

Law Reform Commission of Western Australia

Compensation for Injurious Affection

Project 98

Discussion Paper

October 2007

Law Reform Commission of Western Australia

Commissioners

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ISBN: 978 1 74035 060 0

Printed by Quality Press, Western Australia

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Terms of Reference

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

Acknowledgements

The Law Reform Commission of Western Australia wishes to express its gratitude to Mr Ken Pettit QC, Ms Michele Payne and Ms Helen Cogan for their contribution to the Commission's Compensation for Injurious Affection Reference.

The Commission would also like to thank its publication designer, Cheryl MacFarlane, and its Executive Assistant, Sharne Cranston, for their assistance in preparing this paper for publication.

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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 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 1¹ 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.

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 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 a specific aim of providing the public with an opportunity to comment.⁶ Subsequently, on 18 September 1997, Mr Bob Bloffwitch MLA, 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 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 land caused by something done or proposed to be done on the land or nearby.

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 necessarily contradictory to speak of an 'injurious affection' for which no compensation is available.

1. Refer to Schedule 1 to the Terms of Reference, above p iii.
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 EPLJ 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).
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).

The law in Western Australia has included two distinct meanings of 'injurious affection' or, perhaps more accurately, two distinct applications of the expression.

In the context of a compulsory acquisition of land, the expression applies to freehold land of a person other than the freehold land acquired from that person. It refers 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 means the decrease in value of a person's land caused by a planning scheme: s 173 of the *Planning and Development Act 2005 (WA)*. Typically, land is reserved under a planning scheme for a certain public purpose and thereafter must be dealt with by its owner in any new manner 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 land resulting from the restrictions on use of that land.

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

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. At common law, severance usually meant the reduction of value of a person's remaining land caused merely by the taking of part of the person's land; that is, by the severance of part of the person's land from his remaining land, not caused by the public work for which land was acquired.⁹

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

Their counterpart is 'betterment' or 'enhancement', terms which are used to refer to an increase in value of land retained by a person caused by the taking of part of the person's land or by the public work for which that taking occurred. Betterment arises only for the purposes of set-off. That is to say, betterment caused to some of a person's retained land is set off against compensation payable for a reduction of the value of that person's other land.¹⁰

'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 land or part thereof. At its simplest, 'disruption' refers to re-location costs and lost revenue. However, sometimes a taking of land can 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, or perhaps ideally, 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 may become difficult to preserve the distinction.

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

9. There are cases in which this 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)?
10. For further discussion, see below Chapter 5. This Discussion Paper uses the term 'enhancement' (which was used in s 63 of the *Public Works Act 1902 (WA)*).

The above definition of injurious affection is dictated by aspects of Western Australian law which are not universal. In particular, the following aspects of the definition reflect 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 freehold land is relevant (whereas a leasehold may also suffer injurious affection); and
- the public work which causes the loss in value need not be constructed on the taken land.

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—

- due to the severing of the land taken from that adjoining land; or
- 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).

The section does not refer to 'injurious affection'. Nor does it refer to 'severance', although the reference to damage due to 'severing' the land is usually taken to mean severance damage. 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.

Some commentators take the view that paragraph 241(7)(a) reflects severance and paragraph (b) reflects injurious affection.¹¹ Certainly, the two paragraphs are commonly referred to in those terms, even if merely for convenience, notwithstanding the possible loss of precision.

This Discussion Paper addresses the following drafting issues under s 241(7) of the *Land Administration Act*:

- 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.
- If paragraph (b) is intended to include reductions of value of land caused by either severance or injurious affection, then what is 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'.¹²
- Betterment is to be set off against any damage suffered by a claimant under paragraph (b). Depending on the above issues, betterment will be set off against either injurious affection only, or against both injurious affection and severance.

Other issues which arise in the context of injurious affection are discussed below.

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 the purpose of that public work. For example, a freeway may be proposed to abut the lands of two persons and reduce the values of the two lots in similar fashion. If the freeway authority takes a

11. For further discussion, see below Chapter 3.

12. For further discussion, see below Chapter 4.

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 adjacent retained land.

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.

The use of 'injurious affection' in planning raises separate issues. Those are discussed in Chapter 6.

PROPOSALS FOR REFORM

Throughout this Discussion Paper, the Commission has made a number of proposals for reform and issued invitations to submit on particular issues.

Interested parties may submit suggestions for reform of other aspects of injurious affection that, although not discussed in this Discussion Paper, are within the terms of reference.

The proposals and invitations commonly include the following policy and philosophical issues:

- Many reformers strive for consistency across the legislation of a jurisdiction 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 Discussion Paper between different statutes.
- Where, prima facie, injustice arises from such dissimilar treatment of essentially

similar cases, the impetus is usually to redress the imbalance by augmenting the rights of the relatively disadvantaged rather than by curtailing the rights of the advantaged. This tendency has a cumulative effect upon the public purse.

- The balance between doing justice to individuals and equitably preserving taxpayers' funds for greater priorities is perhaps the most pervasive of policy considerations.
- In pursuit of that balance, it is inevitable that distinctions will be drawn that may be characterised as arbitrary.

In the result, the approach tentatively adopted by the Commission reflects some acceptance that inconsistencies are inevitable, that arbitrary lines are inevitable and that the government priorities and tax payer tolerance may be insuperable impediments to complete justice. However, as mentioned, that tentative approach should not deter interested parties from making submissions based on different or contrary policy criteria.

SUBMISSIONS TO THE LAW REFORM COMMISSION

Submissions may be made by telephone, fax, letter or email to the address below. Those who wish to request a meeting with the Commission may telephone for an appointment.

Law Reform Commission of
Western Australia
Level 3, BGC Centre
28 The Esplanade, Perth WA 6000

Telephone: (08) 9321 4833
Facsimile: (08) 9321 5833
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Submissions received by **15 February 2008** will be considered by the Commission in the preparation of its Final Report.

This Chapter considers the basis of property law and land ownership in Western Australia and the rights of government to acquire interests in land under:

- the *Land Administration Act 1997* (WA) when an interest in land is affected adversely by an acquisition of the adjoining land for public works; and
- the *Planning and Development Act 2005* (WA) when an interest in land is affected adversely by the making or amendment of a planning scheme.

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 has resumed 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 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.

A private person who holds an interest in land may confer upon another person a lesser interest than fee simple. Accordingly, the holder of a fee simple may grant a lease to another person and either may grant an easement. A lease may be a 'lesser' interest than fee simple in no respect except duration – 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)*³ 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'. In theory, native title in many places may have been so complete that the Crown, on acquiring sovereignty, held no more than the 'bare' radical title.

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 government is empowered to compulsorily acquire privately owned interests in land for defined purposes under various statutes

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. (1992) 175 CLR 1.

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*.

The *Land Administration Act* is administered by the Minister for Planning and Infrastructure. The Department for Planning and Infrastructure undertakes land acquisitions under the *Land Administration Act*.

Under s 51(xxxi) of the Commonwealth Constitution the Federal Parliament has the power to acquire property from any state or person but only '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. State parliaments, including the Western Australian Parliament, are not limited by such constitutional constraints.

State statutes, nevertheless, are subject to certain presumptions of statutory interpretation. Legislation is presumed not to alienate vested proprietary interests without adequate compensation.⁴ A statute is presumed not to extinguish a common law right unless the legislative intention to do so is apparent.⁵ 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.⁶

HISTORY OF CURRENT LEGISLATION

Section 63 of the *Public Works Act 1902* (WA)⁷ was the predecessor to s 241(7) of the *Land Administration Act*. Section

63 provided for compensation 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 authorized 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

4. See Pearce DC & Geddes RS, *Statutory Interpretation in Australia* (Sydney: Butterworths, 5th ed., 2001) [5.15]–[5.17].
5. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *South Australian River Fishery Association v South Australia* (2003) 84 SASR 507.
6. *Commonwealth v Tasmania* (1983) 158 CLR 1, 283.
7. 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*).

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.⁸

In the Legislative Assembly, the Minister for Works said:

The first draft of this Bill was prepared and introduced in the other place in December 1995 ... 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 1996.⁹ [which also lapsed].

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).¹⁰

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 the 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'.
- The provision for set off of 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.¹¹ The Minister expressly observed that the law in this area was 'a complex, difficult and, at best, little understood and antiquated area of land law'.¹²

The Minister mentioned that the new provisions for compulsory acquisition of land and its compensation provisions contained 'little change to established principles'¹³ and only 'minor changes'.¹⁴ The minor changes the Minister subsequently discussed during the second reading speech did not include the 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 report¹⁵ or its minutes¹⁶ explains the three changes.

JUST TERMS

Some jurisdictions have adopted the legislative device of 'just terms'. Rather than create an exclusive list of heads of claim for compensation, just terms legislation creates a list of non-exhaustive considerations from which the Courts determine 'just' compensation. There has

8. Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 December 1995, 12406 (George Cash, Minister for Lands).

9. Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 August 1997, 5658 (Hon. Mike Board, Minister for Works).

10. For a history of the Bill, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 August 1997, 5658/2 (Mike Board, Minister for Works).

11. Western Australia, *Parliamentary Debates*, Legislative Council, 26 March 1997, 909/2 (Max Evans, MLA, Minister for Finance).

12. *Ibid* 914/1.

13. *Ibid* 909/2.

14. *Ibid* 913–14.

15. Parliament of Western Australia, *Report of the Legislation Committee on the Land Administration Bill 1997* (1997).

16. Legislation Committee, Parliament of Western Australia, *Minutes of Meeting* (16 September 1997) 1.

been considerable debate on whether Western Australia's constitution should be amended to ensure that all statutes provide for just terms compensation.

A consequence of either proposal is a shift from parliament to the courts of the final determination of the types of compensable damage. That may entail a loss to parliament of the legislative power to balance complete justice to each individual against competing demands on the public purse.

The present reference is confined to injurious affection, which does not warrant an excursion into the general application of just terms. However, two aspects of the matter may be noted in this context. First, the present reference is concerned with the instigation of relevant reforms to improve justice to land owners where practicable. Second, s 241(6) of the *Land Administration Act* already includes a provision for the acquiring authorities and the courts to take into account any 'other facts' they consider relevant to the justice of the case. That provision may be effective to include facts extraneous to the provisions of the section, but it is unlikely to allow a head of damage which is unavailable under s 241(7), such as injurious affection for a leaseholder.

The law of compulsory acquisition of land and compensation has its share of jargon. This Discussion Paper has already mentioned 'injurious affection', 'severance damage', 'betterment' or 'enhancement' and 'disturbance', which 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 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 common law adjustments.

Sometimes, however, terms conceived by the common law lose what consensus and precision they ever had through the tinkering of legislatures and the incapacity of commentators to agree core denotations. The Commission's tentative view is that 'injurious affection' has suffered this fate and that the remedy is to either dispense with the expression or define it.

As alluded to earlier, on one view, s 241(7) of the *Land Administration Act 1997* (WA) has attempted to paraphrase, rather than to define, 'injurious affection'. As also mentioned, it is reasonably clear that the paraphrasing is inadequate.¹

A definition which did not materially affect the law in Western Australia may refer to any reduction in the value of any other land held by the person in fee simple at the date of acquisition which adjoins (or is severed) from the acquired fee simple land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

Section 241(7)(b) does not specifically reflect those elements. It might be

implied, but it is not stated, 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 in the context of enhancement. As explained in Chapter 3, it may be that the legislative draftsman deliberately expressed s 241(7)(b) without reference to public works because the intention was to encompass both injurious affection and severance damage.

As a result, the introduction of s 241(7) has arguably created a new chicken-and-egg 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)?

On a practical note, the latter option necessarily 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 (see below). In any event, the Commission's tentative view is that the overall legislative intention cannot be separated from the question of terminology and definition.

USE OF THE TERM 'INJURIOUS AFFECTION'

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 was to ensure that 'the wording of the Act conformed to modern English standards',² which may have been of influence.

In 1986 the Standing Committee on Government Agencies recommended that 'the *Land Acquisition Act* and all notices

1. See above p 4.

2. Department of Planning and Infrastructure, *Review of the Land Administration Act 1997*, Final Report (August 2005) 11.

issued under that Act should be drafted in a “plain English” style capable of being understood by a person of average intelligence and education.³ 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’.⁴

The use of plain English terms to replace the term ‘injurious affection’ was commented on by the Valuer General in his evidence to the Standing Committee.

[T]he *Land Administration Act* provides for any reduction in the value of adjoining land due to the taking of the subject land. Under the old *Public Works Act*, that would have been termed injurious affection. I believe the drafting authorities in their wisdom decided to reword it in plainer English. I am not sure whether the end result has made it plainer for practitioners, mainly because the valuers in the profession relied on court precedents and, of course, all the court precedents referred to injurious affection. Then we had this new terminology which referred to a reduction in value of land. Although it is clear to me – and it is probably clear to most people reading it – that it refers to a reduction in value, many members of my profession and some judges have had difficulties in the sense that they did not have any precedent to help them measure that new set of words.⁵

Accordingly, it seems that at least one influence on the draftsman’s omission of the expression ‘injurious affection’ was to avoid obscure and archaic terminology.

On the other hand, there has been substantial support among practitioners for the term ‘injurious affection’ to be reintroduced into the *Land Administration Act*.⁶ More recently, from interviews conducted in August 2006, the Commission understands that some officers from the Valuer General’s Office in Western Australia support the re-introduction of definitions for terms such as ‘injurious affection’, ‘severance’ and

replacing the term ‘take’ with ‘resume’. A senior officer from the Planning Commission also prefers the use of the terms ‘injurious affection’ and ‘severance’ and would prefer the term ‘take’ to be replaced.

One Perth solicitor with many years experience has expressed a contrary view.⁷ He would prefer the term ‘injurious affection’ be confined to the planning context where it has a strong and ingrained meaning in planning law.

Further, if the objective under s 241(7) is to provide compensation for any damage suffered by a claimant to adjoining land, the question arises whether there is any need to distinguish between injurious affection and severance damage.

As the history of the concepts has shown, injurious affection originally meant, and perhaps still properly does mean, any reduction in the value of land caused by something done on nearby land. For example, the construction of an airport may, in this sense, injuriously affect the land values of an entire suburb. Accordingly, injurious affection in this sense is independent of any state acquisition of land. Severance, on the other hand, by definition cannot occur without an acquisition of land.

However, the *Public Works Act* and the *Land Administration Act*, in common with many jurisdictions, confined compensation for ‘injurious affection’ to persons from whom land has been taken, effectively removing the major practical reason to distinguish between injurious affection and severance damage.

One possible reason for preserving the distinction is so that enhancement may be set off against injurious affection but not severance, the rationale for which is also elusive.⁸ If that is the sole reason, then, subject to Chapter 5, one might question whether there is any need for paragraph 241(7)(a) at all.

3. Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Proposals for reform* (1989) 2.

4. *Ibid* [3.41].

5. Fenner G, Transcript of Evidence to the Standing Committee on Public Administration and Finance (10 November 2003) 2.

6. This view has been expressed by the following Perth practitioners: G Di Biasi and G Metcalf, Valuer General’s Office (Perth, 17 August 2006) and interview with T Hillyard, Department of Planning & Infrastructure (Perth, 21 August 2006). See also Australian Property Institute, *Suggested Areas of Review Land Administration Act 1997* (undated) 4.

7. Interview with Denis McLeod, Principal Partner, McLeods Barristers and Solicitors (Perth, 15 September 2006).

8. For further discussion, see below Chapter 5.

A contrary argument is that the *Land Administration Act*, also in common with other jurisdictions, sets out a list of matters to which the acquiring authority and the courts must have regard: s 241(1) *Land Administration Act*. That approach provides land owners, acquiring authorities, valuers and courts with a check list of heads of compensation. From that perspective, it may remain useful to list both severance and injurious affection since they constitute discrete inquiries as to the cause of any reduction in value.

Any obscurity or archaism of the expression could be ameliorated by a definition of 'injurious affection'. Alternatively, the Act might paraphrase the concept.

A desirable amendment in this regard might be to ensure that s 241(7) deals only with reduction of value of adjoining land; that is, to ensure that the subsection is not concerned with other categories of damage such as business disturbances, reinstatement and extinguishment, which are dealt with in s 241(6).

One difficulty with s 241(7)(a) is that, if it is intended to apply to or include business losses on account of the severance of land, such business losses are confined to the case of a taking of fee simple, whereas no such limitation arises under s 241(6).

On the other hand, it is well understood that the items in the list of relevant factors in s 241 are not mutually exclusive, which is why practitioners and courts are alert to the possibility of double counting. Nevertheless, the inclusion of a matter in two different items of the section is to be avoided if possible.

The last issue for discussion in this chapter is that which arose in *Edwards v Minister for Transport*,⁹ *Commonwealth of Australia v Morison*,¹⁰ and *Marshall v Director-General, Department of Transport*.¹¹ The

question in each case, speaking generally, was whether compensation was available for injurious affection suffered in respect of a person's retained land only when the injurious affection was caused by a public work established on land taken from that person. The court in *Edwards* held that the work must be on the taken land.

*Morison*¹² 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,¹³ 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 for Western Australia by Parker J in *Cerini v Minister for Transport*,¹⁴ who held 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 in Chapter 4, 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 to compensate a person who has lost some land to a highway shoulder while not compensating his neighbour who has lost land for a buffer verge of the same highway.

In the Commission's view, there is an unavoidable arbitrariness in such decisions. Unless there is good cause, the existing law, which is reflected in *Cerini* and appears to the benefit of the land owner, should not be altered.

9. [1964] 2 QB 134.

10. (1972) 127 CLR 32.

11. [2001] HCA 37.

12. *Morison* involved Victorian legislation similar to the Western Australian provision.

13. Section 20(1)(b) of the *Acquisition of Land Act 1967* (Qld) which provided: 'the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.'

14. [2001] WASC 309. Parker J did not mention the *Morison* case, but *Cerini* appears consistent with *Morison*.

Invitation to Submit 1

The Commission invites submissions on the merits of:

- (a) retaining the phrase 'a reduction of the value of that adjoining land' in s 241(7)(b) of the *Land Administration Act 1997* (WA);
- (b) expressly confining s 241(7) of the *Land Administration Act 1997* (WA) to reductions in value of land; and
- (c) dispensing with the distinction, however expressed, between injurious affection and severance damage.

Subject to receiving those submissions, the Commission's tentative proposals, set out in Chapter 12, are to:

- Retain the reference to 'damage suffered' on the grounds that s 241 is generally concerned with compensation for loss, for which reduction in value of land is relevant but not determinative.
- Omit use of 'injurious affection' on the grounds that, first, while it is premature to delete the term from all statutes, the process has begun to discontinue its use and that process should not be reversed; and, second, at least in respect of the principal legislation, the term will be confined to its planning meaning.
- Replace paragraph (b) with a definition of what would traditionally be termed 'injurious affection', in order to make certain what loss is referred to.

Entitlement under Land Administration Act

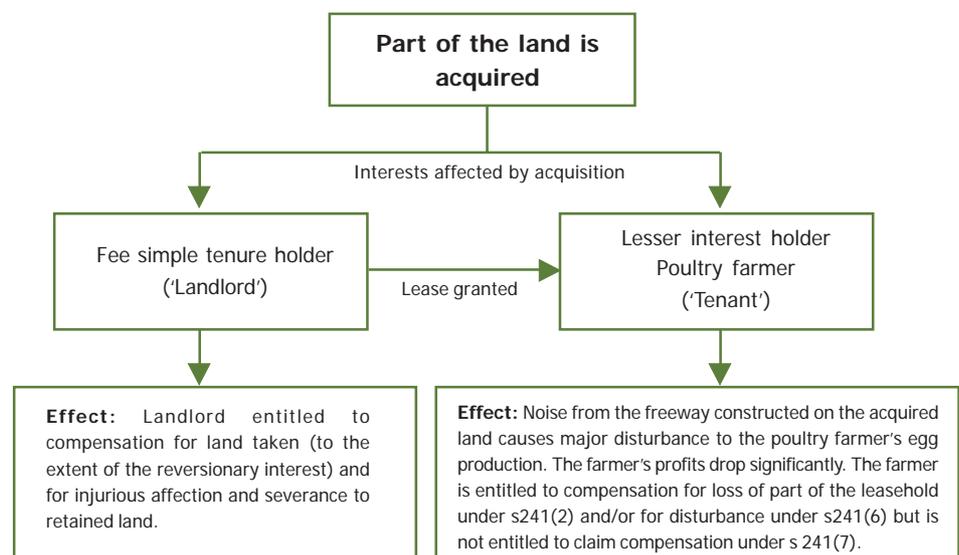
As mentioned in Chapter 2, the 1997 amendments reduced the class of claimants eligible for compensation for injurious affection to those holding fee simple. The diagram below illustrates how this narrowing of entitlement may operate in practice. Each of the other Australian states applies similar principles of compulsory acquisition to the acquisition of freehold, leases and other interests in land.

Several policy objectives are at play in respect of the position in Western Australia. First, the government is relieved of the cost of injurious affection and severance compensation specific to the tenant. Second, 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. This effect flows, primarily, from the fact that the landlord is entitled to the full measure of loss, based on the land's highest and best use. That compensation may not be reduced on account of the grant of a lease, at least not to the full extent of the compensation to the lessee.

However, apart from issues related to the *Dampier to Bunbury Pipeline Act 1997* (WA) and power line easements, the Commission is not aware of any public disquiet since 1997 about unfairly restricted awards in cases analogous to the above example. Nor is there any evidence before the Commission that government officers were concerned prior to 1997 that payments were excessive in this regard.

One reason for this 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 which a person, in the lessee's position, would pay for the taken land rather than lose it.¹ The contrary argument 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 *generalia specialibus non derogant* principle (general provisions shall not derogate from specific provisions).

Example of entitlement to claim compensation under s 241(7)(b)²



1. *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 market.

2. Under the terms of the lease, the tenant may be entitled to a claim against the landlord who could then make a claim under s 241 of the *Land Administration Act 1997* (WA) to recoup these costs. The difficulty is that the tenant has no right under s 241(7)(b) to claim compensation and must rely on the terms of the lease (if there are any) to be compensated for a loss.

Further, s 241(6) permits the payment of compensation on account of disruption of a business and on account of any other facts which it is just to take into account in the circumstances. It may be that lessees, if any, in a position similar to the above hypothetical poultry farmer have been satisfactorily compensated by the operation of s 241(6) since 1997.

Accordingly, the rationale for the 1997 change may have been that cases of injurious affection to leaseholds were insignificant. Nevertheless, in theory at least, there may be cases in which a lessee is disadvantaged.

In the following example, the proposed freeway will reduce the value of the leasehold, including the value of the right to sublet. In many cases, rent review clauses may protect the lessee from financial loss under the leasehold. However, in theory at least, the lessee may be financially disadvantaged with no recourse under s 241(7) of the *Land Administration Act*. The relative infrequency of disadvantage would not appear to justify to denying a remedy.

A third category of examples concerns infrastructure easements. An easement

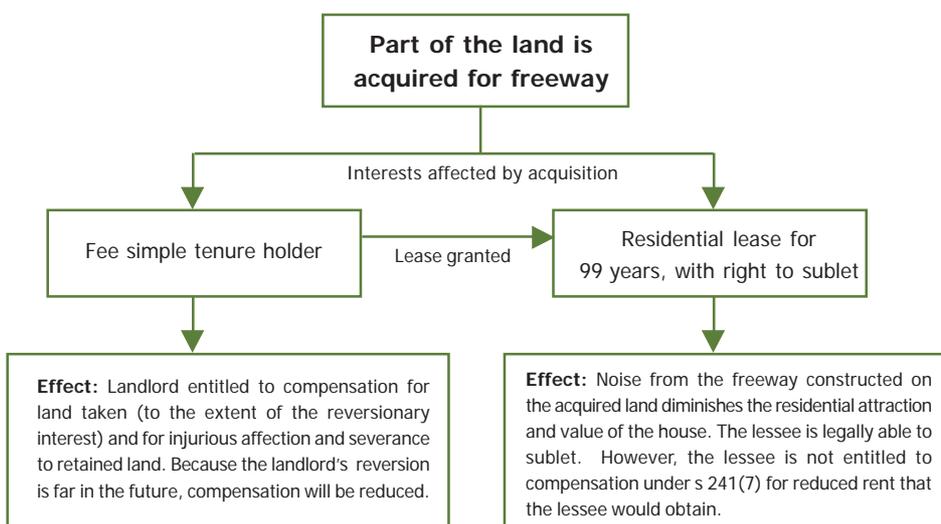
compulsorily taken for high voltage power lines may have substantial effects on the value of the surrounding land. The relevant legislation is dealt with in Chapter 10. Nevertheless, the point may be made here also that s 241(7) of the *Land Administration Act* does not entitle the land owner to compensation for loss of value to adjacent land caused by the power lines.

The Commission would be assisted by submissions on the extent to which lessees or the holders of lesser interests have been disadvantaged, the significance of savings, if any, to government effected by the 1997 changes, and whether in practice s 241(6) has been used for compensation.

Invitation to Submit 2

The Commission invites submissions on the merits and consequences of extending the entitlement to claim compensation under s 241(7) of the *Land Administration Act 1997* (WA) from fee simple holders to include leaseholders, alternatively to all persons from whom an interest in land is taken.

Example of disadvantaged lessee



SET OFF FOR ENHANCEMENT

The *Land Administration Act 1997* (WA) recognises that a public work may enhance the value of land adjacent to a proposed public work. Section 241(7) provides that any such enhancement in the value of a person's land is to be set off against any reduction in the value of land adjacent to the public work held by the same person.

There may be arguments for and against the inclusion in s 241(7) of the *Land Administration Act* of a provision for set off. However, if a set off is to be retained, it is not clear what reasons could be advanced for requiring a set off in respect of injurious affection but not severance. As mentioned above, this issue may be answered if the correct interpretation of the subsection 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.

Section 63(b) of the *Public Works Act 1902* (WA), the predecessor of s 241(7) *Land Administration Act*, expressly 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. It has not yet been determined by a court whether the *Land Administration Act* has departed from the formulation in s 63(b).

In all other Australian jurisdictions, enhancement is, or may be, set off against both injurious affection and severance.¹ In most statutes, enhancement is one consideration in a list of considerations relevant to compensation. In New South Wales, for example, section 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.

In Tasmania, the set off is more explicitly related to both injurious affection and severance. 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;
- (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;
- ...
- (e) whether other land belonging to the claimant is injuriously affected by the carrying out of, or the proposal to carry out, the authorized 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

1. *Lands Acquisition Act 1989* (Cth) s 55; *Lands Acquisition Act 1994* (ACT) s 45; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 55; *Acquisition of Land Act 1967* (Qld) s 20; *Land Acquisition Act 1969* (SA) s 25; *Land Acquisitions Act 1993* (Tas) s 27; *Land Acquisition and Compensation Act 1986* (Vic) s 41.

the amount of compensation determined under subsection (1)(a), (b), (c), (e), (f) and (g).

The following discussion is based on the assumption that, in Western Australia, a set off for enhancement elsewhere applies only to what would otherwise qualify as injurious affection. An issue of relevance concerns the meaning of 'any land'. In theory, some land is taken and some adjoining land suffers injurious affection and/or severance damage, so that 'any land' must refer to a third area of land, whether also adjoining or not.

On that understanding, the Commission would be assisted by submissions on the rationale and merit of providing set off against injurious affection but not severance. In any event, there may be merit in amending s 241(7) to make clear that set off applies or does not apply to severance damage.

Invitation to Submit 3

The Commission invites submissions on the merits of amending s 241(7) of the *Land Administration Act 1997* (WA) to make clear that enhancement is set off against any entitlement to compensation under s 241(7), whether traditionally described as 'injurious affection' or as 'severance damage'.

Subject to those submissions, the Commission is tentatively inclined to recommend an amendment which provides or confirms that the set off applies to any reduction in value of adjoining land. The Commission's tentative proposal is set out in Chapter 12.

Entitlement under Planning and Development Act

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 empowered under the *Planning and Development Act 2005* (WA) to 'reserve' land by making or amending regional and local planning schemes.¹ Land is reserved by the WAPC 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 have acquired 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.

The reservation of privately owned land under region schemes does not 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.

ENTITLEMENT TO COMPENSATION

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 compensation in respect of the injurious affection.²

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

174. 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

1. *Planning and Development Act 2005* (WA) s 4 defines a planning scheme as: 'a local or region 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 the Peel area. Reservations under region schemes will automatically effect reservations under the relevant local planning schemes.

2. 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 the *Planning and Development Act*. There is no mention of set off. Rather, the provision appears 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 Discussion Paper.

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) defines the circumstances in which injurious affection is deemed to be injurious affection by reason of a scheme, but does not define 'injurious affection'.

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 person who owned the land at the date of the planning scheme became operational first sells it.
2. When an application 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.³ A claim may also be made where a planning scheme, which authorises the continuing 'non-conforming use' of the land, provides a date within which compensation can be claimed.⁴

Section 177(3)(a) assists to define the concept of injurious affection. 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. Injurious affection, therefore, is effectively defined in the context of the first sale as that difference in price.

3. *Planning and Development Act 2005* (WA) s 178(1).

4. *Planning and Development Act 2005* (WA) s 178(1)(b). Section 179(1)(b) is concerned with the amount of compensation for injurious affection, that it must not exceed the difference between the value of the affected land and the value of the land as not so affected.

Section 179(1), which sets out the amount of compensation due, 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 payable in respect of a failed, or partly successful, development application, as in the following example.

Example

A reservation may restrict development of an owner's land. Nevertheless, a development application may be approved which is less onerous for the owner than the terms of the reservation would suggest, but still subject to conditions deemed unacceptable by the owner. In such a case, the compensation is based on the allowable development, not on the more onerous restrictions under the reserve.

Conversely, but for this provision, the compensation may have exceeded the price difference, as in this example.

Example

A large parcel of developable land may be under reservation for parks and recreation. The owner's development application will be refused, so preventing development for urban residences. Refusal of the development application will give rise to compensation. The amount of compensation is not determined by the amount the owner might make as a profit should the owner develop the land and sell the residential lots. Rather, under s 179(1), the amount is capped at the difference between the prices the owner could reasonably expect through sale of the land affected and sale unaffected by the reservation. In this example, the compensation is similar to that under the first sale criteria.⁵

The *Planning and Development Act* is silent on the means by which injurious affection is determined in the event of a failed development application. Section 176(1) provides that a claimant or responsible authority may apply to the State

Administrative Tribunal for determination of any question as to whether land is injuriously affected.⁶ In general, however, it is clear enough that the measure of injurious affection is the difference between the value of the land unaffected by the reservation and its value affected by the incapacity to develop as desired.

Accordingly, the Commission's tentative view is that no further statutory definition of 'injurious affection' is required in the context of the *Planning and Development Act*. The Commission would be assisted by submissions in this respect.

Invitation to Submit 4

The Commission invites submissions on the merits of, and the possible form of, statutory definitions for the injurious affection which is compensable under s 173 of the *Planning and Development Act 2005* (WA).

AFFECTED LAND

Under s 174(1) of the *Planning and Development Act*, compensable injurious affection can arise only in respect of the land reserved. This appears to follow the decision of Miller J in *Re Board of valuers, Ex Parte Bond Corp Pty Ltd*.⁷

That creates an anomaly in many cases. Suppose that the reservation affects a sliver of land within a much 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 an unaffected' approach) must be applied, and must be applied only to the sliver.

5. This is not peculiar to the *Planning and Development Act 2005* (WA). It is the usual rule in assessing compensation. The courts do not directly compensate for loss of profits on a venture that has not been undertaken.

6. The purpose of the requirement that the fact of whether or not injurious affection has occurred is to be determined by the Tribunal—rather than an arbitrator under the *Commercial Arbitration Act 1985* (WA)—is so that it may be constituted by members with appropriate planning expertise in the event of complicated factual circumstances.

7. [1998] 101 LGERA 268.

There are two discrete issues. First, an unaffected value of the sliver must somehow be obtained. It cannot be obtained from a before and after approach for the whole land-holding, because that would include the effect on the rest of the land caused by loss of the sliver, contrary to s 174. The same difficulty arises in obtaining an affected value for the sliver.

Second, the question arises whether it is fair to refuse compensation for the effect on the remaining land caused by the reservation of the sliver. As alluded to earlier, this is the parallel in planning of the concepts of 'injurious affection' and 'severance' as used in the acquisition context. To state the problem in words reflecting s 241(7) of the *Land Administration Act*, should the law allow the following compensation for injurious affection under the *Planning and Development Act*?

If a reservation is made of land owned by a person who is also the holder of adjoining land, regard is to be had to the amount of any damage suffered by the claimant—

- (a) due to the reservation of the land; or
- (b) due to a reduction of the value of that adjoining land,

however, if the value of any [other] land held by the person is increased by the reservation, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraphs (a) or (b).

If the law was stated in those terms, the *Bond* case difficulty would disappear. The Commission is not aware of any case in which the *Bond* principle has operated to the advantage of the responsible authority; that is, to the detriment of the land owner. In the one case of which the Commission is aware, an arbitration, the relevant sliver of land was treated as having 'special value to the owner' equivalent to the value of the impact on the remaining land. That result may have merit, but the reasoning is contrary to *Bond*.

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 and includes a public work.⁸

The public purposes for which land may be reserved under planning schemes include 'parks and recreation' purposes or future roads and other infrastructure, and for 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 his day-to-day use of the land. Nevertheless, the value of the land may have been affected by the reservation.

This may arise because a reservation of part of the land prevents the attainment of an otherwise available higher and better use. For example, a person may own a 1000 square metre suburban block with a single residence but under zoning that permitted subdivision for three residences. A reservation for a new road affecting part of the land may allow subdivision of the remaining zoned land for only two residential lots. In such a case, the question arises whether the original owner is made aware that a reduction in value has occurred and is claimable under the *Planning and Development Act*.

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.⁹

Standard conveyancing practice in Western Australia involves purchasers obtaining

8. *Planning and Development Act 2005* (WA) s 172.

9. See WAPC, 'Your Property and Region Schemes', <www.wapc.wa.gov.au/Property+and+land+management/Your+property+and+region+schemes/default.aspx>.

information about zoning and/or reservations. Hence, a purchaser should be aware of the reservation prior to purchase. If injurious affection compensation has been paid to an owner, s 180 of the *Planning and Development Act* provides for a memorial to be placed on title. Section 171 provides that no further compensation is payable. Further, previous owners/vendors will have been invited to participate in the scheme creation or amendment process that gave rise to the public purpose reservation¹⁰ or planning control area declaration¹¹ and thereby informed about compensation entitlements.

Prior to the decision of the High Court in *Temwood*,¹² cases arose where 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.¹³ Following *Temwood*, the WAPC adopted the view that, if compensation had not been claimed by the owner as at the date of reservation, no successor in title has an entitlement to claim compensation. In such circumstances, the adequacy of notice does not arise.

The position under local planning schemes is less clear. The operative provisions¹⁴ 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 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.

Invitation to Submit 5

Submissions are invited on whether the *Planning and Development Act 2005* (WA) and/or the *Town Planning Regulations 1967* (WA) should be amended to provide for notice to land owners affected by a planning scheme reservation of their rights to compensation, for example by memorial on the title.

LIMITATION PERIOD

Related to that issue, is the question of the proper interpretation of s 177(1) of the *Planning and Development Act*. In *Temwood*,¹⁵ the High Court considered whether there was an entitlement to compensation which existed in advance of the right to apply for compensation in respect of reservations 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 1959* ('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

10. *Planning and Development Act 2005* (WA) ss 42 & 84; also *Town Planning Regulations 1967* (WA).

11. *Planning and Development Act 2005* (WA) Pt 7.

12. *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.

13. This occurred in *Kelly v Western Australian Planning Commission* [2006] WASC 208.

14. 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).

15. Above n 12.

compensation when his subdivision approval contained unacceptable conditions.

The High Court was divided on the issue – two of the three majority judges concluded there was only one right to claim compensation, which implies that the expiry of six months from first sale terminates all compensation. However, it was not necessary to determine the issue and the point has not been 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 land to the claimant. Since *Temwood*, the WAPC has taken the view that a purchaser is likely to have obtained land (including the reserved land) at the injuriously affected price in the first place, and should be treated as 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 he 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.

In *Nicoletti*,¹⁶ 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. This has the practical effect of amending the date of valuation or assessment. In theory, the land owner could continue this process until a time convenient to the land owner.¹⁷

From the broadest perspective, the issue is whether successors in title should be able to obtain compensation at all. The interpretation could be put beyond doubt by legislative

amendment to s 178 of the *Planning and Development Act*.

Invitation to Submit 6

Submissions are invited on whether the *Planning and Development Act 2005* (WA) should be amended to provide for:

- independent rights to compensation, with independent six month limitation periods, under each of sub-paragraphs (i), (ii) and (iii) of s 178(1)(a) of the Act; alternatively
- the termination of all rights to compensation for injurious affection upon expiry of six months from the first sale after the land is reserved, or refusal of the first application for development approval, whichever first occurs.

Subject to those submissions, the Commission's tentative view is that all entitlement to compensation should expire:

- for the original owner, six months after first sale or after a refused development application, provided that no compensation has earlier been paid; and
- for a purchaser, six months after a failed development application provided that the original owner has, at the time of selling the land, assigned in approved form his entitlement to compensation to the purchaser.

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

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

Compensation should be the full monetary equivalent of the value to [an owner] of the land. All else is subsidiary to this end.¹

*Chief Justice Dixon,
High Court of Australia*

1. *Turner v Minister for Public Instruction* (1956) 95 CLR 245, 264.
2. *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 apply: *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.
3. *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.'
4. *Land Administration Act 1997* (WA) s 212.
5. *Land Administration Act 1997* (WA) s 217(1).
6. *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 the SAT for determination: *Land Administration Act 1997* (WA) s 218.
7. 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).
8. *Land Administration Act 1997* (WA) s 220.
9. *Land Administration Act 1997* (WA) s 221.
10. *Land Administration Act 1997* (WA) s 223(2).
11. *Land Administration Act 1997* (WA) s 224(3).
12. *Land Administration Act 1997* (WA) s 224(4).

This chapter deals with the question whether the price agreed under voluntary 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.

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.²
- A claim must be made in the approved form and served on the acquiring authority.³
- 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.⁴
- 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.⁵ The acquiring authority must as soon as possible after that report is produced

make an offer of compensation to the claimant.⁶

- If a claimant rejects an offer⁷ 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 ...;
- (c) by reference to the State Administrative Tribunal.⁸

- 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.⁹ A claimant must give the acquiring authority 30 days' notice before commencing proceedings.¹⁰

- 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.¹¹

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.¹²

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 compensation should include all heads of compensation set out in s 241 of the *Land Administration Act*, including injurious affection.

VOLUNTARY ACQUISITIONS

The *Land Administration Act*, the *Planning and Development Act* and many of the Acts listed in the Schedule¹³ have provision for the voluntary acquisition of land as an alternative to compulsory acquisition. In all but one such case, 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 election 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 a compulsory acquisition to which Part 10 will apply.

The importance 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.¹⁴ On their faces, ss 168 and 169 appear to allow solatium to be paid in respect of an agreed taking.

However, s 241(8) provides that solatium is payable 'if the interest in land is taken without agreement' and may be paid 'to compensate for the taking without agreement'. The Commission is not aware of any authority on the question whether solatium is payable under ss 168 or 169 and tentatively holds the view that it is not. However, it has been the practice of some government agencies to include all heads of claim. Of course, the agreed price may reflect a generous view of market value in any event, and render these formalities immaterial.

This issue of solatium is not directly within the Commission's terms of reference. It is raised here because of its connection to a second reason choice under ss 168 and 169 which may be important.

In a part taking, it is not clear that agreements under s 168(a) of the *Land Administration Act* necessarily include injurious affection and

13. Schedule 1 of the Terms of Reference: see above p iii.

14. *Land Administration Act 1997* (WA) s 241(9).

severance. Unless the government's valuer is specifically instructed to assess any reduction in value of the land owner's remaining fee simple, it seems unlikely that injurious affection and severance would be included. On the other hand, if the acquisition proceeds under s 168(b) or s 169, it appears obligatory to include injurious affection and severance; they being part of 'compensation'.

Voluntary acquisitions are included in other statutes. In some statutes, the voluntary 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:

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* (and presumably Part 10 in consequence). While the *Land Administration Act* is incorporated for compulsory acquisition, it is not for voluntary acquisitions. The result is that agreements under the *Dampier to Bunbury Pipeline Act* do not include the benefits of ss 168 and 169 of the *Land Administration Act*.

Section 190 of the *Planning and Development Act* 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.

In other statutes, the position is less clear. 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 37 of the *Energy Operators (Powers) Act 1979* (WA) is in similar terms to the *Water Agencies (Powers) 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 presumably 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 pipeline licensee 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 9.3.1¹⁵ of the Government 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 in this Discussion Paper is whether all acquisitions for a public purpose should be treated as at least quasi-compulsory, so that the safeguards of ss 168 and 169 of the *Land Administration Act* apply. In the further alternative, whether there is a middle course between those options.

It is debatable 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 may 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 may be more designed to facilitate amicable compulsory acquisitions than to facilitate truly consensual transfers.

This issue has a practical and a theoretical side. From a perspective of statutory interpretation, the issue is whether it is open to agencies to voluntarily acquire land at a bargain. However, in view of the practice and policy of agencies, even if that is an open interpretation, is reform required? Initial investigation of this point indicates that the sections are not used to skirt s 241 provisions and obtain bargains. Further, the Commission is not aware of any public disquiet in this regard.

Further, 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.¹⁶ 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 for long-term works) 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 'purely' voluntary provisions such as s 11 of the *Land Administration Act* or s 190 of the *Planning and Development Act*.

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

16. Some of these are explained in Western Australian Planning Commission, 'The Case for Retaining the Metropolitan Region Improvement Tax' (April 2007).

Therefore, in practice, it may be that the criteria for distinguishing truly voluntary acquisitions from agreed compulsory acquisitions has become related to: first, the urgency of the requirement; second, whether the land comes onto 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.

To an extent, such criteria are included in legislation elsewhere. For example, s 38 in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) provides that:

38. 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.

That New South Wales provision applies the principles of compulsory acquisitions to all 'agreed' acquisitions except those which follow upon a landowner placing land on the market.

The Standing Committee on Government Agencies¹⁷ 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*.¹⁸ As explained, that recommendation goes further than the Commission's proposal under this Discussion

Paper and further than the New South Wales statute.

The government's response to the Standing Committee's recommendation under a voluntary acquisition was that the landowner's position differed from the position under a compulsory acquisition, and should not be assimilated.¹⁹ On its face, that response does not apply to the Commission's proposal which is based on three different situations.

The government nevertheless acknowledged the impost to an owner/occupier of land that is subject to a planning scheme reservation. To account for this impost, where land is voluntarily acquired, it suggested market value plus a five per cent premium should be paid where the property is the land owner's principal place of residence.²⁰

However, , since *some* acquisitions are at least quasi-compulsory, and because voluntary or non-litigious resolutions are preferable and ultimately less onerous for tax payers, the return for *those* voluntary acquisitions should more closely approximate those for compulsory acquisition.

The Commission's proposal is that the provisions of ss 168 and 169 of the *Land Administration Act*, which contain certain safeguards, should be available to all persons from whom land is acquired for public purposes at the government's initiative. All other acquisitions (ie, of land that comes onto the market, or is privately offered to the government) may be under ss 11 or 168(1)(a) of the *Land Administration Act* or s 190 of the *Planning and Development Act*.

The rationale for this proposal is to ensure that land owners are aware of their rights. It is not the intention of the proposal to

17. Standing Committee on Government Agencies, *Resumption of Land by Government Agencies: Proposals for Reform*, 9th Report (August 1986) 453–54.

18. *Ibid* 454, Recommendation 33.

19. See 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) 22.

20. *Land Administration Act 1997* (WA) s 221.

ensure that acquiring authorities and the Western Australian Planning Commission, in particular, always pay to land owners the array of entitlements under s 241(7). Many land owners will be willing to sell for less than the sum available under that section. Indeed, many would be advantaged by the opportunity to sell rather than wait, perhaps for many years, for a compulsory acquisition.

Invitation to Submit 7

The Commission invites submissions on the criteria for the application of ss 168(1)(b) and 169 of the *Land Administration Act 1997* (WA) to some agreed acquisitions in order to ensure that a land owner:

- is informed of the option of claiming compensation for injurious affection and severance; and/or
- is entitled to be considered for an award of solatium,

and whether these criteria should be included in the legislation.

ELECTION TO ACQUIRE

The *Planning and Development Act* contains provision for voluntary purchase of land (s 190), compulsory acquisition (s 191, which refers to Part 9 of the *Land Administration Act*) and the 'election to acquire' process (s 187).²¹ The 'election to acquire' process does not fall neatly within the preceding discussion. It is the one 'voluntary' acquisition process that appears to have caused public disquiet.

Section 187 has replaced s 36(2) 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)*²² and *Western Australian Planning Commission v Kelly*.²³

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): ss 187(3) and 188(2).

*Mt Lawley (No. 1)*²⁴ held that the value to be determined on such a reference does not include injurious affection or severance damage to adjacent 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.²⁵ Accordingly, not only is the value determined by the Tribunal not to include such damage, it follows that agreement under s 187 of the *Planning and Development Act* as to price is unlikely to include it either.

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.²⁶ 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.

Apparently in response to the problem that a land owner might refuse an election to acquire,

21. Section 187 re-enacts a power previously exercised exclusively by the Western Australian Planning Commission (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.

22. (2004) 29 WAR 273.

23. [2007] WASCA 160.

24. Above n 22.

25. *Pastoral Finance Association Ltd v Minister (NSW)* [1914] AC 1083.

26. *Mt Lawley (No. 1)*, above n 24, [257] & [263]. The Full Court noted that it is open to the land owner to avoid the process by withdrawing an application for compensation. That 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.

even after taking the matter through an expensive litigation process, Parliament amended this provision in 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 acquire²⁷ but not until after a determination as to the quantum of the purchase price is finally made.

It may be useful to restate in this context that 'injurious affection' has two meanings. The election to acquire may be made instead of paying 'injurious affection', which here means the reduced value of land caused by restrictions on *that* land under a planning scheme. The discussion above does not concern 'injurious affection' in that sense. Rather, the above discussion is concerned with, and arises only upon, an acquisition of land, which acquisition may involve 'injurious affection' (and severance) damage to *other* land, and 'injurious affection' here has the meaning used in the *Public Works Act 1902* (WA). Indeed, that other land may not be the subject of any scheme and hence not the subject of any 'injurious affection' in the first sense.

Further to the election to acquire process, 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 some 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 earlier in this Chapter, 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 acquiring authority requires ownership of the land. Should it follow, in such cases, that the land owner is unable to obtain the compensation in respect of adjacent land that the land owner would obtain had the acquisition been compulsory under s 241 of the *Land Administration Act*?

On one view, the retention of the election to acquire process in light of the availability of s 190 serves no practical policy purpose other than to avoid compensation in respect of adjacent land, in the case where a reservation affects part of a person's land.

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 unilaterally imposed restrictions on any new use of the land.

The Commission would be assisted by submissions on the utility of the election to purchase process in respect of Western Australian Planning Commission's operations under region schemes, the potential application of such powers by local governments under local planning schemes, and the fairness of its retention.

The Commission's tentative view is that the voluntary and compulsory processes of ss 190 and 191 of the *Planning and Development Act* appear to accord the

27. As above, it is not clear how this operates in the context of an application upon first sale.

acquiring authorities the flexibility they require and at the same time ensure that land owners have the legal capacity to secure receipt of an amount closer to full compensation.

Invitation to Submit 8

The Commission invites submissions on whether the election to acquire process in s 187 of the *Planning and Development Act 2005* (WA) should be repealed.

Injurious affection is referred to in 13 different statutes in Western Australia.

This Discussion Paper is concerned with injurious affection, not with compensation generally. Nevertheless, this Chapter has been included because initial inquiries suggest that a disproportionate number of contentious cases in acquisition law involve injurious affection and/or severance.

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.

The Commission tentatively suggests that, 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 meanings attach to the expression. In the case of land acquisitions, whether compulsorily or by agreement, the better means of ensuring consistency and balance is to apply the provisions of one Act, the *Land Administration Act*, so far as possible.

OTHER AUSTRALIAN JURISDICTIONS

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

While all other Australian states have adopted the model of one land acquisition statute, the significance of this should not be overstated.

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* (NT); *Acquisition of Land Act 1967* (Qld); *Land Acquisition Act 1989* (SA); *Land Acquisition Act 1993* (Tas); *Land Acquisition and Compensation Act (1986)* (Vic).

THE COMMISSION'S PROPOSAL

Subject to submissions on this issue, the Commission is inclined against recommending a single acquisition 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.
2. That system allows exceptions to be easily inserted in individual statute 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.

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 perhaps ironic that, in the same year the term 'injurious affection' was omitted from the *Land Administration Act*, 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 1997 (WA)*.

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 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 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.

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

Creation 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.

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.³

However, the *Dampier to Bunbury Pipeline Act* also provides a process under which the Minister does acquire an interest in land directly from the landowner: s 29. Even if state corridor rights are taken, 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, it seems, state corridor rights are not an alternative form of property for sale, and they are not a necessary step in either the sale of rights to construct another pipeline. Rather, in the Commission's view, state corridor rights merely provide an 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.

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 is quite 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': *Hansard*, Legislative Assembly, 11 November 1997, 7525/1.

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, among other things, 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 affected by ss 34 and 41, not by state corridor rights.

It is the Commission's tentative view that Parliament, rather than taking an easement under which payment must be made at the outset, has allowed the alternatives of state 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 Discussion Paper, 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' and is taken to include both meanings. Section 42(1) allows claims for injurious affection:

- caused 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.

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': *Hansard*, Legislative Assembly, 11 November 1997, 7518/6.

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'.

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.

The Commission is not aware of any case-law on this aspect of the *Dampier to Bunbury Pipeline Act*. It is not clear whether it was discussed in *Auld's* case, although it does not appear in his Honour's reasons.

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*.

In light of the above, the Commission's tentative view is that the provisions for compensation in the *Dampier to Bunbury Pipeline Act* are not less fair to the affected land owners than the *Land Administration Act*. On the contrary, in respect of injurious affection to adjacent 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 10.

Rather, the controversy concerning the *Dampier to Bunbury Pipeline Act* stems from the difficulty in understanding the Act, particularly the concept of state corridor rights. It is beyond the scope of the Commission's terms of reference to recommend a wholesale redraft of the *Dampier to Bunbury Pipeline Act*.

Subject to submissions, the Commission's tentative view is that the difficulty of interpretation is not aggravated by use of the expression 'injuriously affected' or cognates. The Commission is presently disinclined to recommend any amendment of the *Dampier to Bunbury Pipeline Act*.

Invitation to Submit 9

The Commission invites submissions on whether the *Dampier to Bunbury Pipeline Act 1997* (WA) should be amended to:

- replace or define the expression 'injuriously affect';
- clarify rights to compensation; and/or
- increase or decrease compensation.

EASEMENTS

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 *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. While complex, that Act does appear to provide for compensation for the effect of the pipeline on land both within the pipeline corridor and outside the corridor.

The primary 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.

In a sense, such compensation could be regarded as 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 compensable and is not related to the taking of fee simple (this issued is discussed in Chapters 2 and 3).

ENERGY OPERATORS

Energy operators² 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 owner³ 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*:

45. 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.

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

(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 to the state government 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 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. In any event subsection (1) is subject to subsection (3).

- The reference to Part 10 *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* 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 injurious affection. 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).
- While it is not entirely clear what effect subsection (2) has, it does not appear to be related to the application of the *Land Administration Act*, or the availability of injurious affection through subsection (3).

In most cases in Western Australia, easements for power infrastructure works are acquired by agreement, in which case Chapter 7 above is relevant.

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

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 Act 1994* (Qld) ss 6 & 116; *Electricity (Pacific Power) Act 1950* (NSW) s 14 & 44; *Electricity Industry Act 2000* (Vic) s 86; *Electricity Act 1996* (SA) ss 4 & 46; *Electricity Supply Industry Act 1995* (Tas) ss 3 & 51.
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.
9. The 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.

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. It further commented that:

The Committee's recommendation could potentially have significant financial implications for the State, and should not be considered without a thorough investigation of the public benefits and costs.¹¹

In light of previous chapters of this Discussion Paper it appears that:

1. The compulsory acquisition of an easement under the *Energy Operators (Powers) Act* does not raise an entitlement to injurious affection or severance in respect of adjacent land. In that respect, its effect is the same as compulsory acquisitions under the *Land Administration Act* of interests less than fee simple, such as an easement.
2. The model of the Dampier to Bunbury Pipeline is, in this regard, anomalously beneficial to the land owner. It appears unique in according rights to

compensation in respect of adjacent land notwithstanding that no fee simple is taken.

3. The implicit criticisms from the Standing Committee appear to be restricted to farming properties. It appears to be suggested that compulsory acquisitions under the *Energy Operators (Powers) Act* be treated in much the same way as compulsory acquisitions under the *Dampier to Bunbury Pipeline Act*.

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, once the decision is made to allow or disallow injurious affection compensation in the absence of a taking of fee simple (as in s 241(7) *Land Administration Act*), it seems unnecessarily arbitrary to alter that outcome in more specific statutes. This point is also discussed in Chapter 8 (dealing with the need for a single compensation statute).

Invitation to Submit 10

The Commission invites submissions on whether there should be compensation to landowners whose land is devalued by electricity transmission line easements.

EASEMENTS FOR WATER INFRASTRUCTURE

The Water Corporation provides water, wastewater, drainage and irrigation services to metropolitan and regional areas of Western Australia.¹² The *Water Agencies (Powers) Act 1984* also provides that water agencies can acquire partial interests in land, such as easements, for public works.¹³

10. Ibid 135.

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.

12. For a comprehensive list of the functions of the Water Corporation, see *Water Corporation Act 1995* (WA) s 27.

13. *Water Agencies (Powers) Act 1984* (WA) s 75(1).

The majority of land required for water infrastructure comprises easements acquired by agreement. During the two years prior to 2003, the Water Corporation completed 2,210 acquisitions of which only four were compulsory acquisitions.¹⁴

As discussed above, the policy of acquiring easements for water infrastructure seems inevitable, it being impractical and inconvenient to acquire freehold. The degree to which water infrastructure under easement adversely affects land values is a matter of fact for evidence. However, since such easements are so common, and apparently well accepted, the Commission is tentatively inclined to recommend no amendment of the *Water Agencies (Powers) Act*.

Invitation to Submit 11

The Commission invites submissions on whether there should be compensation to landowners whose land is devalued by water infrastructure easements.

14. 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 (2004) 137.

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. In the latter endeavour, the legislation requires a licence to clear land in catchment areas: ss 12 B and 12 C.

A land owner is entitled to compensation if his application for a 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).

Section 12E(4), which reflects s 173 of the *Planning and Development Act 2005* (WA), 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 Act is neither the taking of land nor the purpose for which the land is taken. 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, as provided in s 12E(6) of the *Country Areas Water Supply Act*.

In the view of the Commission, the provisions of the *Country Areas Water Supply Act* appear to accord 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 under the *Country Areas Water Supply Act* in respect of land that is not itself the subject of a restriction (cf s 174 of the *Planning and Development Act*).

The Commission would be assisted by submissions on the policy underpinning this difference.

It is also to be noted that 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 Native Vegetation) Regulations 2004* (WA) for which no compensation is payable. This renders the provision under the *Country Areas Water Supply Act* all the more anomalous.

Invitation to Submit 12

The Commission invites submissions on the policy and effect of those provisions of the *Country Areas Water Supply Act 1947* (WA) which accord compensation in respect of land other than land affected by restrictions on clearing, and in light of the limitations on clearing under Environmental Protection legislation.

PETROLEUM PIPELINES ACT

The *Petroleum Pipelines Act 1969* (WA) provides that in Western Australia 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 7 (Voluntary 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 10 (Other Easements), but dissimilar to the provisions of the *Dampier to Bunbury Pipeline Act 1997* (WA) discussed in Chapter 9.

Submissions invited in those chapters will apply here too.

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 had not come into effect at the time this Discussion Paper was prepared. On taking effect, it will replace the *Swan River Trust Act 1988* (WA).

A primary object of the 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*, like the *Swan River Trust Act*,¹ 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 the election to acquire provision discussed in Chapter 7 of this Discussion Paper. Two matters are of relevance.

First, 'owner' is now defined as the proprietor of freehold land, which will narrow the entitled class from that presently entitled. *Hansard* and the explanatory memoranda do not explain that change.

Second, the provisions of Part 5 (dealing with development control) apply to much land that is already the subject of reserves and planning controls under the *Planning and Development Act*. Subsection 89(3) of the *Swan and Canning Rivers Management Act* provides that, if an

1. *Swan River Trust Act 1998* (WA) s 63.

application for compensation may be brought under s 89(2), then no compensation is available upon first sale of the land under s 177(1)(b) of the *Planning and Development Act*.

The effect of subsection (3) appears to be that an owner of affected land, 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 never be entitled to compensation. That is in contrast to the regime under the *Planning and Development Act* which at least accords such an owner the opportunity to claim compensation. On the face of it, s 89(3) appears to unfairly deprive an owner of compensation, and to doubly compensate a successor in title who does wish to develop. That issue is discussed in Chapter 6.

Invitation to submit 13

The Commission invites submissions on the merits of retaining the provisions of s 89 of the *Swan and Canning Rivers Management Act 2006* (WA) by which:

- (a) entitlement to compensation is restricted to those holding fee simple; and
- (b) an owner of affected land who makes no development application is not entitled to compensation if the owner was able to, but did not, apply under subsection 89(2).

The Commission's Proposals

The Commission tentatively proposes that:

Compulsory acquisitions

- In each case where it is practicable, statutes which require provision for compulsory acquisition of land incorporate the provisions of Parts 9 and 10 of the *Land Administration Act 1997* (WA).
- In each case where it is practicable, statutes which require provision for voluntary acquisition of land incorporate ss 168 and 169 of the *Land Administration Act*, and thereby also the relevant provisions of Parts 9 and 10.
- Sections 168 and 169 of the *Land Administration Act* should apply to all acquisitions initiated by government, but not to acquisitions which follow upon a land owner offering land for sale.
- The provisions in s 187 *Planning and Development Act 2005* (WA) for an election to acquire process should be repealed.
- Section 241(7) of the *Land Administration Act* be amended to provide 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—

- due to the severing of the land taken from that adjoining land; or
- due to the effect on that adjoining land caused by the carrying out of, or the proposal to carry out, the public work for which the land was taken,

however, if the value of any other 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 paragraphs (a) or (b).

Planning restrictions

- The election to acquire process should be removed from the *Planning and Development Act 2005* (WA) and the *Swan and Canning Rivers Management Act 2006* (WA).
- An owner, whose land becomes affected by a compensable restriction, should be entitled to compensation upon either refusal or unacceptable conditional approval of a development application or upon first sale, whichever first occurs.
- If an owner is not paid compensation, a purchaser of the land should not be entitled to compensation unless the entitlement of the owner is assigned in prescribed form to the purchaser.

List of Invitations to Submit

Invitation to Submit 1

[page 13]

The Commission invites submissions on the merits of:

- (a) retaining the phrase 'a reduction of the value of that adjoining land' in s 241(7)(b) of the *Land Administration Act 1997* (WA);
- (b) expressly confining s 241(7) of the *Land Administration Act 1997* (WA) to reductions in value of land; and
- (c) dispensing with the distinction, however expressed, between injurious affection and severance damage.

Invitation to Submit 2

[page 15]

The Commission invites submissions on the merits and consequences of extending the entitlement to claim compensation under s 241(7) of the *Land Administration Act 1997* (WA) from fee simple holders to include leaseholders, alternatively to all persons from whom an interest in land is taken.

Invitation to Submit 3

[page 17]

The Commission invites submissions on the merits of amending s 241(7) of the *Land Administration Act 1997* (WA) to make clear that enhancement is set off against any entitlement to compensation under s 241(7), whether traditionally described as 'injurious affection' or as 'severance damage'.

Invitation to Submit 4

[page 20]

The Commission invites submissions on the merits of, and the possible form of, statutory definitions for the injurious affection which is compensable under s 173 of the *Planning and Development Act 2005* (WA).

Invitation to Submit 5

[page 22]

Submissions are invited on whether the *Planning and Development Act 2005* (WA) and/or the *Town Planning Regulations 1967* (WA) should be amended to provide for notice to land owners affected by a planning scheme reservation of their rights to compensation, for example by memorial on the title.

Invitation to Submit 6

[page 23]

Submissions are invited on whether the *Planning and Development Act 2005* (WA) should be amended to provide for:

- independent rights to compensation, with independent six month limitation periods, under each of sub-paragraphs (i), (ii) and (iii) of s 178(1)(a) of the Act; alternatively
- the termination of all rights to compensation for injurious affection upon expiry of six months from the first sale after the land is reserved, or refusal of the first application for development approval, whichever first occurs.

Invitation to Submit 7

[page 29]

The Commission invites submissions on the criteria for the application of ss 168(1)(b) and 169 of the *Land Administration Act 1997* (WA) to some agreed acquisitions in order to ensure that a land owner:

- is informed of the option of claiming compensation for injurious affection and severance; and/or
- is entitled to be considered for an award of solatium,

and whether these criteria should be included in the legislation.

Invitation to Submit 8

[page 31]

The Commission invites submissions on whether the election to acquire process in s 187 of the *Planning and Development Act 2005* (WA) should be repealed.

Invitation to Submit 9

[page 37]

The Commission invites submissions on whether the *Dampier to Bunbury Pipeline Act 1997* (WA) should be amended to:

- replace or define the expression 'injuriously affect';
- clarify rights to compensation; and/or
- increase or decrease compensation.

Invitation to Submit 10

[page 40]

The Commission invites submissions on whether there should be compensation to landowners whose land is devalued by electricity transmission line easements.

Invitation to Submit 11

[page 41]

The Commission invites submissions on whether there should be compensation to landowners whose land is devalued by water infrastructure easements.

Invitation to Submit 12

[page 42]

The Commission invites submissions on the policy and effect of those provisions of the *Country Areas Water Supply Act 1947* (WA) which accord compensation in respect of land other than land affected by restrictions on clearing, and in light of the limitations on clearing under Environmental Protection legislation.

Invitation to Submit 13

[page 44]

The Commission invites submissions on the merits of retaining the provisions of s 89 of the *Swan and Canning Rivers Management Act 2006* (WA) by which:

- (a) entitlement to compensation is restricted to those holding fee simple; and
- (b) an owner of affected land who makes no development application is not entitled to compensation if the owner was able to, but did not, apply under subsection 89(2).

