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FAO Mrs Lucy Galloway

Our ref: ISTK/cae/O/CP Reform

17th June 2015

Dear Madam

Consultation on Reform of the Compulsory Purchase Regime in Scotland

1. Introduction

At Strutt & Parker we have experts in land/estate management, sporting, planning, development, building surveying as well as the sale and purchase of farms and estates. Beyond that, our residential agency teams sell and let flats and houses in Edinburgh and in market towns up and down the country. We also have expertise in commercial real estate, from offices and retail spaces to industrial units and leisure property.

Our rural property consultants manage 1.5 million acres of land and work with over 450 clients on some 600 estates across the UK. In all sectors of our business we have experts who undertake professional valuation, compulsory purchase, renewable energy and expert witness work.

This response is collated on behalf of Strutt & Parker by Ian Thornton-Kemsley, the firm's specialist on compulsory purchase in Scotland who is acting for some 25 landowners affected by the AWPR and has recent experience of CPOs in respect of the M8, the M9 Spur, and the Fochabers Bypass, as well as the exercise of compulsory powers by promoters of gas and oil pipelines, water and sewerage pipes, electricity cables and telecoms. It combines his own experience in dealing with CPO issues with that of the wider firm.

2. General comments

a) The process

Under the present CPO regime a landowner 'sells' his property to a third party not knowing the price he will be paid for the property or even when he may receive such monies. He will receive no interest on any sums due from the time he is dispossessed until the time his claim may eventually be resolved. He is not entitled to any payment for the stress or inconvenience this may cause him or his family.

We are not aware of any other situation where a landowner would willingly enter into such an agreement.

b) Design & Build

It is our experience that most major projects are not carried out by an acquiring authority but by private companies acting on their behalf.

The traditional approach for construction projects consists of the appointment of a designer on one side, and the appointment of a contractor on the other side; the acquiring authority remaining in full control of the project and the land. The design & build procurement route changes this:-

- Acquiring authority engages agents to design the scheme in general terms. For example, the design and promotion of the AWPR was carried out by Jacobs (who are also instructed in respect of the A96 improvements). It is they who carried out the actual design of the scheme and the requisite EIA's in accordance with the Design Manual for Roads and Bridges (DMRB) on behalf of Transport Scotland. It is they who are providing advice to the District Valuer in respect of disputes.

- Having successfully promoted a scheme and obtained a CPO, it is now usual to put the work out to tender and for the scheme to be delivered on a design & build basis.

- Prospective contractors tender a price to complete the design and construct the scheme. The tendering is usually competitive and the best "overall submission" should win (assessed on price, design, programme etc)

- The winning contractor carries out detailed design and construction through employed design consultants and sub-contractors. This may result in variations from previously discussed plans.

- In terms of the contract control of acquired land often passes to the contractor for the build and thereafter the maintenance period (up 30 years in some cases).

- The successful contractor is then responsible for the delivery of the scheme and its maintenance

The thinking is that in a design and build process the successful tender will give savings by tailoring their detailed design of the scheme using their particular experience and skill set. It may answer an acquiring authority's wish for a single point of responsibility in an attempt to reduce risks and overall costs but, from the point of view of affected parties, it enables the acquiring authority to attempt to abrogate its responsibility of the scheme to the contractor.

The main issues of this process in relation to the current CPO regime are:-

- The acquiring authority relinquishes control over design and implementation. This frequently gives rise to quality issues.

- Adversarial attitudes between the contractor and the acquiring authority remain; these are perhaps worse than traditional contractor routes because of the large tender sums involved and the drive of the successful tenderer to save on costs. Affected landowners may be 'squeezed' in this process.

- The acquiring authority is, in our experience, reluctant to agree any variation to the scheme after the contract is let because of the nature of the contract with the contractor.

- The acquiring authority attempts to abrogate any responsibility regarding issues during the build to the contractor. The contractor as a private company tends to ignore the landowners affected by the scheme.

This leaves the affected landowners in such schemes in an unenviable position adding to their costs in dealing with issues arising during the process.

Current CPO legislation is more appropriate to the age where the acquiring authority itself designed, promoted then built the scheme. Any revised legislation must address the current practice and ensure that any agents for the acquiring authority have a clear responsibility in the CPO process

c) Time taken in CPO process

We appreciate the aim of the proposals is to make the compulsory process clearer, fairer and faster. In so doing the process must also balance private property rights and public interest.

We consider that timeliness is frequently a problem in compulsory purchase. Whilst this may be considered a concern to those promoting schemes it is also an issue for affected landowners. This may be due, for example, to undue delays in the planning or appeals process leading up to confirmation of a CPO, or conversely acquirers finding themselves short of time and so take undue haste in taking entry. During the period between announcement of a scheme and implementation, property in the vicinity of the proposed works (and any alternatives) is effectively blighted.

We are also experiencing considerable delays in the assessment and payment of compensation. There is no effective means for a claimant to speed this up, save taking matters to the LTS (which is already occurring in respect of a number of AWPR claims).

d) Claimant's costs incurred before confirmation of a CPO

The long procurement process and tendency to consult on options, however desirable, leads to uncertainty for those property owners along the corridor of any scheme. Such 'blight' on alternative corridors exists until the actual route is finalised and remains in respect of the scheme until the vesting date.

In the case of the AWPR the uncertainty remained from the date of the announcement of the alternative route in 2006 until the vesting date in 2013.

The 'roadshow' for improvements to the A96 has already 'blighted' properties along the route options. This will continue until the scheme is delivered.

Any revised legislation should contain clear duties on an acquiring authority towards affected parties during the design, promotion and implementation of any CPO scheme.

e) Taxation

There are a number of aspects of the interaction of the compulsory purchase regime with the taxation of property which can cause hardship to claimants and which could be ameliorated by Government intervention. In particular, the conversion of a property asset which might qualify for valuable reliefs from capital taxes into a sum of cash which would be fully taxable can be especially problematic in the rural property sector.

f) Other CPO issues

We note that the Law Commission do not propose to deal with: -

i. Blight

   Blight was a key issue identified in the 2001 Scottish Executive Central Research Unit Paper *Review of Compulsory Purchase and Law Compensation.*

   There is a general acceptance that the promotion of, or indeed the threat of compulsory purchase, tends to act as a blighting effect on the marketability of property and associated value. This blight in

practice arises as soon as a CPO corridor is announced. The timescales involved in the CPO process are long and this tends to exacerbate the effect of blight. Our experience is that it can prove extremely difficult for property owners to dispose of their properties in the vicinity of any CPO scheme.

There are a number of strict criteria that have to be met prior to any Blight Notice being valid in current legislation. The default position of acquiring authorities on receipt of a Blight Notice is to reject that Notice on the basis that at least one criteria has not been met – and thus the Notice fails. The effect of not being able to dispose of one's principal asset or, alternatively, being left in limbo for a considerable time prior to compulsory acquisition is manifestly unjust. We consider that the circumstances within which a Blight Notice can be served should be considerably widened.

Blight notices are currently restricted to owner-occupiers and there is a Rateable Value limitation for non-residential properties. Blight does not discriminate between different property types and values. We consider that the requirement that reasonable efforts be adopted to dispose of the property on the open market prior to a Blight Notice being able to be served should also be removed. This is especially so nowadays with regard to residential properties in Scotland as a consequence of the introduction in 2009 of the Home Report. Whilst such a Report tends to focus on the state of repair/condition of the property relevant factors, such as the threat of compulsory purchase, will also be taken into account and will undoubtedly affect marketability and value. It is common practice for potential purchasers of the property to view the Home Report online prior to undertaking any physical viewing of the property and the mere mention of even the threat of compulsory purchase tends to have the effect that the market quickly loses interest in the property. It should also be recognised that there is a cost to be borne by the residential property owner in instructing a Home Report.

ii. Injurious affection where no land is taken

Government has, on the one hand, recognised that blight does not stop at the boundaries of a public work but, on the other, has limited the amount of compensation to be paid in such circumstances; that amount is determined relative to the seven physical factors as stated in the Act and thus loss of view, privacy, amenity etc are not compensatable.

We consider that reform is also required in respect of these provisions.

We consider that the compensatable items should be on the basis of full loss. We also consider that in any CPO the acquiring authority should be under a duty to consider the effect of the scheme on such properties and therefore be under a statutory obligation to reduce the effects of its public work by providing sound insulation and other mitigating works as circumstances dictate.

Although not perhaps "core" these issues all form part of the CPO regime and we consider this should also be addressed as part of this reform.

We set out our comments on the specific matters raised by the Law Commission using the headings contained therein.

PART 1: INTRODUCTORY AND GENERAL

Chapter 1 Introduction

1. The current legislation as to compulsory purchase should be repealed, and replaced by a new statute.

(Paragraph 1.14)

Comments on Proposal 1

We wholeheartedly agree. The current legislation spread as it is between various enactments since 1845 is cumbersome and not fit for purpose in the current age.

Legislation such as the Defence Act 1842, invoked by the MoD against a landowner as recently as 2005, is arguably not ECHR compliant in that there is no right to a hearing.

Chapter 2 General issues

2. For the purposes of compulsory purchase, is the current definition of "land", set out in the 2010 Act, satisfactory?

(Paragraph 2.56)

Comments on Proposal 2

We consider this satisfactory

3. Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?

(Paragraph 2.70)

Comments on Proposal 3

We endorse the comment that acquiring authorities attempt to impose conditions as part of servitudes but do understand the need for such rights (such as restrictions on buildings over electrical cables etc).

We consider that any new legislation should provide that any CPO should be proportionate to the need and by the least intrusive means.

4. What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?

(Paragraph 2.70)

Comments on Proposal 4

It is our experience that electricity undertakers, for example, frequently seek CPO rights for cables (e.g. for offshore windfarms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves because they are selling on any rights they acquire for monetary gain.

If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2.

5. Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?

(Paragraph 2.73)

Comments on Proposal 5

We understand the need for such rights

In exercising such rights it must be made clear in what state the land is to be returned to the landowner as well as the timing as this is a factor in assessing compensation.

Chapter 3 Human rights

6. The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.

(Paragraph 3.51)

Comments on Proposal 6

We agree that this should be expressly stated. We also note the statement at 10.4 that compensation has always been paid in the UK where a Public Authority acquires the property of an individual. That is not strictly the case, as we see it, in that Scottish Water acquires rights to lay pipelines through land and pays no compensation for the presence of the pipe in the land, merely the disturbance arising from installation. The presence of the pipe does have a diminution in value but it is extremely difficult to ascertain values and Scottish Water point blank refuse to pay for this. This should be considered in contrast to the situation in England.

7. Do consultees agree with our view that the current statutory provisions applicable to compulsory purchase in Scotland are compatible with the Convention?

(Paragraph 3.87)

Comments on Proposal 7

With the exception of the Defence Act as set out in Proposal 1, we broadly agree with this save that there is no acknowledgement of the effect on individuals affected by a compulsory purchase order in the present compensation provisions.

PART 2: OBTAINING AND IMPLEMENTING A CPO; THE MINING CODE

Chapter 5 Procedure for obtaining a CPO

8. Compulsory purchase by local authorities under local Acts should be carried out by means of the standard procedure.

(Paragraph 5.5)

Comments on Proposal 8

We agree that there should be a single standard procedure. This procedure should entail: -

a) Promotion of draft CPO
b) Time for objections
c) Hearing or Inquiry
d) Procedure for confirmation/modification/rejection of draft CPO
e) Vesting (include a requirement to provide broad details of any claim)
f) Date for declaring formal completion of the scheme.

9. Is there any reason why the procedures to be set out in the proposed new statute should not be used for compulsory acquisition under any of the enactments listed in Appendix B?

(Paragraph 5.18)

Comments on Proposal 9

We see no reason why this should not be the case.

10. Is there any relevant legislation missing from that list?

(Paragraph 5.18)

Comments on Proposal 10

We are disappointed that the opportunity is not being taken to consider streamlining differing provisions in these other legislation. For instance the right for water authorities to instal water and sewerage pipes in land without paying compensation for the existence of the pipe and the diminution of value arising therefrom appears ripe for reform.

We are particularly concerned by Scottish Water's refusal to accept liability for damage caused by bursts in sewage pipes installed under compulsory powers.

11. Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?

(Paragraph 5.20)

Comments on Proposal 11

The powers to survey land have become much more prominent in recent years because of the increased requirement for environmental surveys in route selection but also because of design and build. It is our experience that acquiring authorities (particularly Transport Scotland) cite their statutory powers to carry out such work but fail to point out rights to compensation.

We agree that it is necessary for acquiring authorities to have powers of entry for survey purposes. We do not agree that a warrant should be given on "emergency" grounds. If access is urgently needed for survey purposes and that access is refused, a warrant can be sought on grounds of refusal. We do not consider it proportionate to allow a warrant to be sought on any other grounds for survey purposes.

All powers of entry should have a corresponding obligation to keep any damage to a minimum, to make good all damage It should be a condition of any such access that any loss or damage should be paid for by the acquiring authority and no landowner or occupier should be left worse off following exercise of such rights.

An authority can go onto land with not less than 3 and not more than 14 days' notice. The issue here is the practice of statutory authorities in respect of this right. Although such works may have been planned for some time it is our experience is that notice is given to the landlord at the last minute (often citing the minimum notice provisions set out in the legislation). This is especially relevant around harvest time when a prior consultation and delay of a few days might make the job easier for both sides.

Intrusive survey works, such as the digging of trail pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. We therefore suggest that if a notice period of less than 28 days is adopted for non-intrusive surveys, the 28 day minimum period should apply for intrusive works where the surface of the land is disturbed.

We consider that a notice period of 28 days would be more reasonable than the current provisions. Such survey work is likely to be planned some time in advance and a 28 day notice period should not unduly inconvenience acquirers in most circumstances. We consider that 14 days is the absolute minimum notice period for non-intrusive survey works and that any shorter period would be unreasonable.

Compensation must also include an obligation to reimburse landowner's time and any professional fees incurred. Acquiring authorities exercising such powers should be under a duty to inform affected parties of their rights to compensation.

12. Is the current list of statutory objectors satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.24)

Comments on Proposal 12

There is frequently difficulty in knowing what constitutes a 'local newspaper', with (for example) certain notifications regarding planning appearing only in certain papers with limited circulation.
Notification of statutory objectors is a moot point in that quite often agricultural tenants are not given formal statutory notice (examples from AWPR can be provided).

13. Should there be any further restrictions on the circumstances in which a statutory objector can insist upon a hearing or inquiry?

(Paragraph 5.25)

Comments on Proposal 13

We accept that it is undesirable for one minor landowner to hold up a massive infrastructure project with its attendant cost implications and the uncertainty caused to affected parties (one such example being Mr Walton in respect of the AWPR). It is however difficult to see how restricting objections might operate so as not to infringe rights of individuals. We consider that there is a difficult balance to strike in this respect but that this is one of public policy.

14. Should the proposed new statute provide that Scottish Ministers must refer cases to the DPEA within a specified time limit and, if so, within what time limit?

(Paragraph 5.26)

Comments on Proposal 14

Whilst we can see that timescales could bring benefits, we would prefer to see them introduced on a non-statutory basis so that inspectors could have the discretion to extend the timescale if circumstances demanded it in a particular case. Inspectors should be under a duty to explain their reasons for extending the timescale at the time when that decision is taken.

We note that timescales can be unhelpful in a Town and Country planning context. We have anecdotal evidence that under-resourced planning officers, rushed into making decisions, will sometimes refuse an application early in the process rather than spend time dealing with it and risk breaching the deadline. We would be anxious to avoid the risk of anything similar happening in the compulsory purchase appeal context.

15. Should the DPEA have discretion over the process for determining objections to a CPO similar to that which they have in relation to planning matters?

(Paragraph 5.30)

Comments on Proposal 15

We consider that the DPEA should have such discretion subject to a statutory requirement to balance public and private interests.

16. The timescales for the process of securing CPOs should continue to be set out in subordinate legislation.

(Paragraph 5.32)

Comments on Proposal 16

There should be a minimum timescale set out in primary legislation.

17. Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?

(Paragraph 5.41)

Comments on Proposal 17

On the fact of it, yes, but issues could arise where there is little or no judicial oversight in the exercise of compulsory powers (as an example as is the situation in the Electronic Communications Code in respect of exercise of powers under paragraphs 5 and 21).

Research indicates that the majority of CPOs are from the Scottish Ministers. It is accepted that a democratically elected body is the appropriate body to confirm CPOs but consider that revised legislation should spell out clear duties on any such confirming body.

The procedure of confirmation of CPOs by the Scottish Ministers has given rise to issues recently. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an Alternative put forward by affected landowners[1]. From evidence led at a subsequent Lands Tribunal hearing in *Strang Steel –v- The Scottish Ministers*[2], it appears that this recommendation was not followed.

In the M74 extension the Reporter's Recommendations were to reject the public works and associated CPO but this recommendation was rejected by the Scottish Ministers.

The decision and reasoning of the confirming body in such circumstances should be transparent and public. This is particularly so where confirmation of CPO is done by an arm of the promoting body (e.g. Scottish Ministers for a Transport Scheme). We consider it

[1] The Reporter's findings are at http://www.dpea.scotland.gov.uk/Document.aspx?id=135841
[2] LTS/COMP/2013/12

important that any enactment should set out an obligation on the confirming authority to act independently and judicially in order to emphasise this is not merely a rubber stamp exercise as it appears to the wider public.

18. Are the current requirements for advertisement and notification of the making or confirming of a CPO satisfactory and, if not, what changes should be made, and why?

(Paragraph 5.42)

Comments on Proposal 18

We consider that should be a more comprehensive notification procedure. This may involve publishing details on an appropriate website and also emails to individuals, agents, or organisations who register.

19. An acquiring authority should be able to revoke a CPO.

(Paragraph 5.46)

Comments on Proposal 19

Yes, but if this occurs it would be reasonable for the acquiring authority to pay any affected party for its costs and time not only in respect of loss arising out of the CPO but also for opposing the Order.

20. Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?

(Paragraph 5.46)

Comments on Proposal 20

There is potential for blighting values of an affected property and a specified time limit introduced (say 10 years) in which a substantially similar scheme cannot be introduced (to avoid minor changes being made allowing a scheme to be reintroduced within any time limit).

21. Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.

(Paragraph 5.47)

Comments on Proposal 21

'Out of pocket' expenses suggests only nominal expenses. The cost of a party opposing one junction on the AWPR reputedly amounted to £750,000.

This proposal should be wider to include any objection to a CPO (see above). It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense etc as a consequence of their proposal to exercise compulsory powers only to withdraw.

22. Acquiring authorities should be required to register CPOs and revocations of CPOs.

(Paragraph 5.50)

Comments on Proposal 22

Revocation should be advertised and published in the same way as the CPO itself.

23. Should there be a new Register of CPOs, or should an entry be made in the Land Register?

(Paragraph 5.50)

Comments on Proposal 23

We agree that a register should be set up.

24. Is the current three year validity period of a confirmed CPO reasonable?

(Paragraph 5.59)

Comments on Proposal 24

We believe that it is but acknowledge that there may be a need for some flexibility depending on the nature of the project.

We consider that the time limit should be shortened to two years but that time should not run until any challenge is exhausted.

25. Should there be a precondition that a CPO will only be confirmed where there is clear evidence that the project is reasonably likely to proceed?

(Paragraph 5.59)

Comments on Proposal 25

This would create a measure of uncertainty. It should be a condition of any draft order that it can only be issued if the project is reasonably likely to proceed and the acquiring authority is able to demonstrate that finance is in place.

26. Where the acquiring authority offer to replace a public right of way which will be affected by a proposed development, should the right to insist upon an inquiry be removed?

(Paragraph 5.64)

Comments on Proposal 26

No, because the route may be issues regarding the suitability of the proposed replacement.

27. Where there is to be an inquiry into the loss of a public right of way, should any such inquiry be combined with any inquiry into the making of the related CPO?

(Paragraph 5.64)

Comments on Proposal 27

Yes.

28. Are there any other aspects of the process for making or confirming a CPO upon which consultees wish to comment?

(Paragraph 5.65)

Comments on Proposal 28

A balance is required between speed and the property/human rights of affected parties. Any new legislation should contain express duty on any acquiring authority (and its agents and contractors) to have regard to the rights of affected parties, not only during the promotion but also the implementation. That duty should also extend to their contractors to reflect the design and build nature of many projects.

We consider this is necessary to ensure that the acquiring authority properly considers alternative options prior to any scheme being eventually promoted. This would potentially negate the need for costly or lengthy Public Inquiries such as seem to have arisen from the failure of Transport Scotland to properly consider alternatives to their proposals for the AWPR. Such a duty would also avoid the conflicts encountered between affected parties and contractors in design and build schemes.

Chapter 6 Challenging a (confirmed) CPO

29. Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?

(Paragraph 6.38)

Comments on Proposal 29

We are concerned at such a proposal. There should be clear duties met in any new legislation on any acquiring authority in designing and implementing a scheme which could lead to a CPO.

There suggestions that acquiring authorities are exercising CPOs on the basis of poorly researched and justified schemes.

Transport Scotland, in their CPO application for the AWPR, relied upon work undertaken by Jacobs and the Scottish Agricultural Colleges (SAC). Much of that work appeared to have been insufficiently researched resulting in time being taken at Public Inquiry in respect of such matters.

Work to justify the route selection for the Fastlink element of the AWPR was carried out between its announcement in December 2005 and May 2006 when the preferred route was announced. All the nine options were based on a link with the A90 at the Netherley junction at Stonehaven. The process could not have been informed by an EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centred on the Fastlink.

Issues arise in the failure of an acquiring authority to properly consider and evaluate alternatives. In respect of the AWPR, considerable time in the Public Inquiry revolved around alternative routes for the Stonehaven junction and to the north of the Don crossing. At the Public Inquiry these alternatives were not given a fair hearing because of the Reporter's concerns that it would delay the Scheme.

In respect of the Fochabers Bypass it is noteworthy that the Reporter was unable to consider an alternative scheme which would not have affected the design landscape of Gordon Castle, a Grade A listed building. Concerns were raised about some of the work undertaken in support of the promoter's route[3]. Transport Scotland stated that an alternative crossing of the Spey to the south of Fochabers was not practicable; we note that the same crossing is now incorporated in proposals for the dualling of the A96!

In another case currently before the LTS it would appear that Transco promoted a CPO for a gas pipeline before a Reporter notwithstanding the fact that, at the time of the CPO hearing, there were questions whether the rights sought were actually necessary. It would appear that Ofgem disallowed the pipeline as being unnecessary in their Transmission Price Control Review stating that NG, on the basis of their knowledge at the time, should have cancelled the scheme in early 2003.

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[3] E.g. paragraph 3.23 http://www.gov.scot/Publications/2005/03/20781/53845

An obligation on acquiring authorities to properly consider alternatives in designing and promoting CPO schemes is likely to go a long way towards mitigating issues at Public Inquiry and the LTS.

30. Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?

(Paragraph 6.38)

Comments on Proposal 30

There should be a clear duty on any acquiring authority to carry out its EIA etc with due care and diligence and if this is not done then there should be a clear right to claim damages.

Likewise an ability to claim damages against a confirming authority might lead to proper scrutiny during this process.

31. Do paragraphs 15 and 16 of Schedule 1 to the 1947 Act operate satisfactorily?

(Paragraph 6.39)

Comments on Proposal 31

We increasingly question that the correct procedures are followed in the process of arriving at a scheme and the consideration of alternatives.

32. Should any challenge to a CPO, on the ground that it is incompatible with the property owner's rights under the Convention, be required to be made during the six-week period for general challenges to a CPO?

(Paragraph 6.44)

Comments on Proposal 32

This would seem sensible

33. Are there circumstances in which such a challenge should be permitted to be made at a later stage?

(Paragraph 6.45)

Comments on Proposal 33

We cannot envisage such circumstances

34. Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?

(Paragraph 6.48)

Comments on Proposal 34

Yes, judicial discretion would seem to accord with ECHR requirements.

35. Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?

(Paragraph 6.51)

Comments on Proposal 35

There has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR but we consider this to be unreasonable given the uncertainty that would result for affected landowners. We believe that situations such as arose in the AWPR would not arise were the clear duties on acquiring authorities in arriving at any CPO scheme.

Chapter 7 Implementation of a CPO

36. Any restatement of the law relating to compulsory acquisition should include provision along the lines of sections 6 to 9 of the 1845 Act.

(Paragraph 7.9)

Comments on Proposal 36

We support such a proposal

37. Should the proposed new statute list all the interests in respect of which a notice to treat should be served?

(Paragraph 7.15)

Comments on Proposal 37

We consider there should be a single standard CPO process for all affected rights and interest.

38. It should be made clear that a person claiming to be the holder of an interest in land, and who has not been served with a notice to treat, has the right to raise proceedings to determine (a) that the interest attracts compensation and (b) the amount of that compensation.

(Paragraph 7.19)

Comments on Proposal 38

We are generally in support of this proposal.

39. Should there be a time limit within which such proceedings must be raised?

(Paragraph 7.19)

Comments on Proposal 39

We consider that any time limit should run for a period of 6 years from the completion of the project (based on rights acquired by peaceable occupation).

There should be a duty on an acquiring authority to specify such a completion date and advertise this appropriately (i.e. in the same way as the original CPO).

40. Should a notice to treat be accompanied by information as to how compensation may be claimed?

(Paragraph 7.25)

Comments on Proposal 40

We agree wholeheartedly with this proposal which should be extended to cover any taking of entry (e.g. in respect of ground investigation works also).

Such information should be agreed with stakeholders and include details on rights to serve 90 day notices etc as well as entitlement to professional advice.

41. Does paragraph 7 of Schedule 2 to the 1947 Act operate satisfactorily in practice?

(Paragraph 7.29)

Comments on Proposal 41

We note that the notice to treat procedure is now rarely used. This suggests it is considered not to operate satisfactorily.

42. When fixing interests in land, should any action taken or alterations made before service of a notice to treat, be considered differently from any action taken or alterations made after such service?

(Paragraph 7.29)

Comments on Proposal 42

See comment above.

43. Does the three-year time limit on the validity of the notice to treat work satisfactorily in practice?

(Paragraph 7.40)

Comments on Proposal 43

See comment above.

44. Should it be competent for an acquiring authority to withdraw a notice to treat and, if so, within what period?

(Paragraph 7.51)

Comments on Proposal 44

Whilst the comments above should be noted, we do not consider there to be a difficulty here for any acquiring authority. Any EIA for the CPO should have identified the potential for development and therefore the level of compensation payable.

45. Should there be any circumstances which would entitle an acquiring authority to withdraw a notice to treat after they have entered on to the land?

(Paragraph 7.51)

Comments on Proposal 45

There may be but this entitlement should include a provision that in so doing the acquiring authority is liable not only for any losses but also any costs incurred in objecting to the proposed scheme (but see comments above).

46. Should the period after which entry can proceed, following a notice of entry, be extended to, say, 28 days?

(Paragraph 7.67)

Comments on Proposal 46

See comments above.

47. Alternatively, should it be competent for a landowner to serve a counter-notice within a set time limit following service of a notice of entry, whether or not the acquiring authority have entered on to the land?

(Paragraph 7.67)

Comments on Proposal 47

See comments above.

48. For how long should a notice of entry remain valid?

(Paragraph 7.73)

Comments on Proposal 48

We note that the commentary at paragraph 7.78 to the effect that an acquiring authority does not need to serve a GVD notice in relation to a short tenancy – which is defined as a tenancy for a year, or from year to year or any lesser interest. This would seem to cover a number of 1991 Act tenancies where the tenancy was for a period and then from year to year. Thus it might be that they do not need to be served notice (subject to general comments above re notice to treat).

49. Should the acquiring authority be required to serve notice of their intention to make a GVD on holders of a short tenancy or a long tenancy with less than one year to run?

(Paragraph 7.78)

Comments on Proposal 49

We agree that there is no reason to exclude such short term tenancies.

50. Where a GVD applies to part only of a house, factory, park or garden, do the current provisions adequately safeguard the interests of the acquiring authority and the landowner and, if not, what alterations should be made?

(Paragraph 7.86)

Comments on Proposal 50

We consider the 28 day notice period for severance to be tight.

51. Should a GVD be available in all circumstances?

(Paragraph 7.89)

Comments on Proposal 51

We suggest a single CPO system be adopted by way of GVD.

52. Are the time limits for implementing a GVD satisfactory?

(Paragraph 7.89)

Comments on Proposal 52

We consider that these are satisfactory.

53. Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.

(Paragraph 7.97)

Comments on Proposal 53

We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD.

In respect of the AWPR six years elapsed between the draft order and the vesting date. During that time any planning application for land required along the route could not be determined. In *Strang Steel –v- Scottish Ministers* issues arose about the probability of planning at the relevant dates. The LTS found that "*there was no reason to doubt that the Council would have granted planning* [for a retail store and petrol filling station]...*in the no scheme world*"[4]. They went on to state "*on the balance of probability* [planning consent]

[4] Paragraph 102

would have been granted on or before 2009"[5]. Had this been the case the landowner would have purified the missives for a sale of the site to Sainsburys for £10.25M. In the event he was awarded only £1.7M. Had the scheme not affected Field 52, the landowner would have sold the site for the highest figure. It is difficult to escape the injustice of this situation which arises out of the working of the current legislation.

The basis for payment of interest is wholly inadequate. The statutory rate is set at 0.5% below the Bank of England base rate which, since March 2009, means that the statutory rate is 0%.

As set out below, acquiring authorities have no incentive to settle claims while affected parties, many incurring commercial overdraft rates of 3% over base,(together with other bank charges) are severely disadvantaged.

In addition the current calculation is based on simple interest whereas the real market operates on compound interest.

54. Where the acquiring authority enter on to the land before it has vested in them, compensation should be assessed as at, and interest on compensation should run from, the date of entry.

(Paragraph 7.98)

Comments on Proposal 54

See comment above.

Compensation for temporary occupation (together with interest) should run from the date of that occupation.

55. In a situation falling within section 12(5) of the 1963 Act, the date upon which compensation should be assessed, and the date from which interest on the compensation should run, should be the date upon which reinstatement of the building on another site could reasonably be expected to begin.

(Paragraph 7.99)

Comments on Proposal 55

We do not support this proposal and note that it could be much earlier than any GVD (which in the case of the AWPR was January 2013. .

In respect of an equivalent reinstatement claim on the AWPR, reinstatement commenced in autumn 2010 and was completed in 2012. In respect of the Aberdeen International School building commenced in 2006 and completed in 2010. The GVD was 2013

[5] Paragraph 109

56. Should the proposed new statute confer upon the LTS a discretion to fix the valuation date at a date different from any of those mentioned above, where it appears to the LTS to be in the interests of justice?

(Paragraph 7.101)

Comments on Proposal 56

It is difficult to see how this would work in practice. Would it apply to all claims or only in respect of claims lodged before the LTS?

57. Where an acquiring authority are in genuine doubt as to whether or not they own a particular part of a parcel of land which they intend to acquire, where title is in the Register of Sasines, they should be able to:

(a) use a GVD in relation to the whole of the land, and

(b) register the GVD in the Land Register.

(Paragraph 7.106)

Comments on Proposal 57

We support this proposal.

58. The provisions of sections 84 to 86 of the 1845 Act should be repealed and not replaced.

(Paragraph 7.114)

Comments on Proposal 58

We support this proposal.

59. What, if any, alterations should be made to the time limits for the various steps involved in the implementation of a CPO?

(Paragraph 7.115)

Comments on Proposal 59

On balance a time limit may be of assistance.

We envisage this being based on the date of opening. There may be different dates for various parts of a scheme (cf the declared opening dates for the M8 to trigger part 1 claims). These dates must be advertised etc in the same manner as the original CPO.

60. Would a new method of implementation of a CPO, along the lines described in paragraph 7.119, be preferable to continuing with the current two methods of implementation?

(Paragraph 7.120)

Comments on Proposal 60

We would welcome a single implementation procedure.

61. If so, what features should it have in addition to, or in place of, those mentioned above?

(Paragraph 7.120)

Comments on Proposal 61

See our comments in respect of Proposal 8.

Chapter 8 Conveyancing procedures

62. Where there has been a confirmed CPO the land can be transferred to the acquiring authority by means of an ordinary disposition registered in the Land Register.

(Paragraph 8.39)

Comments on Proposal 62

We support this proposal.

63. Do consultees agree that, if the GVD procedure is retained, the current rules on transfer of the land should continue, namely that:

(a) title to the land will vest in the acquiring authority at the end of the period specified in the GVD allowing the authority to take entry to the land, and
(b) registration in the Land Register will be required for the acquiring authority to obtain the real right of ownership?

(Paragraph 8.40)

Comments on Proposal 63

We agree.

64. The existing methods of transferring the land following a notice to treat should be replaced with a unitary method, to be known provisionally as a Compulsory Purchase Notice of Title. This would be executed by the acquiring authority.

(Paragraph 8.42)

Comments on Proposal 64

We support this proposal.

65. Do consultees agree that, if the notice to treat and GVD procedures are replaced by a unitary procedure, there should be a single statutory method of transferring the land to the acquiring authority?

(Paragraph 8.43)

Comments on Proposal 65

We agree.

66. The acquiring authority should always obtain a valid title where they have used a method of transfer specified in the new legislation.

(Paragraph 8.45)

Comments on Proposal 66

We support this proposal.

67. Should the Keeper be required to add a note on the Land Register stating that the title has been acquired by compulsory purchase?

(Paragraph 8.46)

Comments on Proposal 67

This may assist in subsequent conveyancing.

Identifying the fact that the acquisition was compulsory would imply that burdens would have been extinguished which might not have happened in a 'normal' transaction. Thus someone checking would be in a better position to know the position regarding the extent of Title.

68. The acquiring authority may serve a notice to treat on any tenant and extinguish the tenant's right under the lease in return for compensation.

(Paragraph 8.54)

Comments on Proposal 68

We support a single CPO system as previously set out.

69. The acquiring authority may serve a notice to treat on any liferenter and bring the liferent to an end in return for compensation.

(Paragraph 8.57)

Comments on Proposal 69

We support a single CPO system.

70. It should be made clear that, on the acquiring authority becoming owner of the land, any subsisting securities would be extinguished.

(Paragraph 8.65)

Comments on Proposal 70

We support this proposal.

71. Do the 1997 Act section 194 and the 2003 Act sections 106 and 107 require reform or consolidation?

(Paragraph 8.75)

Comments on Proposal 71

Both should be retained.

72. It should be competent to acquire new rights subordinate to ownership by means of a CPNT or GVD or equivalent.

(Paragraph 8.81)

Comments on Proposal 72

Please note our response to Proposal 3.

Chapter 9 The Mining Code

73. Should provision along the lines of the Code be included in the proposed new statute and, if so, should any additions or deletions be made?

(Paragraph 9.26)

Comments on Proposal 73

We support a single CPO process.

PART 3: COMPENSATION

In theory no landowner should be disadvantaged by a CPO. He should receive the open market value of the right acquired. The issue is that many CPO projects are notorious for taking a very long time from inception to vesting. During this time properties are affected by the Scheme, well before there is any right to compensation.

This pre-Scheme blight can easily last for decades and does not affect homeowners but also businesses. A clear example of this is the HS2 rail link in England. We are already experiencing similar effects following announcements of various routes as alternatives for the A96 improvements.

In such cases properties and land can be almost impossible to sell, let alone at their true value, and businesses cannot plan development or expansion. In such instances such as the disposal of land or buildings to meet inheritance tax or to fund relocation, owners have no choice but to sell and CPO leaves them in an invidious and highly unfair position.

Given deficiencies in the compensation regime it is little wonder that affected parties resist CPO

In the great majority of schemes, land acquisition is a small element of the cost involved, while delays in acquiring land can be very costly to the project. Allowing an acquiring authority to take an overall view of the matter would offer it a useful degree of freedom in the interests of the public purse. Where an attractive offer is made to a landowner, the acquisition process is, in our view, likely to be quicker and less contentious than if compulsory powers were used. This is likely to have a beneficial impact on schemes, allowing them to proceed more quickly and offering consequential cost savings as a result. Spending a little more money at the start of the scheme might save significant sums overall, as the Chancellor of the Exchequer observed in January to the Royal Economics Society:

> "*We should change our outdated compulsory purchase regime. Both the LSE Growth Commission and Chambers of Commerce have had the bright idea that, in some cases, if you pay people a little more you'd get planning a little quicker and the whole process could cost you less.*"

Taking this argument forward, we consider that there is a case to be made for a statutory uplift to market value to be applied to cases of compulsory acquisition, returning the situation to that which existed before 1919, when it was standard practice to allow a ten per cent uplift in the value of the land taken, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some other

jurisdictions, including on the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is:

> *"...the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent on account of the acquisition being compulsory"*

Chapter 11 Valuation of land to be acquired – basic position

74. The concept of "value to the seller" should continue to reflect any factors which might limit the price which the seller might expect to receive on a voluntary sale.

(Paragraph 11.30)

Comments on Proposal 74

The basis of assessing the value of property acquired should be derived from the concept of open market value as per RICS standards but on the basis of a no scheme world and excluding any blight arising from the scheme. Any additional value arising from special purchasers should be included.

75. Should depreciation of the value of the acquired land, caused by its severance from the retained land, be taken into account when assessing its value?

(Paragraph 11.34)

Comments on Proposal 75

We agree with this proposal but have concerns re the wording of this proposal because of the interlinking of injurious affection, severance and disturbance.

The two main methods under Rule 2 are: -

- "Before and after" (the "before" being under the no scheme world and the after the "blighted" value.
- Value on an OMV basis the land acquired and, separately, the diminished value of the retained land.

Both should be retained and a flexible approach adopted.

76. Does the current law take account of negative equity satisfactorily and, if not, what changes should be made?

(Paragraph 11.42)

Comments on Proposal 76

We consider that it does not.

Where there is a situation of negative equity compensation would be on the basis of market value; the basis of equivalence. This does however fail to recognise that an owner subject to a CPO is unlikely to sell in such circumstances but is forced to do so. We respectfully refer the Law Commission to the DCLG paper recommending that any mortgage should be transferable to prevent any negative equity situation developing.

77. Provision along the lines of rules 2, 4 and 5 should be included in the proposed new statute.

(Paragraph 11.53)

Comments on Proposal 77

We believe so.

There were two equivalent reinstatement cases on the AWPR. The complexity and cost of equivalent reinstatement means that an acquiring authority deliberately avoids any likelihood of a Rule 5 claim.

There is an issue with regard to Rule 5 and that is in regard to case law which provides that where the premises as too big for the particular purpose, reinstatement is based on something more suitable. The District Valuer resisted the reverse being applied in respect of one of the AWPR Rule 5 claims where business was such that expansion should have taken place. This merits consideration.

78. Should a test along the lines of the "devoted to a purpose" test be retained?

(Paragraph 11.55)

Comments on Proposal 78

This should be retained.

79. In cases of equivalent reinstatement, should there be an onus on the claimant to show that compensation assessed on the basis of market value (and disturbance, where appropriate) would be insufficient for the activity to be resumed on another site?

(Paragraph 11.58)

Comments on Proposal 79

On the route of the AWPR; the Aberdeen International School and Parkhill Cattery & Equestrian Centre gave rise to claims under Rule 5. The rebuild of the School was reputed to have cost £51M and the Cattery and Equestrian Centre £3M. In both cases the costs of reinstatement were substantially greater than market value because of the cost of complying with modern building regulations in respect of any new build.

The need for Rule 5 in both the AWPR cases would have been avoided with fairly minimal route adjustment (50m in respect of the equestrian centre). This emphasises the importance of acquiring authorities properly evaluating route options and having regard to the effect of their proposals.

In respect of paragraph 11.60 we agree that any claimant for equivalent reinstatement should not be required to '*demonstrate that the cost of equivalent reinstatement would not be unreasonably disproportion at to the public or social value of the building in question and the activity carried out therein*.' This seems to be an overly harsh test.

In respect of paragraphs 11.61–65 it is noteworthy that elsewhere the equivalent reinstatement might be reduced by the amount by which the value of the property might be improved. The problem, however, is that both the AWPR instances the owners might not be in a position to pay this 'top-up', and do not need a new building anyway, the current one being entirely satisfactory for their purposes. Were it not for the scheme, reinstatement would be unnecessary.

We therefore have difficulty in regard to this proposal given that the equivalent reinstatement principle means that there is no market value *per se*. A claim for extinguishment following various LTS cases is 4-5 times profit. In such circumstances, it might be difficult for the claimant to show that any compensation assessed under a Rule 2 situation would be insufficient.

80. Should the LTS be entitled to impose conditions on the payment of equivalent reinstatement compensation in order to ensure that such compensation is properly used for the reinstatement in question?

(Paragraph 11.66)

Comments on Proposal 80

This seems to be a reasonable condition.

It is our experience that in the AWPR Rule 5 claims Transport Scotland paid in instalments based on certification by project managers of the actual costs of reinstatement. We see no reason that the LTS or an Acquiring Authority should not be entitled to impose similar restrictions.

Chapter 12 Valuation of land to be acquired – rule 3 and the "no-scheme" world

81. How should the "scheme" be defined?

(Paragraph 12.78)

Comments on Proposal 81

The issues arising in *Spirerose*[6] can be seen in respect of *Strang Steel –v- The Scottish Ministers*. It is hard not to feel that the consequence of the present legislation in that case was unjust. We agree that reform is overdue.

82. Should an increase in the value of the land being acquired as a result of the scheme be taken into account for the purpose of assessing compensation?

(Paragraph 12.78)

Comments on Proposal 82

This is the concept of betterment.

In our experience betterment is used by acquiring authorities to try to reduce compensation payable; often on the flimsiest of evidence. In the AWPR it is our experience that some DVs have argued betterment to provide a £nil in response to a claim for advance payment despite having been unable to speak to planning authorities.

It seems to be unreasonable for a landowner with no land take to enjoy the full fruits of a scheme but an immediate neighbour whose land is being taken should have betterment deducted from his compensation. It suggests that a landowner who is affected by a scheme bears a disproportionate cost of its implementation

83. To what extent should an increase in the value of the land being acquired, as a result of the effect of the scheme on other land being acquired, be disregarded?

(Paragraph 12.78)

Comments on Proposal 83

See above.

84. Should any such disregard be limited by reference to the time elapsed since the adoption of the scheme or, if not, on what alternative basis should or might it be limited?

(Paragraph 12.78)

[6] *London –v- Spirerose* [2009] 1WCR 1797

Comments on Proposal 84

Blight can occur from the date of announcement of a scheme.

In respect of the AWPR the sale of a house on the revised route fell through the day the Minister announced the Fastlink proposal

Recent announcements of various proposed routes for the improved A96 have created uncertainty for property owners along the proposed route corridors.

Chapter 13 Valuation of land to be acquired – establishing development value

85. Should the statutory planning assumptions apply to land other than the land which is compulsorily acquired?

(Paragraph 13.14)

Comments on Proposal 85

We consider that the statutory planning assumption should apply to other land on the basis that the other land is the retained land in a part-only CPO.

86. Any existing planning permission should continue to be taken into account in assessing the value of the land to be acquired.

(Paragraph 13.19)

Comments on Proposal 86

We support this proposal.

87. What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?

(Paragraph 13.22)

Comments on Proposal 87

There are considerable issues here with the existing legislation which requires to be addressed.

Firstly the very existence of a scheme may involve an element of protection in respect of any planning application on the affected land. The route for the AWPR was protected meaning that any planning application could not be determined as would have been the case in a no scheme world.

It is difficult to see why such planning protection should be allowed to continue. A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the CPO is implemented.

Example 1: The situation pertaining in *Strang Steel –v- Scottish Ministers*. In this case a new route was chosen for the AWPR in 2006 and given protection by the planning authority. The route affected a field (known as Field 52) which was promoted for a supermarket. In a subsequent compensation claim the LTS found that "*there was no reason to doubt that the Council would have granted planning* [for a retail store and petrol filling station]...*in the no scheme world*"[7]. They went on to state "*on the balance of probability* [planning consent] *would have been granted on or before 2009*"[8]. Had this been the case the claimant could have sold the site to Sainsburys for £10.25M. By the time of the GVD the potential sale price had fallen to £8M. In the event the landowner was only awarded £1.7M based on hope value

Example 2: In a recent case in Angus[9] Seagreen, a body promoting an offshore windfarm, sought to use general planning policy to attempt to derail an application for a solar farm on land they wished to use as a substation for the windfarm notwithstanding the fact that no draft CPO was even in place. Their objection was on the grounds that it would increase the cost of their scheme!

We note the Law Commission deliberations in respect of a Notice to Treat at 7.26 – 7.29. If a planning restriction is to be placed over affected land to protect land which might be subject to a CPO then it would seem reasonable that that should trigger compensation from the promoting authority.

On balance we consider that any new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme).

88. Should there continue to be a statutory assumption that planning permission would have been granted for the acquiring authority's proposals if it were not for the compulsory purchase?

(Paragraph 13.30)

Comments on Proposal 88

This assumption should be retained.

89. If so, should this continue to be limited (a) to planning permission which might reasonably be expected to be granted to the public and, (b) by the *Pointe Gourde* principle?

(Paragraph 13.30)

Comments on Proposal 89

This proposal is supported subject to any CAAD process.

[7] Paragraph 102
[8] Paragraph 109
[9] Angus planning reference 14/00428/FULM

90. The statutory assumption of planning permission for development in terms of paragraph 1 of Schedule 11 to the 1997 Act should be repealed.

(Paragraph 13.34)

Comments on Proposal 90

We agree wholeheartedly!

91. Should the statutory assumption of planning permission for development in terms of paragraph 2 of Schedule 11 to the 1997 Act be repealed?

(Paragraph 13.36)

Comments on Proposal 91

Agreed, especially in view of the equivalent English provision being removed in their 2011 Act.

92. In terms of special assumptions in respect of certain land comprised in development plans, what should be the relevant date for referring to the applicable development plan?

(Paragraph 13.40)

Comments on Proposal 92

The relevant date should be on the GVD or the date of any positive CAAD,

93. The underlying "scheme" should be deemed to be cancelled, for the purposes of considering statutory planning assumptions, at the time when the CPO is first published.

(Paragraph 13.59)

Comments on Proposal 93

We support this proposal.

94. The scope of the underlying "scheme" to be deemed to be cancelled for the purposes of considering statutory planning assumptions, should be the entire scheme and not simply the intention to acquire the relevant land.

(Paragraph 13.61)

Comments on Proposal 94

We support this proposal.

95. Provision along the lines of section 14 of the 1961 Act, as amended, should be included in the proposed new statute.

(Paragraph 13.68)

Comments on Proposal 95

We support this proposal.

96. Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

(Paragraph 13.76)

Comments on Proposal 96

There should instead be some clawback provision, as might well be the case with a commercial transaction, and noted in Crichel Down cases in favour of the authority.

97. If not, should the period for considering subsequent planning permission remain as 10 years?

(Paragraph 13.76)

Comments on Proposal 97

The period should reflect what would happen in commercial transactions. We consider 10 years, two local plan periods, to be reasonable.

Chapter 14 Valuation of land to be acquired - CAADs

Compensation for the value of land taken is generally in accordance with the planning position that would have been relevant absent the scheme. There are practical difficulties where planning consent is speculative.

Normally where a sale is contemplative in such instances a landowner will sell at or about current use market value with a clawback in the event of a more valuable planning consent being obtained (often within a specified time span). Alternatively the landowner may enter into an option agreement with a developer. These options are denied a landowner subject to CPO.

If land is sold without a clawback, values are subjective and may only be at a modest uplift on OMV (cf *Strang Steel –v- Scottish Ministers* where the LTS awarded 20% of developed value. *Spirerose* awarded 40%).

CAADs are an important tool in assessing value.

98. Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?

(Paragraph 14.6)

Comments on Proposal 98

There should be no time limit for the making of a CAAD and the effective date should be the date of any positive CAAD or the GVA whichever is the earlier.

99. Do CAADs currently provide sufficient information and, if not, what further information should they provide?

(Paragraph 14.12)

Comments on Proposal 99

It is our experience that planning authorities have limited experience of CAADs and it is this that gives rise to difficulties. Aberdeenshire Council for example had not had reason to deal with a CAAD for over 50 years prior to an application for a CAAD in respect of land affected by a pipeline in 2008. As a consequence of the AWPR they have had a further four CAADs; most on the AWPR. This may be due to issues in route selection.

Better guidance is called for but we consider that the current provisions are workable.

CAAD applications should not be considered to be a full planning application.

100. Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.

(Paragraph 14.19)

Comments on Proposal 100

We would strongly disagree.

We consider that there needs to be some consistency of approach, and acknowledge that, as noted in 14.18, '*depending on what changes have taken place, this may work to the advantage of one of the parties*.' At least it would settle matters.

The important issue is that a landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme impacts on that use he should be free to require any promoting authority to acquire his interests at that point. (This is why we consider that the blight notice provisions should also be considered in any new legislation).

101. When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, with no assumption to be made about what may or may not have happened before that date.

(Paragraph 14.30)

Comments on Proposal 101

We agree with the Commission's comments regarding the present state of Scots Law in relation to the 2011 Act in England.

We are concerned with regard to the issues that arose in respect of *Strang Steel –v- The Scottish Ministers.*

102. The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

(Paragraph 14.30)

Comments on Proposal 102

We agree clarity is necessary.

103. The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs.

(Paragraph 14.30)

Comments on Proposal 103

We agree.

104. Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

(Paragraph 14.31)

Comments on Proposal 104

We disagree.

105. Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?

(Paragraph 14.33)

Comments on Proposal 105

We have considerable concerns about the operation of section 26 of the 1963 Act given the situation pertaining to *Strang Steel –v- The Scottish Ministers* where a positive CAAD issued by the local authority was cancelled by a Report following an appeal by Transport Scotland. It is worth noting the views of the LTS in that case as to the prospect of planning consent for the land in question and that the alternative site found by the Reporter in the Appeal still has not been developed.

We consider that only the landowner of the land subject to the CAAD should be entitled to appeal.

106. Should there be any change in the current (one month) time limit for appealing against a CAAD? (Paragraph 14.36)

Comments on Proposal 106

We consider this time frame to be tight. It should be three months as in respect of an appeal following refusal of a planning application.

107. Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers? (Paragraph 14.53)

Comments on Proposal 107

Since the Scottish Ministers cannot be seen to be disinterested in a scheme promoted by themselves this would seem reasonable.

In *Strang Steel –v- Scottish Ministers* a CAAD in respect of what was known as Field 52 (on the route of the AWPR) was challenged by Transport Scotland on behalf of the Scottish Ministers and overturned. Had this been a planning application no such appeal rights would have existed, and as the LTS observed in the compensation dispute, "*there was no reason to doubt that the Council would have granted planning consent*".

There appears to be no good reason for an acquiring authority to have such a right of appeal in respect of a CAAD when it would not in respect of a planning application (save in respect of judicial review).

Since the issue is one of compensation any appeal should be to the LTS.

108. If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?

(Paragraph 14.53)

Comments on Proposal 108

We agree with this proposal. Since a CPO is a valuation tool this would seem sensible.

109. Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?

(Paragraph 14.64)

Comments on Proposal 109

We support this proposal. This is the wording introduced in the amendment in 2011 to the English CPO legislation.

110. Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?

(Paragraph 14.64)

Comments on Proposal 110

We agree that there is no justification for the higher test imposed by section 25.

111. In any event, should the same criteria be applied in relation to all relevant planning assumptions?

(Paragraph 14.64)

Comments on Proposal 111

We support this proposal.

Chapter 15 Consequential loss – retained land

112. The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

(Paragraph 15.18)

Comments on Proposal 112

We agree.

113. The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.

(Paragraph 15.25)

Comments on Proposal 113

We are concerned about the drafting of such a provision.

There are however situation where, in practice, difficulties arise. In a case currently before the LTS a CPO scheme prevented the building of two turbines on retained land. The turbines would have produced a very significant income stream for the affected landowner in addition to other turbines which were built. It is important that any proposal does not rule out compensation for loss of profit. Such a situation is less risk to the actual claimant than would be reflected in an arm's length sale transaction.

Severance and injurious affection should not be confined to capital value as may be implied by a "before" and "after" valuation. There needs to be flexibility. See comment on proposal 75 above.

Often injurious affection losses are best considered by a DCF type approach for profits lost on retained land as a consequence of a CPO scheme.

Whereas the market value of acquired land should be on open market basis (i.e. ignoring the circumstances of the claimant) the principle of equivalence suggests that the circumstances of the actual claimant must form part of the assessment of a claim for severance/injurious affection disturbance.

114. Claims for injurious affection should be assessed as at the date of severance.

(Paragraph 15.37)

Comments on Proposal 114

We agree that the claims should certainly be at the date of severance and should take into account factors known or foreseeable at that date.

115. Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.

(Paragraph 15.44)

Comments on Proposal 115

Claims for severance, injurious affection are relatively common in agricultural situations. We consider that careful drafting will be required here if reference is to be to market value.

A capital valuation on a before and after basis is likely to result in a lower value than an assessment of lost profits because comparable sales reflect risk to a potential purchaser – i.e. giving rise to the issues referred to at 15.41. Issues such as this frequently arise in wind,

hydro or solar schemes affected by CPOs. The affected party should be compensated on the basis of equivalence.

On balance we consider that the wording of any injurious affection/severance claim should not be restricted to market value but sufficiently wide as to avoid the situation that arose in *Cooke –v- Secretary of State for the Environment* rather than be restricted to a market value assessment.

116. The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.

(Paragraph 15.49)

Comments on Proposal 116

Again requirements for accommodation works (new accesses, water troughs, fences etc) are common in agricultural claims. In practice because most large projects are design and build and accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works. We have encountered difficulty on the AWPR where the development consortium has not followed specification or agreements relating to accommodation works agreed with the acquiring authority (including the provision of adequate watering facilities for the livestock). On raising the issue with the acquiring authority, clients have been referred to the developer (with whom the claimant has no contractual relationship).

117. Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?

(Paragraph 15.59)

Comments on Proposal 117

We consider it is not.

118. The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.

(Paragraph 15.70)

Comments on Proposal 118

We strongly agree with this proposal. This would accord with the recommendations carried at from the Scottish Executive in 2001.[10]

In our experience in respect of the AWPR and other schemes, the Law Commission's

[10] See above.

statement at 54 that "*it is for the acquiring authority to establish that betterment has occurred and that the value of the land would not have increased, but for the scheme*" tends to be ignored. It is our experience that DVs argue betterment without adequate justification.

Given that neighbouring landowners who do not have land acquired benefit from the scheme with no set-off, it means that those with land acquired bear a greater burden of funding new schemes.

Chapter 16 Consequential loss - disturbance

Disturbance payments have long been an issue of contention.[11]

119. The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property.

(Paragraph 16.30)

Comments on Proposal 119

We support this proposal subject to the general rule against double counting.

Note our comment in respect of Chapter 15.

120. There should be an express statutory provision for disturbance compensation.

(Paragraph 16.34)

Comments on Proposal 120

We agree with this proposal for the reasons set out by the Law commission but are concerned that: -

- A claim may fall between the wording of "market value" per proposal 115 and the nature of claim envisaged under this Head.
- The potential for double counting.
- In many instances market value and disturbance issues are closely related such as the turbine example.

Any new legislation should take this into account.

[11] Cf *Review of Compulsory Purchase and Land Compensation* - Murning, Dundas & Wilson and Montagu Evans 2001.

121. Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?

(Paragraph 16.38)

Comments on Proposal 121

Yes, although it might be difficult to do more than outline the rules in the same way as Lord Nicholls did in *Shun Feng.*[12]

122. The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.

(Paragraph 16.44)

Comments on Proposal 122

There may be a disconnect between the date of publication of the notice and the actual acquisition (6 years in the case of the AWPR).

The Law Commission should consider their findings at 16.43 and provide that disturbance should be valued as at the date of vesting with provision for payment of earlier losses where the claimant can establish the same following the extended meaning set out in *Shun Feng*.

We appreciate that this may involve consideration of a duty to mitigate loss at an earlier date in such claims but the tendency for "pre-scheme blight" is such that there is a grave risk of affected landowners not being properly compensated unless such rights ae incorporated.

123. The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.

(Paragraph 16.45)

Comments on Proposal 123

Agreed, this makes sense. Please note however, our comments in respect of withdrawal of notices.

[12] *Director of Buildings & Land –v- Shun Feng Iron Works Ltd* [1995] 2 AC 111.

124. If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?

(Paragraph 16.47)

Comments on Proposal 124

The consultation process in respect of many schemes gives rise to a negative perception of values along route corridors.

Proposed schemes do influence Planning Authorities' thinking such as occurred in respect of a solar farm application before Angus Council planning[13].

Protection of routes in planning policy also denies landowners the opportunity to develop. The potential injustice is illustrated in the *Strang Steel –v- The Scottish Ministers.*

125. Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation?

(Paragraph 16.50)

Comments on Proposal 125

We believe it should include such provision. This is a logical extension of the Planning & Compensation Act 1990.

126. Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?

(Paragraph 16.57)

Comments on Proposal 126

We do not believe these operate satisfactorily.

We have experienced a growing pattern of acquiring authorities analysing title before accommodating an injurious affection claim and taking a strict approach to claims in order to reduce liability for compensation.

In particular, SSE on the Beauly Denny line have focused on partnerships owning properties. The issue is one of 'land take' affecting a legal title only, and if there is a related property which is clearly connected to the property on which the land take has occurred, but is owned under separate title, any claim to this 'unconnected' property will be rejected.

[13] https://planning.angus.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=N618EMCFG1B00

One example we encountered was a sporting estate on which the owner built his own house. Rather than encumber the whole estate with the mortgage this was separated and forms a separate title. The house is surrounded by the estate and clearly considered in practice as an estate property. SSE argued that because the house formed a separate title to the rights acquired from the remainder of the estate it could not form part of the subjects considered within the injurious affection claim for the Beauly Denny Line.

Other examples on the Beauly Denny line include are a farm owned by a partnership of four siblings. Each of the siblings has a house to which they have personal title to. The injurious affection claim on these properties were disallowed because they were owned under separate title.

Similar issues have arisen in respect of the Fochabers bypass where farming partners in an affected business had personal title to their own houses. The DV considered these were in effect Part 2 claims. Despite the bypass having opened in spring 2012 the DV is still resisting claims in respect of these properties.

In a similar instance a poultry unit affected by the AWPR is under a separate legal title but connected with an adjoining farm which sold wheat to the unit and used the poultry litter to offset fertiliser requirements. The DV is resisting a claim for loss of revenue and increased fertiliser costs on the farm following closure of the poultry unit because of the separate title despite the matter having been raised at the public inquiry as a significant issue for the holding. The value of this is in the order of £50,000 pa to the business.

127. Should the proposed new statute remove the impecuniosity rule as it has been established at common law?

(Paragraph 16.69)

Comments on Proposal 127

Yes, given that the House of Lords effectively replaced it in *Lagden –v- O'Connor* with a test of *"reasonable foreseeability"*, removal of this rule would seem reasonable.

128. Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?

(Paragraph 16.77)

Comments on Proposal 128

It is our view that "*personal circumstances*" are relevant to loss under the general head of "*disturbance*" and should be taken into account.

The circumstances of a claimant is relevant to the options open to him at the valuation date in respect of his taxation position.

The suggestion for "*compensation for the effect of the compulsory purchase on a person in those particular circumstances*" would seem to somewhat overlap with the 'impecuniosity' query of the previous question.

129. Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.

(Paragraph 16.78)

Comments on Proposal 129

We support this but have some practical concerns. In practice most landowners are reluctant to spend money on buildings which are to be compulsorily acquired. Often DVs reduce value on account of the appearance of buildings at the vesting date because of such failure to spend monies.

A balance is required and the duty to mitigate in terms of *Linden Point* should be from the date for entitlement to claim.

130. It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.

(Paragraph 16.88)

Comments on Proposal 130

We agree with the Commission's remarks at 16.92 that the evidential onus be on the party looking for extinguishment of the business and that relocation compensation should be available even when this exceeds the total value of the business.

131. Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?

(Paragraph 16.92)

Comments on Proposal 131

We agree with the Commission's leaning towards disturbance is very definitely the "default setting" with extinguishment only being a last resort.

We agree with the finding at 6.96 that it is often difficult to assess disturbance compensation until the scheme is complete, especially when relocation of a business is involved.

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

(Paragraph 16.99)

Comments on Proposal 132

The valuation date should generally be the vesting date but this should not preclude claimants from claiming disturbance prior to this date subject to the usual rules of cause and effect.

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

(Paragraph 16.99)

Comments on Proposal 133

The use of the words "...*will only be determined when sufficient time has elapsed*..." suggests a different valuation date and raises uncertainty regarding when a claim may be resolved. In practice parties tend to make/accept part payments from the point at which a claim was due with the extent of loss over an extended period being used to assess and agree the full extent.

We have concerns about the use of the word "only" in the question which seems to narrow the position further. A flexible approach to assessment of loss is important.

134. Section 38 of the 1963 Act should be repealed and not re-enacted.

(Paragraph 16.101)

Comments on Proposal 134

Agreed, the arbitrary nature of the discretion could lead to dispute and criticism

135. Should disturbance payments along the lines of those currently provided for by sections 34 and 35 of the 1973 Act be retained?

(Paragraph 16.104)

Comments on Proposal 135

Yes, this proposal seems to be fairly sensible.

136. Should the LTS have jurisdiction in relation to any question arising with regard to disturbance payments, whether mandatory or discretionary?

(Paragraph 16.104)

Comments on Proposal 136

The LTS should have jurisdiction and discretionary rights should extend to acquiring authorities. The issue of discretionary powers should be retained albeit acquiring authorities are not usually minded to use such powers, as it gives an acquiring authority the right and justification to use such powers if minded to do so.

Chapter 17 Non-financial loss

137. Should the minimum period of residence necessary in order to qualify for a mandatory home loss payment be increased and, if so, by how much?

(Paragraph 17.14)

Comments on Proposal 137

We consider that there should be a sliding scale for compensation based on residency.

138. Should the current system, of calculating home loss payments as a prescribed percentage of market value, be retained?

(Paragraph 17.21)

Comments on Proposal 138

Home loss payments in Scotland are miserly in comparison to those in England and Wales. In England the maximum payment is £50,000. In Scotland, as a direct consequence of Ministers' unwillingness to revise payments to keep pace with property values, it is £15,000.

We do not support a fixed maximum in that this is likely to be eroded over time as has been the case in the existing provisions. We consider a sliding scale on a percentage of market value (say up to 10% would be more equitable with a minimum of say, £3,000).

139. If so, should primary legislation provide for the periodic review of the relevant maxima and minima or for an automatic increase (or reduction) to reflect inflation?

(Paragraph 17.21)

Comments on Proposal 139

This would seem reasonable because successive Scottish Governments have proved reluctant to adjust these in the past.

140. As an alternative, should a system, either of a flat rate payment, or of a payment individually assessed in each case, be introduced?

(Paragraph 17.21)

Comments on Proposal 140

A flat rate payment would overpay some and underpay others, and an individually assessed payment could result in significant disputes. We favour a sliding scale as set out above.

141. Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?

(Paragraph 17.28)

Comments on Proposal 141

There are significant issues regarding assessment of farm loss payments:-

- Farm loss payments on the basis of average annual profit from the use of the land for agricultural purposes. This could be problematic after a few poor years, or where there is significant non-agricultural income.
- Deduction of imputed rent figure, whether or not the farm is rented. Again problematic.
- If the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable.

We consider that a more flexible system should be introduced, either on a percentage of the OMV of the acquired land (whether tenanted or not) given the disruption will be the same.

142. The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.

(Paragraph 17.33)

Comments on Proposal 142

Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm and not extend to other cases. Business loss has been payable since 2003 in England but similar legislation was not enacted in Scotland.

We consider that there is a case to be made for a statutory uplift to market value to be applied to all cases of compulsory acquisition, returning the situation to that which existed before 1919, in recognition of the fact that the seller is unwilling.

The uplift under the Land Clauses Consolidation (Scotland) Act 1845 in practice was to award market value plus 10% for urban properties and for rural properties 20%.[14] This model continues to be upheld on the Isle of Man.

[14] Rowan-Robinson J (1990) *Compulsory Purchase and Compensation; The Law in Scotland.*

A premium was recommended in the 2001 Scottish Executive's research paper on CPO reform.

We are aware that Aberdeen University are currently comparing CPO practices across the world. We consider that a study of the cost benefit of such a proposal would provide justification for the level of uplift. We are unsure that a 10% uplift would be sufficient to remove some of the resistance to CPOs. Offering a statutory uplift to market value would give some certainty to the parties about how "attractive" the offer had to be in order for it to be reasonable to proceed with a purchase by agreement in the shadow of compulsory powers.

PART 4: RESOLUTION OF DISPUTES; THE CRICHEL DOWN RULES; MISCELLANEOUS MATTERS

As agents we have encountered considerable difficulty with the payment of fees. We agree terms with our clients based on time upon receiving instructions but frequently find that acquiring authorities dispute such a fee basis in assessing compensation potentially leaving an affected party out of pocket.

We consider any revised legislation must set out the basis for reimbursement of any professional fees incurred by affected parties as a consequence of a CPO scheme.

Claimants' *'reasonably incurred'* fees and costs of putting the claim in response to a CPO are recoverable, effectively under Rule 6 of section 5 of the 1961 Act[15]. Until 2002 the so-called Rydes Scale was applied in the overwhelming majority of cases throughout the UK.

Rydes Scale was prepared by the Valuation Office Agency (VOA) and in an announcement on 18 July 2002 the Office of the Deputy Prime Minister (ODPM – now DCLG) stated:-

> *'....there is widespread agreement that the archaic Rydes Scale for determining Surveyors' fees should be abandoned and that Surveyors should be reimbursed in full in line with all other professional advisers. We do not therefore intend to commission any further reviews of the non-statutory Rydes Scale, and expect that fees will normally be assessed henceforth on a reasonable basis agreed between the parties'.*[16]

This followed LT decisions in *Matthews –v- the Environment Agency*[17] and *Christos –v- Secretary of State for the Environment, Transport and the Regions*[18],

The Scottish Executive research paper '*Compulsory Purchase and Land Compensation*' in 2001 called for a review of Rydes Scale. The Scottish Government however ignored such calls for a similar statement to ODPM in respect of CPO fees in Scotland.

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[15] Cf *London County Council –v- Tobin* [1959] 1 WLR 354; *McGee and Thomson –v- South Lanarkshire Council* SLT 2004
[16] http://www.voa.gov.uk/corporate/Publications/Manuals/LandCompensationManual/sect5/c-lc-man-s5-pt2.html
[17] [2002] RVR 16
[18] [2003] RVR 191

Many acquiring authorities in Scotland sought to continue Rydes Scale for convenience agreeing uplifts on the last version (Rydes Scale 1996). In 2010 organisations such as the Scottish Arbitrators and Valuers Association agreed scales with other acquiring authorities on the basis of the 1996 Scale uplifted by 40% (and more recently to Rydes plus 50%) but Transport Scotland insisted on retaining the previous rate of Rydes plus 25% declining to change their basis of assessment on the basis that surveyors were being adequately compensated due to "*the increase in land values*".

RICS Scottish guidance on surveyors' fees provides a useful summary of issues arising in respect of fees[19]. The current RICS Guidance Note on fees states:-

> *The fee should in all cases be proportionate to the size and complexity of the claim, and be commensurate with the time, effort and expertise required to deal with the case.*

We understand that the VOA has advised Transport Scotland that Rydes plus 25% is not an appropriate basis for the reimbursement of professional fees. Notwithstanding this it is our experience from the AWPR that the Scottish Ministers are only offering landowners reimbursement of professional fees based on Rydes Scale with a 25% uplift notwithstanding any agreement between affected landowners and their agents. DV's, despite their supposed impartial role, appear to be following the Transport Scotland line. In raising this issue one DV has stated in respect of the AWPR:-

> *"In relation to Rydes Scale, the RICS guidance mentions that the fee should be commensurate to the complexity of the case. This case would appear to be a simple one and as such I would see the Rydes plus 25% to be appropriate. In addition, my client, Transport Scotland has not given authority to agree anything more than a 25% uplift.*
>
> *Finally, the hourly rate is something that will have implications for all schemes throughout Scotland. Rates around my proposal have been agreed with other agents and if that is not acceptable to you, what you propose is something that we will have to consider carefully before replying to you further albeit that the fee for each case will have to be viewed on a case by case basis."*

This despite the RICS and the LT in England having discarded such a basis for fee assessment! In *Robert Poole –v- South West Water Ltd*[20] a claimant sought fees based on time whereas the compensating authority offered a fee in line with the old Rydes Scale (1996) plus 20%. The LT held that the surveyor was justified in seeking to agree a time-related fee of £120/hr for 2007/2008 rather than one calculated by reference to the officially abandoned Rydes Scale and to charge for the time spent doing so.

We accept that *Joshua –v- London Borough of Southwark*[21] highlighted the risks of not agreeing fee terms with an acquiring authority and the importance of ensuring that fees are reasonable but, in our experience, an acquiring authority has little interest in agreeing fees.

In *Strang Steel –v- the Scottish Ministers* this issue was not pursued before the LTS because of the time involved in so doing and as a consequence the claimant was only reimbursed professional fees on the basis of Rydes Scale.

[19] Calculation of surveyors' fees relating to the exercise of statutory powers in connection with land and property
[20] [2011]; UKUT 84 (LC); LCA/579/2010
[21] [2014] UKUT 0511 (LC)

Surveyors' fees are now dealt with in the same way as those of lawyers, accountants or any other professionals who become involved in the assessment of CPO. The usual basis is *'quantum meruit'*: an hourly rate reflecting the complexity and particular requirements of each case. Any new legislation should encapsulate this and take account of the wider issue of fees arising from cases such as *Smith –v Strathclyde Regional Council*[22]. Clearly the onus remains on the claimant to justify the claim.

Chapter 18 Process for determining compensation

143. Sections in the 1845 Act relating to the process of dispute resolution should be repealed and not re-enacted.

(Paragraph 18.4)

Comments on Proposal 143

We support this proposal.

144. What evidence can consultees provide of shortcomings in the current LTS procedures for determining disputed compensation claims, and what changes should be made?

(Paragraph 18.17)

Comments on Proposal 144

We note at 18.16 the six months comment from LTS that *'some straightforward cases can be concluded within six months'* inferring that is quite a short time. This may be quite a long time for agents and claimants.

We do not however share the view of RICSS in this regard. We consider that the delays in the CPO process are not entirely due to the LTS. It is our experience on the AWPR that most delays (and frustration) arises from the handling of claims by the DV; most often because they have not been instructed timeously by the acquiring authority or are unable to obtain the information required.

One DV told us *"I can deal with a claim as quickly as you want"* but has imposed significant delays by failing to respond to issues timeously. In another instance on the AWPR a £nil advance payment was made because the DV concerned had had *"...insufficient time to investigate the planning situation"*.

In our experience acquiring authorities resist written only submissions in favour of a full hearing. This significantly ramps up costs requiring the engagement of professional legal advice in response to acquiring authorities' approach. This is a significant disincentive for claimants and therefore an obstruction to fair settlement of compensation. The LTS should be given flexibility in deciding the appropriate method for determining a dispute.

[22] 1982 SLT (Lands Tr) 2

The current 0% interest payable on outstanding claims is a significant frustration to claimants and is a barrier to quick resolution of compensation; this can be readily addressed. In England a rate of 1% over base is being considered[23]. This is neither sufficient to incentivise prompt payment by acquiring authorities nor adequate to recompense a reasonably creditworthy claimant for his cost in borrowing money (as he may to do in the interim). The standard rate used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments suggested on the GOV.uk website is 8 per cent over base[24].

We consider that application of commercial rates of interest coupled with a limiting of the power to award costs against a claimant in CPO cases would go a long way towards addressing any delays in the system. ADR options should be available for smaller claims.

145. Where land is compulsorily purchased which is subject to a tenancy of under one year, disputes about compensation relating to the tenancy should be referred to the LTS rather than the sheriff court.

(Paragraph 18.19)

Comments on Proposal 145

Agreed. This makes sense, especially as the cases would almost certainly be of lower value than those referred to the LTS.

146. Should it be made clear, in the proposed new statute, that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?

(Paragraph 18.22)

Comments on Proposal 146

We consider that it is not always possible to determine the extent of a claim until a scheme is completed and it might be better to consider a period of 6 years from a date of 'declared completion'.

This would require an acquiring authority to publish a "declared completion" date in the same manner as the original CPO. Some flexibility should be afforded the LTS to hear claims outwith this period on exceptional circumstances.

In one case currently before the LTS, a claim had to be lodged and sisted to allow revenue figures to be gathered in support of the claim for loss of wind turbines.

[23] https://www.gov.uk/government/consultations/improving-the-compulsory-purchase-process.
[24] https://www.gov.uk/late-commercial-payments-interest-debt-recovery/charging-interest-commercial-debt

147. Should it be made clear, in the proposed new statute, that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?

(Paragraph 18.22)

Comments on Proposal 147

We agree that standardisation would assist.

148. What, if any, changes should be made to the time limit to claim compensation?

(Paragraph 18.23)

Comments on Proposal 148

It is considered that there should be consistency with regard to time limits, if not, then confusion may arise. In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation- as the acquiring authority should be under a statutory obligation to make this quite clear to all claimants. Equally, it is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation.

However, there may be rare occasions where, for whatever reason, a claimant is not aware that his/her property interest has been compulsorily acquired until sometime after vesting but this should not fundamentally preclude the right to claim compensation; also, the six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired. Nevertheless, it would be incumbent on the claimant to fully demonstrate why such a late claim is being made.

We are currently instructed in a situation where National Grid have installed a pipeline some 250m away from the acquired location which should be covered by such circumstances.

149. Should the LTS be given discretion to extend the time limit in some circumstances?

(Paragraph 18.23)

Comments on Proposal 149

Such discretion should not be given in that it is likely to delay determination.

150. Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?

(Paragraph 18.26)

Comments on Proposal 150

In drafting recommendations and legislation for a revised CPO regime the Law Commission should clearly state the obligation for the reimbursement of professional costs.

This should broadly follow the provisions of the 2010 Act which, under Rule 62 of the Scottish Arbitration rules, when making an Award of expenses requires the Arbitrator to have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances.

The principle for the exercise of such measure of discretion were set out by Lord Woolf in the English case of *AEI Rediffusion Music Ltd –v- Phonographic Performance Ltd*[25] approving an earlier judgement by Nouise LJ in *Re Elgindata Ltd No2* [1992] 1 WLR 107. These are:-

a) *Costs are at the discretion of the Courts.*
b) *They should follow the event except where it appears to the Court that in the circumstance some other order should be made.*
c) *The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs.*
d) *Where a successful party raises issues and makes allegations improperly or unreasonably the Court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs.*

The Court of Appeal in England has recently held that the burden of proof is on the unsuccessful party to show that there should be any departure from the general rule that costs follows success[26], the fundamental principle being that any departure is not justified unless it had been shown that the successful party had acted unreasonably and added to the costs of the dispute.

In a CPO dispute a claimant would not have incurred any such cost where it not for the CPO. We consider costs should fall to be awarded against the acquiring authority save in exceptional circumstances where the LTS decide that a claimant has acted wholly unreasonably.

[25] [1999] 1 WLR 1507
[26] *Halsey –v- Milton Keynes General NHS Trust: Steel-v- (1) Joy (2) Halliday (2004)* (LTL 11/5/2004) EWCA (Civ) 576 CA (Civ Div)

151. Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?

(Paragraph 18.27)

We have some concerns regarding the wording of this question which appears to suggest that claimants may be adding to the costs of hearings. It is our experience that it is acquiring authorities who habitually add to costs by refusing to agree written representations only and engaging senior counsel etc for hearings.

We believe that an acquiring authorities should not be entitled to reclaim its expenses in a compensation dispute save in exceptional circumstances.

Such a proposal should follow Rule 65 of the Scottish Arbitration Rules but lead to potential disputes/cost and time in considering and hearing parties in respect of such any such order (which should of course apply to both parties). The cost of such a hearing should be borne by the acquiring authority.

152. There should be a prescribed form to claim an advance payment.

(Paragraph 18.29)

Comments on Proposal 152

We consider that the present system for advance payments is fatally flawed.

We served payment requests in respect of some 14 clients affected by the AWPR shortly after the vesting date. It is our experience following this that Transport Scotland failed to pay any claim for an advance payment timeously. It would appear that, despite the delay between draft orders and the GVD, they had not put any procedures in place to deal with advance payments and only instructed the DV after receipt of such a claim. The same has been true of subsequent requests.

Furthermore the acquiring authorities' assessment of claims is cautious and so affected parties are usually left out of pocket.

An acquiring authority, assuming it has done its work properly, should be fully aware of the interests being acquired and the likely scale of compensation payable. We would support a process whereby at an early stage, the date of vesting, claims are outlined. The format for this should be designed in consultation with relevant stakeholders.

We do not agree with any proposal for a prescribed format as it may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under an obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form.

An advance payment notice should come as no surprise in such circumstances and the acquiring authority should be under a duty to deal promptly with any such request (with appropriate sanctions for any failure).

An acquiring authority should be afforded a period of time to request further information (say within 21 days of receipt of the claim).

The 90 day notice should act as an ongoing obligation. At the moment acquiring authorities seem to treat a formal request as a one off instance. A claimant should not have to instigate multiple advance payment requests to allow for any change of attitude by a DV assessing compensation (which appears to be the stance of Transport Scotland in respect of the AWPR).

We think that the combination of a prescribed form of applying for advance payment, a 21 day timescale for requesting more information and a more realistic rate of compound interest on late payments following a 90 day notice might help to improve the timeliness of handling claims for an advance payment of compensation.

153. Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

(Paragraph 18.31)

Comments on Proposal 153

Compensation should be due immediately upon temporary access for investigative works etc with interest payable on such claim from that date.

154. Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

(Paragraph 18.33)

Comments on Proposal 154

We consider that such a procedure would be cumbersome and by the time LTS make an order, it might be irrelevant and a waste of all parties' time. We consider it would be better to have some legislative compulsion for realistic advance payments to be made within the due period.

155. At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?

(Paragraph 18.34)

Comments on Proposal 155

The statutory interest rate payable has been 0% since 2009 whereas most overdrafts are 3% over base. A penal rate of interest is essential for the validity of the advance payment process.

The standard rate used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002:

It is for the Acquiring Authority to have adequate valuation and payment procedures in place.

It is however our experience of the AWPR that of advance notice requested not one payment was made timeously because this had not been addressed in advance. In a number of instances on the AWPR Transport Scotland made advanced payments of £Nil in circumstances where their agents (the VOA) had "*...insufficient time to investigate the claim*" (perhaps because they had not been instructed timeously). Such failures make a mockery of the process of advance payment requests and effectively might mean that landowners are bankrolling schemes.

To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that the acquiring authority pay interest on a penal rate on the basis on any balance outstanding from the date that payment under a 90 day request should have been made.

In the event that an affected party is incurring a loss greater than this it should be open for this to form a separate Head of Claim. This would properly balance the interests of CPO powers and those of affected parties.

156. It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.

(Paragraph 18.36)

Comments on Proposal 156

We agree with this proposal.

A payment made to the party holding security may result in penalties. If this does occur then this should form part of any disturbance claim (which we understand is accepted by the DV in such circumstances).

157. Should the LTS have discretion to: -

(a) provide for interest from a date earlier than its award, and
(b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?

(Paragraph 18.38)

Comments on Proposal 157

Oddly these proposals do not mention the suggestion of RICS that 3% interest above base rate should always be paid rather than the matter having to go to LTS for this to be awarded. This does not invalidate the LTS having the discretion under points (a) and (b), but should not be forgotten.

Albeit determining unreasonable conduct on the part of an acquiring authority is difficult where conduct has been unreasonable (such as a failure to deal with 90 day notices timeously or reasonably) then a higher rate should prevail. It would seem reasonable that an acquiring authority pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from the date that payment should have been made.

Notwithstanding any such basis of interest the legislation must not rule out any entitlement for a claimant to seek interest as part of a disturbance payment. It is currently argued by DVs that such a claim is incompetent notwithstanding the fact that the lack of compensation payment and delays in dealing with claims is resulting in claimants incurring bank costs well over statutory interest provisions.

We refer to the Scottish Arbitration Rule 50 in respect of the powers to award interest etc available to an arbitrator which we consider should be conferred on the LTS in respect of CPO disputes.

158. What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 158

It is generally perceived that arbitration would be more cost effective in smaller value disputes and it should be open for the parties to agree ADR.

159. Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 159

There seems to be a lack of information on the cost of arbitration, presumably just in relation to compulsory purchase because of the dearth of such cases

Chapter 19 Crichel Down Rules

Increasingly land take for CPO projects is not limited to what is immediately required for the project but involve land for landscaping and mitigations works.

To illustrate the extent of this:-

- In a recent SSE electricity substation CPO the extent of the substation was 4.5 ha (11 acres) but a further 13 ha (32 acres) was required for landscaping. It would appear from our investigations that SSE made no attempt to mitigate the land take and merely offered to the planning authority an extensive area as part of their planning application in order to obtain speedy consent.
- On one 109 ha (270 acre) farm on the AWPR 17ha (42 acres) were taken for roads and SUDS ponds, but an additional 6.97 ha (17.2 acres) were taken for landscaping and flood alleviation.

160. Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

(Paragraph 19.5)

Comments on Proposal 160

Yes. This would avoid the disputes noted by the Commission. It must be recognised that if land acquired compulsorily is no longer required for that purpose and are surplus there must be a right of pre-emption to the previous owner or his successors in title. Further, the acquiring authority must not be able to gain financially from the transaction, i.e. the price to be paid on any buy-back should be on the same basis as the compensation assessment.

The acquiring authority should not be able to argue "ransom value" as was Transport Scotland's clear attempt in *Strang Steel –v- the Scottish Ministers* where land acquired for the A90 was used to 'ransom' a claim for supermarket potential. The direct consequence of that dispute was for us to include potential ransom as a head of claim in other cases leading to conflict with the DV. This could be dealt with in the conveyancing of such land permitting access or service wayleaves etc and in a duty for an acquiring authority to mitigate the effects of a scheme on affected landowners.

161. Should the Rules apply to all land acquired by, or under threat of, compulsion?

(Paragraph 19.9)

Comments on Proposal 161

We believe it should.

162. Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

(Paragraph 19.11)

Comments on Proposal 162

"*Changed in character*" is a very subjective test made even more difficult by the expiry of time.

Some of the land acquired in respect of the Fochabers bypass was merely regraded and could be returned to agriculture.

Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. There may be a very good reason for a landowner to be able to have back land taken for mitigation works etc. In our experience, the acquiring authority often fails to properly manage land taken for mitigation works or control vermin leading to ongoing issues on retained land. There are issues where land acquired for a road scheme has been used to ransom subsequent owners (cf *Strang Steel-v-Scottish Ministers*).

163. Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?

(Paragraph 19.12)

Comments on Proposal 163

These are probably satisfactory.

164. Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?

(Paragraph 19.15)

Comments on Proposal 164

The time limit should be 20 years.

165. Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?

(Paragraph 19.15)

Comments on Proposal 165

See above.

166. Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

(Paragraph 19.16)

Comments on Proposal 166

We understand that after land is declared surplus it is offered round Government departments. We accept the need for exceptions in respect of other government departments or local authorities but are less certain for the need to retain the other exceptions.

167. Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

(Paragraph 19.17)

Comments on Proposal 167

This should be retained.

168. Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

(Paragraph 19.21)

Comments on Proposal 168

We do not consider that this process operates satisfactorily and the time limits should be extended.

169. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

(Paragraph 19.24)

Comments on Proposal 169

No time limit should apply. Surplus land should be returned to the landowner if not used for the scheme

170. The LTS should have a general jurisdiction to resolve disputes which arise in relation to the disposal of surplus land.

(Paragraph 19.26)

Comments on Proposal 170

We agree that the LTS should have jurisdiction.

It might however be worthwhile to allow the parties to refer the matter to arbitration under the 2010 Act.

Chapter 20 Miscellaneous issues

171. Should section 89 of the 1845 Act be repealed and not re-enacted?

(Paragraph 20.4)

Comments on Proposal 171

We support this proposal.

172. The law on the taking of enforcement action should be amended so as to make it clear that a third party under a back-to-back agreement is entitled to enforce possession by virtue of the CPO.

(Paragraph 20.5)

Comments on Proposal 172

We support this proposal.

173. Does section 114 of the 1845 Act work satisfactorily?

(Paragraph 20.10)

Comments on Proposal 173

We do not consider this section works satisfactorily.

174. Where a short tenancy is compulsorily acquired, should account be taken, for the purposes of assessing compensation, of the likelihood that it will be continued or renewed?

(Paragraph 20.18)

Comments on Proposal 174

Yes, this seems to be more equitable, and experience elsewhere has shown it to be a reasonable assumption to make.

175. Provision along the lines of sections 99 to 106 of the 1845 Act should be included in the proposed new statute.

(Paragraph 20.23)

Comments on Proposal 175

We support this proposal.

176. Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?

(Paragraph 20.27)

Comments on Proposal 176

Yes. A landowner normally has a choice of when to dispose of property and the tax regime will influence such a decision. Where land is acquired compulsorily an affected party has no such option and this should be taken into account in assessing disturbance. All flexibility is lost.

The issue is further complicated that the compensation is not broken down as is treated as a part disposal at the date of vesting when at that date the claimant may be unable to reinvest elsewhere because he has not received payment. It should be noted however that this is linked to the personal circumstances of the claimant. In addition, taxation needs to be amended such that rollover relief extends to investment in a building on remaining land.

The issue is illustrated in a recent AWPR claim referred to the LTS where the claimant was elderly and looking to cut back on the hard work of running the farm on a day to day basis. In anticipation of that position they created a tax effective set up whereby they would eventually move from the older, larger property in their ownership to a more modern, manageable custom built property. This property was however affected by the AWPR and the CPO in respect of it created an immediate Capital Gains Tax (CGT) liability for the claimant. But for the CPO that capital gains tax liability would not have arisen either now or in the future. On the death of the claimant no CGT would be payable and the base value for CGT would have been re-set at date of death value. The CGT liability could have been avoided if the claimant had been able to reinvest the whole compensation for the subjects in a replacement property. That the replacement property had to be acquired within 3 years of the compensation being agreed and that the Applicants did not reside in the replacement property for 6 years. Rather than settle the compensation claim the DV has suggested that the claimant sell the older property to fund the purchase of a replacement property. This would result in an inheritance tax (IHT) exempt asset being replaced by an IHT chargeable asset. Further, due to the proximity of the AWPR it would be a bad time to sell as this property has been blighted by the scheme and could only be sold at a substantially reduced price. The delay in settling the claim has hindered the claimant's ability to purchase a replacement property to the extent that it is now more than likely that they will require to move to the replacement property which they purchase within 6 years of that purchase and the CGT tax liability will accordingly arise. Given the claimant's age and health it is unreasonable to expect the claimant, following reinvestment in a replacement property to lease and thereafter move into, to have to wait a further six years in a situation which is likely to be detrimental to their health before making their move. If Transport Scotland had settled the claim at the time they indicated that they would, prior to the CPO, it is possible that the 6 years would now be nearing its end and the CGT liability would not be an issue.

In addition, the CPO acquisition of the property will cause an additional IHT liability. Prior to the acquisition and in accordance with the claimant's tax planning set up, the farmland would have obtained agricultural relief and as such would have been exempt from inheritance tax. The dwelling house would have obtained agricultural relief and as such may have been exempt from IHT. Unless the compensation is reinvested in a replacement property which is an IHT exempt asset, the acquisition of the farmland and dwelling house creates a future IHT which would not have otherwise arisen.

We trust this is of assistance to the Scottish Law Commission in respect of reforming of the CPO regime in Scotland and we would be happy to meet to address any queries you may have in respect of the matters revised or to expand on some of the comments made.

Yours faithfully

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For and on behalf of Strutt & Parker LLP