



# **Law Commission**

## **COMPULSORY PURCHASE AND COMPENSATION: A SCOPING PAPER**

**Following a reference under section 3(1)(e) of the  
Law Commissions Act 1965**

**Law Commission  
March 2001**

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

The Law Commissioners are:

The Honourable Mr Justice Carnwath CVO, *Chairman*  
Professor Hugh Beale  
Mr Charles Harpum  
Professor Martin Partington  
Judge Alan Wilkie, QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

The terms of this paper were agreed on 14 February 2001.

**The text of this paper is available on the Internet at:**

<http://www.lawcom.gov.uk>

© **Crown copyright 2001**

**LAW COMMISSION**

**COMPULSORY PURCHASE AND  
COMPENSATION: A SCOPING PAPER**

**CONTENTS**

	<i>Paragraph</i>	<i>Page</i>
Background	1	1
Acknowledgements	9	3
Scope of this paper	10	3
Other parts of the UK	13	3
Draft Code Framework	14	3
Scoping Issues	16	4
“take account of appropriate proposals for reform”	17	4
“identify all the existing legislative provisions relating to compulsory purchase powers, procedures and compensation; and group them according to function”	19	5
“identify those provisions which should be repealed because they are redundant, defective or ineffective”	21	5
“identify the extent to which case law might usefully be codified and any consequential effects of that on current statute”	22	5
“identify the need for modernising the language used in current statute law, along with any other amendments aimed at ensuring that the law would apply fairly in all circumstances and in the way originally intended by Parliament”	23	5
“consider international comparisons and any lessons which might be drawn from them”	24	5
Australia	25	6
Canada	27	6
Other	28	7
“set out a programme of work”	29	7
Human Rights Act 1998	30	7
Topics	33	8
Application of the Act	33	8
Making and authorisation of compulsory purchase order	37	9
Implementation	41	9
Determination of compensation	46	10
Compensation principles	49	12
Problem areas	51	12
Disregard of “The Scheme”	52	12
Special suitability rule	61	15
Betterment	65	17
Planning assumptions	69	18
Illegal uses	73	18

	<i>Paragraph</i>	<i>Page</i>
Other issues of detail	76	19
General statement of right	77	19
Market value	80	20
Date of valuation	82	21
Elements of disturbance	84	21
Pre-acquisition losses	88	22
Abortive CPOs	91	23
Home and business loss payments	93	23
Equivalent reinstatement	95	23
Special cases	99	24
Compensation where no land is acquired	100	25
Reverse compulsory purchase	104	26
Repeals and transitional provisions	107	26
Programme of Work	108	27
Consultative Report	108	27
Final report and draft legislation	111	27
Next Steps	113	28
<b>APPENDIX 1</b>		29
Part 1 – Terms of reference for preliminary study		29
Part 2 – Acknowledgements		29
<b>APPENDIX 2: DISCUSSION DRAFT FRAMEWORK</b>		31
Application of the code		31
Making and authorisation of compulsory purchase order		31
Implementation		31
Determination of compensation		32
Compensation principles		32
Special cases		33
Compensation where no land is acquired		33
Abortive CPOs		33
Reverse compulsory purchase		33
Repeals and transitional		33
<b>APPENDIX 3: ENGLISH RULES</b>		34
Part 1: Some basic provisions		34
Land Compensation Act 1961, sections 5 and 9		34
Compulsory Purchase Act 1965, section 7		35
Part 2: Examples of provisions requiring simplification		36
Land Compensation Act 1961, sections 6 and 7, First Schedule		36
<b>APPENDIX 4: AUSTRALIAN LEGISLATION</b>		39
Land Acquisition Act 1989		39
Postscript to Appendix 4: “Special value” in Australian Law		43

# COMPULSORY PURCHASE AND COMPENSATION: A SCOPING PAPER

## BACKGROUND

1. A Study undertaken by the City University for DETR (Department of the Environment, Transport and Regions) in 1997<sup>1</sup> found that 63% of owners were either dissatisfied or very dissatisfied with the compulsory purchase process and that 60% found the experience to be stressful. It took an average of thirty months for acquiring authorities to reach the stage of deciding to make a compulsory purchase order and a further average of twenty months for the order to be confirmed. This was followed by widely varying periods from just under two years to seven years for authorities to reach the point of taking possession (which also fixes the date to which compensation payments relate), with a further average wait of over two years for compensation claims to be settled.
2. The Study also highlighted the disproportionate impact, inflicted in the public interest, on those affected by compulsory purchase:

CPOs are not a common occurrence and comparatively few members of the public experience them even once in a lifetime. Yet the impact on those who are affected is undoubtedly very great. The owners can be perceived as doubly disadvantaged. They suffer not only the stresses and uncertainties of the CPO process, but some believe they are not properly compensated.<sup>2</sup>
3. There is general agreement that current law and practices are cumbersome and convoluted. The long lead-time not only generates uncertainty and financial loss for the current landowners but it also makes the procedure unattractive to potential investors as a means of assembling land for major infrastructure or regeneration schemes.
4. The Urban Task Force Report in July 1999<sup>3</sup> identified a widespread reluctance among local authorities to exercise their powers of compulsory purchase and, other than the problem of lack of resources, the four main reasons for this reluctance were the inherent bureaucracy of the process, uncertainty over powers, a loss of skills and the inadequacy of the compensation provisions. They called for the legislation to be “consolidated and streamlined”<sup>4</sup>.

<sup>1</sup> The Operation of Compulsory Purchase Orders (DETR December 1997) para 4.84. This was a detailed study of the system of compulsory purchase, commissioned by DETR from the City University Business School. It is probably the most comprehensive and authoritative modern account of the workings of the system in practice.

<sup>2</sup> *Ibid* para 5.70. Descriptions of the process included “teeth pulling”, “worst experience in life”, “robbery but ongoing”: table 4.12.

<sup>3</sup> Towards an Urban Renaissance: Final Report of Urban Task Force under Lord Rodgers (DETR 1999).

<sup>4</sup> *Ibid* p 230.

5. In July 2000, a “Fundamental Review” carried out by an Advisory Group for the DETR<sup>5</sup> (the Advisory Group) commented that the law had become “an unwieldy and lumbering creature”. Although their “main thrust” was that the arrangements were “basically sound” with adequate human rights protections, they found “the existing legislative base... complex and convoluted” and requiring simplification and codification.<sup>6</sup> The problem was seen as lying partly in the fact that the legislation was derived from 1845<sup>7</sup> 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.<sup>8</sup>

6. The Law Commission was not directly involved in the work of the Advisory Group, although we have been kept informed. The Review made a number of recommendations for improving both the law and its practical application. Those recommendations are currently being considered by Ministers following consultation.
7. The first recommendation of the Advisory Group, however, proposed a direct role for the Commission in preparing new legislation “consolidating, codifying, and simplifying the law”.<sup>9</sup> 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.

8. On 18th December, following discussion with the Law Commission, the DETR and LCD (Lord Chancellor’s Department) approved terms of reference for a

<sup>5</sup> Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report (July 2000). We shall refer to this as “the Review”. 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. As the “Crichel Down” rules are non-statutory we do not propose to include them in this study.

<sup>6</sup> Review p 7 para iii.

<sup>7</sup> 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, for example, *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”. (Section 6 is reproduced in Appendix 3 Part 2).

<sup>8</sup> Review para 20.

<sup>9</sup> Review para 24.

preliminary study to identify the likely features of such a project, and set out a programme of work. A copy of the terms of reference is annexed at Appendix 1. Any further work by the Commission will need to be the subject of a separate reference, following consideration of this Paper.

#### **ACKNOWLEDGEMENTS**

9. In preparing this preliminary report the Commission has had the assistance of a small working group, for whose help it is most grateful. Their names are given in Part 2 of Appendix 1.

#### **SCOPE OF THIS PAPER**

10. Since the Advisory Group has considered and consulted upon detailed proposals for reform, we do not see it as part of our task to duplicate that work. Accordingly, the emphasis of our work would be on simplifying and modernising the law, rather than more general reform. This paper, in line with the “main thrust” of the Review’s conclusions (see above), assumes the preservation of the principal features of the existing system. However, the changes recommended by the Review, and any decisions by Ministers on those recommendations, would be taken into account in formulating the code.
11. Although this is described as a “preliminary study”, some of the issues covered by the Terms of Reference are extensive. In answering them fully, we would be defining with some precision the shape, content and style of the new legislation, including repeals. In some cases, this will require detailed work, on which it would not be sensible to embark until a basic framework has been defined.
12. The purpose of the present paper, therefore, is to suggest an outline framework and some preliminary responses to the issues raised by the Terms of Reference. It is intended primarily to inform the Ministers, when deciding on the form and content of any further reference. It is not a formal Consultation Paper. However, it is being made available to the members of the Advisory Group, and other interested bodies and individuals, for comment, before we embark on more detailed work (if approved).

#### **Other parts of the UK**

13. Although the Law Commission is directly concerned only with the law of England and Wales, similar issues arise in other parts of the UK. The Scottish Law Commission and the Law Reform Advisory Committee for Northern Ireland will be consulted, as the work proceeds.

#### **DRAFT CODE FRAMEWORK**

14. As a starting point we have thought it helpful to show how a new Code might look, drawing together those existing statutory and common law rules which seem still relevant to modern practice. Appendix 2 sets out a possible framework, for discussion purposes, with an indication of the sources, and shorthand references to the Review recommendations.

15. The intention has been to cover all the normal stages of the compulsory purchase process, including compensation. We have concentrated on provisions which are of general application, with a view to developing a standard model code. We have not at this stage considered modifications or special provisions contained in Acts dealing with particular subject-matter. It has also been assumed that powers of compulsory purchase would not be included in the Code, but would (as now) be conferred by Acts relating to particular functions.

### **SCOPING ISSUES**

16. Before commenting on the suggested framework in more detail, we give our preliminary responses to the individual sub-headings of the Terms of Reference (see Appendix 1):

#### **“take account of appropriate proposals for reform”**

17. As stated above, account will be taken of the reforms recommended by the Review, and any decisions of Ministers following consultation. In the discussion of the main issues below, we have referred to some of the recommendations. The remainder are noted in short-hand form in the draft framework code.<sup>10</sup> Nothing we say in this report is intended to detract from the force of the Review’s proposals, or pre-empt decisions to be made upon them. Nor is it part of our function at this stage to comment upon the responses to the Consultation on the Review. However, we intend to consider, and take account of, those responses in due course, so far as relevant to the scope of our work.
18. Other recent studies which may be relevant include:
- (1) Compensation for the Compulsory Acquisition of Business Interests: Satisfaction or Sacrifice? (Royal Institute of Chartered Surveyors (RICS) 1995)<sup>11</sup>;
  - (2) Compensation for Compulsory Acquisition (RICS October 1995);
  - (3) The Operation of Compulsory Purchase Orders (DETR December 1997)<sup>12</sup>;
  - (4) Final Report of the Interdepartmental Working Group on Blight, December 1997;
  - (5) Fundamental Review: Interim Report (DETR January 1999);
  - (6) Report of Gerald Eve and Co and the University of Reading on the operation of the “Crichel Down” rules (1999)<sup>13</sup>.

<sup>10</sup> See Appendix 2.

<sup>11</sup> By Professor Rowan-Robinson and others.

<sup>12</sup> See footnote 1, above.

**“identify all the existing legislative provisions relating to compulsory purchase powers, procedures and compensation; and group them according to function”**

19. Appendix 2 refers to the principal relevant statutes of general application<sup>14</sup> and proposes a grouping of those which are considered necessary (with or without modification and up-dating) for inclusion in a modern code.
20. Identification of “all” legislative provisions relating to compulsory purchase powers would be a massive task and probably not justifiable as part of the present exercise. Many such provisions are contained in private or local Acts, often obsolete or dealing with very specialised subject-matter. In due course it will be necessary to consider how to ensure that such cases, where appropriate, are brought (with or without modifications) within the scope of the new Code. This is likely to be best dealt with under delegated powers.

**“identify those provisions which should be repealed because they are redundant, defective or ineffective”**

21. A principal objective would be the repeal of the 1845 Act *in toto*.<sup>15</sup> Other candidates for repeal will be identified as the work proceeds. The advice of the Commission’s Statute Law Revision team will assist this task.

**“identify the extent to which case law might usefully be codified and any consequential effects of that on current statute”**

22. This subject is discussed below under the various topic headings.

**“identify the need for modernising the language used in current statute law, along with any other amendments aimed at ensuring that the law would apply fairly in all circumstances and in the way originally intended by Parliament”**

23. These objectives will be taken into account throughout the project. Comments on particular aspects are included under the topic headings.

**“consider international comparisons and any lessons which might be drawn from them”**

24. Compulsory purchase law is notable for the degree of interchange there has been between this country and other Commonwealth jurisdictions, most of which have systems based originally on the English Act of 1845. Many of the important cases in this field have been decided by the Judicial Committee of the Privy Council on

<sup>13</sup> See footnote 5, above.

<sup>14</sup> The principal source has been Halsbury’s Statutes, vol 9, Compulsory Acquisition (4th ed 2000 re-issue).

<sup>15</sup> See para 5 above.

appeal from Commonwealth courts.<sup>16</sup> However, having provided the initial legislative base, this country has been overtaken by others in keeping it up to date. The most direct comparisons appear to be with Australia and Canada.

### **Australia**

25. The Australian Law Reform Commission's (ALRC) 1980 report was a comprehensive comparative review (including a review of the UK law), and included a draft Bill.<sup>17</sup> Most of its recommendations were embodied in the Land Acquisition Act 1989 (Cth) (LAA1989), which applies to Federal acquisitions. That Act covers all the stages of the compulsory purchase process, including compensation, in 140 clauses. Many parts would not be suitable for adaptation for this country, because of basic procedural differences. However, it is a helpful illustration of a modern Code; and parts of it, particularly those relating to compensation (see below), could provide a model for this country.<sup>18</sup> The working of the legislation has recently been reviewed by the Federal Government, and, as we understand, found generally satisfactory.<sup>19</sup>
26. Because of its background in a relatively recent, comprehensive Law Reform Commission report, this Act seems likely to provide the most useful comparison for our purposes. To illustrate the potential value of this comparative material, we make reference to both the report and the Act in the following discussion.

### **Canada**

27. The modernisation of the Canadian legislation in certain Provinces preceded the ALRC Report, and was reviewed by the ALRC.<sup>20</sup> There has been a succession of Acts in different Provinces since 1968, giving effect to what was called the "market value plus" approach, to replace the "value to the owner" approach

<sup>16</sup> For example, the *Pointe Gourde* case (see below, n50), an appeal from Trinidad; and, most recently, *Director of Buildings and Lands v Shun Fung Ltd* [1995] 2 AC 11, an appeal from the Hong Kong Court of Appeal, which is now the leading case on compensation for disturbance (see para 86 below).

<sup>17</sup> Lands Acquisition and Compensation Report (1980) No 14.

<sup>18</sup> There are nine other statutes for the individual states, not all following the ALRC model: see D Brown, *Land Acquisition* (4th ed 1996); M Jacobs, *Law of Resumption and Compensation in Australia* (1998). The Land Acquisition and Compensation Act 1986 (Vic) (LACA1986 (Vic)) has been picked out by Brown as taking the prize for "quality of drafting and good sense": M Jacobs *op cit* p 18, citing Brown 3rd ed (but not apparently repeated in Brown 4th ed).

<sup>19</sup> We are grateful to Professor David Weisbrot, President of the Australian Law Reform Commission, who has assisted us by providing contacts who can assist in evaluating the effectiveness of the Australian reforms. In particular, we have heard from Paul Ferrari, of the Federal Department of Finance and Administration, who has been responsible for their recent review of the 1989 Act. Help has also been offered by Judge Paul Stein, judge of the Land and Environment Court of New South Wales, which exercises jurisdiction over compensation disputes in that state.

<sup>20</sup> ALRC *op cit* p114. See also E Todd, *Law of Expropriation and Compensation in Canada* (2nd Ed 1992). Professor Todd acted as consultant to the British Columbia Law Reform Commission report in 1971 (see below).

derived from UK law (pre-1919). There have been reports by the Ontario Law Reform Commission<sup>21</sup> and the British Columbia Law Reform Commission (BCLRC)<sup>22</sup> and a series of enactments, beginning with the Ontario Expropriation Act 1968.<sup>23</sup>

### **Other**

28. At an earlier stage of the Review, a DETR symposium was chaired by Professor Freilich, who is a Professor of Law in Missouri University, and an expert on US urban law.<sup>24</sup>

### **“set out a programme of work”**

29. In this note we comment on how each of the topics of the draft framework might be addressed and suggest a working plan.

### **HUMAN RIGHTS ACT 1998**

30. The new Code will provide an opportunity to review the existing provisions for compatibility with the European Convention on Human Rights.
31. Of direct relevance are Article 1 of the First Protocol (Protection of Property),<sup>25</sup> and, where homes are affected, Article 8 (Right to respect for private and family life).<sup>26</sup> Compulsory purchase in the public interest, subject to payment of compensation, is in principle permitted by the Convention, and it seems unlikely that there will be major problems of incompatibility under those Articles.<sup>27</sup>
32. Article 6 of the Convention is also relevant to the procedures for confirmation of Orders. This confers a right to a “fair hearing... by an independent and impartial tribunal” in the “determination” of “civil rights and obligations”. The provisions for consideration of objections by Ministers, particularly in the case of Orders promoted by Ministers themselves, have been challenged as incompatible with Article 6.<sup>28</sup> A decision of the House of Lords is awaited.<sup>29</sup>

<sup>21</sup> Ontario Law Reform Commission, *The Basis for Compensation for Expropriation* (1967).

<sup>22</sup> Report on Expropriation, (1971) LRC 5.

<sup>23</sup> See ALRC Report (1980) No 14 p115.

<sup>24</sup> His comments on the Symposium appear in an article: “Final Report for Compulsory Purchase: an Appropriate Power for the 21<sup>st</sup> Century?” [1999] JPL 1076.

<sup>25</sup> Article 1 provides: “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

<sup>26</sup> Article 8 provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Interference by a public authority is permitted provided it is “in accordance with the law” and “necessary in a democratic society in the interests of... (*inter alia*) the economic well-being of the country...”.

<sup>27</sup> See Clayton and Tomlinson, *The Law of Human Rights*, para 18.82ff; also, Redman, “Compulsory Purchase, Compensation and Human Rights” [1999] JPL 315.

<sup>28</sup> In *Alconbury Developments v Secretary of State* [2001]EGCS 5, the Divisional Court made a declaration of incompatibility in respect of a number of provisions, including 1981 Act Sched 1 para 4 (which provides for the consideration of objections to Ministerial orders).

## TOPICS

### Application of the Act

33. The scope of the new Code will have to be determined. The preferred approach would be to make it applicable to *any* compulsory acquisition of land. This would follow the Land Compensation Act 1961.<sup>30</sup>
34. The Acquisition of Land Act 1981 is on its face more limited in scope: it applies to compulsory purchases, either under enactments specified in the Act itself, or to which it is applied by any other enactment.<sup>31</sup> However, this appears to include most ordinary categories of compulsory purchase.<sup>32</sup> The Compulsory Purchase Act 1965 has the same scope as the 1981 Act.<sup>33</sup> It will be necessary to consider whether there is any policy objection to extending these Acts to all compulsory purchases.
35. It will also necessary to reconcile the definitions of the various Acts so far as relevant to the subject-matter of acquisition.<sup>34</sup> Thus, the definitions of “land” vary, for example:

“Land” means any corporeal hereditament, including a building as defined by this section, and includes any interest or right in or over land and any right to water.<sup>35</sup>

“Land” (a) includes messuages, tenements and hereditaments, and (b) in relation to compulsory purchase under any enactment, includes anything falling within any definition of the expression in that enactment.<sup>36</sup>

In summary, they held that the Secretary of State was not an independent judge in relation to the application of his own policies, and that this defect was not remedied by the limited review available in the High Court on legal grounds only.

<sup>29</sup> The House of Lords gave leave for an appeal direct to the House, which was heard at the end of February 2001.

<sup>30</sup> See Land Compensation Act 1961 ss 1, 5.

<sup>31</sup> Acquisition of Land Act 1981 s 1.

<sup>32</sup> Halsbury’s Statutes, vol 9, Compulsory Acquisition (4th ed 2000 re-issue) p 368-70 lists 53 categories of compulsory purchase to which the 1981 Act is applied by other enactments.

<sup>33</sup> Compulsory Purchase Act 1965 s 1.

<sup>34</sup> A related issue is the application of the Code to the compulsory acquisition of the rights over land by the creation of new rights. Schedule 3 of the 1981 Act applies the Act with modifications to certain statutes which allow such acquisition.

<sup>35</sup> Land Compensation Act 1961 s 39(1).

<sup>36</sup> Acquisition of Land Act 1981 s 7. Since these definitions are inclusive, the definition of land in the Interpretation Act 1978 is also relevant; it includes “buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.”

36. These differences appear to be largely historical, and should be capable of rationalisation in a new Code.

### **Making and authorisation of compulsory purchase order**

37. The Acquisition of Land Act 1981 represents a recent consolidation of the relevant provisions. It provides a reasonably coherent, modern framework for compulsory purchase orders made by Ministers, local authorities, and others. It covers the formalities for the making of orders and the procedures for objections, inquiries, confirmation by Ministers and challenge in the Courts.
38. As noted above, the involvement of Ministers in the determination of objections, particularly in relation to Ministerial Orders, is subject to challenge under the Human Rights Act 1998 on grounds of their lack of independence.<sup>37</sup> One important issue before the House of Lords is likely to be whether this lack of independence is cured by the statutory procedures for review by the Courts on legal grounds.<sup>38</sup>
39. Apart from the Human Rights issue, the 1981 Act would not be an obvious priority for reform as part of the present exercise, although its substance could usefully be incorporated in the Code as part of a later consolidation. The issues raised by the Review relate more to practice than substantive law. More fundamental alterations may be needed following the House of Lords decision. However, any such changes are likely to apply to a wide range of planning procedures, rather than simply to compulsory purchase.
40. Accordingly, it is not at present envisaged that work on the Code would include this aspect. However, this can be reviewed, in discussion with the DETR, when the House of Lords decision is published.

### **Implementation**

41. This is a priority for modernisation. Most of the provisions date back to the 1845 Act, and many are obsolete, or unsuited to modern conditions. The aim should be a straightforward, modern code.

<sup>37</sup> Similar problems, at least in relation to Ministerial Orders, arise from the Secretary of State's role in appeals against certificates of appropriate alternative development: Land Compensation Act 1961s 18. Since the certificate is directly relevant to the assessment of compensation payable for acquisition, it is an aspect of the determination of the owner's "rights" under Article 1 of the 1st Protocol.

<sup>38</sup> See 1981 Act s 23, which allows the validity of the order to be challenged on the grounds that the authorisation "is not empowered" under the Act, or that any "relevant requirement" has not been complied with. In practice, the narrow grounds set out in the statute have been broadly interpreted as including all the normal judicial review grounds: see *R v Secretary of State, ex p Ostler* [1977] QB 122. Arguably, they might be further adapted by the courts (without legislative intervention), having regard to Human Rights Act 1998 s 3 (which requires all legislation to be interpreted in a manner compatible with Convention rights).

42. In modern practice, there are two alternative procedures by which the authority may secure title following the confirmation of a compulsory purchase order: “notice to treat” and “vesting declaration”. The former involves service of a notice on each landowner to initiate the process of agreeing or determining compensation.<sup>39</sup> Title does not pass to the authority until the compensation has been settled, but it may obtain possession in the meantime by service of a “notice of entry”.<sup>40</sup> The latter procedure enables the authority, following confirmation, to make a declaration vesting title in itself at the end of a defined period (not less than 28 days) without waiting for the determination of compensation.<sup>41</sup>
43. One issue is whether it is necessary to retain both procedures. The Advisory Group did not reach a firm conclusion. Adopting a single procedure would simplify drafting. However, the procedures have different characteristics and advantages. The vesting declaration is a more logical and efficient way of giving clean title, but the notice to treat procedure may allow more flexibility in timing.
44. The vesting declaration procedure is covered by a reasonably modern (1981) statute, although some improvements may be desirable in the light of experience. The notice to treat procedure is well understood, but needs to be presented in modern form (incorporating any reforms arising from the Review).
45. Completion of purchase also requires to be put in the form of a modern procedure, drawing so far as necessary from what remains relevant of the Compulsory Purchase Act 1965 (itself, derived from the 1845 Act). The Land Registry should be closely involved, and account needs to be taken of the Law Commission’s proposals for reform of the Land Registration Act 1925.<sup>42</sup>

### **Determination of compensation**

46. The Review did not propose any major change in the structure of the legislation for the determination of compensation through the Lands Tribunal. Procedural reforms can for the most part be dealt with by Rules (or Practice Directions) made under existing powers,<sup>43</sup> and are already under consideration. The President of the Lands Tribunal (George Bartlett QC) has commented:<sup>44</sup>

The current Rules were made in 1996. Minor amendments were made in 1997 and 1998. New Rules are required to update the prescribed procedures, particularly in order to bring them into line with the Civil Procedure Rules. I am at present engaged upon this. As

<sup>39</sup> Compulsory Purchase Act 1965 s 5.

<sup>40</sup> *Ibid* s 11(1).

<sup>41</sup> Compulsory Purchase (Vesting Declarations) Act 1981 s 4.

<sup>42</sup> See Land Registration for the 21st Century: A Consultative Document LC No 254. The final report and draft Bill are due to be published in summer 2001.

<sup>43</sup> Lands Tribunal Act 1949 s 3(11). For example, the Review (para 64) noted the informal procedures for simpler cases under rule 28.

<sup>44</sup> In a response to an earlier draft of this paper.

an interim measure I have produced new Practice Directions which are ready to be issued, and these go as far as it is possible to go under the present Rules to apply Woolf<sup>45</sup> to the Tribunal (to the extent that it is appropriate to do so). Practice Directions are issued by the President. They have no formal status. It is arguable that there should be a power in the legislation to make Practice Directions, but, if so, it would, I believe, be more appropriately contained in the Rules rather than in primary legislation.

47. The President has also called for the repeal of sections 2 to 4<sup>46</sup> of the Land Compensation Act 1961:

Sections 2 to 4 of the 1961 Act should in my view be repealed. They cover matters which, to the extent that provision for them is necessary, are more appropriately provided for under the Lands Tribunal Rules, supplemented as necessary by Practice Directions. Rules are made by statutory instrument by the Lord Chancellor under section 3(6) of the Lands Tribunal Act 1949....

Section 2 is, in my view, unnecessary. The current rules do in fact contain provisions equivalent to subs (2), (3) and (4)<sup>47</sup> (in rules 5, 42 and 29 respectively). There is no equivalent of subs (5), but the rule in which one might have expected to find it (rule 50) includes a requirement to give reasons for the decision, which would in practice ensure that the components of an award are stated. These are not requirements that ought to be contained in primary legislation. They should be contained in the statutory rules. The same goes for section 3. Provision for consolidation is made by rule 30. It is a procedural matter and belongs to the Rules.

The Advisory Group's Final Report para 67 said that special consideration should be given to the repeal of section 4. The case for doing so – so that we have the same discretion on costs in CPO compensation cases as in other cases – is, in my view, unanswerable. We ought to be able to approach costs on the same sort of principles as in the CPR in all cases.

48. This proposal raises policy issues for Ministers, but does not pose any significant legislative problem. Accordingly, it does not seem necessary to include this subject within the scope of the Law Commission's study.

<sup>45</sup> See Lord Woolf: Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System (1996).

<sup>46</sup> Section 2 covers: (2) public sittings; (3) expert witnesses; (4) inspection of the land; (5) details of the award. Section 3 provides for consolidation of proceedings. Section 4 provides detailed rules for costs, depending (*inter alia*) on whether the award exceeds any unconditional offer made by the authority.

<sup>47</sup> Since section 2(4) confers powers to enter private land without consent, provision in the Rules may not be sufficient.

### **Compensation principles**

49. This is the top priority for reform, and the most substantial area of likely work for the Commission. Because of this, we discuss the main issues below in more detail than in relation to other topics. The main provisions are contained in the Land Compensation Act 1961 and the Compulsory Purchase Act 1965. Some of the basic provisions are set out in Part 1 of Appendix 3. Part 2, for illustration, reproduces examples of the more complex provisions (Land Compensation Act 1961 ss 6, 7, Sched 1) which would be a prime candidate for reform.
50. The new Code will be able to draw on the Australian precedents, in particular the Land Acquisition Act 1989 (Cth), based on a report of the Australian Law Reform Commission.<sup>48</sup> Appendix 4 reproduces the compensation provisions, which set out the principles in six clauses, in a manner generally consistent with the English case-law.<sup>49</sup>

### **Problem areas**

51. For the most part, the Review proposed the retention of the existing legal framework. It is possible to identify a limited number of potentially controversial issues which are likely to require special attention:
- (1) disregard of “the scheme”;
  - (2) special suitability rule;
  - (3) betterment;
  - (4) planning assumptions;
  - (5) illegal uses.

#### DISREGARD OF “THE SCHEME”

52. A fundamental principle of compensation law is the so-called *Pointe Gourde* rule,<sup>50</sup> that compensation must be assessed “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition”.<sup>51</sup> There is a valuable discussion of the principle, in its common law and statutory context, in a recent Decision of the President of the Lands Tribunal.<sup>52</sup> He summarises the effect of the cases:

<sup>48</sup> Land Acquisition and Compensation ALRC Report (1980) No 14 (see above).

<sup>49</sup> A possible exception is “special value”: see the discussion in Appendix 4 postscript.

<sup>50</sup> Based on the statement of the principle by the Privy Council in *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565.

<sup>51</sup> This is the summary of the rule in *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 per Lord Hope.

<sup>52</sup> *Waters v Welsh Development Agency* Nov 2000 (ACQ/93-97/1999). He treats LCA ss 5(3), 6-9 as related to the same principle.

The principle is that 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.<sup>53</sup>

53. Although the rule was developed by the Courts, its effect is reflected, wholly or partially, in a number of statutory provisions. The Review included under this head Land Compensation Act 1961 section 6,<sup>54</sup> and Land Compensation Act 1961 section 5 rule (3).<sup>55</sup> Section 9 (which the Review proposed to retain subject to minor amendment) also needs to be considered as part of the same subject.<sup>56</sup> Rationalising the present statutory and common law versions of the rule is probably the single most difficult and important issue which needs to be addressed in the Code.
54. The *Pointe Gourde* principle appears to feature in all other Commonwealth systems derived from the 1845 Act. Most of the Australian statutes include some reference to it, but it is also treated as part of the common law. It is a question of statutory construction whether the particular provision is to be treated as expressing, modifying, or supplanting the common law.<sup>57</sup> The LAA1989 (Cth), following the ALRC's recommendation,<sup>58</sup> expresses the principle shortly:

60 In assessing compensation, there shall be disregarded:

(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 land was acquired

55. The Review acknowledged the uncertainty of the existing law, particularly where a single major scheme is being carried out in stages, or where the statute makes it necessary (as in the London Docklands Development Area) to reconstruct a hypothetical alternative development history.<sup>59</sup> The Review made no detailed recommendations, treating the issue as dependent on a "fundamental" policy decision by Ministers whether to retain the "no-scheme" principle.<sup>60</sup>

<sup>53</sup> *Ibid* para 54.

<sup>54</sup> This one of a complex group of provisions (ss 6-8) dealing with the disregard of different categories of development on adjoining land: see Appendix 3 Part 2.

<sup>55</sup> Review para 98. For rule (3), see below under "Special suitability".

<sup>56</sup> The text is set out in Appendix 3. 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, *Law of Compulsory Purchase and Compensation* (5th ed) para 7.4.

<sup>57</sup> *Road Construction Authority v Tiligardis* [1988] ACLD 203; and see D Brown *op cit* para 3.22.

<sup>58</sup> ALRC *op cit* para 247.

<sup>59</sup> *Ibid* para 106. Similar concerns were expressed by Lord Hope in the *Fletcher Estates* case (*supra* at p 321-2).

<sup>60</sup> *Ibid* para 106.

56. Section 6 of the 1961 Act seems to have been an attempt to introduce some certainty into the identification of the scheme, by specifying, in a table,<sup>61</sup> the “cases” in which actual or prospective development” is to be disregarded, and the categories of development to be so disregarded. It produces an extraordinarily opaque scheme. It also suffers from the serious defect that it deals only with prospects on land *other* than the land being acquired. Accordingly, it supplements, but does not displace, the *Pointe Gourde* principle.<sup>62</sup>
57. Another curiosity is the relationship of the *Pointe Gourde* principle with the statutory machinery for certificates of appropriate alternative development<sup>63</sup> (“section 17 certificates”). The purpose of that machinery is to enable a decision to be obtained from the local authority (or, on appeal, the Secretary of State), as to the planning status of the land for compensation purposes. It is now authoritatively established that, in this context, it is relevant to look at the position as at the date of the proposal to acquire, without any need to rewrite prior history:

The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any 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.<sup>64</sup>

58. It might have been expected that the Lands Tribunal’s consideration of the planning prospects of the land would be similarly constrained, but it has been held otherwise.<sup>65</sup> As the law stands, the Tribunal has to rewrite history, and consider what permission might have been granted if the scheme underlying the purchase had never been conceived. One of the Review suggestions is that the *Pointe Gourde* principle might be limited by the same criterion as under section 17.
59. Some comments on possible reform were made by the Chairman of the Law Commission in a paper to the 2000 Oxford Planning Conference:<sup>66</sup>

First, we need to dispense with the wholly unrealistic idea that the issue can be treated simply as an open-ended one of fact for the Tribunal. The “scheme” needs to be defined, and limited in area and

<sup>61</sup> LCA 1961 Sched 1: see Appendix 3 Part 2.

<sup>62</sup> See *Camrose v Basingstoke Corp* [1966] 1 WLR 1100, 1107.

<sup>63</sup> LCA 1961 s 17ff.

<sup>64</sup> *Fletcher Estates v Secretary of State* [2000] 2 AC 307, 322H, per Lord Hope, approving *Jelson Ltd v MHLG* [1970] 1 QB 243.

<sup>65</sup> *Jelson Ltd v Blaby DC* [1977] 1 WLR 1020, where residential value was allowed in the same case in which a s 17 certificate for residential use had been refused (in *Jelson v MHLG* [1970] 1 QB 243). (The correctness of *Jelson v Blaby DC* was left open in *Fletcher Estates* at p 325C).

<sup>66</sup> Sir Robert Carnwath “Compulsory Purchase – a Model for Law Reform?” JPL Occasional Papers (2000) at p 57.

time. It is far too nebulous a concept<sup>67</sup> to be a satisfactory basis, on its own, for determining rights to compensation. Large differences in value may depend on arbitrary choices between wider or narrower versions of the scheme.<sup>68</sup> The statutory versions of the concept<sup>69</sup> have also failed because they are too wide-ranging...

My other observation is that a distinction may need to be drawn between decreases and increases in value. They tend to be seen merely as two sides of the same coin.<sup>70</sup> However, the policy implications can be very different. The right of the owner to be protected against decreases in value caused by the threat of compulsory purchase can be seen as an important part of his property rights. ...<sup>71</sup>

The other side of the coin – that of increases in value – raises different issues, to which the Urban Task Force drew attention.<sup>72</sup> Where the purpose of the scheme is to promote regeneration, the aim of limiting values to those before the announcement of the scheme may be seen as reasonable in principle, provided that it is given effect in a way which is fair and workable.

60. In view of the complexity of this subject, and the lack of any detailed analysis or firm recommendations in the Review, this is one area in which a more radical reappraisal of the existing law is likely to be required as part of the Law Commission's work. To enable possible options for reform to be considered by Ministers along with the other recommendations of the Review, it would be necessary for this topic to be treated as the first priority for study by the Commission.

#### SPECIAL SUITABILITY RULE

61. The English rule (3) requires there to be disregarded "special suitability" which can only be made use of "in pursuance of statutory powers" or for which there is

<sup>67</sup> "A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on...": per Lord Denning MR, *Wilson v Liverpool City Council* [1971] 1 All ER 628, 634.

<sup>68</sup> See, for example, *Bolton MBC v Tudor Properties* [2000] RVR 292.

<sup>69</sup> See especially LCA 1961 s 6, Sched 1, which requires the disregard of development as part of a New Town or Urban Development scheme.

<sup>70</sup> See, for example, *Melwood Units Property Co v Main Roads Commissioners* [1979] AC 426.

<sup>71</sup> Protected by Article 1 of Protocol 1 to the Convention (para 31 above).

<sup>72</sup> See para 4 above. They were concerned that actions taken by public authorities to redevelop could result in "sharp increases in land and property values", and emphasised 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 under Lord Rodgers (DETR 1999) p 228-31).

no market “apart from the requirements of any authority possessing compulsory purchase powers”.<sup>73</sup>

62. A similar rule is also found, in slightly different language, in the Australian statutes.<sup>74</sup> The ALRC thought such a provision was necessary to counter cases<sup>75</sup> 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 landowner should not suffer because one bidder uses its statutory powers to pre-empt competition.<sup>76</sup>

63. Notwithstanding that view, it is doubtful whether there is any good reason to retain the rule, in so far as it may go beyond disregard of the particular scheme of acquisition. Its precise purpose and practical effect have always been obscure.<sup>77</sup> In practice, in modern conditions, it is difficult to think of uses to which land can *only* be put “in pursuance of statutory powers”.<sup>78</sup> Furthermore, since the privatisation of most utilities, it may be difficult to draw any principled distinction between bodies with compulsory powers, and those without.<sup>79</sup>
64. The Review mentioned rule (3) as part of its discussion of the effects of the Scheme, and questioned whether it should continue to apply in relation to “privatised bodies operating principally on a profit making basis for the benefit of shareholders” or “local authorities acting in partnership with developers”. They

<sup>73</sup> See Appendix 3 and note the 1991 amendment.

<sup>74</sup> See, for example, LAA1989 s 60(2) (in Appendix 4). See also ALRC *op cit* para 250.

<sup>75</sup> 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.

<sup>76</sup> ALRC *op cit* para 250.

<sup>77</sup> The House of Lords seems to have found similar difficulty: see eg *Blandrent Investment Developments v British Gas* [1979] 2 EGLR 18; *Herts CC v Ozanne* (1991) 62 P&CR 1.

<sup>78</sup> The rule is directed to *powers*, rather than mere authorisations, such as planning permissions or consents under the Building Acts: see *Herts CC v Ozanne* (1991) 62 P&CR 1, 8.

<sup>79</sup> See eg Transport and Works Act 1992 Part 1, under which powers of compulsory purchase (see Sched 1) in relation to transport works can be conferred on private bodies.

recommended that rule (3) should be “subsumed” within a single statutory “no scheme” rule.<sup>80</sup>

#### BETTERMENT

65. Where the claimant owns other land, which increases in value as a result of the scheme (betterment), there may be a requirement for the amount of the increase to be deducted from the compensation otherwise due. The principle is simply expressed, in relation to highway schemes, 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

66. In relation to acquisitions by other authorities, the Land Compensation Act 1961 section 7 is a much more complicated provision directed to the same purpose.<sup>81</sup>

67. The treatment of “betterment” is a difficult and potentially contentious issue. For example, the ALRC, after a detailed discussion of UK and other precedents, 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 land-owners.<sup>82</sup> This recommendation was not followed. The LAA1989 (Cth), following earlier legislation,<sup>83</sup> makes allowance for increases, as well as decreases, in the value of adjoining land, by requiring to be taken 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;<sup>84</sup> (emphasis added)

68. The Review recommended retention of the betterment principle, but proposed that betterment should be set off only against compensation for severance or injurious affection. This raises a policy issue for Ministers. Whether or not the Review recommendation is accepted, there is considerable scope for simplifying the existing statutory provisions.

<sup>80</sup> Review para 100, 106.

<sup>81</sup> See Appendix 3 Part 2.

<sup>82</sup> *Op cit* para 333ff.

<sup>83</sup> Lands Acquisition Act 1955 (Cth) s 23(1)(c).

<sup>84</sup> LAA1989(Cth) s 55(2)(a)(iv): see Appendix 4.

#### PLANNING ASSUMPTIONS

69. Land Compensation Act 1961 sections 14-16 contain elaborate provisions, which require certain assumptions (some based on the development plan) to be made about the planning potential of the land for valuation purposes. Section 17ff (as noted above, paragraph 57) set out a procedure for enabling the local authority in certain cases to give a certificate specifying the appropriate alternative development for the land.
70. The Review proposed that the section 17 procedure should be simplified, clarified and extended to all the land comprised in the scheme of acquisition. A simplified planning assumption, based on the new section 17 procedure, would replace the existing assumptions in sections 14-16.<sup>85</sup>
71. One aspect of this proposal, which may prove controversial, is the removal of the automatic assumption of planning permission for development in accordance with the authority's proposals.<sup>86</sup> This is well established, but, as the Review observes, may result in the claimant receiving the benefit of development potential which is dependent on the scheme. Relevant also are the existing provisions,<sup>87</sup> allowing a claim for increased value from permissions granted within 10 years of acquisition; the Review proposed their retention.<sup>88</sup> These proposals raise policy issues for Ministers, but present no particular problem of drafting.
72. There seem to be no direct equivalents in the Australian statutes for such provisions relating to planning assumptions. Planning potential is taken into account in the valuation as part of the "highest and best use" of the land.<sup>89</sup>

#### ILLEGAL USES

73. Rule (4)<sup>90</sup> excludes value attributable to uses contrary to law or detrimental to health. Similar provisions are found in Australian and Canadian legislation, but in simplified form.<sup>91</sup> 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.<sup>92</sup> It quoted Professor Todd, commenting on the Canadian provisions:<sup>93</sup>

<sup>85</sup> Review para 117.

<sup>86</sup> LCA 1961 s 15(1).

<sup>87</sup> LCA 1961 Part IV. This part was repealed by the Land Commission Act 1967, but revived by the Planning and Compensation Act 1991.

<sup>88</sup> Review para 118.

<sup>89</sup> Jacobs *op cit* para 23.1-23.3.

<sup>90</sup> Land Compensation Act 1961 s 5(4): see Appendix 3.

<sup>91</sup> See Appendix 4; and ALRC *op cit* para 253.

<sup>92</sup> *Op cit* para 253.

<sup>93</sup> Todd, *The Law of Expropriation and Compensation in Canada* (1976) pp 146-7.

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'.

74. The Review recommended abolition of the rule, on the grounds that it might unfairly exclude the value of relatively innocuous uses, which might reasonably be expected to continue. They thought that market value would in practice reflect the likelihood of an unlawful use being permitted to continue.<sup>94</sup>
75. If abolition of the rule is thought too controversial, the rule could be limited in the same way as the Australian legislation. Further, the Tribunal might be given a discretion to disapply the rule in appropriate cases, for example where the unlawful use has been tolerated in practice.<sup>95</sup>

***Other issues of detail***

76. A number of issues of detail will need to be addressed, including:
  - (1) general statement of right to, and basis of, compensation;
  - (2) definition of market value;
  - (3) date of valuation;
  - (4) elements of "disturbance";
  - (5) pre-acquisition losses;
  - (6) abortive orders;
  - (7) equivalent reinstatement.

GENERAL STATEMENT OF RIGHT

77. The Australian LAA1989 (Cth) contains a statement of the right to compensation, combined with a general obligation on the Courts to ensure "just

<sup>94</sup> Review para 119.

<sup>95</sup> A similar issue arises in private law: see Law Commission Consultation Paper: The effect of Illegality on Contracts and Trusts (1999) Consultation Paper 154. We propose that the Court should have a discretion to decide whether the illegality should act as a defence to a claim for contractual enforcement: para 7.2-7.10.

terms”.<sup>96</sup> The English code will require a similar statement of entitlement. There may be a case for a similar statement of the overriding principle, perhaps in terms of “fair compensation”.<sup>97</sup>

78. The Review proposed no change to the “fundamental principle” that compensation is a single global figure, although for convenience it is assessed under separate heads: “market value”, “severance/injurious affection”<sup>98</sup> and “disturbance”.<sup>99</sup>
79. There may be an issue whether a modern Code would retain those terms, which are well-established, but may mean little to the layman. Both the principle, and the traditional division, are reflected in the Australian statute, but without using those terms.<sup>100</sup>

#### MARKET VALUE

80. The Review recommends the retention of “open market value” as the basis of compensation.<sup>101</sup> The English Act defines it simply by reference to a “willing seller”.<sup>102</sup> The Australian definitions refer to “willing but not anxious seller to a willing but not anxious buyer”. This follows the classic formulation of the High Court of Australia in *Spencer v Commonwealth*:

Shortly stated what is required is ‘an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations’.<sup>103</sup>

<sup>96</sup> See Appendix 4. The expression “just terms” is derived from the guarantee given by the Australian Constitution. See also ALRC *op cit* para 237 (“A ‘just compensation’ override”), referring to the Ontario recommendation (not adopted by the legislature) that there should be a “general statement, in the legislation, that the owner is entitled to full indemnification for his loss”.

<sup>97</sup> This was the expression used by Lord Nicholls to describe the general purpose in *Director of Buildings and Lands v Shun Fung Ltd* [1995] 2 AC 111, 125C.

<sup>98</sup> “Severance” refers to any loss of value caused by the severance of the subject land from other land held with it. “Injurious affection” refers to loss in value caused to retained land by the works or their use. (See below, for discussion of “injurious affection”, where no land is taken).

<sup>99</sup> “Disturbance” is the term used to describe any loss (typically, business or home relocation expenses and temporary loss of profits) caused by the acquisition.

<sup>100</sup> LCA1989 (Cth) s 55(2)(a)(iii)-(iv), (c): see Appendix 4.

<sup>101</sup> Para 85(i).

<sup>102</sup> LCA 1961 s 5(2): see Appendix 3. The purpose was to counter the “old hypothesis of the unwilling seller and the willing buyer”: see per Scott LJ, *Horn v Sunderland Corp* [1941] 2KB 26, 40.

<sup>103</sup> (1907) 5 CLR 418, 441 (per Isaacs J). It has been treated as authoritative by the Privy Council: see eg *Melwood Units v Main Roads Commissioner* [1979] AC 426. The “willing”

81. It is unlikely that there is any difference in the application of the test in practice, but the Australian wording may be more accurate.

DATE OF VALUATION

82. The Review recommends that –
- (1) the date of valuation should (as at present) be the earlier of
    - (a) Under a notice to treat, the date of entry;
    - (b) Under a general vesting declaration, the date when the authority have the right to enter and take possession;
    - (c) The date of agreement or determination of compensation
  - (2) And that the nature of the assets should be fixed as at the date when the notice to treat is served or deemed to have been served.
83. This seems uncontroversial.

ELEMENTS OF “DISTURBANCE”

84. The Review accepted the principles on which disturbance compensation is based, but thought that the “actual details of who is able to claim for what are anomalous, confusing and incomplete.” They recommended that there should be
- ... a clear comprehensive framework to provide, as far as possible without being excessively prescriptive, that no person who suffers financial loss or incurs justifiable expense directly attributable to an acquiring authority’s compulsory purchase proposals will thereby end up out of pocket.<sup>104</sup>
85. The approaches of the Australian statutes vary. Some have simple statements of the principle,<sup>105</sup> while others have more detailed statements of some of the elements of the disturbance.<sup>106</sup>
86. Business disturbance gives rise to particular issues. Assessment may be on a “relocation” or “extinguishment” basis, depending on whether it is reasonably possible to relocate the business.<sup>107</sup> The criteria governing the choice between the

but “not anxious” seller is sometimes referred to in the English cases: see eg *IRC v Clay* [1914] 3 KB 466, 478, per Pickford LJ.

<sup>104</sup> Review para 137.

<sup>105</sup> Eg LAA1989(Cth) s 55(2)(c): see Appendix 4.

<sup>106</sup> Land Acquisition Act 1991 (NSW) s 59; Land Acquisition Act 1997(WA) s 241(6).

<sup>107</sup> There are special rules allowing a claim on the “extinguishment” basis, where the person carrying on the business is over 60: Land Compensation Act 1961 s 46.

two were examined by the Privy Council in the *Shun Fung* case.<sup>108</sup> The Review proposed that they should be codified, summarising them as follows:<sup>109</sup>

- (a) is the business capable of being relocated as a going concern?
- (b) does the claimant have the intention of relocating and is there a reasonable prospect that he will do so?
- (c) would a reasonable business man using his own money decide, in the particular circumstances of the case, to relocate the business?
- (d) is the cost directly attributable to the acquisition and not too remote?

87. Consideration will need to be given to the degree of detail appropriate in spelling out what is essentially a common law principle.

#### PRE-ACQUISITION LOSSES

88. It is now established that disturbance may include losses incurred prior to the notice to treat if they are directly attributable to the prospective compulsory acquisition.<sup>110</sup> The Review recommended that “that position should be regularised in statute”.<sup>111</sup> It proposed that a starting date should be defined, and should be “the date on which the compulsory purchase order becomes operative”.<sup>112</sup>
89. The Australian statutes expressly allow claims for loss arising from the beginning of the statutory procedure. Thus, LAA1989 (Cth) allows the claim for loss which is “a direct, natural and reasonable consequence” of the giving of the “pre-acquisition declaration”, which starts the procedure under that system.<sup>113</sup> However, even such specific statutory language may not exclude claims for earlier losses under the *Shun Fung* principle.<sup>114</sup>
90. Accordingly, if the Review’s objective of limiting such claims in time is to be achieved, it will need to be spelt out clearly.

<sup>108</sup> *Director of Buildings and Lands v Shun Fung Ltd* [1995] 2 AC 111, 127.

<sup>109</sup> *Op cit* para 142.

<sup>110</sup> *Director of Buildings and Lands v Shun Fung Ltd* [1995] 2 AC 111.

<sup>111</sup> Review para 139.

<sup>112</sup> *Ibid* para 140.

<sup>113</sup> LAA1989 s 55(2)(c).

<sup>114</sup> See M Jacobs *op cit* para 22.7.2.

## ABORTIVE CPOs

91. The Review noted the current patchwork of provisions relating to the consequences of proposals for compulsory purchase which are later abandoned. It suggested that:

There is clearly a case in equity for a landowner to be compensated for *any* costs (other than those directly attributable to his opposition to the proposal) or other losses incurred which are directly attributable to the authority's decision to make the compulsory purchase order, irrespective of whether the land is ultimately acquired or not.<sup>115</sup>

92. The ALRC expressed a similar view,<sup>116</sup> which is reflected in the Commonwealth<sup>117</sup> and State<sup>118</sup> legislation. The Review recommended that such costs or losses should be claimable from the later of the date when the order became operative and the date of the cost or loss.<sup>119</sup>

## HOME AND BUSINESS LOSS PAYMENTS

93. The Land Compensation Act 1973 makes provision for additional payments in particular cases, known as "home-loss payments"<sup>120</sup> and "farm-loss payments".<sup>121</sup> The Australian statutes often contain provisions for the grant of additional payments (sometimes referred to as "solatium"). Some are limited to dwellings, others apply generally.<sup>122</sup>
94. The Review made detailed proposals for the retention, with improvements, of home-loss payments, and a new, analogous system of business-loss payments, to replace the existing farm-loss payments. Whether this is accepted is largely a question of policy.

## EQUIVALENT REINSTATEMENT

95. Land Compensation Act 1961 section 5(5) applies to property of a type for which there is no general demand (for example, churches), and allows compensation to be assessed on the basis of the cost of equivalent re-instatement. The Review

<sup>115</sup> Review para 188.

<sup>116</sup> ALRC *op cit* para 187, 190.

<sup>117</sup> LAA1989 s 96, which allows a claim within 3 years of the pre-acquisition declaration being revoked or ceasing to have effect through lapse of time.

<sup>118</sup> See LACA1986 (Vic) ss 46-8; LAA1991(NSW) ss 69-71.

<sup>119</sup> Review para 190.

<sup>120</sup> Land Compensation Act 1973 s 29. The current rate is 10% of the value of the claimant's interest subject to a maximum of £15,000.

<sup>121</sup> *Ibid* s 34.

<sup>122</sup> See Appendix 4; and the discussion in Jacobs *op cit* para 26-1ff. The merits of different approaches were discussed in detail by the ALRC, in relation to dwellings, although the logic of the discussion would extend more widely: see Jacobs *op cit* para 26-3.

recommended retention of this principle, but proposed that the criteria should be “strengthened” by requiring the claimant to show:

- (1) that the value of the site (with any assumed permission) and any disturbance compensation would be insufficient to allow the activity to continue;
- (2) that it is reasonable for him to reinstate and that the cost is not disproportionate.<sup>123</sup>

96. It may be thought that these points are already implicit in Rule (5) and do not need to be spelt out. The Review made no specific recommendation to deal with the potential betterment resulting from reinstatement, although they mentioned evidence that

... the way Rule (5) is being applied in practice means that a displaced occupier can sometimes enjoy the benefit of a degree of betterment which was not allowed for in the overall compensation assessment...<sup>124</sup>

97. In Australia, specific provision for betterment was recommended by the ALRC, which said that there should be provision for

... subtracting... the amount, if any, by which the claimant has improved, or is likely to improve his financial position by the relocation... The formula is flexible, allowing the court to determine the just approach in any particular case.<sup>125</sup>

98. The 1989 Commonwealth Act gives effect to the ALRC’s view,<sup>126</sup> but may be thought over-elaborate.

#### SPECIAL CASES

99. There are numerous provisions in the various statutes dealing with special categories of land or owners of land. These will have to be taken into account in formulating the final proposals, but should not detract from the primary objective of achieving a coherent code for standard cases. Where possible, departures from the standard model should be kept to a minimum. The DETR

<sup>123</sup> *Ibid* para 161. They also recommended the retention of the rule “as at present” (attributed to the *West Midland Baptist* case [1970] AC 874) that the cost of reinstatement, and professional fees, should be calculated as at the date the authority acquires ownership or takes possession. This appears to be a misreading of that case, which fixed the relevant date as the date on which the reinstatement work could reasonably have been commenced. See p 899 *per* Lord Reid and p 912 *per* Lord Donovan.

<sup>124</sup> Review para 159.

<sup>125</sup> ALRC *op cit* para 259.

<sup>126</sup> For a summary table of the differences between this and other Australian statutes, see Jacobs *op cit* para 25.4.

has offered to assist in identifying cases where special provision is required, and any related problems.

#### COMPENSATION WHERE NO LAND IS ACQUIRED

100. The rights of those from whom no land is acquired, but whose land is adversely affected by authority's works or their use, depend on two sets of provisions.<sup>127</sup> The Compulsory Purchase Act 1965 section 10, reproducing an obscure section of the 1845 Act, has been interpreted in the cases,<sup>128</sup> as allowing a claim for the diminution in value of land due to the authority's *works* (but not to their use). Part I of the Land Compensation Act 1973 contains a detailed modern code for compensating those affected by the *use* of public works. It is subject to a number of restrictions, including a rateable value limit (currently £24,600) for business property.
101. The Review called for the rationalisation of these two schemes. They proposed that section 10 should be extended to include "interferences... from non-physical factors and any temporary losses sustained as a direct result of the scheme".<sup>129</sup>
102. This issue was reviewed in detail (including comparisons with the UK and Canada) by the ALRC.<sup>130</sup> From this it appears that the English provisions are relatively generous to claimants.<sup>131</sup> The ALRC's own proposals in their draft Bill for a new, even more extensive right to compensation in such cases<sup>132</sup> were not accepted by the legislature.
103. There is no doubt that section 10 requires modernisation, so that its wording may bear a recognisable relationship to its interpretation in the cases. Any extension of its scope, and its relationship to the 1973 Act, are issues requiring policy decision. The simplest approach may be to draw a clear distinction between provisions dealing, respectively, with damage caused by construction of the works, and with damage caused by use of the works once constructed. The former would be a restatement of section 10, as interpreted by the Courts,<sup>133</sup> with

<sup>127</sup> See the discussion at Review para 191ff.

<sup>128</sup> Now authoritatively explained in *Wildtree Hotels v Harrow LBC* [2000] 3 WLR 165 per Lord Hoffmann.

<sup>129</sup> Review para 206.

<sup>130</sup> ALRC *op cit* Ch 10 ("Injurious affection so far: shreds and patches") and Ch 11 ("Injurious affection and enhancement: a new approach").

<sup>131</sup> *Ibid* para 304. See also Jacobs *op cit* para 13.3-13.4. He refers to US case-law which may enable damages to be awarded for diminution of property despite no formal "taking" having occurred: eg *Thornburg v Port of Portland* 376 P 2d (1962).

<sup>132</sup> ALRC *op cit*. Draft Bill Cl 82ff.

<sup>133</sup> See *Wildtree Hotels v Harrow LBC* [2000] 3 WLR 165.

any modifications resulting from the Review.<sup>134</sup> The latter would follow Part I of the 1973 Act, again with any approved modifications.<sup>135</sup>

#### REVERSE COMPULSORY PURCHASE

104. We have used this term to describe the provisions of the Town and Country Planning Act 1990 relating to purchase notices and blight notices. Both procedures enable a land-owner to compel the authority to purchase land in specified circumstances. The purchase notice procedure applies where land has become incapable of reasonably beneficial use, following a planning refusal.<sup>136</sup> The blight notice applies where the saleability of land is adversely affected by a requirement or allocation for public use.<sup>137</sup> In either case, once the notice has taken effect, compensation is assessed on the same basis as for a compulsory purchase order.
105. Although blight caused by impending compulsory purchase is an important issue, it has not hitherto been included in the compulsory purchase legislation. The relevant part of the Town and Country Planning Act 1990 forms a self-contained Code, which covers a range of planning designations, not all directly related to compulsory purchase. The Review did not itself include this topic, although it noted the recommendations of an earlier Departmental Review.<sup>138</sup> It is a complex subject, raising difficult policy issues, as to the extent to which land-owners should be protected against the adverse effects of schemes which are only at the planning stage.
106. For these reasons, it may be more convenient and sensible to leave any changes to the blight procedures to be dealt with as a separate issue under the 1990 Act, rather than as part of the present exercise.

#### REPEALS AND TRANSITIONAL PROVISIONS

107. A important issue will be how to deal with the multitude of existing statutes (public and private) which have incorporated different parts of the existing code (from 1845 onwards). Work on this task will need to proceed in parallel with the preparation of the Code. However, attempting to cover every such instance would be a mammoth and unrewarding task. It should be possible to deal with the majority of cases by a general provision applying the new Code, with a power for the Secretary of State to deal with special cases by statutory instrument.

<sup>134</sup> For example, the Review criticised the rule (rule (3) of the “McCarthy rules”): see *Metropolitan Board of Works v McCarthy* (1874) WR 7 HL 243), which requires the loss to be an injury to land, rather than personal or business loss: Review para 196.

<sup>135</sup> The Review proposed removal of the restriction to depreciation of existing use value, and the rateable value limit for business premises (currently £24,600): Review para 204-5.

<sup>136</sup> Town and Country Planning Act 1990 s 137.

<sup>137</sup> Town and Country Planning Act 1990 s 149ff. The categories of “blighted land” to which the procedure applies are those defined by Schedule 13.

<sup>138</sup> Interdepartmental Working Group on Blight: Final Report (DETR Dec 1997).

## **PROGRAMME OF WORK**

### ***Consultative Report***

108. In the light of the above, the topics on which, at the first stage, the Law Commission's work could most usefully be concentrated are:
- (1) implementation;
  - (2) principles of compensation;
  - (3) abortive CPOs;
  - (4) compensation where no land is acquired.
109. It is proposed that the Commission be asked, under new terms of reference, to prepare, and publish, a Consultative Report<sup>139</sup> on the contents and possible structure of a Code, or Codes, covering these issues. The purpose would be a detailed review of the existing legislation and common-law rules, leading to proposals for a modern code. In particular, the review would identify: provisions suitable for incorporation in the new Code; provisions requiring substantial recasting; common-law rules suitable for codification; and proposed repeals. It would take account of any decisions made by Ministers for substantive amendments, arising out of the Review or otherwise. Consideration would also be given to the options for implementation (see below).
110. It would be hoped to complete this stage within about one year from approval of the terms of reference. Priority could be given to formulating detailed proposals in relation to "Disregard of the Scheme", for early submission to Ministers, to enable policy decisions to be made on the issues left open by the Review.<sup>140</sup>

### ***Final report and draft legislation***

111. The second stage will be to prepare draft legislation, with an explanatory report, to give effect to the Code. Possibilities for consideration would include:
- (1) a "big-bang" approach: single Bill, constituting a complete Compulsory Purchase Code, covering all the topics in the draft framework;<sup>141</sup>
  - (2) a step-by-step approach: a Bill containing a self-contained Compensation Code, followed by one or more separate Bills dealing with other topics;

<sup>139</sup> The Consultation would not repeat the consultation already carried out in respect of the policy proposals in the Review. It would be directed principally to the possible structure of the proposed Code, and other issues not addressed in detail by the Review (eg proposals relating to the "no-scheme world", see above).

<sup>140</sup> See para 60 above.

<sup>141</sup> Cf the Land Acquisition Act 1989 (Cth).

- (3) a Bill enacting – on a piecemeal basis – the substantive changes arising from both the Review and the Commission’s work; followed by a Consolidation Bill.
  - (4) a combination of (2) and (3).
112. The timing of this work, and decisions as to the form of the legislation, will be partly dependent on the availability of Parliamentary Counsel, and on advice as to the timing of the legislative programme. It may also be necessary to take account of procedural changes arising from the Human Rights Act 1998.<sup>142</sup> Consideration will also be given to the possibility of using the Regulatory Reform Bill,<sup>143</sup> if it becomes law, for some aspects of the reform.

#### **NEXT STEPS**

113. This preliminary report is being made available to selected groups and individuals who are thought to have a specialist interest in the subject. It will also be made available on our web-site.
114. Although it is not a formal consultation paper, the Commission would welcome comments on any aspects of the project, but particularly on the suggestions as to the structure and contents of the Code, and as to priorities. As already stated, we will have regard, so far as relevant to our work, to the responses made to the DETR consultation on the Review. It is unnecessary, therefore, for them to be repeated.
115. Subject to the detail of the terms of reference, if approved, the next step for the Commission will be the preparation of a discussion paper on the law concerning “Disregard of the Scheme” (see above), and the options for reform.

<sup>142</sup> Following the *Alconbury* case: see above.

<sup>143</sup> This is currently before Parliament. If enacted, it would allow legislation to be amended by order so as to remove unnecessary burdens. In the words of the Lord Falconer, Minister of State, it is intended to be “a major tool... to reform entire regulatory regimes and to tackle unnecessary, overlapping, over-complex and over-burdensome legislation.” (*Hansard* HL 21 December 2000, vol 620, col 850).

# **APPENDIX 1**

## **PART 1 – TERMS OF REFERENCE FOR PRELIMINARY STUDY**

**DETR/Law Commission preliminary study to identify the scope for simplifying, consolidating and codifying the compulsory purchase legislation.**

### ***Terms of Reference***

The scoping study will:

- (a) take account of appropriate proposals for reform;
- (b) identify all the existing legislative provisions relating to compulsory purchase powers, procedures and compensation; and group them according to function;
- (c) identify those provisions which should be repealed because they are redundant, defective or ineffective;
- (d) identify the extent to which case law might usefully be codified and any consequential effects of that on current statute;
- (e) identify the need for modernising the language used in current statute law, along with any other amendments aimed at ensuring that the law would apply fairly in all circumstances and in the way originally intended by Parliament;
- (f) consider international comparisons and any lessons which might be drawn from them;
- (g) set out a programme of work.

## **PART 2 – ACKNOWLEDGEMENTS**

### MEMBERS OF WORKING GROUP

George Bartlett QC	President, Lands Tribunal
The Hon Mr Justice Carnwath CVO	Chairman, Law Commission
Tony M Chase FRICS	Partner, Gerald Eve & Co
Professor Keith Davies	University of Reading
David Hawkins	Partner, Nabarro Nathanson
Sir Christopher Jenkins	Former First Parliamentary Counsel
Professor Victor Moore	Barrister, 2 Mitre Court Buildings

Guy Roots QC	Barrister, 2 Mitre Court Buildings
Michael T Seals	Co-chairman, Property Industry Group
Mrs Lorraine Wallwork	District Land Registrar, Lancashire
Arthur Watling	Director of Capital Valuations, Valuation Office Agency
Richard Wilson	Estates Division, National Assembly for Wales
DETR	
Mike Ash	Plans, Compensation & International Division
Andy Hannan	Land and Property Division
Richard Mackley	Legal Group
Jean Nowak	Plans, Compensation & International Division
Robert Segall	Plans, Compensation & International Division
Peter A Frost	Plans, Compensation & International Division

# APPENDIX 2

## THE NEW COMPULSORY PURCHASE CODE

### Discussion draft framework

<i>Lands Tribunal Act 1949</i>	<i>LTA49</i>
<i>Land Compensation Act 1961</i>	<i>LCA61</i>
<i>Compulsory Purchase Act 1965</i>	<i>CPA</i>
<i>Land Compensation Act 1973</i>	<i>LCA73</i>
<i>Local Government (Miscellaneous Provisions) Act 1976</i>	<i>LG(MP)A76</i>
<i>Acquisition of Land Act 1981</i>	<i>ALA81</i>
<i>Compulsory Purchase (Vesting Declarations) Act 1981</i>	<i>CP(VD)A81</i>
<i>Town and Country Planning Act 1990</i>	<i>TCPA</i>
<i>Planning and Compensation Act 1991</i>	<i>PCA91</i>

#### 1 Application of the Code

- a) Reconciliation of existing provisions as to scope, eg
  - LCA61 s 5 (“any compulsory acquisition”)
  - CPA s 1 (refers to ALA81)
  - ALA81 s 1 (list of specified Acts – see Halsbury Vol 9 p368-370)
- b) Reconciliation of definitions, eg definitions of “land”
  - LCA61 s 39(1)
  - ALA81 s 7(1)

#### 2 Making and authorisation of compulsory purchase order

- a) Existing procedures (consolidated in ALA81)
- b) Human rights issues (Modifications following *Alconbury v Secretary of State*)
  - Review issues<sup>144</sup>**
  - 54 (i) allowing acquiring authorities to confirm uncontested orders*

#### 3 Implementation

- a) Time limit – 3 years (CPA s 4)
- b) Notice to treat procedure
  - i) Service of notice to treat (CPA s 5)
  - ii) Notice of entry (CPA s 11)
  - iii) Absent or untraced owners (CPA Sch 2)
  - iv) Omitted interests (CPA s 22)
  - v) Lesser interests (tenancies from year to year etc) (CPA s20)
    - Review issues**
    - 61 (i) reduce time-limit for notice to treat or GVD to 1 year*
    - 61 (ii) land-owner’s right to serve notice to treat and take possession*
- c) Vesting Declaration procedure  
*CP(VD)A 1981*
- d) Completion of purchase
  - i) Refusal to convey (CPA s 9)
  - ii) Costs of conveyance (CPA s 23)
  - iii) Payment into Court (CPA s 25, 26)
  - iv) Repayment of unclaimed compensation paid into Court (LG(MP)A 76 s29)
- e) Advance payment of compensation  
*LCA 73 s 52, 52A*
- f) Dividend land
  - i) Buildings etc (CPA s 8, LCA 73 s 58)
  - ii) Agricultural land (LCA 73 s 53-7)
    - Review issues**
    - 135 (i) up-date language*
    - 135 (ii) clarify power to withdraw notice to treat and substitute on smaller area*

<sup>144</sup> “Review issues” refer to recommendations (with paragraph numbers) made in the Fundamental Review (see Draft Paper para 1.2).

- g) Miscellaneous
  - i) Mortgages (CPA s 14-17)
  - ii) Rentcharges (CPA s 18)
  - iii) Apportionment of rent (CPA s19)
  - iv) Surveys
    - CPA s 11(3)
    - LG(MP)A 76 s 15

#### 4 Determination of Compensation

- a) Jurisdiction of Lands Tribunal (LCA 61 s 1)
- b) Notice of claim (LCA 61 s 4(2))
- c) Reference to Lands Tribunal (CPA s 6)
- d) Lands Tribunal procedure
  - LTA 49 and rules*
  - LCA 1961 s2-4*

##### **Review issues**

- 61(iv) Statutory duty to submit itemised claim*
- 71(ii) Repeal of LCA s 4 (costs)*
- 71(iii) Power of LC to appoint judge to LT*

#### 5 Compensation principles

- a) Basic principles
  - i) Equivalence – fair compensation for the loss sustained, no more no less (see *Shun Fung Ironworks v Lands Director* [1995] 2 AC 111, 125, per Lord Nicholls)
  - ii) No-scheme world – compensation must be assessed “upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition” (*Fletcher Estates v Secretary of State* [2000] 2 AC 307, 315 per Lord Hope)
- b) Elements of standard compensation
  - i) Open market value of interest taken
  - ii) Disturbance – loss or damage to occupier
  - iii) Severance and injurious affection
- c) Open market value
  - i) Definition (LCA61 s5(2))
  - ii) Date of assessment – date of possession or prior determination (common law)
  - iii) Disregard of enhancements with a view to compensation (ALA s4)
  - iv) Disregard of effects of scheme (LCA61 s 6-7, 9; *Pointe Gourde*; common law)
  - v) Certificates of appropriate alternative development
    - LCA 61 s17-19; 14(5-7)

##### **Review issues**

- 85(i) Retention of market value*
- 85(ii) Date to remain as date of possession, or agreement of compensation, if earlier*
- 85(iii) Assets fixed at date of notice to treat or deemed service*
- 106(i) Policy decision required on no-scheme world*
- 106(ii) Choice of disregarding scheme from date of inception or cancellation at date of valuation (or 5 years before?)*
- 106(iii) Single “no scheme” provision, subsuming rule (3)*
- 117 Revised s 17 procedure*
- 120 Repeal of rule (4) (illegal uses)*

- d) Disturbance
  - i) Common law disturbance (LCA61 s5(6); *Horn v Sunderland, Shun Fung* etc)
    - (1) Business
      - (a) Relocation costs
      - (b) Loss of profits
        - Commencement date (date of CPO)
      - (c) Other expenses
      - (d) Total extinguishment
      - (e) Special rules for over 60s (LCA 73 s 46)
    - (2) Residential
    - (3) General

##### **Review issues**

- 157 Codification of law, as in Shun Fung, with commencement date specified (date when CPO became operative)*
- 157(vi) duties in relation to accommodation works*

- ii) Statutory disturbance
  - (1) Occupiers without compensatable interests (LCA 73 s37-8)
  - (2) Non-occupiers' expenses (LCA 61 s 10A)
- iii) Special payments
  - Home loss payments (LCA 73 s29-33)
  - Farm loss payments (LCA 73 s34-36)
  - Review issues**
    - 97(i) Home-loss payments retained – flat-rate or percentage
    - 97(ii) Business-loss payments instead of farm-loss payments
    - 97(iii) Provision for annual updating by statutory instrument
    - 174 Powers to assist displaced owner-occupiers where compensation insufficient to relocate
- e) Severance or injurious affection (CPA s7 and common law)
- f) Betterment (LCA61 s7-8)
  - Review issues**
    - 124(i) betterment set off only against severance or injurious affection
    - 124(ii) definition of “adjacent” for betterment purposes
    - 124(iii) onus on LA to prove betterment
    - 129 Improved assessment of compensation for severance
- g) Compensation based on equivalent reinstatement
  - i) LCA61 s 5(5)
  - ii) LCA 73 s45 (property adapted for disabled)
    - Review issues**
      - 161 Codification of existing law, with onus on claimant (NB error in para (iii) as to date of assessment)
- h) Interest on compensation
  - LCA 61 s32
  - LCA 73 s 52A, 63
  - P&CA91 s 80 Sch 18
  - Review issues**
    - 179 Compound interest; revise £1000 threshold; rates equivalent to bank deposit rates; interest on fees

## 6 Special cases

- a) Statutory undertakers (LCA 1961 s 11, ALA s 16-17)
- b) Minerals (ALA s3 Sch 2)
- c) Local authority land (ALA s 17)
- d) National Trust (ALA s18)
- e) Commons, open spaces etc (ALA s 19, CPA s21, Sch 4)
- f) The Crown (LCA 61 s 33)
- g) Ecclesiastical property (LCA 61 s 34, CPA s 31)
- h) Pipelines (CPA s 37)

## 7 Compensation where no land is acquired

CPA s 10 (*Wildtree Hotels v Harrow LBC* [2000] 3 WLR 165)  
LCA 73 Part I

### **Review issues**

206 Compensation on basis that “but for statutory authority, landowners could recover damages at common law for any loss they have suffered”; merge s10 and LCA 73 Pt; include non-physical factors and temporary losses; repeal provisions which restrict loss to existing use value

## 8 Abortive CPOs

LCA 61 s 31  
CPA s 5(2A-E)

### **Review issue**

190 Owners should be entitled to recover their costs and losses, where authority (for whatever reason) does not proceed with a CPO following authorisation

## 9 Reverse compulsory purchase

- a) Purchase notices
  - T&CPA Part VI Ch I
- b) Blight notices
  - T&CPA Part VI Ch II, Sched 13

## 10 Repeals and transitional

# APPENDIX 3 – ENGLISH RULES

## PART 1: SOME BASIC PROVISIONS

### Land Compensation Act 1961

#### *Rules for assessing compensation*

5. 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 . . .<sup>1</sup> the requirements of any authority possessing compulsory purchase powers:<sup>2</sup>

(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: and the following of this part of this Act shall have effect with respect to the assessment.

#### **Disregard of depreciation due to prospect of acquisition by authority possessing compulsory purchase powers.**

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 of other particulars contained in the current development plan, or by any other

<sup>1</sup> Here the words “the special needs of a particular purchaser” were deleted by the Planning and Compensation Act 1991.

<sup>2</sup> “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).

means) an indication had been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

### **Compulsory Purchase Act 1965**

#### ***Measure of compensation in case of severance.***

7. 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.

## **PART 2: LAND COMPENSATION ACT 1961, SECTIONS 6 AND 7**

### **6 Disregard of actual or prospective development in certain cases.**

(1) Subject to section eight of this Act,<sup>3</sup> 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) ...<sup>4</sup>

(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 capacity to an interest in other land contiguous or adjacent to the relevant land,

<sup>3</sup> 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.

<sup>4</sup> Para 2, taken with Schedule 1 Parts II and III, contains further qualifications in relation to New Towns and Urban Development Areas.

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

### **First Schedule**

#### ACTUAL OR PROSPECTIVE DEVELOPMENT

#### RELEVANT FOR PURPOSES OF SECTION 6

#### PART I

#### DESCRIPTION OF DEVELOPMENT

##### ***Case***

##### ***Development***

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.

## **APPENDIX 4 – AUSTRALIAN LEGISLATION**

### **Land Acquisition Act 1989 (Cth)**

#### ***Entitlement to compensation***

52 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

#### ***Amount of compensation general principles***

55 (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:

(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 Attorney-General's Department or a person authorised under subsection 55E(4) of the "Judiciary Act 1903" requires.

***Meaning of “market value”***

56 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.

***Special provision where market value determined upon basis of potential of land***

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.

***No general market for interest acquired***

58(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 old 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.

***Matters to be disregarded in assessing compensation***

60 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.

## POSTSCRIPT TO APPENDIX 4

### “Special value” in Australian law

1. Most of the Australian statutes include a separate item usually called “special value” as one element in the compensation: for example

any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest (Cth)<sup>5</sup>

“special value”, in relation to an interest in land, means the value of any pecuniary advantage, in addition to market value, to a claimant which is incidental to his ownership or occupation of that land (Vic)

2. This concept is derived from the *Pastoral Finance* case.<sup>6</sup> It was recognised by the ALRC as well-established in Australian law, and was treated as distinct from disturbance.<sup>7</sup> It has, however, been criticised as importing “merely theoretical and highly speculative elements of value which have no real existence”.<sup>8</sup>
3. Although the Privy Council has treated the *Pastoral Finance* case as of general application in the common law,<sup>9</sup> special value has not been treated as a separate head of compensation, but has tended to be equated with disturbance.<sup>10</sup> This seems to follow the leading judgment of Scott LJ in *Horn v Sunderland Corp*<sup>11</sup>, where he uses 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. (In fact, the wide definition of the term “disturbance” in the Australian 1989 Act<sup>12</sup> seems to leave little room for any other “special” element.)
4. Assuming the wide interpretation given to the term disturbance under English law<sup>13</sup> is reflected in the new Code, it is doubtful if there is any need to maintain a separate head of “special value”.

<sup>5</sup> Land Acquisition Act 1989 s 55(2)(a)(ii). This definition is taken from the ALRC draft bill s 35, which (unlike the Act) uses the term “special value”.

<sup>6</sup> [1914] AC 1083.

<sup>7</sup> ALRC *op cit* para 239.

<sup>8</sup> Jacobs *op cit* at p354, citing (*inter alia*) the report of the Ontario Law Reform Commission.

<sup>9</sup> See *Director of Buildings and Lands v Shun Fung Ltd* [1995] 2 AC 111, 128.

<sup>10</sup> *Ibid* 125E-H per Lord Nicholls; and see eg Halsbury's Laws Vol 8(1) Compulsory Acquisition para 233.

<sup>11</sup> [1941] 2KB 26, 43.

<sup>12</sup> See LAA1989 s 55(2)(c) (in Appendix 2): “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...”.

<sup>13</sup> See para 86 above.