Law Reform Commission of Western Australia

Compensation for Injurious Affection

Project 98

Final Report

July 2008

The Law Reform Commission of Western Australia

Commissioners

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Chapter 1 Introduction

Scope of the Reference

The Attorney General has directed the Law Reform Commission of Western Australia ('the Commission') to 'report upon whether, and if so in what manner, the principles, practices and procedures pertaining to the issue of compensation for injurious affection to land in Western Australia require reform.' The Commission was particularly directed to consider:

(a) the provisions of s 241(7) of the *Land Administration Act 1997* (WA), including particularly the rights affected thereby of persons whose land is, or is proposed to be, acquired by compulsory process by the state or by an instrumentality of the state or by any other instrumentality otherwise authorised or directed by statute to acquire interests in land compulsorily, and the extent to which the adjacent land of such persons is affected by such acts and resulting works;

(b) the law and practices in relation to compensation payable or other accommodations capable of being extended to owners and other persons with interests in alienated land where such land is to be regarded as injuriously affected under the terms of those statutes set out in Schedule 1[1] regulating land for public purposes or the implementation of works of a public character;

(c) the continued use and application of the term 'injurious affection'; and

(d) any related matter.

Those terms of reference do not extend to compulsory acquisitions in general, or to planning restrictions (sometimes referred to as 'regulatory takings'[2]) in general. Injurious affection is only one element of the law relating to compulsory acquisitions and only one element of planning restrictions.

Nevertheless, several issues directly relevant to 'injurious affection' could not be adequately dealt with in this Report without following the consequences of reform into areas less closely connected to injurious affection.

Previous inquiries

In August 1986 the Standing Committee on Government Agencies of the Legislative Council of the Parliament of Western Australia presented its ninth report.[3] The recommendations made by the Committee related to s 63 of the *Public Works Act 1902* (WA), the predecessor to s 241 of the *Land Administration Act 1997* (WA) in respect of compulsory acquisition of land for public works. The Committee made 35 recommendations including Recommendation 28 that further examination was required of the issues of injurious affection and enhancement.[4] In June 1987, the Committee's 13th report also recommended that injurious affection required further examination.[5]

In December 1995, a Land Administration Bill was introduced into Parliament with an aim of providing the public with an opportunity to comment.[6] Subsequently, on 18 September 1997, the Chairman of Committees presented the Report of the Legislation Committee on the Land Administration Bill 1997 to the Legislative Assembly.[7] This report contains the clauses which had been agreed or postponed, but does not contain records of the Committee's deliberations.

In May 2004, the Public Administration and Finance Committee made 37 recommendations concerning the

1. Refer to Schedule 1 of the Terms of Reference: see Appendix 2.
2. For a discussion of the jurisprudence of compensation entitlements at common law for regulatory or 'de facto' takings, see Gray KJ, 'Can Environmental Regulation Constitute a Taking of Property at Common Law' (2007) 24 *Environmental and Planning Law Journal* 161.
3. Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Proposals for reform*, 9th Report (August 1986).
4. Ibid 3–4.
5. Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Proposals for reform*, 13th Report (June 1987) xi, Recommendation 22.
6. For more detail, see below Chapter 2.
7. Bloffwitch R, *Report of the Legislation Committee on the Land Administration Bill 1997* (1997).

use of freehold and leasehold land in Western Australia.[8]

Meanings of terms

At its widest, the expression 'injurious affection' simply refers to a deleterious effect on the value of an interest in land caused by something done or proposed to be done on the land or nearby. At that remove, the expression has little more than its ordinary English meaning of affecting in an injurious manner, in the context of land value. The original use of the expression illustrates the point. Originally, s 49 of the *Lands Causes Consolidation Act 1845* (UK) included, as an available verdict:

> [T]he Sum of Money to be paid by way of Compensation for the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such Lands by the Exercise of the Powers of this or the special Act, or any Act incorporated therewith.

More than a century of use of the expression 'injurious affection' has built an accretion of connotations, but these vary from jurisdiction to jurisdiction as legislatures differently set out the conditions for compensation and apply the expression in different contexts.

When used in the contexts of town planning and compulsory acquisition, the expression often carries the connotation that the deleterious effect is compensable, although this is not always the intention of a speaker. It is not contradictory to speak of an 'injurious affection' for which no compensation is available. However, in conventional terms, it is contradictory to speak of injurious affection when no reduction in value of land has occurred, a point that is pertinent in Chapter 5 below.

The law in Western Australia has included two distinct applications of the expression 'injurious affection'.[9]

In the context of a compulsory acquisition of an interest in land, the expression (as used in the *Public Works Act* before 1997) applied to a person's land other than the land acquired from that person. It referred to any reduction of the value of adjoining land of the person caused by the carrying out of, or the proposal to carry out, the public work for which the land was acquired.

In the context of planning law, however, the expression applies to the decrease in value of a person's interest in land caused by a planning scheme's application to that land.[10] Adjoining land is not relevant.[11] Typically, land is reserved under a planning scheme for a certain public purpose and thereafter any new use of the land must be consistent with that intended future purpose. The reserved land may or may not be acquired in the future and, if acquired, the acquisition may not occur for many years. In general terms, compensation is for any reduction of the value of an interest in land resulting from the restrictions on use of that land under the reservation.

The Commission's terms of reference are primarily related to s 241(7) of the *Land Administration Act*, which relates to the first application, but the Schedule of relevant statutes includes those which incorporate the planning application.

A related but distinct concept is 'severance damage', usually abbreviated to 'severance'. Severance, as a distinct concept, is used in Western Australia only in the field of compulsory acquisition. It has no distinct application in the planning context although, in theory, the concept could apply by analogy.

8. Standing Committee on Public Administration and Finance, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Report No. 7 (May 2004).
9. *Re Board of Valuers, Ex Parte Bond Corp Pty Ltd* [1998] 101 *Local Government and Environmental Reports of Australia* 268, 281 (Miller J). Two submissions to the Commission argued that 'injurious affection' did not carry separate 'meanings' in the planning and acquisition contexts: see Robert Ferguson, Submission No. 3 (24 January 2008); Philip Logan, Submission No. 7 (11 February 2008). This debate depends on the level of abstraction at which the issue is addressed. As explained below, the Commission agrees that only one linguistic 'meaning' is involved, but there are two quite distinct applications of the expression, which make their synthesis impracticable.
10. See the discussion in *Folkstone v Metropolitan Region Planning Authority* [1968] WAR 164, 166–68.
11. *Planning and Development Act 2005* (WA) s 173.

At common law, severance usually meant the reduction in value of a person's interest in retained land caused merely by the taking of part of the person's land (or the taking of an interest in part of that land); that is, by the severance of part of the person's land from his remaining land. Severance does not concern decreases in the value of land caused by the public work or purpose for which land was acquired.

In the context of compulsory acquisition law, both 'injurious affection' and 'severance damage' relate to an interest in land retained by a person after an interest in other land is compulsorily acquired from that person. Both relate to a reduction of the value of retained interest in land.

There are cases in which the distinction is difficult to draw. For example, land may be taken for a controlled access highway. The taking/highway may diminish the value of retained land by making access to a school/ shopping centre more difficult. Is that diminution in value severance (mere loss of the land) or injurious affection (the reduced ease of access caused by the particular public work, a highway)?

The counterpart of injurious affection is 'betterment' or 'enhancement', interchangeable terms which refer to an increase in the value of a person's interest in retained land caused by the public work or purpose for which the taking occurred. The expression 'enhancement' was used in s 63 of the *Public Works Act* in the acquisition context. The word 'betterment', however, is used in the planning context in s 184 of the *Planning and Development Act 2005* (WA). For consistency, this Report uses the term 'enhancement' in the acquisition context and 'betterment' in the planning context. However, it is not intended thereby to imply any difference in meaning.

Enhancement arises only for the purposes of set-off. That is to say, enhancement caused to a person's interest in some retained land is set off against compensation otherwise payable.[12]

While that is the common usage of 'enhancement', and is reflected in s 241(7) of the *Land Administration Act*, enhancement may also be caused by the mere taking of part of a person's interest in land; that is, unrelated to the proposed public work. This is sometimes referred to as 'severance enhancement'. It may occur, for example, when the taking of land for a road causes a person's retained land to be split into two titles, the aggregate value of which exceeds the value of the original parcel of land (less the value of the road land).

'Disturbance' is used to mean a person's monetary loss caused by disruption to the person, including to the person's business, arising from a taking of the person's interest in land or part thereof. At its simplest, disturbance refers to re-location costs and lost revenue, although a taking of an interest in land can sometimes completely extinguish a land owner's business. Disturbance can arise in a part-taking of land and, therefore, can fall for consideration along with injurious affection and severance. Usually disturbance is distinct from injurious affection and severance because disturbance is not concerned with the value of land. For example, in a part-taking of land used for a business, it is not usual to describe the cost of re-orienting the business to a smaller area as 'severance damage'. However, in certain circumstances, it is difficult to preserve the distinction.

12. For further discussion, see below Chapter 4.

The foregoing definitions do not always accord with use of the expressions by parliaments. Much depends upon the precise statutory context as different legislatures differently adjust rights of compensation. It is for this reason that courts frequently caution against undiscerning reliance on the jurisprudence of other jurisdictions.[13]

Section 241(7) of the *Land Administration Act* provides as follows:

> If the fee simple in land is taken from a person who is also the holder in fee simple of adjoining land, regard is to be had to the amount of any damage suffered by the claimant –
>
> (a) due to the severing of the land taken from that adjoining land; or
>
> (b) due to a reduction of the value of that adjoining land,
>
> however, if the value of any land held in fee simple by the person is increased by the carrying out of, or the proposal to carry out, the public work for which the land was taken, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (b).

Some aspects of s 241(7) are not universal. In particular, the following reflect Western Australian legislative decisions:

- only injurious affection to 'adjoining' land is compensable (whereas other land may be similarly affected);
- only a person from whom land is taken may apply for compensation (whereas other people may suffer similar reduction in the value of their lands);
- only adjoining freehold land is relevant (whereas an adjoining leasehold may also suffer injurious affection);
- compensation arises only when freehold land is taken (whereas damage may also be suffered when lesser interests are taken); and
- the public work which causes the loss in value probably need not be constructed on the taken land, provided the land was taken for the purposes of the public work, although this is attended by some doubt.

The section does not refer to 'injurious affection' or to 'enhancement'. Nor does it refer to 'severance', although the reference to damage due to 'severing' the land is usually taken to mean severance damage.[14] There is a plausible argument that one cannot fully understand s 241(7) without bearing in mind its predecessor, s 63 of the *Public Works Act 1902*. This is discussed in Chapter 2 below.

Some commentators take the view that paragraph (a) of s 241(7) reflects severance and paragraph (b) reflects injurious affection.[15] Certainly, the two paragraphs are commonly referred to in those terms, even if merely for convenience, notwithstanding the possible loss of precision.

Many submissions made to the Commission supported the view that s 241(7) of the *Land Administration Act* contained ambiguity,[16] in particular:

- Section 241(7)(b) refers to a reduction of the value of retained land. Considered independently of implications from the statutory context (particularly paragraph (a)), paragraph (b) would include any reduction of value caused by the concepts of severance and injurious affection. However, if paragraph (b) is intended to include reductions of value of land caused by either severance or injurious affection, then what is

13. See eg, *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2008] HCA 5, [29]–[35]; *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2007] WASCA 226, [25].
14. Indeed, the original terminology was 'damage … by reason of the severing of the lands': *Lands Consolidation Act 1845* (UK) s 49 (quoted above).
15. For further discussion, see below Chapter 3.
16. See Main Roads Western Australia, Submission No. 4 (31 January 2008); Frank Fford, Submission No. 5 (5 February 2008); George De Biasi, Submission No. 8 (14 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008). Many other recommendations for amendment implied a present lack of clarity.

the intended effect of paragraph (a)?

- Section 241(7)(a) relates to 'damage suffered by a claimant' caused by severing of land. It is not confined to a reduction of the value of the retained land. So expressed, paragraph (a) may include, or be confined to, what would otherwise be regarded as disturbance loss or loss of the margin of value called 'value to owner'.[17]

- If paragraph (b) is intended to capture the concept of injurious affection, should it be read as if it referred only to reduction in value caused by a public work, as is the case for enhancement under s 241(7)?

- Enhancement is to be set off against any damage suffered by a claimant under paragraph (b). Depending on the above issues, enhancement will be set off against either injurious affection alone, or against both injurious affection and severance.

In parallel with issues of clarity, various issues of fairness arise in the context of injurious affection.

A person is not entitled to compensation for a reduction in the value of his land caused by a public work unless the person has suffered a taking of land. For example, a freeway may be proposed to abut the lands of two neighbours and reduce the values of their two lots in similar fashion. If the freeway authority takes a portion, however small, of the land of one owner, that owner will be entitled to compensation for injurious affection whereas his neighbour will not.

Further, a person is not entitled to compensation under s 241(7) except in respect of an estate of fee simple. A person, whose interest in taken land is leasehold or an easement, is compensated for the loss of the leasehold or easement taken but not for any diminished value of an interest in retained adjacent land.

Whether these are seen as fair and reasonable is a question that is influenced by the history of compensation and by the potential effects on the public purse.

A major reason for clarity and precision in the law of compensation is to help ensure both that a landowner obtains fully the compensation the parliament intended and that the landowner is not paid twice for what is essentially the same loss. Clarity of terms is discussed in Chapter 3 below.

The use of 'injurious affection' in planning raises separate issues. Those are discussed in Chapter 5 below.

Guiding principles

The Commission's recommendations in this Report include the following policy and philosophical priorities:

- Compensation for compulsorily taking a person's land, including for damage to adjacent land, should be in an amount that is just.

- Compensation should be effected in a timely and efficient manner.

- Clarity and consistency of legislation are important to each of those two goals.

- Consistency across the state's legislation is desirable on the grounds that it is inherently unjust to treat in different fashion those who are in materially similar circumstances. This aspect of reform appears in several of the comparisons made in this Report between different statutes.

17. For further discussion, see below Chapter 3.

- Where dissimilar treatment of essentially similar cases appears, the Commission has endeavoured to recommend a just standard, not necessarily an existing standard.

In pursuit of a just balance in this complex field, it is inevitable that distinctions will be drawn that may be characterised as arbitrary.

Submissions to the Law Reform Commission

Twenty submissions were made to the Commission in response to its Discussion Paper dated October 2007. They are listed in Appendix 3 to this Report.

In general, the submissions were of considerable assistance in the formulation of this Report and the Commission wishes to express its gratitude to all those who took the time and effort to contribute.

Some submissions included admirable detail while others usefully canvassed the policy and philosophical underpinnings of relevant legislative proposals.

The submissions from government agencies and others have allowed a more confident articulation by the Commission of the above policy considerations.

Chapter 2

Legal bases of compensation

This Chapter deals with the basis of property law and land ownership in Western Australia and the rights of government to acquire and affect interests in land. That background is useful when dealing with the more specific considerations of the Commission's Reference.

Land tenure

When Western Australia was founded as a colony in 1829 the English common law was adopted to the extent 'suitable for local conditions'.[1] Such laws included the doctrine of tenure and the doctrine of divisible 'interests' in land.

Under the doctrine of tenure, all land is originally and ultimately owned by the Crown. Private land rights can be traced to a grant from the Crown and all private interests in land continue to be held 'of the Crown'.[2] This doctrine has led to use of the word 'resumption' to describe the taking of land by the Crown. In legal theory, the Crown resumes what was once the Crown's land.

The doctrine of interests in land has the result that no person, except the Crown, may absolutely own land. Rather, a person may own an interest in land. The greatest interest in land that a person can be granted is a fee simple interest, often also referred to as an 'estate in fee simple', a 'freehold title' or a 'freehold interest'.

The Crown may also grant lesser interests in land, notably a leasehold interest, but also including easements and profits a prendre.

The Crown may also grant a 'licence' to use, and even to occupy, land. For technical and historical reasons a licence is not treated as an interest in land unless a statute so provides.

Since 1890 interests in Crown land may only be granted by or pursuant to statutory authority.[3]

A private person who holds an interest in land may confer upon another person a lesser interest. Accordingly, the holder of a fee simple may grant a lease or an easement to another person and a lessee may grant a sub-lease. A lease is referred to as a 'lesser' interest than fee simple. Leases are always for a certain term whereas freehold is in perpetuity.

In theory, when the Crown acquires all interests in a parcel of land, the Crown thereafter holds, not a fee simple interest, but the absolute title sometimes referred to as the 'plenum dominium'. A fee simple estate implies that the estate is held 'of the Crown' which is why, in theory, it is inappropriate to describe the Crown as holding a fee simple estate. Nevertheless, some statutes have referred to the Crown, or to an emanation of the Crown, holding such an estate. Indeed, certificates of title are issued under which the Crown purportedly holds fee simple title.

This theory was adjusted by the High Court in *Mabo v Queensland (No. 2)*[4] to reflect the fact that native title rights do not derive from a Crown grant. The title ultimately and always held by the Crown was termed 'radical title', which was consistent with the continued existence of native title because:

> [T]he radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).[5]

When the Crown acquired sovereignty over land, it did not necessarily acquire any beneficial ownership of land. Rather, it acquired at least

1. The general principles for the introduction of English law into a 'settled' as distinct from a 'conquered' colony were laid down in Blackstone W, *Commentaries on the Laws of England* (1765) vol. 1, 107.
2. For a discussion of the history of the evolution of real property law, see Bradbrook AJ, MacCallum SV & Moore AP, *Australian Real Property Law* (Sydney: Law Book Co., 2nd ed., 1997) [1.02]. See also Standing Committee on Public Administration and Finance, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Report No. 7 (May 2004) ch 2.
3. Section 3 of the *Western Australian Constitution Act 1890* (Imp) considered in *Nicholas v Western Australia* [1972] WAR 168, 172 & 174.
4. (1992) 175 CLR 1.
5. Ibid 50 (Brennan J).

a bare radical title and, depending on extant native title, perhaps a beneficial interest in land (up to plenum dominium if no native title existed).

Interests in land may also be divided in another manner, namely as between legal and equitable interests. An equitable interest in land is one that is enforceable in equity in cases where it would be unconscionable for the legal owner to claim the benefit. For example, equity will treat as a leaseholder a person who merely has a contract to obtain a lease. Similarly, a person who has contracted to purchase freehold land may be able in equity to obtain an order that the freehold be conveyed as agreed. A person will also have an equitable interest in land when someone else holds the land on trust for the person.

Equitable interests are expressly included within the meaning of 'land' in Parts 9 and 10 of the *Land Administration Act 1997* (WA).[6]

It is open to the state parliament to extinguish, or authorise the extinguishment, of all and any private interests and estates in land, subject in the case of native title to compliance with the requirements of the *Native Title Act* 1993 (Cth).

The word 'land' is frequently used in writings concerned with compulsory acquisition of land. In light of the above, it can be seen that 'land' in that context is almost always intended to mean an 'interest in land'. Indeed, s 5 of the *Interpretation Act 1984 (WA)* provides that, unless the contrary appears, 'land' includes estates, interests and easements. For ease of expression, this Report will generally refer to 'land' in that sense save where ambiguity requires a different approach.

Compulsory acquisition of land

The power to compulsorily acquire land from a private citizen is common throughout the world. Indeed, in Australia, as in the United States, the federal government has this power under federal constitution.

The Western Australian state and local[7] governments are empowered to compulsorily acquire privately owned interests in land for defined purposes under various statutes each of which provides for compensation to the owner of the land.

The *Land Administration Act* is Western Australia's principal statute dealing with the acquisition of land for public works and for the purpose of completing statutory grants to other persons. Some other statutes, which also deal with the taking of land, expressly incorporate the relevant provisions of the *Land Administration Act*.

Under s 51(xxxi) of the Commonwealth Constitution the federal parliament's power to acquire property from any state or person must be exercised 'on just terms'. That provision is interpreted as a constitutional right to just terms, and thereby limits the federal parliament's capacity to determine the compensation that may be paid for compulsory acquisitions by the federal government. However, it is the legislature which determines the precise terms on which property may be acquired and the Constitution does not deprive the legislature of all discretion in determining what is just. Also, the interests of the general public and of the Commonwealth may be taken into account in determining what is just.[8] The concept of 'just terms', therefore, accommodates a range of different compensation provisions.

State parliaments, including the Western Australian Parliament, are

6. See *Land Administration Act 1997* (WA) s 151.
7. Local governments may compulsorily acquire land only under the *Land Administration Act 1997* (WA): see *Local Government Act 1995* (WA) s 3.55.
8. *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269, 279–80, 285, 290–91, 294–95; affirmed (1950) 82 CLR 357.

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not limited by such constitutional constraints.[9] Whether or not the state Constitution or a Bill of Rights should refer to the issue is beyond the scope of the Commission's terms of reference. However, whether a reference to just terms should be included in s 241 of the *Land Administration Act* is discussed in Chapter 3 below.

State statutes are subject to certain presumptions of statutory interpretation. Legislation is presumed not to alienate vested proprietary interests without adequate compensation.[10] A statute is presumed not to extinguish a common law right unless the legislative intention to do so is apparent.[11] On the other hand, it is a presumption of interpretation that mere regulation (in the absence of clear intent to the contrary), entails no payment of compensation.[12] Each of these presumptions operates only when the effect of the legislation is otherwise unclear.

History of current legislation

Section 63 of the *Public Works Act 1902* (WA)[13] was the predecessor to s 241 of the *Land Administration Act*. Section 63 provided for compensation, including for injurious affection, in the following terms:

> In determining the amount of compensation (if any) to be offered, paid or awarded for land taken or resumed, regard shall be had solely to the following matters:
>
> (a) The value of such land with any improvements thereon, or the estate or interest of the claimant therein, as on the date of the gazetting of the notice of the taking or resumption, without regard to any increased value occasioned by the proposed public work; or in the case of land acquired for a railway or other work authorised by a special Act, on the first day of the session of Parliament in which the Act was introduced; or in the case of land taken by agreement pursuant to s 26, the date of the execution of the agreement, unless the agreement provides otherwise ...
>
> (b) The damage, if any, sustained by the claimant by reason of the severance of such land from the other adjoining land of such claimant or by reason of such other lands being injuriously affected by the taking, but where the value of other land of the claimant is enhanced by reason of the carrying out of, or the proposal to carry out, the public work for which the land was taken or resumed, the enhancement shall be set off against the amount of compensation that would otherwise be payable by reason of such other land being injuriously affected by the taking.

A review and consultation process for the administration of Crown land began in 1988. In 1995 a draft Land Administration Bill was introduced into the Legislative Council by the Hon. George Cash (then Minister for Lands) and was open for public consultation, submissions and comment.

In his second reading speech, the Minister, after outlining in detail the contents of the Bill, said:

> I am introducing the Bill this year so that it can be considered and commented on during the parliamentary recess. I am happy to receive such feedback and to incorporate variations, where appropriate, in order to produce a workable and acceptable piece of legislation for Crown land administration.[14]

In the Legislative Assembly, the Hon. Minister for Works said:

> The first draft of this Bill was prepared and introduced in the other place in December 1995

9. *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.
10. See Pearce DC & Geddes RS, *Statutory Interpretation in Australia* (Sydney: Butterworths, 5th ed., 2001) [5.15]–[5.17].
11. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *South Australian River Fishery Association v South Australia* (2003) 84 SASR 507.
12. *Commonwealth v Tasmania* (1983) 158 CLR 1, 283.
13. The title of this Act was changed to the *Land Acquisition and Public Works Act* by s 5 of the *Acts Amendment and Repeal (Native Title) Act 1995* (No. 52 of 1995). It was changed back to *Public Works Act* by s 39 of the *Acts Amendment (Land Administration) Act 1997* (No. 31 of 1997, which accompanied the *Land Administration Act 1997* (WA)).
14. Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 December 1995, 12406 (Hon. G Cash, Minister for Lands).

> ... to provide the public with an opportunity to familiarise themselves with the new proposals and to comment on those proposals over the parliamentary recess. During the public consultation period written submissions were received from a range of government agencies, interest groups and other people. Briefings were also provided at the request of some community groups and state and local government agencies ... the 1995 Bill lapsed. Many of the comments received from the 1995 Bill were incorporated into a new Bill in 1996.[15]

On 18 September 1997 the *Land Administration Act* was passed by Parliament and commenced on 30 March 1998. The *Land Administration Act* consolidated the compulsory acquisition provisions of a number of Acts. These included the *Land Act 1933* (WA), *Local Government (Miscellaneous Provisions) Act 1960* (WA) and *Land Acquisition and Public Works Act 1902* (WA).[16]

In the transition from s 63 of the *Public Works Act* to s 241(7) of the *Land Administration Act*:

- The term 'injurious affection' was removed and the expression 'reduction of the value of that adjoining land' was included. It is not possible, on common understandings of the relevant terms, to hold that 'reduction of the value of ... adjoining land' adequately describes injurious affection, since there is no reference to the public work as the cause of such reduction in value.
- The entitlement to claim compensation for 'reduction of the value of that adjoining land' narrowed from persons with an 'estate or interest' in land to holders of 'fee simple'.[17]
- The provision for setting off enhancement changed from express application to only injurious affection to (arguably) an application to any reduction in value.

During the second reading of the Land Administration Bill 1997 (WA), the Minister for Finance explained that the Bill sought to modernise the administration and management of Crown land in Western Australia.[18] The Minister observed that the law in this area was 'a complex, difficult and, at best, little understood and antiquated area of land law'.[19]

The Minister mentioned that the new provisions for compulsory acquisition of land and its compensation provisions contained 'little change to established principles'[20] and only 'minor changes'.[21] The minor changes the Minister subsequently discussed during the second reading speech did not include a change to the class of people entitled to claim compensation for injurious affection.

The second reading speech does not otherwise assist an understanding of the rationale for the three effects described above. The Bill was referred to the Legislation Committee for the preparation of a report. Nothing in either the Legislation Committee's report[22] or its minutes[23] explains the three changes.

The submissions received by the Commission, including those from relevant government departments, similarly suggested no rationale for those changes. On the contrary, the common understanding in those submissions is that no substantive variation of the law was intended. Rather, the intention was merely to effect a translation into plain English.[24]

However, even if it is accepted that s 63 of the *Public Works Act* was mistranslated into s 241 of the *Land Administration Act*, the Commission is not thereby greatly assisted in recommending just reforms.

15. Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 August 1997, 5658 (Hon. M Board, Minister for Works). The 1996 Bill also lapsed.
16. For a history of the Bill, see ibid 5658/2.
17. The availability of severance and injurious affection compensation when an interest less than fee simple was taken is not beyond argument under s 63(b) of the *Public Works Act 1902* (WA), primarily because paragraph (b) referred to 'land' whereas paragraph (a) referred to land or an estate or interest in land. However, the reference in (b) is to 'such land' as referred to in (a). Also, s 5 of the *Interpretation Act 1984* (WA) provides that, unless the contrary appears, 'land' includes estates, interests and easements.
18. Western Australia, *Parliamentary Debates*, Legislative Council, 26 March 1997, 909/2 (Hon. M Evans, MLA, Minister for Finance).
19. Ibid 914/1.
20. Ibid 909/2.
21. Ibid 913–14.
22. Parliament of Western Australia, *Report of the Legislation Committee on the Land Administration Bill 1997* (1997).
23. Legislation Committee, Parliament of Western Australia, *Minutes of Meeting* (16 September 1997) 1.
24. See Main Roads Western Australia, Submission No. 4 (31 January 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Departmetn for Planning & Infrastructure), Submission No. 16 (29 February 2008).

Chapter 3

Entitlement under the Land

Just terms

Section 241(6)(e) of the *Land Administration Act* already allows account to be taken of 'any other facts … [considered] just to take into account in the circumstances of the case'. Ordinarily, this would go a long way to ensuring that a just result is obtained. However, it presents as one paragraph among five in s 241(6), the rest of which deal with quite specific and mundane matters. As a result, there is authority to the effect that paragraph (e) must be read 'ejusdem generis' by which is meant that paragraph (e) is to be read as confined to the same sort of things as mentioned in paragraphs (a) to (d).

The precursor to s 241(6)(e) was s 63(aa)(v) of the *Public Works Act 1902* (WA), which was in the same terms. In *Konowalow and Felber v Minister for Works*,[1] it was held that the *ejusdem generis* rule applies:

> [T]he Crown submits that the ejusdem generis rule should be applied and the Court's powers under s 63(aa)(v) are in fact restricted to facts of the same kind as those applicable to paragraphs (i) to (iv) … In my opinion the Crown's contention is correct and the ejusdem generis rule applies…I think a possibly better way to describe it is as compensation for loss and damage resulting from interference with the activities being carried on by the Plaintiff on the land…for example he gets compensation for removal expenses, for interference with his business, for the discontinuance of building works in progress and for architects' or surveyors' fees … I find it impossible to impute to the Legislature an intention to introduce into the section by paragraph (v) a general provision of such wide import as that suggested, or of any other import unrelated to that of the other paragraphs.

Under that interpretation, s 241(6)(e) is of limited utility in ensuring that courts and authorities interpret s 241 with an eye to just compensation.

There is no other reference in the *Land Administration Act* to just compensation for taking of land.[2]

The legislation of each of the Commonwealth, New South Wales, South Australia, Australian Capital Territory and Northern Territory includes reference to just compensation.[3]

Tasmania's legislation requires regard, except as otherwise provided, to such other matters as are considered to be 'relevant', without expressly providing that just terms constitute a touchstone of relevance.[4]

Some jurisdictions mention just compensation in sections dealing with the objects of the Act. This reflects a distinction evident in the various statutes between:

- ensuring that just compensation is assessed;[5] and
- ensuring that ambiguities in the legislation are resolved by reference to the object of just compensation.

The Commission prefers the latter approach because it carries a more frank acknowledgement that minor curtailment of rights and more or less arbitrary distinctions are sometimes required.

The Commission favours a reference in s 241 to just compensation, similar to that in s 54(1) of the NSW Act:

> 'The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.'

1. [1961] WAR 40, 42–43.
2. There is reference to just distribution of costs. Also worthy of note is an amendment to the *Land Administration Act 1997* (WA) which has not yet come into operation. Page 252 of the 2005 reprint sets out an amendment to s 156 of the *Land Administration Act 1997* (WA) effected by s 11 of the *Acts Amendment (Land Administration, Mining and Petroleum) Act 1998* (WA), under which native title compensation for acquisition of land must be on just terms. This reflects a Commonwealth requirement under the *Native Title Act 1994* (Cth).
3. *Land Acquisition Act 1955* (Cth) ss 55 & 93; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ss 3 & 54(1); *Land Acquisition Act 1969* (SA) s 3 (but not repeated in s 25); *Land Acquisition Act 1994* (ACT) ss 45 & 78; *Lands Acquisition Act 1978* (NT) s 5 (Item I of Sch 2 refers instead to 'fair' compensation).
4. *Land Acquisition Act 1993* (Tas) s 27(1)(g).
5. See s 93 of the Commonwealth statute.

Recommendation 1

The Commission recommends that s 241 of the *Land Administration Act 1997* (WA) include a reference to just compensation, similar to that in s 54(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

Terminology: 'injurious affection'

The law of compulsory acquisition of land and compensation has its share of jargon. The terms 'injurious affection', 'severance damage', 'betterment' or 'enhancement' and 'disturbance' occur in legislation. Many more terms of art occur in the case law dealing with valuation for compensation purposes.

There is often good reason for the use in legislation of terms of art that the common law has developed, without attempting a legislative definition of such terms. The danger of definition is that some nuances, not yet explored by judges in cases, will be overlooked by parliamentary draftsmen with the result that the legislation may curtail desirable and just development of the common law or of statutory interpretation.

As mentioned earlier in this Report, on one view, s 241(7)(b) of the *Land Administration Act 1997* (WA) has attempted to paraphrase 'injurious affection'. It is reasonably clear that the paraphrasing is inadequate.

Section 241(7)(b) does not state that the cause (or a cause) of the reduction of value of the adjoining land must be the public work. The reference in the section to 'the public works or proposed public works' is solely in the context of enhancement.

As explained, it may be that the legislative draftsman expressed s 241(7)(b) without reference to public works because the intention was to encompass both injurious affection and severance damage, although that seems less likely in light of the Ministers' statements in Parliament.

Nevertheless, the introduction of s 241(7) has arguably created a problem of interpretation: does one read down paragraph (a) to include only disturbance and/or 'value to owner' damages in light of paragraph (b); or does one read down paragraph (b) to include only injurious affection in light of paragraph (a)? The latter option re-incorporates into the section the concept of injurious affection, notwithstanding that the probable legislative intention was to dispense with the term for its archaism and obscurity, at least from the perspective of laymen.[6]

The various (overlapping) options set out in Chapter 3 of the Discussion Paper included:

- Whether the term 'injurious affection' should be re-inserted into s 241(7)(b) of the *Land Administration Act*, with or without a definition.
- Whether s 241(7)(b) of the *Land Administration Act* should be amended to more accurately reflect injurious affection, but without using that term.
- Whether the concepts of injurious affection and severance should be collapsed into the single concept of a diminution in value caused by the taking or the public work.
- Whether s 241(7) should remain confined to damage suffered by a landowner, rather than extended to diminution in the value of the land (whether or not causing damage to the owner).

6. There is little in *Hansard* concerning the Land Administration Bill 1997 to explain why the term 'injurious affection', used in the *Public Works Act 1902* (WA) was omitted. However, one of the objectives of the 1997 reforms, which may have been of influence, was to ensure that 'the wording of the Act conformed to modern English standards': Department of Planning and Infrastructure, *Review of the Land Administration Act 1997*, Final Report (August 2005) 11. In 1986 the Standing Committee on Government Agencies recommended that 'the *Land Acquisition Act* and all notices issued under that Act should be drafted in a "plain English" style capable of being understood by a person of average intelligence and education': Standing Committee on Government Agencies, *Resumption of Land, Proposals for Reform* (1989) 2. The Committee 'recognise[d] that legal requirements impose certain restrictions on drafting; however, they do not require convoluted drafting or the use of obscure or archaic terminology'.

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There was wide support for the amendment of s 241(7) to clarify its operation. In light of the difficulties of interpretation experienced in the relevant professions, the Commission recommends that an amendment be made to resolve the question whether s 241(7)(b) includes only what was previously referred to as 'injurious affection'. The form of that amendment will depend on other recommendations dealt with below.

Most submissions received by the Commission on this point were from persons who deal professionally with issues of compensation. A majority of those submissions advocated the re-introduction of the expression 'injurious affection',[7] and a majority of those advocates also thought the expression should be defined.[8] The reasons advanced mostly depended on the view that persons within the profession well understood the expression through many years of judicial explication of s 63 of the *Public Works Act*. Further, people in the profession continue to refer to 'injurious affection' notwithstanding that the expression no longer appears in the *Land Administration Act*.

Nevertheless, the Commission recommends that the expression not be re-incorporated, for the following reasons.

First, it is generally accepted, including by the Commission, that, if the expression is incorporated, it requires definition. That is because the bare expression, if purportedly used as a term of art, does not delimit the extent of compensation. For example, it does not itself illuminate whether compensation is due only in respect of fee simple land, or only in respect of adjacent land, or only when taken land is used to construct a public work.

The better view is that the expression is not a true term of art – it means little more than a reduction in value of land (as illustrated by the terms of s 49 of the *Lands Causes Consolidation Act 1845 (UK)* – see above). The fact that most commentators submitted that a definition was required is an indication that its denotation is not well accepted.

Accordingly, it is as easy, or easier, to use an expression such as 'reduction in value of land caused by a public work' than to use 'injurious affection' with a definition.

Other matters, such as the cause of the injurious affection, are better included in substantive provisions than in a definition section. Hence, one is left with the proposal to define an ordinary English expression, which is not appropriate or necessary.

Second, 'injurious affection' has a continuing role in the *Planning and Development Act*, where its meaning is different, albeit related. A definition under the *Land Administration Act*, which definition would be unsuitable for the *Planning and Development Act*, is apt to confuse laymen and perhaps others. This is particularly so if, as the Commission recommends in Chapter 5, injurious affection in the acquisition sense is incorporated into the *Planning and Development Act*.

Third, while the expression might be well known to professionals, the legislation should be as clear as practicable to laymen as well. That is particularly true in a field, such as the taking of land, which is apt to arouse personal responses. In the Commission's view this is better served by omitting 'injurious affection'.

Doubtless, people in the relevant professions will continue to refer to

7. See Glenn Miller, Submission No. 2 (24 January & 2 April 2008); Robert Ferguson, Submission No. 3 (24 January 2008); Main Roads Western Australia, Submission No. 4 (31 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008). A similar submission was made by Ralph & Louis Prestage Submission No. 9 (14 February 2008). Submissions to the contrary were received: see Water Corporation, Submission No. 10 (14 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008).

8. See Glenn Miller, Submission No. 2 (24 January & 2 April 2008); Main Roads Western Australia, Submission No. 4 (31 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 15 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).

'injurious affection' in this context but, under the Commission's recommendations in this Report, at least those references will accurately reflect the statutory entitlement, which is doubtful at present.

Fourth, the trend in other Australian jurisdictions is to replace the expression.[9] The *Land Administration Act* has not included the expression 'injurious affection' since 1997 and its introduction now would not assist conformity.

Terminology: 'severance'

The shift from s 63 of the *Public Works Act* to s 241(7) of the *Land Administration Act* included the omission of 'severance of ... land' and its replacement with a reference to the 'severing of the land'. As noted above, the original *Land Causes Consolidation Act* 1845 (UK) referred to the 'severing of the Lands'.

The Commission does not accept that the cause of plain English drafting is assisted by either terminology. However, one or the other must be used.

Most text books on the subject refer to 'severance' and 'severance damage',[10] as do most other Australian jurisdictions.[11]

The change in 1997 appears to have contributed to doubt about whether paragraph 241(7)(a) reflects what is normally termed 'severance damage', although the doubt principally arises from the terms of paragraph (b).

Recommendation 2

The Commission recommends that the term 'severance' be reinstated in s 241(7) of the *Land Administration Act 1997* (WA).

Separation of injurious affection and severance

The next issue is whether it is preferable to separately identify injurious affection and severance within s 241(7). The legislative approach in s 241 is to list the matters to which a court may have regard in assessing compensation. It would accord with that approach to retain separate reference to the two causes of diminished value.

On the other hand, the two concepts are difficult to distinguish in some respects. The example is given in Chapter 1 of the difficulty in determining whether the taking of land for a road, causing reduced ease of access from the remaining land to the coast or a school etc, is to be considered injurious affection or severance. The present need to make such a determination has caused some arguably procrustean analyses of severance and injurious affection.

The ideal outcome would be to separately list the two concepts to ensure full compensation, but not require strict categorisation of damages as due exclusively to either severance or injurious affection.

Under s 63 of the *Public Works Act*, and probably still under s 241(7) of the *Land Administration Act*, enhancement is to be set off against injurious affection but not against severance. That sometimes necessitates a valuation which strictly segregates the two concepts and thereby immerses valuers and the court in an otherwise pointless distinction.

Further, in many cases, valuers and courts prefer a 'before and after' valuation, under which the reduction in value of retained land is determined

9. Queensland, South Australia and Tasmania still use the expression 'injurious affection' in their principal land acquisition provisions: *Acquisition of Land Act 1967* (Qld) s 20(1)(b); *Land Acquisition Act 1969* (SA) s 25(1)(a)(ii); *Land Acquisition Act 1993* (Tas) s 27(1)(e); whereas the Commonwealth, New South Wales, Victoria, Australian Capital Territory and Northern Territory do not. Section 62 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) uses the expression but only in reference to easements, etc, and not as a term of art.

10. Eg, Brown D, *Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia* (Sydney: LexisNexis Butterworths, 5th ed. 2004) [3.29]; Hyam AA, *The Law Affecting Valuation of Land in Australia* (Sydney: Federation Press, 3rd ed., 2004) ch 16.

11. *Land Acquisition Act 1955* (Cth) s 55(2)(a)(iii); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55(c); *Land Acquisition and Compensation Act 1986* (Vic) s 41(1)(c); *Land Acquisition Act 1969* (SA) s 25(1)(b)(ii); *Land Acquisition Act 1993* (Tas) s 27(1)(c); *Land Acquisition Act 1994* (ACT) s 45(2)(a)(iii); *Lands Acquisition Act 1978* (NT) Sch 2 item 2(c). Only Queensland's legislation refers instead to the severing of land: *Acquisition of Land Act* 1967 (Qld) s 20(1)(a).

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for compensation purposes by separately assessing the value of the land before and after the taking. That assessment will indiscriminately capture all varieties of loss, including injurious affection and severance. However, if enhancement elsewhere is involved, the valuer is then obliged to dissect the before and after valuation to distribute losses between injurious affection and severance.

Whether enhancement should be set off and if so against which of the two kinds of reduction in value is dealt with in Chapter 4. The Commission has there recommended, for unrelated reasons, that enhancement be set off against both. If that recommendation is accepted, there will be no need to strictly categorise losses as due to injurious affection or severance. Hence, the distinction can and should be preserved for the sake of clarity,[12] without the impediment of complicating relevant valuations.

Recommendation 3

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain separate references in paragraphs (a) and (b) to severance and injurious affection respectively. Paragraph (b) should include reference to a reduction in value of adjoining land attributable to the public work, to reflect injurious affection.

It follows that paragraphs (a) and (b) of s 241(7) should be read as cumulative – a landowner should be compensated for damage caused by reductions in the value of land attributable to either or both the matters in paragraphs (a) and (b).[13]

Recommendation 4

The Commission recommends that the word 'or' between paragraphs (a) and (b) of s 241(7) of the *Land Administration Act 1977* (WA) be replaced with 'and'.

Damage suffered

In the view of the Commission, s 241(7) should continue to refer to 'damage suffered by the claimant', rather than merely to diminution in the value of the land. The principal reason is that s 241 generally deals with loss to a claimant. In certain cases, a person's retained land may be reduced in value, but the person may not thereby suffer as loss the full measure of that reduction. For example, a landowner may have contracted to sell, but not actually transferred, his retained land at a price higher than the value of the retained land after the taking. In such a case, the land owner's loss is the difference between the before value and the contract price, not the difference between the before and after values.

In those cases, the better outcome is that compensation accord with the loss actually suffered.

Recommendation 5

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain its focus on 'damage suffered by the claimant'.

12. This was supported by submissions from Robert Ferguson, Submission No. 3 (24 January 2008); George De Biasi, Submission No. 8 (14 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 15 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008). Frank Fford also supported the distinction although this may have been influenced by their wish to restrict set off to injurious affection: see Frank Fford, Submission No. 5 (5 February 2008).
13. This was the submission of all who considered the point from this perspective: see Main Roads Western Australia, Submission No. 4 (31 January 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); George De Biasi, Submission No. 8 (14 February 2008).
14. *Land Acquisition Act 1955* (Cth) s 55(2)(a)(iv); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55(f) read with definition of 'land' in s 4; *Land Acquisition and Compensation Act 1986* (Vic) s 41 (1)(e); *Acquisition of Land Act* 1967 (Qld) s 20(1)(b) read with definition of 'land' in s 2; *Land Acquisition Act 1969* (SA) s 25(1)(b)(ii); *Land Acquisition Act 1993* (Tas) s 27(1)(e) read with definition of 'land' in s 3; *Land Acquisition Act 1994* (ACT) s 45(2)(a)(iv); *Lands Acquisition Act 1978* (NT) Sch 2 item 2 read with the definition of 'land' in s 4.
15. See Robert Ferguson, Submission No. 3 (24 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); George De Biasi, Submission No. 8 (14 February 2008); Ralph & Louis Submission No. 9 (14 February 2008); Water Corporation, Submission No. 10 (14 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 14 (15 February

Interest held

The 1997 legislative amendments limited the class of claimants eligible for compensation for injurious affection to those holding fee simple.

Each of the other Australian jurisdictions applies similar principles of compulsory acquisition to the acquisition of freehold, leases and other interests in land.[14] Each includes compensation for injurious affection and severance for interests less than fee simple.

The possible policy objectives at play in respect of the position in Western Australia are as follows.

First, the government is relieved of the cost of injurious affection and severance compensation specific to the interest holder (tenant, holder of easement etc). The submissions received by the Commission, including those from government agencies, did not advance or support such a policy objective.[15]

Second, in the case of a lease, it is possible in practice that the aggregate of the injurious affection and severance damages of the landlord and the tenant will exceed the injurious affection and severance damages had the land not been leased. Similarly, in the case of an easement, the aggregate of the injurious affection and severance damages of the dominant and servient tenement holders and the tenant may exceed damages had the land no easement. While there is no evidence before the Commission that government officers were concerned prior to 1997 that payments were excessive in this regard, one submission recommended holders of different interests in the same land should not be able to claim in respect of the same loss.[16] It seems a preferable solution to relevantly limit, rather than to eliminate, compensation in this respect. This is dealt with below.

Apart from issues related to power line easements,[17] no submission to the Commission mentioned a specific case of unfair treatment caused by the confinement of s 241(7) to takings of fee simple. Rather, submissions were concerned with the possibility of disadvantage.[18]

One reason for the lack of evidence of disadvantage may be that the compensation to an affected lessee, for loss of part of the demise, can be measured to include the 'value to the owner' of that part. In this context, 'value to the owner' (ie, the lessee) will include compensation calculated as the amount that a person in the lessee's position would pay for the taken land rather than lose it.[19] This is dealt with below. In short, the Commission's view is that 'value to owner' cannot legitimately be used in this manner, but that is not to deny it has been.

Also, in such cases, s 241(6) permits the payment of compensation on account of disruption of a business and on account of any other fact, which it is just to take into account in the circumstances. It may be that business lessees have been satisfactorily compensated by the operation of s 241(6) since 1997. This too may account for the lack of evidence.

Nevertheless, it is clear in principle that there may be cases in which a person is disadvantaged by the limit in s 241(7).

Recommendation 6

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to provide an entitlement to compensation for persons who hold any interest in the taken land and suffer a reduction in value of any interest in adjoining in land.

2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008). The Main Roads Department opposed the addition of interests in land other than freehold on the ground that lessees are able to renegotiate the terms of their leases to mitigate loss: see Main Roads Western Australia, Submission No. 4 (31 January 2008). However, this does not appear to the Commission to be a reliable assumption. Where renegotiation is achieved, then compensation will be reduced. But there is no good reason to exclude compensation for non-negotiable leases, or for cases in which re-negotiation achieves only partial redress.

16. Water Corporation, Submission No. 10 (14 February 2008), see below.
17. See Robert Ferguson, Submission No. 3 (24 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); George De Biasi, Submission No. 8 (14 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Water Corporation, Submission No. 10 (14 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).
18. See below Chapter 10.
19. *Pastoral Finance Association Ltd v Minister (NSW)* [1914] AC 1083. *Pastoral Finance* is authority for the proposition that the appropriate value of the land is not the 'market value' in some cases, but the value a prudent man, in the position of the owner, would pay for the land rather than lose it. The test in *Pastoral Finance* is a departure from the price that could be obtained in the open market.

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Limit on aggregate compensation

It was mentioned above that there may be a difference in the value of land according to whether it is assessed as an unencumbered freehold or as the aggregate of values to the freeholder and a lessee. In other words, the leasing of land may create additional value. For example, the lease may have special value to the lessee whereas the freehold has no similar special value to the freeholder.[20]

Certainly, the leasing of land can create aggregate compensation entitlements greater than would apply had the land not been leased.

At issue is whether s 241(2) of the *Land Administration Act*, which already provides for compensation to both a freeholder and lessee, should contain a cap on total compensation. The policy in support of a cap would include that a land owner should not be able to increase the compensation by leasing land to an associated company or person. Even when the lease is pursuant to legitimate business concerns, the compensation should not be increased.

On the other hand, if it is the case that the grant of a lease, particularly to an unrelated person, creates additional value, then there seems no good reason to deny compensation for the additional value.[21]

Of other Australian jurisdictions, only New South Wales appears to have included a cap on compensation. Section 56(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) provides:

> When assessing the market value of land for the purpose of paying compensation to a number of former owners of the land, the sum of the market values of each interest in the land must not (except with the approval of the Minister responsible for the authority of the State) exceed the market value of the land at the date of acquisition.

In the Commission's view, the recommended inclusion in s 241(1) of the *Land Administration Act* of a reference to 'just' compensation will assist to resolve these matters. The increase in value that might otherwise flow to one person will be assessed for its fairness, and all relevant matters taken into account. It does not appear to be equitable that compensation be capped in all cases. Further, it is not clear whether both the freeholder and the lessee are to share the burden of reduced compensation, and if so under what formula.

Accordingly, the Commission does not recommend an express cap on 'value' or on compensation.

Value

As mentioned above, a submission to the Commission urged the view that some of the unfairness alleged in the Discussion Paper was illusory because the concept of 'value to owner' was implicit in the word 'value' in s 241(2) of the *Land Administration Act*.[22] It was suggested that 'value' means, in language of the seminal case, the price the owner would pay rather than lose the land.[23] On this standard, the 'value to owner' includes the amount the owner's retained land would diminish in value on account of the taking and the public work; that is, would include what is referred to as severance and injurious affection damage.

The Commission does not accept that view. There is no doubt that, as a general principle of acquisition law, value to owner is an important concept. However, it is no more than a principle to be used in aid of the interpretation of a statute.[24] In the

20. This may be the only circumstance in which the aggregate values of freehold and leasehold exceed unencumbered freehold.
21. A submission from the Water Corporation, while not expressly endorsing a cap, suggested a limitation on the eligibility of the freeholder and the leaseholder to claim compensation for 'the same loss': see Water Corporation, Submission No. 10 (14 February 2008). However, if the freeholder and the leaseholder do indeed suffer losses in value (eg, on account of the same adjacent freeway), there seems no good reason, from their perspective, to limit eligibility to one of them even if, from the perspective of the acquiring authority, it increases aggregate liability.
22. See Glenn Miller, Submission No. 2 (24 January & 2 April 2008).
23. *Pastoral Finance Association Ltd v Minister (NSW)* [1914] AC 1083; 15 SR (NSW) 535. *Pastoral Finance* is authority that the appropriate value of the land is not the 'market value' in some cases, but the value a prudent man, in the position of the owner, would pay for the land rather than lose it.
24. For an explanation of this in respect of 'injurious affection', see *Walker v Sydney Harbour Foreshore Authority* [2008] HCA 5, [29]–[35].

case of the *Land Administration Act*, s 241(2) cannot include that part of the 'value to the owner' that is assessed by reference to injurious affection and severance because s 241(7) deals specifically with those matters and imposes specific limitations.[25] Therefore, the holder of a leasehold interest, for example, could not presently be validly compensated under s 241(2) for injurious affection or severance.

The better view is that certain aspects of 'value to the owner' replicate the matters in s 241(7) of the *Land Administration Act*, and are therefore removed from s 241(2) on the proper interpretation of the Act under the principle that general provisions shall not derogate from specific provisions.

The matter may be illustrated by examples.

Example of easement [26]

The owner of fee simple lot A may rely for access on an easement through lot B. Under the present law, a compulsory taking of Lot B, including the easement land, will clearly lead to compensation for the taking of the easement under s 241(2). However, there may be a reduction in the value of lot A caused by loss of the easement. This is an example of severance and compensation could not be paid to the owner of lot A under s 241(7) because no fee simple was taken from that owner. The owner of lot A may argue that his compensation under s 241(2) includes the value of the easement to him, which includes the amount of the reduction in value of lot A. However, since this is a case of severance, the better view is that severance damage is excluded except under the conditions in s 241(7), particularly the legislative provision that no severance damage is payable to a person except upon the taking of that person's fee simple.[27]

Example of lease

The owner of freehold residential land may lease the land for 99 years with a right to sub-let. If part of the land is taken for a freeway, the landlord, the head lessee and the sub lessee will each be entitled to compensation under s 241(2) for the taken land. The value of the remaining land will be depreciated by reason of the proximity of a freeway. The landlord will be compensated under s 241(7) for that loss. The head tenant will not be compensated, notwithstanding that the amount of rent achievable under sub-lease has been reduced.[28]

Value to owner is closely related to 'special value', and the two concepts have been said to be indistinguishable.[29] It should be accepted that subject to the section, 'value' in s 241(2) includes 'special value' or 'value to owner'. Therefore, 'value' under s 241(2) will sometimes exceed market value.

In respect of that component of value to owner attributable to severance and injurious affection, compensation is assessed by regard to factors specific to severance and injurious affection set out in s 241(7). Under the Commission's recommendations, the extent to which 'value' in s 241(2) is subject to s 241(7) would be a moot issue, because the recommended reform of s 241(7) incorporates all usual incidents of the entitlement.

The question, rather, is whether it should be set out in the legislation that the word 'value' in s 241(2) includes aspects of value to owner and special value, or whether case law on this issue is sufficient to inform courts and affected parties.

25. 'Value' in s 241(2) of the *Land Administration Act 1997* (WA) nevertheless will include 'special value' or 'value to owner' assessed by reference to factors other than severance and injurious affection. Therefore, 'value' under s 241(2) will sometimes exceed market value. See the example of special value given by Callinan J in *Boland v Yates Corporation Pty Ltd* (1999) 74 ALJR 209, [292].
26. This example was included in the submission of the Law Society: see Law Society of Western Australia, Submission No. 18 (27 March 2008).
27. Similarly, in the case of infrastructure easements, such as for high voltage power lines, s 241(7) of the *Land Administration Act 1997* (WA) does not entitle the land owner to compensation for loss of value to land adjacent to the easement caused by the power lines. This is dealt with below in Chapter 9.
28. In some cases, a rent review clause may protect the head lessee from financial loss under the leasehold.
29. *Kelly v WAPC* [2007] WASCA 226, [26]. Based on the example of special value given by Callinan J in *Boland v Yates Corporation Pty Ltd* (1999) 74 ALJR 209, [292], a possible distinction is that special value is peculiar to the particular claimant, or a small group, whereas value to owner would apply to any person who held the land held by the claimant. In any event, the distinction is not material to the merits – both are to be the subject of compensation. Glenn Miller submitted to the Commission that there is a useful distinction, relying on *Boland*: Glenn Miller, Submission No. 2 (24 January & 2 April 2008).

3

The legislation in each of the Commonwealth, New South Wales, Victoria, Tasmania, Australian Capital Terriroty and Northern Territory refers to special value and value to owner, although not always by those names.[30] The statutes in Queensland and South Australia do not.

Of the jurisdictions that refer to special value and value to owner, none recognises that special value and value to owner may be caused by the proposed public work. Rather, they all apply the Pointe Gourde principal (see below) only to market value. Nevertheless, it seems obvious that no compensation should lie for special value or value to owner caused by the proposed public work.[31] At present, because 'value' in s 241(2) includes parts of special value and value to owner, those aspects are presently subject to the Pointe Gourde principle. The Commission recommends that the point not be lost in amended legislation.

In the Commission's view, s 241(2) of the *Land Administration Act* should include a reference to value to owner and special value, subject to s 241(7). Rather than use those terms of art, the Commission prefers an expression similar to that incorporated in s 45(2)(a)(ii) of the *Land Acquisition Act 1994* (ACT): 'the value … of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest'.[32]

Recommendation 7

The Commission recommends that s 241(2) of the *Land Administration Act 1997* (WA) include, subject to s 241(7), a reference to 'the value … of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest'.

Pointe Gourde Principle: foreknowledge of the public work

Section 241(7) of the *Land Administration Act*, dealing with enhancement, expressly reflects the need to take account of both the effect of the public work itself and the effect of the anterior proposal to carry out the public work. The latter is a recognition that the value of land may be increased by market foreknowledge that the public work is in prospect.[33] It should be noted that the effect of the proposal to carry out the relevant public work may not be expressly included in s 241(2) of the *Land Administration Act*, which refers instead to the effect of the 'proposed public work'. Similarly, there is no express reference in s 188 of the *Planning and Development Act* to the proposal to implement a scheme.

On one view, it has not previously been necessary to include in legislation references to the anterior proposal for a public work because case law on the meaning of 'value' has reliably informed valuers and courts of the Pointe Gourde principle of interpretation[34] including this aspect of it. However, two matters must now be taken into account.

First, the Court of Appeal in *Mount Lawley Pty Ltd v Western Australian Planning Commission (No. 2),*[35] dealing with the meaning of 'attributable … to the Scheme' for the purposes of the *Planning and Development Act*,[36] appears to have held that market foreknowledge of the Scheme is not necessarily disregarded in assessing value. Alternatively, the reasons are open to the interpretation that only foreknowledge of the scheme ultimately adopted is to be disregarded, which may reflect a dilution of the principle of interpretation dealt with in *Wilson v Liverpool Corporation.*[37]

30. *Land Acquisition Act 1955* (Cth) s 55(2)(a)(ii); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ss 55(b) & 57; *Land Acquisition and Compensation Act 1986* (Vic) ss 40 & 41(1)(b); *Land Acquisition Act 1993* (Tas) s 27(1)(b); *Land Acquisition Act 1994* (ACT) s 45(2)(a)(ii); *Lands Acquisition Act 1978* (NT) Sch 2 item 2(b).
31. For example, a person may have a non-conforming use of land for a blacksmith's forge. If a race-track (the public work) was established nearby, the blacksmith's use of the land would found a special value in the land by virtue of the public work. (This example is adapted from the example given by Justice Callinan in *Boland v Yates* (1999) 167 ALR 575, [292]).
32. The ACT provision is the same as the Commonwealth definition of 'special value' and is generally similar to those in the New South Wales, Victorian and Northern Territory legislation. However, some differences in wording may lead to substantive differences in operation as case law develops.
33. Case law has consistently reflected this requirement. See eg, *Housing Commission of New South Wales v San Sebastian Pty Ltd* (1978) 140 CLR 196, 205–206: '[I]f the proposed public purpose and the possibility or likelihood of resumption … has become known prior to the date of resumption, the market value … will probably reflect by way of increase or decrease the possibility or likelihood… Therefore, that value cannot be accepted.'
34. *Pointe Gourde v Sub-Intendent of Crown Lands* [1947] AC 565.
35. (2007) 34 WAR 49, [169], [175], [184] & [191].
36. The Court of Appeal was actually dealing with s 36(2b) of the *Metropolitan Region Town Planning Scheme Act* (1959). The successor provision for that section is s 188 of the *Planning and Development Act 2005* (WA), the terms of which are not relevantly distinguishable.
37. *Wilson v Liverpool Corp* [1971] 1 All ER 628, 634: 'A scheme is a progressive thing. It starts vague

Section 241(2) refers to alteration in value 'attributable to the proposed public work', which is *prima facie* similar to the provision under consideration by the Court of Appeal. However, since a taking, and hence the date for valuation, usually precede commencement of the relevant public work, it should be obvious that s 241(2) includes alterations in value attributable to the antecedent proposal to complete the public work. The better view, therefore, is that s 241(2) does require disregard of alterations in value attributable to the proposal for a public work, and is unaffected by the reasons in *Mt Lawley*.

Second, however, the reference to enhancement in s 241(7) of the *Land Administration Act* does include reference to the proposal for a public work (which is related to the relevant date of assessment of damage – see below). Accordingly, if the Commission's recommended new s 241(7)(b) does not refer to a proposal for a public work, that difference may assume an unintended significance. On the other hand, if the present reference to a proposal for a public work in the context of enhancement is deleted, the deletion may assume an unintended significance. For that reason too, the Commission has recommended that s 241(7)(b) include reference to the proposal for the relevant public work.

If s 241(7) is to include two references to proposal for a public work, then so too should s 241(2) in order to avoid any unintended significance being ascribed to that distinction.

In the view of the Commission, it is essential to a fair outcome that valuers disregard the effect on value of market anticipation of a public work. The same view has been taken in the relevant legislation of most other Australian jurisdictions, which include reference to a proposal to carry out the public work as a matter to be disregarded,[38] notwithstanding argument that such inclusion may be too obvious to require mention.

Accordingly, to avoid any doubt, and in view of the Australian consensus otherwise prevailing, the Commission prefers that s 241(2) of the *Land Administration Act* be amended to include reference to a proposal for a public work.[39]

Once s 241(2) includes reference to a proposal for a public work, it should be beyond doubt that the reasons in *Wilson v Liverpool Corporation* apply.

For reasons explained later in this Report, the reference to 'public work' should be replaced by reference to the 'purpose for which the land was taken'.

Recommendation 8

The Commission recommends that s 241(2) of the *Land Administration Act 1997* (WA) be amended to include reference to a proposal to carry out the purpose for which the land was taken.

Date of assessment

A submission to the Commission pointed out that s 241(7) does not specify the date upon which its amount of compensation is to be assessed. It was suggested that the date should be the same as in s 241(2), usually the date of the taking.[40]

Any severance damage will probably be suffered at the date of the severance; that is, the date of the taking.

and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed.'

38. *Land Acquisition Act 1995* (Cth) s 60(c); *Land Acquisition Act 1994* (ACT) s 50(1)(c); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55(f); *Lands Acquisition Act 1978* (NT) Sch 2 item 8; *Land Acquisition Act 1969* (SA) s 25(1)(h)(c); *Land Acquisition Act 1993* (Tas) s 33(1)(b); *Land Acquisition and Compensation Act 1986* (Vic) s 43 (1)(a). The matter is not expressly dealt with in the *Acquisition of Land Act 1967* (Qld) s 20.
39. In Chapter 5 below the Commission recommends a similar amendment of s 188 of the *Planning and Development Act 2005* (WA).
40. See Law Society of Western Australia, Submission No. 18 (27 March 2008).

However, any injurious affection damage may be caused by either the anticipation of a public work or by the constructed public work but, at the date of the taking, the public work is not usually constructed. It is possible that the work itself will cause a greater or a lesser reduction in value than the market anticipation of it did, and that may be better determined at a date later than the date of the taking. The same is true of enhancement.

One submission to the Commission urged that s 241(7) not be drafted so as to discourage abatement of the factors that lead to injurious affection, such as abatement by use of noise bunds and vegetation screens.[41] An understanding that s 241(7) is assessed as late as practicable will assist parties to take into account such abatement measures.[42]

For those reasons, the Commission does not recommend prescription of the date of taking for the purposes of s 241(7).

Edwards v Minister for Transport

The next issue to be considered in this context is whether injurious affection should be compensable only when the injurious affection was caused by a public work established on land taken from that person. Alternatively, should injurious affection be compensable where it is caused by the public work for which the land was taken, even where the public work was not established on the taken land? For example, a road widening may necessitate taking a strip of private land but that strip may be used only for a relocated footpath. In such a case, is the owner to be compensated only for the injurious affection caused by the footpath on the taken land, or compensated for the injurious affection of the increased traffic on the upgraded road which was the purpose of the taking?

This general issue has arisen in *Edwards v Minister for Transport;*[43] *Commonwealth of Australia v Morison;*[44] *and Marshall v Director-General, Department of Transport*.[45] The court in *Edwards* held that the relevant work must be on the taken land before compensation arises.

Morison[46] distinguished *Edwards* without overruling it. The Court held that compensation was not limited to depreciatory effects of works constructed on the acquired land itself, but could reflect the impact of the work as a whole. *Marshall,* which concerned Queensland legislation,[47] held that the exercise of any statutory power associated with the work need only be the reason for the taking of land and, accordingly, was more clearly discordant with *Edwards*.

The point was considered in the context of Western Australian legislation by Parker J in *Cerini v Minister for Transport*,[48] who preferred the view that s 241(7)(b) of the *Land Administration Act* allowed compensation for injurious affection caused by the public work for which the land was taken from Mr Cerini.

As mentioned, it is somewhat arbitrary that a person from whom land is taken, no matter how little land, should be compensated while his neighbour from whom no land is taken is not compensated. That arbitrariness is less under *Edwards* than under *Morison, Cerini* and *Marshall*. On the other hand, it is no less arbitrary, under *Edwards*, to compensate a person who has lost some land to a highway shoulder while not compensating his neighbour who has lost land for a footpath or buffer verge of the same highway.

41. Ibid.
42. This will have an effect on the period over which interest accumulates before payment, and an adjustment of s 241(11) of the *Land Administration Act 1997* (WA) is required.
43. [1964] 2 QB 134.
44. [1972] 127 CLR 32.
45. [2001] HCA 37.
46. *Commonwealth of Australia v Morison* [1972] 127 CLR 32 involved Victorian legislation similar to the Western Australian provision.
47. *Acquisition of Land Act 1967* (Qld) s 209(1)(b) which provided: 'the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land'.
48. [2001] WASC 309. Parker J did not mention the *Morison* case, but *Cerini* appears consistent with *Morison*.

In the Commission's view, there is an unavoidable arbitrariness in such legislative decisions. The existing law, which is reflected in *Cerini,* and benefits the land owner, should not be altered.[49]

Public Work

Section 241(2), in reference to the Pointe Gourde principle, refers to 'public work'. Section 241(7), in reference to enhancement, also refers to the relevant 'public work'. Under the Commission's recommendations made above, s 241(7)(b) will also include a reference to a reduction in value due to the relevant public work.

On those bases, effects on value of adjoining land caused by the purpose of a taking, which purpose is not a 'public work', would not be dealt with as the Parliament intended. This has been accommodated in different ways.

'Public work' is defined in s 151 to have the same meaning as in the *Public Works Act 1902*. From time to time this has required an expanded definition of 'public work'. The definition now extends beyond the ordinary English use of the expression to include, for example, the protection of indigenous flora and fauna.[50]

Under s 165 of the *Land Administration Act*, land may be taken for purposes that are not the establishment of a public work. Takings under s 165 are accommodated for the purposes of compensation by s 166, which provides that a taking under s 165 is treated as if it were for a public work. In a similar fashion, s 20 of the *Western Australian Land Authority Act 1992* deems compulsory takings under that Act to be 'public works' for the purposes of compensation under the *Land Administration Act*.

Another approach is contained in ss 191 and 192 of the *Planning and Development Act 2005* (WA) which applies Part 10 of the *Land Administration Act 1997* (WA) but in suitably amended form.

Some jurisdictions have dealt with injurious affection by reference to the effect on value of the 'implementation of the purpose for which the land was acquired',[51] which is apt to capture all cases. As mentioned earlier, the original legislation, the *Lands Causes Consolidation Act* 1845 (UK) referred to alteration in value caused by the exercise of powers under the relevant statute. These approaches are preferable to artificial deeming provisions and artificial definitions of 'public work'. They are more readily understood without the need to trace through definitions and deeming provisions.

The Western Australian approach seems to owe much to its origin in the *Public Works Act*.

Recommendation 9

The Commission recommends that ss 241(2) and (7) of the Land Administration Act 1997 (WA) be amended to replace references to 'public work' with references to 'the purpose for which the land was acquired'.

That recommendation may require consequential amendment of other provisions, such as s 166.

It should be noted incidentally that a difficulty may be thought to attach to the current use of the expression 'public work' defined to include, for example, the protection and preservation of indigenous flora and fauna. That is to say, under s 241(2), value is to be assessed

49. Only one submission to the Commission favoured the approach in *Edwards v Minister for Transport* [1964] 2 QB 134: George De Biasi, Submission No. 8 (14 February 2008).
50. See paragraph (14A) of the definition of 'public work' in s 2 of the *Public Works Act 1902* (WA).
51. Eg, *Land Acquisition and Compensation Act 1986* (Vic) s 40(1)(e).

disregarding the proposed protection and preservation of indigenous flora and fauna. Indigenous flora and fauna have long been protected under the *Wildlife Conservation Act* (1950). However, the proposed protection and conservation referred to in s 241(2) is that *additional* protection and conservation proposed in respect of the taking. The same interpretation clearly should apply to the Commission's recommended reform of s 241(2) and need not be spelled out in the legislation.

The expression 'public work' is presently also used in Part 9 of the *Land Administration Act,* dealing with the taking of land. In particular, under s 161, interests in land may be taken for a 'public work'. For this reason, too, 'public work' has been defined to include those purposes for which land is to be taken, including protection and conservation of indigenous flora and fauna.

In summary overview, the *Land Administration Act* incorporates a list of purposes for which land may be taken. It is important that Parliament retain oversight of the purposes for which land may be compulsorily taken, as it presently does. However, the list of purposes is contained under the definition of 'public work', which is unlikely to give laymen the correct impression, particularly since the definition is contained within the 'Public Works Act'. The extended and artificial definition of 'public work' in the *Public Works Act* is not for the purposes of the *Public Work Act*, but for the purposes of the *Land Administration Act*.

Accordingly, the above-mentioned vices (artificial definition and lack of clarity) occur under Part 9 as well as under Part 10.

Further, this Report is concerned with the question whether a single dedicated statute should be enacted dealing with compulsory acquisition of land, as is the case in all other Australian jurisdictions. In Chapter 8, the Commission has recommended that the existing reliance on the *Land Administration Act* be retained, which departs the Australian norm. Nevertheless, reform of the incorporation of the *Public Works Act* definition would help promote the virtues associated with a single statute.

The position in other Australian jurisdictions varies,[52] but the taking of land is generally less confined to defined purposes than in Western Australia. The noteworthy aspects of the positions in other jurisdictions are:

- Only Queensland has a list of purposes for which land may be taken, and further purposes may be included by regulation.
- In other jurisdictions that rely on a 'public purposes', the purposes are defined broadly.
- No other jurisdiction confines takings of land to the purpose of a 'public work'.
- In respect of injurious affection, the cause of the reduction in value need only be the purpose for which the land was taken.

Recommendation 10

The Commission recommends that s 161 of the *Land Administration Act 1997* (WA) be amended to refer to 'public purpose' instead of 'public work' and that s 151 be amended to include a definition of 'public purpose'.

52. *Land Acquisition Act 1955* (Cth) allows acquisition for a 'public purpose' defined to mean any purpose in respect of which the parliament has power to make laws: s 6 & 22(1); NSW and ACT are similar: *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ss 3, 4 & 21; *Land Acquisition Act 1994* (ACT) ss 19 & 32. *Acquisition and Compensation Act 1986* (Vic) allows acquisition for a public purpose but does not define 'public purpose': ss 1(a) & 41(7)(ii). *Acquisition of Land Act* 1967 *(Qld)* refers to a schedule of specified purposes for which land may be taken, but includes also any purpose declared by regulations to be a purpose: s 5 and schedule; *Land Acquisition Act 1969* (SA) does not appear to confine the purposes for which land may be taken; *Land Acquisition Act 1993* (Tas) allows the taking of land for any public purpose defined to mean a purpose related to the administration of the government of the state: ss 3 & 4; *Lands Acquisition Act 1978* (NT) allows land to be acquired for any purpose whatsoever: s 43. See *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20 (15 May 2008).

Consequential amendments will be required throughout Part 9 of the *Land Administration Act*. Those consequential amendments should take note of s 143(10), dealing with pastoral leases, which contains a definition of 'public purpose' for that section.

Chapter 4 Enhancement

Set off for enhancement

The *Land Administration Act 1997* (WA) presently recognises that a public work may enhance the value of land adjacent to a proposed public work. Section 241(7) provides that, upon taking a person's land, any enhancement in the value of the person's other land is to be set off against the compensation otherwise payable for a reduction in the value of land adjacent to the taken land held by the same person.

There are two issues for consideration: should enhancement be set off at all and, if so, against what other compensation should it be set off?

The Commission does not recommend that set off for enhancement be abandoned. Solatium apart, the over-riding goal of compensation legislation is to compensate a dispossessed owner for the loss actually suffered but, within limits, only for that loss.

Section 63(b) of the *Public Works Act 1902* (WA) provided that compensation was payable for damage from severance and from injurious affection, but provided that enhancement elsewhere was set off against injurious affection only. It is unclear why s 63(b) so provided.

Section 241(7) of the *Land Administration Act* departed from the form of s 63 of the *Public Works Act* and, ordinarily, a court might assume that the change indicated an altered intention. If the correct interpretation of s 241(7) is that paragraph (b) encompasses all reductions in value caused by the taking and the public work, that is, by both injurious affection and severance, then the debate would be resolved. However, the likelihood is that paragraph (b) was intended merely to state in plain English what had previously been called 'injurious affection', and a court would not be justified in assuming an intention to substantively alter the law. In any event, the Commission is concerned to clarify the law as well as to reform it.

No submission to the Commission proffered a rationale for confining the set off to injurious affection. It was pointed out that enhancement and injurious affection are concerned with an alteration in value *attributable to the public work* whereas severance is not.[1] However, that does not constitute a rationale pertaining to the over-riding goal of compensating persons for, and only for, losses suffered as a result of the taking of their interest in the land.

Further, a part taking of land might cause 'severance enhancement'. For example, the bisection of land may enable two created lots to be sold at a higher aggregate price than the original lot. This raises the question whether severance enhancement should also be set off against other reductions in value.

The current Western Australian limit to the set off is in contrast to most Australian jurisdictions where enhancement is, or may be, set off, not only against both injurious affection and severance, but also against all compensation otherwise due.[2]

In Tasmania, the set off is explicitly related to, not only injurious affection and severance, but to other compensation including that payable for the taking of land. Section 27 of the *Land Acquisitions Act 1993* (Tas) relevantly provides that:

> In determining compensation under this Act, regard is to be had to the following matters:
>
> (a) the market value of the estate of the claimant in the subject land;

1. George De Biasi, Submission No. 8 (14 February 2008).
2. *Land Acquisition Act 1955* (Cth) s 55(2)(a)(iv); *Land Acquisition Act 1994* (ACT) s 45(2)(a)(iv); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55(f); *Acquisition of Land Act* 1967 (Qld) s 20(3); *Land Acquisition Act 1969* (SA) s 25(1)(j); *Land Acquisition Act 1993* (Tas) s 27(1)(d); *Land Acquisition and Compensation Act 1986* (Vic) s 41(1)(e). The position in the Northern Territory is less clear. While Schedule 2 of the *Lands Acquisition Act 1978* (NT) does not expressly refer to enhancement, it is restricted to the loss the claimant has suffered which may imply that enhancement is set off.

(b) any special value the estate in the subject land may have to the claimant which is –

(i) a financial advantage incidental to the claimant's ownership of that estate; and

(ii) in addition to its market value;

(c) the damage caused by severance of the subject land from other land belonging to the claimant;

(d) the betterment of other land belonging to the claimant which is caused by the carrying out of, or the proposal to carry out, the authorised purpose;

(e) whether other land belonging to the claimant is injuriously affected by the carrying out of, or the proposal to carry out, the authorised purpose;

(f) any disturbance relating to any loss or damage suffered, or cost reasonably incurred, by the claimant as a consequence of the taking of the subject land; ...

(g) except as provided in this Part, such other matters as the acquiring authority, the Court or an arbitrator may consider to be relevant.

(2) Subject to subsection (3), the enhancement of other land referred to in subsection (1)(d) is to be set off against the amount of compensation determined under subsection (1)(a), (b), (c), (e), (f) and (g).

Acts of the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory provide that enhancement is a consideration brought to bear on the compensation otherwise due, implying that a set off may be against any compensation otherwise due. In New South Wales, for example, s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) provides that:

> In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):
> ...
> (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

Under similar provisions, Courts have sometimes set off enhancement of retained land against the value of land taken, and on occasion have even awarded no compensation at all.[3] That result turns on the construction of the relevant statute, since any set off for enhancement is wholly a creation of statute.[4]

The Commission does not recommend that the enhancement set off be extended to all compensation otherwise due.

Submissions to the Commission on the issue of set off fell into three categories. Some urged that enhancement should be set off against injurious affection only.[5] However, no persuasive rationale emerged.

The Law Society submitted that set off should occur for enhancement of a person's retained land only to the extent that the enhancement is 'over and above'[6] the enhancement enjoyed by others in the vicinity. This could apply set off to injurious affection, or to severance, or to both, depending on the facts. However, in the Commission's view, this would require detailed examination of other properties in the vicinity, which would not simplify litigation. Further, it would not eliminate arbitrary distinctions

3. *Brell v Penrith City Council* (1965) 11 LGRA 156; *Jones v Blue Mountains City Council* (1978) 25 *The Valuer* 502; *Parkes Development Pty Ltd v Burwood Municipal Council* (1969) 17 LGRA 257.
4. *Adelaide Fruit & Exchange Co Ltd v Adelaide Corporation* (1961) 106 CLR 85.
5. See Robert Ferguson, Submission No. 3 (24 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).
6. By which the submission meant enhancement through a *cause* not affecting others in the vicinity, rather than an amount of enhancement that exceeded enhancement enjoyed by others in the vicinity: Law Society of Western Australia, Submission No. 18 (27 March 2008)

because set off would depend on the extent that neighbours enjoyed enhancement, which could vary greatly from one vicinity to another.

Third, most submissions could find no rationale for the distinction and recommended set off against both injurious affection and severance.[7] This is the Commission's preference also.

Section 241(7) of the *Land Administration Act* should be amended to provide that enhancement is set off against reduction in the value of adjoining land caused by either severance or injurious affection. In the Commission's view, a landowner should always be compensated for an appropriation of land and, severance and injurious affection claims apart, should otherwise enjoy the enhancement of a public work along with others in the neighbourhood.

Recommendation 11

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to provide that enhancement is set off against reduction in the value of adjoining land caused by either severance or injurious affection.

Severance enhancement

The Commission's view is that there is no distinction, relevant to compensation, between enhancement due to a public work and enhancement due to the act of severance. Accordingly, the reference in s 241(7) to an increase in the value of land should include increases due to both the proposed works and severance.

Recommendation 12

The Commission recommends that the reference in s 241(7) of the *Land Administration Act 1997* (WA) to an increase in the value of land should include increases due to both the proposed works and severance.

Identifying the land

Some confusion has arisen in respect of the identity of the land which is intended by the words in s 241(7) 'any land held in fee simple [the value of which] is increased by the carrying out, or the proposal to carry out, the public work for which the land was taken'. Obviously, 'any land' and 'the land' refer to different land. The former refers to land not taken and the latter to land taken.

However, it is unclear whether 'any land' refers to, or includes, the adjoining land which is the subject of severance or injurious affection damage.

The land intended by paragraphs (a) and (b) is, by definition, land whose value is reduced and therefore cannot be land whose value is enhanced. However, some practitioners have taken the view that the set off provision requires a parcel of adjacent land to be divided up into parts enhanced and parts reduced in value, with the former 'set off' against the latter. This is a pointless exercise because it merely results in an overall view of whether adjacent land is enhanced or reduced in value.

One interpretation of s 241(7) is that the reference to 'any land' means any other land, i.e. any land which is neither the taken land nor the land subject to severance or injurious affection damage. It refers to a third area of land.

7. See Main Roads Western Australia, Submission No. 4 (31 January 2008); Western Australian Planning Commission, Submission No. 6 (6 February 2008); George De Biasi, Submission No. 8 (14 February 2008); Water Corporation, Submission No. 10 (14 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008). The Department of Planning and Infrastructure agreed that there was merit, in setting off against both forms of damage, but declined to so recommend because it was unknown whether any valuation issues may be impacted: Department for Planning & Infrastructure, Submission No. 16 (29 February 2008). In the Commission's view, this misgiving turns on whether all distinction between injurious affection and severance is abandoned, which is not the Commission's recommendation.

For example, land may be taken for a road that bisects a person's land. The road may enhance the remaining land on one side of the road but depreciate the land on the other side. In such a case, the enhancement would be set off against the injurious affection. The outcome should not depend on whether the two retained areas of land remain or become subject to one or two certificates of title – that is to say, the outcome should be the same whether the two retained areas of land comprise one 'land' or two 'lands' for the purposes of 'any land'.

This example may also be used to illustrate the artificial exercise of deciding whether the reduction in value on one side constitutes injurious affection or severance. In an effort to avoid set off, land owners sometimes attempt to characterise the decreased value as severance in order to avoid set off, while acquiring authorities may argue it is injurious affection. In the commission's view, the set off should apply in either case.

Similarly, an argument may concern whether the enhancement is due to the works, and to be set off, or due to severance and not set off. Those arguments are relevant to the present form of s 241(7) but irrelevant to a just outcome.

A second example is where a land owner, dispossessed of part of one lot for the purposes of a road, happens to own another lot of land some distance away. If the land severed by the taking is reduced in value, but the second lot is enhanced in value, then the latter would be set off against the former in Western Australia. This is unusual in Australia.

In most Australian jurisdictions the 'other' land; that is, the land subject to enhancement, is restricted to land adjoining or severed from the taken land.[8] It does not include land the claimant might own some distance away which is nevertheless enhanced by the relevant public work. Those jurisdictions apply the set off in the first example above, but not in the second. The Tasmanian legislation, on the other hand, allows set off in both examples.

The key to understanding the Western Australian position, relative to other Australian jurisdictions, is that it alone restricts the whole issue of set off to adjoining lands. In other jurisdictions, set off may be made against the value of the land taken. In those jurisdictions, adjoining land (ie, all of it) is either reduced in value (which increases the compensation payable for the land taken) or enhanced in value (which reduces that compensation). Only in Western Australia does one need to assume two categories of adjoining land in order to make sense of the provision.

Therefore, in Western Australia, the matter could be resolved by simply inquiring whether, in aggregate, adjoining lands are reduced in value. Set off would be subsumed in that inquiry. Aggregate reduction in value of adjoining lands would be compensable (as in other jurisdictions) and aggregate enhancement would be irrelevant (unlike other jurisdictions).

There are competing policy considerations on the issue whether enhancement should be taken into consideration when it arises in lands that are not adjoining. On the one hand, arguably, a person should be compensated only for the overall loss caused by a taking for a public purpose so that set off should apply in respect of other land whether or not adjoining or severed from the taken land. On the other hand, all other land owners in the vicinity of

8. *Land Acquisition Act 1955* (Cth) s 55(2)(a)(iv); *Land Acquisition Act 1994* (ACT) s 45(2)(a)(iv) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55(f); *Acquisition of Land Act* 1967 (Qld) s 20(3); *Land Acquisition Act 1969* (SA) s 25(1)(j); *Land Acquisition and Compensation Act 1986* (Vic) s 41(1)(e). In Tasmania, s 27(1)(d) of the *Land Acquisition Act 1993* (Tas) simply refers to 'other land' (ie, is not limited to other adjoining land). The *Lands Acquisition Act 1978* (NT) does not refer to enhancement.

the relevant public work may enjoy the enhancement it brings, so that a person who happens to have suffered a taking elsewhere should not be singled out from his neighbours.

In this narrow context, it is not helpful that most other jurisdictions exclude set off when the enhanced lands are not adjoining. This issue is an example of the somewhat artificial or arbitrary distinctions that have to be made, in an overall effort to create a fair result. Since other jurisdictions allow set off against the value of land taken, the fair balance must be differently assessed in Western Australia.

The Commission does not recommend that s 241(7) of the *Land Administration Act* be amended to restrict the class of retained and enhanced land to only those lands that adjoin the taken land.

The meaning of 'adjoining land' may require attention. Generally, the expression applies to lands that are contiguous within the same certificate of title or contiguous lands in another certificate of title. However, it is presently unclear whether 'adjoining land' includes land, under a different certificate, which is contiguous, not with the taken land, but with land adjoining the taken land. This can arise when a landowner suffers a taking of one lot of land from a larger holding of several lots all with different certificates of title.

In the Commission's view, a fair balance is achieved by regarding land as 'adjoining' when it is not separated from the taken land by land owned by another person (including the Crown). The Commission recommends that this be accommodated for s 241(7) of the *Land Administration Act*.

Recommendation 13

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to ensure that 'adjoining land' includes land owned by the claimant and separated from the taken land only by other land owned by the claimant.

Section 3 of the *Land Administration Act* contains a definition of 'adjoining' but only in respect of parcels of Crown land. That form of definition, which allows Crown lands to be 'adjoining' even though separated by roads, railways, watercourses and reserves or unallocated Crown land, is not appropriate for the purposes of s 241(7). However, the definition of 'adjoining' could be extended to separately cover its meaning in s 241.

Severance and injurious affection: cumulative damage

Another issue given prominence in submissions to the Commission is the possibility that s 241(7) could be interpreted to mean that a land owner is entitled to compensation for either severance or injurious affection but not for both.[9] This issue arises because of the use of 'or' instead of 'and' between paragraphs (a) and (b). The Commission's view is that s 241 should not be so interpreted, because it is contrary to the purpose of fair compensation.

Nevertheless, this too should be placed beyond doubt by amendment.

9. See Main Roads Western Australia, Submission No. 4 (31 January 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); George De Biasi, Submission No. 8 (14 February 2008).

Recommendation 14

The Commission recommends that, between paragraphs (a) and (b) of s 241(7) of the *Land Administration Act 1997* (WA), the word 'or' be replaced with the word 'and'.

Adjoining or severed land

Some jurisdictions have given effect to this issue by referring to other land 'which adjoins or is severed from the acquired land',[10] others, including Western Australia, have referred only to 'adjoining land';[11] and others only to 'land severed'.[12]

This appears to be partly a semantic debate, perhaps turning on whether the relevant adjoining land was originally under the same certificate of title as the taken land. If so, then it was more clearly 'severed' from the taken land. 'Adjoining land' is apt to capture land whether or not severed in that restricted sense. That is to say, the addition of 'severed' to 'adjoining' does not appear to affect the ambit of the provisions. However, where the reference is only to 'land severed' it may be open to argument that adjoining land not under the same certificate of title is excluded, which would not reflect a legislative intention to effect fair compensation.

Recommendation 15

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain its present reference to 'adjoining land'.

The definition of 'adjoining land' is dealt with above.

10. New South Wales, Queensland and Victoria.
11. South Australia and Western Australia.
12. The Commonwealth and Australian Capital Territory.

Chapter 5

Entitlement under the Planning

Overview

The Western Australian Planning Commission ('WAPC') and local governments are the statutory authorities responsible for urban, rural and regional land use planning and land development matters. The WAPC and local governments are respectively the 'responsible authorities' in relation to region and local planning schemes made under the *Planning and Development Act 2005* (WA)[1] The WAPC and local governments, as responsible authorities, are responsible for both dealing with applications for development approval and claims for compensation under region and local schemes respectively.

Planning schemes commonly classify land for certain kinds of use. That classification is usually relevant, and is sometimes determinative, when the responsible authorities come to consider applications for subdivision or development approval. Land proposed for private use is commonly 'zoned' while land proposed for public use is commonly 'reserved'.

Land is commonly classified as a 'reserve' by planning schemes for a particular land-use purpose in order to ensure that it remains reasonably available for the purpose.

In some cases, land is reserved for an immediate purpose. For example, the WAPC may acquire land over time for a rail corridor but find that altered design requirements necessitate a modified corridor alignment. Additional land may be reserved for the purpose of the corridor to enable the WAPC to acquire the land within a short timeframe for the imminent project.

In other cases, land may be reserved for a period before being used for the reserved purpose. For example, long term planning may identify a future need for a major highway. Such land may be reserved for decades before budget and demographic conditions lead to acquisition of the land and construction of the highway. In such cases, the restrictions under the reservation ensure that the required land is not developed in the meantime in a manner that makes its later use for the purpose unnecessarily expensive or disruptive.

Both private and public land may be reserved under a planning scheme. The mere reservation of privately owned land does not alter its ownership.

Apart from the special case of non-conforming uses of land,[2] the reservation of privately owned land under region schemes does not itself give rise to any right to compensation, notwithstanding that restrictions on use of the land may accompany the reservation. Instead, each land owner's entitlement to compensation is deferred until certain specified events. The objectives of this legislative deferral are, first, to avoid an extremely large compensation liability accruing at the date a region planning scheme is implemented; and, second, to avoid paying compensation for land unnecessarily.

Compensation for particular land may prove unnecessary because the planning scheme is later amended to remove the relevant reservation or because later events cause a land-owner to be unaffected, or even advantaged, by the relevant reservation.

Injurious affection

Under s 173(1) of the *Planning and Development Act*, any person whose land is 'injuriously affected' by the making or amendment of a planning scheme is entitled to obtain

1. *Planning and Development Act 2005* (WA) s 4 defines a planning scheme as: 'a local or regional planning scheme that has effect under this Act and includes – (a) the provisions of the scheme; and (b) all maps, plans, specifications and other particulars contained in the scheme and colourings, markings or legends on the scheme'. The two regional planning schemes are the Metropolitan Region Scheme and Peel Region Scheme for land use in the Perth metropolitan and Peel area. Reservations under region schemes will automatically effect reservations under the relevant local planning schemes.
2. See *Planning and Development Act 2005* (WA) ss 174(1)(c), 178(1)(b) & 178(2).

compensation in respect of the injurious affection.[3]

Section 174(1) sets out the circumstances in which 'land is injuriously affected by the making or amendment of a planning scheme'.

When land is injuriously affected

(1) Subject to subsection (2), land is injuriously affected by reason of the making or amendment of a planning scheme if, and only if —

(a) that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose;

(b) the scheme permits development on that land for no purpose other than a public purpose; or

(c) the scheme prohibits wholly or partially —

(i) the continuance of any non-conforming use of that land; or

(ii) the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.

(2) Despite subsection (1)(c)(ii), a planning scheme which prescribes any requirement to be complied with in respect of a class or kind of building is not to be taken to have the effect of so prohibiting the erection, alteration or extension of a building of that class or kind in connection with, or in furtherance of that class or kind in connection with, or in furtherance of, non-conforming use.

(3) Where a planning scheme wholly or partially prohibits the continuance of any non-conforming use of any land or the erection, alteration or extension of any building in connection with or in furtherance of a non-conforming use of any land, no compensation for injurious affection is payable in respect of any part of the land which immediately prior to the coming into operation of the scheme or amendment does not comprise —

(a) the lot or lots on which the non-conforming use is in fact being carried on;

(b) if the prohibition relates to a building or buildings standing on one lot, the lot on which the building stands or the buildings stand; or

(c) if the prohibition relates to a building or buildings standing on more than one lot, the land on which the building stands or the buildings stand and such land, which is adjacent to the building or buildings, and not being used for any other purpose authorised by the scheme, as is reasonably required for the purpose for which the building or buildings is or are being used.

(4) If any question arises under subsection (3) as to whether at any particular date, any land —

(a) does or does not comprise the lot or lots on which a non-conforming use is being carried on;

(b) is or is not being used for any purpose authorised by a scheme; or

(c) is or is not reasonably required for the purpose for which any building is being used,

the claimant or responsible authority may apply to the State Administrative Tribunal for determination of that question.

Section 174(1) specifies the circumstances in which land is injuriously affected by reason of the making or amendment of a planning scheme. Because it is rare for planning schemes to prohibit all private use of zoned land or prohibit the continuance

3. The making or carrying out of a planning scheme, including a reservation of land, may effect betterment of the subject land. Section 184 of the *Planning and Development Act 2005* (WA) allows a responsible authority to recover from a land owner one half of any such betterment. The provision is unrelated to 'injurious affection' under that Act. There is no mention of set off. Rather, the provision is concerned to allow a responsible authority to be rewarded for its work and expenditure in elevating the value of land. For those reasons, s 184 is not relevant to this Report.

of non-conforming uses, most cases of injurious affection under planning legislation concern the reservation of land.

Although not express, it seems obvious that s 174(1) is met when paragraph (a) *and* either paragraph (b) or (c) are met. In other words, s 174(1) is not fulfilled simply by virtue of an extant reserve.[4] This and other aspects of s 174(1) are addressed below.

Section 177(1) of the *Planning and Development Act* sets out the point in time at which a land owner may apply for compensation in respect of injurious affection due to a planning scheme, namely:

1. When the land is first sold following the date of the reservation.
2. When an application made in good faith for approval to develop the land is refused.
3. When an application to develop land to which a planning scheme applies is approved but on conditions that are not acceptable to the applicant.

A claim must be made within six months of the above occurring.[5] This is dealt with below.

Section 177(3) provides that the person determining the amount of compensation must be satisfied of certain matters before compensation is payable. In the case of a first sale the owner must have received a lesser price than would be expected if the land was not reserved, must have given notice of the intention to sell the land and must have sold the land in good faith. When a development application is relied upon to trigger the right to compensation, the application must be made in good faith.[6]

Section 177(3)(a) assists to specify when injurious affection is compensable. It applies to the event of first sale of the reserved land and provides for the assessment of the difference between the price which the owner could, in good faith, reasonably obtain and the price the owner could reasonably have expected had the land not been reserved.

Section 179(1) sets out the amount of compensation due. It provides that the amount due is not to exceed that difference, implying that the amount may be less than that difference. The compensation due may be less than that difference when it is paid pursuant to the termination of a non-conforming use.

In overview, therefore, injurious affection is effectively treated as the reduction in value of land caused by its reservation. However, s 174(1) may be thought to define 'injurious affection', rather than merely set out preconditions for the form of injurious affection with which Part 11 (compensation and acquisition) is concerned. In *City of Canning v Avon Capital Estates (Australia) Ltd*,[7] the State Administrative Tribunal (Chaney J) held that s 174(1) exhaustively defines the concept.[8] The result of the ruling is that, for the purposes of the *Planning and Development Act*, 'injurious affection' is defined without reference to any reduction in value of the land – land may be 'injuriously affected' by a reservation notwithstanding that the value of the land is unaffected or even enhanced by the reservation.

Given the history of the concept, this decision reflects an unsatisfactory legislative use of the term 'injurious affection'. It is also in contrast to the meaning of the term in the previous legislation.[9] It is in contrast too with the plain English meanings of 'injuriously affected' and 'injurious affection'.

4. However, *City of Canning v Avon Capital Estates (Australia) Ltd* [2008] WASAT 46 may be to the contrary of this interpretation.
5. *Planning and Development Act 2005* (WA) s 178(1).
6. See *Planning and Development Act 2005* (WA) s 177(3)(b). A purpose of the legislation is to defer payment of compensation, as explained above. If applications for development approval could be made in the absence of an honest desire to develop, then compensation could be made payable at any time of the land owner's choosing.
7. [2008] WASAT 46.
8. The reasons for decision were delivered after the Commission had received submissions in the present Reference.
9. *Town Planning* and *Development Act 1928* (WA) s 11.

In most cases, this interpretation of s 174 will not affect the ultimate amount of compensation payable, which remains to be determined under s 179 in an unexceptional manner. However, the interpretation may affect the outcome in respect of limitation periods, eligibility, liability and procedure.

If the view were accepted, following *Avon*, that injurious affection exists whenever land is classified as a reserve under an extant planning scheme, then it is lost from consideration that injurious affection, and the relevant reduction in value, may have occurred under a previous local government planning scheme. This may occur, as in *Avon*, where land was reserved before 2005 under the *Town Planning and Development Act 1928* (WA), and hence then subject to the limitation period in s 11 of that Act. That land is now dealt with under the *Planning and Development Act*. If, under *Avon*, that land is regarded as injuriously affected merely on account of the present continuation of its reservation, then the expiration of an earlier limitation period under s 11 will be disregarded.

In the Commission's view, injurious affection should not be treated as if it were unrelated to a reduction in the value of land and unrelated to the date of the event that caused the reduction in value. The substantive reasons are as follows.

First, the concept ought not depart the meaning hitherto accepted, which reflects its plain English meaning and its historical use. Second, the date of the reduction in value may be relevant to a limitation period and should not be overlooked. Third, it should be clear that, subject to the Commission's recommendations in respect of s 177, only the person who owned the land at the date of reservation is entitled to claim compensation, rather than whoever happens to own it at the date a claim is made. Last, only the responsible authority that first imposed the reserve should be liable, not the responsible authority that merely reflected the earlier reservation. For example, the WAPC may create a reserve in the Metropolitan Region Scheme, which a local government reflects in its local planning scheme.

For those reasons, s 174(1) should not be taken to exhaustively define the phrase 'land is injuriously affected by reason of the making or amendment of a planning scheme'. Section 174(1) could be amended by replacing 'land is injuriously affected' with 'land may be injuriously affected'. Such an amendment would assist to make clear that s 174 is intended to set out additional preconditions for claiming injurious affection, and is not intended to define the concept of injurious affection or the quoted phrase.

Recommendation 16

The Commission recommends that s 174(1) of the *Planning and Development Act 2005* (WA) be amended to make clear that it does not exhaustively define 'land is injuriously affected by reason of the making or amendment of a planning scheme' for the purposes of s 173(1).

Subject to that amendment, the Commission does not believe that the provisions which employ 'injurious affection' are unclear or ambiguous.

No submission to the Commission was based on a view that the use of 'injurious affection' in this context required clarification. Rather, the clarification that was suggested to the Commission concerned a reconciliation of the planning

10. See Frank Fford, Submission No. 5 (5 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008). The WAPC, on the other hand, considered the meaning of injurious affection did not require clarification or definition, but did not address the *Avon* case delivered subsequent to its submission.

and acquisition meanings.[10] The Commission has recommended against re-introduction of 'injurious affection' in the *Land Administration Act 1997* (WA) and against any definition of the expression. It follows that there is no need to attempt a reconciliation of the two applications of the expression.

Further, as mentioned earlier, there is no 'common law' concerning injurious affection – the concept is entirely a creation of statute and the case law concerning it is solely concerned with statutory interpretation.[11] Even if the expression has application under two different statutes, as was the case before 1997 under the *Public Works Act 1902* (WA) and the *Metropolitan Region Town Planning Scheme Act 1959* (WA), no need arises to reconcile the two.

Accordingly, the Commission does not recommend that any further statutory definition of 'injurious affection' be made in the context of the *Planning and Development Act*.

Use of an arbitrator

It was mentioned above that the interpretation of s 174(1) of the *Planning and Development Act* in the Avon case affects existing procedure.

Under s 176, the State Administrative Tribunal is to decide whether land is injuriously affected, but the amount of compensation is to be determined by arbitration. The Tribunal held that it was obliged to decide only whether the requirements of 174 were met, and was not empowered to decide contested pleas that no reduction in the value of the land could have been caused by the particular planning scheme.

The distinction in s 176 appears to have been intended to ensure that planning matters are decided by the Tribunal and valuation matters by an arbitrator.[12] In the Commission's view, the interpretation preferred by the Tribunal does not conform to that Parliamentary intention.[13]

Furthermore, in the Commission's view, there is no sound reason for the separation of a litigious matter into its planning and valuation aspects, with each to be dealt with in a different forum. There is ample precedent illustrating untoward consequences of dealing with litigation in such a piecemeal fashion. Since the advent of the State Administrative Tribunal, the advantage, if any, of the present arrangement is slight. Accordingly, the Commission's recommendation is that the *Planning and Development Act* should reflect the position that exists under s 220 of the *Land Administration Act*, and should dispense with statutory reference to an arbitrator.

The same considerations apply to s 184(4), which deals with assessment of betterment.

Recommendation 17

The Commission recommends that s 176 of the Planning and Development Act 2005 (WA) be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation, including as to whether the land has been injuriously affected and as to the amount of compensation. Similarly, s 184(4) should be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation and recovery of betterment value.

Affected land and adjoining land

Under s 174(1) of the *Planning and Development Act*, compensable injurious affection arises in respect

11. *Walker v Sydney Harbour Foreshore Authority* [2008] HCA 5, [29]–[35].
12. *City of Canning v Avon Capital Estates (Australia) Ltd* [2008] WASAT 46, [27].
13. On the other hand, s 177(3) of the *Planning and Development Act 2005* (WA) clearly accords the arbitrator jurisdiction over questions that would normally be regarded as planning, rather than valuation, issues. This will be addressed by the Commission's recommendation that the Tribunal assume plenary jurisdiction.

of the land reserved and not at all in respect of adjoining land. This reflects the applications of 'injurious affection' in that Act: in *Re Board of valuers, Ex Parte Bond Corp Pty Ltd* ('*Bond*'),[14] Miller J relied on the 'well established distinction' between compensation in the land acquisition and planning contexts.

In *Bond*, part of a lot of land was reserved. A notice of intention to sell the reserved part of the lot was given to the WAPC. The Board of Valuers instead assessed the unaffected value of the whole lot. Miller J held the Board had erred. His Honour held that the legislation was focused on the planning meaning of injurious affection and hence was restricted to the land reserved.[15] This meant that the effects of the Scheme amendment on the value of the remainder of the land could not be taken into account.

Further, his Honour ruled out the possibility of outflanking that result by treating the 'value' of the reserved portion as a reference to 'value to owner' under such cases as the *Pastoral Finance Association* case[17] (see Chapter 4 above). This aspect of his Honour's reasons was consistent with the approach taken when determining the price to be paid for land on an election to purchase by the responsible authority in *Western Australian Planning Commission v Kelly.*[18]

In *Bond*, the owner benefited from his Honour's reasons because the Scheme, apart from reserving part of the lot, re-zoned for development the rest of the lot and thus increased the value of the lot. If, as the WAPC argued, it was the before and after value of the whole lot that was relevant, compensation to the owner would have been much less.

In other cases, however, the application of *Bond* will be to the disadvantage of the owner, as it would have been in *Kelly* if the Court of Appeal had not found an alternative comparative sales method to give the same quantum of compensation as that determined by the trial Judge.

There are two consequences of *Bond* relevant to this part of the Commission's Report.

First, no compensation is available to an owner of reserved land arising from the reduction in value of his adjoining land as a result of the reservation. An application under s 178 (read with ss 174(1) and 177) cannot include compensation for adjoining land on either first sale or on a development application. Similarly, enhancement of the value of adjoining land held by the same owner cannot be taken into account.

Second, even if the responsible authority elects under s 187 to acquire the reserved land instead of paying compensation under s 178, still there is no compensation for the reduction in value of adjoining land. Nor is there any equivalent of an enhancement set off. The issue of election to acquire is dealt with in Chapter 7.

Returning to the first consequence, suppose that the reservation affects a sliver of land within a larger parcel and that there is no market for the sliver of land. In such a case, the valuation method to be applied for the purposes of s 179 must be one which values the sliver in a way that does not incidentally capture variance in value for the rest of the land holding. That is to say, a before and after approach (often referred to here as an 'affected and unaffected' approach) must be applied, but must be applied only to the sliver. That is a problem for the professional valuers.

Of more concern to the Commission is the effective disentitlement to compensation for reduction in value of adjoining land and the effective

14. [1998] 101 LGERA 268, 281.
15. Ibid.
16. Ibid 282. See *Pastoral Finance Association Ltd v Minister (NSW)* [1914] AC 1083.
17. [2007] WASCA 160, [39]–[40].
18. *Kelly v Western Australian Planning Commission* [2006] WASC 208 (trial); *WAPC v Kelly* [2007] WASCA 160 (appeal).

removal of considerations of enhancement. In the Commission's view, the legislation, as judicially interpreted, is unfair and inconsistent in its provisions for compensation, and is out of kilter with the provisions of the *Land Administration Act*. It is no answer to say that this is merely the result of the planning meaning of injurious affection – so it is, but the unfairness remains.

The issue can be stated as follows: should the entitlement to compensation under s 179 of the *Planning and Development Act* provide that, if a reservation is made of land, the compensation payable to the owner includes both:

(a) the reduction of the value of the reserved land (as presently set out in s 179); and

(b) the reduction of the value of adjoining land owned by the applicant,

caused by the reservation, however, if the value of that adjoining land is increased by the Scheme amendment under which the reservation was made, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (a)?

If the law was stated in those terms, the decision in the *Bond* case as to the appropriate approach to assessment of compensation for injurious affection would be reversed. It would also resolve the difficulty of valuing land that did not constitute a lot because the reserved land and adjoining land (including within the same lot) would be assessed.[19]

It must be borne in mind that compensation under s 174(1) is only in respect of the reservation, not for a taking. In some cases, a later taking of a reserved portion of land will give rise to an entitlement to severance and injurious affection damage occasioned to remaining land. However, this is not a reliable outcome. First, if the later taking is pursuant to the election to acquire process, then no such compensation is paid (see the second consequence mentioned above, dealt with in more detail in Chapter 7). Second, the date at which injurious affection and severance are determined is at or after the date of the taking, not the date of the reservation, and a considerable time may pass between those dates. The remaining land may be sold in the meantime so that, when the reserved part is taken, the landowner no longer holds adjoining land for the purposes of s 241(7) of the *Land Administration Act*.

Further, at the date of the taking, the amount of severance and injurious affection damage may be less than it would have been had the relevant date been the date of the reservation. This may occur because the remaining land is fully subdivided and developed by the date of the taking, and its loss to the land owner at that date does not include a loss of development potential.

These difficulties would vanish if the relevant date for valuation on a taking were the date of the reservation rather than of the taking. However, this could disadvantage a landowner in times of increasing land values. Assuming that interest would be also payable from the date of the reservation, either the landowner or the acquiring authority might be disadvantaged depending on prevailing interest rates. Further, it must be borne in mind that the acquiring authority does not acquire the land at the date of reservation, and ordinarily ought not be required to pay as though it did. Allowing the landowner to elect which date is to apply would not solve all these difficulties.

19. This approach was endorsed in submissions: see Frank Fford, Submission No. 5 (5 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008).

For those reasons the Commission does not recommend altering the valuation date on a taking.

Rather, the Commission recommends that ss 174(1) and 179 of the *Planning and Development Act* be amended to the effect suggested above. A person whose land is reserved should be entitled to claim compensation, assessed on the dates mentioned in s 179(2), in respect of reductions in value of reserved and adjoining lands, subject to set off for enhancement.

Recommendation 18

The Commission recommends that, if a reservation of land is made, s 179 of the Planning and Development Act 2005 (WA) provide that the compensation payable to the owner includes both:

(a) the reduction of the value of the reserved land; and

(b) the reduction of the value of adjoining land owned by the applicant,

caused by the reservation, however, if the value of that adjoining land is increased by the Scheme amendment under which the reservation was made, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (a).

The compensation paid in such cases will be deducted from any compensation ultimately paid upon an acquisition of the reserved land.[20]

The Commission's recommendation will require a consequential amendment to s 174(1), which presently assumes that injurious affection may occur only in respect of land that is reserved. Form 7 of the Planning Regulations will also require amendment.

Awareness of entitlement to compensation

Land may be reserved under a planning scheme for a public purpose; that is, a purpose which serves or is intended to serve the interests of the public or a section of the public.[21]

The public purposes for which land may be reserved include 'parks and recreation' purposes or future roads and other infrastructure, and a variety of public purposes including educational uses, and civic and cultural purposes. In such cases, it is possible, indeed it is often likely, that the land owner will be practically unaffected in continuing the day-to-day use made of the land prior to reservation. Nevertheless, the value of the land may have been affected by the reservation.

When region schemes or scheme amendments are initiated, which involve the reservation of private land for public purposes, documentation is circulated to owners as part of the procedure specified by s 43 of the *Planning and Development Act.* The documentation includes information about compensation entitlements.[22]

Standard conveyancing practice in Western Australia involves purchasers obtaining information about zoning and/or reservations. Hence, a purchaser should be aware of the reservation prior to purchase. Further, owners will have been invited to participate in the scheme creation or amendment process that gave rise to the public purpose reservation[23] or planning control area declaration[24] and thereby informed about compensation entitlements.

The WAPC has formal processes for advising owners of their rights when land is reserved under a regional scheme.

20. *Planning and Development Act 2005* (WA) s 192(1).
21. *Planning and Development Act 2005* (WA) s172.
22. See Western Australian Planning Commission, 'Your Property and Region Schemes', <http://www.wapc.wa.gov.au/Property+and+land+management/Your+property+and+region+schemes>.
23. *Planning and Development Act 2005* (WA) ss 42 & 84; also *Town Planning Regulations 1967* (WA).
24. *Planning and Development Act 2005* (WA) Pt 7.

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Prior to the decision of the High Court in *Temwood,*[25] cases arose in which a landowner applied for compensation on account of the refusal of a development application, but so applied notwithstanding that the land owner had purchased the land from a previous owner who had failed to apply for compensation upon first sale.[26]

Following *Temwood,* the WAPC adopted the view that, if the owner (as at the date of reservation) does not claim compensation, no purchaser of the reserved land has an entitlement to claim compensation. This view is based on two considerations. First, two of the four Justices in *Temwood* [27] who dealt with the point held that a purchaser cannot claim compensation and, second, the purchase price may not have included any amount in respect of a continuing entitlement to compensation.

Under the Commission's recommendations, an entitlement to compensation will survive until first sale in all cases except earlier payment of compensation and no entitlement will survive first sale except upon a formal assignment of an entitlement to compensation for a development application which is subsequently either refused or approved subject to unacceptable conditions.[28]

Accordingly, the question is whether there is sufficient notice of that regime. Clearly, the purchaser has an entitlement only if it has been assigned. Assignment presumably would not have been sought unless a development application was under consideration. Hence, there appears to be no need to ensure notice is given to the purchaser in any event or to the vendor in the event the purchaser seeks assignment. Therefore, the question is simply whether additional measures are required to bring to the attention of the original owner his entitlement upon first sale.

It may not be sufficient merely that the owner's rights are explained at the time of reservation, since that time may precede first sale by many years. In its Discussion Paper, the Commission suggested that the entitlement to compensation be endorsed on the certificate of title. However, the WAPC submitted that, in light of the extensive formal processes already involved, which it detailed, and conveyancing procedure, no additional measures were necessary. That submission has force. The usual inquiries will reveal whether the land is reserved and whether compensation has been paid, which will give rise to the question of assignment. That seems sufficient notice. Also, memorials on title are more usually warnings to persons dealing with the land, rather than notices of entitlements.

A further issue is incidentally relevant to a landowner's awareness of an entitlement to compensation. At first glance, it may be thought insufficient that an entitlement is brought to the landowner's attention at the time of first sale because s 177(3)(a)(ii) of the *Planning and Development Act* provides that compensation is not payable unless the responsible authority was given written notice of the landowner's intention to sell, which notice must be given 'before selling the land'. However, the phrase 'before selling the land' has been held to mean before conveyance, rather than before offer and acceptance.[29] Therefore, the notice may be given at any time before conveyance, including a few minutes before conveyance.

Accordingly, there is usually ample time in the course of dealing with an offer and acceptance, settlement and conveyance for a vendor or the vendor's agents to act pursuant to s 177(3)(a)(ii).

25. *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.
26. This occurred in *Kelly v Western Australian Planning Commission* [2006] WASC 208.
27. Gummow and Hayne JJ; McHugh and Callinan JJ to the contrary.
28. See discussion below under 'Limitation Period'.
29. See *Bond v Western Australian Planning Commission* [2000] WASC 257. The Full Court in *Bond* dealt with s 36(4)(a)(ii) of the *Metropolitan Region Town Planning Scheme Act 1959* (WA), which was in the same terms as s 177 (3)(a)(ii) of the *Planning and Development Act 2005* (WA).

Notice of intention to sell

Section 177(3)(a)(ii), mentioned above, entails a further issue of relevance to the Commission's terms of reference. In the *Bond* case, the Court was unable to identify a clear purpose for the provision. It was agreed by the parties that the purpose was not to allow the responsible authority to 'elect to acquire' the land instead of paying compensation,[30] nor was it to allow the responsible authority to acquire by agreement. Rather, it was held at [50] that the purpose of the notice of intention to sell was —

> to enable the [responsible authority] to undertake an investigation, contemporaneously with the sale (that is, the conveyance) in regard to the issues of "reasonable steps" ... and "good faith" ... [now in s 177(3)(iii) *Planning and Development Act*] ... The fact that notice would then be given, say, minutes before the sale ... took place, would not be material ... [T]he purpose of the notice would be to ensure that the [responsible authority] was aware of the sale ... before receiving a claim in respect of the land sold. ... The purpose of the notice... was to enable the [responsible authority] to investigate the transaction immediately, and to prevent an owner from giving notice say 6 months after conveyance when the facts would be more difficult to establish.[31]

In essence, the purpose of the notice is to allow the responsible authority to investigate up to six months earlier than would be possible if no notice is given. The Full Court acknowledged that this explanation was 'not an entirely satisfactory answer to the inquiry concerning the true purpose of the notice', but was better than any alternative advanced in argument.[32] It is unsatisfactory, in the Commission's view, because, first, six months is not a significant delay when the only real issue is whether a fair and reasonable price was obtained. Second, it will not be clear at the date of sale that a claim for compensation is to be made. Third, it could be easily arranged that relevant sales of reserved land are brought to the attention of the responsible authority through automated administrative processes, so that early investigation could be otherwise arranged.

It follows that s 177(3)(ii) may operate to deprive a person of compensation for lack of notice, when the purpose of the notice is insubstantial.

The options for reform include:

- dispensing with the notice of intention and providing instead that any claim for compensation must be lodged at the date of sale; and
- simply dispensing with the notice of intention altogether.

The Commission sees no utility in retaining s 177(3)(a)(ii) of the *Planning and Development Act*. As mentioned, its only significant purpose is to allow slightly earlier investigation, which purpose could easily be facilitated by the relevant authority monitoring registrations of transfers of land.

Recommendation 19

The Commission recommends that s 177(3)(a)(ii) of the Planning and Development Act 2005 (WA) be repealed.

Limitation period

The proper interpretation of s 177(1) of the *Planning and Development Act* was considered in *Temwood.*[33] The

30. Election to acquire under s 187 of the *Planning and Development Act 2005* (WA) (formerly under s 36(2a) of the *Metropolitan Region Town Planning Scheme Act 1959* (WA)) is discussed below in Chapter 6.
31. *Bond v Western Australian Planning Commission* [2000] WASC 257, [50].
32. Ibid [51].
33. *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.

5

High Court considered whether there was an entitlement to compensation which existed in advance of the right to apply for compensation in respect of a reservation under the Metropolitan Region Scheme. The issue arose for determination because of the ambiguity of s 36 of the *Metropolitan Region Town Planning Scheme Act* ('MRTPS Act'), which was in similar terms to s 177(1) of the *Planning and Development Act*. Section 36(3) of the MRTPS Act provided that compensation was not claimable until:

(a) The land was first sold following the date of reservation; or

(b) The WAPC refused an application for development approval or granted permission to carry out development with conditions that were unacceptable to the applicant.

Under s 36(5) of the MRTPS Act, compensation could only be claimed within six months of each of those events and was payable only once. It was unclear whether a failure to claim compensation within six months of first sale meant that the purchaser, who wished to develop the land, was precluded from claiming compensation when his subdivision approval contained unacceptable conditions. (Similarly, it was unclear whether a failure to claim compensation for a refused development application terminated the owner's entitlement to claim upon first sale, although this was not the fact in *Temwood*).

The High Court was divided on the issue – two of the three majority justices concluded there was only one right to claim compensation, which implies that the expiry of six months from first sale terminates all compensation. However, the two dissenting justices held to the contrary, and the point cannot be regarded as authoritatively resolved.

The Commission understands that, prior to *Temwood*, the WAPC (which is the primary source of injurious affection compensation payments arising from planning scheme restrictions) was prepared to accept claims for compensation arising from refusals to permit development on land due to reservations, notwithstanding that six months had elapsed since the relevant sale of the reserved land to the claimant. Since *Temwood*, the WAPC has taken the view that a purchaser is likely to have obtained the reserved land at the injuriously affected price in the first place, and should be ineligible to claim injurious affection compensation under s 173 of the *Planning and Development Act*. This is on the basis that payment would constitute compensation for loss of something the purchaser never had and may not have paid for.

Further, if the original owner had been compensated upon sale of the land, no entitlement would arise for that or any subsequent owner whose development application is refused due to the scheme. It seems irrelevant to the merits of the purchaser's claim that the vendor was or was not paid compensation unless it be shown that the purchaser paid an unaffected price. He presumably will pay an unaffected price if the vendor assigns the entitlement.[34]

In *Nicoletti,*[35] the Supreme Court decided that a landowner affected by a reservation is entitled to submit a claim for compensation for injurious affection (following refusal of a development application) and to then withdraw and resubmit a further claim. In theory, the land owner could repeat this process with the practical effect of amending the date of valuation or assessment.[36] From the perspective of the authority, this results in wasted administrative costs. However, the land owner may genuinely wish to develop, and may therefore prefer

34. A submission from the Law Society of Western Australia took the opposite view. It was submitted that the entitlement to compensation should 'run with the land' and terminate only upon payment: see Law Society of Western Australia, Submission No. 18 (27 March 2008). The idea that compensation should 'run with the land', like a covenant, implicitly underlies some of the debate in this context: The Commission cannot accept that position – there is no reason in policy or equity to 'compensate' a purchaser who purchased at the affected price and has therefore suffered no loss.

35. *Nicoletti v Western Australian Planning Commission* [2006] WASC 131.

36. *Planning and Development Act 2005* (WA) s 187(4).

to later lodge a second development application than accept compensation upon failure of the first.

Certainly, there would be a difficulty in paying compensation upon a refusal of development approval, only to allow a second modified development application, and there seems no useful purpose in preventing subsequent development applications. Also, there would be unfairness in providing that a land owner who neglected to apply for compensation upon a refused development application is also thereafter barred from applying upon first sale of the affected land.

Therefore, the Commission does not recommend the effect of *Nicoletti* be reversed. On the contrary, it should be made clearer that the refusal of a development application gives rise to compensation which, if not claimed within 6 months, terminates compensation in respect of that application, but not in respect of first sale or subsequent development applications. In other words, preservation of compensation entitlement should not depend on the land owner making a timely withdrawal of his development application.[37]

Several submissions were made to the Commission in respect of the period of six months.[38] One submission suggested that no time limit should apply since a limitation period was merely a means of depriving an owner of an entitlement. While limitation periods always have that effect, this submission implicitly suggests that land acquisition and compensation should be exempt.[39] Other submissions suggested that the Minister be given a discretion to extend the period as is the case under s 207(2) of the *Land Administration Act*.[40]

In other Australian jurisdictions, the issue of limitation periods is variously accommodated.

Comparisons are difficult in the planning context, but Victoria, Queensland and Tasmania have reasonably comparable provisions. In Victoria, no claim may be made for compensation on the first sale of affected land unless 60 days' advance notice of the sale is give to the planning authority.[41] In Queensland, the limit is six months after a refused development application and two years after a dedication of land to a public use.[42] In Tasmania the loss is assessed under its land acquisition legislation where a 60 day limit is imposed (see below).[43]

In the acquisition environment, only two other Australian jurisdictions apply a limitation period to compensation for the acquisition: Tasmania (where the 60 day period does not operate as a bar to compensation) and Northern Territory (where the three-year period does operate as a bar).[44] A facility to extend the time limit exists in Tasmania and Northern Territory.[45]

Essentially, the problem is that, on the one hand, expedition should be encouraged because all parties benefit from a prompt dealing with compensation and some aspects of assessment of compensation are better addressed contemporaneously. Limitation periods ensure expedition. On the other hand, termination of entitlement after six months may be a too severe consequence unless safeguards exist. The Commission's view is that, with the safeguards proposed, the present six-month limits are fair, but the inter-relationship of the limits needs clarification.

The Commission's view is that the fairest balance, bearing in mind administrative difficulties, is that all entitlement to compensation terminates six months after first sale if the original owner does not claim compensation, unless the original owner (the vendor) assigns an

37. The withdrawal of an application for compensation for injurious affection may still be made if an owner wishes to avoid or terminate an election to acquire (see below).
38. Robert Ferguson, Submission No. 3 (24 January 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Peel Action Group, Submission No. 12 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).
39. See Robert Ferguson, Submission No. 3 (24 January 2008).
40. See Frank Fford, Submission No. 5 (5 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008).
41. *Planning and Environment Act 1987* (Vic) s 106
42. *Integrated Planning Act 1997* (Qld) s 5.4.6, read with ss 5.4.2 & 5.4.3 respectively.
43. *Land Use Planning and Approvals Act 1993* (Tas) s 66(1), applying the *Land Acquisition Act 1993* (Tas).
44. *Land Acquisition Act 1993* (Tas) ss 37(a) & 38; *Lands Acquisition Act 1978* (NT) ss 52(1) & 52(3).
45. *Land Acquisition Act 1993* (Tas) s 78; *Lands Acquisition Act 1978* (NT) s 52(1). This has been dealt with later in this Chapter. See also below Chapter 7, 'Election to Acquire'.

entitlement to the purchaser on that first sale. In that way, a purchaser may have greater confidence in purchasing that he will either obtain development approval or be compensated if approval is refused. However, no other entitlement should be assignable or otherwise survive the first sale, i.e. thereafter no entitlement should survive for compensation on second sale or on subsequent development applications or in respect of non-conforming uses.

Recommendation 20

The Commission recommends that entitlement to compensation should expire:

1. for the original owner:
   (a) six months after a development application is refused or approved with unacceptable conditions, but only in respect of the particular development application refusal or conditional approval (ie not in respect of a subsequent development application made by the same owners in good faith); or
   (b) six months after first sale, if not assigned to the purchaser;
2. for a purchaser of reserved land, six months after a development application is refused or approved with unacceptable conditions provided that the original owner has, at the time of selling the land, assigned to the purchaser, in approved form, his entitlement to compensation upon an unsuccessful development application;

and in any case subject to a discretion in the Minister to extend the time limit.

The position under local planning schemes is less clear. The operative provisions[46] still allow claims within six months of the scheme or scheme amendment being made, or following the refusal of an application for development application by reason of the reservation. The *Planning and Development Act* now has conflicting provisions for the circumstances in which compensation may be sought in respect of earlier local scheme reservations. Accordingly, amendment to the Model Scheme Text may be required. The manner in which any limitations on entitlement to compensation might be communicated in respect of claims to local governments should be considered as part of that process.

Delay and good faith

In some cases, a reservation of land, or even the likelihood of a reservation, may result in the owner being unable to find a purchaser for the land.[47] This places considerable stress on the application of s 178(1)(a)(i) (dealing with first sale of reserved land). Accordingly, some land owners appear to seek compensation pursuant to s 178(1)(a)(ii) or (iii) instead, by lodging a formal development application. However, the legislation disapproves an artificial development application; that is, one motivated by the wish to receive compensation rather than by a genuine wish to develop. Section 177(3)(b) provides that the Arbitrator, in determining compensation, must be satisfied that the development application was made in good faith. That requires that the person making the application must genuinely wish to carry out the development.[48]

Hence, it was suggested in a submission to the Commission, some land owners are both unable to sell reserved land and unable to make a development application in good

46. The injurious affection compensation claim provisions are set out in Model Scheme Text appended to the *Town Planning Regulations 1967* (WA) upon which all local planning schemes are based. These still reflect the provisions of the now repealed s 11 of the *Town Planning and Development Act 1928* (WA), but often also include compensation on the occasion of a refused development application.
47. See, for example, the position of the applicant in *Kelly v WAPC* [2006] WASC 208 (Simmonds J). This difficulty was stressed in submissions to the Commission: see Philip Logan, Submission No. 7 (11 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008).
48. *Bond Corporation Pty Ltd v WAPC* (2000) 110 LGERA, [2000] WASCA 257, [53]–[56].

faith, and are thereby deprived of any avenue for compensation.[49] However, the overriding purpose of the compensation provisions is to delay payment of compensation until the land is needed or the land owner is distinctly disadvantaged. That purpose would be thwarted if artificial development applications could be made.

In the circumstances postulated, the land owner and the relevant authority may need to reach agreement on sale or acquisition under s 190 of the *Planning and Development Act*.

Also, an owner whose land is partly reserved may have no avenue for compensation until first sale. Under the Commission's other recommendations, this may keep an owner out of compensation for the injurious effect of the reservation on both the reserved land and adjoining land, until first sale. This may cause hardship. An owner may have reduced access to mortgage finance on account of a reduced value of his land attributable to a reserve. The owner may not wish to sell the home or business premises.

In general terms, the Commission's view is that these are unavoidable consequences of the purpose of the compensation regime. It will be for the government to assess the financial consequences, and for the Parliament to amend that regime if and when the time arrives that compensation need not be deferred. Of recent, the trend is in the opposite direction under Part 11 of the *Planning and Development Act*.

Nevertheless, a mechanism for relief of hardship may be useful for such cases.

The Commission recommends an amendment by which the Minister may require the responsible authority to pay compensation as if on a refused development application in cases of particular hardship. Exercise of that power will occasionally advance the date of payment of compensation, but will not otherwise add to the impost on Treasury.

Recommendation 21

The Commission recommends an amendment to s 178 of the *Planning and Development Act 2005* (WA) by which the Minister may require the responsible authority to pay compensation as if on a refused development application in cases of particular hardship.

Conditions on sub-division approval

The WAPC has the power to withhold approval of a sub-division of land except upon conditions, which may include the cession of land for public purposes.[50]

The High Court has decided that sub-division conditions may validly include the ceding of land.[51] It was in this context that the High Court in *Temwood*[52] considered whether an entitlement vested in a land owner at the time of reservation, or at the relevant time mentioned in s 177, and held it was the latter. Had it been the former, the condition could have been characterised as effecting an appropriation of a vested interest, and more objectionable, rather than the conditional approval of subdivision.

A submission to the Commission suggested that the right to compensation should vest in the owner at the date of reservation with actual payment deferred until an event under s 177(1) occurs.[53] However, that would resurrect the

49. See Robert Ferguson, Submission No. 3 (24 January 2008).
50. *Planning and Development Act 2005* (WA) ss 143 & 153.
51. *Lloyd v Robinson* (1962) 107 CLR 142, 154–55; *Western Australian Planning Commission v Temwood* (2004) 221 CLR 30 (McHugh, Gummow & Hayne JJ; Callinan & Heydon JJ dissenting).
52. *Western Australian Planning Commission v Temwood,* ibid.
53. See Law Society of Western Australia, Submission No. 18 (27 March 2008).

debate in *Temwood* about whether, absent express statutory authority, a condition of subdivision can include cession of land without compensation. It does not seem to otherwise advance the interests of land owners.

The Commission does not recommend any amendment in this respect.

Proposal for a scheme

It was mentioned above that s 241 of the *Land Administration Act* should be amended to make clear that the Pointe Gourde principle applied to any effects on value caused, not only by the public work, but also by market foreknowledge that the public work was proposed.

The same considerations apply to s 192(1)(a) of the *Planning and Development Act*.

Recommendation 22

The Commission recommends that section 192(1)(b) of the *Planning and Development Act 2005* (WA) be amended to make clear that the value of land is to be assessed without regard to any increase or decrease in value attributable to either the planning scheme (including its operation or effect) or a proposal to implement the planning scheme.

Definition of 'planning scheme'

The first appeal in the *Mt Lawley (No. 1)* case[54] dealt with the question what particular amendments to the Metropolitan Region Town Planning Scheme were to be disregarded for the purposes of s 36(2a) of the repealed *Metropolitan Region Town Planning Scheme Act*. The successor provision is s 188(1) of the *Planning and Development Act*, but the Commission has recommended repeal of that section. Under that recommendation, valuations pursuant to an election to acquire will occur under s 192 of the *Planning and Development Act*.

Section 192 in general terms applies s 241 of the *Land Administration Act*, but read with the particular articulation of the Pointe Gourde principle set out in s 192(1) of the *Planning and Development Act*. Section 192(1) requires the assessment of value without regard to any increase or decrease in value attributable to 'the relevant planning scheme'.

'Planning scheme' is defined so as to mean the entire relevant scheme, eg the Metropolitan Region Town Planing Scheme ('MRS'), or an entire local government planning scheme.

Obviously, it would be ridiculous to assess the value of land in Perth in 2008 disregarding the entire MRS. The Full Court in *Mt Lawley (No.1)* held instead that only the operative amendment of the MRS was to be disregarded.[55] This result was assisted by the then definition of 'scheme' to include 'or any part thereof'. Hence, in the context of s 36(2b) of the *Metropolitan Region Town Planning Scheme Act,* disregard of the scheme could be taken to mean disregard of the operative part of the scheme. No similarly facilitative refinement of the definition occurs in the *Planning and Development Act*.

However, this result in *Mt Lawley (No. 1)* was not without controversy either, because the relevant amendment not only reserved the Mt Lawley land but also altered the zoning of adjoining land. Hence, while the reservation of Mt Lawley's land was to be disregarded, so too was the fact that relevant adjoining land had

54. (2004) 29 WAR 273.
55. Ibid [20].

altered from a rural to an urban zone and increased in value. Disregarding the whole amendment was to the disadvantage of Mt Lawley.

This issue is particularly difficult to resolve in a satisfactory manner. On the one hand, it is too simplistic to provide that only the relevant reservation is to be disregarded, because the simultaneous up-zoning of adjoining land may be dependent upon a public use of the reserved land. That is to say, it may not be correct to virtually assume that, but for the public purpose, the reserved land would have been up-zoned. On the other hand, it is plainly unjust to require a valuation on the assumption that the reserved land would not have been up-zoned.

In the Commission's respectful view, the approach and outcome in *Mt Lawley (No. 1)* was, in this respect, the most equitable available. The Court held that the up-zoning of adjoining land was to be disregarded but allowed expert evidence on whether the adjoining land would have been up-zoned in any event.

In the Commission's view, it would be too difficult, and may be counter productive, to legislate for the kind of approach in *Mt Lawley (No. 1)*. Rather, the Commission recommends the re-incorporation of 'or any part thereof' into the definition of 'planning scheme'.

Recommendation 23

The Commission recommends that the words 'or any part thereof' be included in the definition of 'planning scheme' in s 4 of the *Planning and Development Act 2005* (WA).

Chapter 6

Agreed acquisitions

This chapter deals with the question whether the price agreed under agreed acquisitions returns to an owner the full monetary equivalent of the value to the owner of his land and, if not, whether reforms should be recommended.

The full worth of land to its owner may include an amount reflecting a consequent reduction in the value of remaining land. Such losses would not be recovered in the market. They are recoverable only under the principles of compulsory acquisition.

Compulsory acquisition

Upon compulsorily acquiring land, the acquiring authority will offer an amount of compensation based upon a valuation obtained by the authority. There are procedures to be followed to adjudicate any dispute.

The procedure relating to valuing land under the *Land Administration Act 1997* (WA) is as follows:

- An affected land owner has six months to initiate a claim for compensation.[1]
- A claim must be made in the approved form and served on the acquiring authority.[2]
- A claimant may request that the claim be satisfied by the provision of compensation in a form other than money and the acquiring authority must consider the request and negotiate in good faith.[3]
- If the claim for compensation is not disputed the acquiring authority must produce a report dealing with the value of the interest and the value of any damage suffered by the claimant within 90 days of receiving the claim.[4] The acquiring authority must as soon as possible after that report is produced make an offer of compensation to the claimant.[5]
- If a claimant rejects an offer[6] the method of determining compensation can be by way of any of the following methods:
  - (a) by agreement between the acquiring authority and the claimant;
  - (b) by an action for compensation by the claimant against the acquiring authority ...; or
  - (c) by reference to the State Administrative Tribunal.[7]
- If an offer is not made by the acquiring authority within 120 days the claimant may commence proceedings in a court (which court will depend on the amount of compensation sought) or the State Administrative Tribunal.[8] A claimant must give the acquiring authority 30 days' notice before commencing proceedings.[9]
- If a claimant rejects an offer, the matter can be taken to the State Administrative Tribunal by serving on the acquiring authority a notice of appointment of assessor. Within 30 days of this the acquiring authority must:
  - (a) appoint an assessor and inform the claimant of the appointment; or
  - (b) make an offer of compensation if an offer has not already been made; or
  - (c) increase the offer of compensation.[10]
- If none of the above three conditions is met within 30 days, the President of the State Administrative Tribunal can, on the request of the claimant, appoint an assessor for the purpose of determining what compensation should be paid.[11]

Those processes, while dealing with a compulsory acquisition, allow agreement on the amount of compensation. A properly informed land owner will be aware that the

1. *Land Administration Act 1997* (WA) s 207. The Minister can extend the period if he/she 'is satisfied that the application is reasonable and made in good faith': *Land Administration Act 1997* (WA) s 207(2). If the time limit has expired without a claim being made and it appears to the acquiring authority that the person, who held the interest immediately before the taking is absent from the state or under 18 years old, is out of the state or is incapable of instigating legal proceedings then a specific set of procedures applies: *Land Administration Act 1997* (WA) s 210. The acquiring authority must make an offer of compensation and apply to the State Administrative Tribunal (SAT) for a direction on how to proceed. If the SAT accepts the offer of compensation on behalf of the person, the compensation must be paid into the Supreme Court within 30 days of the decision and remain there until an application is made by the person concerned: *Land Administration Act 1997* (WA) ss 210, 249.
2. *Land Administration Act 1997* (WA) s 211. The notice must provide details of: '(a) the particulars identifying the land in respect of which the claim is made; (b) the nature and particulars of the claimant's interest in the land; (c) if the land or the interest is charged, leased, or subject to any easement – particulars of the charge, lease or easement; (d) each matter on account of which compensation is claimed, with particulars of the nature and extent of the claim; and (e) the claimant's full name and address for service.'
3. *Land Administration Act 1997* (WA) s 212.
4. *Land Administration Act 1997* (WA) s 217(1).
5. *Land Administration Act 1997* (WA) s 217(3). This claim and offer can be amended by notifying the other side after the offer has been made but not if the matter of compensation has been referred to a court or to the SAT for determination; *Land Administration Act 1997* (WA) s 218.

compensation should include all heads of compensation set out in s 241 of the *Land Administration Act*, including any reduction in the value of adjoining land.

Agreed acquisitions

The *Land Administration Act*, the *Planning and Development Act 2005* (WA) and many of the Acts listed in the Schedule[12] have provision for the agreed acquisition of land as an alternative to compulsory acquisition. In all but one such case,[13] the use of those provisions has excited little controversy.

Section 11 of the *Land Administration Act* allows the Minister to acquire land by purchase or exchange. This provision has not caused significant public disquiet so far as the Commission is aware.

Within Part 9 of the *Land Administration Act*, dealing with 'Compulsory Acquisition', s 168 provides that, where an interest in land is required for a public work, the acquiring authority (a) may enter an agreement with the land owner to purchase the interest or (b) may obtain the land owner's consent to the taking, with compensation to be provided under Part 10; that is, under s 241. Further, in the event that the acquiring authority and the land owner proceed by agreement under paragraph (a) of s 168, the agreement may specify the price or consideration or may stipulate that the price is to be assessed as if for compensation under Part 10: s 169(1).

The acquiring authority is obliged by s 168(2) to advise the land owner of the procedures of Parts 9 and 10 and payment of purchase money or compensation. Accordingly, it is open to the land owner at any stage to make an informed choice to have Part 10 compensation applied to the proposed transfer of land – either by so agreeing with the acquiring authority or by declining any agreement and thereby precipitating the compulsory acquisition to which Part 10 will apply.[14]

The significance to the owner of having such a choice lies in the possibility that the provisions of s 241 will produce compensation in excess of the market value of the land in question. This may occur for several reasons.

First, ss 241(8) and (9) provide for what is frequently referred to as 'solatium'. Solatium is an amount, over and above the assessed damage, paid as solace for the compulsory taking. The *Land Administration Act* provides that solatium of up to 10 per cent of the amount otherwise awarded may be added to the compensation. Exceptional circumstances may justify payment of more than 10 per cent.[15] Section 169 allows solatium to be paid in respect of an agreed taking because it allows the price to be assessed 'as if for compensation under Part 10'.[16]

Second, in a part taking, while it is not necessary that agreements under s 168(1)(a) of the *Land Administration Act* include an allowance for a reduction in value of retained land as a consequence of the taking or the public work for which the taking occurred, the owner is at least made aware of the entitlement to claim in respect of those damages and probably would seek it under s 169(1).

Agreed acquisitions are included in other statutes. In some statutes, the agreed and compulsory acquisition provisions of the *Land Administration Act* are both expressly incorporated. For example, each of the 'redevelopment acts' expressly incorporates Parts 9 and 10 of the *Land Administration Act*, and hence ss 168 and 169:

6. A claimant can only reject an offer or amended offer within 60 days of being served with it: *Land Administration Act 1997* (WA) s 219(1).
7. *Land Administration Act 1997* (WA) s 220.
8. *Land Administration Act 1997* (WA) s 221.
9. *Land Administration Act 1997* (WA) s 223(2).
10. *Land Administration Act 1997* (WA) s 224(3).
11. *Land Administration Act 1997* (WA) s 224(4).
12. See Schedule 1 of the Terms of Reference at Appendix 2 of this Report.
13. For the election to acquire process, see below Chapter 7
14. These provisions appear to have been influenced by the Western Australian Parliament's Standing Committee on Government Agencies which concluded that, in land acquisitions which are the subject of an injurious affection claim under planning legislation, the acquisition is more akin to compulsory than to voluntary acquisition. It recommended that acquisitions of this nature should be treated on the same terms and conditions as a compulsory acquisition under the *Land Administration Act 1997* (WA): Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Proposals for Reform,* 9th Report (August 1986) 453–54, recommendation 33.
15. *Land Administration Act 1997* (WA) s 241(9).
16. No submission suggested that solatium not be available. The Department of Planning and Infrastructure supported retention of solatium for this purpose: see Department for Planning & Infrastructure, Submission No. 16 (29 February 2008).

- *East Perth Redevelopment Act 1991* (WA) s 21;
- *Subiaco Redevelopment Act 1994* (WA) s 24;
- *Midland Redevelopment Act 1999* (WA) s 23;
- *Hope Valley-Wattleup Redevelopment Act 2000* (WA) s 6;
- *Armadale Redevelopment Act 2001* (WA) s 20.

On the other hand, s 29(2) of *the Dampier to Bunbury Pipeline Act 1997* (WA) provides that a right, title or interest may be acquired for the purpose of the pipeline either (a) by agreement or (b) compulsorily under Part 9 of the *Land Administration Act*. While the *Land Administration Act* is incorporated for compulsory acquisition, it is not for agreed acquisitions. The result is that agreements under the *Dampier to Bunbury Pipeline Act* do not necessarily include the benefits of ss 168 and 169 of the *Land Administration Act*.

Similarly, paragraphs (d) and (e) of s 28(3)(d) of the *Energy Operators (Powers) Act 1979* (WA) set out respectively an operator's power to acquire land by agreement and by compulsion. The power of compulsory acquisition is to be exercised under the *Land Administration Act*, but the power to acquire by agreement is not.

Section 190 of the *Planning and Development Act* also contains a clear example of a stand-alone voluntary acquisition provision:

> The responsible authority may, for the purpose of a planning scheme, in the name and on behalf of such responsible authority, purchase any land comprised in the planning scheme from any person who may be willing to sell the same.

The position is less clear in other statutes. An acquisition of land for the purposes of the *Water Agencies (Powers) Act 1984* (WA) appears to be administered under the *Land Administration Act*, although this is not expressly stated in the Act. Section 75 of the *Water Agencies (Powers) Act* deals only with the power of the relevant authority to take an interest in land less than the interest held by its owner. In that context, the expression is used 'whether by way of agreement or by way of a compulsory taking under Part 9 of the *Land Administration Act*. So expressed, the implication is that the 'agreement' intended is not an agreement under ss 168 and 169 of the *Land Administration Act*.

Section 19 of the *Petroleum Pipelines Act 1969* (WA) provides in subsection (1) that land may be compulsorily 'taken' by the Minister at the instance of a pipeline licensee and, if so, the taking must be effected under Part 9 of the *Land Administration Act* (and Part 10 in consequence). Subsection (2) provides that subsection (1) does not apply unless the Minister is first satisfied that the pipeline licensee has made reasonable attempts to acquire the land by agreement with its owner. The landowner has no capacity to rely on ss 168 or 169 of the *Land Administration Act*. While a licensee may of its own accord inform the owner of the process and of entitlements upon a compulsory acquisition, it would not ordinarily be in the commercial interests of the licensee to do so.

Because of the word 'taken' (see definition in s 151 of the *Land Administration Act*), it appears that the Minister has no statutory capacity under the *Petroleum Pipelines Act* to renew an attempt to acquire the land by agreement under ss 168 or 169 of the *Land Administration Act*, although this is not beyond doubt.

Government policy is to endeavour to purchase land at market value: Policy 9.3.1[17] of the Government

17. Policy 9.3.1 was most recently updated in June 2005.

Land Policy Manual, which stipulates that compulsory acquisition is to be regarded as an action of last resort. Agencies are required to exercise due diligence in ascertaining and negotiating a fair market price, utilising the advice of the Valuer General where practical. If a price has been negotiated in excess of 110 per cent of the Valuer General's assessment of market value, the consent of the Minister for Land must be obtained.

The issue for consideration by the Commission is whether all acquisitions for a public purpose should be treated as quasi-compulsory, so that the provisions of ss 168 and 169 of the *Land Administration Act* should apply.

It is unlikely that the legislative intention for ss 168 and 169 of the *Land Administration Act* includes application to truly consensual purchases in the sense used in the market or applied in the cases dealing with market value. In the circumstances relevant to ss 168 and 169, the land owner will be aware that the land is required for a public work and that, should the land owner not 'agree' to sell, the land will probably be compulsorily acquired notwithstanding. That is to say, ss 168 and 169 are more designed to facilitate amicable compulsory acquisitions than to facilitate truly consensual transfers.

However, some government acquisitions are more closely analogous to voluntary sales in the market. This is particularly the case in the planning and environmental contexts, where government's piecemeal acquisitions of land in the market have resulted in major efficiencies for large projects.[18] Therefore, a quite different legislative approach may be justified in such cases. Section 190 of the *Planning and Development Act* reflects this approach.

With the exception of the Western Australian Planning Commission (which has the ability to utilise the Metropolitan Region Improvement Fund to acquire land likely to be needed in the long-term) most agencies' capital works budgets are formulated to shorter development timeframes, resulting in a more disruptive 'just in time' policy affecting acquisition negotiations. In these cases, ss 168 and 169 apply, rather than the more 'purely' voluntary acquisition provisions such as s 11 of the *Land Administration Act* or s 190 of the *Planning and Development Act*.

Therefore, in practice, it may be that the criteria for distinguishing truly voluntary acquisitions from 'agreed compulsory acquisitions' have become related to: first, the immediacy of the requirement; second, whether the land comes on to the market independently of any government initiative; and, third, whether a land owner is attracted by a government initiated offer to purchase. Those criteria do not appear in the legislation.

Such criteria are included in legislation in NSW and Victoria.[19] Section 38 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) provides that:

> **Compensation entitlement if land (not available for public sale) acquired by agreement**
>
> An authority of the State is to take into account, in connection with any proposed acquisition by agreement of land not available for public sale, the same matters as are required to be taken into account under this Part in determining the compensation payable for an acquisition by compulsory process.

The New South Wales and Victorian provisions reflect a policy of treating as quasi compulsory all acquisitions flowing from a requirement to acquire land for a public purpose except where the land is already on sale.

18. Some of these are explained in WAPC, 'The Case for Retaining the Metropolitan Region Improvement Tax' (April 2007).
19. Section 18 of the *Land Acquisition and Compensation Act 1986* (Vic) allows acquisition by agreement after a notice of intention to acquire is served. The compensation must take into account the matters that apply on a compulsory acquisition.

6

However, no other Australian jurisdiction has an equivalent to the New South Wales and Victorian provisions for regard to the heads of claim under compulsory acquisitions.[20] Indeed, no other jurisdiction has an equivalent of ss 168 and 169 of the *Land Administration Act* (WA).

The policy considerations relevant to this issue include the following:

- Some acquisitions are quasi-compulsory in the sense that a landowner may 'agree' to sell partly because he or she knows that the land will be taken in any event. In such cases, it may not be fair to pay a price less than the compensation that would be due on a compulsory acquisition.
- Where land is already reserved, or under a development control area,[21] and is offered for public sale by its owner, an acquisition by an acquiring authority should be treated as quasi-compulsory for this purpose.
- Agreed or non-litigious resolutions are preferable and ultimately less onerous for tax payers and should be encouraged by a purchase price more closely approximate to those for compulsory acquisition.
- Agreed or non-litigious acquisitions are usually preferable from the land owner's perspective too, since no money is lost in litigation costs.
- Where the acquiring authority may, but need not, acquire land immediately it may suit a landowner to sell at or near market value. That option should not be closed by legislation.
- Where the landowner has placed land on the market independent of any pending State acquisition, there is less justification for paying above market value.
- It is generally preferable for government dealings in land to be conducted with full disclosure of the rights of the landowner.

Sections 168 and 169 of the *Land Administration Act* balance those considerations. The Commission does not recommend amendment of those provisions. The Commission does not recommend that these sections be amended to allow a purchase of land otherwise than under the disclosure requirements of s 168(2).

Section 45(3)(b) of the *Energy Operators (Powers) Act* draws a distinction between land that the energy operator is required under legislation to acquire and land that the energy operator may elect to acquire. The distinction is framed so as to suggest that an acquisition is optional if the reason for the acquisition is of a certain type. However, the powers to acquire by agreement and by compulsion, set out in s 28(3)(d) and (e) respectively of the *Energy Operators (Powers) Act*, contain no such distinction. The distinction in s 45(3)(b) was relied upon by Western Power to submit that its power to acquire by agreement should not be brought within ss 168 and 169 of the *Land Administration Act* because, to do so, may confuse the basis for negotiation and restrict more innovative approaches.

However, in the Commission's view, nothing in the circumstances of Western Power distinguishes it from the policy considerations listed above. First, ss 168 and 169 of the *Land Administration Act* apply only when land is required. The purpose of those sections is to allow more amicable dealings in acquisitions that would otherwise be by compulsion. Second, when land is required but not for a considerable period, acquisition should not on that basis alone fall outside ss 169 and 169. Third, the Commission does not recommend that all consensual acquisitions be brought within those sections: land already

20. *Land Acquisition Act 1955* (Cth) s 40 which provides for ministerial approval of agreed purchases, if satisfied that the acquisition is a normal commercial transaction between parties dealing with each other on equal terms; *Acquisition of Land Act* 1967 (Qld) s 15 which allows agreed acquisitions in the alternative to compulsory acquisitions, but this does not derogate from the authority's capacity to acquire by ordinary offer and purchase; *Land Acquisition Act 1969* (SA) s 15; *Land Acquisition Act 1993* (Tas) s 9; *Land Acquisition Act 1994* (ACT) s 32; *Lands Acquisition Act 1978* (NT) ss 31A & 35A.

21. Pursuant to the *Swan and Canning Rivers Management Act 2006* (WA) (see below).

on the market and land offered by an owner are not included.

The Commission does not recommend the approach adopted in NSW and Victoria of paying full compensation except in the case of land independently placed on the market. As a submission pointed out, there are cases in which an advance purchase by government has 'kick-started' a development, to the advantage of the land owner.[22] In such cases, the owner and the acquiring authority should be able to reach agreement in the range of amounts between market value and full compensation under s 241 of the *Land Administration Act,* provided always that there is adequate explanation of the land owner's rights.

Recommendation 24

The Commission recommends that other statutes which provide for acquisitions by agreement reflect or incorporate ss 168 and 169 of the *Land Administration Act 1997* (WA) where land is acquired for public purposes at the government's initiative and where reserved land is acquired.

Other acquisitions (ie, of land that comes onto the market, or is privately offered to the government) may be made as if the acquiring authority were an ordinary purchaser in the market. This should not apply to land reserved under the *Planning and Development Act* or controlled under the *Swan and Canning Rivers Management Act*.

Since s 190 of the *Planning and Development Act* presently applies where the initiative for sale is from either the landowner or the acquiring authority, it should be amended to reflect the criteria recommended above (ie, amended to reflect ss 168 and 169 of the *Land Administration Act* where land is reserved or acquired at the government's initiative). The difference between ss 168 and 169 of the *Land Administration Act* and s 190 of the *Planning and Development Act* is that the former are used for imminent projects whereas the latter is sometimes used for long term land-banking in a manner not generally disadvantageous to the owner (but could also be used for 'just in time' acquisitions).

Recommendation 25

The Commission recommends that s 190 of the *Planning and Development Act 2005* (WA) apply differently in two different contexts:

(a) if the land owner offers land for public sale or privately to the authority, which land is not reserved land, then the purchase may proceed as in the market; but

(b) if the authority initiates purchase negotiations, or if the land is reserved, then ss 168 and 169 of the *Land Administration Act 1997* (WA) should operate.

The rationale for this recommendation is to ensure that land owners are aware of their rights and options, and that the entitlements under s 241 of the *Land Administration Act* are within the range for negotiation. It is not the intention to ensure that acquiring authorities always pay to land owners the array of entitlements under s 241(7) under agreed acquisitions.

Finally, as the submission of the Law Society pointed out, it is desirable that all 'approved' claim forms for compensation (eg, under s 211(1) of the *Land Administration Act*) reflect the entitlement to claim for injurious affection and severance. Completing a claim form will usually focus a claimant's mind more sharply than reading an explanatory document.

22. See Philip Logan, Submission No. 7 (11 February 2008). Other submissions also supported this graded approach to the issue: George De Biasi, Submission No. 8 (14 February 2008); Water Corporation, Submission No. 10 (14 February 2008).

Chapter 7

Election to acquire

The *Planning and Development Act 2005* (WA) contains provisions for an agreed purchase of land (s 190), compulsory acquisition (s 191, which refers to Part 9 of the *Land Administration Act 1997* (WA)) and the 'election to acquire' process (s 187).[1]

The 'election to acquire' process is formally a compulsory acquisition, but it is often thought of as agreed in that the land owner may precipitate either an acquisition or payment of compensation. In any event, it does not fall neatly within the preceding discussions. It is an acquisition process that has caused significant discontent.

Section 187 replaced ss 36(2a) and (2b) of the *Metropolitan Region Town Planning Scheme Act 1959* (WA), which has been the subject of several cases in the Supreme Court, most recently in: *Mount Lawley Pty Ltd v Western Australian Planning Commission (No. 1)*[2] and *(No. 2)*[3] and *Western Australian Planning Commission v Kelly*.[4]

Section 187 of the *Planning and Development Act* provides that, where a claim is made for injurious affection to land caused by a reservation of, or restriction upon, the land under that Act, the responsible authority may 'at its option elect to acquire the land so affected instead of paying compensation'. If the authority and the owner cannot agree a price, the matter may be referred to the State Administrative Tribunal (among other options).[5]

Mt Lawley (No. 1) decided, in respect of s 36(2b) of the *Metropolitan Region Town Planning Scheme Act*, that the value to be determined did not include injurious affection or severance damage to adjoining land of the owner. Since *Kelly*, it seems clear that such value does not include 'value to owner' or 'special value' as explained in the *Pastoral Finance* case.[6] Accordingly, not only was the determined value to exclude such damage, it follows that agreement under s 36(2) as to price was also unlikely to include it.

It is not completely clear whether that interpretation will apply to the successor provision, s 188 of the *Planning and Development Act,* although the reasoning in *Mt Lawley (No. 1)* remains at least partly relevant.

In the view of the Commission, the election to acquire process, as interpreted in *Mt Lawley (No. 1),* causes an unfair disadvantage to landowners. For example, land may be reserved for a road bisecting rural land with urban potential. On a refused development application, and election by the responsible authority to acquire, the value of the land to be taken for the road will not include the amount by which adjoining land is reduced in value by reason of the road. Such reduction in value could be severe, as when a highway is to pass close to a residence, or when it physically separates a farmhouse from the farm.[7]

The owner in such a case would be entitled to injurious affection and severance damage compensation for a consequent reduction in the value of adjoining land, and to other aspects of value to owner and special value, if the same land were taken for the same purpose under s 241 of the *Land Administration Act*. Further, if the responsible authority were not to elect to acquire, and paid compensation under s 179, then a later acquisition of the land would be under s 191 in which case injurious affection and severance damage would be compensable.

There is no apparent policy justification for those differences. The difference is not explained by the policy underlying

1. Section 187 of the *Planning and Development Act 2005* (WA) re-enacts a power previously exercised exclusively by the WAPC. In respect of compensation claims for region scheme reservations under the *Planning and Development Act 2005* (WA), the powers now extend to local governments regarding claims under planning scheme public purpose reservations which are not otherwise reflected in region scheme reservations. However, as such reservations are exceptional, the discussion in this Chapter is confined to the practices of the WAPC.
2. (2004) 29 WAR 273.
3. [2007] WASCA 226.
4. [2007] WASCA 160.
5. See *Planning and Development Act 2005* (WA) ss 187(3) & 188(2).
6. *Pastoral Finance Association Ltd v Minister (NSW)* [1914] AC 1083.
7. One submission graphically illustrated this possibility: see Thelma & Graeme Richards, Submission No. 19 (3 April 2008).

compensation in the planning arena, namely the deferral of compensation until the times set out in s 177.[8]

The Commission recommends that the legislation be amended accordingly (see below).[9]

Before the *Planning and Development Act* came into effect, an election by the authority to purchase was binding upon the authority but not upon the land owner.[10] To that extent, the owner could avoid an acquisition that omitted payment in respect of injurious affection and severance and continue to use land for any existing lawful purpose. By doing so, however, the land owner might also deprive himself of any compensation pending compulsory acquisition, which may not occur for decades, and in the meantime remain unable to develop the land.

Apparently in response to the problem that a land owner might refuse an election to acquire, even after taking the matter through an expensive litigation process, Parliament added s 187(4) of the *Planning and Development Act*. Under that amendment, a land owner may withdraw an application for compensation and thereby terminate the election to acquire[11] but not after a determination as to the quantum of the purchase price is made.

Further, s 190 of the *Planning and Development Act* provides, independently of s 187, that a responsible authority may 'purchase any land comprised in a planning scheme from any person who may be willing to sell the same'. It appears open to pay to that person the value of the land to him or her, including therefore recognition of the cost to the owner occasioned by severance damage or damage caused by the prospective public work.

On the other hand, s 190 may be viewed by the authorities, and intended by Parliament, as a no-fuss means of acting in the market as would any private purchaser. Nevertheless, an astute owner will realise that the land is required, that a compulsory acquisition could be engineered, and that the government is likely to adjust the agreed price accordingly.

The distinction made in Chapter 6, between truly consensual purchases and compulsory or quasi-compulsory acquisitions, is more difficult to apply to the circumstances which give rise to the election to acquire process. Often, the landowner initiates an application for compensation long before the responsible authority requires ownership of the land.

On one view, the retention of the election to acquire process in light of the availability of ss 190 and 191 serves little practical policy purpose other than, under case law, to avoid compensation in respect of damage to adjacent land, in the case where a reservation affects part of a person's land. At most, its defensible operation lies merely in making clear that the authority may acquire even when, indeed because, a claim for compensation has been lodged.

Acquisitions under s 187 are 'agreed' in the sense that the land owner may decline to sell, but they are quasi-compulsory in the sense that the relevant planning authority has imposed restrictions on any new use of the land and prefers to acquire than pay compensation.

The Commission's view is that the voluntary and compulsory processes of ss 190 and 191 of the *Planning and Development Act* accord the responsible authority the flexibility it requires and at the same time ensure that land owners have the legal capacity to secure receipt of an amount closer to full compensation.

8. No submission to the Commission sought to justify or retain the discrepancy between compensation paid under the election to acquire process compared with compensation under s 241 of the *Land Administration Act 1997* (WA). Those who recommended reform included Chief Justice Wayne Martin, Submission No. 1 (17 December 2007); Robert Ferguson, Submission No. 3 (24 January 2008); Philip Logan, Submission No. 7 (11 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Peel Action Group, Submission No. 12 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008); Thelma & Graeme Richards, Submission No. 19 (3 April 2008).
9. It is noted that some persons who made submissions to the Commission on this issue appeared under the impression that the Commission had tentatively proposed in its Discussion Paper the wholesale removal of a power to acquire land instead of paying compensation for injurious affection, and structured their submissions accordingly. However, the Commission proposed only the removal of the particular *process* that accompanies such an election (see below).
10. *Mt Lawley Pty Ltd v Western Australian Planning Commission (No. 1)* (2004) 29 WAR 273, [257] & [263]. The Full Court noted that it is open to the land owner to avoid the process by withdrawing an application for compensation. This is no doubt true in the case of a refused application to develop the land. There was no discussion of the case in which the application for compensation arose upon a proposed first sale. It is hard to see how a similar option is available should the application be for compensation upon first sale.
11. As above, it is not clear how this operates in the context of an application upon first sale.

7

Sections 187 and 188 should be amended to retain the provision that reserved land may be acquired instead of paying compensation but that any such acquisition be effected under ss 190 or 191.

It should be noted that, pursuant to the previous recommendation, s 190 will apply differently in two different contexts:

(a) if the land owner offers land for public sale or privately to the authority, which land is not reserved land, then the purchase may proceed as in the market; but

(b) if the authority initiates purchase negotiations, or if the land is reserved, then ss 168 and 169 of the *Land Administration Act* should operate.

Section 187, amended as recommended, would fall into the latter category since the subject land will be reserved.

This leaves only the argument that the responsible authority, which does not independently (i.e. but for the application for compensation) wish to acquire at the time, may be obliged nevertheless to pay full acquisition compensation. In the Commission's view, that is the fair, and should be the inevitable, consequence of an election to acquire.

Acquisition of what land?

Under the Commission's recommendations, a responsible authority may still elect to acquire instead of paying compensation in respect of a development application. One change under another recommendation is that the compensation for a refused development application will take account of a reduction in the value of adjoining land consequent upon the reservation.

At present, however, the responsible authority is able only to elect to acquire the reserved land: see the references in s 187 to 'the land'.

The question therefore arises whether, or to what extent, the responsible authority should be able to elect to acquire the adjoining land instead of paying compensation for damage to that adjoining land.

It seems clear that, if the owner and the responsible authority agree, then the legislation should permit purchase of such land. Under s 190, which is integral to the Commission's recommendations on election to acquire, land may be purchased which is 'comprised in the planning scheme' and only if the purchase is 'for the purpose of a planning scheme'. Arguably, that would presently prevent the agreed purchase of adjoining land.[12] An amendment would be required to the effect that land adjoining the reserved land may be purchased by agreement (a) only if the reserved land is to be acquired by agreement or by taking; (b) whether or not the adjoining land is comprised in the planning scheme; and (c) whether or not the purchase is for the purpose of a planning scheme. The Commission so recommends.

Such a purchase should also attract ss 168 and 169 of the *Land Administration Act*.

However, no corresponding amendment should be made to the power of compulsory acquisition under s 191. A paramount principle in the compulsory acquisition of land from citizens must be that land is compulsorily taken only when required for a public purpose.

12. The point has been the subject of judicial consideration. In *Mandurah Enterprises v WAPC* [2007] WASC 43, [39]-[51], Le Miere J found that taking of the whole of a lot which was only partly reserved was authorised by the *Planning and Development Act 2005* (WA), but that decision was under appeal at the time of this Report. The argument that adjoining zoned but unreserved land could be taken was doubted but not decided in *Re McTiernan; ex parte McKay* [2007] WASCA 35, [88]–[89].

Recommendation 26

The Commission recommends that s 190 of the *Planning and Development Act 2005* (WA) be amended to allow the purchase by agreement of land adjoining reserved land if the reserved land is to be acquired by agreement or by taking, whether or not the adjoining land is comprised in the planning scheme and whether or not the purchase is for the purpose of a planning scheme. Section 191 should not be amended.

Limitation periods

The present election to acquire process does not incorporate any limitation period binding the land owner.

The land owner must apply for compensation for a refused development application within six months, and the responsible authority is obliged to elect within a further three months whether to acquire. However, once an election is made to acquire, it appears from s 187(4) that the owner must then apply for compensation for the acquisition, but no time is prescribed (although s 188(3) allows the responsible authority to advance the matter after 12 months).

It would be preferable for s 187 not to imply that a further application is required. Rather, the responsible authority should advance the matter with the expedition. Under the Commission's proposals, the election to acquire would lead immediately to the application of s 190 (amended as recommended) and, failing agreement, to s 191. Application of s 191 requires a claim to be lodged by the owner within six months.[13]

There are two points in that process that may require time limits. First, the responsible authority should commence negotiations for the voluntary purchase of the land under s 190 soon after an election to acquire is made. Second, the duration of the negotiation should not be indefinite.

In the Commission's view, it is not desirable to prescribe a specific date by which a compulsory taking must occur under s 191 in the event negotiations are unsatisfactory. Negotiations may properly take some time to complete and the land owner may be content for the time to be taken.

Rather, in the Commission's view, the better approach to protecting the interests of the land owner is to allow the land owner to serve a notice requiring the responsible authority to take the land under s 191 within 30 days. Once the taking order is made, the present limitation periods in s 207 of the *Land Administration Act* will operate.

It should also remain open to the land owner to withdraw the claim for compensation for injurious affection at any time before formally agreeing a price or before a taking order is made. In that event, the election to acquire would lapse although it would then remain open to the responsible authority to compulsorily take the land at any time under the powers in s 191 (which do not depend on an 'election to acquire').

Recommendations for election to acquire

In summary of the various sub-headings for the topic of election to acquire, the Commission recommends the retention of a power to acquire instead of paying compensation, but recommends that the process

13. *Land Administration Act 1997* (WA) s 207.

and the amount of compensation should accord with other powers of acquisition.

Recommendation 27

The Commission recommends that the *Planning and Development Act 2005* (WA) be amended to the following effects:

- Under s 187 a responsible authority may elect to acquire reserved land instead of paying compensation for injurious affection.
- An acquisition under s 187 is pursuant to either s 190 (amended as recommended above) or ss 191 and 192.
- The election requires the responsible authority to commence negotiation under s 190, without the need for the land owner to apply for compensation for the acquisition.
- A land owner may, at any time after an election is made, give a notice requiring the responsible authority to take the land under s 191 within 30 days without, or without further, negotiation.
- Sections 187(3) and 188 are repealed.
- The election, once made, binds the responsible authority to acquire. Neither party is bound to agree under s 190. However, the owner is bound by an election to the extent that, if the owner does not withdraw its application for compensation, and if no agreement is reached on price, then a compulsory acquisition proceeds.
- For clarity, s 190 should allow the agreed purchase of the applicant's adjoining land which is the subject of a claim for compensation (under the Commission's recommendation for ss 174 and 179). However, that adjoining land should not be liable to be compulsorily acquired (unless, as present, it is within a Scheme and the acquisition is for the purposes of a Scheme).

An acquisition under s 187 will be, in essence, under the *Land Administration Act* but with an adjusted articulation of the Pointe Gourde principle. Section 241(2) of the *Land Administration Act* includes a statutory embodiment of the Pointe Gourde principle.[14] The principle is that compensation must not include any increase or decrease in value of the land that is caused by the purpose for which the land is to be taken, including market foreknowledge of that proposed purpose. But s 241(2) is expressed as a requirement to discount any increase or decrease in value attributable to the 'proposed public work'. For that reason, s 192(1)(a) of the *Planning and Development Act*, in effect, substitutes a tailored version of the Pointe Gourde principle under which value is assessed without regard to any increase or decrease in value attribute to 'the relevant planning scheme'.[15]

14. *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.
15. This issue is also discussed in Chapter 3 above.

A single Land Compensation Act

Chapter 8

Injurious affection is referred to in 13 different statutes in Western Australia. More statutes deal with land acquisition without mention of injurious affection.

In its 2003 report to the State government, the Standing Committee on Public Administration and Finance ('the Committee') recommended:

> [T]he enactment of a single Act dealing exclusively with all aspects of the compulsory acquisition of land in Western Australia [and that] where multiple agencies are involved in the compulsory acquisition of land for significant major public works projects, that a lead agency be appointed to carry out all of the acquisitions.[1]

In its response to the Committee's report, the government supported the intent of a single Act but indicated that it regarded the *Land Administration Act 1997* (WA) as performing that role. The government considered that other enabling legislation applying to statutory authorities and specialist agencies should continue, essentially in its current form. This was further developed in the government's 'Statement of Principle' contained in its response; in particular:

> The Government considers that due to the complexity and possible impacts on the economic, social and environmental development of the State, a 'one size fits all' approach is not appropriate and that the ability for individual agencies with enabling powers to acquire land be maintained but the processes of the *Land Administration Act 1997* in terms of 'taking and compensation' be applied to the greatest possible extent'.[2]

The government appeared to accept the concept of a 'lead agency' indicating that the Department of Planning and Infrastructure's State Land Services is the appropriate lead agency in most instances. State Land Services is the lead agency for takings in the name of the Minister for Lands.

A wider role for a lead agency may be desirable. For example, the Western Australian Planning Commission and Main Roads are responsible for the majority of takings but they do not necessarily follow the process of State Land Services. The various redevelopment authorities, which have statutory exemption from some of the pre-taking procedures, may also depart from the State Land Services process.

For most acquisition purposes, the Commonwealth, both territories, and every state except Western Australia rely mostly on one Act with provisions dedicated only to land acquisition and compensation. Some also have provisions for entry and occupation of land and native title provisions, but usually only insofar as they are relevant to land acquisition and compensation.[3]

In the case of land acquisitions, whether compulsory or by agreement, there is already a close approximation to a single statute: Parts 9 and 10 of the *Land Administration Act*. The better means of ensuring continuity, consistency and balance in Western Australia is to ensure that all statutes requiring the acquisition of land apply the provisions of the *Land Administration Act*.

The reasons are:

1. There is little on the merits to distinguish between a single acquisition act and a system for the uniform adoption by other Acts of Parts 9 and 10 of the *Land Administration Act.* In other words, there does not appear to be significant advantage in excising Parts 9 and 10 from the *Land Acquisition Act* in order to form a dedicated acquisition statute.

1. Standing Committee on Public Administration and Finance, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Report No. 7 (14 May 2004) 80, Recommendations 3 and 4.
2. Western Australian Government, *Response to the Western Australian Legislative Council Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Parliamentary Paper No. 2947 (2004) Principle 2.
3. *Land Acquisition Act 1989* (Cth); *Lands Acquisition Act 1994* (ACT); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); *Lands Acquisition Act 1978* (NT); *Acquisition of Land Act 1967* (Qld); *Land Acquisition Act 1989* (SA); *Land Acquisition Act 1993* (Tas); *Land Acquisition and Compensation Act 1986* (Vic).

2. That system allows exceptions to be easily inserted in individual statutes where exceptional circumstances require a different approach.

3. Western Australian practitioners and the public are accustomed to the present dominance of the *Land Administration Act*, so that significant advantage should be demonstrated before recommending another major change.

4. In this complex area of the law, there is no distinct advantage in consolidating all statutory provisions relating to 'injurious affection', not least because two separate applications attach to the expression.

The Commission does not recommend the consolidation of all compulsory acquisition powers and provisions into a single statute. Nor does the Commission recommend the consolidation of provisions relating to injurious affection.[4]

4. Submissions on this issue were divided: see Robert Ferguson, Submission No. 3 (24 January 2008); Philip Logan, Submission No. 7 (11 February 2008); and Ralph & Louis Prestage Submission No. 9 (14 February 2008) who supported a single acquisition Act. Two submissions thought the present form of the *Land Administration Act 1997* (WA) was sufficient: see Frank Fford, Submission No. 5 (5 February 2008); Peel Action Group, Submission No. 12 (15 February 2008). Submissions from government officers did not address the issue.

Dampier to Bunbury Pipeline Act

Chapter 9

This Chapter deals with the contentious issues of 'State corridor rights' and 'injurious affection' under the *Dampier to Bunbury Pipeline Act 1997* (WA).

It is ironic that, in the same year the expression 'injurious affection' was omitted from the *Land Administration Act 1997* (WA), apparently for its archaism and obscurity, it was introduced into the *Dampier to Bunbury Pipeline Act*, with compensation to be determined under the *Land Administration Act*.

There are three inseparable issues: what is the effect of the legislation; is the effect expressed with sufficient clarity; and is that effect in need of substantive reform? The effect of the legislation is not easily explained.

History of the pipeline

Construction of the Dampier to Bunbury natural gas pipeline ('DBNGP') was completed in 1984. A 30 metre wide easement was taken from each land owner along the path of the pipeline and noted on the affected titles. Each easement was expressed to permit the holder of the easement to construct pipelines; that is, it was not restricted to the single pipeline then planned for construction. The easement was initially held by the State Energy Commission, but was transferred and is now held by the 'DBNGP Land Access Minister' (as defined in the *Dampier to Bunbury Pipeline Act*) ('the Minister'). The landowners were paid compensation.

The *Dampier to Bunbury Pipeline Act* was enacted 13 years after the Dampier to Bunbury pipeline was constructed. One purpose of the *Dampier to Bunbury Pipeline Act* was to facilitate the sale of the pipeline, as is clear from the Act's long title. A second purpose was to set out the process by which more pipelines might be authorised and constructed.

In 1998, the strip of land containing the pipeline and easement was converted into 'land in the DBNGP corridor' pursuant to s 31(4). At that point, all rights held by the Gas Corporation in the DBNGP corridor transferred to the Minister. The 'land in the DBNGP corridor' was then the same as the land in the 1984 easement.

In 2002, a widening of the DBNGP corridor to 100 metres was declared from about the Burrup Peninsula to Bullsbrook, just north of the metropolitan area. That addition to the DBNGP corridor was made under s 33. The 30 metre corridor still exists in the metropolitan area, from Bullsbrook to Kwinana. Work is in progress to widen the southern section of the DBNGP corridor, between Kwinana and Kemerton, from 30 to 50 metres.

Effects of the *Dampier to Bunbury Pipeline Act*

Of interest under the Commission's terms of reference, the *Dampier to Bunbury Pipeline Act* contains three means of affecting land owners' rights: s 34 (sale of rights to private operator), s 41 (statutory restrictions) and s 29 (acquisition of State corridor rights).

Section 41 imposes restrictions on the use of land in the DBNGP corridor. The restrictions are generally to the effect that nothing may be done that is inconsistent with rights that have been, or may be, conferred under s 34. The s 41 restrictions do not appear to be more onerous to land owners than the 1984 easement, but extend in some places to a wider area than the easements. The restrictions came into effect upon the declaration or extension of the DBNGP corridor,

earlier than and independent of any taking of State corridor rights or sale of rights to a private operator.

By s 29(2) of the *Dampier to Bunbury Pipeline Act*, State corridor rights may be acquired by the Minister by way of a compulsory acquisition under Part 9 of the *Land Administration Act*. State corridor rights may be taken only within a pre-existing DBNGP corridor. State corridor rights were acquired north of the metropolitan area in respect of both the widened and original DBNGP corridor by taking orders under the *Land Administration Act*. The taking orders were expressed to take 'all interests and rights in the land such as to enable [the Minister] to hold State corridor rights'.

Section 34 provides for the conferral of rights on a private pipeline operator for the purposes of constructing and operating a pipeline.

It is the creation (or extension) of the DBNGP corridor: (a) triggers the imposition of s 41 restrictions; (b) permits the Minister to confer on a third party the rights described in s 34, to have, construct and operate a pipeline; and (c) permits but does not require the Minister to take State corridor rights. Each of those effects occurs only in the DBNGP corridor.

State corridor rights

State corridor rights are defined in s 28:

> State corridor rights are an interest in land in the DBNGP corridor and the extent of the interest is such that, if State corridor rights are held in land, neither conferring rights under section 34 nor exercising any right conferred under that section would injuriously affect any right, title, or interest in the land.

The meaning of 'State corridor rights' has caused considerable debate. Pullin J expressed some misgivings about the expression in the course of hearing *Auld v The Minister*.[1]

Section 34(1) is the provision that facilitates the conferral of rights by the Minister to construct and operate further pipelines. It is not necessarily the case that the Minister will own the s 34 rights at the time the Minister confers them upon a third party. The Minister might confer such rights directly at the expense of existing landowners. That is to say, it is possible for the entire process (for another pipeline) to occur without the Minister acquiring the necessary rights as an intermediate step.[2] It is also possible for the Minister to pay compensation to a landowner affected by the conferral and exercise of s 34 rights without the Minister first acquiring s 34 rights.

In short, the purposes of authorising and constructing another pipeline and according compensation could all be effected without the Minister taking any right or interest in the DBNGP corridor, in particular without taking State corridor rights.[3]

However, s 290 of the *Dampier to Bunbury Pipeline Act* also provides a process under which the Minister may acquire an interest in land directly from the landowner. Even if State corridor rights are taken under that section, the future sale of pipeline rights is still accomplished by the conferral of rights under s 34. In other words, there is no provision for the conferral of State corridor rights upon a third party. On the contrary, the Minister retains State corridor rights, including after the full sale of pipeline rights under s 34.

Therefore, State corridor rights are not an alternative form of property for sale, and they are not a necessary step in the sale of rights to construct another pipeline. Rather, in the Commission's view, State corridor rights merely provide an

1. [2005] WASC 17.
2. This point is slightly obscured by the fact that the Minister holds the easements originally created in 1984. However, the Minister holds no such rights in the widened part of the DBNGP corridor where a pipeline could be constructed.
3. It should be noted that although this point seems clear from the *Dampier to Bunbury Pipeline Act* itself, the Minister in his Second Reading speech for the DBP Bill expressed the matter differently: 'Part 4 creates State corridor rights which are the rights that allow a pipeline operator access to the land to construct, operate, or enhance a gas pipeline in the corridor. The Land Access Minister will be able to designate additional land to be in the corridor provided the land is intended in the future to be available to confer rights on a pipeline operator to build and operate a gas pipeline': Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 1997, 7525/1.

alternative method for the operation of the compensation provisions of the *Dampier to Bunbury Pipeline Act*. That is made clearer by the compensation provisions themselves.

Compensation

Section 42(1)(c) allows compensation for the imposition of restrictions under s 41. Sections 42(1)(a) and (b) allow compensation for the sale of rights and the exercise of rights under s 34.

Section 29(2) allows compensation for the taking of State corridor rights. Section 42(2) prevents double recovery. It provides that s 42(1) is inoperative if State corridor rights have been taken.

Clause 35 of Schedule 4 of the *Dampier to Bunbury Pipeline Act* provides that, in applying the *Land Administration Act* (for the purposes s 29), the taking of land and the land taken are to be regarded as effected for the purposes of the conferral of rights under s 34 'whether or not rights have already been conferred under that Part in respect of the land'. Clause 35 does not apply to s 42 of the *Dampier to Bunbury Pipeline Act* because that section does not concern any 'taking' of land. Clause 35 appears to confirm that the legislative intention behind State corridor rights is to allow compensation to be paid in advance of the conferral of s 34 rights and in advance of the operation of some restrictions under s 41(2)(a).

Hence, it seems to the Commission, State corridor rights constitute a mechanism by which the Minister may consolidate, and may expedite, rights to compensation, but which otherwise does not affect the process of declaring the DBNGP corridor, imposing restrictions, conferring rights on a purchaser or constructing and maintaining a pipeline. That mechanism is intended to facilitate the sale of s 34 rights unencumbered by claims to compensation. In other words, State corridor rights ensure that the Minister holds an interest in land, but that interest is not used for any purpose other than to trigger, and settle, compensation.

Similarity to easement

Section 28(1) provides that, by the act of acquiring State corridor rights, the Minister acquires any right, title or interest from the land owner, which the land owner might otherwise have relied upon to claim that his land is injuriously affected by the sale, construction or maintenance of the pipeline. That is to say, State corridor rights are defined by reference to things that might later be done to the land under s 34, in particular by reference to the land's capacity to be injuriously affected (and hence the landowner's capacity to claim compensation) when those things are done later.

In this respect, State corridor rights are similar to an easement for the purpose of a gas pipeline.[4] Upon taking an easement, the land owner is paid, in effect, for his loss of legal capacity to resist the construction and use of a pipeline. State corridor rights could be similarly viewed, except that State corridor rights are expressed entirely by reference to the loss of capacity of the landowner to later claim compensation, rather than by reference to the landowner's loss of capacity to resist the conferral of s 34 rights. That is because the land owner's loss of capacity to legally resist the pipeline is effected by ss 34 and 41, not by State corridor rights.

In the absence of judicial exposition, the Commission's view is that Parliament, rather than taking an easement under which payment must be made at the outset, has allowed the alternatives of State

4. The Minister referred to an easement in the Motion to Suspend Standing Orders for the Second Reading: 'The Bill, which I hope to second read in a little while, authorises AlintaGas to sell the pipeline; lays down rules for the use of the easement, sets up criteria under the auspices of the Minister for Lands for the easement to be expanded and a regime to allow progressive reduction in transport charges to gas users. It facilitates many other mechanical matters necessary to conclude the sale process': Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 1997, 7518/6.

corridor rights and s 42. This may have been done so that the latter might be utilised where, for example, the cost of taking is especially high and perhaps will ultimately be proven unnecessary.

Concept of injurious affection

Earlier in this Report a distinction was drawn between two different uses of the expression 'injurious affection': a planning use and an acquisition use. The *Dampier to Bunbury Pipeline Act* uses the expression 'injuriously affect' to include both meanings. Section 42(1) allows claims for injurious affection:

- caused to nearby land by exercising rights under s 34, eg by constructing a pipeline, a compulsory acquisition meaning; and
- caused by restrictions on use of the land in anticipation of a possible pipeline, a planning meaning.

The expression 'injurious affection' is used in the *Dampier to Bunbury Pipeline Act* to simply mean 'affect by reducing the value of the land'. Used in that manner, it would be apt to capture a reduction in value which traditionally might be termed 'severance damage'.

This does not assist the wider causes of uniformity or clarity in the meaning of 'injurious affection' but, in its context here, the expression does not contribute to ambiguity.

Fairness of compensation

Section 42(1) permits compensation for injurious affection arising both from the conferral or exercise of rights mentioned in s 34 and from s 41 restrictions. Section 42(3) provides that Schedule 2 applies with respect to compensation.

Clause 2(2) of Schedule 2 provides that 'the claim for compensation may extend not only to land in the DBNGP corridor but also to any other affected land of the claimant'. Hence it is clear that the injurious affection mentioned in s 42(1) includes injurious affection to land adjacent to the DBNGP corridor. That is confirmed by the definition of 'land holder' in s 42(4), which is not confined to holders of land in the DBNGP corridor.

Clause 6 of Schedule 2 provides that, in the event the Minister and land owner cannot agree on the amount of compensation, the matter may be determined under Part 10 of the *Land Administration Act* which applies with such modification as the circumstances require. In particular, it appears that one required 'modification' is that s 241(7) of the *Land Administration Act* is to be treated as if it were not confined to a taking of fee simple. This seems required because clause (2)(2) expressly allows compensation for adjoining land. In any event, under the Commission's recommendations, s 241(7) would not be so confined.

Under s 29, compensation for the taking of State corridor rights (or any interest in land) is also determined either by agreement or under the *Land Administration Act*.[5]

In light of the above, the Commission's view is that the provisions for compensation in the *Dampier to Bunbury Pipeline Act* are no less fair to the affected land owners than the *Land Administration Act*. On the contrary, in respect of reduction in value of adjoining land, the *Dampier to Bunbury Pipeline Act* is distinctly more generous. It is also more generous than the provisions applying to other infrastructure easements, as discussed in Chapter 11.

5. The Law Society submitted that all compensation rights for the purposes of the pipeline should be brought under the *Land Administration Act 1997* (WA): see Law Society of Western Australia, Submission No. 18 (27 March 2008). As discussed above, in the Commission's view this is already the case under s 29(2) of the *Dampier to Bunbury Pipeline Act 1997* (WA). Other 'injurious affection' is due to causes listed in s 42, not including any acquisition, and those matters would not fall comfortably within the *Land Administration Act 1997* (WA).

Rather, the controversy and anxiety concerning the *Dampier to Bunbury Pipeline Act* stem from the difficulty in understanding the Act, particularly the concept of State corridor rights, rather than from any unfairness. It is beyond the scope of the Commission's terms of reference to recommend a wholesale redraft of the *Dampier to Bunbury Pipeline Act*.

The Commission's view is that the difficulty of interpretation is not aggravated by use of the expression 'injuriously affected' or cognates.[6]

The Commission does not recommend that any amendment of the *Dampier to Bunbury Pipeline Act*, except that s 29(1) should incorporate ss 168 and 169 of the *Land Administration Act 1997* (WA).

6. The Department of Planning and Infrastructure's submission to the Commission advised that there had been no claim for injurious affection to date, which the Department attributed to the taking of State Corridor Rights in areas where such claims might be anticipated, and to the pre-existing easement: see Department for Planning & Infrastructure, Submission No. 16 (29 February 2008). The absence of any claim, and hence the absence of any dispute and litigation, made it difficult to assess whether the *Dampier to Bunbury Pipeline Act 1997* (WA) is likely to cause difficulty.

Chapter 10

Infrastructure corridors

Most infrastructure corridors other than roads and railways are implemented by the taking of an easement.

An easement is a right enjoyed by a person in respect of the land of another, where the exercise of the right interferes with the usual rights of the owner of the land.[1] More particularly, an easement is a right attached to one piece of land by which the owner of that land enjoys a right in respect of other land.

From that definition, an easement requires a 'dominant tenement' (the land to which the right attaches) and a 'servient tenement' (the land to which the right applies), which must be owned by different persons.

In the context of government land acquisition, however, the government may acquire an 'easement' without being the owner of a dominant tenement. Rather, the government may hold what is referred to as an 'easement in gross', which simply means an easement without a dominant tenement.

The State and the local governments are currently able to create and take an easement in gross under s 195 of the *Land Administration Act 1997* (WA). An easement in gross is the common method by which electricity, gas and water authorities acquire the right to install and maintain infrastructure over private land.

Chapter 9 dealt with the issue of the *Dampier to Bunbury Pipeline Act 1997* (WA). The taking of State corridor rights is similar to the taking of an easement. That Act provides for compensation for the effect of the pipeline on land both within the pipeline 'corridor' and outside the corridor.

The focus in this Chapter is upon the absence of compensation in other infrastructure legislation for compensation in respect of land outside the easement. For example, an energy operator which acquires an easement for the erection of power lines across private property is required to pay for the easement but is not required to pay for any decline in the value of the rest of the property caused by those power lines.

Such compensation would be for 'injurious affection' damage to the owner's remaining land. It is so termed in the *Dampier to Bunbury Pipeline Act.* The only reason it might not be so termed in other infrastructure legislation is that it is not presently compensable because it is not related to the taking of fee simple as required under s 241(7) of the *Land Administration Act*. This issued is dealt with in Chapters 2 and 3 where the recommendation is made that s 241(7) should apply to the taking of any interest in land, not merely to the taking of fee simple. Under that recommendation, the taking of an infrastructure easement would, but for specific exemptions, result in compensation for a consequent reduction in value of adjoining land.

An infrastructure corridor may of course be implemented by the taking of an interest other than an easement, notably by taking the fee simple. Ordinarily, the taking of fee simple under s 241 of the *Land Administration Act* would entail compensation for severance and injurious affection damage to adjoining land. However, some statutes specifically exempt infrastructure corridors from payment of certain types of injurious affection.

Accordingly, the issue in this chapter is whether specific exemptions should apply in favour of infrastructure corridors, whether by the taking of an easement or any other interest in land.

1. *District of Concord v Coles* (1906) 3 CLR 96.
2. The definition of 'energy operator' under s 4 of the *Energy Operators (Powers) Act 1979* (WA) includes an electricity corporation such as Western Power.

Energy operators

Energy operators[2] in Western Australia maintain and upgrade the electricity network in the state. They have power under the *Energy Operators (Powers) Act 1979* (WA) to compulsorily acquire, enter and occupy land to carry out the public works necessary to meet this responsibility.

The *Energy Operators (Powers) Act* allows energy operators to acquire land by compulsory acquisition (either the whole or a portion) for public works either by agreement with a land owner[3] or by compulsory acquisition under the *Land Administration Act*.[4] 'Land' is defined to include interests in land, and includes an easement.[5]

Compensation for compulsory acquisition, although generally under the *Land Administration Act,* is affected by s 45 of *the Energy Operators (Powers) Act:*

> **Claims against the energy operator for the use of land and the application of the *Land Administration Act 1997***
>
> (1) Subject to subsection (3), an energy operator shall not be liable to pay compensation for, or in respect of any damage attributable to, the placing of any works or other things to which section 43(1) applies or by virtue of the grant of the right of access deemed by that subsection to be vested in the energy operator.
>
> (2) No claim lies against an energy operator by reason of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment, alleged to be occasioned by the placing of works of the energy operator on any land.
>
> (3) No claim lies against an energy operator by reason of the placing of any works of the energy operator upon, in, over or under any land, other than a claim —
>
> (a) pursuant to section 120;[6] or
>
> (b) under Part 10 of the *Land Administration Act 1997*, as read with this section, where the energy operator –
>
> (i) is by this or any other Act required; or
>
> (ii) by reason of the nature of the works there placed, the nature of the locality in which the works are placed, the safeguarding of particular works, public safety, future development proposals, or otherwise, elects,
>
> to acquire the land or an estate or interest in the land.

When reporting in 2004, the Standing Committee noted that there appeared to be no equivalent statutory provision to s 45(2) of *the Energy Operators (Powers) Act* in any other Australian state.[7] The Standing Committee noted:

> Each of the other Australian States apply (sic) basically the same process for the compulsory acquisition of easements as they do for the compulsory acquisition of freehold land, and the same general compensation and valuation principles apply to both types of transactions.[8]

The relevant effects of s 45 appear to be:

- Subsection (1) is related to damage caused by *use and presence* of infrastructure, not to the taking of land which presumably precedes such use and presence. It is not relevant to injurious affection because subsection (1) is subject to subsection (3).

3. *Energy Operators (Powers) Act 1979* (WA) s 28(3)(d).
4. *Energy Operators (Powers) Act 1979* (WA) ss 28(3)(e), 37(1), 45(4) & (5).
5. *Energy Operators (Powers) Act 1979* (WA) s 36.
6. *Energy Operators (Powers) Act 1979* (WA) s 120 provides that an energy operator must pay adequate compensation for physical damage or otherwise make good the physical damage done to the land in the exercise or purported exercise of an energy operator's powers under the Act.
7. *Electricity (Pacific Power) Act 1950* (NSW) ss14 & 44; *Electricity Act 1994* (Qld) ss 6 & 116; *Electricity Act 1996* (SA) ss 4 & 46; *Electricity Supply Industry Act 1995* (Tas) ss 3 & 51; *Electricity Industry Act 2000* (Vic) s 86.
8. Standing Committee on Public Administration and Finance, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Report No. 7 (May 2004) 102.

- The reference to Part 10 of the *Land Administration Act* by subsection (3) does not allow compensation for injurious affection to land outside a power line easement, because s 241(7) of the *Land Administration Act* presently applies only when fee simple is taken.
- However, subsection (3) also applies if the authority takes fee simple land for a power line, and may then have the effect of including compensation for a reduction in value of adjoining land. However, the Commission understands that the authority in Western Australia proceeds by easement in most cases. Indeed, great inconvenience might be occasioned were it to take freehold instead because landowners would thereby lose the right of access (unless they took an easement over the authority's land).
- However, while it is not entirely clear, subsection (2) probably denies a landowner compensation for a reduction in the value of adjoining land caused by the amenity and aesthetic effects of proposed power transmission lines on the taken land.

In most cases in Western Australia, easements for power infrastructure works are acquired by agreement, in which case Chapter 6 above is relevant.

Previous recommendations

Easements for electricity transmission lines are frequently taken over farming properties.[9] The Standing Committee recommended to government in 2004 that:

> [A]n appropriate method and level of compensation should be established by legislation for those landholders whose land is subject to an electricity transmission line easement. To achieve that end, the Committee recommends that one of the following two positions be implemented by State Government:
>
> (a) Section 45(2) of the *Energy Operators (Powers) Act* 1979 be repealed; and
>
> (b) The *Land Administration Act* 1997 be amended to expressly provide for compensation to a landholder for injurious affection to the landholder's land arising from the acquisition by a State government department, agency or body or any interest in that landholder's land. The calculation of injurious affection should also take into account the value of the land covered by the easement.
>
> OR
>
> Both the *Energy Operator's (Powers) Act* 1979 and the *Land Administration Act* 1997 be amended to provide that the compensation to be paid to a landholder for the acquisition by Western Power Corporation of an electricity transmission line easement must include a component for land value that is equivalent to one hundred per cent of the land value of the land covered by the easement.[10]

The government rejected the Standing Committee's recommendation on financial grounds. It relied on information from the Minister for Energy that additional levels of compensation to private landowners would need to be accounted for through increased tariffs paid by electricity consumers.[11] A submission made to the Commission by Western Power pointed out that the loss of amenity and aesthetic effects on the value of land caused by power transmission lines may extend for

9. Standing Committee on Public Administration and Finance heard evidence from a number of witnesses as to the impact that transmission lines can have on an agricultural property, ranging from decreased land value for the entire property, the prevention of further development of land near the transmission lines, and restrictions on the use of new technology, such as larger farm machinery and more efficient irrigation equipment (ie, boom sprinklers). Agricultural landholders expressed frustration at the limited grounds for compensation for the impact of transmission lines: ibid 104.
10. Ibid 135. While not directly material to the Commission's terms of reference in this Report, it might be noted that criticisms from the Standing Committee appear to be restricted to (or at least focused on) the impact of the legislation on farming properties. This is probably because transmission lines are often underground in built up areas.
11. Western Australian Government, *Response to the Western Australian Legislative Council Standing Committee on Public Administration and Finance in Relation to the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Parliamentary Paper No. 2947 (2004) 8.

several kilometres. However, the submission did not repeat the claim that the financial impost of extending compensation would be prohibitively large.[12]

The Commission is not inclined to the second option suggested by the Standing Committee. That option would have arbitrary results in respect of compensation.

The two major issues to be addressed are the fairness of the compensation provisions and the consistency of those provisions with other statutory schemes. As mentioned in Chapter 1, a degree of arbitrariness seems inescapable when drawing the boundary of compensability. Generally, however, once the decision is made to allow injurious affection compensation in the taking of an interest less than fee simple, it is unnecessarily arbitrary to alter that outcome in more specific statutes.

The only justification suggested for excluding compensation in respect of power lines is the large financial impost to a power company. That 'justification', of course, discounts the owners' perspective, namely the large losses in land value caused by the power lines.

Last, the history of this legislation is interesting if not instructive.[13] Originally, s 31 of the *State Electricity Commission Act 1945* simply provided that takings of land were to be effected under the *Public Works Act*, s 63 of which would have accorded rights to injurious affection and severance even for the taking of an easement.[14] Section 45(2) of the *State Energy Act 1979*, which replaced the *State Electricity Commission Act*, originally provided that:

> No claim lies against an energy operator by reason *only* of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment, alleged to be occasioned by the placing of works of the energy operator on any land.[15]

That provision, particularly the word 'only', does not appear to have been directed at precluding claims for injurious affection when land is taken for works, in the usual way. Rather, it appears to have been directed at preventing claims for loss of amenity etc by persons who have not been subject to a taking. The word 'only' was deleted in 1986. While the intent is not clear, the effect has been to derogate from s 241(7) of the *Land Administration Act* so far as takings of fee simple are concerned, and the effect under the Commission's recommendations or the *Land Administration Act* will be to derogate quite fulsomely from the intended operation of s 241(7).

The word 'only' was also deleted from s 45(3) at the same time. However, that change did not itself have the effect of derogating from s 241(7) of the *Land Administration Act*. Rather, s 45(3) has that effect because it requires the *Land Administration Act* to be read with s 45(2).

Recommendation 28

The Commission recommends that s 45(2) of the *Energy Operators (Powers) Act* 1979 be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative; that is, in respect of persons who have not suffered a taking of land.

This recommendation, foreshadowed in the Commission's Discussion Paper, was widely supported by submissions.[16] No submission opposed the proposed reform.

12. Western Power, Submission No. 17 (6 March 208).
13. The Commission is grateful to the Valuer General, Mr Fenner, who drew attention to this legislative history: see Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008).
14. As mentioned in Chapter 1, while not beyond argument, the better view is that severance and injurious affection compensation were available when an interest less than fee simple was taken under s 63(b) of the *Public Works Act 1902* (WA).
15. Emphasis added.
16. See Ferguson, Submission No. 3 (24 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); Robert George De Biasi, Submission No. 8 (14 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Peel Action Group, Submission No. 12 (15 February 2008); Western Australian Farmers Federation (Inc), Submission No. 13 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).

10

Easements for water infrastructure

The Water Corporation provides water, wastewater drainage and irrigation services to metropolitan and regional areas of Western Australia.[17] The *Water Agencies (Powers) Act 1984* also provides that water agencies can acquire partial interests in land, such as easements, for public works.[18] The policy of acquiring easements for water infrastructure seems inevitable, it being impractical and inconvenient to acquire freehold.

Section 81(2) of the *Water Agencies (Powers) Act 1984* has the same effect as s 45(2) of the *Energy Operators (Powers) Act* 1979. The observations made above apply equally here.

Perhaps unlike the position under the *Energy Operators (Powers) Act*, takings of interests in land for water infrastructure under s 241(7), amended as recommended in earlier chapters of this Report, would raise the question whether infrastructure within each water easement enhanced the value of land. Although a matter of evidence, it seems likely that enhancement would often overwhelm any injurious affection or severance damage except where the infrastructure does not supply water to the landowner. In many cases, therefore, the amendment of s 81(2) may not have the consequence of increased compensation.

The Water Corporation submitted that where any interest in land, freehold or easement, is acquired, compensation should be in accordance with s 241 of the *Land Administration Act*, including any reduction in the value of adjoining land. The Corporation also, separately, agreed that s 241 include damage caused by takings of interests less than freehold.

Recommendation 29

The Commission recommends that s 81(2) of the *Water Agencies (Powers) Act 1984* (WA) be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative in respect of persons who have not suffered a taking of land.

This recommendation was widely supported by submissions to the Commission.[19]

17. For a comprehensive list of the functions of the Water Corporation, see *Water Corporation Act 1995* (WA) s 27.
18. *Water Agencies (Powers) Act 1984* (WA) s 75(1).
19. See Robert Ferguson, Submission No. 3 (24 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); George De Biasi, Submission No. 8 (14 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Water Corporation, Submission No. 10 (14 February 2008); Peel Action Group, Submission No. 12 (15 February 2008); Department for Planning & Infrastructure, Submission No. 16 (29 February 2008); Western Australian Farmers Federation (Inc), Submission No. 13 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).

Other Schedule 1 Acts

Chapter 11

Country Areas Water Supply Act

The *Country Areas Water Supply Act 1947* (WA) was originally enacted to replace the *Goldfields Water Supply Act 1902* (WA). It now includes provision for the construction, maintenance, administration and safeguard of water supplies to the Goldfields and Great Southern areas, including control of catchment areas. Control of catchment areas is largely concerned with rising salinity. In this endeavour to control, the legislation requires a licence (a 'CAWS licence') to clear land in catchment areas: ss 12 B and 12 C.

A formal document, 'Policy and Guidelines for the Granting of Licences to Clear Indigenous Vegetation in Catchments Subject to Clearing Control Legislation', has been used by successive water resources management agencies, and presently by the Department of Water.

A land owner is entitled to compensation if his application for a CAWS licence is refused. A claim may be in respect of the land sought to be cleared and any other land under the same occupation or ownership which is rendered unproductive or uneconomic, or is 'otherwise injuriously affected': s 12E(2). The Department has also issued 'Guidelines for Compensation Procedures'.

Section 12E(4), which reflects s 173 of the *Planning and Development Act*, provides for compensation for injurious affection in the event an application to clear land is refused, refused in part, or is approved with conditions unacceptable to the applicant.

Section 12E(6) provides that compensation may be resolved by an agreement to purchase the land or by a compulsory acquisition under Part 9 of the *Land Administration Act*, and in either case compensation for injurious affection will be paid only in respect of land, or an estate or interest in land, that is not purchased or compulsorily acquired.

Those provisions operate upon only the planning meaning of 'injurious affection'. That is because the cause of the injurious affection mentioned in the *Country Areas Water Supply Act* is neither the taking of land nor the purpose for which the land is taken.[1]

Section 12E of the *Country Areas Water Supply Act* accords compensation to a class of persons beyond those who would be entitled if the policy of the *Planning and Development Act* applied. In particular, compensation for injurious affection is available in respect of land that is not itself the subject of a restriction. That is to say, land held by a farmer, but not within a control area, may be the subject of compensation if is rendered unproductive or uneconomic or is otherwise injuriously affected. That contrasts with the present form of s 174 of the *Planning and Development Act*, but accords with the Commission's recommendation in Chapter 5.

Therefore, the Commission recommends no alteration to the *Country Areas Water Supply Act* in this respect.

The Department of Water has informed the Commission that it is not aware of any instance in which the refusal of a licence to clear has rendered land outside a controlled area unproductive or uneconomic, and no compensation has been paid for vegetation areas in uncontrolled land.

Land clearing controls are imposed under Part V Division 2 and Schedule 5 of the *Environmental Protection Act 1986* (WA) together with the *Environmental Protection (Clearing of*

1. It may be that the taking does cause 'injurious affection' in the acquisition sense, in which case it will be assessed under s 241(7) of the *Land Administration Act 1997* (WA), as provided in s 12E(6) of the *Country Areas Water Supply Act 1947* (WA). The Department of Water has informed the Commission that it is not aware of any instance of land being compulsorily taken in the administration of clearing controls: see Department of Water, Submission No. 11 (14 February 2008).

Native Vegetation) Regulations 2004 (WA).[2] Thereafter, a proponent for land clearing required authorisation under a permit. There is no compensation payable in respect of a refusal of authorisation.

This legislation applies to land within a control area under the *Country Areas Water Supply Act.* An EPA permit is always required, whether or not a Country Areas Water Supply licence has been issued. An EPA permit usually obviates the need for a CWAS licence, except where compensation has been paid. In some cases, both are required and in some cases a licence is required even though an EPA exemption applies. Hence, refusal of authority to clear land in a control area attracts compensation under one Act and no compensation under another.

The Department of Water wishes to retain the compensation provisions for the event that the Department wishes to restrict clearing despite an EPA exemption. That will generally have the effect that no compensation will be paid if the EPA refuses a permit, and compensation will be paid where the EPA does not prevent clearing but the Department of Water does. That outcome generally accords the application of environmental protection legislation to the rest of the community and with the Commission's recommendations. Accordingly, for this reason too, the Commission recommends no alteration of the *Country Areas Water Supply Act.*

Petroleum Pipelines Act

The *Petroleum Pipelines Act 1969* (WA) provides that a person shall not commence, continue the construction of, alter or reconstruct a pipeline without a license. A person so licensed is referred to in the legislation as a 'licensee'.

Section 19(1) of the *Petroleum Pipelines Act* relevantly provides that:

> [T]he Minister may, on the application of the licensee and at his expense in all things, take under Part 9 of the *Land Administration Act 1997*, as if for a public work within the meaning of the *Public Works Act 1902*, any land or any easement over any land whether for the time being subsisting or not.

Subsection (1) does not apply unless the Minister is satisfied that the licensee, after making reasonable attempts to do so, has been unable to acquire the land or easement over the land by agreement with the owner thereof. This has been discussed in Chapter 6 (Agreed Acquisitions).

In respect of injurious affection, these provisions have the effect that the taking of fee simple for a pipeline would excite s 241(7) of the *Land Administration Act* in respect of adjacent land, but the taking of an easement for the same purpose would not.

This is similar to the provisions of the *Energy Operators (Powers) Act* and the *Water Agencies (Powers) Act 1984* (WA), discussed in Chapter 11 (Other Easements), but dissimilar to the provisions of the *Dampier to Bunbury Pipeline Act 1997* (WA) discussed in Chapter 10.

The Commission's recommendations in respect of s 241(7) will have the effect under 19(1) of the *Petroleum Pipelines Act* that injurious affection to adjoining land, caused by a new pipeline, becomes compensable.

Accordingly, the Commission makes no recommendation to amend the *Petroleum Pipelines Act.*

2. The Regulations took effect on 8 July 2004.

Swan and Canning Rivers Management Act

In September 2006, the Western Australian Parliament passed the *Swan and Canning Rivers Management Act 2006* (WA) and the *Swan and Canning Rivers (Consequential and Transitional Provisions) Act 2006* (WA). The legislation has replaced the *Swan River Trust Act 1988* (WA).

A primary object of the *Swan and Canning Rivers Management Act* is to make provision for the protection and management of the Swan and Canning Rivers and associated land.

Section 89 of the *Swan and Canning Rivers Management Act* provides that an owner of private land is entitled to compensation for 'injurious affection' where the Minister refuses, or approves on unacceptable conditions, an application to develop land within a management area. 'Injurious affection' in s 89 carries the planning meaning of the expression.

Generally, the compensation provisions under s 89 reflect those in the *Planning and Development Act*, including provisions that give rise to a right to apply for compensation (discussed in Chapter 5) and provisions for the election to acquire process (discussed in Chapter 7).

However, there are two differences of relevance to this Chapter.

'Owner' is defined as the proprietor of freehold land, which is narrower than s 174 of the *Planning and Development Act* (read with the definition of 'land' in s 4). This should be amended.[3]

Recommendation 30

The Commission recommends that s 89(1) of the *Swan and Canning Rivers Management Act 2006* (WA) be amended to define owner as the proprietor of an estate or interest in land.

Second, the provisions of Part 5 (dealing with development control) generally apply to land that is already the subject of reserves under the *Planning and Development Act*. However, some development control areas are not the subject of a reserve under the *Planning and Development Act*, and there is no formal constraint upon the creation of new development control areas in places not the subject of a reserve.

Section 89(2) allows claims for compensation only in the event of unsuccessful development applications. It does not allow any claim upon the event of first sale, unlike s 177(1)(a) of the *Planning and Development Act*.

Subsection 89(3) of the *Swan and Canning Rivers Management Act* provides that, if an application for compensation 'may be' brought under s 89(2), then no claim lies under s 177(1)(b) of the *Planning and Development Act.* Therefore, notwithstanding that an application for compensation may be brought under s 89(2), an owner may also bring an application for compensation upon first sale under s 177(1)(a) of the *Planning and Development Act*. That will be possible only when the land is subject to both a reserve (under the *Planning and Development Act*) and development control (under the *Swan and Canning Rivers Management Act*).

The effect of ss 89(2) and (3) is therefore that an owner of affected land, not a reserve, who does not wish to develop, but who nevertheless suffers a reduction in the value of his land because of Part 5 restrictions on development, will not be entitled to compensation when he sells his land for an affected price. That is in contrast to the regime under the *Planning and Development Act,* which accords such an owner the opportunity

3. This proposal was supported in submissions from Frank Fford, Submission No. 5 (5 February 2008 Ralph & Louis Prestage Submission No. 9 (14 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008); Swan River Trust, Submission No. 20 (23 April 2008).

to claim compensation on first sale. On the face of it, ss 89(2) and (3) unfairly deprive such an owner of compensation, and compensate a successor in title who does wish to develop. That issue is discussed in Chapter 5 but the recommendations made there will not address this specific case under the *Swan and Canning Rivers Management Act*.

The extent of development control areas was intended to coincide with reserves, and almost does, but there are some slivers of land that are within development control areas and not within reserves. These are inadvertent results of minor discrepancies in description or mapping. In any event, these cases fall within s 69(1) of the *Swan and Canning Rivers Management Act,* which provides that Part 5 does not apply to a development on land when the land is partly outside a development control area. Therefore, in the cases in point, a development application will fall for assessment by the responsible authority under the *Planning and Development Act*.

In consultation with officers of the Swan River Trust, the Commission was unable to identify any area of freehold land that fell wholly within a development control area and not also within a reserve. Hence, presently in respect of freehold, the issue of concern explained above appears to be moot. However, if other interests in land are to be included, such as leases for restaurants and boat harbour facilities, the issue of concern may have greater practical impact.

In any event, the unintended lacuna exists and may cause injustice in the future.[4]

Recommendation 31

The Commission recommends that s 89 of the *Swan and Canning Rivers Management Act* 2006 (WA) be amended to ensure that a person whose land is subject to a development control area, and not to a reserve, may claim compensation for injurious affection upon first sale of the land.

Section 89(8) allows the Trust to 'purchase' the land affected by the Minister's decision to refuse a development application instead of paying compensation. Section 89(9) incorporates, 'for the purposes of this section', ss 180, 187 and 188 of the *Planning and Development Act* (the 'election to acquire' processes). While not beyond doubt, ss 89(8) and (9) appear to create the option of purchase or election to acquire. Since election to acquire already includes attempting to agree a purchase price, this seems unnecessarily duplicate. It should also be borne in mind in the context of the Commission's recommendations for agreed acquisitions.

The Commission's earlier recommendations to amend ss 187 and 188 of the *Planning and Development Act* will have indirect application to ss 89(8) or (9) of the *Swan and Canning Rivers Management Act.* No amendment of the latter provisions is required in this context.[5]

4. The Swan River Trust generally supported amendments of the *Swan and Canning Rivers Management Act* that mirrored equivalent provisions of the *Planning and Development Act 2005* (WA): see Swan River Trust, Submission No. 20 (23 April 2008).
5. It is noted in passing that s 89(9) requires references to 'the Commission' (ie, the WAPC) in 'that section' (meaning ss 180, 187 and 188 of the *Planning and Development Act 2005* (WA)) to be read as if they were references to the Trust. This appears to reflect an inadequate amendment to take account of the 2005 change from the *Metropolitan Region Town Planning Scheme Act 1959* (WA) to the *Planning and Development Act 2005* (WA). Section 89(9) should refer to the 'responsible authority' and should refer to 'those sections'.

Form of s 241 of the Land Administration Act

Chapter 12

From previous chapters of this Report it is clear that s 241 of the *Land Administration Act 1997* (WA) is the central and crucial provision in Western Australia for the acquisition of land. It is the means for determining compensation for:

- compulsory acquisitions under the *Land Administration Act*;
- compulsory acquisitions under several other statutes which expressly refer to it;
- agreed acquisitions under the *Land Administration Act*.

Section 241 is also the means by which Western Australia has addressed the goal of a single separate compensation statute.

Under the Commission's recommendations, s 241 should assume an even greater role, including in respect of an amended election to acquire process under the *Planning and Development Act*.

The Commission has also referred to several instances of professional confusion concerning the meaning of s 241.

All other Australian jurisdictions have adopted a format different from s 241. Those other jurisdictions have set out a list of matters to which regard must or may be had in assessing compensation. There exists a degree of conformity among those other jurisdictions not shared by Western Australia.

These matters raise for consideration whether a comprehensive redrafting of the section is desirable.

One submission to the Commission urged that no further attempt be made to 'clarify' the section, on the grounds that the last attempt, in 1997, was counter productive.[1] Many submissions urged a return to the use of 'injurious affection', or the re-enactment of s 63 of the *Public Works Act 1902* (WA), as the sole means of any legislative clarification.[2] Those submissions did not so much deny the need for clarification as doubt the capacity to achieve it in plain English legislation.

The Commission agrees that the 1997 amendment failed to clearly articulate its intent, but does not accept that the best means of redress is a return to pre-1997 terminology. The precise failing in s 241 is easy to identify. Injurious affection has been dealt with in almost every other Australian jurisdiction in an apparently unproblematic manner. In any event, there are several matters that require specific amendment and clarification of s 241, apart from injurious affection, and the opportunity ought not be passed to further clarify the intention if possible.

The Commission does not see a need for wholesale redraft of s 241.

1. See Glenn Miller, Submission No. 2 (24 January & 2 April 2008).
2. See Glenn Miller, Submission No. 2 (24 January & 2 April 2008); Robert Ferguson, Submission No. 3 (24 January 2008); Main Roads Western Australia, Submission No. 4 (31 January 2008); Frank Fford, Submission No. 5 (5 February 2008); Philip Logan, Submission No. 7 (11 February 2008); Ralph & Louis Prestage Submission No. 9 (14 February 2008); Gary Fenner, Valuer General, Landgate, Submission No. 15 (22 February 2008); Australian Property Institute, Submission No. 14 (15 February 2008); Law Society of Western Australia, Submission No. 18 (27 March 2008).

Appendix 1 List of recommendations

Recommendation 1 [page 17]

The Commission recommends that s 241 of the *Land Administration Act 1997* (WA) include a reference to just compensation, similar to that in s 54(1) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

Recommendation 2 [page 19]

The Commission recommends that the term 'severance' be reinstated in s 241(7) of the *Land Administration Act 1997* (WA).

Recommendation 3 [page 20]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain separate references in paragraphs (a) and (b) to severance and injurious affection respectively. Paragraph (b) should include reference to a reduction in value of adjoining land attributable to the public work, to reflect injurious affection.

Recommendation 4 [page 20]

The Commission recommends that the word 'or' between paragraphs (a) and (b) of s 241(7) of the *Land Administration Act 1977* (WA) be replaced with 'and'.

Recommendation 5 [page 20]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain its focus on 'damage suffered by the claimant'.

Recommendation 6 [page 21]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to provide an entitlement to compensation for persons who hold any interest in the taken land and suffer a reduction in value of any interest in adjoining in land.

Recommendation 7 [page 24]

The Commission recommends that s 241(2) of the *Land Administration Act 1997* (WA) include, subject to s 241(7), a reference to 'the value … of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest'.

Recommendation 8 [page 25]

The Commission recommends that s 241(2) of the *Land Administration Act 1997* (WA) be amended to include reference to a proposal to carry out the purpose for which the land was taken.

Recommendation 9 [page 27]

The Commission recommends that ss 241(2) and (7) of the *Land Administration Act 1997* (WA) be amended to replace references to 'public work' with references to 'the purpose for which the land was acquired'.

Recommendation 10 [page 28]

The Commission recommends that s 161 of the *Land Administration Act 1997* (WA) be amended to refer to 'public purpose' instead of 'public work' and that s 151 be amended to include a definition of 'public purpose'.

Recommendation 11 [page 32]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to provide that enhancement is set off against reduction in the value of adjoining land caused by either severance or injurious affection.

Recommendation 12 [page 32]

The Commission recommends that the reference in s 241(7) of the *Land Administration Act 1997* (WA) to an increase in the value of land should include increases due to both the proposed works and severance.

Recommendation 13 [page 34]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) be amended to ensure that 'adjoining land' includes land owned by the claimant and separated from the taken land only by other land owned by the claimant.

Recommendation 14 [page 35]

The Commission recommends that, between paragraphs (a) and (b) of s 241(7) of the *Land Administration Act 1997* (WA), the word 'or' be replaced with the word 'and'.

Recommendation 15 [page 35]

The Commission recommends that s 241(7) of the *Land Administration Act 1997* (WA) retain its present reference to 'adjoining land'.

Recommendation 16 [page 39]

The Commission recommends that s 174(1) of the *Planning and Development Act 2005* (WA) be amended to make clear that it does not exhaustively define 'land is injuriously affected by reason of the making or amendment of a planning scheme' for the purposes of s 173(1).

Recommendation 17 [page 40]

The Commission recommends that s 176 of the *Planning and Development Act 2005* (WA) be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation, including as to whether the land has been injuriously affected and as to the amount of compensation. Similarly, s 184(4) should be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation and recovery of betterment value.

Recommendation 18 [page 43]

The Commission recommends that, if a reservation of land is made, s 179 of the *Planning and Development Act 2005* (WA) provide that the compensation payable to the owner includes both:

(a) the reduction of the value of the reserved land; and

(b) the reduction of the value of adjoining land owned by the applicant,

caused by the reservation, however, if the value of that adjoining land is increased by the Scheme amendment under which the reservation was made, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (a).

Recommendation 19 [page 45]

The Commission recommends that s 177(3)(a)(ii) of the Planning and Development Act 2005 (WA) be repealed.

Recommendation 20 [page 48]

The Commission recommends that entitlement to compensation should expire:

1. for the original owner:
   (a) six months after a development application is refused or approved with unacceptable conditions, but only in respect of the particular development application refusal or conditional approval (ie not in respect of a subsequent development application made by the same owners in good faith); or
   (b) six months after first sale, if not assigned to the purchaser;
2. for a purchaser of reserved land, six months after a development application is refused or approved with unacceptable conditions provided that the original owner has, at the time of selling the land, assigned to the purchaser, in approved form, his entitlement to compensation upon an unsuccessful development application;

and in any case subject to a discretion in the Minister to extend the time limit.

Recommendation 21 [page 49]

The Commission recommends an amendment to s 178 of the *Planning and Development Act 2005* (WA) by which the Minister may require the responsible authority to pay compensation as if on a refused development application in cases of particular hardship.

Recommendation 22 [page 50]

The Commission recommends that section 192(1)(b) of the *Planning and Development Act 2005* (WA) be amended to make clear that the value of land is to be assessed without regard to any increase or decrease in value attributable to either the planning scheme (including its operation or effect) or a proposal to implement the planning scheme.

Recommendation 23 [page 51]

The Commission recommends that the words 'or any part thereof' be included in the definition of 'planning scheme' in s 4 of the *Planning and Development Act 2005* (WA).

Recommendation 24 [page 57]

The Commission recommends that other statutes which provide for acquisitions by agreement reflect or incorporate ss 168 and 169 of the *Land Administration Act 1997* (WA) where land is acquired for public purposes at the government's initiative and where reserved land is acquired.

Recommendation 25 [page 57]

The Commission recommends that s 190 of the *Planning and Development Act 2005* (WA) apply differently in two different contexts:

(a) if the land owner offers land for public sale or privately to the authority, which land is not reserved land, then the purchase may proceed as in the market; but

(b) if the authority initiates purchase negotiations, or if the land is reserved, then ss 168 and 169 of the *Land Administration Act 1997* (WA) should operate.

Recommendation 26 [page 61]

The Commission recommends that s 190 of the *Planning and Development Act 2005* (WA) be amended to allow the purchase by agreement of land adjoining reserved land if the reserved land is to be acquired by agreement or by taking, whether or not the adjoining land is comprised in the planning scheme and whether or not the purchase is for the purpose of a planning scheme. Section 191 should not be amended.

Recommendation 27 [page 62]

The Commission recommends that the *Planning and Development Act 2005* (WA) be amended to the following effects:

- Under s 187 a responsible authority may elect to acquire reserved land instead of paying compensation for injurious affection.
- An acquisition under s 187 is pursuant to either s 190 (amended as recommended above) or ss 191 and 192.

- The election requires the responsible authority to commence negotiation under s 190, without the need for the land owner to apply for compensation for the acquisition.
- A land owner may, at any time after an election is made, give a notice requiring the responsible authority to take the land under s 191 within 30 days without, or without further, negotiation.
- Sections 187(3) and 188 are repealed.
- The election, once made, binds the responsible authority to acquire. Neither party is bound to agree under s 190. However, the owner is bound by an election to the extent that, if the owner does not withdraw its application for compensation, and if no agreement is reached on price, then a compulsory acquisition proceeds.
- For clarity, s 190 should allow the agreed purchase of the applicant's adjoining land which is the subject of a claim for compensation (under the Commission's recommendation for ss 174 and 179). However, that adjoining land should not be liable to be compulsorily acquired (unless, as present, it is within a Scheme and the acquisition is for the purposes of a Scheme).

Recommendation 28 [page 73]

The Commission recommends that s 45(2) of the *Energy Operators (Powers) Act* 1979 be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative; that is, in respect of persons who have not suffered a taking of land.

Recommendation 29 [page 74]

The Commission recommends that s 81(2) of the *Water Agencies (Powers) Act 1984* (WA) be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative in respect of persons who have not suffered a taking of land.

Recommendation 30 [page 77]

The Commission recommends that s 89(1) of the *Swan and Canning Rivers Management Act 2006* (WA) be amended to define owner as the proprietor of an estate or interest in land.

Recommendation 31 [page 78

The Commission recommends that s 89 of the *Swan and Canning Rivers Management Act* 2006 (WA) be amended to ensure that a person whose land is subject to a development control area, and not to a reserve, may claim compensation for injurious affection upon first sale of the land.

Terms of Reference

Appendix 2

The Law Reform Commission of Western Australia is to inquire into and report upon whether, and if so in what manner, the principles, practices and procedures pertaining to the issue of compensation for injurious affection to land in Western Australia require reform, and in particular, and without detracting from the generality of this reference:

(a) the provisions of s 241(7) of the *Land Administration Act 1997* (WA), including particularly the rights affected thereby of persons whose land is, or is proposed to be, acquired by compulsory process by the state or by an instrumentality of the state or by any other instrumentality otherwise authorised or directed by statute to acquire interests in land compulsorily, and the extent to which the adjacent land of such persons is affected by such acts and resulting works;

(b) the law and practices in relation to compensation payable or other accommodations capable of being extended to owners and other persons with interests in alienated land where such land is to be regarded as injuriously affected under the terms of those statutes set out in Schedule 1 regulating land for public purposes or the implementation of works of a public character;

(c) the continued use and application of the expression 'injurious affection'; and

(d) any related matter

and to report on the adequacy thereof and on any desirable changes to the existing law and practices in relation thereto.

Schedule 1

Land Acquisition and Public Works Act 1902

Land Administration Act 1997

Town Planning and Development Act 1928

Western Australian Planning Commission Act 1985 (Peel and Bunbury Regions)

Metropolitan Region Town Planning Scheme Act 1959 (Perth Metropolitan Region)

Redevelopment Acts (East Perth, Midland, Subiaco, Armadale, Hope Valley-Wattleup etc)

Country Areas Water Supply Act 1947

Water Agencies Powers Act 1984

Energy Operators (Powers) Act 1979

Dampier to Bunbury Pipeline Act 1997

Petroleum Pipelines Act 1969

Swan River Trust Act 1988

Appendix 3

List of submissions

Australian Property Institute Inc (WA Division)

George De Biasi AAPI, Licensed Valuer

Department of Water

Department for Planning and Infrastructure, State Land Services Branch

John Elphick, Principal Acquisition Manager, Main Roads Western Australia

Gary Fenner, Valuer General, Landgate

Robert Ferguson, Ferguson Fforde Miller

Frank Fforde, Partner, Ferguson Fforde Miller

Law Society of Western Australia

Philip Logan FAPI, Certified Practising Valuer

The Hon Wayne Martin, Chief Justice of Western Australia

Glenn Miller, Partner, Ferguson Fforde Miller

Peel Action Group

Ralph and Lois Prestage

Thelma and Graeme Richards

Swan River Trust

Water Corporation

Western Australian Farmers Federation (Inc)

Western Australian Planning Commission

Western Power