the lessor, it shall be so referred by the authority;
- (c) if that question is referred to the Tribunal the lessor shall be deemed to have accepted the surrender of the lease at the expiration of one month after the date of the determination of the Tribunal or on such other date as the Tribunal may direct and to have agreed with the authority on the terms of surrender which the Tribunal has held to be reasonable.

For the purposes of this subsection any terms as to surrender contained in the lease shall be disregarded.

(7) Where the lessor refuses to accept any sum payable to him by virtue of subsection (6) above, or refuses or fails to make out his title to the satisfaction of the acquiring authority, they may pay into court any sum payable to the lessor by virtue of that subsection; and subsections (2) and (5) of section 9 of the Compulsory Purchase Act 1965 (deposit of compensation in cases of refusal to convey etc) shall apply to that sum with the necessary modifications.

(8) Where an acquiring authority who become entitled to the lease of any land as mentioned in subsection (6) above are a body incorporated by or under any enactment the corporate powers of the authority shall, if they would not otherwise do so, include power to farm that land.

(9) . . .

ACQUISITION ACT 1981, SECTION 4

(1) In relation to a compulsory purchase the Land Compensation Act 1961 shall have effect subject to the provisions of this section.

(2) The Lands Tribunal shall not take into account any interest in land, or any enhancement of the value of any interest in land, by reason of any building erected, work done or improvement or alteration made, whether on the land purchased or on any other land with which the claimant is, or was at the time of the erection, doing or making of the building, works, improvement or alteration, directly or indirectly concerned, if the Lands Tribunal is satisfied that the creation of the interest, the erection of the building, the doing of the work, the making of the improvement or the alteration, as the case may be, was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.

APPENDIX 4

COMPARATIVE MATERIAL

PART A: AN AUSTRALIAN LEGISLATIVE CODE

Land Acquisition Act 1989 (Cth)

Section 52: Entitlement to compensation

A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition.

Section 55: Amount of compensation- general principles

(1) amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.

(2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including:

(a) except in a case to which paragraph (b) applies:

(i) the market value of the interest on the day of the acquisition;

(ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest;

(iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and

(iv) where the acquisition has the effect of severing the acquired interest from another interest, any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired;

(b) if:

(i) the interest acquired from the person did not previously exist as such in relation to the land; and

(ii) the person's interest in the land was diminished, but not extinguished, by the acquisition;

the loss suffered by the person because of the diminution of the person's interest in the land;

(c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of:

(i) the acquisition of the interest; or

(ii) the making or giving of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest;

other than any such loss, injury, damage or expense in respect of which compensation is payable under Part VIII;

(d) if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted;

(e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of:

(i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and

(ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Secretary to the Department requires.

Section 56: Meaning of “market value”

For the purposes of this Division, the market value of an interest in land at a particular time is the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer.

Section 57: Special provision where market value determined upon basis of potential of land

Where the market value of an interest in land acquired by compulsory process is assessed upon the basis that the land had potential to be used for a purpose other than the purpose for which it was used at the time of acquisition, compensation shall not be allowed in respect of any loss or damage that would necessarily have been suffered, or expense that would necessarily have been incurred, in realising that potential.

Section 58: No general market for interest acquired

(1) This section applies where:

(a) an interest in land (in this section called the old land) is acquired from a person by compulsory process;

(b) immediately before the acquisition, the person was using the old land, or intended to use the old land, for a purpose other than the carrying on of a business;

(c) but for the acquisition, the land would have been, or would have continued to be, used for that purpose;

(d) at the time of the acquisition, there was no general demand or market for land used for that purpose; and

(e) the person has acquired, or intends to acquire, another interest in other land (in this section called the new land) in substitution for the acquired interest and intends to use the new land for the same purpose.

(2) The market value of the acquired interest on the day of acquisition shall be taken to be the greater of:

(a) the amount that, apart from this section, would be the market value (if any) of that interest on that day; and

(b) the net acquisition cost in relation to the interest in the new land.

(3) The net acquisition cost, in relation to the interest in the new land, is the amount calculated in accordance with the formula:

$$CA + E - FI$$

where:

CA is the amount of the cost, or the likely cost, to the person of the acquisition of the interest in the new land;

E is the amount of the expenses and losses incurred, or likely to be incurred, by the person as a result of, or incidental to, ceasing to use the old land and commencing to use the new land for the same purpose; and

FI is the present value of any real and substantial saving in recurring costs (relating to land or an interest in land) gained by the person as a result of the relocation.

Section 60: Matters to be disregarded in assessing compensation

In assessing compensation, there shall be disregarded:

(a) any special suitability or adaptability of the relevant land for a purpose for which it could only be used pursuant to a power conferred by or under law, or for which it could only be used by a government, public or local authority;

(b) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law;

(c) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the purpose for which the interest was acquired; and

(d) any increase in the value of the land caused by the carrying out, after a copy of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest was given to the person, of any improvements to the land, unless the improvements were carried out with the written approval of the Minister.

**PART B: AUSTRALIAN AND CANADIAN MATERIAL ON INJURIOUS AFFECTATION
WHERE NO LAND IS TAKEN**

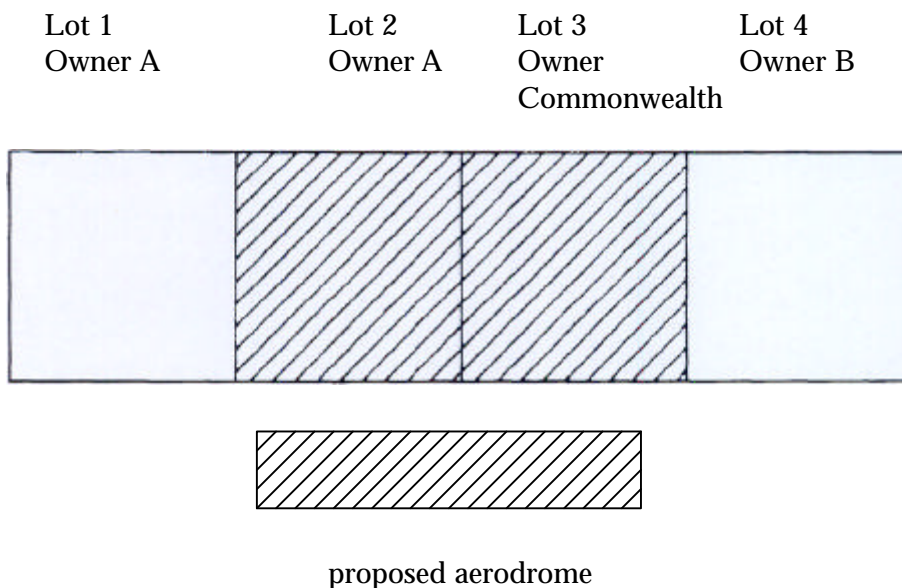
(i) Extracts from ALRC report

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Chapter 11: Injurious Affection and Enhancement: A New Approach

PARAS 305-312

305. *The anomaly summarised.* The situation which exists at present under Commonwealth legislation can be illustrated by a diagram:



Assume the Commonwealth decides to construct an aerodrome on lots 2 and 3. It owns lot 3 but it must acquire lot 2 from A who also owns lot 1. B owns lot 4. As land is acquired from A he will be entitled¹ to compensation not only for the value of lot 2² but also for depreciation arising from injurious affection to his retained land (lot 1) due to the proposal to construct and use the aerodrome. If the depreciatory factors can be isolated, as between lots 2 and 3, such compensation will be limited to damage arising from the works on and use of lot 2; *Edwards*³ case will be applied.⁴ If not he will be compensated for depreciation in the value of lot 1 arising from the work on and use of both lots 2 and 3. B, as owner of lot 4, may be equally affected by the construction and use of the aerodrome. He may be more seriously affected than A. He will receive no compensation as he has lost no land. As the aerodrome will be constructed under statutory authority, he has no action in nuisance against the Commonwealth such as would lie if the aerodrome were established by a private person or without statutory authority. A should receive compensation for the value of the land taken but there is no justification for allowing A to receive compensation for 'pure' injurious affection while denying it to B.

306. *The burden of the loss.* It may be argued that extending a right to compensation to B would be to extend to individuals the opportunity to profit from public works and add to the cost of necessary public facilities. Landowners must, according to this view, accept expansion of public works in their neighbourhood, even if they

¹ Under s.23(1)(c) of the Lands Acquisition Act 1955.

² And for any severance damage.

³ [1964] 2 QB 134.

⁴ See *Commonwealth v. Morison* (1972) 127 CLR 32 and para. 292-3 above.

cause personal loss, for the greater public good. This argument overlooks the fact that the affected landowner loses his common law remedy. If compensation is accurately calculated, there is no question of a profit-merely the offset of loss. It is desirable that an affected landowner should at least be given a statutory right to claim compensation in lieu of a nuisance action. The potential cost to the government, and the community, of compensation is clearly an important consideration. But the cost, whatever it may be, is already there. The only question is whether it should be borne by the community whose representatives plan and effect the work in the perceived public interest or by particular landowners who are unfortunate enough to be in the 'wrong' place at the time of the public works.

307. *Equation of partial taking and no taking situations.* A preliminary issue is whether injurious affection on a partial taking and that where there is no taking should be treated the same way. In principle, as the overseas reforms and the Australian committees have recognised, there is no reason to treat the assessment of injurious affection compensation differently. The only contrary argument is that it is only by reason of the use of the *acquired* land that the government authority is able to do the acts which cause the injury and that it is therefore appropriate to treat an owner from whom the land has been acquired as being in a special position. However, the factual situation resulting from the public works is more important. Reverting to the diagrammatic example, the owners of lots 1 and 4 may be equally affected. If they are differently affected this will be a result of the planning of the work, not the history of the land title.

308. *Present partial taking rules.* If partial taking and no taking situations are to be treated in the same way it is necessary to consider the suitability of the existing rules governing injurious affection on a partial taking. The main problem is that which is highlighted by *Edwards' case*⁵ and illustrated in the diagram, where the works involve the use not only of the acquired land but also of other land (for example lots 2 and 3). However, this difficulty resolves itself once the approach is taken that partial taking and DO taking situations are comparable. On this basis there is no ground for distinguishing the effect of acts done on the land acquired from that of acts done on other land. It is the effect of the project as a whole that should be considered. Similarly, if taking and no taking situations are equated, the requirement that the affected lands be 'held with' the acquired lands becomes irrelevant. It is, however, necessary to consider whether claims should lie whether or not the acts complained of would have given rise to a common law action (as is the present position in relation to partial takings). Furthermore the construction/use distinction must be considered and also the important issue of whether damages should be available for all economic loss, for business loss or merely for depreciation in the value of the land. These issues can conveniently be dealt with in a consideration of the alternatives which could be adopted to provide compensation for injurious affection in a principled way.

Alternative Approaches

309. *Piecemeal answers.* Three possible, piecemeal, approaches exist.

⁵ [1964] 2 QB 134.

- *Compensation only if land taken.* Retain the existing system: that is, limited compensation where land is taken if certain prerequisites are satisfied. No compensation if no land is taken. This is anomalous and unjust.
- *Compensation where land taken for effects of whole work.* Retain the existing system with modifications: that is, minor legislative changes to ensure that the rule in *Edwards' case*⁶ does not apply; clarification of the distinction between 'held with' and 'adjoining or severed from'; consider the possibility of extending claimable loss to personal and/or business damage. No compensation if no land is taken. While minor amendments would perhaps bring a higher degree of clarity to the Commonwealth Act such an approach ignores the need to consider generally the effect of injurious affection from commonwealth construction and use of works. Unless compensation is to be limited to individuals from whom land has been acquired, this reform will not suffice.
- *Separate rules for injurious affection where no land is taken and where land is partly taken.* The third possibility is to retain injurious affection where land is partly taken, as at present or as modified, and to have separate provision for injurious affection where no land is taken. This is what has occurred in England. The existing law on a partial taking has been retained as has the provision which enables compensation to be paid where there is no taking, when the circumstances satisfy certain rules. The 1973 amendments⁷, while representing a major development, have been 'tacked on' to the existing law. However, Australia lacks a legislative equivalent of s. 68, so that a 'tacking' operation is not possible. The better approach is to deal with the positions covered by the various English provisions in one statute.

310. *Possible new approaches: the law of nuisance.* The statutory remedy of compensation, where no land is taken, is given in lieu of the common law right of action in nuisance. The latter is taken away by the statutory authority under which the injury is done. Accordingly there is a logical attraction in specifically reinstating the claimant's right to a claim equivalent to nuisance. Compensation would then be payable where the acts of the Commonwealth involved it in activities which would, at common law, fall within the tort of nuisance. The need to provide compensation would arise only where the statute authorising the work excluded a common law action. If immunity was not conferred, a common law action for damages or an injunction would lie. Such an approach would place the Commonwealth in much the same position as a private individual except that, instead of damages and injunctions, a right to a once-only payment of compensation would be given. Three objections may be raised to this proposal. First, it is arguable that the introduction of such a rule would actually reduce compensation for those owners whose land is partially acquired. Whereas, at the present time, they may receive injurious affection compensation for any damage occasioned by the proposed work they would, under such a rule, be limited to damage from nuisance. It is difficult to see how, in practice, a claimant would be disadvantaged if all nuisances were compensable. Nuisance damage includes not only the physical factors mentioned in the United Kingdom list (noise, fumes etc.) but also obstruction of access⁸, in some cases a

⁶ Id.

⁷ Land Compensation Act 1973.

⁸ The nuisance in such case is a public nuisance but a private person who shows special damage may recover damages or obtain an injunction. An example is furnished by *Smith v. Warrilghah*

major source of damage. Most types of damage fall within the concept of nuisance. Furthermore the limitations inherent in the present approach must be recognised. The calculation of injurious affection is based upon the nature of the proposed use, not upon actual experience. Such a calculation may substantially understate the loss. There is every advantage in preferring actuality to prediction. The second objection is that, as the Justice Supplemental Report points out, there would be great difficulty in fitting many of the larger kinds or public works, such as highways, into the common law concept of nuisance.⁹ A highway authority could claim that it is merely making ordinary and reasonable use of the land or argue that the nuisance is created by the traffic not the road. Finally, the policy issue of whether statutory authorities should be equated with private individuals must be considered. It might be thought that the cost of public works constructed for the benefit of the community should be shared generally by the community so that individuals living near such public works do not suffer financial loss for the injurious affection caused by such works, but the consequence of any new right will be to increase the cost of some public works. Cost may be reduced by limiting the type or damage recoverable.¹⁰

311. *A combination of the United Kingdom provisions.* An alternative approach would be to combine the effect of the English provisions, eliminating certain difficulties and obscurities. Compensation could be paid for depreciation in the value of an interest in land, whether or not land had been acquired from the claimant, caused by the construction, in the sense of the existence, or public works or by physical factors resulting from the use of public works. There would be no requirement that the acts should amount to an actionable nuisance, although in fact this would often be the case. However, if compensation is paid, to avoid double recovery, a nuisance action should not be permitted.¹¹ The legislation could require that compensation claims be brought only after a specific period had elapsed after the commencement of the use of the public works. Although injury from the existence of works may well be in evidence before this time, a compulsory waiting period would ensure that a single assessment of damage could be fairly made. Two criticisms may be levelled at such a scheme. The first is that the list of specified physical factors may be too restrictive. Any list may omit factors which will arise in some cases and which are presently compensable on a partial taking. There is force in this point. For example, if the intent or the United Kingdom legislation was to list those factors which would be actionable in nuisance, in the absence of statutory authority, it is difficult to justify the exclusion of obstruction to access. This is a public nuisance but it may cause special damage to a particular individual. A landowner has a legal right of access to a public road to which his land has frontage.¹² If, pursuant to statutory powers, a public authority denies that access, the use to which the land may be put, and therefore its value, may be seriously affected. Access has been denied for some perceived public benefit. It seems reasonable that the community compensate for

Shire Council (1961) 79 WN (NSW) 436; 7 LGRA 97, where a service station proprietor obtained an injunction to restrain the obstruction of a road giving access to his premises.

⁹ *Justice Report: Compensation for Compulsory Acquisition and Remedies for Planning Restrictions together with a Supplemental Report*, Stevens, London, 1973, para. 119.

¹⁰ This is the proposal, to be achieved in different ways, of both the Victorian and New South Wales Committees: see para. 316,318 below.

¹¹ cf. Land Compensation Act 1973 (U.K.), 55.1(6), 17.

¹² See *Marshall v. Blackpool Corporation* (1935] AC 16; *Kenthurst Investments Pty Ltd v. Wyong Shire Council* (1964) 10 LGRA 307,312 and cases there cited.

the loss. It is a loss which a private owner could not inflict on another. Secondly, it may be argued that the concept or damage is too narrow—that restriction of the claim to depreciation in the value of the land does not take account of business losses. The Ontario Act allows injurious affection compensation for 'such personal and business damages, resulting from the construction and not the use of the works by the statutory authority as the statutory authority would be liable for if the construction were not under the authority of a statute'.¹³ An affected person, it may be argued, should not be in a worse position than if the development were carried out privately. The argument has merit, but there are countervailing factors. First, there is a danger of duplication. Where land is used commercially for its highest and best use any diminution in the profitability of that use is likely to affect adversely its market value. Hence the capitalised value of damage to the business will be compensable. Where the land is used commercially for a use less than its highest and best use damage to the business will not necessarily cause loss. It may hasten a change to the higher use. The Ontario formula may give compensation where no loss has been suffered. Compensation on the basis of loss of value to the land would appear adequately to cover most owners. Secondly, there is a practical objection. Loss of land value is relatively easy to prove. Inquiries into the extent and cause of business losses are likely to be lengthy, complex and expensive. To restrict compensation to loss of value of the land is not to diminish benefits presently available to owners part of whose land is acquired. Their compensation is calculated on the basis of loss of value of the land. What then of tenants? This depends upon the right of compensation given under new legislation. If all tenants, regardless of the length of their lease, are free to bring a claim for the diminution in the value of their interest they will recover the greater part, at least, of their business losses. The United Kingdom Act limits claims by tenants to those who, at the relevant date, have an unexpired term of at least three years. The policy has been to provide rights for people with less than a fee simple interest but to impose a lengthy term condition is to avoid a multitude of small claims from tenants with a very limited interest in the land. However any arbitrary limitation will give rise to anomalies. If a tenant, with an unexpired term of less than three years, is able to prove that his leasehold has been diminished in value there is no reason of principle to deny him compensation. The burden of costs is likely to discourage petty and frivolous claims.

312. *Blight and the time of claim.* Whether it be decided to adopt the law of nuisance, a statutory list or a combination of both the question arises as to the date upon which the right to compensation should arise. The earlier it is, the more certain that a person who has the claim will be the person actually damaged by the public work. From that point of view it would be best to fix the date as the time of the announcement of the work. However, works frequently take years to construct. Plans change. Projects stop and start. To value the claim as at the announced date would be to prefer prediction to experience with possible injustice to one of the parties. The statutory authority may find itself, as it could now in the case of partial acquisitions, in the position of having paid injurious affection for works which are never completed. This situation did, in fact, occur in respect of the land the subject of *Morison's case*.¹⁴ The land was acquired for the extension of Mangalore airport to permit the training of jet pilots. Subsequently the Parliamentary Public Works

¹³ Expropriation Act 1969, s. 1(1)(e).

¹⁴ (1972) 127 CLR 32. See para. 292 above.

Committee found that the noise from the proposed extensions would be excessive and that there were suitable alternative facilities at Avalon. Training was centralised at Avalon. In the result the Commonwealth paid \$22 800 for injurious affection damage which did not eventuate. To vest the claim at the date of announcement but to value it after completion of the project would create administrative difficulty. The original claimant might have sold his property, died or disappeared, by the time it could be valued and paid. The alternative is to vest the claim after the work is completed, either immediately, as is the United Kingdom position¹⁵, or at some specific later period. Delayed vesting has the disadvantage that an owner may sell during the course of construction, his price being reduced because of the proposed work, and yet be deprived of compensation. The purchaser would know that, when the work is completed, he will have a claim for compensation and this may enable the vendor to argue against a full reduction of the price. However, there will be some reduction since no purchaser will pay the full value of the estimated future compensation. In the course of time, as people adjust to the notion of claims on the basis of a vesting at the date of the announcement, the Commission would so recommend. However, there appears to be no such method. The least unsatisfactory alternative is to vest the claim on a date shortly after the completion of the work, when its effects are known, and to allow an action to be brought immediately. This solution would give less than full compensation to the owner forced, or electing, to sell during the construction of the work. But he would be better off than he is now, to the extent that the purchaser was persuaded by the prospect of compensation being payable not to reduce his offered price unduly by reason of the public works complained of.

PARAS 319-332

The Cost of Reform

319. *Relevance of cost.* The importance of cost may be exaggerated. If a loss is suffered by reason of the construction and use of a public work, and if it is correct in principle that the loss be borne by the community, the cost or giving effect to that principle should not be regarded as decisive. However, it is a relevant consideration and the Commission has sought to ascertain the cost of providing an enlarged compensation right for injurious affection.

320. *Aerodromes.* The major Commonwealth activity likely to attract injurious affection claims is the construction of aerodromes. In 1973 the Australian Taxation Office, at the request of the Department of Civil Aviation, studied the effect of the use of Adelaide airport upon values in the area. Valuers compared sales of residential properties in the flight paths with sales of properties just outside the flight paths. Sales of properties in the vicinity of the airport were compared with sales of properties in areas not affected by the airport. A total of 387 sales was considered. The properties the subject of those sales were inspected. Houses were divided into three categories, according to age and style. Graphs were prepared to show the mean price of each type of house within, and just outside, each flight path.

¹⁵ The Act does not specifically so state. It permits claims in the claim period commencing 12 months after completion of the work: s. 3(2). However a person disposing of his interest in the 12 months may claim: s. 3(3). Effectively therefore the right to claim vests in the owner as at completion date.

In some cases the graphs revealed no difference between the mean price of houses of a particular category within, and just outside, a particular runway. In other cases the mean price of houses within the flight path was a little lower than the mean price of the same type of house just outside that runway. However, in no case did the difference exceed 10 per cent. The valuers were not able to say whether that difference, where it occurred, was solely attributable to aircraft noise. They concluded:

From the objective view point of the real estate market, it is difficult to prove that there is any detrimental effect on property values. Comparison of values on properties inside and outside the same flight path does not reveal any great divergence in the trend of values.¹⁶

The Department of Administrative Services sought comment from the Australian Taxation Office upon the cost of providing injurious affection compensation in respect of the extension of Brisbane aerodrome. The Office advised:

No accurate assessment can be made of the extent of damage caused to properties not acquired until final plans are approved showing the location of runways and flood mitigation works. Nevertheless, the valuer is of the opinion that wherever sited these works will result in damage to a number of properties and that additional compensation could exceed \$1 million.¹⁷

The estimate of about \$1 million should be put into context. The works proposed for Brisbane aerodrome are major extensions, upgrading it from domestic to international standard. Two additional runways will be constructed, doubling both the capacity of the aerodrome and the area used for runways. The Department of Transport estimates the total cost of the project at \$170 million.¹⁸ The total acquisition cost of the land needed for the extensions will exceed \$15 million.¹⁹ In this context an additional \$1 million, to provide compensation for private individuals damaged by the extension, is not unacceptable.

321. *Roads: Commonwealth constructions.* The Commonwealth is directly responsible for road works only in the Australian Capital Territory and the external territories. In neither case is injurious affection from the construction and use of roads likely to be a significant factor. In the Australian Capital Territory it has been the practice for major roads to be constructed well before development and lease of the surrounding land. It is unlikely that a claim would arise in respect of those roads. There may, of course, be need to construct some new roads, or to widen existing roads, but the planning of Canberra renders it unlikely that such work will significantly affect private land. Similarly, there is little likelihood of significant cost in the external

¹⁶ Australian Taxation Office. *The Possible Effect of Jet Aircraft Noise on Property Values near Adelaide Airport*, December 1973, p.11.

¹⁷ Letter from Assistant Commissioner of Taxation, Valuations, to the Secretary of the Department of Administrative Services. 6 February 1979.

¹⁸ Information on the current estimate supplied verbally by the Department of Transport to the Commission. June 1979.

¹⁹ Estimate supplied by the Department of Transport in June 1979.

territories each of which is small and unlikely to require major road building programs.

322. *Roads: State constructions.* The Commonwealth has, in the past, provided finance for road construction by State instrumentalities, including local authorities. The cost effects of injurious affection on State road programs might therefore be a legitimate matter for consideration before adopting Commonwealth legislation which could set a precedent for State legislation. To some extent the precedent has already been set. Government-appointed committees in each of the two most populous States, New South Wales and Victoria, have already recommended the principle of injurious affection compensation.²⁰ In Victoria, that recommendation has already been accepted by the Government.²¹ Although in each case limitations were proposed, it is clear that each committee saw depreciation from the noise occasioned by road use as the major area of concern. In these two States, therefore, the cost may well be incurred by force of State law. Notwithstanding, inquiries have been made to ascertain the cost of the compensation provided in the United Kingdom by the Land Compensation Act 1973.²² Figures for the whole of the United Kingdom are available only in relation to the trunk road program, which is financed through the Department of the Environment. The total cost of that program exceeds £ 300 million per year. Approximately 10 per cent of the total cost is expended on compensation to landowners in respect of the acquisition of land or injurious affection. During the period of 5 1/4 years from the commencement of the 1973 Act until 31 December 1978, the Department paid a total of £3.93 million for compensation under Part I of the 1973 Act, that is to landowners from whom no land was taken in respect of the adverse effects of the use of trunk roads. The effect of such compensation has been to add about 0.25 per cent to the cost of the trunk road program. In the United Kingdom, non-trunk roads are constructed by county councils. It has not been possible to obtain comprehensive figures to illustrate the extent to which the provision of Part I compensation has increased the cost of the non-trunk program. However in the period of 3 1/2 years from the commencement of the Act until 30 June 1977 the Greater London Council had received 45 claims of which, in July 1977, 30 had been admitted or were likely to be admitted. The estimated liability of the Council in respect of those claims was only £30000. The Assistant Divisional Valuer of the Council told the Commission that he regarded the additional public cost as insignificant but considered that the Act was useful in providing justice in the relatively few cases where individuals suffered extraordinary damage through road construction.²³

²⁰ See para. 316, 318 above.

²¹ On 16 May 1978, the Minister for Planning, the Hon G. P Hayes, M.P., announced the Government's decision to legislate for the implementation of the recommendations of the Gobbo Committee discussed at para. 316 above. As mentioned in para. 317 a Bill was introduced on 8 December 1978 but has not yet been enacted.

²² The information was supplied by the Chief Valuer, Valuation Office, Inland Revenue, London, in letters to the Commission of 4 October 1977 and 3 May 1979. Figures for the period after 31 December 1978 were not available at the date of this Report.

²³ Personal discussion between the Assistant Divisional Valuer (Special Duties), Mr R.E. Flack and Commissioner Wilcox in July 1977. Mr Flack went on to offer the opinion that one of the most useful consequences of the Act was to cause design engineers to consciously consider the effect of the road works upon adjoining properties, causing them to design more

323. *Other works.* In 1978 the State Offices of the Australian Taxation Office were asked to review the properties compulsorily acquired during the financial years 1975-76, 1976-77 and 1977-78 with a view to detecting cases in which additional costs would have been involved if the injurious affection proposals of the Commission tentatively advanced in the Discussion Paper had then been the law.²⁴ The purposes of acquisitions included water and sewerage pipelines, offices, defence stations, industrial and residential subdivisions in the Northern Territory, road widening and re-alignment, navigation and radio instrument sites, a 'naval impact area', and an air weapons range. Only in the case of Brisbane aerodrome was it thought that the tentative proposals would have resulted in any increase in the amount of compensation payable by the Commonwealth.

324. *Conclusion on cost.* The available evidence indicates that the cost of implementing a scheme for comprehensive injurious affection, measured by depreciation in the value of the land, will be quite low. In the case of the construction or extension of a major airport it may add a million dollars or more to a cost likely to be measured in hundreds of millions of dollars. In Commonwealth Territories it will add insignificantly to the cost of road works. In the States, if the British experience is any guide²⁵, it will add a figure less than 0.5 per cent to that cost. In the case of other works rarely will there be any additional cost.

325. *Need for reform.* If the cost is likely to be small the number of claimants will be small. Why, then, is there a need for reform of the present rules? Does the call for reform stem simply from a desire for legal tidiness? The present rules are anomalous. They are explained by history but they cannot be supported by logic. A more rational law may easily be substituted. However, that would be an insufficient argument for change. Change, if it is to be made, must be justified by relevance to need. That need is demonstrated by the fact that there have been successful claims in Britain and that studies have shown a need in Australia. The Victorian Committee identified cases where loss had been sustained because of the use of roadways.²⁶ The study at Adelaide airport showed some relationship between use of the airport and the values of particular properties.²⁷ The opinion of the Australian Taxation Office, in relation to the extension of the Brisbane airport was that, wherever the runways were located, the values of about 100 properties in a particular small township, in which no land had been acquired, would be affected. For the individuals concerned the fact that

sympathetically to the environment. For the first time there were economic advantages in so doing. (Mr Flack's views did not necessarily represent those of the Greater London Council.)

²⁴ The tentative proposals, as set out in the Discussion Paper (pp. 18-19) and, more fully, in the Working Paper (para 7.50- 7.68) were similar in cost effect to the proposals in this Report.

²⁵ It is likely that the British figures overstate the extent of the increase, as applied to Australian conditions. Many trunk roads run through heavily built up areas, cities and villages, containing narrow fronted houses built upon, or close to, the road alignment. By contrast, Australian residential allotments are typically much wider and houses set back from the street. Traffic densities in Australia are typically lower. The effect, therefore, of a new road upon an existing built-up area is likely to be greater in the United Kingdom than in Australia.

²⁶ *Report*, p. 32.

²⁷ See para. 320 above.

depreciation through public works is relatively infrequent is no consolation or answer. Justice to such owners demands reform of the law to give them proper compensation. The comparative rarity of the problem makes it possible to undertake that reform at acceptable public cost.

A Comprehensive Scheme

326. *Nuisance or a list of factors?* In the Discussion Paper the Commission suggested a list of factors which would attract injurious affection claims.²⁸ They were divided into *construction factors*: denial of access from a frontage lot to a public road, loss of air and overshadowing; and *use factors*: noise, vibration, smelt, fumes, smoke, artificial lights and discharge of substances. The major reason why a list was proposed (rather than a principle making the Commonwealth liable where, but for statutory immunity, a nuisance action would have succeeded) was the difficulty of applying the common law rules as to nuisance to public works. However, comment on the Discussion Paper provided a number of additional examples of possible injurious effects of public works which were, in principle, indistinguishable from the factors suggested. No list could be, and remain, comprehensive. Reliance upon a list necessarily leads to anomalies. A wider principle is required but resort to the law of nuisance alone has the difficulties already noted. The solution is to underpin the legislation by referring to the law of nuisance, but to add a list to avoid doubt. This will allow the courts to apply it to new situations and to adapt the compensation entitlement to developments in the law of nuisance. With this in mind it is proposed that the legislation use the term 'injurious factor', defined to include:

- noise
- vibration
- smell
- smoke
- fumes
- artificial lighting
- discharge of substances
- heat
- gas
- vapour
- loss of air
- overshadowing
- loss of support
- restriction or prevention of access between the relevant land and a public road, waterway or seashore

In addition to this list the definition should include anything in relation to which, in the State or Territory in which the relevant land is situated and in the absence of statutory authority or immunity, there exists a right of action for nuisance by an

²⁸ ALRC DP5, p.19.

owner of land against the owner or occupier of other land.²⁹ The list of specific items includes factors which would, at common law, give rise to an action in nuisance. It also includes two factors, loss of air and overshadowing, which would not ordinarily give rise to an action. They are losses which may be caused by a private development, as much as a public one, but there is generally a better opportunity to resist adverse private development than public development.³⁰ This distinction justifies their inclusion. It may be contended that, upon the same basis, loss of view should be included. However, it is desirable that a statutory authority, in planning a work, should be able to calculate the total cost. It will know the extent to which a given design will cause overshadowing of, and loss of air to, nearby land and may reasonably estimate the adverse effect on value. The number of affected properties will be comparatively small. Loss of view is more difficult to calculate. The number of properties affected is likely to be greater and the loss is likely to be more variable. The loss of view occasioned, on particular properties, by a public development will vary from time to time, as buildings on intervening land are erected or demolished or even as the affected property is remodelled or extended. The position calculated when the public development is planned may be very different from that applicable when it is completed. This would render budgeting more difficult. Even accepting the argument that there is no essential virtue in limiting rights against a public developer to those available against a private developer the provision of compensation for loss of view may go too far.

327. *Right of compensation.* The legislation should apply to any land vested in the Commonwealth, or in any authority of the Commonwealth.³¹ As in the United Kingdom, the test should be whether there has been a loss of value in land because of the injurious factor. Mere inconvenience or loss of amenity should not attract compensation unless this adversely affects value. Where that test can be met, compensation should be provided in respect of changes which occur after the commencement of the new legislation. Such a change may take one of three forms:

- completion of the construction of a work on Commonwealth land;
- commencement of a use of Commonwealth land: or
- substantial intensification in the use, whenever commencing, of Commonwealth land, being an intensification that results from completion of construction of a work.³²

Compensation should not be available for the mere inconvenience caused during the construction period. This is an inconvenience equally suffered in respect of private development and has at most a transient effect upon property values. In relation to a building or work constructed on land, compensation should be available in respect of any injurious factor caused by the existence of the building or work. Such cases will probably be limited to denial of access, loss of air and overshadowing and be

²⁹ Draft Bill, cl. 82.

³⁰ Zonings, to which objections may be made, will generally control the scale of private development. In most States an individual has a right of objection to a development application for a nearby private site. In the case of public development, zonings are less specific; development applications either unnecessary or less susceptible to objection.

³¹ Draft Bill, cl. 84.

³² Draft Bill, cl. 85.

comparatively rare. There will be more cases involving use of land, in relation to which any of the other injurious factors may become relevant. Compensation should not be available in respect of a use which was in existence at the commencement of the Act. To allow such compensation would involve significant cost. Moreover it would involve compensating people who have purchased land knowing of the existence of a particular Commonwealth use and thus purchased more cheaply. Any new compensation right should be prospective in the sense that it applies only to activities commencing after the date of the new legislation. Thus, in relation to use of land, the general position should be that compensation is available only where the use commences after the date of the legislation. There will, however, be cases where a long standing use has been intensified because of the construction of works. *Morison's case*³³ provides an example; the extension of an existing aerodrome so as to make it suitable for jet aircraft. It would be anomalous to provide compensation in the case of a completely new aerodrome but to deny it where the aerodrome has been extended, with a consequent substantial intensification of use. Substantial intensification consequent upon construction should attract compensation. There will be cases where a use gradually, and without any new construction, intensifies to the disadvantage of neighbouring owners. Ideally compensation should be available in such cases, but to introduce this category would involve the parties in significant evidentiary problems. Moreover, normally, people would expect a gradual increase in the use of existing facilities. They may be presumed to have taken this likelihood into account when purchasing their land. They would not normally, be expected to anticipate the construction of new works which significantly change the position.

328. *Measure of compensation.* Compensation should be related to loss of value. The appropriate test is not whether there has been an actual reduction, in money terms, in the value of a particular parcel of land by reason of the injurious factor. To impose that requirement would be to deny compensation in cases where land values, generally, are increasing through inflationary factors. There may have been an actual increase in the money value of a parcel notwithstanding that it has been comparatively disadvantaged because of the injurious factor. The appropriate comparison is between the value of the land in its affected condition and the value which it would have had in the absence of the injurious factor. There will, occasionally, be difficulties in determining that hypothetical value but evidence of sales of properties which are unaffected by the injurious factor will generally provide guidance. The United Kingdom Land Compensation Act 1973 provides for a similar approach. This has caused no difficulty in practice. The compensation which is payable should therefore be defined as the amount by which the market value of the land is less than the amount that would have been the market value on the 'relevant day' if the depreciation caused by the existence of the thing constructed, the commencement of the use or the substantial intensification of the use, as the case may be, had not occurred.³⁴ The term 'relevant day' should be defined as being the first anniversary of the completion of the construction or commencement of the use, as the case may be.³⁵ This delay of 12 months should allow the market to adjust to the new work or activity and will provide some opportunity for sales evidence to

³³ (1972) 127 CLR 32.

³⁴ Draft Bill, cl. 86.

³⁵ Draft Bill, cl. 83.

accumulate, providing guidance to valuers in determining the extent of the depreciation.³⁶

329. *Source of injury.* The intention is to provide compensation for injury occasioned by Commonwealth works. It ought, therefore, to be necessary for the claimant to show that the source of the injury is an injurious factor emanating from Commonwealth land. This is the normal obligation of a plaintiff bringing a nuisance action at common law. It is insufficient merely to show that an activity on particular land has had the indirect effect of increasing noise levels and the like. However, an exception must be made in respect of aerodromes. The adverse affect of an aerodrome is occasioned by the noise of aircraft arriving at, or departing from, the aerodrome. Usually the worst effect, on a particular householder, occurs when the aircraft is passing over his own land. Thus a limitation, in relation to aircraft noise, requiring the noise to emanate from Commonwealth land would largely defeat the purpose of the amendment. It would also occasion significant valuation problems as valuers would have to assess the extent to which the market would be influenced by noises in and over the aerodrome but disregarding noises outside the aerodrome. The reality of the matter is that the problem is occasioned by the existence and use of the aerodrome. Consequently the legislation should specifically provide that injurious factors caused by aircraft arriving at, or departing from, an aerodrome vested in the Commonwealth shall be regarded as having their source at the aerodrome.³⁷

330. *Relationship to damages claims.* The proposal for statutory compensation arises from the assumption, which is valid in most cases, that a common law action will be precluded because of the provisions of the statute authorising the public work. In order to ensure that the compensation provisions are not defeated by the general rule of legal immunity it is desirable specifically to provide that the right to compensation subsists notwithstanding any immunity otherwise conferred by law.³⁸ The provision of statutory compensation is designed to assist the position of an owner of land adversely affected by a Commonwealth work or activity. In the majority of cases that owner will not have an available common law action. There may, however, exist particular cases where there is a common law remedy as, for example, where the Commonwealth has exceeded its statutory authority or the statute preserves common law rights. It would be wrong, in legislation designed to assist the owner, to deny him that remedy. His right to sue for damages should be specifically preserved.³⁹ However the claimant should be forced to elect. To permit him to recover both damages at law and statutory compensation would be to compensate him twice over for the damage sustained by him. The legislation should provide that if a person has recovered damages he shall not be entitled to statutory compensation and vice versa.⁴⁰

331. *Determination of claim.* There should be a time limit for submission of claims for compensation. A limitation of three years has, in recent times, been adopted in

³⁶ A 12 months delay is provided by the United Kingdom legislation (see para. 302 above) and has been recommended in both Victoria (para. 312) and New South Wales (para. 318).

³⁷ Draft Bill, cl. 87; and see Land Compensation Act 1973 (UK), s. 15.

³⁸ Draft Bill, cl. 88.

³⁹ Draft Bill, cl. 89.

⁴⁰ Draft Bill, cl. 89.

legislation relating to a number of different subjects. Limitation periods should be made uniform, to the maximum extent possible, and the Commission therefore suggests this period.⁴¹ The period should date from the 'relevant day' being the day upon which the claim vests.⁴² An obligation should be imposed upon the Minister promptly to decide whether compensation is payable and, if so, a fair and reasonable estimate of the amount of compensation. That decision should be served upon the claimant⁴³, who should have a right to review by the Administrative Appeals Tribunal⁴⁴ or to final determination in the Federal Court of Australia.⁴⁵

332. *Mitigation.* The United Kingdom Act contains elaborate provisions for mitigation of the injurious effect of public works.⁴⁶ Pursuant to those provisions, constructing authorities frequently perform work on affected properties: notably double-glazing of windows to reduce noise. The view has been put to the Commission, by those experienced in the operation of the United Kingdom legislation, that it is undesirable to make the mitigation of the works mandatory. There is too much scope for legitimate argument as to the works necessary to offset the effects of a particular public work. Some owners will desire simultaneously to remodel their premises, with scope for argument as to apportionment of costs. Others will oppose any construction work on their property at all. The better course is simply to empower the constructing authority to carry out such works as may be agreed with the affected owner to mitigate the adverse effects of the public work.⁴⁷ To the extent that it does so, or would be willing to do so, damage to value of the property is mitigated. A generous and imaginative policy of mitigation will reap its own reward in saving compensation payments and in reducing the adverse effect of public works.⁴⁸

(ii) ALRC draft legislation: Draft Lands (Acquisition and Compensation) Bill, Part XIII

Reproduced with kind permission from the Australian Law Reform Commission. Source: The Australian Law Reform Commission Report No 14: *Lands Acquisition and Compensation* (1980), page 222-224.⁴⁹

⁴¹ Draft Bill, cl. 90.

⁴² Draft Bill, cl. 85.

⁴³ Draft Bill, cl. 91.

⁴⁴ Draft Bill, cl. 92.

⁴⁵ Draft Bill, cl. 59.

⁴⁶ Land Compensation Act 1973, ss. 20-7.

⁴⁷ Draft Bill, cl. 93. This may not be necessary. Such a matter is probably already covered by any constructing authority's incidental powers, but the question should be put beyond doubt.

⁴⁸ It is, of course, the policy of many constructing authorities to do this sort of work at present time. For example, main roads authorities, when they acquire land for road widening, normally offer to rebuild front fences or walls. The cost of doing this, in conjunction with the road works, is presumably much less than paying all the landowners the cost of having separate contractors to do works, is presumably much less than paying all the landowners the cost of having separate contractors do works for each property.

⁴⁹ This part of the ALRC proposed the draft bill which was not adopted by the legislature: cf LAA (Cth) 1989, s 55(2)(a)(iv) in App 4, Part A above.

PART XIII-COMPENSATION FOR INJURIOUS AFFECTION.

82. A reference in this Part to an injurious factor shall be read as reference to each of the following:

- (a) noise;
- (b) vibration;
- (c) smell;
- (d) smoke;
- (e) fumes;
- (f) artificial lighting;
- (g) discharge of substance;
- (h) heat;
- (i) gas;
- (j) vapour;
- (k) loss of air;
- (l) overshadowing;
- (m) loss of support;
- (n) restriction or prevention of access between the relevant land and a public road, waterway or sea shore;
- (o) anything in relation to which, in the State or Territory in which the relevant land is situated and in the absence of statutory authority or immunity, there exists a right of action for nuisance by an owner of land against the owner or occupier of other land.

83. In this Part, "the relevant day" means--

- (a) in relation to an injurious factor caused by the existence of anything constructed on land-the first anniversary of the completion of the construction of that thing;
- (b) in relation to an injurious factor caused by the use of land or of anything constructed on land-the first anniversary of the commencement of that use; and
- (c) in relation to an injurious factor caused by the intensification of the use of land or of anything constructed on land--the first anniversary of the completion of the construction as a result of which the use was intensified.

84. (1) This Part applies to land vested in an authority of the Commonwealth, including an authority of the Commonwealth specified in regulations referred to in sub-section 6(2). in the same manner as it applies to land vested in the Commonwealth.

(2) In the application of this Part to land vested in an authority of the Commonwealth, a reference to the Commonwealth shall be read as a reference to the authority of the Commonwealth.

85. Where the value of an interest in land has been depreciated by an injurious factor caused by--

(a) the existence of anything constructed on land vested in the Commonwealth the construction of which was completed after the commencement of this Act and after the land became vested in the Commonwealth;

(b) the use of land vested in the Commonwealth or of anything constructed on land vested in the Commonwealth being a use that commenced after the commencement of this Act and after the land became vested in the Commonwealth; or

(c) a substantial intensification in the use, whenever commencing, of land vested in the Commonwealth or in the use of anything constructed on land vested in the Commonwealth, being an intensification that results from the completion of construction on the land after the commencement of this Act and after the land became vested in the Commonwealth,

the person in whom that interest is vested on the relevant day has, subject to this Part, a right to compensation in respect of the depreciation in the value of his interest.

86. The compensation payable to a person who has a right to compensation under section 85 is the amount by which the market value of his interest in the land on the relevant day is less than the amount that would have been the market value of his interest on the relevant day if the depreciation in value caused by the existence of the thing constructed, by the commencement of the use or by the substantial intensification of the use, as the case may be, had not occurred.

87. (i) Subject to sub-section (2), there is no right to compensation under this Part in respect of depreciation by an injurious factor unless the source of the injurious factor is on land vested in the Commonwealth.

(2) Injurious factors caused by aircraft arriving at or departing from an aerodrome vested in the Commonwealth shall be regarded as having their source at the aerodrome whether or not their source is in fact outside the boundaries of the aerodrome.

88. The right to compensation under this Part subsists notwithstanding any immunity otherwise conferred by law on the Commonwealth.

89. (i) This Part does not prejudice or affect the right of a person to institute an action for, and to obtain, damages or any other remedy that is available under another law in respect of loss or damage suffered by the person by reason of injurious factors caused by the existence of anything constructed on land vested in the Commonwealth or the use of anything constructed on land vested in the Commonwealth.

(2) Where a person recovers judgment for damages in an action referred to in sub-section (1), he is entitled to payment of the damages but ceases to be entitled to compensation under this Part.

(3) Where the amount of compensation payable to a person under this Part has been agreed or determined, that person ceases to be entitled to damages or any other remedy under another law in relation to any loss of value to land in respect of any injurious factor in relation to which compensation has been agreed or determined

90. Compensation is not payable under this Part unless a claim for compensation is made to the Minister within 3 years after the relevant day.

91. (i) The Minister shall consider a claim for compensation under section 90 and shall make a decision in writing-

(a) assessing the amount of compensation payable to the claimant if he is satisfied that the claimant is entitled to compensation; or

(b) rejecting the claim if he is not so satisfied.

(2) The Minister shall cause a copy of his decision under sub-section (I) to be served on the claimant.

(3) If the Minister does not, within 2 months after a claim for compensation is made, make a decision under sub-section (I), the Minister shall be deemed to have rejected the claim.

92. (i) An application may be made to the Tribunal for a review of a decision under section 91.

(2) Sub-section 51(2) and sections 52 to 55, inclusive, apply to and in relation to a review of a decision under this Part in the same manner as they apply to a decision under Part VII.

93. The Minister may authorise the carrying out on land vested in the Commonwealth or, by agreement with the person or persons having an interest in other land, on the other land of works for mitigating the adverse affect of an injurious factor that gives a right to compensation under this Part.

(iii) A Canadian example: The Ontario Expropriations Act R.S.O. 1990, c. E-26, s1(1)

Section 1(1) : Definitions

“injurious affection” means,

(a) where a statutory authority acquires part of the land of an owner,

(i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(b) where the statutory authority does not acquire part of the land of an owner,

(i) such reduction in the market value of the land of the owner, and

(ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired; ("effet préjudiciable")

APPENDIX 5

THE NO-SCHEME RULE - HISTORY

INTRODUCTION

The “no-scheme rule”

- A.1 It is an established principle of compensation law that compensation “cannot include an increase in value which is entirely due to the scheme underlying the acquisition.” This rule, following the name of the case from which this formulation is taken, is often called the “*Pointe Gourde* rule”.¹ The rule requires the disregard of decreases in value caused by the scheme, as well as increases in value.² In other words, the value must be assessed in the “no scheme world”, that is “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition”.³
- A.2 Although the rule was developed by the Courts, its effect has been reproduced, or reflected, in a number of provisions now contained in the Land Compensation Act 1961. They are section 5(3) (“special suitability”);⁴ section 6 (disregard of changes in value arising from actual and prospective development);⁵ section 9 (depreciation due to prospect of acquisition);⁶ sections 14-16 (planning assumptions); section 17ff (certificates of appropriate alternative development).⁷
- A.3 Strictly speaking the *Pointe Gourde* rule refers only to the judicial (or “common law”⁸) version of the rule, as opposed to the various statutory versions. Furthermore, as will be seen, there is room for debate whether the *Pointe Gourde* formulation is, or should be taken as, an accurate statement even of the judicial rule. Accordingly, we have preferred to use the term “no-scheme rule”, as a convenient shorthand for all the various manifestations of the rule, both statutory and non-statutory.

¹ *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565, PC, at p 572, *per* Lord MacDermott.

² *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426.

³ *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 *per* Lord Hope. This hypothetical state of affairs is usually referred to as “the no-scheme world”.

⁴ This is derived from the 1991 Act, giving effect to recommendations of the Scott Committee: see para A.30 below.

⁵ This is one of a complex group of provisions (ss 6-8) dealing with the disregard of different categories of development on adjoining land. Sections 7-8 deal with increases in value of adjacent land. The background and general effect of section 6 (formerly, s 9(2) of the 1959 Act) is described in Part II and Part VI.

⁶ This also comes from the 1959 Act, although based on a provision in the 1947 Act: see Part II and Part VI.

⁷ These provisions, in their current form, are set out in Appendix 3.

⁸ The term “common law rule” is sometimes used to describe the principle developed in the cases. However, since compensation is an entirely statutory creation, it is perhaps more accurate to treat the rule as one of interpretation of the word “value” in the relevant statutes: see *Rugby Water Board v Shaw-Fox* [1973] AC 202, 214, *per* Lord Pearson. To maintain the distinction, therefore, we shall refer to the “judicial” and “statutory” versions of the rule.

- A.4 An understanding of the history is important, both to understand the present law, including the genesis of the present statutory rules, and to provide a firm basis for the new Code. We examine that history, and draw some conclusions as to the present state of the law. We also discuss the issues which need to be addressed by the new Code and make our proposals.

Three phases of evolution

- A.5 The evolution of the rule can conveniently be divided into three phases, the first from 1845 Act, through to the changes made by the 1919 Act, following the recommendations of the Scott Committee; the second, covering the so-called *Indian* case (1939) and the *Pointe Gourde* case itself (1947), up to and including the 1947 Act; and the third, from 1959 to today, covering the modern development of the rule, beginning with the restoration of the market value principle in what became the 1961 Act.

PHASE (1): FROM 1845 TO 1919

The early cases

Value to the owner

- A.6 The 1845 Act provided limited guidance as to the basis on which compensation was to be assessed. Section 63 simply required “regard to be had... to the value of the land” (as well as loss to the owner due to severance or injurious affection). It was established in the early cases that this meant the value to the owner, not the value to the acquiring authority.⁹ The cases up to 1919 were directed to working out this principle.
- A.7 One aspect of the “value to the owner” test was that any enhancement of value which could only be enjoyed by the acquiring authority was implicitly excluded. This is illustrated by a case in 1870, in which the authority was acquiring three graveyards and converting them to secular use (a new street and building sites). The Court rejected an argument that the owner should get the value of their use for secular purposes, since this change could not have been achieved without statutory powers:

When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom the property is taken, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it.¹⁰

Special adaptability

- A.8 Thus it was established that added value given by the existence of the undertaker’s statutory powers had to be left out of account. On the other hand, if the land had

⁹ See e.g. *Penny v Penny* (1868) LR 5 EQ 277.

¹⁰ *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42 *per* Cockburn CJ.

intrinsic advantages, which gave it special suitability of adaptability¹¹ for the proposed use, quite apart from the undertaker's scheme, that could be taken into account in the valuation. Although the word "scheme" was sometimes used, it was interchangeable with words such as "purpose" or "undertaking".

- A.9 A number of the early cases on the rule concerned land acquired by water companies for reservoirs. *Re Ossalinsky and Manchester Corporation* (1883)¹² confirmed that the valuer should disregard any enhancement due to the use of statutory powers;¹³ but this, it was held, did not mean that he should ignore the intrinsic suitability of the land for use as a reservoir:

You must not look at *the particular purpose* which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it *as an illustration* to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary (sic), but are schemes with certain probability in them. I do not see any objection to that being used as an argument.¹⁴ (emphasis added)

- A.10 This approach was followed in 1904 in another reservoir case.¹⁵ If the site had "peculiar advantages for supplying water"¹⁶ apart from any scheme "for appropriating the water to a particular water authority", they could be taken into account:

It would be otherwise, no doubt, if there was no natural value in the place as a water site apart from the particular scheme or Act of Parliament, or, in other words, there is no value for which

¹¹ Although different expressions are used in the earlier cases, the term "special adaptability" seems to have become the most popular in the period leading up to the 1919 Act (see para A.19 below, referring to the comments of Shearman J in 1914), and it was used by the Scott Committee (paras A.30-33 below). The 1919 Act itself (in rule (3)) refers to "special suitability or adaptability": see para A.32 below. But, as it appears from the cases referred to below, other terms are also used (e.g. "peculiar advantages", "natural value", "special value").

¹² Reported in *Browne and Allan's Law of Compensation* (2nd ed 1903) p 659, and cited (as the earliest reported example of the principle) by Lord Hodson in *Rugby Joint Water Board v Foottit* [1973] AC 202, 219.

¹³ "When a railway company, or any other person who takes land under compulsory power, is to pay for that land, you are not to make them, as it were, buy it from themselves; you are not to take the value which, in their hands, it would acquire, and make them pay for it as if they had no compulsory power..." (*ibid*, per Stephen J).

¹⁴ Per Grove J; quoted by Buckley LJ in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, 36. (The words after "special purpose" were omitted from Lord Hodson's quotation from the same passage in the *Rugby Water Board* case).

¹⁵ *In re Gough and Apatia, Silloth and District Joint Water Board* [1904] 1 KB 417. This seems to be the first use of the word "scheme" in this context.

¹⁶ "If there is a site which has peculiar advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation - if the site has peculiar advantages for supplying in that sense": *ibid*, per Lord Alverstone CJ, at 422.

compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters.¹⁷

Special purchaser

- A.11 Although not directly relevant to the no-scheme rule, it is useful to note another valuation principle, established by the Court of Appeal in 1914, which was part of the background to rule (3) in the 1919 Act.¹⁸ The case concerned the valuation of a house for tax purposes.¹⁹ As a house on its own it was worth £750, but to an adjoining nursing-home it had an added value of £250 for the purpose of extending the home. It was held that this “special purchaser” addition was not to be excluded. Furthermore, this did not mean that the valuer allowed simply “one extra bid”. As Swinfen Eady LJ said:

Such an assumption would ordinarily be quite erroneous. The knowledge of the special bid would affect market price, and others would join in competing for the property with a view to obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase.²⁰

- A.12 As will be seen, rule (3) in the 1919 Act required such special purchaser value to be excluded in assessing compensation for compulsory purchase, but this part of the rule was eventually repealed in 1991.²¹

From Lucas to Fraser

- A.13 The effect of the no-scheme rule was discussed in four important cases, in the decade before the Scott Committee, two English cases (one in the Court of Appeal and one in the Divisional Court) and two Canadian cases (in the Privy Council).

The English cases

- A.14 *In re Lucas and Chesterfield Gas and Water Board* (1909)²² is often taken as the leading authority for the rule. The case again concerned the acquisition of land for a reservoir, and the issue was whether the suitability of the claimant’s land for the

¹⁷ *Ibid.*

¹⁸ *IRC v Clay & Buchanan* [1914] 3 KB 466 The case was cited with approval by the Privy Council in the *Indian* case (see para A.34 below).

¹⁹ The question was the amount which it would realise “if sold... in the open market by a willing seller...”: Finance Act 1910, s 25(1).

²⁰ [1914] 3 KB 466, 476. For a modern application of this approach, see *Mercury Communications Ltd v London & India Dock Investments Ltd* (1993) 69 P&CR 135, 158 (Judge Hague QC). He criticised the decision in *BP Petroleum v Ryder* [1987] RVR 211 (Peter Gibson J) for having “resurrected the ‘one more bid’ argument”.

²¹ See para A.93 below.

²² [1909] 1 KB 16. The powers were conferred under a local Act (*Chesterfield Gas and Water Board Act 1904*): pp 18-19.

purpose of constructing a reservoir could be taken into account. In a classic²³ statement of the rule, Fletcher Moulton LJ said:

The owner receives for the lands he gives up their equivalent, ie that which they were worth to him in money...But the equivalent is estimated to be the value to him, and not on the value to the purchaser, and hence it has from the first been recognised as an absolute rule that this value is to be estimated *as it stood before the grant of the compulsory powers*. The owner is only to receive compensation based upon the market value of his lands *as they stood before the scheme was authorised by which they are put to public uses*. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.²⁴ (emphasis added)

This passage confirms the no-scheme rule as one aspect of the “value to the owner” principle. It also implies a relatively narrow approach, under which the scope of the “scheme” is limited to that whereby the subject land is “put to public uses”, and there is no looking back beyond the time of authorisation.²⁵

- A.15 The other significant feature of the case related to the precise limits of the “special adaptability” principle. On this aspect, there was a significant difference between the two leading judgments. Fletcher Moulton LJ considered that, where the land had special value only for the purpose of the acquiring authority, it must be disregarded. However, if that value also existed for other purchasers, it could be taken into account, even if those purchasers would themselves require statutory powers to realise that potential.²⁶ Thus, it was essential that there should be evidence of *some* market, apart from the interest of the acquiring undertaker,²⁷ even if that market might be limited to those having, or able to get, statutory powers.²⁸
- A.16 Vaughan Williams LJ, however, went further. He agreed that the market should be treated as including others who might be able to obtain statutory powers. But he

²³ It was relied on by both majority and minority in the leading modern House of Lords authority, *Rugby Water Board v Shaw-Fox* [1973] AC 202, at p 214 (Lord Pearson), p 243 (Lord Simon) See also (in Australia) *Crompton v Commissioner of Highways* (1973) 5 SASR 301, *per* Wells J: “[f]undamentally, the law is founded on the classic formulation by Fletcher-Moulton LJ *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, at 29-30.”

²⁴ *Ibid*, p 29.

²⁵ Vaughan Williams LJ also thought that the matter should be looked at “as it existed before the promoters had obtained their powers”: p 28.

²⁶ *Ibid*, p 31. The arbitrator had found that the site had “particular natural advantages” for a reservoir”: p 19.

²⁷ He had in mind that “in a densely populated country like England” a particular tract suitable for a reservoir might be “useful in this way to more than one locality, and may thus be the subject of competition between them”: *ibid*.

²⁸ *Ibid*, p 31-2: “In the case of waterworks for public supply promoters must always arm themselves with parliamentary powers, since distribution would otherwise be impracticable. But if by its prudence and foresight a public authority had by private negotiation secured a desirable site for a reservoir for the water supply of its own district, it would not be in accordance with the practice of Parliament to refuse to it the powers necessary to its effective use for that purpose.”

considered that the acquiring authority itself should also be considered as a potential buyer:

I agree... that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable... also on the ground that *the fact that the board itself might become possible purchasers who would give a special price for the land ought to be considered.*²⁹ (emphasis added)

However, the valuer had erred in treating the “probability and the realised probability as identical”. What had to be valued was, not the “realised” potential of the land for the acquiring authority’s purpose, following the actual grant of statutory powers, but simply “the possibility” of the site going into the market for that purpose.³⁰

A.17 On this aspect, the third member of the Court, Buckley LJ appears to have agreed with the approach of Vaughan Williams LJ. He could see no reason why the answer should depend on the number of potential competitors.³¹ However, since the result of the case was not affected by the difference on this point,³² the existence of a majority for this view was not treated as conclusive in later cases.

A.18 In *Sidney v N E Ry Co* (1914),³³ the Divisional Court preferred the approach of Fletcher Moulton LJ. The facts were unusual. The railway company had taken over a stretch of line used as a private colliery railway and incorporated it into their main lines, overlooking the fact that their wayleave was limited in time. They subsequently obtained statutory powers to acquire the freehold. It was held that the valuer should take into account the possible market from adjoining colliery owners, but not the special need of the railway company itself:

... the umpire should have regard to the special adaptability of the land for railway purposes but not to the fact of the existence on it of an integral part of a public railway, or to the fact of such railway forming part of the main line.³⁴

²⁹ *Ibid*, p 25.

³⁰ *Ibid*, p 28.

³¹ *Ibid*, pp 35-6: “The appellants admit... that, if there be three persons whose combined properties offer special adaptability for some person, each is in compensation under the Act entitled to receive the fair value of his land having regard to its special adaptability... But if one of the three is desirous of buying out the other two, then, if their argument is right, the element of special adaptability is removed, because he as one of the three can prevent the user for the special purpose... This appears to me to be a suicidal argument.”

³² On the facts of the case, the difference between Vaughan Williams LJ and Fletcher Moulton LJ was not material to the decision, because the arbitrator was held to have erred in law on either view (see p 32).

³³ [1914] 3 KB 629.

³⁴ *Ibid*, p 635, *per* Avory J. The owners were claiming “... an enhanced value... on the sole ground that the railway company are placed in great difficulty from the fact that if the wayleave expired they would be left, not with a main line on the premises, but with a bit of the mainline ending at one place and another bit beginning at another place...” (p 639, *per* Shearman J).

A.19 Shearman J noted problems caused by the concept of “special adaptability”, which he traced to *Ossalinsky’s case* (see above):

... the ingenuity of claimants has been largely exercised in discovering or attempting to discover special adaptability of some sort in any kind of land compulsorily taken.³⁵

In his view “special adaptability was nothing more than an element in market value”.³⁶ Following the approach of Fletcher Moulton LJ in *Lucas*, he thought that the suitability for railway purposes could be taken into account, but not “the exigencies of the N E Railway Company”.³⁷

A.20 Rowlatt J summarised the general principle as then understood:

It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give it as a marketable commodity, provided that the existence of the scheme is not allowed to add to the value.³⁸

A.21 Another useful summary of the perceived effect of the English cases, shortly before the intervention of the Scott Committee, was given in *South East Rly Co v LCC*.³⁹ This concerned a strip of land taken from the railway company for the widening of the Strand. The main issue was whether compensation for the land taken should be reduced to reflect the enhanced value of the adjoining land retained by the company. The answer was no (in the absence of statutory provision to that effect). Eve J set out six principles:

(1) The value to be ascertained is the value to the vendor, not its value to the purchaser, (2) In fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3) market price is not a conclusive test of real value; (4) *increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded*; (5) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6) the true contractual position of the parties – that of purchaser and vendor – is not to be obscured by endeavouring to construe it as

³⁵ *Ibid*, p 640.

³⁶ *Ibid*, p 640. He gave as an example the “adaptability” of land bordering a river for the purposes of potential purchasers wanting to establish a wharf.

³⁷ *Ibid*, p 640.

³⁸ *Ibid*, p 636. Rowlatt J’s judgment on the facts seems to be affected by the “one extra bid” argument, which was rejected by the Court of Appeal in the *Clay* case, decided a few weeks later (see para A.11 above).

³⁹ [1915] 2 Ch 252.

another contractual relation altogether – that of indemnifier and indemnified.⁴⁰ (emphasis added)

- A.22 Proposition (4) is particularly important because it was cited as authority for the rule in the *Pointe Gourde* case itself. In requiring disregard of any value attributable to the acquiring authority's undertaking, Eve J seems implicitly to have been adopting the view of Fletcher Moulton LJ in *Lucas*, rather than that of Vaughan Williams LJ. In that respect, as we have seen, he was consistent with the Divisional Court in *Sidney*.

The Canadian cases

- A.23 The judgments in *Lucas* (without distinction) were cited with approval by the Privy Council in two Canadian cases, both involving the acquisition of river land for hydro-electric projects.

- A.24 In *Cedars Rapids Manufacturing and Power Co v Lacoste* (1914),⁴¹ two separate pieces of land (“the three subjects”) in the St Lawrence river were acquired in connection with a power generation scheme. The acquiring company had been granted powers under a Canadian statute to develop water powers on a stretch of the river, and had obtained a lease of the river bed and the right to abstract water.⁴² The arbitrators' award had been based on agricultural value; the Supreme Court of Canada had adopted a figure based on a proportion of the value to the undertakers.⁴³ The Privy Council rejected both approaches:

Where... the element of value over and above the bare value of the ground itself... consists in adaptability for a certain undertaking... the value is not a proportional part of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects⁴⁴ which made the undertaking a realised possibility...⁴⁵

- A.25 The valuation evidence had proceeded on the wrong basis. The witnesses had treated the “three subjects as forming parts of a completed whole”, thus wrongly

⁴⁰ [1915] 2 Ch 252, 259.

⁴¹ [1914] AC 569. “The law... has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*, where Vaughan Williams and Fletcher Moulton LJJ deal with the whole subject exhaustively and accurately.” (p 576, *per* Lord Dunedin).

⁴² “The scheme” was to construct a dyke in the river bed between the three pieces of land, which would impound all the waters in the river north of the dyke: *ibid*, p 575.

⁴³ *Ibid*, p 578: “All the witnesses persist in looking at the three subjects as forming parts of a completed whole and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the undertakers.”

⁴⁴ As far as one can see from the report, the reference to “the other subjects” (in the words emphasised) was intended to include such things as the lease of the river-bed, and the water-abstraction rights: *ibid*, p 575.

⁴⁵ *Ibid*, p 576.

treating the scheme as “a realised probability”, contrary to the statement of Vaughan Williams LJ in *Lucas* (see above). The error went further than *Lucas*:

For in that case there was only one subject. Here there are three subjects detached, and the value which all the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated. The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but *with the possibility of that or any other company coming into existence and obtaining powers...*⁴⁶ (emphasis added).

- A.26 Thus, the valuer was required to ignore, not merely the compulsory powers granted for the acquisition of the three islands, but all the powers granted to the power company for its scheme. However, although the existence of the *actual* statutory powers was to be ignored, the *possibility* of such powers being granted in the future, to that or another company, was to be taken into account. This exercise in “possibilities” was similar to that envisaged by Vaughan Williams LJ,⁴⁷ but neither he nor the Privy Council gave any guidance as to how it was to be carried out in practice.⁴⁸
- A.27 In the other Canadian case, *Fraser v City of Fraserville* (1917),⁴⁹ river falls (“the Great Falls”) were expropriated by an electric light undertaking, which had previously expropriated lands higher up the river and was in the course of constructing a reservoir to increase the power of the falls.⁵⁰ The arbitrator had arrived at his award by taking a proportion of the capitalised profits to the undertakers, including, apparently, those due to the extra power, which would result from the reservoir.⁵¹

⁴⁶ *Ibid*, p 579.

⁴⁷ See para A.16 above.

⁴⁸ As the ALRC commented (*op cit*, para 234): “The Privy Council gave no guidance as to how the Canadian court was to assess this possibility and ascribe a value nor did it explain why it was right in principle to allow the owner to take some part of the value to the hypothetical statutory authority but no part of the value to the actual statutory authority.”

⁴⁹ [1917] AC 187.

⁵⁰ The falls had been used for electricity generation for some years before the lease and business were sold (voluntarily) to the municipality in 1905; in 1907, the municipality adopted a bye-law authorising the construction of a reservoir higher up the river, with powers of expropriation; the bye-law authorising acquisition of the Great Falls was passed in 1909: *ibid*, pp 189-90.

⁵¹ This seems to be the effect of the judgment below (cited in French by the Privy Council): “Ils ont, comme dans la cause citée plus haute, commis l’erreur de faire participer l’expropriée aux bénéfices de la plus-value, donnée à la propriété, par la réalisation de l’objet pour lequel acquisition en était faite. Ils font payer à la ville, non pas la valeur d’un pouvoir d’eau pouvant développer 300 h.p., qui est ce que les propriétaires vendent, mais moitié de la valeur d’un pouvoir additionnel de 1200 h.p., qui est ce que la ville doit réaliser par l’exécution des travaux qu’elle a en vue ou en voie d’exécution.”: *ibid*, p 193.

- A.28 The Privy Council agreed with the Court below that the award was erroneous. Lord Buckmaster, summarised “the substance” of the earlier cases, including *Lucas, Sidney* and *Cedar Rapids*:-

... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, *excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired*, the question of what is the scheme being a question of fact for the arbitrator in each case. (emphasis added)⁵²

- A.29 This passage is significant, in that its use of the word “scheme” was echoed in *Pointe Gourde* itself.⁵³ Also, it establishes that the identification of the scheme is a “question of fact” for the arbitrator, rather than one of law for the courts. This is stated as a simple proposition, without further reasoning or citation. Nor does the Privy Council give any specific guidance as to the scope of the “scheme” on the facts of the case, or whether it included the reservoir, which was under construction at the same time, but under a separate bye-law. However, it was the respondent’s submission that “the reservoir and the works upon the appellant’s land were all one scheme, and not two separate schemes”.⁵⁴ At the very least, the Privy Council did not reject this as a possible view of the facts.⁵⁵

The Scott Committee

- A.30 The establishment of the Scott Committee, at the end of the First World War, is described elsewhere in this Report.⁵⁶ One of the issues it sought to address was the problem of speculative values, arising from the need to take account of “special adaptability”, as highlighted in the *Sidney* case. Since the Committee’s reasoning provides the background to what became rule (3) in the 1919 Act, it deserves full citation:

The [Courts’] own decisions have quite logically said that all “potential” as well as actual value should be included under the head of “value to the owner.” But under the cloak of this criterion merely theoretical and often highly speculative elements of value which had no real existence have crept into awards as if they were actual; while elements of remote future value have all too often been discounted, and valued as if there were a readily available market.⁵⁷

...the special adaptability of land for a particular purpose may be taken into account in assessing the price to be paid for land, even

⁵² *Ibid*, p 194.

⁵³ See para A.42 below; but the words “for which” (rather than “underlying”) more clearly direct attention to the future, rather than the past.

⁵⁴ *Ibid*, p 188.

⁵⁵ In *Sprinz v Kingston upon Hull City Council* [1975] RVR 178, 183 (n 128 below), *Fraser* was cited by counsel for the authority without dissent from the claimant, for the proposition that: “the fact that the proposals involved separate acquisitions, by instruments or time, does not prevent the joint proposals constituting one scheme”.

⁵⁶ Part II, para 2.5.

⁵⁷ The Scott Report, para 8.

where that purpose is the very purpose for which the land is taken, and even although it is not used, or at the time intended to be used, and even although without getting neighbouring owners to agree upon a joint scheme of development it could not be used for that purpose, provided its adaptability is such that as to render it available for sale to other persons than the promoters. And it is not necessary for the owner to show that at any given moment there are actual competitors for the land, if by reason of the situation and character of the land there are what may be called natural customers for it.⁵⁸

A.31 The Committee considered that potential competition from statutory undertakers should not be taken into account:-

We do not think that the Tribunal is justified in having regard to the possibility that undertakers to whom the State has granted statutory powers may compete with each other for the same land. Such competition is only possible under an imperfect system for the granting of statutory powers. In our view, any competition between Public Authorities or any other statutory undertakers for the same land should be determined by the decision of the Sanctioning Authority... But, while we would exclude as a basis of market value any possible competition for the land between statutory undertakers, we would not exclude the competition of those who require the land for any purpose for which statutory powers are not required.

A.32 They recommended that:

... the owner should not be entitled to any increased value for his land which can only arise, or could only have arisen by reason of the suitability of the land for a purpose to which it could only be applied under statutory powers.

This was the genesis of the main part of what became rule (3) in the 1919 Act:⁵⁹

The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from [*the special needs of a particular purchaser or*⁶⁰] the requirements of any Government Department or any local or public authority.⁶¹

⁵⁸ *Ibid*, para. 10. Similar observations had been made in the *Sidney* case itself (see para A.18 above).

⁵⁹ The Acquisition of Land Act 1919, s 2(3), replaced (with amendments) by the Land Compensation Act 1961, s 5 (3).

⁶⁰ These words, which followed a separate recommendation of the Scott Committee, designed to counter the effect of the decision in *IRC v Clay* [1914] 3 KB 346 (see para A.11 above), are not relevant to the discussion of the no-scheme rule; they were repealed by the Planning and Compensation Act 1991.

⁶¹ The Act applied initially to compulsory acquisition by “any Government Department or any local or public authority” (s 1(1)); “public authority” was defined as “any body of persons, not trading for profit, authorised by or under any Act to carry on a railway, canal, dock or

- A.33 As appears from the above extracts from the report, the Committee’s intention in this rule was to exclude *any* value attributable to the needs of statutory bodies, whether of the acquiring authority itself or of possible competing authorities (a possibility which it attributed to “an imperfect system for the granting of statutory powers”). The only relevant market was one consisting of “those who require the land for any purpose for which statutory powers are not required”. Thus the intended effect was to go further, in disregarding the potential demands of statutory authorities, than either of the leading judgments in *Lucas*.

PHASE (2): FROM 1919 TO 1959

The *Indian* case (1939)⁶²

- A.34 The Privy Council’s judgment in this case contains the most detailed analysis of the relevant principles at this level. However, the relevant Indian statute contained no equivalent of rule (3) of the 1919 Act. Accordingly, the relationship of that rule to the principles explained by the Privy Council was left uncertain.
- A.35 A Harbour Authority had compulsorily acquired land from the claimant, containing fresh water springs, for the purpose of providing a water supply to the harbour (then under construction) and its hinterland. The harbour scheme had begun years before. The need for a fresh water supply arose from the discovery that existing supplies were affected by malaria. In practice the only possible purchaser of the land as a water supply was the Harbour Authority.⁶³ The Court of Appeal had held (following Fletcher Moulton LJ in *Lucas*) that, because the value of the Spring as a source of drinking water arose entirely from the scheme carried out by the Harbour Authority, the value for that purpose should be ignored.⁶⁴
- A.36 The Privy Council disagreed. Unlike the judges in *Cedars Rapids* and *Fraser*,⁶⁵ Lord Romer recognised the significant differences between the two main judgments in *Lucas*⁶⁶ (“diametrically opposed to one another”), and preferred that of Vaughan Williams LJ.⁶⁷ Even where the special value existed only for the acquiring authority,

other public undertaking”. It was subsequently extended to cover most bodies exercising compulsory purchase powers. See para A.96 below.

⁶² *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (“the *Indian* case” is a convenient, and frequently used, shorthand).

⁶³ *Ibid*, p 327.

⁶⁴ *Ibid*, pp 326-7. Before the Privy Council, the authority maintained the position that the “purpose of the acquisition (here the harbour or malarial schemes) must be excluded”; the claimant argued that since the land was “left out in the original scheme”, the value resulting from it should be taken into account: pp 306-7.

⁶⁵ Lord Romer referred to Lord Buckmaster’s formulation of the rule in *Fraser*, but observed that it “makes no reference whatever to the present question”: *ibid*, p 321. Lord Romer does, however, appear to go further than the Canadian cases, in apparently requiring the authority’s *actual* proposals for the site to be taken into account, rather than merely the *possibility* of such proposals: see para A.37 below, and cf paras A.16 and A.25 above.

⁶⁶ See paras A.15-16 above.

⁶⁷ [1939] AC 301, 320-1. He criticised the decision in *Sidney v NE Ry Co* (see above) for similar reasons: pp 321-3.

that should be taken into account in considering what a willing purchaser would pay:

... if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it...

... even where the only possible purchaser of the potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers...⁶⁸

- A.37 Lord Romer also commented on the use of the term “scheme” by Fletcher Moulton LJ in *Lucas*. He thought it correct to speak of disregarding the “scheme”, if by that was meant simply “the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality”. But that would not justify entirely excluding the acquiring authority as a potential purchaser:

The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value.

On the other hand, he expressly rejected an interpretation of the “scheme” which equated it with (and required disregard of) “the intention formed by the acquiring authority of exploiting the potentiality of the land”. Thus, it seems, their actual proposals for the land, as willing purchasers without compulsory powers, were to be taken into account in the valuation.⁶⁹

- A.38 The *Indian* case, therefore, apparently gave approval to a version of the no-scheme rule which was significantly narrower than that which had been adopted in the English cases before 1919, as summarised by Eve J in the *S.E. Railway* case.⁷⁰ This may not at the time⁷¹ have been seen as particularly important in the English context, since by then those cases had apparently been overtaken by rule (3) of the 1919 Act.

⁶⁸ *Ibid*, pp 316-7, 322.

⁶⁹ *Ibid*, pp 319-20.

⁷⁰ See para A.21 above. Eve J’s formulation of the rule was not apparently cited, in argument or in the judgments, in the *Indian* case.

⁷¹ In any event, at the time of this case (1939), the precise scope of the no-scheme rule was probably not seen as a very live issue.

The Pointe Gourde case

- A.39 It was not until 1947, in the *Point Gourde* case⁷² itself, that the relationship between the no-scheme rule and the rule (3) was considered by the higher courts. Unfortunately, the reasoning given by the Privy Council, in relation either to the earlier cases or to the statute, was limited.
- A.40 A quarry in Trinidad was acquired in connection with the establishment of a US naval base.⁷³ As the stated case showed, the land had “a special suitability or adaptability” for producing quarry products, and had a market value as quarry land before the acquisition. The quarry business of the owners was totally extinguished by the acquisition, and in assessing compensation the tribunal “was largely guided by the estimate it formed of the prospective profits”. Of the total award of \$101,000, the sum of \$86,000, which was not challenged, included the value of the quarry as a going concern, and made allowance for its “special suitability or adaptability” for that purpose. The issue concerned an additional sum of \$15,000, explained in the case as follows:

The tribunal considered that the market value of the quarry land and business would be increased if the United States needs were supplied from this quarry land on a commercial basis as greater prospective profits might be expected.

As it was put in the “facts taken from the judgment of the Judicial Committee”, the sum of \$15,000 was “evidently awarded as the measure of the loss of that element of prospective extra profit”.⁷⁴

- A.41 The sole issue⁷⁵ raised by the local court was whether this item was excluded by rule (3) (which was reproduced in the relevant statute⁷⁶). It was held by the Privy Council that rule (3) had no application, because it was concerned with the *use* of the land itself, not of the *products* of the land. The use of the quarried stone in construction of the naval base, though of particular importance to the United States on account of their special needs, did not constitute a special adaptability *of the land* for any purpose.⁷⁷
- A.42 However, in the Privy Council it was argued, in the alternative, that the \$15,000 should be disallowed under the no-scheme rule. This argument succeeded. Lord MacDermott stated the rule as follows:

⁷² *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

⁷³ The UK Government had agreed with the US Government in March 1941 to lease land required for naval bases. Certain land belonging to the claimant, at Pointe Gourde in Trinidad, was required for the establishment of one such base. It was acquired compulsorily in April 1941, under powers conferred by the Land Acquisition Ordinance 1941: *ibid*, p 566.

⁷⁴ *Ibid*, pp 566-8.

⁷⁵ See *ibid*, p 568. Although this was stated as the issue for determination, the judgment of the Full Court, as Lord MacDermott observed, appeared to be based on the no-scheme principle: *ibid*, pp 572-3.

⁷⁶ Section 11(2) of the Land Acquisition Ordinance, No 14 of 1941.

⁷⁷ [1947] AC at p 572.

It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value, which is entirely due to the scheme underlying the acquisition.⁷⁸

He rejected an argument that the relevant scheme was the acquisition of the quarry land, not the construction of the naval base, because there was a specific finding in the case that the land acquired was “required by the United States for the establishment of a naval base in Trinidad.”⁷⁹

The importance of Pointe Gourde

- A.43 Lord MacDermott’s statement of the principle has formed the starting point for subsequent discussion, and the case has given its name to the rule. However, for a leading case, the judgment is surprisingly short of legal reasoning.
- A.44 The result itself is not unexpected, but the reasoning seems the wrong way round. The interpretation of rule (3) was curiously narrow. As we have seen, the reference to “special adaptability” in rule (3) was related to the use of that, and similar terms, in earlier cases. As Shearman J had said in *Sidney*, special adaptability was “nothing more than an element in market value”.⁸⁰ The Scott Committee might have been surprised to learn that the special locational suitability of a quarry to provide materials for construction of a naval dock was not within the rule.⁸¹
- A.45 By contrast, the application of the judicial rule was unexpectedly wide. The *Indian* case, although the most recent consideration of the subject by the Privy Council,⁸² was ignored in Lord MacDermott’s judgment. The word “scheme” was applied without any reference to Lord Romer’s discussion of its correct use, and misuse.⁸³ Instead, reliance was placed on a first instance summary (Eve J in *S.E. Railway*) of English authorities that had been expressly disapproved by the Privy Council. Under the *Indian* case, the only “scheme” to be disregarded would have been the fact of compulsory purchase. The special interest of the US Navy in the products of the quarry would not have been left out of account; compensation would have

⁷⁸ *Ibid*, at p 572. He cited with approval Eve J’s formulation of the rule in *SE Railway v LCC* (see above). The only other case cited in the judgment was *Fraser v Fraserville* (see above). It is to be noted that Eve J did not use the term “scheme”, but referred to an increase in value “consequent upon the execution of the undertaking for or in connection with which the purchase is made...” (see above).

⁷⁹ *Ibid*, p 573.

⁸⁰ See para A.19 above.

⁸¹ On this interpretation, even if rule (3) had been applicable in the *Indian* case, it would have had no effect; again, it was the special suitability of a *product* of the land (the water from the springs), rather than of the land itself, which gave the added value. However, it is difficult to see that as a significant distinction from, e.g., the reservoir cases (see paras A.14-29 above), where the special suitability lay in the topography of the land, allowing it to be used for a reservoir, rather than in the existence of a water-supply on site.

⁸² It was cited in argument: *ibid*, at p 569.

⁸³ See para A.37 above. In *Waters v Welsh Development Agency* (June 2002), the Court of Appeal suggested that the difference between the two cases turned on their particular facts: in the *Indian* case the acquisition of the water supply arose from a separate decision, some years after the start of the harbour project; in the *Pointe Gourde* case, the quarrying and the land for the naval base was acquired as part of the same order.

included the amount which the Navy would have been willing to pay, in friendly negotiations, for that extra value.⁸⁴

- A.46 Right or wrong, however, the *Pointe Gourde* case established the conventional form of the modern rule. Two particular features of the case were to become important in the subsequent development of the rule. First, Lord MacDermott's formulation referred to the scheme *underlying* the acquisition, rather than (as in *Fraser*)⁸⁵ the scheme *for which* the acquisition was authorised. There is no suggestion that this was thought to be a significant difference. Indeed, the relevant finding as to the scheme (see above) used the word "for", and was expressed in terms appropriate to the *Fraser* test. However, as will be seen, the change of terminology was to lead, in subsequent cases, to a wider interpretation of the scope of the "scheme", both spatially and temporally.
- A.47 Secondly, the no-scheme rule was used to exclude value attributable to use of land other than the subject of the valuation.⁸⁶ Previous cases had been concerned principally with the special suitability of the subject land for development on *that* land. As Denyer-Green notes, the proximity of the naval base would have given the quarry added value, even if it had not been compulsorily acquired. He comments:

... the latter value was betterment and for the first time it was excluded from the compensation. Hence the significance of the case to present day acquisitions where market value may well be enhanced by acquiring authority schemes.⁸⁷

FROM 1947 ACT TO 1959

The 1947 Act

- A.48 The *Pointe-Gourde* case (1947) was decided by the Privy Council at almost the same time as the planning system of this country was being radically altered by the Town and Country Planning Act 1947. The general features of the 1947 Act were outlined in Part II of this Report.⁸⁸ The most durable aspect was the imposition of universal planning control, under a system the main elements of which have

⁸⁴ It is to be noted that the stated case did not in terms raise the *Indian* case issue. The extra sum was expressed in the stated case as the additional profitability of the quarry business arising from the navy project, not (as under the *Indian* case) an additional sum which the navy would have paid for the land in friendly negotiations. Cf Keith Davies in *Law of Compulsory Purchase and Compensation* (5th ed 1994), at pp 130-2; he suggests that the tribunal's real error was in awarding the value of the products in addition to the value of the land: "(it)... is rather like saying that the market price of a farm as a going concern includes not only the land, the goodwill and the equipment, but also the retail value of all the produce into the bargain." However, this interpretation seems doubtful; as far as one can judge from the report, the \$15,000 was the increase in the going concern value of the quarry undertaking, not the value of the products as such.

⁸⁵ See para A.28 above.

⁸⁶ Although the quarry seems to have been included in the same compulsory acquisition as the land needed for the actual naval base ([1947] AC at p 566, referred to at n 72 above), it appears to have been treated it as a separate item for valuation purposes (*ibid* p 567).

⁸⁷ Denyer-Green, *op cit*, p 217-8. *Fraser* (para A.27 above) might be an earlier example.

⁸⁸ See Part II, para 2.8.

survived until today. The other main element, which did not survive, was the expropriation by the state of all development value.

- A.49 The assumption was that most development would be promoted by public authorities, using compulsory powers where necessary, on land designated for that purpose in a statutory plan. Where land was developed privately, a development charge was payable. Where land was compulsorily acquired, compensation was based on existing use value, which would normally exclude any potential value for other uses, including the authority's own scheme. Thus the "no-scheme rule" had little relevance.⁸⁹ There was however a statutory rule to ensure that, in valuing land, any depreciation caused by its designation for compulsory purchase, was disregarded.⁹⁰

Case law

- A.50 In the following period, in so far as the no-scheme rule was mentioned, it was not by reference to the *Pointe Gourde* case.⁹¹ That case was referred to in a number of Lands Tribunal decisions as authority on rule (3) of the 1919 rules.⁹²
- A.51 The only relevant higher authority, from the years before 1959, appears to be *Lambe v Secretary of State for War* in the Court of Appeal.⁹³ In that case, the Secretary of State had purchased the freehold of a territorial army headquarters building, over which the territorial army already had a lease. The Court of Appeal accepted that the special interest of the Secretary of State in marrying the two interests could be taken into account. It approved the Tribunal's valuation described as being "assessed in conformity with the judgment in the *Indian* case..." In doing so, it adopted Lord Romer's definition of the "scheme", and rejected the argument of the acquiring authority that *Pointe Gourde* required the Tribunal to disregard the price which the authority would be prepared to pay in friendly negotiations. Parker LJ adopted Lord Romer's words:

The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.⁹⁴

- A.52 The restoration, in 1959, of the market value principle opened a new chapter in the development of the no-scheme rule; which we consider in the next section.

⁸⁹ See the discussion in *Kaye v Basingstoke Corp* (1969) 20 P & CR 417, 453.

⁹⁰ Town and Country Planning Act 1947, s 51(3). An expanded version of this became section 9 of the 1961 Act (see below).

⁹¹ It is of interest that, even in 1962, in the last edition of the then standard work on compensation (Cripps, *Compulsory Acquisition of Land* (11th ed)), the *Pointe Gourde* case is referred to (para 4-114) as an authority on rule (3), rather than for the judicial rule which later took its name. That rule is explained by reference to *Lucas, Fraser*, and the *Indian* case: Cripps, paras 4-014, 015, 111.

⁹² *Lester v Secretary of State for War* (1951) 2 P & CR 74; *London Investment and Mortgage Co Ltd v Middlesex County Council* (1952) 2 P & CR 331; *Glover v Edmonton Corp* (1953) 3 P & CR 451; *Lambe v Secretary of State for War* (1954) 4 P & CR 230. In one Lands Tribunal case, it was cited as affirming the "well-settled principle" stated by Eve J in the *S E Rly* case: *Cooper v Smallburgh RDC* (1958) 9 P & CR 396.

⁹³ [1955] 2 QB 612. The case is discussed further below at paras A.87-91.

PHASE (3): MODERN DEVELOPMENT

The Town and Country Planning Act 1959

- A.53 The 1959 Act was intended to restore the market value principle of compensation as it applied before the 1947 Act. Its main provisions were reproduced in the 1961 Act, in which it was consolidated with (inter alia) the extant provisions of the 1919 Act (including rule 3). In that form, with some later amendments, they remain part of the current law. In restoring market value, it was thought necessary to make specific provision to take account of the advent of universal planning control.⁹⁵ The solution of the 1959 Act was to make specific provision for the planning assumptions to be made in the valuation of the subject land (ss 2-8). These rules became sections 14ff of the 1961 Act.⁹⁶
- A.54 Separate provision (section 9) was made for the disregard of increases or decreases in value attributable to actual or prospective development of other land within the authority's scheme. One significant innovation in section 9 was the attempt to prescribe, by way of a Table, the application of the principle to different categories of project, such as new towns, and areas of comprehensive development. This became section 6 of, and Schedule 1 to, the 1961 Act.⁹⁷ Section 9 also retained the 1947 rule, relating to disregard of depreciation due to designation for compulsory acquisition, but extended it to depreciation due to any "indication" (in the development plan or otherwise) of the likelihood of compulsory acquisition. This became section 9 of the 1961 Act.

Government explanations

- A.55 The general purpose of the new rules was explained by the Lord Chancellor introducing the Bill:

The new basis of compensation under the Bill is founded on the principle that the owner of the land acquired should receive the value which he could expect to get for his land in a private sale in the open market if there were no proposal by any public authority to buy the land...

But nowadays... the value of land depends very much upon planning permissions. We need therefore to know the answer to the question: "With what planning permissions could the land be expected to be

⁹⁴ *Ibid*, at 622.

⁹⁵ The background was explained by Lord Denning in *Myers v Milton Keynes Development Corpn* [1974] 1 WLR 696, 702. It is doubtful whether such elaborate provision was in fact needed; in jurisdictions unaffected by the 1961 Act, the no-scheme rule has been able to take account of any appropriate planning assumptions, without statutory assistance: see e.g. *Melwood Units v Commissioner of Main Roads* [1979]AC 426 PC (Queensland) (Compensation, following severance of a development site by a new road, was assessed on the basis that, but for the road scheme, planning permission would have been granted for the whole site).

⁹⁶ See paras A.63-65 below.

⁹⁷ See para A.58 below.

sold in the open market if it were not wanted by a public authority?” [Sections 2 to 8]⁹⁸ seek to provide the answer to this question...

[Section 9] seeks to protect acquiring authorities from paying for value clearly created by the very scheme for which they are buying the land. It *enunciates and extends* the well-established principle in compensation that “value due to the scheme” must be ignored. The same clause protects owners whose land is being bought from depreciation caused by the threat of a public acquisition.⁹⁹ (emphasis added)

- A.56 Thus it is clear that the purpose of the new provision was to give statutory effect to, but also to extend, the no-scheme rule as developed judicially, taking account of the modern system of planning control. The use of the word “enunciates” suggests that it was seen as replacing the judicial versions of the rule. The difference between the wider (*Pointe Gourde*) and narrower (*Indian case*) versions does not seem to have been noticed.

The Land Compensation Act 1961

- A.57 The 1961 Act was a consolidation, and was not intended to change the law. However, it had the effect of bringing together in one statute two sets of rules based on the no-scheme principle (section 5(3) from the 1919 Act; and sections 6ff from the 1959 Act), without any real attempt to co-ordinate them.¹⁰⁰

Section 6 and the no-scheme rule

- A.58 As will be seen, section 6 (with the First Schedule)¹⁰¹ has been subject to particular criticism: the convoluted wording was difficult to interpret;¹⁰² the section applied to “other land”, but made no equivalent provision for the subject land;¹⁰³ and the statute failed to indicate whether or not the new rules were intended as a complete no-scheme code, or simply as a supplement to the judicial rule.¹⁰⁴
- A.59 However, if one ignores these problems, the general approach was reasonably clear. The legislature attempted to take account of the different circumstances in which

⁹⁸ These are the section numbers as they became in the 1959 Act. In the 1961 Act, ss 2-8 became ss 14-18; s 9 became ss 6-9.

⁹⁹ *Hansard* (HL) 14th April 1959, col 578.

¹⁰⁰ We have referred elsewhere to the uncertainty about which rules apply only to the subject (or “relevant”) land: Part V, para 5.14 above. There was also a confusing change of the order of the provisions. In the 1959 Act, the provisions for planning assumptions on the *subject land*, were followed logically by the provisions relating to disregard of development on *other land* within the same CPO or designation. In the 1961 Act, the order was reversed. Sections 9(2) to (5) of the 1959 (dealing with “*other land*”), became ss 6 to 8 of the 1961 Act, in a group headed “General Provisions” (immediately following the 1919 rules, reproduced in s 5). The rules for planning assumptions on the *subject land* are in ss 14 ff, under a separate heading - “Assumptions as to planning permission”.

¹⁰¹ The full text is set out in App 3.

¹⁰² See para A.68 below.

¹⁰³ See para A.69 below.

¹⁰⁴ See para A.68 below.

compulsory purchase orders might be made, under the post-war planning regime. Some would be for single, self-contained projects; others would be related to much more extensive designations, such as comprehensive development areas or new towns. Thus, different rules were laid down for disregarding the value attributable to development on associated land, depending on whether the associated land was: within the same compulsory purchase order (case 1); within the same comprehensive development area (case 2); within an area designated under the New Towns Act (case 3); within a town development area (case 4); within an urban development area (case 4A); or within a housing action trust area (case 4B) (The last two were added in 1980 and 1988 respectively, by the Acts which introduced those designations¹⁰⁵).

- A.60 On a compulsory purchase order for the purposes of a self-contained project (case 1), there was to be a one-stage application of the no-scheme rule. Changes in the value of the subject land, attributable to development (or the prospect of it) for the same purposes on other land within the same order, was to be disregarded, if:

... [the development] would not have been likely to be carried out if...the acquiring authority had not acquired and did not propose to acquire any of the land.¹⁰⁶

Thus, under this head only the value effects of the particular proposal to acquire were to be disregarded.

- A.61 Where, however, the order was for land within one of the designations specified in the Schedule, there would be a two-stage application of the rule. Thus, for example, where the order was for land within an area designated for a new town (case 3), there were to be disregarded, not only changes of value attributable to development for the purposes of the particular proposal (as above); but also changes in value attributable to development “in the course of the development of the new town”, in so far as that development “would not have been likely to be carried ... if the [new town] area... had not been [so] designated...”.¹⁰⁷ Thus, under this head both the value effects of the particular proposal, and also those of the original designation as a new town, were to be left out of account.¹⁰⁸
- A.62 This analysis shows why the new rules were rightly described to Parliament as “extending” the existing rule. The one-stage test for case 1, taken on its own, was a reasonably close representation of the rule as stated, for example, by Eve J.¹⁰⁹ It required one to look no further than the purpose or “undertaking” for which the

¹⁰⁵ Local Government, Planning and Land Act 1980, s 134; Housing Act 1988, Part III.

¹⁰⁶ 1961 Act, s 6(1)(a), Sched 1, case 1.

¹⁰⁷ *Ibid* s 6(1)(b), Sched 1, case 3.

¹⁰⁸ In relation to an Urban Development Area (case 4A), there is a further qualification: it is specifically provided that development is not excluded from being left out of account, if it is (a) development carried out before designation of the UDA, (b) development outside the UDA, or (c) development by an authority other than the acquiring authority. This refinement was added by 1980 Act, s 145(2).

¹⁰⁹ “(4) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded”: *S E Railway v LCC* [1915] 2 Ch 252, 259 (para A.21 above).

particular compulsory purchase order was made. However, the two-stage test for the other cases went much further than any application of the rule in the previous authorities. It required the valuer to look back, beyond the inception of the particular acquisition, to the original designation, however far back in time and however more extensive in area than the immediate proposal.

Planning assumptions

A.63 The new rules in relation to planning assumptions were also, apparently, modelled on the no-scheme rule, but taking account of the modern planning system. The purpose, as the Lord Chancellor said (see above), was to answer the question:

With what planning permissions could the land be expected to be sold in the open market if it were not wanted by a public authority?

A.64 This was achieved by specifying the assumptions to be made, broadly in three categories:

- (1) Permission was to be assumed for development of the subject land in accordance with the acquiring authority's own proposals (s 15);¹¹⁰
- (2) If the subject land was allocated in the development plan for some form of valuable development (e.g. residential or commercial), permission was to be assumed for such development in accordance with the allocation as would have been given in the absence of the compulsory purchase proposal (s 16);
- (3) If it was not so allocated,¹¹¹ a certificate could be obtained as to the permission which would have been granted in the absence of the compulsory purchase proposal (s 17).

These were to be in addition to any actual permissions in force at the date of notice to treat.¹¹²

A.65 The link to the no-scheme rule can be seen in the form in which the questions were posed. For example, section 17 required the authority to certify its opinion:

... regarding the planning permission that might reasonably have been expected to be granted in respect of the land in question, if it

¹¹⁰ As an apparent exception to the no-scheme rule, this applied whether or not the permission would have been granted in the absence of the authority's proposal: see para A.100 below.

¹¹¹ In 1991 the restriction to land not allocated for valuable development was removed, so that the section 17 certificate procedure was extended to any land subject to compulsory acquisition: 1991 Act, s 65(1) .

¹¹² 1961 Act, s 14(2). The reference to the date of "notice to treat" may reflect the fact that, before the *West Midland* case in 1968 (see Part V, paras 5.71-74 above) this was thought to be the valuation date.

were not proposed to be acquired¹¹³ by any authority possessing compulsory purchase powers.¹¹⁴

Permission in accordance with the certificate was to be assumed for valuation purposes.¹¹⁵ On the other hand, lack of such a certificate, or even a negative certificate, was not to lead to the assumption that permission would necessarily be refused for any development;¹¹⁶ but was a matter to be taken into account:

... in determining whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land, regard shall be had to any contrary opinion expressed in relation to that land in [the certificate]¹¹⁷

The no-scheme rule in the Courts

A.66 In the early cases under the new statutes, the Courts readily assumed that the new statutory rules were intended to reflect the judicial rule. In the first case to reach the higher courts, *Davy v Leeds Corporation* (1964), Lord Dilhorne referred to the *Pointe Gourde* case, and observed that section 9(2) of the 1959 Act (section 6 of the 1961 Act) had “given statutory expression to the principle which Lord MacDermott stated was well settled”.¹¹⁸ None of the earlier cases on the no-scheme rule were cited.¹¹⁹ It seems to have been from this time that the rule first became commonly referred to by reference to the *Pointe Gourde* case.¹²⁰ The *Indian*

¹¹³ Land was “proposed to be acquired...” in the circumstances defined by 1961 Act, s 22(2): that is, in the case of an ordinary compulsory purchase order, the date of the statutory notice of the making of the order. (The section is set out in App 3).

¹¹⁴ 1961 Act, s 17(4), This was amended by the 1991 Act, s 65 to refer to permission which “would have been granted” rather than “might reasonably have been expected to be granted”. The change was presumably intended to reduce the scope for speculation. It is not clear, however, why the same change was not made to s 14, as part of the amendments made by the same Act (see n 192 below).

¹¹⁵ 1961 Act, s 15(3).

¹¹⁶ *Ibid*, s 14(3).

¹¹⁷ *Ibid*, s 14(3) (s 14(3A)), following the 1991 amendments: 1991 Act Sched 15 para 15(2)).

¹¹⁸ *Davy v Leeds Corpn* [1965] 1 WLR 445, 453 The case concerned some houses owned by the claimants, within one of 13 slum clearance areas. A compulsory purchase order was made, covering the 13 slum clearance areas and other adjoining land required to form a suitable redevelopment area. The owners argued that their houses should be valued as though the whole CPO area were cleared and ripe for development. This was rejected (applying section 6, case 1) because the clearance would not have taken place in the absence of the proposal for compulsory purchase. (Before the Tribunal it had been argued erroneously that section 6 did not apply, because clearance was not “development”; it was not until the CA that it was noticed that this point was expressly covered by the section: see [1964] 3 All ER 390, 392).

¹¹⁹ Since there was a single CPO covering the whole of the area planned for redevelopment, there was no need for any discussion of the possible differences between s 6 and the judicial no-scheme rule.

¹²⁰ Cf n 91 above, referring to the 1962 edition of *Cripps*.

case, and its approval by the Court of Appeal in *Lambe*, seem to have been largely forgotten.¹²¹

A.67 The main features of the modern law, following the 1961 Act, emerged from a series of cases, principally in the Court of Appeal presided over by Lord Denning MR. He sought, not always successfully, to reconcile the common law with the new statutory rules. The resulting developments can be considered under six heads:

- (1) Assimilation of the judicial and statutory versions
- (2) Judicial evolution
- (3) The no-scheme world
- (4) Decreases in value due to the scheme
- (5) A valuation tool only
- (6) The *Indian* case

(1) Assimilation of the judicial and statutory versions

A.68 Although the new statutory rules were seen as giving effect to the *Pointe-Gourde* principle, it was not clear whether they were intended to be a self-contained code, or merely to supplement the existing judicial version of the rule. Further, the convoluted wording of the section,¹²² made it very difficult to interpret or apply. The solution eventually adopted by the Courts was to treat section 6 and the judicial rule as existing side-by-side as part of a single legal principle, so that in practice little distinction was made between the two, and literal interpretation of the statute was largely abandoned.

A.69 This process of assimilation began in *Camrose v Basingstoke Corporation*.¹²³ In *Camrose*, the Corporation made an order under the Town Development Act to expand Basingstoke and receive an influx of population from London. A large proportion of the land required was owned by the appellant, who agreed to sell it

¹²¹ In *Davy*, the *Pointe Gourde* case was the only authority cited on this point. The *Indian* case does not appear to have been cited in any of the leading modern cases (see below, e.g. *Camrose*, *Wilson*, *Myers*, *Devotwill*), until the *Rugby Water Board* case in 1973 (see paras A.87-91 below). Even then, the differences between various versions were not discussed. The most illuminating discussion in the earlier period, including reference to the *Indian* case, is to be found in the decision of the Lands Tribunal (Sir Michael Rowe QC) in *Kaye v Basingstoke Corp* (1969) 20 P& CR 417. However, his view that the judicial rule only survived for the purpose of “plugging gaps” in section 6 was not followed in later cases, because it was inconsistent with *Camrose*: see n 128 below (*Sprinz*).

¹²² In *Davy* in the Court of Appeal, Harman LJ, in a memorable passage, described the language of the section as “a monstrous legislative morass” or “Slough of Despond”: [1964] 3 All ER 390, 394. To Diplock LJ, preferring “a Minoan to a peregrine metaphor”, it was a “labyrinth” (p 396). Even Lord Denning MR said that he had “rarely come across such a mass of obscurity, even in a statute.” (p 392). (It was no mean achievement to have so baffled three of the leading minds of the then Court of Appeal; and this, in spite of the assistance, as counsel, of the future Lord Bridge and Sir Frank Layfield QC).

¹²³ [1966] 1 WLR 1100. The only cases referred to in argument, or in the judgment, were *Pointe Gourde* and *Davy*.

for its compulsory purchase value. In valuing the subject land, the Tribunal distinguished between parts of the subject land close to the town, which it valued at full residential value, and more remote parts, which it valued (ignoring the town development scheme) at “hope value” only. The problem was that section 6 applied a statutory version of the no-scheme rule to surrounding land, within defined categories (“the other land”), but it said nothing about the application of the rule to the subject land itself.

A.70 Accordingly, the claimants argued that the whole of the subject land should be valued with the benefit of the town development scheme. They argued that the 1961 Act was intended as a complete code, replacing the judicial version of the rule. Lord Denning accepted this as a literal reading of the section, but rejected it as contrary to common sense. He gave his understanding of the interaction of the statute and the judicial rule:

The explanation of section 6(1) is, I think, this: The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving (sic) the acquisition. That was settled by *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* ... It is left untouched by section 6(1). But there might be some doubt as to its scope. So the legislature passed section 6(1) and the First Schedule in order to make it clear that you were not to take into account any increase due to the development of the other land, namely, land other than the claimed parcel. I think that the decision in the *Pointe Gourde* case covers one aspect: and section 6(1) covers the other ...¹²⁴

A.71 Russell LJ relied on:

... the history of compulsory acquisition, in which it has long been judicially established that the prospect of the direct impact of the relevant scheme on the land to be acquired is to be ignored. It is not possible against that background to construe the section as tacitly or by implication altering the law. Rather is the exclusion of the relevant land a recognition of a well-known situation for which legislation was not necessary.¹²⁵

A.72 By 1970, therefore, it was clear that the *Pointe Gourde* rule survived alongside the provisions of the 1961 rule.¹²⁶ As the Tribunal said in a case in 1970:

The existing state of the law is certainly that the *Pointe Gourde* principle will operate to achieve results which would previously have

¹²⁴ *Ibid*, p 1107. The explanation, while producing a sensible result in the case, was not supported by anything in the history of the Act, or in the Parliamentary debates.

¹²⁵ *Ibid*, pp 1110-1. He commented: “The drafting of this section appears to me calculated to postpone as long as possible comprehension of its purport”.

¹²⁶ The view that section 6 of the 1961 Act was an exhaustive code seems to have had its last gasp in *Devotwill v Margate Corp* [1969] 2 All ER 97, 106, *per* Winn LJ (he referred, however, to “the gallantry with which counsel for the acquiring authority sought to interpret the lamentable language of the section before finally abandoning any reliance.”).

been achieved at common law, unless those results were already achieved by the statute.¹²⁷

Indeed, the Tribunal's view was that, where appropriate, both had to be applied independently.¹²⁸ However, it became difficult to see why the statute was needed at all, since, as the Tribunal itself observed, all the cases in Schedule 1 seemed "to fall fairly and squarely within the common law principle as stated by Lord MacDermott".¹²⁹

(2) Judicial evolution

WILSON V LIVERPOOL CITY CORPORATION¹³⁰

A.73 This important case can be treated as settling the modern form of the common law rule, at least in the Court of Appeal.¹³¹ From 1960, the Corporation had been seeking to assemble an area of 391 acres for housing development. 305 acres were acquired by private agreement. Planning permission for the whole area was granted by the Minister in late 1963. In early 1964, a compulsory purchase order was made for the remainder. The claim related to 74 acres belonging to one owner. By the time of the acquisition of the 74 acres, comparable adjoining land of the claimants was being sold to a private developer at a price (£6,700 per acre), on the basis that, having regard to the Corporation's plans, it was "dead ripe" for development, and could take advantage of the infrastructure and other improvements under the Corporation's plans. The Tribunal treated the development of the whole 391 acres as the "scheme" to be disregarded under the rule, on the basis that, in the no-scheme world, the development would have been deferred for two years, and there would have been additional infrastructure costs. The Tribunal reduced the value to £5,350 per acre.¹³²

¹²⁷ *St John the Baptist Hospital v Canterbury City Council* [1970] RVR 608, 630.

¹²⁸ "... it is our opinion that, as a matter of strict law both [section 6] and the [*Pointe Gourde*] principle must be applied, where on the facts they are capable of applying, independently of each other.": *Sprinz v Kingston upon Hull City Council* [1975] RVR 178, 173 LT (D Frank QC, President and V Wellings QC). The Tribunal rejected the view (expressed in *Kaye* – see n 89 above) that the judicial rule survived only for the purpose of plugging the gaps in section 6: p 183. The main issue in *Sprinz* was whether the Council's plans for development, in the Bransholme South and North areas of the city, were to be treated as one scheme or two. The Tribunal took the latter view, largely because the development areas were separately defined and there was an 8 year gap between the development of Bransholme South and North respectively: p 184. The test applied was "to find out on what date there was a scheme and then to ascertain whether it included Bransholme North": p 183.

¹²⁹ *Wilson v Liverpool City Council* [1969] RVR 741 LT (J S Daniel QC and J R Laird). It is to be noted, however, that the legislature persisted in treating the Schedule as a separate and detailed Code, by adding yet further refinements, in relation to new towns (1973 Act, s 50), and urban development areas (Sched 1, Part III, added in 1980).

¹³⁰ [1971] 1 WLR 302, CA.

¹³¹ See e.g. *Bolton MBC v Tudor Properties* [2000] RVR 292, where Mummery LJ gives a summary of the principles as established by that and later cases. The facts of *Bolton* are noted in Part VI, para 6.23.

¹³² It made a further deduction, under 1961 Act s 7, to represent the enhancement, due to the scheme, in the value of the adjoining land which had been sold privately. The full facts of the cases appear in the Lands Tribunal decision at [1969] RVR 741. They are summarised in App 6.

A.74 The owners argued that this reduction was not justified, either by section 6, because the area for application of the rule was limited to the “area authorised to be acquired” under the compulsory purchase order;¹³³ or under the judicial rule, because the plans for the 391 acres were not sufficiently “precise and definite” to constitute a “scheme”. The Court of Appeal rejected these arguments and upheld the Tribunal’s approach.

A.75 The judgments in effect ignored the limitations on section 6, proceeding on the basis that, in the light of *Camrose*,¹³⁴ it was sufficient to apply the judicial rule.¹³⁵ As to that, they rejected the argument that the *Pointe Gourde* principle only applies “when the scheme is precise and definite; and is made known to all the world”. Lord Denning (in a much quoted passage) said:

A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded at the time when the value is to be assessed.¹³⁶

A.76 Widgery LJ said that it was wrong to focus attention on the word “scheme” as having “some magic of its own”; it was to be treated as synonymous with other words used, such as “undertaking” or “project”:

... the purpose of the so called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition. The extent of the scheme is a matter of fact in every case ... It is for the tribunal of fact to consider just what activities - past, present or future - are properly to be regarded as the scheme within the meaning of this proposition.¹³⁷

A.77 *Wilson* was (perhaps unconsciously) innovatory in four ways:

- (1) It confirmed that the judicial rule survived, not merely for the purpose of remedying apparent anomalies in the statutory version. In *Camrose*, the Court of Appeal had been faced with the apparent absurdity that the rule should apply to “other land” but not to the subject land. In *Wilson*, there was no such absurdity. It would have been perfectly possible to have

¹³³ See 1961 Act, Sched 1, case 1, and s 6(3)(a).

¹³⁴ The claimants accepted in argument that the continued existence of the judicial rule was settled by *Camrose*, but reserved the point for argument in the House of Lords: [1971] 1 WLR 302, 310.

¹³⁵ The only cases referred to (without any detailed analysis) were *Pointe Gourde* and *Fraser*.

¹³⁶ [1971] 1 WLR 302, 310. It is not clear why Lord Denning needed to go so far. The only issue was whether the “scheme” was made sufficiently clear by the Minister’s grant of outline permission in 1963, or whether it needed to await “final clearance” of detailed plans in 1968 (see [1969] RVR at 748).

¹³⁷ *Ibid*, p 310.

limited it to the land subject to the actual order. The result was that the tightly drafted limits¹³⁸ of section 6 became irrelevant thereafter.

- (2) Lord Denning's statement that the scheme needed to be traced back to the time when the scheme was "vague and known to few" was a substantial extension of the retrospective scope of the rule, and apparently unsupported by previous authority.¹³⁹ For example, Fletcher Moulton LJ in *Lucas* required the valuer to look back to the position "as it stood before the grant of compulsory powers" or "before the scheme was authorised."¹⁴⁰ It went further even than section 9 (in relation to decreases in value), which at least required some "indication" (in a development plan or otherwise) of the prospect of compulsory purchase.¹⁴¹ Widgery LJ did not apparently go so far.¹⁴²
- (3) The rule lost any necessary link with the scope of the special powers granted to the authority. As has been seen, the original justification of the rule was directly linked to the special advantages only available to a body having statutory or similar powers for a particular project.¹⁴³ In all the subsequent cases, the definition of the scheme was related in some way to the extent of those powers. The 1961 Act preserved that link in Schedule 1, under which all the cases are defined by reference to specific statutory regimes. In *Wilson*, however, that link is lost. No reference is made to any particular statutory basis for the development of the remainder of the 391 acres.¹⁴⁴ The Corporation appears simply to have acquired the land, and sought planning permission,¹⁴⁵ in the same way as a private developer.

¹³⁸ An illustration of the precision of the drafting can be seen in 1961 Act, s 6(3)(b) which, in relation to acquisitions for defence purposes, extends the scope of Case 1 to include adjacent land comprised in a notice to treat under like powers, served one month before or after the notice to treat for the subject land. Under the *Wilson* interpretation, this provision would have been unnecessary, since orders, so closely connected in time and space, would have been treated as part of a single scheme.

¹³⁹ Of the two cases referred to in the judgment, in *Pointe Gourde* the history of the "scheme" seems to have started with the UK/US agreement in March 1941, followed almost immediately by the acquisition: para A.40. n 73 above. In *Fraser* the retrospective scope of the scheme was not determined by the Privy Council: see para A.29 above.

¹⁴⁰ See para A.14 above.

¹⁴¹ The text of s 9 is in App 3. Cf the second *Jelson* case (paras A.82 and A.103-105 below), where Lord Denning equated s 9 with the *Pointe Gourde* rule.

¹⁴² He said that the scheme must exist "in some shape or form *at the confirmation of the compulsory purchase order itself*", and "*then... it may develop almost from day to day...*": p 310 (emphasis added). The other judge (Megaw LJ) made no comment on this point but simply "agreed".

¹⁴³ See paras A.6-12 above.

¹⁴⁴ Other than its general powers to acquire land for housing purposes.

¹⁴⁵ Cf *Ozanne v Herts CC* [1991] 1 WLR 105 (see para A.107 below), where it was confirmed that the reference to "statutory powers" in rule (3) meant something more specific than the mere need to obtain planning permission.

- (4) It followed that there was no necessary limit to the spatial extent of the scheme.¹⁴⁶ This increased the potential for unfairness between those whose land was taken, and those able to retain it and take advantage of the wider scheme. As Keith Davies observes (in relation to the *Wilson* case):

Why should one owner get less per acre than his neighbour for comparable land, merely because he sold under compulsion and his neighbour did not?¹⁴⁷

(3) The no-scheme world

A.78 The width of the rule as so established meant that valuers were required to conduct an elaborate game of imagination, inventing the “no-scheme world” to be assumed for the purpose of valuation. In theory, this involved going back to the very inception of the scheme (possibly even before approval, when it was “vague and known to few”) and rewriting history thereafter. This process of looking back beyond the particular order had been sanctioned by the 1961 Act, in the case of the specific designations (as set out in cases 2 to 4B).¹⁴⁸ However, under the extended version of the judicial rule, it was not confined to those categories.¹⁴⁹

A.79 The exercise was graphically explained by Lord Denning:

The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing...¹⁵⁰

A.80 It is not, however, to be assumed that under “the old order” things would have remained static in the area. The valuer is required to consider whether there might have been other changes in the area, which would have affected the value of the

¹⁴⁶ An extreme illustration is *Bird & Bird v Wakefield MDC* [1978] 2 EGLR 16 CA, where a CPO for some 30 acres, promoted by a District Council for industrial development, was held to be part of a County Council “scheme” for an area of some 770 acres, even though the County Council had made no proposals for compulsory purchase.

¹⁴⁷ K Davies, *op cit*, para. 7.9.

¹⁴⁸ An example is *Bromley LBC v LDDC* [1997] RVR 173, 176, 186ff (rewriting history after 9 years of “scheme” development in the London Docklands Development Area).

¹⁴⁹ See e.g. *Cronin v Swansea CC* [1972] RVR 428 (the scheme was traced back 25 years to a declaratory order made in 1947 in connection with war damage). The Tribunal held that the rule did not require it to assume that “the whole of the town centre of Swansea should remain fossilised in the state in which it was to be found at the end of the last war”. All that was to be left out of account, under *Pointe Gourde*, was any increase in value which was “entirely due” to the scheme. It was proper therefore to take account of any enhancement by virtue of the development “by agencies other than that of the council acting in the exercise of their statutory powers”: p 431 (Emlyn Jones, FRICS).

¹⁵⁰ *Myers v Milton Keynes DC* [1974] 1 WLR 696, 704. The exercise was further complicated in that case by the fact that, under the statutory rules, planning permission was to be assumed in 10 years time. The valuer’s imagination, therefore, had to be sufficiently fertile, to rewrite history 8 years back to the beginning of the new town scheme, and carry it forward for 10 years in the future.

subject land. In *Margate Corp v Devotwill*,¹⁵¹ land allocated for residential development was required for a by-pass scheme. The question arose what assumption the Tribunal should make about the possibility of an alternative road scheme in the no-scheme world, which would have facilitated development of the subject site. The Tribunal had taken the view that, if the actual bypass on the subject land were to be disregarded, the inevitable corollary would be the construction of an alternative by-pass on other land, to meet the urgent traffic need. This approach was held, in the House of Lords, to be too simplistic:

If there was to be a bypass on the respondent's land it by no means followed that there would inevitably be a bypass somewhere else. There might be or there might not be. It might have been possible to have another route for the bypass; it might have been quite impossible... There would have to be a new examination of the problem. Were there then some other ways? If so what were they – and how effective would they be? Would it have been practicable to effect some road-widening? Could some traffic regulatory adjustments have been made?...¹⁵² (the judgment enumerates a series of similar questions which the unfortunate Tribunal would have to consider on the renewed hearing)

- A.81 The impracticality of this solution was recognised by the legislature in 1991, by providing that where land is taken for a highway, it is to be assumed (for the purposes of the planning assumptions under the 1961 Act) that “no highway would be constructed to meet the same or substantially the same need...”¹⁵³ But no change was made in relation to the similar questions which arise under the common law rule, or in relation to acquisitions for purposes other than highways.

(4) Decreases in value due to the scheme

- A.82 As developed in the cases up to *Pointe Gourde*, the no-scheme rule was concerned with disregard of *increases* in value caused by the scheme. Recognition of the need for a rule to protect the dispossessed owner against the blighting effect of designation for acquisition seems to date back to section 51(3) of the 1947 Act,¹⁵⁴ which was expanded in section 9 of the 1961 Act:

9. No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of ... allocation or other particulars contained in the current development plan, or by any other means)¹⁵⁵ an indication had been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

¹⁵¹ [1970] 3 All ER 864.

¹⁵² *Ibid*, 869-870.

¹⁵³ Planning and Compensation Act 1991, s 70 (inserting new subsections (5)-(8), into section 14 of the 1961 Act).

¹⁵⁴ See paras A.48-49 above.

¹⁵⁵ The reference to “allocation... in the current development plan” can be traced back to s 50(3) of the 1947 Act. Under, *ibid*, s 5(2), one of the principal functions of the development plan was to designate land for compulsory purchase. That is no longer the case.

This was not originally seen as related to the *Pointe Gourde* rule.¹⁵⁶ It seems that it was not until the second *Jelson* case¹⁵⁷ that section 9 was directly linked with the *Pointe Gourde* rule.¹⁵⁸

- A.83 In the *Melwood Units* case, in 1979, the Privy Council confirmed that the judicial rule applied to decreases in value, as well as increases, quite apart from any statutory provision to that effect.¹⁵⁹ In that case, the claimant's site of 37 acres was severed by an expressway, with the result that only 25 acres north of the road could be developed as a shopping centre, and the actual permission was confined to that area. Compensation was assessed (under the no scheme rule) on the basis that but for the road-scheme, planning permission would have been granted for the whole 37 acres.

(5) A valuation tool only

- A.84 In the *Rugby Water Board* case,¹⁶⁰ the House of Lords held that the no-scheme rule applied to valuation only, and not to the ascertainment of the interests to be valued. The case concerned the compulsory acquisition of two farms held under agricultural tenancies. Under the Agricultural Holdings Act¹⁶¹ and the relevant leases, the landlords could serve a notice to quit where land was required for another use for which permission had been granted. The issue was whether, following compulsory purchase for a permitted reservoir, the respective interests of landlord and tenant should be valued as though such a notice could be served; or whether that possibility should be disregarded as entirely due to the authority's scheme.
- A.85 The House, by a majority, held that the interests had to be assessed as they stood in the real world at the date of notice to treat, and that the no scheme rule had no application.¹⁶² As already noted, the speeches contain extensive references to the earlier authorities. However, although it represents probably the leading modern authority on the rule in the House of Lords, the limited issue raised by the appeal did not require any detailed analysis of the underlying principles, or the conflicting formulations.

¹⁵⁶ See e.g. *Cripps*, para 4-111; section 9 is dealt with separately (para 4-121a).

¹⁵⁷ *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020 CA; see para A.103-105 below .

¹⁵⁸ It was treated as part of the same principle in *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315, *per* Lord Hope. See also the critical discussion of the *Pointe Gourde* rule in K Davies, *op cit*, para 7.4ff.

¹⁵⁹ *Melwood Units v Commissioner of Main Roads* [1979] AC 426 PC. *Pointe Gourde* was referred to and it was simply asserted, without discussion, that the same principle applied "in reverse": p 434, *per* Lord Russell. The particular statute referred only to "increases" in value; but "the absence of the reverse of the medal" in the statute did not change the position: *ibid*, p 435E.

¹⁶⁰ *Rugby Water Board v Shaw-Fox* [1973] AC 202.

¹⁶¹ Agricultural Holdings Act 1948, ss 23, 24(2)(b).

¹⁶² In his dissenting speech, Lord Simon convincingly attacked the majority's reasoning as "artificial, legalistic and destructive of the fundamental principles on which compensation is assessed..." (p 241H).

- A.86 The effect of this decision, in the context of agricultural holdings, was reversed by statute.¹⁶³ Otherwise, it remains good law,¹⁶⁴ although, as far as one can judge from reported cases, it does not appear to have caused serious problems in other contexts.¹⁶⁵

(6) The *Indian* case

- A.87 The new, wider version of the no-scheme rule was difficult to reconcile with Lord Romer's interpretation of the rule in the *Indian* case. As we have noted, the *Indian* case had been followed by the Court of Appeal in *Lambe v Secretary of State for War* (1955).¹⁶⁶ The same approach was adopted by the Tribunal in a 1970 case concerning the acquisition of land for Kent University.¹⁶⁷ The Tribunal, following Lord Romer said:

... even if the existing university is regarded as the only possible purchaser, that does not mean that the value of the land for university purposes is to be ignored, or that we should say there was no demand for the land because the only person who wanted it was the existing university.¹⁶⁸

- A.88 Neither the *Indian* case itself, nor *Lambe*, has ever been over-ruled, or even doubted, in the higher courts. The *Indian* case has been followed in other jurisdictions, and in English cases in other statutory contexts, in which market value was relevant to compensation.¹⁶⁹
- A.89 However, in a recent case,¹⁷⁰ the Tribunal declined to follow it. The case concerned the acquisition of land required to provide a wetland nature reserve to replace mudflats and other land taken for the Cardiff Bay Barrage development scheme. One question was whether the valuation should take any account of the potential

¹⁶³ Land Compensation Act 1973, s 48.

¹⁶⁴ The decision was followed reluctantly in Australia: *Road Construction Authority v Tiligadis* [1988] ACLD 203 (Gobbo J).

¹⁶⁵ The results can seem artificial. For example, in *Abbey Homesteads Ltd v Northants CC* (1992) 32 RVR 110 CA, land was acquired for a school and was subject to a prior restrictive covenant reserving it for that purpose. It was held that (in accordance with *Rugby Water Board*) the interest to be valued was the land subject to the covenant; but that, in valuing it, it could be assumed that in the no-scheme world there was an 85% chance of the covenant being discharged by the Lands Tribunal (under s 84 of the Law of Property Act 1925).

¹⁶⁶ [1955] 2 QB 612. See paras A.51 and A.66 above.

¹⁶⁷ *St John the Baptist Hospital v Canterbury City Council* [1970] RVR 608.

¹⁶⁸ [1970] RVR at p 631 (J S Daniel QC). The Tribunal held on the facts that there were other potential buyers.

¹⁶⁹ The *Indian* case has been followed in the Supreme Court of Canada in *Fraser v R* [1963] SCR 455 (see para A.119 below) and in later cases - see Todd, *op cit*, p146ff. It has also been followed in English cases, not covered by the Land Compensation Act 1961: see *BP Petroleum v Ryder* [1987] EGLR 233, 248 (Peter Gibson J); *Mercury Communications Ltd v London and India Dock Investments* (1995) 69 P & CR 135 (Judge Nigel Hague QC). The latter case is discussed in App 7. See also *R Evans (Leeds) Ltd v English Electric* (1978) 36 P&CR 185 (Donaldson J).

¹⁷⁰ *Waters v Welsh Development Agency* [2001] RVR 93 (George Bartlett QC, President) at first instance.

value of the land as part of the overall development scheme, or whether that should be excluded under the no-scheme rule.

A.90 The President accepted the approach of the *Indian* case has “some attractions”:

... particularly where the acquiring authority is a commercial utility rather than an arm of central or local government acquiring the land for social needs. It does, however, give rise to problems in distinguishing between the authority’s pressure to buy, which is to be disregarded, and its motivation which is not; and difficulties of valuation are also likely to arise.

A.91 However, he concluded that the *Indian* case was “unquestionably at odds” with the rule as it has been applied in cases in the Court of Appeal and House of Lords,¹⁷¹ and that the decision in *Lambe* could no longer be regarded as good law.¹⁷² He summarised the effect of the no-scheme rule, in its judicial version, as follows:

Compulsory powers of acquisition are only conferred in the public interest. A compulsory purchase order is only made and confirmed for a public purpose which the making authority and the confirming authority judge to be sufficiently important to warrant compulsion. The principle is that any effect on the value of the land acquired arising from the public purpose or public purposes prompting their acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded. A scheme or proposal is the embodiment of the public purpose or public purposes concerned.¹⁷³

Applying this test, he decided that, even if the “scheme” was taken as simply the nature reserve proposal, the “public purpose” for that proposal was to compensate for the loss of the mudflats under the Barrage development scheme. Accordingly, any effect on value of this purpose had to be left out of account.¹⁷⁴

Particular issues

A.92 Against the general approach established by the cases referred to above, a number of particular issues had to be considered:

- (1) Limits of rule (3)
- (2) Planning assumptions
- (3) Ransom strips

¹⁷¹ *Ibid*, para 52 (He refers to *Davy, Wilson, Myers, and Rugby Joint Water Board* – see above).

¹⁷² *Ibid*, para 53.

¹⁷³ *Ibid*, para 54.

¹⁷⁴ *Ibid* paras 55-7. He also held that, if it were necessary to identify “the scheme underlying the acquisition”, it should be taken as the Cardiff Bay barrage, not simply the nature reserve: para 65. This aspect of the decision, but not the “public purpose” test, was upheld by the Court of Appeal. The Court of Appeal also declined to accept that the *Indian* case was no longer good law; see para A.45 above.

- (4) Disturbance
- (5) Purchase notices

(1) Limits of rule (3)

A.93 We have already referred to the narrow interpretation of rule (3),¹⁷⁵ adopted in *Pointe Gourde*, as the same time as the judicial rule was expanded to fill its place.¹⁷⁶ Subsequent cases have followed that lead, and the rule has been further cut down by statute. The legislature has also intervened to cut down the scope of the rule.¹⁷⁷

A.94 In practice, it appears to have little remaining purpose. This sequence of decisions has established:

- (1) That the “adaptability” must be a quality of the subject land itself, not a quality of its products (*Pointe Gourde*), or of the nature of the interest (*Lambe*)¹⁷⁸;
- (2) That “special” implies something “exceptional in character, quality or degree”, rather than qualities shared with other possible sites (*Batchelor*);¹⁷⁹
- (3) That the purpose requiring use of statutory powers must relate to the subject land, not to other land (*Ozanne*);¹⁸⁰
- (4) That the need for general forms of consent, such as planning permission or stopping-up orders, is not sufficient to bring the rule into play;¹⁸¹
- (5) That the “market” may include a mere speculator, with no direct interest in the use of the land (*Blandrent*).¹⁸²

¹⁷⁵ See para A.32 above for the original wording of the rule in the 1919 Act. The current version (1961 Act, s 5(3)) is in App 3.

¹⁷⁶ See para A.45 above.

¹⁷⁷ The “special purchaser” part of the rule (not directly relevant to the present discussion) was repealed by Planning and Compensation Act 1991, Schedules 15, 19.

¹⁷⁸ *Lambe v Secretary of State for War* [1955] 2 QB 612.

¹⁷⁹ Per Mann LJ in *Batchelor v Kent CC* [1989] 59 P&CR 357, 362.

¹⁸⁰ *Ozanne v Herts CC* [1991] 1 WLR 105, 111 per Lord Mackay LC. In that case it was argued that the rule required to be left out the possibility of the use of adjoining land for access, since that could only be achieved by use of the council’s powers to stop up an existing road. See below (“ransom strips”).

¹⁸¹ *Ibid*, at p 112. Lord McKay cited, as illustration of the powers to which rule (3) might apply, the Parliamentary powers granted for water-power development in the *Cedar Rapids* case (para A.24 above); he contrasted those powers, with the consents required in the same case for erecting works in the river-bed and for water-abstraction, which were not within rule (3). A wider construction would mean that the rule would exclude any use to which the land could be put “only after obtaining some particular statutory consent such as planning permission, consent under the Building Acts, or the like”: p 112C-E.

¹⁸² *Blandrent Investment Developments Ltd v British Gas Corporation* [1979] 2 EGLR 18, 22, per Lord Scarman.

A.95 A rare reported example of the rule having some practical effect is *Livesey v CEBG*.¹⁸³ In that case agricultural land was acquired for the erection of a power station at Ferrybridge. The Tribunal accepted, without any detailed discussion, that rule (3) applied, so as to exclude the value for use as a power station. However, the judicial version of the no-scheme rule seems to have been treated as having the same result.

A.96 Had it not been so restricted by judicial interpretation, the rule might have had unexpected effects. A significant but unremarked change was made by the 1961 Act, in which a reference to an authority “possessing compulsory purchase powers” replaced the words of the 1919 Act “any Government Department or any local or public authority.”¹⁸⁴ As already noted, “public authority” was defined by the 1919 Act so as to exclude bodies “trading for profit”.¹⁸⁵ The 1961 replacement has no such limitation. “Authority possessing compulsory purchase powers” means:

...in relation to any transaction, ... any body of persons who could be or have been [authorised to acquire an interest in land compulsorily] for the purposes for which the transaction is or was effected...¹⁸⁶

A.97 Thus, no distinction is made between privatised utilities operating for profit, and public authorities.¹⁸⁷ For example, if the decision in the *Livesey* case is correct, it would also apparently exclude any value attributable to the possibility of competition from a privatised power-generator.¹⁸⁸ Further, there is no need for the body to be in any sense public, or operating under statute. All that is needed is that it should have obtained, or have been able to obtain, compulsory powers.¹⁸⁹

¹⁸³ [1965] EGD 605, LT.

¹⁸⁴ 1919 Act, s 2(3). See para A.32 above.

¹⁸⁵ 1919 Act, s 12. See n 61 above. The 1947 Act, s 57(1) extended the 1919 Act so that references to “public authorities” included the Central Land Board (established under that Act), and statutory undertakers (as defined by s 119(1)), whether or not trading for profit. The 1959 Act, s 1(2) applied the 1919 rules to all compulsory acquisitions.

¹⁸⁶ 1961 Act, s 39(1). This amendment seems to have been made in the 1961 Act as a consequential amendment, as appropriate to a consolidation Act, following the extension of the Act (by s 1 of the 1959 Act) to cover all compulsory acquisitions (cf 1919 Act, s 1, which applied only to acquisitions by Government Departments, or local or public authorities, as there defined). There is no indication in Hansard that the implications for rule (3) were separately considered.

¹⁸⁷ A recent review for the Scottish Executive has recommended consideration of the “need for privatised utilities to be required to obtain a ‘public interest certificate’ if they wish to continue to benefit from the application of rule 3” (Review of Compulsory Purchase and Land Compensation: Scottish Executive Central Research Unit 2001).

¹⁸⁸ See Electricity Act 1989, Sched 3, under which the Secretary of State may authorise compulsory acquisition by privatised licence-holders.

¹⁸⁹ Compulsory powers do not necessarily depend on a public or statutory function. For example, a private manufacturing company might obtain compulsory powers under the Transport and Works Act 1992 for a railway link to its factory; if so, the value attributable to that use would apparently be excluded under the rule, even though the purpose is essentially commercial.

(2) Planning assumptions

- A.98 We have referred above to the provisions of 1961 Act, sections 14 to 16, setting out the planning assumptions to be made for valuation purposes. They are not easy to interpret or apply, particularly in their relationship with the common law rule. We summarise some of the problems.
- A.99 Section 14(2) allows account to be taken of any permission relating to the subject land, whether or not it includes other adjoining land (s 14(4)(b)). This applies whether or not the permission would have been granted in the no-scheme world. However, a permission on adjoining land, not including the subject land, will apparently have to satisfy the no-scheme rule. *Stayley Developments Ltd v Secretary of State*¹⁹⁰ illustrates the inconsistencies which may result:

The subject land had been acquired for the M66 motorway. By the time of the notice to treat, the motorway scheme had led to permission being granted on the surrounding land (but not the subject land) for industrial and related development; and a section 17 certificate was also given for industrial development of the subject land. The Act required the hypothetical permission for the subject land (under section 17) to be taken into account.¹⁹¹ However, the actual permission for the surrounding land was ignored, because it would not have been granted in the no-scheme world.¹⁹²

- A.100 Section 15(1), inconsistently with the judicial rule, requires permission to be assumed for development of the subject land in accordance with the proposals of the planning authority, whether or not it would have been granted in the absence of the underlying scheme.¹⁹³ However, the same assumption does not apply to any surrounding land proposed to be developed by the authority. Unless it is covered by an existing permission which also applies to the subject land (see above), permission can only be assumed if it would have been granted in the no-scheme world. The result can be highly artificial, as illustrated by *Myers v Milton Keynes DC*.¹⁹⁴

¹⁹⁰ LT December 2000 (ACQ/144/1998).

¹⁹¹ 1961 Act, s 15(5).

¹⁹² If, however, the actual permission on the surrounding land had included any part of the subject land, it would have been taken into account: 1961 Act, s 14(2), (4)(b), whereby any permission in force at the date of notice to treat is taken into account, if it is a permission for the subject land, or *for any area including that land*.

¹⁹³ Although not directly relevant to the no-scheme rule, we should also note section 15(3), which preserves, subject to restrictions, the right to take account of certain categories of so-called "Third Schedule" development: see Town and Country Planning Act 1990, Schedules 3, 10. These complex provisions defined certain categories of minor development which were excluded from the definition of "new development" under the 1947 Act, for the purpose of determining the scope of the existing use under that Act. They have limited purpose today and there seems little justification for including them.

¹⁹⁴ [1974] 1 WLR 696, CA. We have already quoted Lord Denning's description of the "land of make-believe" required by the rule. It was apparently agreed in that case that the assumed permission under s 15 was a matter affecting the nature of the "interest", and therefore (under the *Rugby Water Board* case – see para A.84 above) not affected by the no-scheme rule: p 702. However, this approach is unsupported by any other authority; it conflicts with *Melwood Units v Commissioner of Roads* (see n 95 above and para A.83 above), and with Lord

The Development Corporation acquired the claimant's Estate, for the purpose of developing the new town of Milton Keynes. The Court accepted that the subject land itself was to be valued with planning permission for residential development, even though such a permission could not have been expected in the absence of the new town proposal. However, the existence of the new town proposal on the surrounding land had to be ignored.

A.101 Section 16 was apparently intended to have the effect that, where land was either "defined" or "allocated" by the development plan for valuable development, permission for it would be assumed. For example, in an area allocated in the plan for industry, an industrial permission would be assumed.¹⁹⁵ It has failed for two reasons:

- (1) The section has not caught up with the modern system of local plans, which do not "define" development;¹⁹⁶
- (2) In relation to "allocated" land, its purpose was in effect nullified by the Court of Appeal holding that permission would only be assumed if it would have been granted in the no-scheme world (an assumption which could have been made without the assistance of statute).¹⁹⁷

A.102 Section 17 has been more successful.¹⁹⁸ The certificate procedure was intended to provide a means by which, in cases where land was not allocated for any valuable use, the planning authority could "certify" the planning permission which would have been granted in the no-scheme world. As interpreted by the Courts, however, it has lost touch with the basis of the common law rule. Under the common law rule, apparently, the no-scheme world has to be recreated looking back to the inception of the scheme. Under section 17 there is no looking back; the position is considered on the basis that the scheme is cancelled immediately before the notice to treat or other "proposal to acquire".

A.103 This can produce very different results, as illustrated by two cases, relating to the valuation of the same strip of land acquired from Jelson Estates Ltd in Blaby District. The subject land was a strip excluded from the development of surrounding land, to form part of a ring road. The ring road proposal was

Denning's own application of the rule in e.g. the second *Jelson* case (see para A.103 below) (in both of which cases assumed permissions were treated as valuation issues, within the judicial version of the no-scheme rule).

¹⁹⁵ "...it is to be assumed that there is permission for the use for which the land is defined or allocated in the development plan" *Hansard* (HC) 13th November 1958, cols 588-9 (J R Bevens MP, Parliamentary Secretary, Ministry of Housing and Local Government).

¹⁹⁶ *Purfleet Farms v Secretary of State* (LT, January 2001, ACQ/108/2000): "It is an element of the compensation legislation that...cries out for revision." (George Bartlett QC President).

¹⁹⁷ *Provincial Properties v Caterham UDC* [1972] 1 QB 453 CA.

¹⁹⁸ See para A.65 above.

abandoned. The strip could not be developed on its own for housing purposes, and the council accepted a purchase notice:¹⁹⁹

- (1) The *first Jelson* case²⁰⁰ was concerned with a decision by the Secretary of State, refusing a section 17 certificate for residential development. For this purpose the prospect of alternative development had to be considered at the date of the deemed notice to treat,²⁰¹ by which time the housing estates had been built on both sides of the strip of land, and separate development was impossible. A “nil” certificate was therefore correct.
- (2) The *second Jelson* case²⁰² related to the subsequent decision of the Lands Tribunal, assessing compensation for the same strip of land. For that purpose, the Tribunal was not restricted by the negative certificate.²⁰³ Applying the no-scheme rule, it was possible to look further back in time, and to assume the abandonment of the road-scheme from its inception, before the houses had been built; on that assumption, the strip would have been developed along with the other residential land.²⁰⁴ Accordingly, the compensation for the land was assessed at residential values.²⁰⁵

A.104 The interpretation (in the first case) of section 17 was confirmed recently by the House of Lords in *Fletcher Estates v Secretary of State*.²⁰⁶ The position had to be considered as at the date of the proposal to acquire, as defined,²⁰⁷ on the basis that:

... the scheme for which the land is proposed to be acquired *together with the underlying proposal* which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past.²⁰⁸ (emphasis added)

¹⁹⁹ Under Town and Country Planning Act 1990, s 137 (land incapable of reasonably beneficial use).

²⁰⁰ *Jelson Ltd v Minister of Housing and Local Government* [1970] 1QB 243, CA.

²⁰¹ The “proposal date” as defined by 1961 Act, s 22(2)(b).

²⁰² *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020, CA.

²⁰³ 1961 Act, s 14(3): see para A.65 above.

²⁰⁴ The same result was arrived at under 1961 Act, s 9 (see para A.77 above), by treating the original road scheme as an “indication” that the land was to be compulsorily acquired. Cf the narrower view of causation taken by the Court of Appeal (also under Lord Denning) in *Hoveringham Gravels Ltd v Secretary of State for the Environment* [1975] QB 764 (compensation not allowed under the Ancient Monuments Act, when designation had been followed by refusal of planning permission for development).

²⁰⁵ In *Fletcher Estates*, the House of Lords did not find it necessary to examine the correctness of the second *Jelson* case (see *Fletcher* at p 325C).

²⁰⁶ [2000] 2 AC 307, HL. The case concerned land acquired in 1990 by the Department of Transport for a bypass, on a line which had been defined since 1970. It was held that the s17 issue should be judged by reference to the time of the proposal to acquire (1986).

²⁰⁷ That is, depending on the procedure, the date of the original notice of the order, the deemed notice to treat, or an offer in writing by the authority: 1961 Act, s 22(2).

²⁰⁸ *Fletcher*, at p 322H, *per* Lord Hope.

The emphasised words provide an interesting contrast with Lord Romer's statement (in the *Indian* case) that the "scheme" was limited to the obtaining of compulsory powers, and was not to be taken as including "the intention formed by the authority of exploiting the potentiality of the land."²⁰⁹

A.105 Lord Hope emphasised the difficulty of:

...try[ing] to reconstruct the planning history of the area on the assumption that the proposal had never come into existence at all.... The further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to be to reach a conclusion in which anybody can have confidence.²¹⁰

This might have been equally valid as a comment on the application of the no-scheme rule in the second *Jelson* case; however, the House did not find it necessary to comment on the correctness of that decision.²¹¹

(3) Ransom strips

A.106 Particular problems, and protracted litigation, have resulted from cases applying the no-scheme rule to "ransom strips". Typically, a builder may own a substantial area of potential development land, but need a small strip of land to secure the necessary access to the public highway. The owner of the strip will expect a substantial premium (or "ransom value") above its existing use value, to unlock the potential of the development area. The Lands Tribunal decision in *Stokes v Cambridge Corporation*²¹² has given its name to the valuation practice of treating the premium as equivalent to a proportion (typically one third to one half) of the increased development value so released.

A.107 There were questions about the relationship of this rule to the no-scheme principle. Authorities, acquiring access land to facilitate development on adjoining land, argued that the development value should be disregarded under the no-scheme rule, and the land valued at existing use value, without any ransom element.²¹³ In *Ozanne v Herts CC*, such arguments (encompassing the common law rule and rule (3)) led to hearings extending over six years (including three visits to

²⁰⁹ See para A.37 above.

²¹⁰ *Ibid*, p 323D. He quoted (p 324A) Phillimore LJ (in the first *Jelson* case, para A.103 above, at p 255) where he said that to look back further "would open up a considerable field for guesswork which would often make it impossible to give firm advice to any member of the public as to his rights."

²¹¹ *Ibid*, p 325C.

²¹² (1961) 13 P&CR 77. The particular case concerned the valuation of land compulsorily acquired for industrial development, where the authority owned the land needed for access; the issue was the amount of the deduction to represent that interest.

²¹³ In *JA Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159, the authority and the developer had entered an agreement for the authority to acquire the access land, on the assumption (mistaken as it proved) that existing use value would be paid.

the Court of Appeal and one to the House of Lords), before the case was sent back for complete rehearing by the Lands Tribunal.²¹⁴

- A.108 The present law appears now to be settled, following *Batchelor v Kent County Council* (1989),²¹⁵ where Mann LJ made it clear that the “ransom” element of value was not to be excluded under the no-scheme rule, unless it was solely attributable to the authority’s own proposals for development:

If a premium value is ‘entirely due to the scheme underlying the acquisition’ then it must be disregarded. If it was *pre-existent to the acquisition* it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate without compensation and would contravene the fundamental principle of equivalence.”²¹⁶

Thus, for example, where land is allocated in the local plan for private residential or commercial development, dependent upon access across the ransom strip, the negotiating position of the owner of the strip is not “entirely due” to the authority’s scheme, but derives from the planning allocation.

- A.109 Although the law is apparently settled, its application in practice can cause difficulties, and the figures arrived at can seem somewhat arbitrary. The choice of the appropriate access for a major development will usually be based on both physical and planning factors, and may be the subject of special financing agreements between the developer and the relevant authorities, including provision for compulsory purchase of the necessary land. It may be impossible for the parties to judge in advance the likely cost of the access arrangements.²¹⁷

(4) Disturbance

- A.110 In *Director of Buildings and Land v Shun Fung Ironworks*,²¹⁸ it was held that the disturbance claim could include losses incurred from the time of the

²¹⁴ [1988] RVR 133 (First Lands Tribunal decision); [1989] RVR 179 (Court of Appeal); [1991] 1 WLR 105 (House of Lords); [1991] RVR 229, [1992] 38 EG 158 (Second Lands Tribunal decision); [1995] RVR 40 (Second Court of Appeal decision). There were two separate hearings before differently constituted Courts of Appeal (3rd May 1994 and 10th October 1994). On the last occasion the case was remitted to the Lands Tribunal for a complete rehearing. The parties then settled.

²¹⁵ (1989) 59 P&CR 357.

²¹⁶ *Ibid*, p 361. In a later case it was suggested that the words in italics should have read “pre-existent to the scheme”: *Wards Construction v Barclay Bank* (1994) 64 P&CR 391, 396 *per* Nourse LJ.

²¹⁷ See, e.g., the *Batchelor* case itself (*ibid*). Planning permission had been granted for a substantial residential development, subject to a condition preventing occupation of houses in phase 2, until off-site road works (including a new roundabout) were completed. The County Council, under an agreement with the developer, made a compulsory purchase order for the necessary land (0.86 acres). The value for its existing agricultural use was £3,000. The first tribunal valued it at £500,000; following a successful appeal (on the grounds that the basis of the award had not been explained) a second Tribunal valued it at £2.15m. An appeal against this award was rejected: *Wards Construction Ltd v Barclays Bank* (1994) 68 P&CR 391. Nourse LJ expressed some “mystification” at the range of the figures, but concluded that there was no error of law (p 394). See also *JA Pye (Oxford) Limited v Kingswood BC* [1998] 2 EGLR 159.

²¹⁸ [1995] 2 AC 111, PC. The case is discussed in more detail in Part IV.

announcement of the proposed acquisition (of the site of a steelworks), even though preceding the formal statutory process of resumption. The Privy Council upheld the Tribunal's award for loss of profits from that date, assessed by comparing the profits (or losses) in the real world with those in the no-scheme world. The "scheme" in that cases was held to be confined to the threat of resumption of the steel works itself, rather than any wider proposal.

- A.111 The application of the principle may pose more difficulties where the inception of the scheme is less clear-cut, and where its effects are less specific. For example, the declining profits of a corner shop in an area blighted by redevelopment proposals may be attributable to the "scheme", but not necessarily to the acquisition, or threat of acquisition, of the shop itself.²¹⁹

(5) Purchase notices

- A.112 The Town and Country Planning Acts allow service of a purchase notice where land is shown to be "incapable of reasonable beneficial use" following the refusal of a planning permission. Where the notice is accepted, the effect is that the authority is "deemed" to have served a notice to treat, and compensation is assessed as though pursuant to a compulsory purchase order.²²⁰ The application of the no-scheme rule in such cases poses a conceptual difficulty, since the rule assumes a scheme or project by the authority to acquire the land, rather than a sale which is forced upon it. The results have not been consistent:

- (1) In *Birmingham DC v Morris & Jacombs*²²¹ the lack of beneficial use was due to the land being reserved by a planning condition as part of the access road. Its value as an access road was found to be £4,000, while its value for residential development would have been £15,000. The Court of Appeal held that there was no scheme of acquisition, the acquisition having been forced on the Council, and that the land should be valued at the lower figure.
- (2) In *Jelson v Blaby DC*,²²² the purchase notice related to a strip of land which had been excluded from an earlier development, because of its reservation for a road scheme (later abandoned), and was incapable of development on its own. Although the acquisition was, as in the previous case, forced on the authority, the Court of Appeal accepted that the effects of the road scheme were to be disregarded (under the common law rule and section 9), and upheld the award based on the higher residential value.²²³

²¹⁹ See *Emslie v Aberdeen DC* [1994] 1 EGLR 33, 38, *per* Lord President Hope.

²²⁰ Town and Country Planning Act 1990, ss 137 and 143.

²²¹ [1977] RVR 15.

²²² See para A.103 above.

²²³ Although the case was heard some six months after *Morris & Jacombs*, the latter does not appear to have been cited in argument.

INTERNATIONAL COMPARISONS

Commonwealth

- A.113 The no-scheme rule appears to feature in some form in all other Commonwealth systems derived from the 1845 Act.²²⁴

Australia

- A.114 Most of the Australian statutes include some reference to it, but it is also treated as part of the common law.²²⁵ It is a question of statutory construction whether the particular provision is to be treated as expressing, modifying, or supplanting the common law.²²⁶ Typical is LAA 1989 (Cth), which restates the no-scheme rule in two paragraphs:

In assessing compensation, there shall be disregarded:

(a) any special suitability or adaptability of the relevant land for a purpose for which it could only be used pursuant to a power conferred by or under law, or for which it could only be used by a government, public or local authority...

(c) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the purpose for which the interest was acquired;²²⁷

- A.115 (a) is similar to rule (3) as it appeared in the English 1919 Act.²²⁸ The ALRC thought such a provision was necessary to counter cases²²⁹ where compensation had reflected potential for public use by including a figure “unsupported by mathematical calculation and lacking intellectual persuasion”. They said:

It is desirable to have a rule, excluding any potentiality realisable only by a statutory authority. In cases where the statutory authority is only one of the potential purchasers, the usual rules should apply. The

²²⁴ See e.g. Jacobs, *The Law of Resumption and Compensation in Australia* (1st ed 1998) chapter 27; Todd, *The Law of Expropriation and Compensation in Canada* (1st ed 1992) chapter 6.

²²⁵ See e.g. the *Melwood Units* case (n 95 and para A.83 above).

²²⁶ *Road Construction Authority v Tiligardis* [1988] ACLD 203; and see D Brown, *op cit*, para 3.22.

²²⁷ LAA (Cth) 1989, section 60(a) and (c).

²²⁸ See para A.32 above.

²²⁹ Notably *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, where three islands in the St Lawrence river were acquired for a power generation scheme; the Supreme Court of Canada awarded compensation on the basis of their value for the scheme. The Privy Council rejected this approach, because the actual scheme of the acquiring company could not be taken into account; it held, however, that the valuation had to have regard to “the possibility of that or any other company coming into existence and obtaining powers”: *ibid*, p 579. Rule (3) of the 1919 rules seems to have been designed to exclude that possibility.

landowner should not suffer because one bidder uses its statutory powers to pre-empt competition.²³⁰

It gave no evidence that the rule had been successful in achieving that purpose. In Canada, the rule has been dispensed with in most jurisdictions.²³¹

A.116 (c) is designed to give effect to the no-scheme rule.²³² The previous Act was in similar terms but referred only to disregard of increases in value.²³³ The ALRC recognised it as a statutory expression of the *Pointe Gourde* principle, but regarded the existing statute as deficient in merely referring to increases.²³⁴ There is no suggestion in the ALRC report that the application of the rule in this formulation had caused significant problems.

A.117 The reference to the “purpose” for which the interest is acquired may be read against the background of the procedure for compulsory purchase under the same Act. This starts with a “pre-acquisition declaration” by the Minister that he is considering acquisition for “a public purpose”; the “public purpose” must be identified in the declaration.²³⁵ The implication may be that it is this purpose which will be disregarded in assessing compensation.²³⁶

Canada

A.118 A similar mixture of statutory and judicial versions of the rule is to be found in Canada.²³⁷ A typical example of a statutory rule is Canada Act 1985, section 26(11)(c) which requires disregard of increases or decreases due to:

the anticipation of expropriation by the Crown or from any knowledge or expectation, prior to the expropriation, of the public work or other public purpose for which the interest was expropriated.

A.119 The leading Supreme Court case of *Fraser v R*²³⁸ shows a narrow approach to the judicial rule. The case concerned the acquisition by the Crown of land required to

²³⁰ ALRC, *op cit*, paras 234, 250. It recommended retention of the rule to deal with problems of speculative values (citing cases such as *Cedar Rapids*, see para A.24 above).

²³¹ See Todd, *op cit*, pp 152-4. The Report of the Royal Commission on Expropriation, 1961-63 (“The Clyne Report”) had considered the matter and concluded that the possibility of increased compensation resulting from competition among statutory takers was so remote that it was not necessary to exclude it (*ibid*).

²³² The use of “purpose” rather than “scheme” is echoed in some of the English cases: see e.g. *Waters v Welsh Development Agency* [2001] RVR 93 (LT), 102, para 54: “...any effect on the value of the land acquired arising from the public purpose or public purposes prompting the acquisition, whether from their adoption by the authority or from their implementation, is to be disregarded.”

²³³ Land Acquisition Act 1955, s 23(2).

²³⁴ ALRC, *op cit*, para 247.

²³⁵ LAA 1989 (Cth), s 22(1)(2).

²³⁶ Although this implication does not appear to have been drawn expressly in any of the relevant authorities, it may help to explain the relative lack of litigation on the scope of the “purpose” to be disregarded under the rule.

²³⁷ See Todd, *op cit*, pp 160-165.

²³⁸ (1963) 40 DLR (2d) 707.

build a causeway; the issue was whether the valuation should take account of the use of 9 million tons of rock, on the subject property, to build the causeway.²³⁹ Ritchie J referred to *Pointe Gourde* and other cases, which he regarded as establishing that:

... the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.²⁴⁰

However, distinguishing *Pointe Gourde*,²⁴¹ and following the *Indian* case,²⁴² he held that this did not require the special adaptability of the land for use for the Crown's purpose to be disregarded.²⁴³

South Africa

A.120 The South African Expropriation Act 1975, section 12(5) provides a series of rules to be applied in determining compensation, of which the following are relevant in the present context:²⁴⁴

(b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;

²³⁹ The facts of the cases were unusual, in that, due to "bureaucratic bungling" the expropriation order had to be reissued, by which time the Crown had entered an agreement with a contractor which contemplated use of this rock for the project; "the potential market for this commodity had thus become a reality" (see the analysis at Todd, *op cit*, p 148).

²⁴⁰ *Ibid*, p 722.

²⁴¹ Ritchie J distinguished *Pointe Gourde* on the basis that there: "the special suitability... could not arise until after the acquisition by the British Crown and after the lands had been leased to the United States for the purpose of building the base and that it only came into being because of the special needs of the United States." (p 723). It is not easy to see, however, why these were seen as distinguishing factors, since in both cases it was the needs of the public project which created the special demand. Cartwright J reached the same result on the basis that "the reality of the situation" was that what the Crown was acquiring "was intended to be used not as land but as a source of building material for which there was an ascertainable market price". (pp 709-710).

²⁴² See para A.88 above.

²⁴³ See also the Californian case, *People v Andresen* (1987) 193 CA3d 1144, where a quarry was expropriated for repairs to a dam; the enhanced value of the quarry for this purpose was allowed because the expectation that the state would use rock from this quarry was "not tantamount" to an expectation that it would take the quarry itself. See below.

²⁴⁴ The 1975 Act (Act 63 of 1975) was a consolidation of South Africa's principal expropriation legislation. Its main compensation provisions were expressed in a single section: section 12 (as amended by the Expropriation Act Amendment of 1992). The State is entitled to expropriate property for public necessity or public utility. Compensation generally is based on the amount that would have been realised by the property "if sold...in the open market by a willing seller to a willing buyer", subject to a number of detailed rules. These provisions have to be read now subject to the 1996 Constitution, section 25(3), which contains a number of overlapping provisions relevant to compensation, which have no parallel in the UK.

(f) any enhancement of depreciation, before or after the date of the notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account.²⁴⁵

- A.121 Paragraph (b) is of interest as a more modern version of rule (3). It is difficult, however, to envisage many situations in which it would have effect in practice, which are not also covered by (f).

Other jurisdictions

California

- A.122 The American courts have developed an equivalent principle of “project enhancement”, but narrowly confined to the enhancement due to the prospect of compulsory acquisition of the subject land. The case-law was reviewed by the Californian Supreme Court in *Merced Irrigation Dist. v Woolstenhulme*.²⁴⁶ The Court referred to the general principle, as established by the US Supreme Court, that “project enhanced” value is a proper element of compensation, unless the property itself was “probably within the scope of the project from the time the Government was committed to it.”²⁴⁷ A distinction was drawn between enhancement in the value of land *likely to be taken* as part of the proposed improvement; and enhancement in the value of land *expected to be outside* the improvement, whose value may rise because of the benefits of proximity to the project. In determining just compensation, the former, but not the latter, had to be excluded.²⁴⁸
- A.123 In the particular case, the land was in the area of a regional water project. It was originally excluded from the project, but was subsequently included. It was held that it was wrong to eliminate the appreciation in market value which the project gave it before it was “designated for condemnation”, since that would in effect deny the owner “the market value of his property prior to the time when it was pinpointed for taking”.²⁴⁹
- A.124 The same principle was applied in another California case, on facts not dissimilar to *Pointe Gourde*. In *People v Andresen*,²⁵⁰ the state sought to condemn property for use as a rock quarry for repairing dams in the area, following a major rock slide. Compensation was assessed taking account of the enhanced value due to the Government’s indications (in the months prior to condemnation) that the rock

²⁴⁵ Expropriation Act 1975 (Act 63 of 1975), s 12(5)(f).

²⁴⁶ (1971) 4 Cal.3d 478, Tobriner J. The California Constitution (S 14, Art 1) provides that private property shall not be taken without “just compensation”.

²⁴⁷ *United States v Miller* (1943) 317 US 369, 377.

²⁴⁸ (1971) 4 Cal.3d 478, 490-92. The Court declined the invitation to hold in the abstract that identical principles applied to project *depreciation* or “blight”, since it might encourage authorities to announce a project at an early stage in order to drive down values: p 483, n 1.

²⁴⁹ *Ibid*, p 484.

²⁵⁰ (1987) 193 CA3d 1144.

would be used for this purpose. Indications of prospective *use* did not necessarily imply *condemnation*, and therefore were properly taken into account in fixing the market value.

A.125 There is now specific provision in the Californian Code:²⁵¹

The fair market value of the property shall not include any increase or decrease in value of the property that is attributable to any of the following:

(a) The project for which the property is taken....

France

A.126 A similar concept is found in the French Expropriation Code.²⁵² Values are based on the “effective use” (“l’usage effectif”) of the land one year before the date of the opening of the statutory inquiry into the project; no account is to be taken of changes in value after this date due to the “announcement of the works” (l’annonce des travaux), or to public works carried out three years before that date in the built-up area (l’agglomération) in which the land is situated.

Conclusion on international comparisons

A.127 Comparative study shows that the no-scheme rule or its equivalent is a normal feature of compensation codes. Otherwise, it offers no ready-made solutions. The various statutory versions provide some possible models for the new Code. Some of the cases offer interesting parallels, but generally they provide further demonstration of the difficulty of drawing clear dividing lines in this area of the law. It is noteworthy, however, that in spite of the numerous examples of statutory versions of the basic no-scheme rule, and some examples based on rule (3) of the 1919 rules, there appear to be no parallels for the more elaborate provisions of other parts of the 1961 Act. The comparisons support our overall view that the primary aim of the new Code should be to remove or confine such unnecessary complications.

CONCLUSION – THE NO-SCHEME RULE TODAY

A.128 It is a curious fact that the no-scheme rule, in its judicial and statutory versions, has not been subject to full review by the House of Lords in the 40 years since the restoration of the market value basis of compensation in 1959.²⁵³ The present law rests on Court of Appeal authority, which itself, as we have seen, was based on limited analysis of either the statute or the earlier authorities. Those earlier

²⁵¹ Californian expropriation law is codified principally in the California Code of Civil Procedure (“CCP”), sections 1230.010-1273.050. Compensation is specifically addressed in sections 1263.010-1263.620. Further provisions, on relocation, are found in the California Government Code, sections 7260-7277 (“Relocation assistance”). See also the California Evidence Code, sections 810-824 (“Evidence of Market Value of Property”).

²⁵² See Code de l’expropriation pour cause d’utilité publique, Art L 13-15.

²⁵³ In *Davy and Rugby Water Board* the issues were relatively narrow. Even in the *Ozanne* saga (see para A.107 above), the House of Lords’ consideration (unlike that of the Court of Appeal) was limited, by the grounds of appeal, to rule (3).

authorities include two conflicting Court of Appeal judgments (in *Lucas*), and two conflicting decisions of the Privy Council (the *Indian* case and *Pointe Gourde*).

- A.129 It is, therefore, still open to the House of Lords to reconsider the position, and it is far from clear how the various conflicts would be resolved. The recent decision in *Fletcher*, though limited to section 17, suggests that the House might be sympathetic to an argument which sought to restrict the more speculative features of the rule.²⁵⁴
- A.130 The clearest, and most authoritative, statement of the rule, which the Privy Council apparently intended to adopt in *Pointe Gourde*, is probably that of Lord Buckmaster in *Fraser v City of Fraserville* (1917).²⁵⁵ What is to be excluded is “any advantage due to the carrying out of the scheme for which the property is compulsorily acquired”. That was said in the context of projects, whose extent was identified by the statute or statutory instrument by which they were authorised, the only factual issue being whether or not they were to be treated as a single “scheme” for the purposes of the rule. The ambit of the rule has been extended and obscured by its rewording by the Privy Council in *Pointe Gourde*, referring to “the scheme *underlying* the acquisition”, and by its interpretation in later cases, which have treated the issue as one of pure fact.
- A.131 As for the statutory versions, rule (3) of the 1919 Act has been interpreted so narrowly as to have little practical effect. In any event, it was directed to the perceived problems of the time, as identified by the Scott Committee.²⁵⁶ It sought to exclude speculative values dependent upon the exercise of statutory powers, whether by the acquiring authority itself, or by competing authorities. The problem of *competing authorities* was attributed to the “imperfect system” of granting statutory powers; it is not an issue which has featured in any of the post-war cases, no doubt due to the more centralised and regulated systems of control now in place. As to exercise of powers by the *acquiring authority* itself, this seems in practice to be covered by the judicial version of the rule.²⁵⁷ Accordingly, rule (3) seems to have become effectively redundant.
- A.132 Turning to the more modern versions, section 9 of the 1961 Act, originally derived from the 1947 Act, requires disregard of *decreases* in value attributable to an “indication” of the prospect of compulsory purchase. It provides protection against blight caused by the prospect of compulsory acquisition. It was not originally related to the no-scheme rule, but can be seen as a reasonable extension of it. It is less easy to support its use, as in the second *Jelson* case,²⁵⁸ as a foundation for

²⁵⁴ See paras A.104-105 above.

²⁵⁵ [1917] AC 187. See para A.27 above.

²⁵⁶ See paras A.30-33 above.

²⁵⁷ As shown by *Pointe Gourde* itself, where rule (3) was held not to apply: see paras A.39-47 above.

²⁵⁸ See para A.103 above.

additional planning assumptions not supported by the provisions of the 1961 Act dealing specifically with that issue.²⁵⁹

- A.133 Section 6 of the 1961 Act (first introduced in 1959) got off to a very bad start, from which it never recovered. It appears to have been a genuine attempt to give some shape to the no-scheme rule within the new planning system established by the 1947 Act. It took account of the different circumstances in which compulsory purchase orders might be made, by distinguishing between those for self-contained projects (case 1); and those related to more extensive designations, such as comprehensive development areas or new towns (cases 2ff). The application of the rule in each case was defined by strict statutory limits. However, because of the convoluted wording of the section, literal interpretation was largely abandoned in the cases, and instead it was treated as existing side-by-side with the judicial rule, as part of a single, widely stated principle.
- A.134 A more faithful interpretation might have modelled the future development of the no-scheme rule on the statutory version, rather than the other way round. In relation to self-contained orders, application of case 1 (directly or by analogy) would have led to the rule being confined to the area of the particular compulsory purchase order. In relation to the other cases, the need to “rewrite history” would have remained, although it would have been within defined statutory bounds. Furthermore, the comparison of the wording of section 6 with that of section 17 might have encouraged the court to bring the two into line as far as possible.²⁶⁰
- A.135 Most of the provisions of the 1961 Act relating to planning assumptions, other than section 17 (certificates of appropriate alternative development), have proved anomalous or ineffective. Section 17, as interpreted in *Fletcher Estates*, provides a firmer basis for developing a single and exclusive set of rules for planning assumptions in the new Code.

²⁵⁹ Although s 14 accepts the possibility of assumed permissions other than those derived from any certificate under section 17, it seems to contemplate that the test for determining those assumed permissions will be exactly the same as under section 17: see para A.65 above.

²⁶⁰ The “cancellation approach”, eventually approved for section 17 in *Fletcher*, could have been seen as equally appropriate for section 6. Thus, under case 1, it would not have been necessary to look back beyond the particular proposal to acquire. The precise definition of “proposal to acquire” would have required to be considered, since s 22(3) does not apply directly to s 6.

APPENDIX 6

THE NO-SCHEME RULE – ILLUSTRATIVE CASES

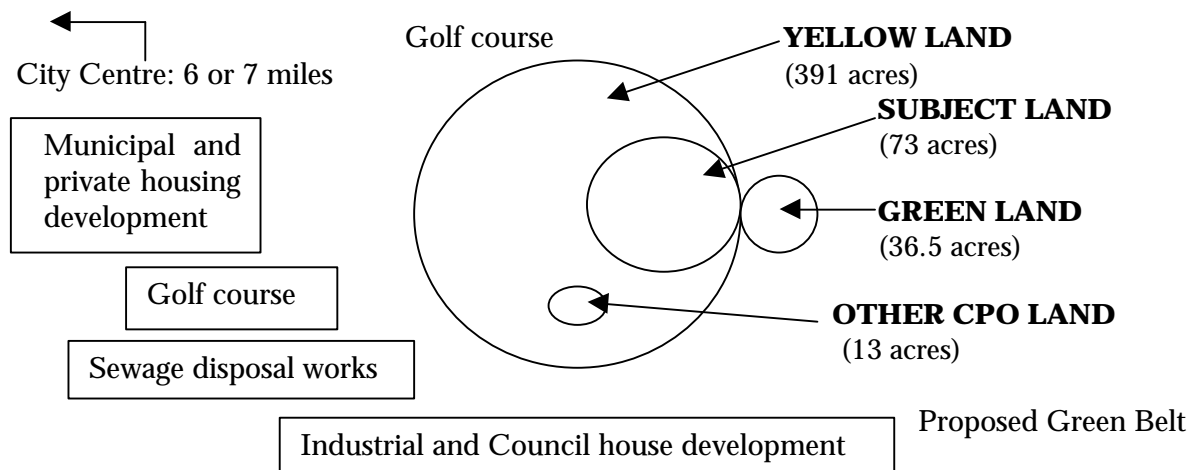
INTRODUCTION

- A.1 In this appendix, we have selected two cases, for the purposes of illustrating the effect of the present law: (A) applying compulsory purchase principles under the 1961 Act; (B) applying a “willing parties” approach, not subject to the 1961 Act. The facts and reasoning in each case illustrate the practical application of the different approaches in arriving at a figure of compensation.

(A) Compulsory purchase principles under the 1961 Act

Wilson v Liverpool City Council (1971)

- A.2 We have referred in the historical review to the judgment of the Court of Appeal, as settling the modern form of the judicial rule.¹ However, the decision of the Lands Tribunal² (which was upheld by the Court of Appeal) gives a fuller statement of the facts, and the steps by which the Tribunal arrived at the figure of compensation. It also illustrates the operation of the 1961 Act provision for deduction of “betterment” on adjoining land,³ which were not in issue in the Court of Appeal.
- A.3 The case concerned a compulsory purchase order made in 1964 relating to 73 acres of land owned by Mr Wilson (the “subject” land). It formed part of an area of 391 acres of agricultural land (the “yellow” land), some 6 miles to the east of the centre of Liverpool, for which at that time the Council were seeking to develop for residential and ancillary purposes. Mr Wilson also owned a further area of 36.5 acres (the “green” land), which was contiguous to the subject land, but outside the yellow land.



¹ [1971] 1 WLR 302. See App 5, para A.73.

² [1969] RVR 741, LT.

³ 1961 Act, s 7 (see App 3 for the text).

A.4 The background was as follows:-

- (1) At the material time, the development plan showed the area as so-called "white land", not zoned for development in the development plan. The area was surrounded on three sides by various forms of built development and golf courses, and on the other by "provisional" green belt.
- (2) From about 1961, it became become apparent that such provisional green belt areas were unlikely to be released for development, thus increasing the pressure for release of white land. From that time the owners of land in the area of the yellow land, began to make applications for permission for development of their own land. In July 1962, Mr Wilson made an application for housing development of the subject and green land together, which was refused by the Council, but then appealed to the Minister.
- (3) In February 1963 the Council adopted a 10 year programme to provide 5,000 houses per year to meet the housing the needs of its area.
- (4) In March 1963, the development committee resolved to apply for permission for housing development of the yellow land (including the subject land, that is the 73 acres belonging to Mr Wilson), and gave authority to negotiate for the acquisition of this land. In May 1963, the Council applied to the Minister for outline planning permission for development of the yellow land for residential and ancillary purposes. In September 1963, it approved in principle proposals for development, including 210 acres of housing, 120 acres of open space, education, shopping and other facilities, and provision of roads and sewerage. In November 1963, the Minister granted permission for development of the whole of the yellow land, reserving for his own approval the layout and details.
- (5) In January 1964, the Minister allowed Mr Wilson's appeal and granted outline permission for housing development of the subject land and the green land.
- (6) In February 1964, the Council made a compulsory purchase order in respect of the 86 acres of the yellow land, including the subject land (but not the green land), and a further 13 acres belonging to smaller owners. The other 305 acres of the yellow land had been acquired by agreement. Following a public inquiry, the order was confirmed in January 1965.
- (7) In May 1965 notice to treat was served for the subject land, and the other 13 acres, within the order. In June 1965, the Minister approved a master plan for the development of the yellow land, subject to further details.
- (8) In June 1965, Mr Wilson exchanged contracts for sale of the green land at a price equivalent to £6,700 per acre.
- (9) In June 1966, the council took possession of the subject land, following notice of entry.
- (10) In January 1968 the Minister gave final clearance to the Council's proposals for the yellow land.

A.5 The Lands Tribunal held that £343,465 compensation was payable, representing £392,808 for the subject land (£5,350 per acre), less £49,343 for “betterment” of the green land (£1,350 per acre). The main points were:

- (1) There was in existence at the date of the notice to treat⁴ a scheme underlying the acquisition of the claimants’ land within the *Pointe Gourde* principle. The scheme was the Council’s proposal to develop the whole area of 391 acres. It was sufficiently precise to enable the owners of the land to find out what was in it on the Minister’s grant of planning permission (1963) or at the latest at the confirmation of the compulsory purchase order in 1965.⁵
- (2) The subject land had to be valued with the benefit of the existing permission for housing development (1961 Act, s 14(2)), and an assumed permission for development in accordance with the Council’s proposal (s 15(1)), regardless of whether they would have been granted in the absence of the scheme.
- (3) The sale of the green land at £6,700 was evidence of the “dead ripe” value of land for residential development, but that figure was in part attributable to the purchaser’s knowledge of the scheme, and the fact that roads and sewers would be available. Without that knowledge, the price for land (even assuming an existing permission) would have reflected a likely deferment for 2 years, and a deduction for the cost of sewers and wayleaves; giving a figure of £5,350 per acre.
- (4) Applying the same approach, the “betterment” on the adjoining land (to be deducted under 1961 Act, s 7⁶) was assessed at £6,700 - £5,350 = £1,350 per acre.⁷

⁴ The notice to treat was taken as the date of valuation, following the normal practice, before the *West Midland Baptist* case established the date of possession as the correct date (see Part V, para 5.68 above); although that case had been decided by the time of the appeal, the Court of Appeal refused to allow this issue to be reopened: see [1971] 1 WLR at pp 306-7.

⁵ The Tribunal rejected the claimant’s argument that there could be no “scheme” until all necessary consents had been obtained, and all decisions in principle made, which they put at January 1968, when the Minister gave final clearance: *ibid*, p 748.

⁶ Note that under s 7, the question was whether the value of the green land was increased, not by the “scheme”, but by the prospect of development of the 86 acres included in the compulsory purchase order. The Tribunal held, however, that the Council’s developing the 86 acres was as good a guarantee of sewerage and other facilities for the 36.5 acres as was its wider scheme.

⁷ The Policy Statement proposes that in the new Code, such “betterment” would only be deducted from compensation for severance or injurious affection: see Part V, para 5.33 above. On that basis, there would have been no deduction in the *Wilson* case.

(B) “Willing parties” outside the 1961 Act

***Mercury Communications Ltd v London and India Dock Investments Ltd (1995)*⁸**

A.6 Mercury needed to lay and use cable ducts under a private road owned by the defendants (“LIDI”). The ducts were needed to provide additional telecommunications links between Mercury’s “Earth Station” in East London, and the development at Canary Wharf. Under the Telecommunications Act 1984, the County Court had power to make a compulsory order granting the necessary rights, subject to terms as to compensation, that is:

Such terms as to the payment of consideration... as it appears to the court would have been fair and reasonable if the agreement had been given willingly... (sched 2 para 7(a))

A.7 Mercury argued that compulsory purchase principles were applicable; and that accordingly the consideration should be nil, or nominal, since any increase in value due to the Mercury scheme must be ignored. LDDI argued that compulsory purchase principles did not apply, and that they should be treated as entitled to negotiate for an annual payment, based on a share of Mercury’s anticipated profits from the Canary Wharf operation (by analogy with the approach in *Stokes v Cambridge Corp*⁹). They put this at £24,175 p. a.

A.8 The Court held that:

- (1) The words “fair and reasonable” necessarily involved “an element of subjective judicial opinion”, depending on the judge’s own perception, rather than a purely objective assessment of “market value”.¹⁰
- (2) Both grantor and grantee must be assumed to be “willing”.¹¹ Relevant guidance was to be obtained from cases dealing with the meaning of “willing” seller and purchaser, in the compensation context. But, otherwise, compulsory purchase rules, including the *Pointe Gourde* principle, had no application under the Code.¹²
- (3) The share of profits basis, proposed by LDDI, was not appropriate, except where what is in issue is a single capital payment, and the “benefit to the developer/payer can be relatively easily quantified, as in the typical *Stokes v Cambridge* situation.”¹³

⁸ (1995) 69 P&CR 135 (HH Judge Hague QC, Mayor’s and City of London County Court).

⁹ (1962) 13 P&CR 77 LT (See App 5). The Lands Tribunal held that the compensation payable for a development site, should be reduced by one third, representing the price which would have had to be paid to the owner of a strip of adjoining land, which held the key to access.

¹⁰ 69 P&CR 135, 144.

¹¹ *Ibid.*

¹² *Ibid.*, pp 145-50, 156.

¹³ *Ibid.*, p 161.

- (4) The appropriate payment should be a capital payment or annual rent, reflecting “the anticipated use of the right and thus its importance and the value to the grantee.”¹⁴ This could only be determined by reference to evidence of comparable transactions.
- (5) The best starting-point was the agreements entered into by the parties in 1987-8, authorising the installation of the original ducts, which had provided for annual payments, equivalent to £4,000 at current values. Although this figure had involved a “horse-deal”, and had been affected by Mercury’s “anxiety to settle” because of the constraints at the time, it appeared to the judge to be “in the right sort of bracket” and “of a kind that appears fair to both parties and reasonable”. The figure had to be adjusted it, (inter alia) downwards to discount the element of “anxiety”, and upwards to take account of the numbers of cables.¹⁵
- (6) Having made these adjustments, the judge arrived at an annual figure of £9,000, which he determined to be “fair to both parties and reasonable on the basis that the deed of grant was given willingly”.¹⁶

¹⁴ *Ibid*, pp 162-3. He drew an analogy with cases where the court has to fix “consideration for a right of importance and value to the grantee, but which causes no detriment to the grantor...”: e.g. *Whitwam v Westminster Brymbo Co* [1896] 2 Ch 538, where the defendant had run trucks over rails on land belonging to the plaintiff, and damages were based on appropriate wayleave rent, whether or not the defendants made any profit (pp 542-3).

¹⁵ *Ibid*, p 168.

¹⁶ *Ibid*, p 169.

APPENDIX 7

COMPENSATION FOR ACQUISITION OF RIGHTS:

ARTICLE BY N E HUTCHISON AND J ROWAN-ROBINSON

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NORMAN E. HUTCHISON AND JEREMY ROWAN-ROBINSON, UTILITY WAYLEAVES: A COMPENSATION LOTTERY? [2002] JPIF 159

1. Introduction

For the good of all. That is the argument used when privately-held land is occasionally required for public purposes. In these instances it has long been accepted that the loss to the individual is offset by the gain to the wider community of which the individual is a part. In order to expedite public projects and to ensure that private rights give way when required, Parliament has been ready to confer powers of compulsion. The public sector and a host of others have all been able to rely on powers of compulsory purchase, including the creation of new rights falling short of ownership, to ensure that public purposes are achieved.

This paper focuses on an important but relatively neglected area where privately held land is commonly required for public purposes[1]. This is for the provision of physical infrastructure. In order to bring services such as water I sewerage, electricity, gas and telecommunications to the consumer, a network of pipes and cables together with supporting facilities has to be provided. Ready access to such services is generally considered to be in the public interest and Parliament has conferred statutory powers on the suppliers, including where necessary the use of compulsion, to secure provision. These powers typically provide for the creation of a wayleave (in effect a licence) or, where a more formal arrangement is required, something akin to an easement or, in Scotland, a servitude. In recent years, the supply of these services has increasingly been passed to the private sector and the providers are commonly referred to as "the utilities". This area is important, partly because of the very extensive network of pipes and cables in existence at the present time, partly because of the very large number of wayleaves that are negotiated each year, and partly because of the anticipated growth in the level of services to be supplied by cable and telephone during the next decade.

The history of the development of compulsory powers by public authorities has been one of striving to achieve a fair balance between, on the one hand, retaining adequate safeguards for the individual whose land is required and, on the other, the importance of not delaying schemes which are to serve a much needed public purpose. The former is reflected in the requirement to give notice of an intention to exercise compulsory powers, the right to object and to be heard in support of an objection and an entitlement to compensation reflecting a financial equivalent of the loss. The latter is reflected in the use of codified procedures, the delegation by Parliament of decisions on the exercise of compulsory powers in each case to a minister and provision for fast track vesting of title.

What is different about the use of compulsion by the utilities is that the supply of many of the services is now undertaken, as already indicated, not by public authorities, but by the private sector. The privatisation programme of the 1980s transferred the supply of many of the utilities from state control to companies carrying on their business in pursuit of profit. There is nothing very new about this. In the nineteenth century many of the utilities were in the private sector and operated with the benefit of compulsory powers. However, when they were brought into the public sector, procedures were streamlined and compensation was pegged to the fair market value. This owed much to the two reports of the Scott Committee which criticised the "indefensible complexities" of the procedures and the extravagant compensation settlements where access to private land was required for public purposes[2]. When the utilities were eventually returned to the private sector during the 1980s, they took with them the compulsory powers accompanied, for the most part, by the streamlined procedures and fair market value compensation. There was no significant adjustment in procedure or compensation to reflect their new status. McAuslan and McEldowney question whether this was appropriate[3]:

...the whole law of compulsory acquisition and compensation is based on the assumption that a public agency is acquiring land in the public interest and it is permissible in the circumstances that a legal framework is created which ensures that an even hand is held between the interests of the tax-payer and the private land-owner. It must be open to question whether the same basic framework is wholly appropriate where a commercial organisation wishes to purchase land for its commercial purposes.

This paper focuses on the compensation arrangements and sets out to consider whether they strike a fair balance between the interests of the utilities and the landowners. The paper is structured as follows: section 2 provides a brief discussion of the distinction between a wayleave and an easement in legal terms. Section 3 outlines the methodology adopted, while section 4 considers the measure of compensation. Valuation methodology and practice is discussed in section 5. Finally, section 6 provides some conclusions and recommendations.

2. Definitions: easements or wayleaves?

There is some confusion about the nature of the rights conferred by statute on the utilities. Some utilities have power to acquire a right in land less than ownership. This seems to be analogous to the creation of an easement (servitude in Scotland). Such a power is conferred, for example, on Transco[4], public electricity suppliers[5], public telecommunication operators[6] and water and sewerage undertakers in England and Wales[7]. Curiously, no such power is conferred on water authorities in Scotland. These rights are commonly referred to as "easements", although the legislation does not generally use this term. Indeed, very often there will be no dominant tenement and the rights granted (e.g. to construct fixtures on the land) will go beyond what is possible with an easement.

In addition, provision is commonly made in utilities' legislation for the creation of what is generally referred to as a "wayleave", although the legislation does not always use this term. The wayleave empowers the utility concerned to install, maintain, repair and replace their infrastructure in private land. Such provision is to be found, for example, in the Electricity Act 1989[8], the Telecommunications Act 1984[9] and the Water Industry Act 1991[10] (and the corresponding legislation in Scotland)[11]. Curiously, no such compulsory power is conferred on public gas transporters.

In practice, there may be some difficulty in distinguishing between these two rights. Normally, at common law, a wayleave is treated as a form of licence and is personal to the parties, it is precarious and terminable after an agreed period and will not run with the land so as to bind successors in title. Because of this compensation is often paid by way of annual payments. Easements, on the other hand, if properly constituted, are legal interests in land. The benefit and burden are annexed to identifiable land and run with the respective dominant and servient tenements so as to bind successors in title. Easements may be of indefinite duration and because of this compensation is often paid as a capital sum. However, as we have already mentioned, the benefit of the utility easement may not be annexed to identifiable land. Furthermore, wayleaves often run for a considerable period of time, indeed some of the statutory provisions governing compulsory way leaves stipulate that they will bind anyone who is at any time an owner or occupier of the land[12]. In other words, it is not clear that in practice there is much difference between the two. Apart from Transco which has no choice, it is not clear that the utilities see any particular advantage in an easement that they do not enjoy through a wayleave.

3. Methodology

To answer the research question, a desk study was undertaken of the enormous range of legislation dealing with infrastructure, to determine the nature and extent of the statutory powers providing for the creation of wayleaves and "easements". The results of the study are set out in Hutchison and Rowan- Robinson (2000). Thereafter, an interview survey of a sample of the key utilities was undertaken to obtain an understanding of the way in which they operate in practice. The list of those interviewed is set out in the Appendix. Reference to "key" utilities refers to the gas, electricity, telecommunications, water and sewerage industries. In addition, the bodies representing owners and occupiers of land were contacted to find out the consequences for those most affected. Although the desk study revealed a surprisingly wide range of such powers conferred on both public authorities and the private sector, this paper focuses only on the key utilities.

4. Compensation[13]

Although there is no constitutional requirement in the UK to compensate a landowner where access to private land is taken in exercise of compulsory powers, statute almost always provides for this. Furthermore, there is a strong judicial presumption that, in the absence of clear wording, Parliament does not intend to provide for the expropriation of a right without full compensation[14]. This is reinforced by the Human Rights Act 1998 which incorporates into English and Scots law the European Convention on Human Rights. This section of the paper examines the provisions for compensation which apply to the key utilities.

The measure of compensation

The question "what should be the measure of compensation" depends on the purpose that compensation is intended to achieve. The following brief discussion considers five different purposes that compensation can serve[15]. Although the discussion is based on compensation for compulsory purchase, these purposes are relevant also to compensation for compulsory access to private land by the utilities.

First of all, it has been suggested that a utilitarian approach to compensation would provide claimants with a small balance of advantage thus encouraging less objection and speedier settlements[16]. By way of illustration, Cullingworth cites the Minister

of Transport in 1958 as stating that his department "could not be more strongly in favour" of a bill providing for an increase in the measure of compensation for compulsory acquisition because of the difficulties faced by his department in time-consuming procedures for compulsory acquisition at unattractive rates of compensation[17].

Secondly, what has been described as a "Rawlsian" or "justice as fairness" approach to compensation[18] might also conclude that those faced with expropriation of their land should end up marginally better off, not for utilitarian reasons, but because that would seem to be just and fair. It has been suggested that the compensation decisions of the lay juries prior to 1919 exhibited some of the characteristics of a Rawlsian approach to compensation[19]. That was at a time when compulsory powers were being exercised by private enterprise carrying on business as much for the pursuit of profit as for the public interest.

Thirdly, and drawing on the approach to settling damages claims, the courts have determined that compensation for compulsory purchase should generally be measured by the financial equivalent of the claimant's loss[20]. Since 1919 and the growth in the exercise of compulsory powers by the public sector, statutory rules have measured this loss by analogy with a sale in the open market by a hypothetical willing seller[21]. Compensation, on this approach, reflects, so far as possible, the sum required to leave the claimant as well off financially, but no better off, than he or she would have been without the change in their position[22].

Fourthly, it has since been acknowledged that, where compulsory powers are exercised, claimants may face losses other than patrimonial loss. With residential claimants, this is sometimes referred to as "householder's surplus" and reflects loss of ties with an area, friendships made and so on, items to which it is difficult to attach a value[23]. This sort of loss is now compensated where homes are compulsorily acquired through the home loss payment[24] and there is pressure to recognise that others, such as commercial claimants, also experience similar uncompensated losses[25]. Compensation here goes beyond financial equivalence and offers a measure of solace to the claimant.

Finally, it has been argued that there might be advantage in terms of efficiency and equity if the measure of compensation enabled a claimant to participate in the social worth of the scheme for which access to private land is acquired[26]. Such an approach would be concerned not so much with measurement of loss but with redistribution of profit. The Sheaf committee, for example, considered the possibility of encouraging the voluntary sale of land to local authorities by allowing the payment of a price which gave the landowner part of the equity estimated to arise from the subsequent development[27]. The idea was rejected as inequitable and likely to inflate market values.

Against this background, the paper considers what measure of compensation is applied by statute to the compulsory creation of "easements" and wayleaves.

Easements

The position with regard to the creation of an "easement" or "servitude" has been standardised to quite a large extent and is, therefore, relatively straightforward. If Transco is used as an example, the Gas Act 1986 applies s. 7 of the Compulsory Purchase Act 1965, in adapted form[28] to the assessment of compensation in England and Wales. Section 7, as adapted, provides that:

In assessing compensation to be paid by the acquiring authority under this Act regard shall be had not only to the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.

As Denyer-Green points out [29], this identifies two heads of claim: depreciation in the value of the land through which the pipe-line is to be laid, including any lost development potential, and severance and injurious affection. Any value added to the land which is attributable to Transco's scheme would be ignored on the basis of the *Pointe Gourde* rule[30], so the owner could not claim for the value of the right to Transco. The Land Compensation Act rules are applied[31]. In Scotland, the principal measure is set out in s. 61 of the Lands Clauses Consolidation (Scotland) Act 1845 and this identifies the same two heads. In terms of the different measures of compensation described above, s. 7 of the 1965 Act aims to provide claimants with a financial equivalent of their loss.

The Telecommunications Act 1984 [32], Electricity Act 1989[33] and the Water Industry Act 1991[34] apply the same approach to their respective utilities.

Wayleaves

The position with regard to compensation for compulsory wayleaves is more complex. There is very little standardisation and it is necessary to consider each of the utilities in turn.

1. *Electricity.* The Electricity Act 1989 provides that the occupier of land, and the owner where the owner is not in occupation, may recover compensation from the electricity company for the grant by the Secretary of State of a wayleave[35]. In addition, compensation is payable for any damage to land or moveables and for disturbance[36]. No further assistance is gained from the Act as to what is meant by "compensation for the grant". Is it, like s. 7 of the 1965 Act, simply concerned with a financial equivalence of the claimant's loss or does the reference to the grant imply an element of consideration? Unlike wayleaves for pipe-lines, electricity wayleaves may result in structures on the land which have a serious effect on the view and a corresponding depreciating effect on the value of the "retained" land[37]. Does "compensation for the grant" encompass injurious affection? The Land Compensation Act rules are not applied and the result, as Denyer-Green points out, is that the measure of compensation remains unclear[38].

2. *Water supply and sewage disposal.* The Water Industry Act 1991 provides for England and Wales that, if the value of an interest in land is depreciated as a result of the laying of a pipe in private land, compensation equal to the amount of the depreciation shall be paid to the person entitled to that interest[39]. The compensation entitlement applies not only to the land in which the pipe is being laid but to land held with that land. In other words, it includes injurious affection. The rules set out in s. 5 of the Land Compensation Act 1961 are to be applied to the assessment of compensation for depreciation[40] and provision is made for set off for any enhancement in value[41]. In addition to depreciation, any loss or damage of the nature of disturbance attributable to the carrying out of the works is to be compensated[42].

The general approach in the 1991 Act to the measurement of compensation (depreciation, damage and disturbance) is similar to that for compulsory rights orders under the Pipe-lines Act 1962[43] except that the latter makes no reference to the application of the Land Compensation Act rules or to set off. Broadly, the approach in both cases is to provide for a financial equivalent of the loss.

North of the border, the Sewerage (Scotland) Act 1968 makes provision for compensation for any loss, injury or damage sustained by any person by reason of the exercise of the power to lay pipes for sewage disposal[44]. The Water (Scotland) Act 1980 provides that where a water authority lays a main through private land, the authority must pay compensation for "any damage done to or injurious affection of that land"[45]. It is not altogether clear whether "any damage" refers simply to disturbance or whether it would cover depreciation should this occur.

3. *Telecommunications*. The Telecommunications Act 1984 provides for the court to include such terms and conditions as appear appropriate, including such terms and conditions with respect to the payment of consideration as appears "would have been fair and reasonable if the agreement had been given willingly"[46]. Compensation is also payable for loss or damage[47]. The "fair and reasonable" test is similar to the provision in the Mines (Working Facilities and Support) Act 1923[48] and its successor Act of 1966[49]. Both the MWFS Acts provided for compensation for access to minerals to be determined on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted. In *Re Naylor Benzoin Mining Co. Ltd* [50] and subsequently in *BP Petroleum Developments Ltd v. Ryder* [51] it was held that compulsory purchase principles should be applied in assessing compensation under these Acts so that the position of special purchasers should be ignored.

The 1984 Act provision was considered in *Mercury Communications Ltd v. London and India Dock Investments Ltd* [52]. Mercury argued that the same approach should apply. However, His Honour Judge Hague QC in the County Court, having regard to the terms of the legislation which it replaced and to other provisions in the 1984 Act Telecommunications Code, distinguished the provision and held that the determination of what was fair and reasonable involved an element of subjective judgement and that the phrase should be interpreted without regard to compulsory purchase principles. It followed from this that the *Pointe Gourde* principle, which requires any increase in value due to the scheme underlying a compulsory acquisition to be ignored, had no application. The claimants, for their part, argued that the proper consideration to be paid should be an annual sum representing a percentage of the anticipated net profit to Mercury from the development for which the cables were required, in other words a measure reflecting the social worth of the scheme. This argument was also rejected. Such an approach was considered appropriate only in cases like ransom strips where there is a single capital payment to be made and where the benefit to the utility is readily quantifiable. The judge concluded that wayleave payments reflect the use made of the right granted and its importance to the grantee so that a wayleave "rent" would generally be the most fair and reasonable way of calculating the consideration. That approach was not, however, practical in right of way cases such as this. In the end, a fair and reasonable consideration was determined by reference to the settlements under two earlier agreements negotiated in the area. The measure employed by the 1984 Act would seem to come closest to the social worth model in the sense that it is concerned less with the loss to the landowner than the gain to the utility, although it would seem that that worth should reflect the value

of the wayleave rather than a proportion of the value of the scheme for which it is required.

Comment

The different measures of compensation provided in law for compulsory access by the utilities to private land is both surprising and confusing. The interview survey suggests that there is too little experience of contested claims arising from compulsory access to be clear about just how far these measures actually differ in *practice* and how they affect valuation. On paper, however, they seem to range from a strict compulsory purchase compensation approach at one end to a more generous consideration-based approach at the other. The approach in *practice* to the valuation of rights negotiated under the shadow of compulsory powers is considered in the next section of this paper.

There is no obvious justification for the different approaches. It would seem to be highly desirable to have clarity about whether compensation should be based on depreciation, whether the Land Compensation Act rules should be applied to determine this, whether injurious affection is compensatable, whether there should be an element of consideration and whether set off applies[53].

5. Valuation

Although much of this paper has been devoted to a discussion of the statutory provision for compensation, it is important to bear in mind that compensation arising from nearly all of the thousands of requests for access every year are settled by negotiation without recourse to statutory powers. The statutory measures of compensation clearly provide a backcloth against which the negotiations take place, but neither the claimants nor the utilities are bound by them. Much of the interview survey was directed towards identifying the approach adopted by the different utilities to the settlement of claims negotiated under the shadow of compulsory powers. A detailed questionnaire was prepared for the face to face interviews with seven promoters. These comprised two each from the electricity I water and telecommunication industries and one from the gas industry .In selecting tl.1e promoters care was taken to ensure as broad a representation of practice as possible, within the fmanical constraints of the project. From the survey it became evident that the vast majority of new wayleaves over the last three years were acquired in rural 167 areas. In consequence, lengthy interviews were also held with the National Farmers Union (NFU) in England and Scotland and with the Country Landowners Association (CLA). At all the interviews, which lasted between one and two hours, detailed notes were taken and the transcript was subsequently returned to the interviewees for checking.

This section will consider the appropriate valuation methodology which should be used in making a claim for compensation for land which is sterilised by a wayleave and will then compare current practice between the gas, electricity, water and telecommunication industries.

In granting a wayleave, whether by agreement or though compulsory powers, the landowner is giving a right to the promoter to enter his land to construct and use apparatus, and to return at any future date to carry out repairs. As discussed in the previous section, existing legislation makes provision for a variety of compensation measures but is not clear how far they differ, as only one -the Telecommunications Act 1984 -explicitly provides for consideration with the others compensating for any

loss. The statutory compensation measure of loss to the claimant is normally calculated by reference to the diminution in market value of the land including the effects of severance and injurious affection, plus any disturbance elements; but with a negotiated settlement it does not need to be calculated in this way.

In some, but not all, cases of statutory compensation, payment is only made where the wayleave crosses a claimant's interest and the claimant receives no benefit. Where the owner benefits from the service provided then no payment is made. For example, where the owner of a business park requires the installation of a telephone line to the buildings, then no compensation would be payable for entering the land. However, if the line crosses an adjoining field in order to supply the business park then the owner of that field would be entitled to receive compensation. Generally, the companies charge their customers for the initial cost of connection and while practice and the amount differ between the utilities, the connection charge must to some extent defray the cost of the wayleave payments.

The NFU and the CLA (or equivalent bodies in Scotland) negotiate annual agreements with Transco as well as with the electricity and telecommunication industries, which are intended to guide compensation settlements in both compulsory and voluntary cases. These agreements substantially reduce the time spent on negotiation between the parties, although they are not binding. If members of the NFU or the CLA feel that they are not sufficient to compensate in their particular circumstances then they are free to negotiate on their own account, although the onus is on the claimant to prepare the claim and provide comparable evidence to substantiate the loss. Notably, there is no agreement with the water/sewerage industry.

The key issue is the degree of sterilisation which results from the existence of the apparatus. Some equipment might result in 100 per cent sterilisation while others might result in a minor or nil reduction in value or could even result in an increase in land value. To illustrate this point, where an electricity line is proposed through afforestation and it is considered that the electricity structures are likely to be permanently required, their presence effectively sterilises the ground in perpetuity along the length of the wayleave. As a result the landowner loses all future earning capability on the land occupied by the apparatus and under the wires, and the land value effectively reduces to nil. The compensation claim should reflect the financial equivalence of the loss and will be based on the reduction in market value as a consequence of the wayleave which in this case is full open market value, including future potential[54]. In contrast, where an electricity line is proposed across arable land, only the area of ground physically occupied by the apparatus is sterilised, with the farmer able to grow crops and carry out normal agricultural operations under the flying wires. In the case of underground pipes, the degree of sterilisation may be very minor except where development is proposed. Often building is prevented immediately above the pipe and this may affect the development value of the site. In practical terms, the presence of a pipeline may restrict the size of an extension to an existing dwelling or prevent new dwellings being constructed.

A further possible complication is the involvement of the Health and Safety Executive (HSE) where high pressure pipelines are proposed. The HSE is a statutory consultee to the local planning authority on planning applications where the application site is affected by a notifiable pipeline or is within a certain distance of such a pipeline. This distance is commonly referred to as the consultation zone. Where the HSE believes that there is unacceptable risk to the public as a consequence of the proximity of the pipeline, it will advise the planning authority to reject the application. This may result

in a substantially wider sterilised strip than was originally compensated. Concern was expressed by practitioners about whether, in practice, compensation is paid for the entire area affected. "Easements", however, commonly provide for further compensation for lost development value where planning permission is refused solely because of the existence of the pipe-line.

It is common practice in negotiated wayleaves to set off any benefit due to the existence of the apparatus, even though statute does not always provide for set off in the exercise of compulsory powers. As noted in the previous section, the Water Industry Act 1991 does make provision for set off, and the provision of a new water main or sewerage system might well increase the development value of the contiguous land to a far greater extent than any reduction in value due to the sterilisation of the land at the immediate vicinity of the apparatus. Despite this set off provision, in the majority of cases the existence of the wayleave results in a reduction in land value, although not the complete sterilisation of the land in perpetuity.

The claim for compensation may be based on the future potential of the site. In any sale situation the future potential is reflected in the exchange price in the market place. Where the potential is uncertain, for example where planning permission has not yet been obtained, the price includes an element of "hope value", and in this situation the price is normally greater than the existing use value but less than the alternative use value without any uncertainty. This is relevant here, as the majority of wayleaves are in rural areas, some on the peri-urban fringe, where the potential for alternative use will be reflected in the offers made in the open market by a purchaser. The onus is on the claimant to provide open market^[55] evidence of any sales of land with similar characteristics.

In a poor market open market sales evidence may be difficult to obtain. There may be very few transactions and much of the evidence that does exist is often clouded in secrecy. Moreover, the property market is often criticised for not reacting quickly to changes in underlying fundamentals and is thus, to a degree, inefficient. Indeed, there is tentative evidence to support the view that the UK commercial property market exhibits only a weak form of efficiency^[56] where prices do not fully reflect all publicly available information. For example, there may be a reduction in tax rates and current valuations may not adequately take into account this uplift in income. Claimants may therefore feel that relying on historic comparable evidence does not adequately reflect their loss. In these cases it may be appropriate to consider an explicit discounted cash flow approach, where all future income and expenditure is discounted back to the present day at an appropriate discount rate to leave a net present value which is the land value. However, inputs to the calculation require critical analysis as the NPV figure is highly sensitive to changes in a number of key variables, including the choice of discount rate. In view of this sensitivity, it is not surprising that promoters prefer to consider claims using past comparable sales evidence rather than explicit DCF techniques.

The exact area of land sterilised depends upon the type and purpose of the apparatus. A certain distance either side of the pipe, sewer, line or cable is required for safety and access purposes and should be included in calculating the area affected by the wayleave. Where a capital payment is to be made the width of the land sterilised is multiplied by the length of the wayleave and then a sterilisation factor applied. Often in the initial installation of the apparatus, a larger area may be required, (the initial working width) than will be needed in the future for maintenance purposes (the sterilised width). However, where the land faces any restrictions in use then the entire

area should be included in the calculation[57]. Such restrictions might include prohibition against building above the pipe or the growing of trees. It was apparent in our survey of the utilities that the exact area which is sterilised is subject to negotiation and that practice differs between companies in the same industry. A standardised approach would appear to be needed to avoid uncertainty and confusion among claimants. On occasions, the agreed settlement is a global sum which is not easily disaggregated among the component parts of the claim.

Where the sterilisation payment reflects the effect on market value, then no additional annual payments should be made. This would be double counting. Where annual payments are made they are calculated on a per item of equipment basis. The annual payments are often described as "rent", but this terminology can be misleading as the payment is in essence for a right acquired over land.

The measure of compensation under a negotiated wayleave

The results of our survey of current practice within the gas, electricity, water and telecommunication industries are now considered with the key differences highlighted.

Transco. Under the national agreement with the CLA/NFU, Transco has agreed to pay 80 per cent of the vacant possession value of the land affected. The land values are calculated with reference to local comparable evidence. The farmer can carry out normal acts of husbandry on the land and continue to grow crops or graze cattle. However, there is a restriction on building above the land occupied by the pipe and on a buffer zone either side of the pipe. This sterilised area for building purposes ranges from three metres to 24 metres depending on the diameter and pressure of the pipe. In addition an occupier's payment is made, partly as compensation for the time which the occupier spends on the paperwork and partly as an inducement for the early return of the consent form. On receipt of the signed form, Transco is allowed to enter the land prior to the completion of the legal formalities. The payment is calculated on a per metre basis depending on the diameter of the pipe. For example, if the diameter of the pipe is 36" to 48" the payment is £2.50 per metre run.

Where the land affected is not in agricultural use, then Transco is more flexible with the level of payments. In practice, with small areas in residential gardens, higher rates are employed, as owners will not accept small sums, of say, £25. In other cases where the land affected has a higher open market value than agricultural values, then the payments may be at reduced percentage, say 50 per cent of the land value and are subject to negotiation between the parties.

Disturbance payments are made to cover such items as crop loss, repairs to drainage, professional fees and a payment to reflect the farmer's time. The national agreement also allows the claimant to make a further claim for loss of development value should planning permission not be granted at any time in the future notwithstanding that the original claim may have been settled on the basis of existing use value plus disturbance.

Under this agreement the claimant receives significantly more than would seem to be strictly required to compensate for the actual loss. This would indicate that both parties have accepted the need for an element of consideration to be paid. While accepting that the occupier must allow access at all times, a farmer can very often carry on growing crops or grazing cattle and thus has no loss of income, yet receives compensation amounting to 80 per cent of the land value with an opportunity to seek

further compensation if planning permission is refused solely because of the existence of the pipeline. At the same time, Transco is satisfied with the level of payment as it gains swift access to the land, reduces the administrative cost of negotiating payments while at the same time initiating and maintaining a good working relationship with the landowner which is seen as crucial. All the utilities require unfettered access to their apparatus for maintenance and repair, and if the goodwill was lost and landowners adopted a "locked gates policy" then this could result in lengthy disruption to supplies and services.

Electricity. The national agreement with the electricity industry, consists of two elements. The first part is an annual payment to landowners/owner occupiers and is calculated on a per item of equipment basis. It is unclear exactly how these figures are calculated, but from the evidence submitted in *Clouds Estate Trs v. Southern Electricity Board* (1983) 268 EG 376 and 451, the basis of the rates would appear to stem from the underlying rental value of the land. However, the Current rates appear to be far in excess of agricultural rental values. If one imagined a hypothetical field full of electricity poles the total annual payments would greatly exceed the underlying rental value of the land in agricultural use. Moreover, as the rates are based on aggregated data of land values which are then applied throughout the country, the rates may seem particularly at odds with the underlying rental values of poor quality land in remote areas. The CLA argues that the payment includes other elements, for example, compensation for the presence of the lines, the loss of sporting rights and visual impact of the whole apparatus[58]. While this may be true, the payments would also seem to include what amounts to a consideration for the granting of the wayleave.

The second element of compensation is an annual payment to occupiers for agricultural interference and is calculated using an ADAS model. The rates are revised annually, on an upward only basis, and attempt to accurately reflect the increased costs associated with the presence of the equipment, such as the extra time needed to harvest the crop and the cost of additional weedkiller. Despite the upward only clause at a time when some costs are reducing, these payments attempt to reflect actual loss, and thus appear not to include an element of consideration.

Disturbance payments are made to cover any loss during installation or subsequent repair of the apparatus and claimants are also entitled to compensation under the headings of severance and injurious affection. However, the various elements of the claim must be consistent with each other[59]. It is not, for example, possible to claim disturbance or injurious affection if the depreciation claim is based on development potential which would inevitably involve disturbance or injurious affection. The electricity companies are satisfied with the level of compensation paid, once again reflecting the need for a good working relationship with the occupier in order to ensure access in the future.

Water. There is no national agreement with the CLA/NFU and the water/ sewerage industry. During the research, two completely different approaches to compensation were found between the non privatised North of Scotland Water Authority (NoSWA) and a privatised water company operating in England and Wales. The NoSWA pays no compensation for the acquisition of wayleave rights (except on Crown Land). As with all of the promoters involved in our study, in preparing the line of the wayleave, the Authority works closely with the landowner to minimise any disruption. The Authority argues that if the landowner suffers no loss as a result of the presence of the water main or sewer under his land, then no compensation is payable. However,

compensation is paid for disturbance where the loss arises directly and unavoidably as a result of the scheme, and for injurious affection.

The privatised water company operating in England and Wales makes capital payments for the acquisition of the wayleave on a per metre basis, based on 50 per cent of the agricultural land value. Where the land is in non agricultural use, then "enhanced" agricultural land values are used which, although an improvement, may be significantly less than the full open market value of the land. This anomaly would appear to be based purely on commercial expediency, with the route of the pipe chosen in order to minimise sterilisation. One-off capital payments are made for structures above the ground such as manhole covers, with the level of payment (normally between £100 and £400) dependant on the degree of inconvenience to farm activities such as ploughing. Unlike the agreement with the electricity industry, the amount is not calculated with reference to an ADAS model of agricultural interference, but by negotiation between the parties. This seems a further anomaly which introduces potential inconsistency between companies and which could be overcome. Indeed, it was suggested during our research that some water companies offer significantly lower levels of payment than others. Disturbance payments are made to cover any direct and unavoidable loss suffered during installation and maintenance, and compensation is paid for injurious affection provided this is consistent with other elements of the claim.

While the terms offered by the water company is less than paid by Transco, the payment, based on 50 per cent of agricultural land value, appears greater than the actual loss suffered by a farmer and thus would appear to include what amounts to an element of consideration for the grant of the wayleave. The water company is highly satisfied with the level of compensation payable believing it to be commercially expedient and reasonable to make a payment in order to establish a good working relationship with the owner.

Telecommunications. The CLA/NFU enter into national agreements with British Telecom and the other main operators such as Cable & Wireless Communications (Mercury) Ltd. Similar to the agreement with the electricity industry, the agreement with ET consists of two parts; an annual payment to landowners which is calculated on a per item of equipment basis, and annual agricultural disturbance payments to occupiers which are in line with the ADAS model. ADAS model.

For the period ending 31 March 2001, Mercury agreed to pay a single payment of £6.00 per metre run for a fixed term of 20 years for the right to lay maintain and renew up to four ducts laid in a single trench in agricultural land. The farmer can continue growing crops above the ducts although the area is sterilised for building purposes. Single capital payments are also made for junction boxes which are located below and finish level with the surface and which can cause a nuisance for ploughing. Using an average price for 173 agricultural land of £7,833 per hectare^[60] and assuming a sterilised width of 6 metres, the payment of £6.00 per metre represents a payment at nearly one and a third times the underlying land value.

The CLA, which was involved in negotiating the agreed rate, commented that the payment of £6.00 per metre is not related in any way to agricultural land value. It was argued that as the telecommunications operator can lay cables in the public highway without payment, the figure of £6.00 per metre is a rough approximation of the difference in cost between restoring tarmacadam and restoring agricultural land after cable laying. The figure was therefore calculated on an avoided cost basis. Whichever

way the figure is calculated, the payment appears to include an element of consideration, as the farmer can carry on his normal operations.

However, in non-rural locations the exact method of valuation employed is far from clear. In these cases the settlement is more a reflection of the negotiation strengths of the parties with the level of land value and the width of the sterilised strip all being subject to a degree of give and take. Exactly how much consideration is actually paid is uncertain.

Comment. One of the most striking aspects of the research has been the different levels of payment made to claimants for negotiated wayleaves. Some of the payments are annual, some one-off capital amounts and some, as with Mercury on agricultural land, capital payments for a limited period of time. Moreover, some utilities attempt to compensate actual loss while others pay no compensation, or alternatively include a consideration for the grant of the right which is greater than the actual loss. While similar rates across all the utilities would not be appropriate, as the degree of sterilisation depends on the apparatus employed, some consistency of procedure and approach to compensation, reflecting a fair balance for claimants, would seem sensible.

To illustrate this point, imagine the predicament of a landowner who owns a field which is located on the edge of an expanding town and who is approached by four different utilities -gas, electric, water and telecommunication -all of which wish to place equipment under, over or on his land. The landowner is faced with a bewildering plethora of legislation, which will produce compensation levels which will differ, not only across the industries but also in some cases between companies within the same industry for the installation of the same apparatus. This is not satisfactory and leads to a compensation lottery.

6. Conclusions and recommendations

Striking a fair balance

One feature which distinguishes the nature of the power conferred on the utilities from the exercise of conventional compulsory purchase powers is the continuing relationship between the landowner and the utility. The CLA referred to this as having some of the characteristics of a landlord/tenant relationship. If this continuing relationship is to operate on a satisfactory basis, it is clearly desirable that both sides should be content with the outcome. Striking a fair balance is therefore very important and detailed below are a number of observations on current practice and recommendations for change.

The measure of compensation should be standardised for the creation of an easement and the Land Compensation Act rules should be invoked with minor adaptations. There is no doubt that a lot of confusion would be avoided if the measure of compensation for wayleaves was clarified and standardised. At present the measure varies from utility to utility and in some cases is unclear. It is recommended that the measure of compensation should be codified. The code could then be incorporated by reference into every statute which confers compulsory wayleave powers on a utility. In doing so the following matters would need to be determined:

Q1. Should a consideration be paid for the grant of the wayleave or should landowners simply be entitled to a financial equivalent of their loss?

This is a matter of political choice; but it would seem that there would be nothing very novel about providing for a consideration. This research shows that, with the exception of water in Scotland, voluntary settlements commonly include what in effect is an element of consideration; and the Telecommunications Code makes explicit provision for consideration. The authors believe that an element of consideration would be consistent with the privatisation of the utilities. It would also be consistent with the position which applied in the nineteenth century before the utilities were brought into the public sector. It is arguably also fair that those affected should receive some recognition beyond their financial loss; and experience in practice suggests that there could be advantages for the utilities in terms of a speedy settlement.

Q2. If a consideration is to be paid, how should it be measured?

In *Mercury Communications Ltd* (above) the judge favoured, but did not adopt, an approach for annual payments which reflected the use made of the right granted, i.e. something akin to a royalty payment or a wayleave "rent". The implication from the judgement is that with capital payments, an assessment based on the increase in the value of the land due to the scheme for which the wayleave is required might be appropriate: the so-called *Stokes v. Cambridge* approach^[61]. In other words, the consideration might reflect an element of the gain to the utility. However, in reality it is extremely difficult to measure the gain to the utility from the installation of specific items of apparatus at the local level. Some of the apparatus installed will produce a very high level of return while others, in the more remote areas, may be lucky to produce a minimum level of profit. In practice, a percentage of market value is used, in a somewhat arbitrary way, which in effect partly reflects the gain to the utility. For rural areas, the percentage is renegotiated from time to time (except for water) on a national basis by the CLA/NFU (and their Scottish counterparts) and the utilities. This sort of approach is analogous to the home loss payment which is an arbitrary additional payment to residential occupants dispossessed as a result of compulsory purchase^[62]. This would seem to be a pragmatic approach and it is recommended that the current legislation is amended to reflect that the compensation due to claimants should reflect gain to the promoter but that it is calculated as a percentage of market value. Some support for such an approach is to be found in the decision of the Lands Tribunal in *County and District Properties Ltd v. Harrow London Borough Council*^[63]. In that case the reference land was compulsorily acquired for comprehensive development along with two other parcels of land belonging to the acquiring authority. It was accepted by the Tribunal that the highest value for the reference land that could be obtained in the open market would be in anticipation of the development of the combined site, including the acquiring authority land as offices. An allowance was made in the valuation of the reference land for the acquisition of the land not within the ownership of the claimant. This reflected a 33 per cent premium to account for the "ransom" element. The percentage, in effect the marriage value for the additional land making up the combined site, equates with the percentage of market value to which we are referring.

In *County and District Properties* the percentage reflected the relatively weak bargaining positioning of the owner of the additional land. We think the exact percentage should be the subject of negotiation between the parties and there may well need to be different rates for rural and urban areas. For example, a rate of 80 per cent of market value may be appropriate when the land is in agricultural use. However, 80 per cent of market value when the land has planning permission for say, prime retail, may produce a level of compensation which prohibits the installation of services and may

run contrary to the public interest argument. There is a precedent for differentiating rural and urban areas. The supplement payable on compulsory acquisition in Scotland pre 1919 was considerably more generous in rural than in urban areas.

However, in certain instances the claimant may well suffer a loss which is greater than the compensation calculated by reference to a percentage of market value. This may be particularly the case where planning permission for a higher use is denied due to the presence of the apparatus. This would be unfair to the claimant, who would be an unwilling seller unable to walk away from the proposal. In these cases there needs to be a fall back position where the claimant can decide to pursue compensation based not on percentage of market value, but on the basis of all loss. This will generally be reflected in depreciation in the market value of the land, including depreciation in the value of any retained land. Depreciation may be measured by the effect on the existing use value of the land or, in appropriate cases, the development value. An alternative approach would be to compensate on an itemised basis for the actual effects of the works on the management of the land, rather than for the consequences of these effects on the market value[64].

The claimant would not be able to make a claim based on both a percentage of market value as well as all loss, as in that case the compensation would reflect both value to the purchaser as well as value to the seller, which would be double counting.

Disturbance should also be paid, including any loss of profits which is not reflected in depreciation. A disturbance claim should, however be consistent with the rest of the claim. In other words, if the claim for loss is based on development value and/or injurious affection, then disturbance would not normally be recoverable.

A decision will also need to be made about set off. There are two problems with set off. First of all, the prospect of connecting to a utility is likely to benefit a number of properties, including some which have not been subject to a wayleave. Why should those which are subject to the wayleave be penalised by having this benefit set off against the compensation when the others retain the benefit? Secondly, this is an arbitrary means of recovering betterment. Set off is measured, not by the amount of betterment but in effect by the amount of worsenment. In other words, if the benefit is considerable but the loss is limited, the utility will only recover that amount of the benefit which is co-extensive with the loss. It might be more logical if the utilities were simply to rely on user charges to recover this benefit.

In putting forward these recommendations, it is recognised that any change produces winners and losers and drawing the line between the interests of the utilities and those of landowners is always going to be difficult. However, there is no doubt that this is an area where change is required.

Notes

1. For a helpful discussion of this whole area see Wilkinson (1995).
2. *First Report of the Committee on the Acquisition and Valuation of Land for Public Purposes*, Cmnd.8998 (HMSO, 1918a); *Second Report of the Committee Dealing with the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes*, Cmnd.9229 (HMSO, 1918b).
3. Electricity Act 1989, Current Law Statutes Annotated, ch.29, annotations by P. McAuslan and J. McEldowney. See too B. Denyer-Green, "Specific purposes, specific

powers: the powers of privatised utilities", in *Proceedings of the National Symposium on Compulsory Purchase: An Appropriate Power for the 21st Century?*, DETR, 1999 (Denyer-Green, 1999).

4. Gas Act 1986, s. 9(3) and Sched. 3, Part III, para. 1, as amended by the Gas Act 1995, Sched. 3, para. 56.

5. Electricity Act 1989, s. 10 and Sched. 3, para. 1(2).

6. See, for example, Telecommunications Act 1984, s. 34(3). 7. Water Industries Act 1991, s. 155(2). 8. Section 10 and Sched. 4, para. 6.

9. Section 10 and Sched 2, para. 5.

10. Section 159.

11. See the Water (Scotland) Act 1980, s. 23 and the Sewerage (Scotland) Act 1968, s. 3.

12. See, for example, the Electricity Act 1989, s. 10(1) and Sched.4. It should be noted that negotiated wayleaves will generally only bind the parties to them.

13. See generally Denyer-Green (1999), *supra* n. 2.

14. *Burmah Oil Company (Burma Trading) Ltd v. Lord Advocate* 1964 SC (HL) 117; *Tiverton and North Devon Railway Co. v. Loosemore* (1884) App. Cas. 480; *Colonial Sugar Refining Co. Ltd v. Melbourne Harbour Trust Commissioners* [1927] AC 343; *Bond v. Nottingham Corporation* [1960] Ch. 429; *Belfast Corporation v. OD Cars Ltd* [1960] AC 490; and *Westminster Bank Ltd v. Minister of Housing and Local Government* [1971] AC 508.

15. See generally J. Rowan-Robinson, *Compulsory Purchase and Compensation: The Law in Scotland* (W. Green & Son Ltd, 1990), Ch. 4 (Rowan-Robinson, 1990).

16. M. Bell (1980), "Taking justice seriously: Rawls, utilitarianism and land compensation", *Urban Law and Policy*, Vol. 23 No.3 (Bell, 1980).

17. J.B. Cullingworth, *Environmental Planning*, Vol. IV (Cullingworth, 1980), p. 185. See too P. McAuslan, *Ideologies of Planning Law*, (Pergamon Press, 1980), Ch. 4 (McAuslan, 1980).

18. From J. Rawls, "justice as Fairness", 67 *Phil. Rev.* 164 (Rawls, 1958); also J. Rawls, *A Theory of Justice* (Harvard University Press, 1971), p. 22 (Rawls, 1971).

19. Bell (1980), *supra* n. 36.

20. *Stebbing v. The Metropolitan Board of Works* (1870), LR 6 QB 37.

21. See the Land Compensation Act 1961, s. 5; Land Compensation (Scotland) Act 1963, s. 12.

22. *Horn v. Sunderland Corporation* [1941] 2 KB 26 per Scott LJ at pp. 42 and 49.

23. See *The Report of the Commission on the Third London Airport* (HMSO, 1971); *The Report of the Urban Motorways Committee: New Roads; in Towns*, Department of the

Environment (Department of the Environment, 1972); and *Development and Compensation -Putting People First*, Cmnd.5124 (HMSO, 1972a).

24. Land Compensation Act 1973, ss. 29-33; Land Compensation (Scotland) Act 1973, ss. 27-30.

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27. *Report of the Working Party on Local Authority/Private Enterprise Partners/Up Schemes* (HMSO, 1972b), paras. 94-6 and Annex K.

28. As substituted by the 1986 Act, Sched. 3, para. 7.

29. Denyer-Green (1999), supra n. 2

30. Derived from *Pointe Gourde Quarrying and Transport Co. v, Sub-Intendent of Crown Lands*; [1947] AC 565. The principle is to the effect that increases or decreases in value due to the scheme underlying the acquisition should be ignored in assessing compensation.

31. The rules are set out in the Land Compensation Act 1961, s. 5; and the Land Compensation (Scotland) Act 1963, s. 12.

32. The 1984 Act does not expressly adapt s. 7 of the 1965 Act. It simply applies in s. 34(1) the Acquisition of Land Act 1981 procedure and that Act, in turn, applies the Land Compensation Act 1961 to the assessment of compensation (s. 4(1)).

33. 1989 Act, Sched.3, Part II, para. 8

34. 1991 Act, s. 154(5) and Sched. 18.

35. 1989 Act, s. 10(1) and Sched. 4, para. 7(1).

36. 1989 Act, s. 10(1) and Sched. 4, para. 7(2).

37. It is reasonable to highlight the position of neighbours who may also suffer injurious affection and corresponding depreciation in the value of their property as a result of the structures but who will not fall within the compensation entitlement in s. 10(1) and Sched. 4, para. 7(1) of the 1989 Act.

38. Denyer-Green (1999), supra n. 2.

39. 1991 Act, s. 180 and Sched. 12, para. 2(1). In *Leonidis v. Thames Water Authority* (1979) 77 LGR 722, the claimant was held on earlier legislation to be entitled to loss

of profits incurred over a period of 11 months as a result of the exercise of powers by the Water Authority.

40. 1991 Act, s. 180 and Sched. 12, para. 3(2). See *Collins v. Thames Water Utilities* (1994) 99 EG 116; *Rush and Tomkins Ltd v. West Kent Sewerage Board* (1963) 14 P&CR 469.

41. 1991 Act, s. 180 and Sched. 12, para. 3(4).

42. 1991 Act, s. 180 and Sched. 12, para. 2(2).

43. Section 14.

44. 1968 Act, s. 20.

45. 1980 Act, s. 23(2).

46. 1984 Act, s. 10 and Sched. 2, paras. 5(4) and 7(1)(a).

47. 1984 Act, s. 10 and Sched. 2, para. 7(1)(b).

48. Section 9(2). 49. Section 8(2).

50. [1950] Ch. 567.

51. [1987] RVR 211.

52. (1994) 69 P&CR 135.

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APPENDIX 8

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APPENDIX 9

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