COMPULSORY ACQUISITION OF LAND FOR LOCAL GOVERNMENT PURPOSES IN NEW SOUTH WALES

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This thesis examines the nature and scope of the power of local authorities in New South Wales to acquire land compulsorily for the purposes of exercising local government functions. The broad nature of the power exercised by local authorities is the same as the acquisition power exercised by other governmental agencies, but the function of local authorities as planning authorities, and the attendant consequences on land values of this function, provide an interesting focus for the examination of the power.

Apart from the purpose of acquisition, the other key constraint on the power's exercise is the requirement to pay compensation. The exercise of the power, however, has far-reaching non-remediable consequences for those persons whose lands are acquired and for other persons affected by the ultimate execution of the purpose for which the land is acquired.

While no statistics are readily available to calculate the extent of the 257 local authorities' contribution to the consequences of all State acquisitions (see the Appendix), their single contribution as administrators of an out-moded planning system alone must be considerable. The thesis, therefore, concludes with a survey of current policy initiatives which attempt to bring together, in a 1978 setting, various facets of acquisition issues, such as property concepts, compensation strategies, planning and decision-making roles.
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CHAPTER ONE

THE SOURCES AND NATURE OF THE LAW OF LAND ACQUISITION

Historical Note

Compulsory acquisition, or 'resumption' as it is more commonly termed in New South Wales, refers to the process whereby the government takes private property without the agreement of the property owners.\(^{(1)}\) The earliest established form of compulsory acquisition was the English eighteenth century 'inclosure' movement,\(^{(2)}\) although there had been instances of acquisition, under public statute, in previous centuries.\(^{(3)}\) The essence of inclosures was the extinction of various rights of common under compulsory powers and the substitution of allotments for those rights with the object of reallocating the land so that it would be more efficiently farmed. This form of acquisition was marked by the fact that to a great extent the expropriators and the expropriated were the same people, the land simply being redistributed on a more efficient basis.\(^{(4)}\)

The next development in the formalisation of compulsory acquisition in England occurred in the early nineteenth century, when it became common for groups of entrepreneurs to obtain powers by private Act of Parliament to acquire land for purposes such as building canals, railways, markets, water works and other perceived necessities of an emerging industrial society.\(^{(5)}\) In many cases, local authorities took over or promoted these activities themselves. Later in the nineteenth century, the procedure was simplified by enacting a standardised set of provisions which could be incorporated in each
private Act of Parliament, unless otherwise provided. Eventually, private legislation was replaced by public legislation.

In Australia, the modern forms of compulsory acquisition developed from different origins, but the basic need for acquisition was the same as in England. In New South Wales, when tracts of land were granted to the early settlers, a condition was usually inserted in the grant that the Crown could use the land, say for public highways, at some subsequent time. As the need to construct public works increased with the nation’s development, the provisions of the Crown grants became inadequate, and special Acts of Parliament were passed, to meet special needs such as military defence and sewers.

The first general acquisition statute in New South Wales was the Lands for Public Purposes Acquisition Act 1880, which specified the purposes as water supplies, schools, roads, libraries, military fortifications and the like. This Act was replaced by a series of statutes, based on the general public statutes of England, which finally culminated in the Public Works Act 1912 (from hereon referred to as the Public Works Act). This Act of 1912 remains the principal Act governing land acquisition in New South Wales today, although resumptions are effected also under a number of other statutes such as the Public Roads Act 1902, the Local Government Act 1919, (from hereon referred to as Local Government Act), the Main Roads Act 1924, the Housing Act 1941, the Sydney Cove Redevelopment Authority Act 1968, the Growth Centres (Land Acquisition) Act 1974, and the Land Commission Act 1976.
The Underlying Principles

Jurisprudential inquiry into the source and nature of the governmental right to acquire land by compulsory process has distilled a number of key notions.\(^{(10)}\)

Firstly, there is the notion of 'unrestricted sovereignty', which asserts that the sovereign body has the right to govern and as an incident of the function of governing it has the right to take land. In *Minister of State for the Army v. Dalziel*, Rich J. explained the principle thus:

'One of the characteristic features of a fully sovereign power is its legal right to deal as it thinks fit with anything and everything within its territory. This includes what is described in the United States as eminent domain (*dominium eminens*), the right to take to itself any property within its territory, or any interest therein, on such terms and for such purposes as it thinks proper, eminent domain being thus the proprietary aspect of sovereignty'.\(^{(11)}\)

A second hypothesis about the source of the right is that the sovereign is merely taking back land of which it was prior owner. This is the feudal notion that the lord has the residual property and is able to take what is his: an idea which is particularly associated with reservation clauses in early Crown grants in Australia (thereby giving rise to the use of the term 'resumption'). However, in English law the proprietary rights of the lord were more theoretical than actual and this hypothesis has not been pressed, so that more reliance has been placed on the first hypothesis which
emphasises that the State takes private property by virtue of its sovereignty rather than by virtue of its ownership.\(12\)

In addition, there are other notions which are not concerned with the existence or the source of the right to take property. They reinforce the existence of a sovereign right to deprive the subject of his property, but at the same time they restrict it by highlighting the high regard for private property which characterises the common law. These notions limit the consequences of a compulsory taking, principally by insisting that the subject should be indemnified for the taking.\(13\) The operation of the limitations, however, is dependent upon the jurisdiction of the courts to restrict governmental sovereignty.

Prerogative powers of government, for example, are regarded as having been conceded to the Crown by the common law, and the courts maintain jurisdiction to determine whether an alleged prerogative power is in fact given by the common law and whether what has been done falls within the power. Accordingly, when property is acquired under the prerogative power, the right of the Crown to do so is open to challenge in the courts unless the taking is for the defence of the realm in time of national danger.\(14\) However, even if the taking under the prerogative power is lawful, the limitation applies that compensation must be paid to the owners of the property.\(15\)

When, as is more likely in modern times, the sovereign power of acquisition is exercised under statutory authority rather than by Royal Prerogative, the courts have no similar jurisdiction since Parliament is an absolute legal sovereign in the sense that the
validity and morality of its laws are not open to common law control. Statutes, therefore, may provide for the taking of property for any purpose and without payment of compensation. \(^{(16)}\) Nevertheless, the limitations still assume significance in the judicial construction of statutes. Hence there is said to be a fundamental principle that a statute should not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms. \(^{(17)}\)

The 'principle', of course, is no more than a presumption: it provides no legal guarantee that persons deprived of their property will be compensated, fairly or at all, since it is always open to Parliament to provide that no compensation will be payable.

This presumption was expanded into a constitutional limitation in Section 51 (xxxii) of the \textit{Commonwealth of Australia Constitution Act}, which fetters the Commonwealth legislative power by permitting acquisitions only for limited purposes and on 'just terms', but there are no constitutional limitations, save those imposed by federation, on the acquisition power of the New South Wales legislature. \(^{(18)}\) The State power, therefore, is limited only by the rule of statutory construction but, as a matter of political reality, the State legislation usually does provide for compensation. \(^{(19)}\)

The scope of the limitation arising from the rule of construction is uncertain. Originally it was suggested by the English courts that if an acquiring authority had a choice of statutory powers open to it, and one power provided for compensation while the other did not, the authority must choose the power which provided for compensation. \(^{(20)}\) This approach was rejected later by the Court of Appeal where the question whether '... the arbitrary
results which modern legislation has produced admit of any protection by the courts in their function of guarding the rights of a subject against oppression by the executive was answered in the negative.\(^{(21)}\) A subsequent appeal to the House of Lords, however, turned on a provision of the relevant planning legislation and did not canvass the issue further.\(^{(22)}\)

On the other hand, it is certain that a limitation imposed by the legislature will not be defeated by the Crown preferring to rely on its prerogative power. The statutory power is regarded as displacing the prerogative power, so that the Crown is not able to claim that it is acting under its prerogative power and thereby escape compliance with any statutory restrictions.\(^{(23)}\) A statute, however, will not be held to abrogate a prerogative of the Crown unless it does so by express words or by necessary implication.\(^{(24)}\)

Delegation of the Power

The power of government to acquire land compulsorily may be conferred on other authorities, including local authorities, by enabling legislation. Such authorities become, for the purpose of exercising the acquisition power, statutory fiduciary agents of the Crown.\(^{(25)}\) Local authorities in New South Wales are given the general power to take private property under Part XXV of the Local Government Act, but they are subject to the requirement of Section 536 of that Act, which has the effect that no council can exercise its power of compulsory acquisition except with the prior approval of the Governor-in-Council.\(^{(26)}\) This approval is intended to provide a safeguard against arbitrary action by the local authority since its decisions will be subjected to scrutiny.\(^{(27)}\)
Processes which Countervail Principles of Compulsory Acquisition

The special rule of construction of acquisition statutes, under which it is presumed, until the contrary is shown, that Parliament intended to provide for compensation, does not apply to other processes whereby the sovereign body (and its agencies) interfere with private property rights. These processes usually are distinguished from compulsory acquisition by placing more emphasis on the public utility of the process, and notions of restricted sovereignty designed to offset private grievances have been outweighed by notions about furthering 'the public good'.

On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rule of statutory interpretation devised by the courts ... This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.

'Side by side with this, however, and developing with increasing range and authority during the second half of the nineteenth century came the great movement for the regulation
of life in the cities and towns in the interests of public health and amenity ... Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property ...' \(^{(28)}\)

A particular application of this approach is seen in the situation where a local authority, as a condition of subdivision approval, requires provision of land for recreation purposes. The High Court has explained that in such a case there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. Legislation initially took away the right to subdivide without approval and gave no compensation for loss. It instead allowed landowners to subdivide with approval, provided they complied with validly imposed conditions. The landowner must decide for himself whether the right to subdivide will be bought at too high a price by complying with the conditions. \(^{(29)}\)
1. 'Resumption' undoubtedly is a misnomer, derived from an imperfect hypothesis about the source of the compulsory acquisition power, discussed infra.

2. Nearly 4,000 private Inclosure Acts were passed in the hundred years prior to the passing of the Inclosure Act, 1845.

3. See, for instance, Maitland, The Constitutional History of England (1963) at 431-432, referring to general Acts of resumption by which grants made by former monarchs were annulled.

4. The compulsion element was said to be balanced by the 'public good'. The Inclosure Act, 1845 was a product of the differing opinions on this 'public good' and gave rise to the Report of the Select Committee on Commons Inclosure, dated 5 August, 1844.

5. There was much litigation about the scope of the powers of a private undertaking to do things which impinged on rights of private property. See, for instance, East Anglian Railways Co. v. Eastern Counties Railway Co. (1851) 11 C.B. 775; 138 E.R. 680 and Earl of Shrewsbury v. North Staffordshire Railway Co. (1865) 35 L.J. Ch. 156.


8. See the reproduction of such a grant in Kemp, Principles of the Law of Real Property in N.S.W. (1903) at 543 and the particular conditions litigated in Rapley v. Martin (1865) 4 S.C.R. (N.S.W.) 173; Burns v. Allen (1889) 10 L.R. (N.S.W.) Eq. 218; Cooper v. Stuart (1889) 14 App. Cas. 286.

9. For instance, the Public Roads Act, 1833; the Military Defence Lands Act 1854; the Sydney Corporation Act, 1879.


11. (1944) 68 C.L.R. 261 at 284.
12. Cf. Milurrump v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141, where the theory was important in the different context of rejecting a contention that certain aborigines had native communal title to land.

13. See Blackstone, Commentaries on the Law of England, I, 139. There is also a notion which treats compulsory acquisition from the viewpoint of an enforced sale, or compulsory purchase. It is based on the necessity to ensure that the principle of fair compensation is in fact enforced, so that in reality, this notion merely reinforces that of restricted sovereignty: see Mann, 'Outlines of a History of Expropriation', (1959) 75 L.Q.R. 188 at 204-205. In any event, the notion of agreement is artificial and 'compulsory purchase' has never been established as an underlying principle in Australian acquisition law.


18. Commonwealth v. N.S.W., ibid.

19. Although the base date of calculating the compensation is sometimes 'frozen'. See, for instance, the Growth Centres (Land Acquisition) Act, 1974.


22. [1970] 1 All E.R. 734, but Lord Reid expressly found there was no abuse of power in the local authority pursuing the course it did.

23. A.-G. v. De Keyers Royal Hotel [1920] A.C. 508. (At the time this case was litigated, it was generally believed that compensation was not payable under the prerogative power).


ACQUISITION FOR LOCAL GOVERNMENT PURPOSES

The Scope of the Acquisition Power

A council, being a statutory body, has its powers limited and circumscribed by statute. The most significant limitation on its compulsory acquisition power is that land may be acquired only for purposes authorised by the Local Government Act. Whether particular purposes are to be characterised as 'local government purposes' must, therefore, be determined by examining the powers conferred on local authorities under the Act. Some of these powers carry with them, in their terms, the power to acquire land. In other cases, the question becomes one of statutory construction: it is necessary to consider the nature of the power and the circumstances of the case. To this end, two principles of construction are of particular relevance. Firstly, what the statute does not expressly or impliedly authorise is taken to be prohibited. Secondly, the general intention of the legislature is taken to be the extension of and not the restriction of the powers of local government.

The decision in Murrurundi Electric Supply Co. Pty. Ltd. v. Murrurundi Shire Council illustrates the greater importance which Roper C.J. in Equity attached to the second principle of construction, when he rejected a contention that resumption for the purposes of council offices and a council works depot was not authorised under the Act. His Honour said:
'The expression "any purpose of this Act" as used in the section is somewhat elliptical. Its expanded meaning in my opinion is - in order to use that land to effect any purpose which by the provisions of the Act the council is required or empowered to effect ...

'There are no sections of the Act which expressly in terms or like terms require or empower the council to provide itself with offices ... or a Council Works Depot ... If, however, by necessary implication the council is required or empowered to do something, the same consequences must ... follow as if it had been so required or empowered in express terms ...

'It is ... a purpose of the Act that the council must provide itself with offices for the transaction of its business, and it is a purpose of the Act that the Council may provide itself with a Council Works Depot, and these purposes emerge just as emphatically and with the same consequences as if the Act had expressly provided that the Council must provide itself with offices for the transaction of its business and may provide itself with a Council's Work Depot. The resumption therefore, in my opinion, is perfectly valid'.

A council nevertheless must select an appropriate power upon which to validate its stated purpose. In <cite>Howarth v. McMahon</cite> the council was held to have misinterpreted the power conferred by section 358(1) of the Act, which provided that a council may provide, control, and manage or subsidise associations, institutes, and clubs
for returned sailors and soldiers. The High Court considered
that the power was designed to enable a council to provide and
maintain under its authority things considered to be for the
general advantage, and the power could be used only for a composite
and continuous activity on the part of the council. A purported
resumption in reliance on the section accordingly was invalid where
the council intended to sell the acquired land to trustees of a
sub-branch of the Returned Sailors, Soldiers and Airmen's Imperial
League. (37)

Even where an appropriate power does exist in the Act, the
purpose must be accurately stated in order to be consonant with the
particular power relied upon by the council. In Collins v. Willoughby
Municipal Council (No. 1) (38) land was acquired for the purpose of
providing a new town hall and administrative offices, but it was
decided later to locate these offices elsewhere. The council decided
to realise the land it had acquired, with the addition of a further
piece of land, which the council did not own, as one parcel to be
developed in accordance with the council's views as to town planning
and development. The additional piece of land was the subject of a
council resolution that it should be acquired compulsorily 'for purposes
of providing offstreet parking', and the solicitors advising the
council were of the opinion that the appropriate section to confer
power for resumption in these circumstances was section 249 (cc).
The court, however, took the view that a valid resumption could not
be effected under that section, since the council proposal was not
for accommodation of motor vehicles but part of a plan for redevelopment.

This finding did not necessarily mean that a valid acquisition
could never be achieved, since Hardie J. (as he then was) stressed
that his judgment that the council acted *ultra vires* should not be taken as any indication, one way or the other, as to whether the council could have resumed the land validly under another section (section 321). In fact, a further attempt to acquire the land, relying on that section, was successful."(39) On this occasion, the council stated that the land was to be acquired for the purpose of leasing it, the lessee being required to erect a multi-storey commercial building containing free public car-parking accommodation, and Else-Mitchell J. found no objection to the validity of the resumption.

Surprisingly, this nexus between the acquisition power and specific purposes of the Act has only been well-established since the early 1950s, when it was urged that, since land may be acquired for any purpose under the Act(40) and since the Act contains a miscellaneous power of 'acquisition' under section 477, acquisition itself was a purpose and the acquisition power was, therefore, a power 'independent of purpose'. A similar argument was advanced in respect to the then section 322.(41)

These arguments were based in the history of sections 477 and 322. Prior to 1905, the local governing authorities in New South Wales had no power to resume land. By section 15 of the *Local Government (Shires) Act, 1905*, a power of compulsory acquisition was conferred upon shire councils. This power was exercised through the Governor under section 16 of that Act. *The Local Government Extension Act, 1906* extended those provisions to municipalities. *The Local Government Act, 1906* consolidated the earlier Acts and made provision for acquisition in sections 129 and 130, which were
substantially identical with sections 15 and 16 of the 1905 Act. These sections took the form of a power to resume for a purpose and provided for the machinery of resumption. The Local Government Act, 1919 substantially reproduced sections 129 and 130 of the 1906 Act in sections 532 and 536.

The power conferred by section 477, having no previous history in local government statutes, was thus new and additional. Also, although section 322 was comparable to section 22 of the Sydney Corporation Amendment Act, 1905, which did have a confined operation, it was submitted that there was an important change in wording. The High Court was invited to conclude from the apparent novelty of sections 477 and 322 that the power of acquisition by local authorities was unrelated to any particular purpose. Such a conclusion, it was submitted, would not leave the power without safeguards: the Governor-in-Council must approve; the council must provide the funds; the courts are able to set aside any exercise which is a fraud on the power or which is not in the interests of the area, or not for a genuine local government object.

By joint judgment, the High Court rejected these arguments: 'It is true that section 477 is not referred to in the judgment of this Court in Thompson v. Randwick Municipal Council. But it was certainly not overlooked when the Court was considering its opinion. In the more recent case of Howarth v. McMahon the meaning of the section was carefully considered by this Court and the opinion was there expressed that "the vagueness of the expressions employed in this provision affords no warrant for giving
it a more generous scope than section 532. On the contrary it suggests that it is an incidental power depending upon specific powers the exercise of which calls for the acquisition of land. No machinery is supplied outside Part XXV for acquiring land when section 477 is invoked).

'... we do not think that ... history throws any real light on the meaning of these sections in the structure of the present Act. Section 477 appears to have been imported from South Africa and had no previous history in Australia. Section 322 appears to be derived from section 22 of the Sydney Corporation Amendment Act 1905 ... (T)he words "as elsewhere in this Act provided" and the word "thereupon" in section 322 appear to us to confine the operation of the section, like section 22 of the Sydney Corporation Amendment Act, to doing of things upon land purchased or resumed for some purpose elsewhere provided in the Local Government Act. We see no reason whatever for reconsidering the meaning placed upon this section in Thompson v. Randwick Council, where it was said: "In our opinion this section does not confer a power to purchase or resume independently of purpose nor does it enumerate purposes for which purchases or resumptions may be made. Its operation is to confer powers which may be exercised with respect to land when purchased or resumed for a purpose authorised elsewhere in the Act".\(42\)

'The submission that the facts that such a body must obtain the approval of the Governor-in-Council and provide the
necessary funds before it can resume land indicates that these are the safeguards intended by the Act against the resumption of land for an unlawful purpose cannot be accepted. The submission is quite inconsistent with the decision of the Privy Council in *Municipal Council of Sydney v. Campbell* ([1925] A.C. 338) as this Court pointed out in *Criterion Theatres Ltd. v. Sydney Municipal Council* ((1925) 35 C.L.R. 555). It is clearly a judicial function to determine what is a purpose within the meaning of section 532 of the Act'.

While it was, therefore, settled that the acquisition power was a 'purpose power', the position has been subsequently qualified in one respect by the legislature. The cases which raised the doubt had done so in the context of the question whether land could be acquired for 'recoupment' purposes, namely whether there was authorisation to acquire additional land for the purpose of meeting the cost of carrying out works on the acquired land. The narrower argument was based in the meaning of section 535 which was in these terms: 'Where the council proposes to acquire land for any purpose it may also acquire other land adjoining or in the vicinity', but in line with its general reasoning the High Court adhered to the following construction of that section:

'It's operation is to confer powers which may be exercised with respect to land when purchased or resumed for a purpose authorised elsewhere in the Act. Section 535 authorises a council, where it proposes to acquire land for any purpose, also to acquire other land adjoining or in the vicinity.
The language of section 535 is in terms very wide. But the section can only operate where the council proposes to acquire land for any purpose. It is therefore not an independent but an incidental power and this indicates that some limits must be placed on its meaning. It does no more, we think, than confer a power to acquire land adjoining or in the vicinity of land authorised to be acquired by section 532 whenever the acquisition of such adjoining or proximate land is reasonably incidental to the carrying out of the purpose for which the land is authorised to be acquired under that section'.

The case prompted a statutory response in the form of section 532(2) and (3), and in Baiada v. Baulkham Hills Shire Council, Roper C.J. in Equity considered that the new provisions substantially altered the law previously applied by the High Court. He was of the particular opinion that a council has, under the provisions of section 532(2) and (3), power to acquire land by resumption 'to some extent independently of purpose'. Likewise, when a provision of similar purport was considered by the High Court in C.C. Auto Port Pty. Ltd. v. Minister for Works, the authority of a Western Australian council to acquire land only for authorised purposes was held to be extended by the section which gave an additional power of acquisition not dependent upon authorised purposes. The extent to which such an acquisition could be said to be not strictly required for a local government purpose is limited, however, by:

'... an implication that a logical connection of some sort must exist between the object the council has in view in acquiring the additional land and the public purpose of the acquisition initially determined upon'.
Relationship of the Acquisition Power to Other Local Government Powers

This acquisition power, being a purpose power, therefore has its scope determined by other local government powers. It has little bearing, however, on the scope of these other powers, except as a 'positive planning' device. Its potential in this regard was considered in Shaw v. The Minister, where it was contended that prescription of a planning scheme under Part XIA of the Act would be a more appropriate method of ensuring that land was devoted ultimately to recreational purposes than would immediate resumption of the land. The land in question was designated for a National Park, but not immediately required for that purpose.

The contention was dealt with in this way:

'This argument overlooks the fact that accepted categories of planning control, such as rural and green belt zoning, cannot ensure that land is kept in a primitive state and not developed at all; and if the lands are reserved for open space ... this would not prevent the appreciation in value of the land and would leave to the owner the option of determining when and whether it is to be resumed for public purposes ... Moreover, it is probable that if the use of the land were restricted by a prescribed scheme the owner would have some claim for compensation under s. 342AC of the Local Government Act and there would inevitably be pressures for the rezoning of the land or for the suspension of the planning scheme under s. 342Y with a view to the land being developed in some limited fashion'.
This significance of the resumption power as a planning tool may reach into the operation of powers which have a relationship with planning. However, there must be some statutory base for that relationship. The possibility, and even the probability, of the resumption power being exercised is, for instance, a matter extraneous to those which a council is entitled to take into account in building and subdivision applications. The Act does not make resumption per se a relevant consideration. Thus it has been held that a council is not entitled to refuse approval for a subdivision on the ground only that it proposed to resume portion of the subject land, and it is irrelevant that, if resumption took place prior to subdivision, compensation might be saved. A similar result has been reached in relation to refusal of building applications.

It makes no difference that the resumption proposals have reached an advanced stage. In Re Gibson & Hurstville Municipal Council, the land in question had been zoned under the council's draft planning scheme as a parking area and the council had taken action to seek the approval of the Governor to resume the land for a parking area. The Cumberland, Newcastle and Wollongong Board of Appeal came to the conclusion that, while it was logical for the council to disapprove of a building application in view of the action initiated towards acquiring the site, this was not in itself sufficient justification for rejection of the application.

By contrast, since a planning scheme itself is a relevant consideration in a subdivision application, a proposed resumption of the kind referred to in the Gibson Case, may be relevant also, provided the proposal is dependent upon a planning scheme. In
Re R. Fretus Pty. Ltd. & Greater Wollongong City Council, the council had initiated action to resume part of the land in a proposed subdivision and, while resumption action had been halted pending the outcome of the appeal against council refusal to approve the subdivision, there was no doubt that the resumption would proceed after the appeal. The Board of Subdivision Appeals agreed that the council was entitled to regard the resumption proposals as part of draft planning scheme proposals. The Board was satisfied that the Illawarra Planning Scheme had reached an advanced stage and the council, therefore, was justified in taking its resumption proposals into consideration when dealing with the subdivision application.

This synergistic effect of the relationship between the acquisition power and planning has been accorded similar significance in respect to the council power over development applications. In Manchil Pty. Ltd. v. Willoughby Municipal Council, the council refused development consent in reliance on a draft control plan which designated the land, subject of the application, for public parking. The Local Government Appeals Board upheld the appeal on the basis that the plan had not been adopted formally by resolution of the council and that the plan went beyond what could be regarded as a detailed plan or design within the framework of the relevant planning ordinance. The Board also had reservations about the practicality of the council proposal and its implementation. Nevertheless, the Board decided to withhold its decision for three months to allow the council to initiate acquisition of the site. Nothing materialised within that time, however, and the development application was approved for the foregoing reasons.
Since changing concepts of what constitutes good planning are blurring the historical divisions between subdivision, building and development control, it is a logical development to allow councils to take a proposed exercise of their acquisition power, at least in furtherance of planning goals, into account when determining any land use application.

Alternative Modes of Acquisition

Land may be acquired for local government purposes without resort to Part XXV of the Act, but the alternative modes of acquisition have confined areas of operation. While some element of compulsion usually is present, the compulsion may be applied in an indirect fashion, by someone other than the council, or under a statute other than the Local Government Act, and not necessarily within the framework of acquisition law.

For instance, section 262 of the Act enables a council to acquire land for the purpose of road widening by using the realignment method of acquisition. This method is effected under the Public Roads Act, 1902, and vesting of the acquired land in the council may depend simply upon the clearing of the land of buildings and obstructions. The council, however, is not bound by its choice of this method and, at any time, may decide to purchase or resume any or all of the lands affected by the realignment under the provisions of the Local Government Act relating to the purchase or resumption of land.

Other examples occur in sections 374, 602 and 160A of the Act.
Land in respect of works of water supply, sewerage, drainage or electricity may ultimately vest in a council pursuant to section 374 upon extinction of certain liability to the Treasurer. A council may sell land by public auction for overdue rates pursuant to section 602 and may itself bid for and purchase the land (compulsion relating to the forced sale without guaranteeing that the council itself will acquire the land). Under section 160A a council may accept a 'voluntary' transfer of land in full satisfaction of rates due and in arrears in respect of the land.

Also, by means of imposing conditions on a subdivision approval, a council is in a position to by-pass the exercise of its resumption power or ensure availability of funds from a private source for the acquisition of public recreational lands or for the carrying out of road proposals. Acquisition in this way constitutes an exception to the general principle whereby statutes are construed as not enabling private property to be expropriated without compensation. (60)

In a proper case, a council may require some proportion of land to be provided as a public reserve out of the land to be subdivided. (61) In a case where the council is entitled to require that such provision be made it may, instead of imposing that condition, impose a condition for the payment of a reasonable sum for the acquisition or improvement of other land for public recreation. (62) The Act does not provide any relevant test or guide, nor does it indicate in what way or on what principle a council is to arrive at its decision on these matters. The courts, however, have said the decision must be reasonable. (63)

The fact that the council has been considering acquisition of
land for recreation purposes, prior to the subdivision application, will have a bearing on the reasonableness of the conditions imposed. Where the Minister for Local Government had indicated that specified recreation areas, amounting to approximately ten per cent of a development area, should be acquired by the council, the Board of Subdivision Appeals considered that in the light of the council's obligations to obtain such land it would not be unreasonable to seek a cash contribution from the subdivider. (64)

Choice of Methods

In some cases a choice of methods may be available to a council, and it seems that the courts will not entertain challenges to an actual choice based only on arguments about comparative suitability of methods. In C.C. Auto Port Pty, Ltd. v. Minister for Works,(65) it had been argued that even if the resumption could otherwise be said to be justifiable it could not be said to be a valid exercise of power because, in the circumstances, the matter was one which could be more appropriately dealt with, and should have been dealt with, by the exercise of the powers conferred under some other legislation. The argument was rejected by the High Court on the basis that:

'Assuming that a local authority has a qualified power to resume land for specified purposes and that it exercises its power honestly for one or more of those purposes there can be no objection merely on the ground that the resumption might have been effected pursuant to some other power which it is suggested, or thought, might have been more appropriately exercised'. (66)
Even where an actual choice is not apparent, the court will not substitute its own decision for that of the acquiring authority and will only make an assessment of which method has in fact and in law been relied upon. In Reith v. Town & Country Planning Board, two separate powers of compulsory acquisition were available and the actual resolution passed and the notice given by the authority were equivocal as to which power had been exercised. The Full Court of the Supreme Court of Victoria decided:

'The land could be acquired lawfully pursuant to either of two powers, subject only to ministerial approval being given to the exercise of the particular power. Approval had been sought and given for acquisition in one particular way. The Board intended to exercise the power for which approval had been sought and given. In the actual exercise of the power, it made use of equivocal statements which did not point with any certainty (to either) as the source of the power. The board should be regarded as exercising the power which it intended to exercise and which it had been given authority to exercise'.

Taking Temporary Possession

Where acquisition in the nature of temporary possession only is required, a council need not resort to its full acquisition powers.

'... it would be absurd to expect a council to have to follow the cumbersome procedure of acquisition of an interest in land if it is merely temporary access which is required for the
purpose of fulfilling some power granted to it elsewhere in the Act'. (69)

The powers that a council may rely on vary according to the statutory purpose which the temporary possession advances. For instance, when acting under Part XIV of the Act, a council has conferred upon it the powers in sections 80 and 82 of the Public Works Act which enable entry and occupation of land in connection with public works. The combined operation of sections 382 and 383 of that Part with section 80 of the Public Works Act gives an extensive power, considerably wider than mere temporary possession. (70)

In respect to its other powers, including those in Part XXV, a council must rely on the somewhat narrower section 524 which empowers it to make inspections of land and buildings, to take necessary measures in order to ascertain character and condition of land and buildings, and to make surveys for the purposes of the Act. Consequently, it is this section which a council must avail itself of in order to provide itself with lawful entry onto private land for the purposes say of reaching a decision under Part XXV whether the land should be acquired or what portion of it should be acquired. (71)

The advantage of a preliminary entry within statutory power is that the council would be entitled to seek an injunction to restrain the landowner from interfering with surveys and the like. However, even though entry may be lawful, and not a trespass, the landowner nevertheless is able to claim compensation in respect of any damage done in connection with the entry. Also, the manner of the exercise of the power under section 524 is controlled by requiring the council
to do as little damage as possible, and there is always the risk of having the entry itself challenged on the ground that it is *ultra vires*, for example, where the possession is more of a permanent than temporary character.\(^{(72)}\) On the other hand, an entry without statutory power, although amounting to a trespass, would not be a ground for invalidating later acquisition proceedings.\(^{(73)}\)

**Inverse Compulsion**

The general reach and relevance of the local government acquisition power in Part XXV of the Act, as sketched in this chapter, are strict functions of State delegation to local authorities. No general provision is made for compulsion being applied by the landowner against the local authority.\(^{(74)}\) That is, an individual landowner may not take the initiative to set the acquisition process in motion, subject to the limited exception provided by some planning schemes.\(^{(75)}\)

Moreover, there are no Local Government Act provisions which could be relied upon to compel a council to take more land than it has decided upon. By contrast, section 138, Public Works Act provides that where a person is willing and able to sell and convey the whole of 'any house or other building or manufactory', he shall not be required to sell or convey to the constructing authority a part only. Also, where lands (not situated in a town or built upon) are cut through and divided by an authorised work so as to leave, either on both sides or on one side, less than half a statute acre, section 139 of that Act enables the owner of a small parcel to require the constructing authority to purchase it.

Even so, only section 139 confers a complete compulsion right on
the landowner. The effect of section 131, Public Works Act, 1900 (now section 138, Public Works Act, 1912) was considered in Whitfield v. McQuade, where the respondents had given notice, when works were nearly completed, that they objected to selling a portion of the property and called upon the Government to resume the whole. The Government refused and claimed to retain the portion already acquired. The Privy Council affirmed a decree of the Supreme Court that the Government was not entitled to resume the portion without taking the whole, and that if they refused to resume the whole they held the portion in trust for the respondents and must reconvey it to them.

In reliance on this decision, the respondents made a further demand on the Government which again refused to resume the whole, but offered instead to reconvey the portion. In the new round of litigation which followed, it was held by the High Court that the Government was not bound to take the whole property, unless they had done something from which a contract to take the whole could be implied. The Government was prevented from taking a fraction, but it was not compelled to take the integer. Therefore, the Government had an option under the section to take the whole or none, and any right conferred on the landowner only extended to forcing the Government to exercise that option.

Since not even these Public Works Act provisions apply to a council acquisition effected under the Local Government Act, the only means available to a landowner for influencing the acquisition of his land by a council is by reliance on the recent enlargement of the New South Wales Ombudsman's jurisdiction. An alternative to statutory right has emerged, for instance, in relation to problems created by 'forward planning' on the part of the Department of Main
Roads which announces its plans for roads some ten or fifteen years in advance, thereby creating difficulties for owners who want to sell their property and obtain a reasonable price for it. In some cases of real hardship, the Ombudsman has been able to persuade the Department to acquire the property ahead of its schedule. Although the Ombudsman has no enforcement powers, he does have access to Department Heads and departmental files and is in a position to be more persuasive than an ordinary citizen within the administration.
CHAPTER TWO FOOTNOTES


31. See, for instance, ss. 342 0 (a), 365, 235, 238, 261, 262, 492.


34. (1951) 68 W.N. (N.S.W.) 118.

35. Id 120.

36. (1951) 82 C.L.R. 442.

37. Likewise in Burroughs v. Cumberland County Council (1960) 6 L.G.R.A. 87, the power to resume land which the council considered necessary to carry into effect a planning scheme was held to be unavailable for the purposes of reserving built-up land as a park and recreation area, since the council could only declare land which was vacant for parks and gardens.


40. S. 532 (1).


42. Id 446-447.

43. Id 451-452.

44. Thompson v. Randwick Municipal Council (1950) 81 C.L.R. at 103-104.
45. (1952) 87 W.N. (Pt. 1) (N.S.W.) 222.

46. (1965) 113 C.L.R. 365.

47. Id 383.

48. See ss. 532 (2) (c) and 321. See also specific provision in s. 342 O (a) for acquisition as a means of enforcing compliance with a planning scheme.


50. Id 102.

51. Ex parte Bowie; re Sutherland Shire Council (1920) 5 L.G.R. (N.S.W.) 73.


55. Unreported, 1977, before the Local Government Appeals Tribunal.

56. See, for instance, s. 342 G (hl), Local Government Act and the Reports under the name of the Minister for Planning and Environment on a 'New Planning System for New South Wales'.

57. Of course, when a new system of planning is introduced, it is almost certain to abolish the distinction between separate applications for building, subdivision and development matters.

58. S. 262 (4).

59. S. 262 (6).

60. See Lloyd v. Robinson (1962) 107 C.L.R. 142, discussed ante in Chapter 1.

61. S. 333 (1) (g).
62. S.333 (1) (g) and (2).


64. Re Peck & Blacktown Municipal Council (1964) 6 Land Laws Service 269. In respect to a cash contribution towards construction of a road, see s. 331 (2) and the decision in Blacktown Municipal Council v. Portelli (1973) 28 L.G.R.A. 224.


66. Id 375.


68. Id 68-69.


70. Gallen v. Strathfield Municipal Council [1971] 1 N.S.W.L.R. 122, where the N.S.W. Court of Appeal held the council could construct and maintain sewerage and drainage pipes under these sections without first resuming an easement.


73. Invalidity is discussed as a separate topic in Chapter 3.

74. Cf. in the United Kingdom where 'purchase notices' may be used in response to adverse planning decisions and 'blight notices' in response to the threat to marketability of land resulting from adverse planning proposals: see K. Davies, Law of Compulsory Purchase and Compensation, (1975) at Chs. 12-13.

76. (1908) 7 C.L.R. 710.

77. Ombudsman (Amendment) Act, 1976 which amended the 1974 Act by widening the Ombudsman's jurisdiction to cover conduct in relation to matters of administration under the Local Government Act. While he is precluded from investigating conduct subject to right of appeal or review conferred by or under statute he may investigate if he is of the opinion that special circumstances make it unreasonable to expect the right to be or have been exercised.
CHAPTER THREE

JUDICIAL CONTROL OF THE ACQUISITION PROCESS

Judicial control over the process of acquisition by local authorities derives from the general control of the courts over bodies exercising powers, especially statutory powers, and no attempt has been made by the New South Wales legislature to oust the jurisdiction of the courts in this regard. (78) This chapter focuses on the circumstances in which the courts, at the instance of an affected landowner, may be prepared as part of this general jurisdiction to pronounce that a council acquisition is invalid, although other aspects of invalidity falling within the law of administration, particularly as it relates to local authorities, must always be borne in mind. (79) For instance, there may be the possibility of suit by persons other than the landowner. (80) Equally significant are the principles that, if a local authority steps outside the limits of its power, the defect cannot be cured merely by the acquiescence of persons adversely affected, (81) and a local authority cannot be precluded from asserting the invalidity of its acts if another person seeks to rely upon their legality. (82)

No significant difference in the courts' approach emerges from the fact that acquisition may take place either by compulsory means (83) or by voluntary negotiation, (84) since the powers of purchase and resumption are conferred by sections 532 and 477 in identical terms. However, there are some added considerations concerning the exercise of the purchase power. (85) Chief among them is the rule that in voluntary negotiations, the acquiring authority is to be treated as any other contracting party, notwithstanding statutory powers and
obligations, and the contractual position is typified in this statement from *Philegan & Co. Pty. Ltd. v. Blacktown Municipal Council*:

'A council is a statutory corporation having statutory powers and duties to perform and ratepayers are given certain statutory rights including a right to elect members of the council but I do not think that a council has duties towards a ratepayer of the kind which would entitle the court to refuse specific performance on the ground that the council is exercising its statutory powers has made a bad bargain'. *(86)*

**Ultra Vires**

The prevailing concept is that an acquiring authority must act within the limits of its powers, and not abuse its powers, and this is embodied in the doctrine of *ultra vires*. The doctrine encompasses several heads of invalidity which are relevant to a consideration of whether circumstances giving rise to a compulsory acquisition are such that the acquisition will be held invalid: acting for an improper purpose; acting in bad faith; failing to have regard to relevant considerations or being materially influenced by irrelevant considerations; acting with unreasonableness. In addition, principles relating to informality of procedure, natural justice and fairness cut across the doctrine of *ultra vires*.

**Improper Purpose.** Because of the nature of the acquisition power as a 'purpose power', improper purpose is the major reported ground for invalid resumptions. Rather than become involved in what would amount to no more than a listing exercise, it is sufficient to
summarise the position outlined in Chapter Two as follows: if an acquisition is effected for a purpose which is not authorised by the Act, that acquisition will be held invalid on the ground that it was effected for an improper purpose, irrespective of whether the acquiring authority intended to act improperly.\(^{(87)}\)

**Bad Faith.** Bad faith also enjoys a certain notoriety as a ground for invalidating a resumption because of the close association which exists between purposes (end results) and motives (reasons actuating purposes). Thus where land is acquired for composite authorised and unauthorised purposes, the validity of the acquisition centres around the *bona fides* of the acquiring authority.\(^{(88)}\) The courts look to the dominant purpose for which the power was exercised. If this purpose is authorised and the authority *bona fide* exercises its power for this purpose, a subsidiary unauthorised purpose may be regarded as falling within power.\(^{(89)}\)

In *Thompson v. Randwick Municipal Council*,\(^{(90)}\) for instance, the High Court found that the council in attempting to acquire more land than was required was not acting in good faith, since profit-making by sale of additional land was not authorised and was the substantial purpose actuating the council in deciding upon the proposed resumption.\(^{(91)}\)

'... the council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose. It is not necessary that the ulterior purpose should be the sole purpose ... But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to
resume this land if it had not been desired to reduce the
cost of the new road by the profit arising from its re-sale'.\(^{(92)}\)

Even where the purposes disclosed are *intra vires* the acquisition
may be impeached where it is proved that the council 'though professing
to exercise its powers for the statutory purpose, is in fact employing
them in furtherance of some ulterior object'.\(^{(93)}\) Bad faith of this
kind, based solely in the motives underlying a decision to resume, is
notoriously difficult to prove. The difficulty lies in the imprecise
nature of bad faith and in the usual paucity of admissible evidence
which could be used to attribute motives to a corporate decision.\(^{(94)}\)
However, in *Dunlop v. Woollahra Municipal Council*,\(^{(95)}\) Wootten J. was
prepared to minimise the difficulty by having regard to matters lying
behind a council resolution. He held that evidence of what was said
at meetings of the council and of matters which might affect the vote
or reflect the state of mind of individual councillors was admissible.
Also, *prima facie* evidence of bad faith may be provided where the
resumption is effected for a purpose different from the stated purpose.\(^{(96)}\)

Apart from the difficulty in establishing the impropriety of
motives to the satisfaction of a court, complications may arise from
the presumption that the motives of the Crown as acquiring authority
are not to be questioned.\(^{(97)}\) There has been, however, a shift in
attitude in relation to decisions which, in reality, are made other
than by the Crown. Although the court in *Motor Wheel Tyre Co. Ltd.
v. Commissioner for Railways*\(^{(98)}\) doubted whether it should go behind
the fact that the formal requirements for a statutory vesting had
been complied with, the High Court in *Banks v. Transport Regulation*
Board held that approval by the Governor-in-Council of a void decision by the Board was not in effect a decision of the Governor and so did not preclude an examination of the Board's decision. Practice in cases such as these, therefore, is to treat the presumption as irrelevant.

An additional complication in respect to bad faith as a ground of invalidity may enter by virtue of the existence of section 321 of the Act. While an acquisition primarily to promote or advance private interests would afford an example of an acquisition tainted with bad faith, special regard should be paid to section 321. A council is authorised by this section to acquire land for the purpose, inter alia, of undertaking the planning of new roads and subdivisions; the rearrangement of existing roads and replanning or resubdivision; the alteration, remodelling or improvement of land and buildings in such manner as the council thinks fit; and the selling or leasing whole or portion of the land 'as elsewhere provided' in the Act. Where the land is acquired for the purpose of undertaking any of the matters set out in section 321 (1) (a), or doing all or any of the things set out in section 321 (1) (b), the council may do those things on the land acquired. Acquisition for purposes under section 321 (1) is deemed to be acquisition for a purpose of the Act within the meaning of section 532.

The section enables the council to undertake what is known as 'positive planning', namely more efficacious planning than is possible by mere supervision over private development and redevelopment. By bringing land under its ownership, the planning authority is in a better position to secure the treatment of an area as a whole; hold
land together; provide for relocation of population or industry; replace open space; preserve buildings of special architectural or historical interest; make land available to private developers who are prepared to conform to an overall plan; undertake development itself.

Many of these goals of positive planning may be achieved under section 321. Additionally, sections 342 0 (a) and 532 (2) (c) may be relied upon for the purposes of carrying into effect, and giving effect to, the provisions of prescribed planning schemes; section 365 for the preservation of buildings; section 475 P for promoting, encouraging and stimulating the establishment, expansion or development of industries and the acquisition of land for industrial sites or buildings; and section 496 for housing purposes.

Thus, although the council may undertake development itself, often it would be a more economic proposition for the council to pass on the acquired land to private developers. The council may do this under section 321 (1) (b) (viii), by selling or leasing whole or portion of the land 'as elsewhere provided' in the Act. The Act provides (apart from acquisition for re-sale under section 532 for recoupment purposes) for the Part XXIV Ancillary Powers which enable a council to sell or exchange any land belonging to it (section 518) and to lease land (section 519).

The sale and lease powers are not expressed to be for limited purposes. Nevertheless, sale and lease are 'ancillary' powers and could only be validly applied toward legitimate local government objects. Therefore, while a distinction between council and private undertakings loses some of its significance in the light of section 321,
insofar as actual development may be carried out on acquired land either by the council or by a private developer, the distinction remains important when determining the motivation of the council. That purpose must be a genuine town planning purpose in order to validate both the acquisition and subsequent dealing with the land by the council. Provided there is such a purpose, there will be a council undertaking, notwithstanding that private persons execute it for the council.

These propositions about the impact of section 321 are well illustrated in Collins v. Willoughby Municipal Council (No. 2), where the council intended to carry out the improvement and/or embellishment of its area, pursuant to section 321, by leasing acquired land. In the course of judgment, Else-Mitchell J. said:

'No doubt, prior to the 1951 amendments to the Local Government Act, land could not be resumed simply for the purpose of selling it to or vesting it in a third person, and even since those amendments a resumption which is effected with the sole object of giving it or selling it to some person who does not propose to apply it for any local government purpose may also be invalid. But, where a local government purpose is sought to be achieved by a scheme which entails the disposal of the land acquired or some interest therein it may nevertheless still be properly characterised as an 'undertaking' of that purpose by the council'.

Earlier His Honour indicated the potential width of the 'planning purposes' which may bring section 321 into operation:
'The purpose of undertaking improvement and embellishment ... is a broad purpose which, in the context of a Part of the Act dealing with town planning, must be construed as extending to matters beyond those specifically and more narrowly stated in section 321 (a) (i), (ii) and (iii). The word "improvement" in the field of local government can embrace almost every activity which can be effected on or with respect to land; "utilitarian betterments" was the phrase used to describe it in Thompson v. Randwick Municipal Council ...

'It is true that in section 321 the word "improvement" is linked with "embellishment" and is qualified by the words "of the area". But this does not mean that a council must have the purpose of both improving and embellishing the land to be resumed before it can resume it. The disjunctive seems to be clearly implied and the High Court in Thompson v. Randwick Municipal Council so interpreted the phrase ...'. (107)

The section was also given a generous scope in Lynch v. Ku-ring-gai Municipal Council. (108) There it was said that it is not necessary that the council should have an irrevocable or particular plan for effecting its objects, provided that it is expedient to use the land for improvement and embellishment, that the land is suitable for such use and should be so used, and the council's conclusion upon these general considerations is bona fide and without ulterior purpose.

**Irrelevancy and unreasonableness.** Provided that acquisition is for an authorised purpose and without ulterior motive, the question
whether designated land is required for that purpose is one of fact. The judicial attitude which predominates pays high regard to the undesirability of setting narrow limits to the exercise of wide discretionary powers vested in local authorities. Thus land may be said to be required for a purpose even though it is not needed for a long time in the future; it is not necessary that the purpose be formulated in precise detail prior to the decision to resume; nor that the council should have an irrevocable or particular plan for effecting its objects.

Yet it may be possible to identify abuse of discretion in circumstances where irrelevant considerations are taken into account in the decision to acquire or when the decision is manifestly unreasonable. **Ultra vires** conduct based upon these grounds, like bad faith, brings into issue the reasons why it was considered necessary to acquire the land. The invalidity, however, rests upon a failure to measure up to objective standards and will be established only in respect of a truly preposterous decision.

The cases postulate a point beyond which the decision of the acquiring authority is not a true exercise of its discretion, and maintain a somewhat illusory dichotomy between interference on this basis and non-interference simply on the merits of the decision. Accordingly, 'if the proposal of the council is so ill-defined at the present time that the resumption might be effected for purposes which are proper or for purposes which are improper, then the proposal to resume is improper at the present time'. Similarly, if the plaintiff established 'that the land is incapable of being used for the purposes for which the council is threatening to have it resumed
this would probably be sufficient to establish his case. (113)

In deciding against the plaintiff's claim that a compulsory acquisition was unreasonable, the court in *Paddle v. State Electricity Commission of Victoria* (114) explained that the ground would have been established if the plaintiff had shown that no reasonable authority vested with the powers of the Commission, and acting reasonably, could decide to erect an electricity line along the proposed route, since such a decision would not be a true or real exercise of the power granted to the Commission. But the court further indicated that if a reasonable authority vested with those powers, and acting reasonably, could so decide then the decision would be within the powers of the Commission and it would not be the function of the court to decide which route should be selected.

**Jurisdictional Error**

While, historically, *ultra vires* has been used as the basis for judicial review of non-formalised discretionary decisions and jurisdictional error has been relied upon to review exercises of judicial or quasi-judicial power, in recent years there has been a trend away from classifying the functions of the body subject to review and a corresponding tendency to use the doctrines of *ultra vires* and jurisdictional error interchangeably. (115) If these trends were ignored, the doctrine of jurisdictional error, when applied according to a strict classification of function approach, has doubtful application to the acquisition power. (116)

The presence or absence of these trends is of no consequence,
however, in respect to the acquisition power. In that the doctrine predicates that a body is incapable of proceeding to make any decision at all when prerequisite non-procedural matters do not exist at the time the decision is entered into, it highlights particular circumstances which could give rise to an invalid acquisition, regardless of whether the terminology of *vires* or jurisdiction is used. Since the only statutory non-procedural prerequisite to the exercise of the resumption power is that the acquisition must be for a purpose of the Local Government Act, these circumstances would be covered by resort to principles which bear directly on the purpose limitations of the power: the lack of, or insufficiency of, evidence to ground the decision.

Thus in *Burroughs v. Cumberland County Council* (117) the argument and the judgment, that a resumption of built-up land for parks and gardens was invalid, was based in the fact that the land would be acquired for an unauthorised purpose, although the argument could be analysed equally in terms that the council decision was erroneous in law since the council could only declare land which was vacant for parks and gardens. Similarly, the preliminary matter whether a National Fitness Camp is a 'school' was raised in *Cromer Golf Club Ltd. v. Downs* (118) in the context of a failure to comply with a procedural requirement to describe the purpose of the resumption sufficiently to identify it as being for an authorised purpose.

**Informality of Procedure**

A body exercising statutory power is not only limited to the powers conferred by statute, but also must exercise them according
to the prescribed procedure, unless because of their trivial nature
the procedural requirements are treated as directory only. The
courts have formulated criteria for determining whether procedural
rules are to be regarded as directory (in which case non-compliance
is treated as an irregularity not affecting the validity of what
has been done) or as mandatory (in which case non-compliance is
treated as affecting the validity of what has been done).

The principle of construction concerning the distinction
was expressed in **Clayton v. Heffron** viz:

'Lawyers speak of statutory provisions as imperative when
any want of strict compliance with them means that the
resulting act, be it a statute, a contract or what you will,
is null and void. They speak of them as directory when they
mean that although they are legal requirements which it is
unlawful to disregard, yet failure to fulfil them does not
mean that the resulting act is wholly ineffective, is null
and void. It is almost unnecessary to say that the decided
cases illustrating the distinction relate to much humbler
matters than the validity or invalidity of the constitution
of the legislature of a State. But in them all the performance
of a public duty or the fulfilment of a public function by a
body of persons to whom the task is confined is regarded as
something to be contrasted with the acquisition or exercise
of private rights or privileges and the fact that to treat
a deviation in the former case from the conditions or directions
laid down as meaning complete invalidity would work inconvenience
or worse on a section of the public is treated as a powerful
consideration against so doing'.
The distinction between mandatory and directory requirements is not an easy one to draw in practice and calls into consideration the scope and purpose of the particular rule which is alleged to be broken in relation to the general framework of the resumption power. Moreover, a particular rule may permit gradations of compliance. The following case illustrates both these points.

In *Town of St. Peters v. Dangerfield* (120), the council was required by statute when exercising its power of compulsory acquisition to prepare 'such specifications, maps, plans, sections and elevations as may be necessary', expressing *inter alia* the nature and extent of the undertaking. The council prepared specifications and plans expressed to be for 'works in connection with the provision of a major recreation area'. The plans indicated that the diversion of a river would be involved but gave no details about how the land would be developed as a recreation area. It was held that the plans and specifications constituted a compliance with the statute, but if the council intended not only to provide a place of recreation by diverting the river but to construct improvements then it would have been necessary for the plans and specifications to contain particulars of such improvements, since the word 'extent' means something more than dimension.

The legislature, of course, may obviate the need to distinguish between kinds of procedural rules by deeming conduct to be valid notwithstanding non-compliance with procedural requirements. Section 548 (1) of the Act is such a provision, which states that the validity of a notification of the Governor purporting to be made under the Act, and within the Governor's powers, shall not be deemed invalid by reason of any non-compliance with any matter required by the Act as a
preliminary to the making of the notification. This provision, however, has been construed as not having any effect on any mandatory requirements placed on the council itself. It has been held that the publication of a notification of resumption does not have the effect of precluding the plaintiff from challenging the validity of a resumption, nor does it preclude the court from inquiring into the question whether the conditions precedent to the resumption had been performed. (121)

The relevant requirements which may bring the procedural rules into operation are contained in Part XXV and in Ordinance 77. Section 536 E of the Act provides for the making of ordinances for carrying Part XXV into effect and, in particular, for requiring notice of any proposed resumption to be given by the council to the owners of the land proposed to be resumed. Ordinance 77, cl. 3 sets out the form and effect of such a notice, and provides that the council must serve it by certified mail on all owners of the designated land, allowing a period of not less than thirty days in which written objections to the proposal may be lodged with the council. The notice must specify the purpose of the acquisition and the relevant section(s) of the Act. However, in any case where the council satisfies the Minister that it is impractical to comply with these requirements, or that it is in the public interest that the requirements should be waived or varied, the Minister may waive or vary the requirements.

This position contrasts with that applying under the Public Works Act where notice to the owner is not a preliminary formal step in the acquisition process. Sections 42 and 47 of that Act create alternative methods of compulsory acquisition, either by Gazette
notification or by notice to all parties with an interest in the land. Both of these forms of notice constitute a first and final announcement that the land will be taken and do not allow for any negotiation, except on terms of compensation.

When a notice of intention is served, the council must take into consideration all objections lodged with the council by the owners of the land proposed to be resumed, and all other representations addressed to it relating to the proposal, before resolving to make an application for the approval of the Governor to the publication of a notice of resumption. The council must then inform all persons from whom objections have been received of its decision and, if the decision is to proceed with the resumption, that objections may be addressed directly to the Minister. (122)

Once the final decision has been taken, there is no right of appeal. Short of some political initiative, the decision must stand unless it is open to challenge on the grounds that it is invalid. Invalidity for procedural non-compliance at this stage in the acquisition process has not been litigated, but a similar statutory requirement to give notice before the exercise of a power to enter and carry away from land certain material has been held to be mandatory in Victoria. (123)

The nature of the Ordinance 77 requirements, of course, is complicated by reason of the Minister being empowered to waive or vary the requirement to give preliminary notice. Attention obviously has been directed to the position of the landowner by providing what prior information must be given so that he may know what to object to, but the ultimate availability of the safeguard is a matter of
ministerial discretion. Certainly, the requirement that the extent and quality of the consideration given to objections must be indicated in a statement accompanying the application to the Governor indicates that the requirement to take account of objections is more than tokenistic, but the nature of that requirement also continues to hinge upon whether the opportunity to object has been removed under cl. 3.

It should be noted that there is no requirement for general publicity about a proposed resumption. By contrast, in the United Kingdom, general publicity about an acquisition proposal must be achieved by advertisement in the local press in two successive weeks, in addition to separate notices being sent to owners, lessees and occupiers (unless the 'confirming authority' directs instead that similar notices be displayed on some conspicuous object on the land). There is then provision for conducting a public local inquiry and for reporting to the 'confirming authority' who must consider the report and any objections. In Wilson v. Secretary of State for the Environment it was stated that the publicity requirement entitles the public to a 'spreading' of information about a proposed acquisition, and the assumption is implicit that if public notice is required it should be effective and genuine public notice. In this case, persons, who had not seen the notices themselves and might never have done so, were considered entitled to rely on a defect in the description of the land if the defect prevented general talk about the proposal.

As far as service of the notice to persons specified in Ordinance 77 is concerned, alternative modes of service are available which would include affixing a notice upon some conspicuous part of the land or advertising in local press. However, the Ordinance only
specifies 'certified mail' as the mode of service and the council would not be required to do more than that.\(^{(125)}\) The reference in the Ordinance to representations, additional to objections from owners, does not mean that third parties have objection rights.\(^{(126)}\)

Upon deciding to proceed with acquisition, the council must make an application for approval of the Governor to publication by the council of a notice of resumption under section 536 of the Act. The application form is specified by Ordinance 77, cl. 2 and contains information about the purpose of the acquisition; the relevant section(s) of the Act; the reason for the acquisition by resumption; the details of the relevant council resolution; and a statement that provision will be made by the council for payment of compensation and costs in respect of the resumption. The application must be accompanied by copies of a draft notice of acquisition; registered plans; copies of objections and representations; and a statement indicating what consideration has been given by the council to objections and representations.

With the approval of the Governor, the council may then publish a notice of resumption in the Gazette, together with a description of the land, and a notice is also to be published in a newspaper circulating in the area where the land is located.\(^{(127)}\) A plan of the land showing the separate parcels and names of owners must be kept at the office of the council and a copy lodged with the Surveyor General; these plans are open for public inspection.\(^{(128)}\) The council also has to advise any person who, immediately before publication of the notice, was the owner of the land referred to in the notice that the land has been resumed and forward to such a person a claim for compensation.\(^{(129)}\) Upon publication of the Gazette notice, the land
is vested in the council and the former owner is entitled to compensation. (130)

The requirement to obtain the approval of the Governor would be mandatory, by analogy with similar requirements for approval of a superior authority in relation to the exercise of other local government powers. (131) Therefore, although it is difficult to conceive of a resumption notice being published without the approval of the Governor, failure to obtain approval would invalidate the resumption.

In a different context, in Collins v. Willoughby Municipal Council No. 2, (132) Else-Mitchell J. emphasised that no council can exercise a power of compulsory acquisition without the prior approval of the Governor. There it had been argued unsuccessfully that the resumption was an extreme attack on the plaintiff's rights of property and that the power of resumption was 'an extraordinary power exercisable at the whim of a council uncontrollable by any authority'. In earlier litigation between the same parties the requirement of obtaining the Governor's approval had been raised in yet another way. It was alleged that the purported resumption was invalid for non-compliance with the Ordinance in the sense that the application by the council was not in truth approved by the Governor. (133)

Although section 532 of the Act provides that land may be acquired for a purpose under the Act, the Act itself does not require that the purpose be stated in the notice of acquisition. (134) However, Ordinance 77 requires that the purpose of acquisition be stated in the notice of intention to acquire (cl. 3), the application to the
In Howarth v. McMahon it was argued that the statement of purpose in the resumption notice was not mandatory. The High Court responded by saying that it was necessary to state the purpose, since the operation of the machinery provisions for resumption 'depends entirely on the substantive power becoming exercisable and that means, when the power is sought in s. 532, that it is an indispensable condition that the resumption shall be for a purpose of the Act'. The reasoning behind holding this type of requirement to be mandatory later was explained by Dixon C.J. as including the fact that the acquisition power was limited to acquisition for purposes within power, plus the notion that 'the landowner who is compulsorily dispossessed of his land would seem to have a right in point of justice to know precisely for what it was needed'. These reasons made it essential to express the purpose, and it would not be enough to leave it to inference.

The statement of purpose in the notice of intention to acquire and in the application to the Governor is required additionally to include identification of the specific section of the Act which is relied upon by the council. This inclusion, however, does not appear in the model form set out for the notice of acquisition, and by implication from Collins v. Willoughby Municipal Council it is not necessary to name the section in that notice, but query whether the case implies that following the wording of the section in the notice of acquisition is necessary.

In that case, the resumption was attacked inter alia on the basis that there was a fatal disconformity between the notice of
intention and the application for the approval of the Governor on the one hand, and the approval of the Governor and the notification in the Gazette on the other hand. The notice of intention and the application for approval described the proposal as one for the 'provision' of a site for the accommodation of vehicles near a public road as authorised by section 249 (cc), whereas the approval given by the Governor and the notice of resumption referred to the resumption as one for the purpose of 'providing, controlling and managing' a site for the accommodation of vehicles near a public road. The latter followed the language of the section. The point was dismissed because the earlier documents not only referred to the provision of a site but mentioned section 249 (cc) as conferring the authority. This was sufficient to satisfy the court that both descriptions referred in substance to the same thing.

The description of acquired land is required to be shown in the notice of resumption and in a newspaper circulating in the area in which the land is located. Additionally, plans are required to be filed in the office of the council and at the Department of Lands, and these plans are to be open for public inspection. The fact that these requirements of local advertisement and exhibition arise subsequent to, or at the most contemporaneous with, the vesting of the land in the council would indicate that non-compliance would not be fatal to the validity of a resumption.

There is no case directly in point, but some analogy may be drawn with failure to advertise prior to suspension of a planning scheme. This failure has been held not to effect the validity of the suspension. In Attorney-General (ex rel. Goddard) v. North Sydney Municipal Council, while believing the purpose of
advertisement was to inform the public, the court was influenced by the absence of public objection rights prior to suspension action. The same reasoning would apply with greater force to a failure to provide public information after formal acquisition. A person with a special interest would need to establish a case, if any, based on failure to be given notice of intention to acquire.

If requirements of local publicity and exhibition are not mandatory, there could be no contingent requirement that the description of the land in the advertisement and plans be accurate. On the other hand, since the *Gazette* notification is an essential step in procedure, and is the 'instrument' by which the land is vested in the council, general conveyancing practice would indicate that an exact description of the land should appear in that notification. However, a less than exact description may suffice provided it is possible to identify the land with certainty.\(^{(141)}\)

The final requirement to give notice, following on the publication of the *Gazette* notice, to any person who immediately before that publication was the owner of the land\(^{(142)}\) really does no more than afford the previous owner an opportunity to elect whether to accept the valuation made by the council. The requirement arises subsequent to gazettal and non-compliance, therefore, should not have a retrospective effect on validity of an acquisition.

An analogous, but different, requirement under the *Closer Settlement (Amendment) Act, 1907* was treated by the Supreme Court of New South Wales as a condition precedent in *Pye v. Minister for Lands*.\(^{(143)}\) However, both the High Court and the Privy Council rejected this view. The High Court was of the opinion that if the Crown did
not exercise its option to afford the opportunity then the owner had no ground of complaint.\((144)\) The Privy Council was of the opinion that although the opportunity should have been given, the landowner lost the right to it by subsequent conduct on his part.\((145)\) Because of this latter finding, the language used by the Privy Council was not conclusive as to the status of the requirement as directory or mandatory, but the High Court was clearly of the opinion that the requirement was not mandatory.

**Natural Justice**

The doctrine of natural justice also is concerned with procedural requirements. These requirements are implied by the courts and undoubtedly they may be excluded by Parliament.\((146)\) Where Parliament has supplied some statutory procedure, a difficult question, therefore, arises as to the extent that the statutory procedure can be supplemented by natural justice requirements.

Although natural justice is associated traditionally with two rules which set the minimum standards for fair decision-making (\textit{Audi alteram partem} and \textit{Nemo debitis esse judex in propria sua causa}), there is not a satisfactory general test to determine when natural justice is applicable. As Megarry J. once put it:

'It may be that there is no simple test, but that there is a tendency for the Court to apply the principles to all powers of decision unless the circumstances suffice to exclude them'.\((147)\)

Recent decisions have, however, elucidated the approach to be
taken by the courts where some procedures have been laid down by Parliament. Lord Reid described the judicial role as follows:

'For a long time the courts have, without objection from parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation'.\(^{(148)}\)

Also, Barwick C.J. has emphasised that good grounds must exist for judicial interference with the statutory process:

'... it seems to me that the first step is to construe the relevant portions of the Act and to educe therefrom the scheme of inquiry, report and subsequent action which it contemplates. I do not regard it as appropriate in this case first to presume that the requirements of natural justice would be applicable ... because the conclusions ... may adversely affect some person or body and then to search for some displacing or contrary provision or indication in the statute. It is in relation to the carrying out of the whole process prescribed by the statute that the question as to the requirements of natural justice is to be considered'.\(^{(149)}\)

While these cases contain a warning as to the proper limits of the judicial role, they also adopted a line of reasoning which is expansive in relation to the kinds of situation in which a court may intervene. For some time, the prevailing line of reasoning had been
that the rules of natural justice are not applicable at all to an
inquiry where there is no lis to be decided between parties and
where the acts are 'administrative' in nature. The decision in
Ridge v. Baldwin changed the emphasis from a consideration of the
function of the tribunal or authority, as being judicial or quasi-
judicial, to a consideration of whether the applicant or objector
will have his rights affected by the decision. The High Court
later expressed approval of this approach. However, a tendency
to classify functions lingers on, and there has been little attempt
to extend the second rule of natural justice, because of its under-
lying basis, to non-judicial decisions.

The applicability of the natural justice doctrine to the
resumption power thus will depend initially upon characterisation of
the function a council performs when deciding to resume, if the
narrow line of reasoning is pursued. If the wider view is adopted,
natural justice will depend solely upon the construction of the
Local Government Act.

According to a strict analysis of functions, a compulsory
acquisition is not an instance of a judicial or quasi-judicial
function (deciding a dispute between parties), but it does appear
to affect rights of property: it confiscates property rights. There
are no New South Wales decisions, but there is a Queensland decision
to the effect that natural justice does not apply under either view.

In Amstad v. Brisbane City Council (No. 2) the Queensland
court rejected an argument that resumption by the council creates 'a
prejudicial effect upon the rights of individuals with respect to
property and that the formation of the council's opinion 'requires for its efficacy the prior observance of the fundamental principles of natural justice'. To some extent the court applied the classification of function test, by holding that the council was not required to observe principles of natural justice since, in determining that certain lands were required, the council was not acting in a judicial or quasi-judicial manner. However, the court also made it plain that whether the council is obliged to comply with the principles of natural justice 'depends fundamentally upon the legislative intention as expressed in the provisions of the statute'. When those provisions were examined they showed, in the opinion of the court, that the acquisition of land by the council entitled persons with an estate or interest in the land to adequate compensation for any loss flowing from the acquisition. In these circumstances, it was held that the acquisition of property could not be equated to the deprivation of proprietary rights which occurred under the demolition order in Cooper v. Wandsworth Board of Works. (154)

This restrictive reasoning may or may not be adopted by a New South Wales court, but the absence of litigation in this state more likely is attributable to a belief that a court would view the statutory requirements as adequate safeguards. This belief is probably sustainable, even having regard to the fact that judicial views on adequacy differ. (155) The unlikelihood of the courts' implying more than the express requirements may be evaluated from a brief resume of those requirements which correspond with the first rule of natural justice. This rule has been described as a fair opportunity to make any relevant statement and a fair opportunity to correct or controvert any relevant statement which may be prejudicial, (156) and its operation appears to have been excluded by
the presence of the express requirements in respect to preliminary notice and hearing of objections, as provided under Ordinance 77.\(^{(157)}\)

The application of the second rule of natural justice, based in the notion that justice should not only be done but also be seen to be done, is even more unlikely given the non-judicial nature of the decision to resume. However, bias, in fact, may fall within the grounds for attacking a decision as **ultra vires**, such as where improper purpose, irrelevant considerations, unreasonableness or bad faith are established. By using the grounds of **ultra vires** it may, therefore, be possible to challenge an acquisition decision for bias in a different guise. Lack of prior negotiation, which is not a statutory requirement,\(^{(158)}\) may, for instance, be indicative of pre-disposition and assist in providing a ground of challenge as evidence of bad faith. The difficulty, however, is that bad faith requires more than a finding of likelihood of bias.

**Fairness**

Since the decision in **re H. K. (an Infant)**,\(^{(159)}\) a concept of fairness sometimes has been used by judges to denote implied procedural obligations. Even if there is no duty to act judicially, there is a duty to be fair:

"'(I)t is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly'.\(^{(160)}\)"

The concept of fairness overlaps the doctrines of **ultra vires** and natural justice, and it is arguable whether it is a separate
doctrine. It denotes absence of abuse of discretion in non-judicial bodies, and also emphasises that the courts have veered away from a strict analysis of the function of such bodies by implying procedural requirements into their activities. Because of its open-ended nature, attempts to rely on it as a special doctrine naturally have led to some confusion and prompted this typical judicial comment:

'(T)o say that all tribunals, Courts and others alike are, in the exercise of judicial or quasi-judicial powers, affected by the principles of natural justice is one thing. What are the requirements of natural justice in the particular case where a tribunal bears little resemblance to a court of law is quite another'. *(161)*

Nevertheless, fairness was relied upon to bring the second rule of natural justice into operation in respect to non-judicial activity in *Lower Hutt City Council v. Bank*. *(162)* There the council had contracted to lease land to a company and, having agreed to take all necessary steps to close a street, the council arranged, in accordance with its statutory obligation, to hear any objections. Objectors sought prohibition against the council meeting, contending it was no more than a sham, there being a real likelihood that the council would not decide to reverse its prior decision evidenced in the agreement with the company. Prohibition was granted on the basis that the quality of fairness required is such that the council must be prepared to reverse its prior decision after having heard argument, if it was in an impartial frame of mind. The council was not entitled to approach the objectors with a closed mind.
Although the New Zealand court applied the concept of fairness, a more traditional approach could have been taken to arrive at the same result. For instance, it could have proceeded on the well-established doctrine that a local authority cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties. (163) In other cases there may not be an alternative approach available and much will depend upon the willingness of the courts to develop an operational doctrine of fairness.

In Dunlop v. Woollahra Municipal Council, (164) a case in which the development of both natural justice and fairness were examined, Wootten J. resorted back to the functional classification approach as a preliminary to applying the doctrine of fairness. His Honour was at pains to keep somehow intact the doctrine of natural justice for judicial and quasi-judicial functions. He found that the functions traditionally, even if often inappropriately, classified as 'judicial' or 'quasi-judicial' attract the rules of natural justice and other duties arising from an overall duty of fairness. Other administrative functions, not classified as judicial, attract a duty to act fairly (which may include giving notice of intention and an opportunity to be heard).

The case was concerned with powers exercised pursuant to sections 308 and 309 of the Local Government Act, and these powers while used in relation to individual properties were equally used in a general way to effect a form of common rule over a large number of properties. It was held that the exercise of these powers did not attract the principles of natural justice, since those principles should be preserved as applicable to the traditional class of
function to which they are appropriate. The powers, even so, had to be fairly exercised, that is treated as subject to an implied condition of what is fair in the circumstances. In the particular circumstances, what was regarded as being fair seemed to accord with the requirements of the first rule of natural justice.

Whether or not fairness should be kept notionally separate from natural justice in this way is quite arguable. In *Wiseman v. Borneman*, (165) it was accepted that procedures must be fair in all the circumstances and this principle should not degenerate into rigid rules. The underlying basis of the rules of natural justice often has been stated as a common law obligation to act fairly, and drawing a distinction between merely the names of the doctrines to be applied, depending upon the kind of function which is performed, in reality is to draw no distinction at all. The criteria which are taken into account in determining what powers require procedural safeguards to be implied, such as the terms of the statute conferring the power and the nature of the right affected, are effectively the same whatever the functional characterisation of the power.

Moreover, the basic tension which exists between protecting the subject from arbitrary or unlawful invasions of rights and allowing the affairs of government to proceed without judicial intermeddling is not made any easier by drawing the distinction. The tension has no easy solution and does not lend itself, by its very nature, to rigid analysis. Obviously the actual requirements of fairness that may need to be implied into the exercise of a judicial power may vary from those implied into the exercise of non-judicial power, but what is fair in relation to both types of power rests in the end result on the judicial attitude which the particular circumstances evoke.
Therefore, the chief significance in emphasising fairness for compulsory acquisition is that it represents a greater recognition of the general availability of judicial review for non-judicial functions. This emphasis, however, does not alter the nature of the inquiry which the courts enter into when deciding whether to imply procedural requirements into the acquisition process. (166)

**General Equitable Jurisdiction**

In *Simpsons Motor Sales (London) Ltd. v. Hendon Corporation* (167) it was suggested that the court, in its equitable jurisdiction, might in certain circumstances interfere with the enforcement by an acquiring authority of its legal rights. It was thought that an equitable right in the landowner might be found to exist, based upon the view that to permit the acquiring authority to continue to enforce its rights would in some real sense be against good conscience. Lord Evershed explained that to achieve such a result:

'... it would be necessary to show one or both of the following: that there had been on the part of the corporation something in the nature of bad faith, some disconduct, some abuse of their powers: that there had been on the part of Simpsons some alteration of their position ...

(168)

If the reasoning had not been couched in terms of estoppel and if an equitable right had not been treated as a ground distinct from *ultra vires*, what was said in that case would appear to add nothing to the established avenues of judicial review based in *ultra vires* conduct, procedural omissions and natural justice requirements. However, it is quite likely that the court was using
the terminology of *vires* in the sense of excess of power and was using the equitable right to cover instances of abuse of power. Certainly the matters enumerated as giving rise to the equitable right could give rise to review for *ultra vires* conduct in the wider sense of an abuse of power. The added notion of estoppel, however, could have no application when challenging the legal effectiveness of a compulsory acquisition by a local authority in New South Wales. (169)

**Summary of Invalidity Rules**

The overall picture of judicial control of the acquisition process, therefore, is this. Control is exercised by the courts over the administrative decision to acquire land, but the circumstances in which the control is plainly exercised are those which give rise to acquisition for an improper purpose. Since quite a number of procedural requirements have been written expressly into the system, the potential scope for control under the principles of natural justice or fairness is circumscribed. Because compensation has been provided and because the acquisition power is subject to superior approval and supervision within the administration, even where there are no express requirements in relation to the giving of prior notice and so forth, the judges may not be prepared to substitute their individual views for those of the legislators. In terms of the strict reasoning which emerged from *Amstad's Case*, the element of prejudice upon which natural justice is based may have been removed.

It is obviously difficult for the courts to assess what is their proper province when acting as a check on administration, and
there are many conflicting decisions to be found. But what is increasingly accepted is that judicial review, in present form, is not intended to 'secure general correctness' in administration and that it cannot do so where motivating reasons and policies are not available for scrutiny. (171)

**Remedies**

Some special considerations apply to the remedies available consequent upon an invalid resumption. Clearly, prior to formal acquisition, the landowner may restrain a council from carrying out a proposed resumption where the decision to acquire is proved to be invalid. (172) Even so, as a result of the decision in *Pye v. Hawkins*, (173) the owner may have precluded himself from questioning the validity of an acquisition. In that case, the plaintiff sought a declaration that a resumption was invalid and was held to be estopped from maintaining the suit. The estoppel was said to arise out of the lodgment of an appeal on the assessment of value of the acquired land, since a necessary foundation to jurisdiction to hear such an appeal is assertion of a valid resumption. A 'without prejudice' letter which had been written to the Minister in relation to earlier proceedings (disposed of in the Privy Council) was held to be no longer operative.

The court said:

'The defendants submit that he (the plaintiff) cannot now be allowed to assert that the resumption was invalid. It is not said that the validity of the resumption has become res judicata ... They rely upon an estoppel by representation arising from the facts that the plaintiff in appealing to the
Land and Valuation Court asserted the validity of the resumption and that the Minister of Lands was thereby led into resisting that appeal and into contesting the subsequent litigation arising out of it on the assumption induced by the plaintiff’s prosecution of the appeal that the validity of the resumption would not be challenged.

"The principle on which the defendants rely has been considered in many cases (see, for example, Bennett v. Murray (1940) 64 C.L.R. 382 at 404-405) and cases there cited and Banque des Marchands de Moscou v. Kindersley [1951] Ch. 112 at 119-120)). "A party who adopts an assumption as to a state of affairs for the purpose of exercising rights cannot afterwards disturb the assumption for the purpose of claiming inconsistent rights against others who have acted on the same common basis" (Bennett v. Murray ibid). But the other elements of an estoppel must be present in order to invoke this principle, and in particular it must be shown that the one party obtained an advantage from adopting the assumption and the other party suffered a detriment from acting on the same basis". (174)

After formal acquisition has taken place, it is the nature of the remedy available to a landowner which is complicated. Even assuming that he has not brought himself within this wide application of the doctrine of estoppel, he may find that the council has acquired an indefeasible title to the improperly acquired land by registration pursuant to the Real Property Act, 1900. Initially, it was thought that the Real Property Act did not give the acquiring authority an indefeasible title as against the previous owner or preclude the court from investigating the validity of a resumption. (175) However, in
the High Court endorsed the principle enunciated by the Privy Council in Frazer v. Walker that registration of a void instrument (void for any reason) is, in the absence of fraud, effective to vest and divest title and to protect the registered proprietor against adverse claims.

The Privy Council itself had endorsed an earlier decision in Boyd v. Mayor Etc. of Wellington that the indefeasibility of the title of registered proprietors derived from void instruments generally. In that case the Wellington Corporation was held to have acquired a valid title pursuant to registration of a proclamation which was void, because it was ultra vires the Corporation.

The landowner's position is only slightly retrieved by the fact that the Registrar General is given power to withhold registration of a resumption application pending notification to the person affected, thereby giving such person an opportunity of contesting the validity of the resumption before registration. But once an acquisition is notified in the register, an indefeasible title exists against the previous owner, and no action lies for recovery of damages sustained by reason of the Registrar General exercising his powers in respect of an invalid resumption.

Return of the land, therefore, would necessitate having both the acquisition and title registration set aside, but the appropriate remedy in such a case has yet to be worked out in litigation. In Cromer Golf Club Ltd. v. Downs the plaintiff sought a declaration that the Registrar General (the second defendant) be directed to cancel a Certificate of Title issued to the acquiring authority. Also, an order was sought against the acquiring authority (the Minister for
Public Works) for conveyance of the land to the plaintiff, on the ground that the invalidity of the resumption raised an equity against the Minister which was enforceable against him notwithstanding his registered proprietorship of the land. Submissions on these applications were not answered since the resumption was held to be valid.

The possibility of claiming damages in such a situation likewise has not been litigated in New South Wales. Obviously, if compensation had not been paid, the landowner may choose to treat the acquisition as valid and take the statutory compensation. However, he may not be able to insist on payment of compensation in light of the rule that estoppel does not apply to preclude a council from asserting the invalidity of its own acts. Conveyance back may be difficult also if the land had been disposed of to a third party who had become the registered proprietor. In any event, the landowner may not be interested in that form of remedy, say where works on the land have rendered it of no use to the landowner.

Damages as a remedy would need to be based in tort, and there are two possible tort actions which (unlike trespass) do not presuppose a continuing claim to the land. One possibility is to be found in the High Court judgment in Beaudesert Shire Council v. Smith & Ors. There the authorities cited in judgment were said to justify a proposition that 'by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other'. In this case, the unlawful act was constituted by the council acting without authority, but particular details of the action have not been canvassed in subsequent litigation.
The other possibility derives from the tort of misfeasance in public office. In *Smith v. East Elloe Rural District Council*\(^{(185)}\), land belonging to the appellant had been made the subject of a compulsory purchase order. She brought court action more than six weeks after notice of confirmation of the order had been published, that is after the date on which an application concerning the validity of the order was permitted to be made to the English High Court. The action was brought against the local authority which had obtained the order, the clerk to the local authority and the Government Department which had confirmed the order. Damages were claimed as well as an injunction against further trespass to the land of the appellant. The house on the land had been already demolished, and the claim was founded in bad faith on the part of the acquiring authority, although the nature of the bad faith was not known in the proceedings in the House of Lords.\(^{(186)}\)

It was held that the action might proceed against the clerk in relation to the claim for damages. The claim fell within the tort action for misfeasance in public office, namely that if a public officer does an act which, to his knowledge, amounts to an abuse of office and he thereby causes damage to another person an action lies against him at the suit of that person.\(^{(187)}\) However, it was held further that the action against the council and the Government Department could not proceed by reason of the specific statutory prohibition against questioning the validity of the compulsory purchase order. The court took the view that the jurisdiction of the court had been ousted by the statute. Even though that view no longer holds sway\(^{(188)}\) it was sufficient then to prevent the court from determining the matter further.
There are no other cases directly in point, although actions founded on the tort have been litigated in Australia. In the Victorian case of Farrington v. Thomas & Bridgland, the tort was available where the defendants had given an order to close down the hotel of the plaintiff and, in doing so, had purported to exercise power which they knew they did not possess. In that case, it was held that it was not necessary to show that the officers had acted 'maliciously', only that they had acted with knowledge that what they did was an abuse of office. It was thought that in some cases even this knowledge may be unnecessary, provided there was proof of damage. The court found the tort proven.

The court in the Farrington Case referred to Wood v. Blair & Helmsley Rural District Council as support for holding that the giving of the order amounted to an abuse of office, and for holding that the damage resulting from the plaintiff's own act in obeying the invalid order should be regarded as damage caused by the act of giving the order. In this case, the plaintiff was a dairy farmer who sued the council and its medical officer of health for conspiring to destroy his business by serving certain notices upon him. The notices were found to be invalid, but the claim was dismissed on the ground that the plaintiff had not shown that he had suffered any damage over and above the sum he had received under the invalid arbitration award which followed on from the invalid notices. No argument, however, was raised to suggest that the plaintiff in accepting the statutory compensation was estopped thereby from maintaining the action for damages.

Agreements not to Acquire Compulsorily

One further aspect of judicial control arises in the context
of agreements made prior to initiation of the acquisition process under which the acquiring authority purports to bind itself not to acquire certain land by compulsory process. The issue simply is whether the council is able to so bind itself. (192)

In Birkdale District Supply Co. Ltd. v. Southport Corporation (193) the question was raised whether an agreement by which the Birkdale Council had transferred an electricity undertaking to an electricity supply company was void at common law as being incompatible with due discharge of statutory duties. The answer given was that it was not void in this case because the contract was really a contract by a local authority to exercise the power given to it in a particular area, and in a particular way, rather than a contract to transfer its powers to another authority or person. However, in the course of judgment it was said:

'The appellants have relied strongly on a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties'. (194)

The principle referred to had been established in Ayr Harbour Trustees v. Oswald, (195) where a covenant not to construct works on acquired land was held to be void because it purported to bind the trustees and their successors not to use powers conferred for the public good. The principle also was arrived at, independently of
reference to the *Ayr* decision, in *Watson's Bay & South Shore Ferry Co. Ltd. v. Whitfield.* (196) Land had been resumed by the Crown and dedicated as a public park. Some years later the Minister for Lands gave notice to revoke the dedication, and also purported to enter an agreement with Whitfield promising to offer the land for sale by public auction after the dedication was revoked. The amount of money thereby raised was to be accepted by Whitfield in full satisfaction of a claim for compensation in respect of the resumed land.

The High Court found the agreement to be invalid for a number of reasons including that the bargain was an attempt to fetter in advance the discretion and public duty of the Minister. The court said:

>'The very ground of the claim is that the Minister was bound by the contract to exercise his statutory power, not as the expediency of doing so presented itself to him at the moment of exercise, but as predetermined by the contract ... The contract was not the completed exercise of discretion... but it was an anticipatory fetter on the future exercise of discretion and public action'. (197)

The above principle, therefore, would operate to prevent a local authority from making a binding agreement not to acquire land compulsorily, as such an agreement would be incompatible with its due exercise of powers under the Local Government Act. On the other hand, an acquiring authority would be competent to give an undertaking which is not inconsistent with the exercise of its statutory powers, and such an undertaking may be relevant in the assessment of compensation for the acquisition. (198)
Not only is a council unable to bargain away, or otherwise undertake not to exercise, powers vested in it for public purposes, but it follows also that it cannot be estopped from exercising its powers where non-contractual assurances are given by its officials and these assurances are acted upon to the detriment of an individual, say where substantial development of land proceeds on the understanding that the land is not likely to be resumed. That principle is clearly stated in N.S.W. Trotting Club Ltd. v. Glebe Municipal Council (199) where it was contended inter alia that the council was estopped from withdrawing its consent to occupation of a road and it was held that the council could not be prevented by any principle of estoppel from exercising any statutory discretion which it might possess. (200)
CHAPTER THREE FOOTNOTES


79. The law relating to the remedies provided by judicial review will not be examined, although the availability of some specific remedies will be discussed infra. Generally see H. Whitmore and M. Aronson, Review of Administrative Action, (1978) at Part 3.

80. In Attorney-General v. De Winton [1906] 2 Ch. 106, the local authority was considered to be liable at the suit of any ratepayer on the footing of breach of trust in respect to the misapplication of the authority's funds. The notion of a local authority owing a fiduciary duty to its ratepayers was expressed also in Roberts v. Hopewood [1925] A.C. 578. In addition, see s. 213 of the Act re the power of an inspector of local government accounts to surcharge a member or servant of a council. Cf. Collins v. Lower Hutt City Corporation [1961] N.Z.L.R. 250.


83. General acquisition of land is provided for in ss.532 and 477. Specific acquisitions are provided for further in ss. 235, 238, 261, 262, 321, 342 0 (a), 384, 417, 417 A, 418, 492, 524, 536 AA.

84. Generally in both ss. 532 and 477.

85. Also, as a practical matter, the Department of Local Government insists that councils should pursue all avenues of negotiation before seeking approval for a proposed resumption.


87. Howarth v. McMahon (1951) 82 C.L.R. 442; Burroughs v. Cumberland County Council (1960) 6 L.G.R.A. 87; and Chapter Two generally.
88. Cf. if land is acquired for composite authorised purposes, the courts will not interfere with the discretion of the local authority as to what quantum of land is to be used for each purpose (Attorney-General v. Sunderland Corporation [1929] 2 Ch. 436).

89. '... whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires': Attorney-General v. Great Eastern Railway Co. [1880] 5 App. Cas. at 478.

90. (1950) 81 C.L.R. 87.

91. S.532 (3) had not been enacted.

92. Id 106.


95. [1975] 2 N.S.W.L.R. 446.


98. (1950) 50 S.R. (N.S.W.) 205.


100. Thompson v. Randwick Municipal Council (1950) 81 C.L.R. 87; Howarth v. McMahon (1951) 82 C.L.R. 442; C.C. Auto Port Pty. Ltd. v. Minister for Works (1965) 113 C.L.R. 365, where in each case the High Court did not exhibit any reluctance to hear arguments on bad faith.

101. 'The authority are entrusted with statutory powers, to be used bona fide for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the rate-payers by straining their powers in the interest of persons who desire to acquire (land)' (J. L. Denman & Co. Ltd. v.)

102. S. 321 (2).

103. S. 321 (3).

104. See judicial comments to this effect in Sourris v. Pine Rivers Shire Council (1971) 23 L.G.R.A. 381.


106. Id 221. Later, His Honour said: 'Although this (lease) is accompanied by the grant of an estate in the land to the lessee, that grant is only a demise for a term and is defeasible on breach of the covenants and conditions of the lease'. The term of the lease was for ninety-nine years, but whether His Honour was implying that effective control could only be maintained through a lease, and not through an outright sale to the private developer, is not clear. In Baiada v. Baulkham Hills Shire Council (1952) 87 W.N. (Pt. 1) (N.S.W.) 222, Roper C.J. in Equity seems to have accepted that an acquisition for re-sale was within power.

107. Id 220.


111. Lynch v. Ku-ring-gai Municipal Council supra at 150; Dorn v. Minister for Public Works (1924) 42 W.N. (N.S.W.) 8; cf. Woolworths Properties Pty. Ltd. v. Ku-ring-gai Municipal Council (1964) 81 W.N. (Pt. 1) (N.S.W.) 262 where doubt was expressed about the applicability of these concepts when seeking to limit a local authority's power in relation to a development application, but note that the council decision was challenged under a statutory right of appeal, not as a matter of judicial review, and it was open to the court to delete an unreasonable condition attached to the development consent.


114. [1968] V.R. 425. See also Marquess of Clanricarde v. Congested District Board of Ireland (1915) 79 J.P. at 482. For an illustration of the wide range of considerations which could be taken into account in a decision to acquire land, see Johnson & Co. (Builders) Ltd. v. Minister of Health [1947] 2 All E.R. 395; cf. where a decision is arrived at without any supporting evidence, as was established in Coleen Properties Ltd. v. Minister of Housing & Local Government [1971] 1 W.L.R. 433.


122. Ordinance 77, cl. 5.

123. O'Brien v. Shire of Rosedale [1969] V.R. 645. Query whether such a requirement would be implied under the first rule of natural justice, as to which see infra.


125. Provided the service to the persons specified is effective, See, for instance, Hewitt v. Leicester City Council [1969] 2 All E.R. 802 at 804.
126. Departmental practice is to regard the reference as relating to representations made by other public bodies.

127. S. 536 (1).

128. S. 536 (2).

129. Ordinance 77, cl. 9.

130. Ss. 536 A and 536 B.

131. See, for instance, H. C. Sleigh Ltd. v. Maitland City Council (1970) 90 W.N. (Pt. 1) (N.S.W.) 750.


134. Cf. s. 42, Public Works Act which does so require.

135. (1951) 82 C.L.R. 442.

136. Id 449.


138. S. 536 (1) and (2).

139. Despite public information being of special interest to a person with a compensable claim who has neither received individual notice nor seen the relevant Gazette, and of general interest to ratepayers (see Milburn v. Glenelg Shire [1940] V.L.R. 1 at 7).


142. Ordinance 77, cl. 9.

143. (1952) 69 W.N. (N.S.W.) 291.

144. (1953) 87 C.L.R. 469.

145. (1954) 90 C.L.R. 635.


152. See, for instance, Banks v. Transport Registration Board (1968) 42 A.L.J.R. 64.


154. (1863) 32 L.J. (C.P.) 185.

155. The extent of difference could not be more marked than in the following cases. In Miladinovic v. South Sydney Municipal Council (1973) 28 L.C.R.A. 195, the council was held to be under an obligation to observe principles of natural justice by giving the owner of a house an opportunity to be heard before a decision to demolish was reached, notwithstanding the existence of a right of appeal under the Local Government Act. But in Twist v. Randwick Municipal Council (1974) 28 L.C.R.A. 346, the court was of the opinion that Miladinovic should not be followed and that Cooper's Case could be distinguished in view of the right of appeal given by the New South Wales statute. The Twist decision, in holding that natural justice was not applicable was influenced by the availability of the statutory
remedy and this meant that it was not considered necessary to supplement the statutory provisions so as to enable 'fair play in action': see Wiseman v. Borneman supra, which was followed by the court in Twist. On appeal to the High Court, the Twist decision stood, but Mason J. made it plain in his decision that it could not be concluded, merely because there was a wide right of statutory appeal, that the legislature intended to exclude the right of the owner in natural justice to be heard by the council: (1976) 12 A.L.R. 379.


157. By analogy with the decision in Tange v. Drummoyne Municipal Council (1962) 79 W.N. (N.S.W.) 37, the courts also would not imply a right to a hearing before the issue of the notice of intention to acquire.

158. While in practice, departmental policy ensures that negotiation precedes resumption, there is no statutory requirement that a council must resort to negotiation prior to, and as a prerequisite of, the compulsory process. Cf. The Law Reform Commission (Australia), Discussion Paper No. 5, 'Land Acquisition Law: Reform Proposals', (1977) at 9 and Working Paper No. 8, 'Land Acquisition Law', December, 1977, at 46, believed the owner is better off being acquired quickly (provided there is opportunity for an independent public inquiry) than entering protracted negotiations.


160. Id 630, per Lord Parker C.J.


163. Discussed in more detail infra.

164. [1975] 2 N.S.W.L.R. 446.

165. [1969] 3 All E.R. 275. The 'doctrine' was criticised in passing by the High Court in Salemi v. The Minister (1977) 14 A.L.R. 1, and in Gardner v. Dairy Industry Authority of N.S.W. [1977] 1 N.S.W.L.R. 505 (now on appeal to the High Court) Samuels J.A. rejected it entirely as a separate doctrine.


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168. Id 1127.

169. See infra.

170. Which is the position in relation to an acquisition effected primarily under the provision of the Public Works Act.

171. Currently, two different responses to the difficulty are being entertained in New South Wales. One is policy-style legislation which deliberately opens up the field for judicial intervention by laying down a general policy to which the administration, guided and compellable by the courts, must adhere. (See Reports on a New Planning System for New South Wales.) The other is the already operative office of the Ombudsman which provides a non-judicial entree to matters internal to public administration. His functions are investigatory and yet have to be supplemented by an administrative body which has power to set aside official action and direct what should be done in its stead. (See Law Reform Commission of New South Wales, 'Report on Appeals in Administration'.) Acceptance of these kinds of responses at a general level would indicate a tolerance for specific reforms in land acquisition which required a resuming authority to justify a taking (see The Law Reform Commission (Australia), Discussion Paper No. 5, 'Land Acquisition Law: Reform Proposals', (1977) at 5-6 and Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 38).


174. Id 150-151. The Minister was held to have suffered a detriment by reason of the costs incurred in excess of taxed costs in the Land and Valuation Court.


179. S. 31 A (5), Real Property Act, 1900. The Report of the Interdepartmental Committee on Land Acquisition Procedures in New South Wales (January, 1978) recommended, at 1085, that the same notice of intended resumption which would be given to owners under new resumption procedures should be filed with the Registrar General.

180. S. 31 A (4), Real Property Act, 1900. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law' (December, 1977) at 70-71, merely approved the practice whereby vesting coincided with gazettal (since the event upon which title changes is a matter of public record), and did not refer to the ultra vires question. Neither did the Interdepartmental Committee.


184. Id 215.


186. But see G. Ganz, 'The Limits of Judicial Control over the Exercise of Discretion', (1971) Public Law 367, where she refers to an earlier action by the same landowner for trespass against the council, because the council had postponed the derequisitioning of the plaintiff's land until they were ready with their compulsory purchase order so that the plaintiff would receive less compensation. This conduct was described as being the relevant mala fide exercise of power.

187. Ganz also refers to an action for conspiracy, against the clerk arising out of the same transaction, where it was held there was no bad faith on his part because the predominant purpose of the clerk was to help the council and not injure Mrs. Smith.


190. Also, unauthorised entry onto the premises for the purpose of committing the tort was found to amount to a trespass.


194. Id 364.


196. (1919) 27 C.L.R. 268.

197. Id 277. See also the decision of the Privy Council in Cudgen Rutile (No. 2) v. Chalk (1975) 49 A.L.J.R. 22, which reviews various authorities on this general topic.

198. See Lapham v. Orange City Council (1968) 88 W.N. (Pt. 1) (N.S.W.) 309, discussed infra.


200. See also Lever Finance Ltd. v. Westminster (City) London Borough Council [1970] 3 W.L.R. 730; 3 All E.R. 496, and cases cited in H. Whitmore and M. Aronson, op. cit. at 244, in respect to estoppel about the limits of authority.
CHAPTER FOUR

ANCILLARY INCIDENTS OF COMPULSORY ACQUISITION

The date of acquisition is the date of notification in the Gazette, and the primary effect of the notification is to vest the subject land in the council and thereby convert existing interests in the land into claims for compensation from the date of notification. There are, however, ancillary incidents which pose their own special issues and which are attributable to this primary effect.

Amendment, Replacement and Abandonment of Notices

Neither the Public Works Act nor the Local Government Act make specific provision for complete withdrawal, or for amendment, of a notice of acquisition and such powers should not be implied. The special position of a notice under section 47 of the Public Works Act, which has the same legal effect as a notice pursuant to section 536 of the Local Government Act, was considered in Blackwell v. Railway Commissioners, and was explained in these terms:

'It is said that no man's land can be taken without giving him notice, and therefore the taking could not have effect in cases of this description until that notice had been received by the party affected, or at any rate, the statutory provision with regard to giving him notice had been carried out, namely by sending him a letter addressed to his last known place of abode, or by serving him personally with a copy of the notice.
The land in this case was taken under the provisions of section 47 ... To my mind the notice necessary to complete the acquisition and to determine the title of the original owner and vest the land in the Constructing Authority is the notice which was issued (and executed by the Constructing Authority but not transmitted to the owner until a later date) ... That is not a notice that the lands are required or that they are to be taken, but it is a notice that the lands have been finally appropriated and have been taken ... The Act provides that the taking is to be by notice, and in my opinion the appropriation is by the very notice itself; the signing of that notice is the taking of the land ... The very notice itself sets out that the lands have been finally appropriated, and in my opinion it does not lie in the mouth of the Constructing Authority at this stage to insist that that notice was incorrect and that the land had not been finally appropriated.

The finality of the notice has never been tempered by English notions that compulsory acquisitions is a quasi-contract, or compulsory 'purchase', so that there is no possibility of withdrawal of the notice as canvassed in R. v. Hungerford Market Co.\(^{(205)}\) In that case, the court proceeded on the basis that where a corporation had statutory powers to acquire property, and no power was reserved to the corporation of countermanding a notice once given, \textit{prima facie} the corporation was bound by the notice. However, it was accepted that the notice could be withdrawn with the consent of the owner of the land.

Not only would such withdrawal be impossible but there is no room for unilateral or mutual amendment, or substitution, of a
notice issued pursuant to Part XXV, Local Government Act. Reversal of the acquisition process would have to be achieved by conveyance back to the affected landowner, although in relation to misnomers, inaccurate descriptions or omissions, the savings provision of section 648 (2) of the Act may operate.\(^{(206)}\)

The corollary to the acquiring authority being bound by its notice is that an owner is unable to resist the notice by bringing an action on grounds other than the invalidity of the acquisition. This means that general equitable principles which have been applied in relation to other local government powers and under different systems of acquisition\(^{(207)}\) will be inapplicable.

The ground of abandonment, for instance, as developed by English decisions,\(^{(208)}\) is really a question of estoppel, the essence of which is that the acquiring authority had conducted itself in such a way as to lead the landowner to alter his position and somehow be put in an unfair position because of long delays on the part of the acquiring authority in finalising the acquisition. By contrast, after gazettal of a council resumption in New South Wales, any representation in the nature of an estoppel could not be competently made by a council.\(^{(209)}\) Also, the defences of laches and delay are not available against a local authority unless it is acting \textit{intra vires} as a mere contracting party.\(^{(210)}\)

**Transfer of Title**

Certain sections of the Public Works Act are brought by section 536 C of the Local Government Act into operation 'for the purpose of ascertaining and dealing with ... compensation' for 'resumption
or appropriation of land by the council'. These sections include section 45 which provides that any estate or interest whether legal or equitable 'shall ... be deemed to have been as fully and effectually conveyed to the Constructing Authority as if the same had been conveyed by the persons legally or equitably entitled thereto by means of the most perfect assurances in the law'. Section 53 is also called in aid to enable certain persons, normally under a legal disability or incapacity, to sell and convey lands under the provisions of the Public Works Act. This latter section has the effect of overreaching various beneficial interests where the 'vendor' is, for example, a trustee or executor.

These Public Works Act provisions, designed to perfect and facilitate the passing of title to the acquiring authority, apply only to a statutory vesting as a consequence of compulsory acquisition by a council, since section 536 C (2) of the Local Government Act does not import the provision for the purposes of purchase or lease (the other modes of acquisition listed under section 532). Hence if a council acquires land by means of successful voluntary negotiations, passing of title normally would be governed by ordinary rules for the sale of land. However, the council would not be precluded from resorting to the machinery of compulsory acquisition in order to take title, in which case only other aspects of the agreement would remain within the rules of a contract for sale.

The dual nature of an agreement which actually gave the council an option to acquire land by purchase or compulsorily, at the same agreed price, raised such an issue for the New South Wales Court of Appeal in Lapham v. Orange City Council. The appellant agreed to sell to the council land upon which he conducted his business,
or alternatively he agreed to 'permit' the council to acquire
his land for the same agreed price. Under the agreement, the council
had the right to purchase by private treaty up to a certain date and
the right to resume up to a certain later date. Instalments of money
were payable under the agreement upon the happening of certain events.

In upholding a decision by Else-Mitchell J., refusing an
injunction to restrain execution of a warrant for possession by the
council (that is, part of the compulsory process), the Court of
Appeal said:

'In our view the deed is ... a contract (of sale). Clause 1
therefore is an offer to sell or permit the acquisition of the
land. This offer was accepted. The parties were certain;
the property was certain; the price was certain. On the
conditions of the agreement the title to the land was to pass
from the vendor to the "purchaser" (as the council is called
throughout the deed) for a price agreed upon. The title might
at the option of the "purchaser" pass in one of two ways,
either by conveyance or by the vendor permitting the acquisition
of the land by the purchaser by resumption, but the consideration
was fixed by the agreement and remained fixed which ever method
of passing the title was adopted. The method of passing title
became in these circumstances not a matter of contract, but
rather of conveyance or of machinery for transfer. The agree-
ment might just as well have provided for the option of the
In an agreement of this kind the machinery of transfer, once the
price is agreed on, does not in our view change the agreement
from a contract for sale of the land into some other agreement
which cannot be described by these words. If A. agrees to pay to B. a certain sum of money in consideration that B. will accept that sum of money in full satisfaction of all his right, title and interest in certain land, then in our view that is a contract for the sale of that land, whatever provision otherwise the agreement might make for the passing of that right, title and interest from B. to A.' 

Where resumption is the mode selected by the council, special provisions also operate in respect to title registration. Where a notice of acquisition is gazetted for land under the provisions of the Real Property Act, 1900, section 31A of that Act provides that upon lodgment of an application and request by the council the Registrar General shall issue a new Certificate of Title and, in order to safeguard against registration of any purported dealing with the land in the interval between gazettal and registration of the council as proprietor, the Registrar General may make a pencil note on the appropriate folio of the register. Where the resumed land is not under the Real Property Act, registration of the notification must be in the form prescribed by section 196A of the Conveyancing Act, 1919 and section 31A of the Real Property Act provides that upon lodgment of a 'resumption application' the Registrar General shall issue to the authority in whom the land is vested a Certificate of Title under the provisions of the Real Property Act.

Therefore, it is not essential for the Council to 'get in' an existing Certificate of Title or other documents of title before becoming registered as proprietor. If the existing title document is produced, however, the Registrar General will endorse on it a memorial to the effect that the council is now the registered proprietor of the resumed land.
The indefeasibility which is accomplished by registration of even an invalid resumption was mentioned in Chapter Three in connection with the remedies available for invalid resumptions, but there is one aspect of indefeasibility which is unaffected by the decision in *Frazer v. Walker*. (213) This is where the statutory vesting is valid and has not been converted into a registered title. In this situation, the system of registration no longer holds sway, but once again the result is to the advantage of the acquiring authority as the following cases demonstrate.

In *Trieste Investments Pty. Ltd. v. Watson* (214) portion of the land contained in a Certificate of Title was subject to an unregistered resumption. There was no legislation, at the relevant time of vesting, permitting the Registrar General to make an entry on the register notifying the vesting or removing the name of the previous registered proprietor. The plaintiff claimed damages from the Registrar General on the ground that his Certificate of Title contained an error, omission or misdescription. It was held that there was no duty on the Registrar General to note the resumption on the Certificate of Title and, therefore, it could not be said that the title contained an error or omission. The fallacy of the plaintiff's case was said to lie in the assertion that the Real Property Act achieved complete indefeasibility, whereas the true position was that it was always subject to overriding statutory interests. It was said further that the view cannot be taken that a resumption is something coming within the registration system and, therefore, requiring registration.

A similar approach emerges from *Pratten v. Warringah Shire Council* (215) which was decided after *Frazer v. Walker*. The litigation
again arose out of a statutory vesting for a drainage reserve under the Local Government Act, and again the resumption was unregistered. The statutory title of the council was held to prevail over the registered title of the plaintiff, and also the council was not estopped from asserting its claim by previous representations to the solicitors of the plaintiff.

The court proceeded on the basis that the vesting became immediately operative under the relevant provision of the Local Government Act, regardless of the fact that the land was registered under the Real Property Act in the name of some other party. This meant that thereafter the registered proprietor did not in law have the fee simple in the land and nor could the fee simple be vested in a transferee. The absolute indefeasibility ordinarily flowing from registration, as propounded by Frazer v. Walker, will not avail where the fee simple has, by an overriding statute, been removed in effect from the registration system. However, the judgment proceeds to suggest that if the council had requested the Registrar General to notify the vesting, this would have had the effect of putting the fee simple back into the register, 'whereafter registered dealings would have their normal effect and significance in accordance with the provisions of the Real Property Act'.

A resumption for a drainage reserve no longer crystallises a statutory vesting since, where a subdivision is approved after the commencement of the Local Government and Conveyancing (Amendment) Act, 1964, section 340E of the Local Government Act now provides that vesting occurs only upon registration in the office of the Registrar General. Nevertheless, the reasoning in the above cases would seem to have general application to vesting under section 536A of the
Local Government Act, if a valid resumption is not registered. The conclusion is that once an acquisition is notified in a register, an indefeasible title exists against the previous owner even where the acquisition is *ultra vires*, but a valid statutory vesting does not need to be registered in order to prevail over the registered title of the previous owner. There is thus an obvious tension between the systems of title registration and resumption which needs to be resolved, one way or the other, at the statutory level.

To date, statutory amendments, following on the decision in *Frazer v. Walker* and the adopting decisions of the High Court, have indicated an acceptance of these decisions without grappling with the basic issue as to whether registration ought to cure a statutory vesting which has no legal effect under general law. The amendments include *inter alia* the power given to the Registrar General to withhold registration of a resumption application pending notification to the person affected and the removal of any ambiguity latent in section 135 of the Real Property Act (the 'protection' section of the Act) by the insertion of the words 'or under any void or voidable instrument'. While it is not contentious, and indeed it is desirable, that the essential goals of the Torrens System should be achieved by a consistent attitude with regard to indefeasibility the anomalies of the present situation require attention by the legislature, or surely that system loses credibility.

**Taking Possession of Acquired Land**

In private conveyancing, the execution of the conveyance of the legal estate normally entitles a purchaser to go into possession. In compulsory acquisition, the date of gazettal must be regarded as the
equivalent of a completion date, unless special arrangements have been made between the acquiring authority and the former landowner. The sole provision made by statute is under section 65 of the Public Works Act which enables the acquiring authority to issue a warrant to the sheriff to deliver possession, and this section is extended to apply to compulsory acquisition by local authorities. Since no special conditions are specified in the section, the timing of the decision to enter into actual possession would appear to be discretionary with the council. Because the courts are not involved in the issue of a warrant under section 65, no conditions have ever been implied, although there is dicta of Stawell C.J. in Victoria that in the absence of statutory provision payment of compensation is a condition precedent to lawful entry.

The lack of court involvement has also meant that questions as to whether the owner or occupier is entitled to reasonable notice before vacating the land and what status a person has who continues in possession after the date of acquisition are unresolved. As a matter of practice, however, a requisition is made to ensure that final payments of compensation coincide with vacant possession or, where immediate possession is not required by the council, an occupation agreement is negotiated.

In the absence of a special agreement, the person who remains in possession appears to occupy a kind of wasteland, where he has no title but where also he is neither a tenant of the acquiring authority nor a trespasser. It has been held that the position of landlord and tenant is not created and that the former owner is not obliged to pay rent. Likewise, the acquiring authority has been held to have none of the obligations of a landlord. Thus the previous

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owner is not afforded the benefit of protection provided by landlord and tenant legislation. In *Lapham v. Orange City Council*, it was suggested that if any tenancy was created it was a tenancy at will which could be terminated by notice or by the issue of a warrant. The absence of recognised legal rights in the person remaining in possession, however, does not mean that he is able to escape a statutory obligation imposed simply on an 'occupier' of land.

A tenant of the former owner also has his interest in the land converted into a claim for compensation and his status after the date of acquisition is as indescribable as that of a former owner in occupation. In England, for instance, there is conflicting authority on the question whether a compulsory acquisition frustrates a lease. *Bailey v. De Crespigny* has been cited as authority for a proposition, which it probably does not support, that a compulsory acquisition has the effect of discharging parties to a lease from their obligations under the lease. However, in *Matthey v. Curling* it was explained that whereas a lessor who has entered into a covenant on behalf of himself and his assigns in relation to land retained by him will not be liable for breaches of that covenant committed by an authority which has acquired the land compulsorily, this doctrine has no application to a covenant by a lessee either to pay rent or deliver up premises. The lessee is simply entitled to an indemnity from the acquiring authority on a compulsory assignment of his lease. By contrast, in Canada, there seems to have been more support for the position that compulsory acquisition does frustrate leases.

The issue has not really been litigated in New South Wales, but some assistance is provided by section 76 of the Public Works Act (which applies to a council acquisition). This section deals with the
situation where part only of the land comprised in a lease is taken and provides for apportioning rent between the lands taken and the residue. An implication arises thereby that the acquired part of the lease is frustrated, and that appears to be the approach adopted in *Perpetual Trustee Co. v. Franklin* \(^{(230)}\) where it was decided that the lessee was liable to pay only the apportioned part of the rent.

**Injury to Land During the Period of Occupation**

Assuming that the previous owner has at least some equitable right of occupation after the date of acquisition until the acquiring authority enters into possession, the question arises as to who is legally responsible for carrying any loss arising out of injury to the realty during that period. There is no special provision relating to insurance of the property in either the Public Works Act or the Local Government Act.

Where injury occurs prior to the date of acquisition, in the period between notice of intention to acquire and the notice of acquisition, the doctrine of privity of contract dictates that the owner is entitled to the proceeds of any insurance money under a policy effected by him. Also, the compensation payable by the acquiring authority would be calculated on the value of the property as it stood at the date of formal taking, that is with reference to the damage. Where the property is injured after formal acquisition, the compensation payable, being based on the value of the property at the date of acquisition, would be calculated without reference to the damage. \(^{(231)}\) The payment of insurance money in this instance would depend upon the nature of the policy and the nature of the right which subsists in the previous owner after title, but not
possession, has been transferred to the acquiring body.

There is no authority on the point and the question seldom arises in practice since the owner has his full compensation rights against the acquiring authority, which usually has no incentive to preserve any benefit from existing insurance if its plans for the acquired land include demolition of existing structures. Normally, by analogy with a conveyance, the acquisition would be regarded as terminating any insurable interest of the previous owner. There may be, however, a special occupation agreement under which the previous owner is made responsible for safeguarding the property, in which case there could be a continuing insurable interest under a fire policy. Where there is no such agreement and property is destroyed by fire after the date of acquisition, the property would only be at the risk of an owner continuing in possession for deliberate or negligent damage, and he would have no insurable interest as a basis for asserting a claim under a fire policy as opposed to a policy of liability insurance.

Surprisingly, a case did occur in Canada where insurance was paid to a former owner in respect of premises destroyed by fire after the date of appropriation. The court questioned the wisdom of the payment but, since payment had been made, held that the acquiring authority was not entitled to benefit from it and could not deduct it from the compensation payable for the expropriated property. The reasoning was clear that any windfall gain to the insured after the date of appropriation was relevant to subrogation rights of the insurer, but not to the compensation obligation of the authority.
Contracts with Third Parties

The effect of compulsory acquisition on leases and insurance raises a central issue whether the acquisition alters or destroys rights and obligations in contractual relationships generally. The effect must depend largely upon the nature of the contract and the rights which are involved. The relevant rights may be purely personal and regulated by the contract, or they may be property rights which cease to be capable of contractual regulation.

The right of an agent to be paid commission by a vendor when property is sold, for instance, will turn on the terms of their agreement. Accordingly, when the position of an agent, engaged to find a willing purchaser, who introduced a purchaser which ultimately resumed the property was considered, it was held that there was no liability to pay commission to the agent, since his employment resulted in a 'dis-service' to the former owner and the acquiring authority could not be regarded as a willing purchaser. An agent, therefore, would be well advised to insert a special term in an agency agreement to the effect that, if the land is resumed, commission will be paid on the amount of compensation payable. In that way, the whole issue of frustration may be obviated as it was in Claude Neon Ltd. v. Hardie. In that case, the Supreme Court of Queensland left open the question whether compulsory acquisition gave rise to frustration of a contract for hire of an illuminated sign (to be installed on premises which were subsequently resumed), since there was a special provision within the terms of the contract.

By contrast, the respective rights of a vendor and purchaser where, after the date of the contract of sale and before completion
of the conveyance, an acquisition notice is published may not be so clearly referable to the express terms of their contract. In that instance, rules of property will supervene and the solution is very much a product of the relevant acquisition process, as is illustrated by the differing conclusions of the English and Australian courts.

In *Hillingdon Estates Co. v. Stonefield Estates Ltd.* (237) an action for specific performance of a contract to buy land succeeded despite the fact that a compulsory purchase order had been made in relation to that land. The impending compulsory transfer to the acquiring authority was treated merely as if it was a prospective sub-sale by the purchaser who was, therefore, specifically liable to complete.

An application to avoid the contract was treated as being a plea of discharge of the contract by frustration. The English court thereupon examined the legal theories underpinning frustration: that there is an implied contract or term in relation to an unforeseen, unpredictable and unknown state of affairs which in fact arises or that the event completely destroys the subject matter of the contract so that it can no longer be carried out or recognised in its original shape and form. The court also considered the property theories surrounding an uncompleted contract of sale for land: the purchaser becomes the owner in equity, subject to his obligation to perform his part of the contract by paying the purchase money and the vendor holds as trustee for the purchaser and his interest is an interest in the purchase money.

The effect of the compulsory purchase order was said merely to
place an obligation on the person who was the 'owner' of the land, that is the purchaser, and as such it did not affect the vendor whose only interest was in the purchase money. Even though the compulsory purchase order very much altered the situation, it could not be regarded as altering it in such a fundamental and catastrophic a manner as to justify the court in saying that the whole contract had been frustrated. There was no legal objection to the contract being completed by conveyance. The purchasers were considered to be in exactly the same position vis-a-vis the acquiring authority as they would have been if they had completed their contract prior to the compulsory purchase order, and the existence of the order could not be regarded as an encumbrance on the vendor's title.

In McMahon v. Sydney County Council, Jordon C.J. had adopted similar reasoning when he said, in obiter, that the doctrine of frustration did not operate in a vendor and purchaser situation. More recently, however, another New South Wales case, Austin v. Sheldon, raised the effect of a resumption of a substantial part of land subject to an uncompleted contract of sale. The vendor sought a declaration that, by reason of the resumption, the purchaser no longer had any interest in any part of the land or in the compensation payable in respect of the part which had been resumed. The court concluded that the effect of the resumption was to put an end to the contract of sale.

Dealing with the argument to the contrary, flowing from the propositions that the purchaser becomes the owner of the property in equity and that the risk of the property passes to the purchaser as from the date of contract, the view was taken that these notions of ownership and risk-passing are based on an assumption that the contract
for sale will be completed. The assumption was held to be inapplicable when a resumption intervenes, and so the contract was avoided and frustrated. The purchaser, nevertheless, was entitled to compensation, since the proper test for compensation is whether in the particular case the contract is one which the purchaser would have been entitled to enforce by a decree for specific performance had the resumption not supervened. (240)

This decision did not turn on the fact that a portion only of the land comprised in the contract was to be resumed, because the residue was so small the court proceeded as if all the land was resumed. The decision is at odds, therefore, with the English decision on the question of frustration. However, the New South Wales decision is more appropriate in the light of the quite different principles and attitudes which permeate the English acquisition process, and because it would be impossible for a contract of sale to be completed once title is vested in the acquiring authority. The fact that the vendor would have to substitute a right to compensation for legal title would seem to provide good reason for treating the contract as frustrated.

Disposal of Land No Longer Required

Where land is acquired compulsorily for a particular purpose, there may be land left over after carrying out that purpose. The council may wish to dispose of the surplus or use it for a different purpose to the purpose for which it was acquired. Alternatively, the council may never use acquired land at all or the original use of it may cease, in which case the council may wish to dispose of the whole of the land or use it for a different purpose.
Section 98 of the Public Works Act expressly authorises a constructing authority to sell or lease, with the approval of the Governor, land acquired under the provisions of the Act which is not required for the purpose of acquisition. This section has no general application to council acquisitions and there is no similar provision in the Local Government Act. The Local Government Act does provide under section 536, however, that acquired land will vest in the council and, under sections 518 and 519, that a council may sell or lease any land vested in the council except, inter alia, land 'subject to a trust'. Land 'subject to a trust' in section 518 has been decided to mean land held upon the trusts indicated in section 526 or upon public trust created by Crown grant. (241)

Acquired land would not be regarded as being subject to a trust by reason only of the acquisition being for a particular purpose. In the course of deciding whether Government House was impressed with a public trust, Isaacs J. set out the criteria which would support this conclusion when he said:

'What then is the supposed trust? ... It is, in fact, nothing but a supposed surrender by the Crown of the right to use its own public property, if used at all, in any but the one way - a surrender based on no consideration, accompanied with no easement or servitude, or grant of any fragment of ownership. I am unable to classify the alleged right, or to identify its position in our system of law'. (242)

Thus in Randwick Municipal Council v. Rutledge, (243) Windeyer J. stated that it was a mistake to think that lands appropriated and taken into use by the Crown for a particular purpose, without any
identifiable action to create a trust, become dedicated for that purpose and could not be used thereafter by the Crown for another purpose. Similar reasoning was applied in *Sourris v. Pine Rivers Shire Council* (244) when it was held that land acquired for a purpose under the *Acquisition of Land Act, 1967* (Qld.) was not impressed with a trust for that purpose.

On the basis of the reasoning in the above cases, acquisition for a purpose would not of itself create a trust preventing a valid sale of the land under section 518. That a council may dispose of acquired land (in circumstances similar to those provided for under section 98, Public Works Act) does not in fact seem to have been questioned in New South Wales. In *Re Ku-ring-gai Municipal Council*, (245) the council had acquired land for the purpose of providing a drainage reserve on part of a subdivision. After providing the drainage reserve, the council desired to dispose of the balance, re-subdivided and subject to modified restrictions. Upon evidence being given that the proposed modifications would be of distinct benefit to the land and that its value would be increased, while none of the neighbouring properties would be affected in any way, an order was made to give effect to the council proposals. Also, for example, in *Collins v. Willoughby Municipal Council (No. 1)* (246) it was accepted sub silentio that the council could properly re-sell the whole of the land originally acquired for the purpose of a Town Hall and other offices.

Assuming that the land may be disposed of, the only control over the decision that the land is no longer required would stem from the general requirement that the council should act in good faith. In practice, such a decision would be difficult to challenge because of the problem associated with establishing motives of a corporate
body. This proposition is supported by a recent New Zealand case, where the decision of a local authority (that it did not require land for the public work for which it had been acquired) was attacked on the ground that the real motive behind the decision was to pass a benefit to a particular body. The power of re-sale was given by statute and its exercise was stipulated to be dependent upon the council resolving the land was not required for the public work. The court said:

"In finding the land not required for the public work the council was ... doing no more than deciding a question of fact entrusted to it for decision by the statute. It was not exercising a power ... In deciding a question of fact the council must no doubt act in good faith. It cannot resolve that the land is no longer required if it is clearly and indisputably the position that it does still actually require it ... If its determination of the question of fact ... was one which is sustainable on the existing facts, then it seems ... not to matter at all with what purpose or motive the council brought the question up for examination, provided only that it fairly considered it." (248)

The existence of a right to put acquired land to a different use, as distinct from disposing of it, also emerges from the above analysis. It would be necessary, however, to show that the new purpose was within power, and that circumstances had arisen which made use of the land for the original purpose inadvisable, since the jurisdiction of the courts continues after acquisition in respect to any ultra vires use of the land. (249)
Some alternative uses are expressly provided for in the Local Government Act, but they do not appear to confine change of use to only the purpose stated in the sections. Section 347 states that 'Any land acquired by the council for any purpose under this Act, and not required for that purpose, may be used for the purposes of this Part', that is for Part XIII Public Recreation purposes. Section 482 enables a council to provide various buildings for public purposes on any land (other than a public road or reserve) vested in or dedicated to or acquired by the council for any purpose, and section 514 B (3) allows the council to use any land owned by the council which is not required for any other purpose temporarily or permanently for 'small holding' purposes.

Where land is used for a public reserve within the meaning of section 4 of the Local Government Act, however, different considerations apply. A public reserve becomes dedicated for that purpose, and there is accordingly a statutory limitation on change of use. In order to effect a change, a council normally institutes a Private Member's Bill in Parliament. In relation to the disposal of such land, a practice has developed whereby approval is sought to a resumption back to the council for the purpose of disposal. This procedure has been employed, for example, to allow a council to exchange land originally acquired for a public reserve for land more suitable for that purpose.

Rights of Pre-emption

Neither the Public Works Act nor the Local Government Act confer any special right on a former owner to purchase land back from the acquiring authority when the land is no longer needed for the purpose for which it was acquired. The express power of sale in section 98
of the Public Works Act leaves disposal at the discretion of the acquiring authority and the Local Government Act is completely silent on the question of disposal. No right could be implied since former interests in the property are fully converted into a claim for compensation. (252)
201. The operative words of the Gazette notice are: '... the council with approval DOETH HEREBY give notice that the land described is hereby resumed and DOETH HEREBY give notice that upon publication of this notice ... the land becomes ... vested in the council'.

202. S. 536 B of the Act. (The remaining Chapters deal with compensation issues.)

203. (1931) 10 L.G.R. (N.S.W.) 147. Cf. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 50-62, recognises the necessity for abandonment in some cases, provided compensation entitlement exists, but does not make specific recommendations about the mode of abandonment. The Interdepartmental Committee on Land Acquisition Procedures in New South Wales, however, did make provision in its 1978 Report for both abandonment before acquisition and rescission of a resumption prior to compensation being paid, in its proposed ss. 44 and 53.

204. Id 150.

205. (1832) 110 E.R. 478.

206. See Cooney v. Municipality of Ku-ring-gai (1963) 114 C.L.R. 582; 37 A.L.J.R. 212 where members of the High Court expressed differing opinions on the scope of this section. The Interdepartmental Committee recommended the insertion of a new s. 52 in the Public Works Act to deal with correction of errors in the original notification.

207. The significant difference being that the principles are applied to conduct which precedes formal vesting.


211. (1968) 88 W.N. (Pt. 1) (N.S.W.) 309.

212. Id 314-5.


216. Id 142.


218. See the Real Property (Amendment) Act, 1970.

219. For instance, by abolishing statutory vesting and replacing it with some form of registration (see s. 340 E, Local Government Act and McKenna v. Municipality of Burnie (1970) 22 L.G.R.A. 402). Alternatively, compulsory acquisition, like fraud, could be made an exception to indefeasibility. The Interdepartmental Committee did not discuss these issues although many of its recommendations were directed towards title registration practice.

220. In England, the acquiring authority is required to wait until the compensation has been settled, although there may be entry into possession in advance of the payment of compensation by service of a notice of entry or by obtaining consent of the owner of every subsisting legal estate in the land. Also, the Law Reform Commission of Canada in its Working Paper 9, 'Expropriation', 1975, surveyed what it considered essential to good expropriation law. It approved of the federal Expropriation Act, 1970 which provided for taking of possession:

(1) if the owner is not in occupation at the time of the expropriation;

(2) if the owner agrees at any time after expropriation;

(3) after 90 days' notice of need for possession and making of an offer for compensation; or

(4) if Cabinet decides that because of special circumstances the land is urgently needed.

In cases (1), (2) or (4) early possession entitled the owner to
a solatium of 10% on value of the land.

The New South Wales Interdepartmental Committee recommended the replacement of s. 65 by a new s. 75 under which proceedings for possession would be taken in the Supreme Court and the right of entry could be enforced by a police officer. No conditions are laid down.

221. R. v. Pohlman (1869) 6 V.L.R. 109. Cf. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 72-74, took the position that the former owner is technically a trespasser, and concluded that the issue of a warrant is both necessary and reasonable, provided the courts have control over the process. Neither payment of, nor agreement on, compensation was considered an essential precondition.

222. Minister v. Mathieson (1903) 3 S.R. (N.S.W.) 298. Cf. The Law Reform Commission (Australia) ibid that technically the former owner is nothing but a trespasser.


225. Ibid.

226. For instance, to pay rates (Sydney Municipal Council v. Brownen (1902) 2 S.R. (N.S.W.) 244). The Interdepartmental Committee at 1085-1087 directed its attention to difficulties in respect to obtaining proof of rates and other taxes charged on the land at the date of resumption. It also proposed terms and conditions under which occupation agreements would be negotiated after resumption: see the proposed s. 143.


228. [1922] 2 A.C. 180.


231. R. v. Clarke (1896) 5 Ex. C.R. 64.
No analogy could be drawn with a private conveyance, at a point prior to the passing of title such as the making of the contract for sale. At that point the property is at the risk of the purchaser but the vendor retains an insurable interest in receiving the purchase price (Davjoyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Ltd. [1965] N.S.W.R. 1257).


Drache v. Winnipeg City (1970) 9 D.L.R. (3d) 532. See also Phoenix Insurance Co. v. Spooner [1905] 2 K.B. 753, where the owner had been paid insurance money for damage incurred prior to formal acquisition but after the date fixed for payment of compensation.


(1940) 40 S.R. (N.S.W.) 427.


The result was that the vendor was entitled to the increase in value of the land which was agreed to have accrued between the date of contract and the date on which the resumption notice took effect. The proposed s. 54 of the Interdepartmental Committee would give the Land and Valuation Court wide powers to adjust any rights and liabilities in connection with land or with transactions in relation to land affected by resumption.


Williams v. Attorney-General (N.S.W.) (1913) 16 C.L.R. 404 at 433. The Privy Council dismissed an appeal, Their Lordships announcing that they were in entire accord with the High Court: (1915) 19 C.L.R. 343. Cf. The so-called 'Public Trust Doctrine' which gained momentum in the United States of America following upon the publication of an article under the name of Professor Sax in (1970) 69 Michigan Law Review 471. Nevertheless, the author recognised that in many cases it is reasonable to assume that a government resolution that certain resources will be used for specific purposes implies that the specified uses shall be
available only until the legislature decides to devote the land to some other public purpose. The present discussion raises the question whether there are bars to a non-statutory change of plans in respect to lands acquired by a council.

243. (1959) 102 C.L.R. 54 at 75-76.

244. (1971) 23 L.G.R.A. 381.

245. (1929) 9 L.G.R. (N.S.W.) 89.


247. See discussion of bad faith ante, in the context of challenging the legality of a decision to acquire land.


249. Attorney-General v. Pontypridd Urban Council [1906] 2 Ch. 257 probably over-stated the position when it was decided that it was ultra vires for a local authority, having acquired land for a particular purpose, to use the land so acquired, or any part of it, for another purpose (even if that other purpose may be within statutory power).

250. There is no case directly in point, but if the land is not impressed with a trust it should follow that the council, acting in good faith, should be able to put the land to any use authorised under the Local Government Act. Lynch v. Ku-ring-gai Municipal Council (1947) 16 L.G.R. (N.S.W.) 144, affirmed (1948) 17 L.G.R. (N.S.W.) 14, is equivocal in that it decided that, since only part of the land acquired was immediately required, the council could use the remainder for some other lawful purpose provided care was taken to prevent any rights being acquired which would prevent or interfere with its use for the ultimate purpose for which it was acquired.

251. Information obtain by communication with legal officers in the resumption section of the Department of Local Government.

252. It is interesting that the California Law Revision Commission's Recommendations proposing the Eminent Domain Law (December, 1974), concluded against creating a general repurchase right on the basis of the many practical problems of administration that would be involved. Generally, see Sterling, 'Former Owner's Right to Repurchase Land Taken for Public Use', (1973) 4 Pac. L.J. 65. The Interdepartmental Committee in New South Wales did recommend, however, that resumptions could be rescinded provided compensation had not been paid (excluding advance payments).
CHAPTER FIVE

COMPENSATION ENTITLEMENT

Physical Subject Matter of Acquisition

Compensation entitlement for compulsory acquisition of land by a local authority initially depends upon showing that 'land' has been taken. There is no definition of 'land' in the Public Works Act, but there is a general definition in section 4 of the Local Government Act(253) and a special definition in section 531 (2) of that Act(254) for the purpose of Part XXV. The latter definition is concerned only with the interests in land, and the section 4 definition does not establish what constitutes land in its physical sense. The physical subject matter of an acquisition, therefore, must be determined by the 'ordinary meaning' of land as derived from general legal theory, but subject to the Mining Act, 1973 and the Coal Mining Act, 1973.(255)

Under general law, it is presumed that if an authority has power to acquire land, it takes all the land above and below the surface,(256) subject to the rules on fixtures and any special characteristics of the physical mass. A most important characteristic for compensation purposes is the presence or absence of minerals which are considered to form 'part of the concrete physical mass, commencing at the surface of the earth and extending downwards to the centre of the earth, which is called "land"'.(257) The acquiring authority, however, can acquire no more land than the owner has and minerals, although physically part of the land, may have been excluded from it by operation of law. Whether first of all, a particular substance is a mineral is a question of fact to be determined by the evidence, including statutory enactments.(258)
If a substance is a mineral, it may be excluded expressly by reservation in Crown grants or by reservation and vesting under statute. Or it may be excluded by implication, if it is a royal metal which was not expressly included in an original Crown grant. In the absence of an exclusion, and subject to section 536 AA of the Local Government Act, minerals are a constituent part of the land taken, although the ownership of the surface of the land and the minerals need not be necessarily in the same person.

Other characteristics which bear on the subject matter of acquisition would include the position of boundaries which may have altered over time by force of the doctrine of accretion. Thus, provided the change is not rapid enough to be substantial and perceptible within a short space of time, the owner of acquired land will also have any increment caused by natural and gradual accretion acquired. However, where the addition to land is caused by artificial reclamation, then the doctrine of natural accretion does not apply, but, even so, some rights may be established in relation to the reclaimed land so that compensation entitlement may exist.

Where land is covered by sea, it is vested solely in the Crown and no compensation rights would exist in relation to it for a private citizen. However, the land may not necessarily be vested in the Crown in right of the State of New South Wales. Since the enactment of the Seas and Submerged Lands Act, 1973 (Com.), sovereignty in respect of the territorial sea (and in respect of the airspace over it and in respect of its bed and sub-soil) is (by section 6) vested in and exercisable by the Crown in right of the Commonwealth. Section 10 provides for Commonwealth sovereignty also in respect of internal waters (waters of the sea on the landward side of the baseline of the territorial
sea), but section 14 saves the rights of the States in respect of
waters of the sea within any bay, gulf, estuary, river, creek, inlet,
port or harbour which were within the limits of a State before federation
and remain so. By section 15, wharves, jetties and certain other
structures are excepted also from the vesting of sovereignty in the
Commonwealth. (264)

Establishing Entitlement

Section 536 B of the Local Government Act provides that the
owner of any land resumed or appropriated shall be entitled to receive
compensation for that land. For the purpose of ascertaining and
dealing with compensation, section 536 C (1) applies section 45,
sections 53 to 79 inclusive, sections 102, 103, 106 and 124, sections
126 to 131 inclusive, and sections 135 and 136 of the Public Works Act.
These sections are then deemed to be amended in certain respects by
section 536 C (2).

Under section 45 (3) of the Public Works Act, every person upon
asserting his claim and making out his title shall be entitled to
compensation. A notice of claim together with an abstract of title
must, under section 102 of that Act, be served on the council by every
person claiming compensation within ninety days from the publication
of the Gazette notification of resumption (or within such further time
as may be allowed by the Court). In practice, the point is rarely
taken that the notice is out of time. If it is, the application to
the court is at the cost of the claimant, who must submit an actual
claim before the court will be prepared to consider whether it should
be admitted out of time. (265)
Section 49 (3) of the Public Works Act further enacts that if no claim is made by the person entitled within two years the claim is deemed to have been waived or abandoned, but this section does not apply to a Local Government Act resumption. Thus section 102 is the only relevant provision in relation to the setting of time limits for a compensation claim consequent upon an acquisition for general local government purposes. Where it would be inequitable, however, in all the circumstances to allow a council to rely strictly on non-compliance by the claimant with section 102, the courts may intervene. In Re Walker, a claim was allowed to be lodged ten years after resumption, where the claimant was out of the jurisdiction and ignorant of his rights in the property. But in Public Trustee v. Penrith City Council, where fourteen years had elapsed and no special case was made out, the court exercised its discretion to refuse to grant an extension of time.

Upon receipt of the notice of claim, the council, by virtue of section 536 C (2) (c) (ii), has to obtain from its solicitor a report on the title of the land relating to the claim. Within sixty days after receipt of that notice the council is required to cause a valuation of the land, or of the estate or interest of the claimant therein, to be made. Thereafter, as soon as practicable, the claimant is to be informed of the amount of the valuation by notice in the form of the Seventh Schedule to the Public Works Act. Within one hundred and twenty days after the service of that notice, there may be, under section 103 of the Public Works Act, a variation by further notification to the claimant.

Notification of the valuation is a condition precedent to the bringing of a court action to recover compensation. If the
valuation is not made in accordance with the section, the courts will compel the appropriate authority to do so. For example, in *Ex parte Keegan*\(^{(271)}\) mandamus was granted to compel valuation where compensation for resumed land had been paid already to the wife, as administratrix, of a person erroneously believed to be dead. Likewise, in *Re Broughton*,\(^{(272)}\) where land had been resumed and T had claimed (and had been paid) compensation as owner of the land, it was held that B, having disclosed a *prima facie* title to the land, was entitled to have a valuation of his interest made, although the question of title between T and B could not be decided on the application for mandamus. In *Sparke v. Minister for Works*\(^{(273)}\) the Minister had refused to make a valuation of a mortgagee's interest, and instead indicated that he would pay only the principal and interest due on the mortgage at the end of a certain time period. The court held that while the Minister was at liberty to redeem the mortgage under powers conferred by the Public Works Act, the power to redeem was entirely independent of the plaintiff's right to claim compensation and have a valuation of such claim made.

**Who May Claim**

Under Section 102 of the Public Works Act, the responsibility for initiating a claim lies with the claimant. The onus also is upon the claimant to establish his claim to compensation, by inference from section 61 (1) (b) of the Public Works Act which provides that if the claimant neglects or fails to make out a title to the acquired land to the satisfaction of the council, the council may pay the compensation payable into court. However, a person in possession of the land has his burden lightened by section 63 of the Public Works Act, which deems him to be the owner until the contrary is shown to
the satisfaction of the court.

In order to assert a right to compensation the claimant must show an interest in the land resumed. Ordinarily, the relevant interest is an unconditional fee simple, but lesser interests may be compensable provided always the claimant establishes that his interest has been terminated as a result of the resumption. The interest must also be of a financial and proprietary nature. While it is not always easy to draw precise distinctions between compensable and non-compensable interests, legal authority exists to support claims in the circumstances set out below.

Inchoate possessory title. In Perry v. Clissold the Privy Council held that a person who had incomplete possessory title was a person with an interest in the land and entitled to claim compensation. It was said that:

'A case for compensation is not necessarily excluded by the circumstances that under the provisions of the Act the Minister acquired not merely the title of the person in possession as owner, but also the title, whatever it may have been, of the rightful owner out of possession who never came forward to claim the land or the compensation payable in respect of it, and who is, as the Chief Justice says, "unknown to this day"'.

On the other hand, a claim by the owner with documentary title, before the appropriate period has expired, would prevent the title by possession from maturing. Thus the position is that a person showing title by adverse possession is, in the absence of any claim by the documentary owner, to be deemed to be the owner of the land and
entitled to compensation, although unable to establish that the title of the true owner is barred by such possession.  

**Tenancies.** A lessee, of course, has a compensable interest in land, but a tenant at will for a short period may not be regarded as having a compensable interest if he is required, under the tenancy, to surrender occupation before the acquiring authority takes possession. Where it is not possible to terminate the tenancy before the taking is effected, the tenant does have a compensable interest. 

**Easements and Licences.** Easements are contained expressly in the definition of land in section 531 (2), and if an easement is interfered with compensation is payable, subject to the operation of section 536 A (1A) and (1B). 

By contrast, licences normally will be treated as pure personalty and not compensable. Such was the fate of the gas company’s rights in respect of pipes which were held in *Commissioner for Main Roads v. North Shore Gas Co.* to be in the nature of a licence and not in the nature of an easement or other interest in land. Similarly, exclusive rights, for a term of years, to display advertisements have been held not to confer an interest in land capable of forming the subject of compensation. The use of words such as 'lessor', 'grant' and 'let' makes no difference if in fact a privilege or licence only is granted. 

Nevertheless, there may be instances where a licence loses its personal character and becomes a matter to be taken into consideration in assessing compensation. In *Commissioner of Land Tax v. Nathan* the High Court took the view that the land in question (apart from its
physical adaptability to the purposes of a racecourse) had a special characteristic, namely that the Turf Club would issue to the owner of the land (quite irrespective of his identity) a licence to hold race meetings thereon. Consequently 'such a virtual monopoly, so to speak, running with the land, is a real enhancement of its value as a commodity, by increasing the price it will fetch'.

Analogous reasoning is adopted in respect of a claim for goodwill. The High Court decided in Minister for Home & Territories v. Lazarus (287) that the goodwill of a licensed victualler's business, so far as it adds value to the unimproved value of the land, is to be included as part of that value. Pursuant to that decision, conflicting decisions were made in the valuation courts of New South Wales, which were resolved by the Privy Council holding that the unimproved value could not be enhanced by the value of a licence which could be granted only in connection with buildings. (288) The Privy Council emphasised that if the goodwill of a business is personal only it adds nothing to the value of the land. Yet if it is attributable wholly or partly to the land, it pro tanto enhances its value and, if the land is resumed, that value is recoverable, not as 'goodwill' but as part of the value of the land.

Restrictive covenants. A covenantee, in relation to a restrictive covenant which runs with the land, has an interest in land and is entitled to compensation, but if a tying covenant does not create an interest in land no compensation is payable in respect of it. For instance, a supplier of goods under a 'trade tie' does not have an interest in land. (289)

Mortgages. The estate or interest of a mortgagee is converted
into a claim for compensation,\(^{(290)}\) and claims by mortgagees are dealt with specially in sections 66 to 75 of the Public Works Act. It should be noted, however, that the resumption does not affect the personal covenant in the mortgage as between the mortgagor and the mortgagee to continue payments under the mortgage.

Section 66 of the Public Works Act follows the method under which the mortgagee receives the principal and accrued interest (together with costs and charges) and further prescribe for six months' additional interest (for the cost and inconvenience of having to reinvest the capital involved). There are also special provisions in sections 68 and 70 dealing with the situation where the mortgaged lands are of less value than the principal, interest and costs secured thereon, where compensation is to be settled by agreement between the mortgagee and the party to the equity of redemption on the one part and the public authority on the other part. Where there is failure to agree, the courts will determine the respective amounts as in other cases of disputed compensation, but there is no special relief given to owner-mortgagors from making up deficiencies where compensation for market value is less than the principal owing on the mortgage. However, it should be noted that despite the inclusion of sections 66 to 75 for the purposes of Local Government Act resumptions, there is some doubt as to whether these sections are applicable other than to purchases.\(^{(291)}\)

**Contracts for Sale.** A contract for sale of land must be specifically enforceable before an equitable interest in land arises under it for the purchaser.\(^{(292)}\) The position was explained in \*Austin v. Sheldon*\(^{(293)}\)
'Assuming that the purchaser in the present case was, as I think he was, entitled to the rights which arise where the contract is one of which equity would grant specific performance, then, in my opinion, he has such an interest in the land as would constitute him an "owner" in the provision (namely section 536 B and subject to the definition of 'owner' in section 4 of the Act).

A person with an option to purchase also may have a compensable interest, although the status of an option is far from clear in Australia. If an option is seen as a conditional contract creating an equitable interest in the land to which it relates, and not merely regarded as an irrevocable offer, then the unexercised option does give a compensable interest. (294)

Multiple Claims

In an action for compensation, there is no issue as to title. (295) Disputes about ownership must be settled by the ordinary process of law in a distinct action from an action for compensation. In this regard, it is considered proper for the parties to take advantage of the declaratory procedure afforded in the Equity Court. (296)

Disputes aside, there will be cases where more than one person claims an estate or interest in the same parcel of resumed land. (297) The issue, therefore, was raised early as to whether 'when land which is taken by the Government for public purposes is held by different persons for successive estates, or the total estate is otherwise divided, the compensation payable by the Government in respect of the land taken is to be assessed once for all, or whether the
individual owners of estates or interests in the land are entitled to separate assessment of the value of their respective interests'. By a majority, the High Court initially decided that if several claimants each brought an action, the actions should be consolidated and that the value of the particular interests or estates could be required to be separately ascertained only in special cases, where their value was quite independent of the value of the land itself (such as where there was a lease of the land or an easement over it). (298)

Despite criticism of this approach and the difficulties it gave rise to in application, the State courts accepted it until the High Court overturned its earlier decision. In Rosenbaum v. The Minister the dissenting view expressed by Isaacs J. in the Harris Case was preferred to the proposition that the tribunal in assessing compensation should fix one sum to represent the value of a fee simple in possession in the acquired land, leaving it to persons claiming estates and interests in that land to litigate as a separate question the proportions in which they should share in that sum.

The proper procedure was explained as follows:

'Each estate or interest which was separately held at the time of the resumption is converted into a separate claim; each person's claim is to be separately notified, separately valued by the Constructing Authority, quantified (in the absence of agreement) in a separate action at the suit of the person claiming, thereafter separately substantiated by the making out of a title by that person, and separately satisfied by means of a payment to him or to the Master in Equity'. (301)
The result is that the owner of each interest in the land has a separate right to compensation, even though this may mean that the sum of the compensation payable to the owners of all interests exceeds the amount that would have been payable if one person had owned all interests.

This right of separate claimants to make separate claims for compensation should not be confused with the operation of sections 61 and 62 of the Public Works Act. Under section 61, the council may, if it thinks fit, pay into court compensation in respect of any interest where compensation (either agreed or awarded to be paid) has been refused; or there is neglect or failure to make out a title to the satisfaction of the council; or a refusal to convey or release lands as directed by the council; or the owner of the interest is absent from New South Wales or cannot be found after diligent inquiry. The money so paid in is subject to the control and disposition of the Court, and under section 62 the Court may, 'as to the Court seems fit', order distribution of such money according to the respective estate, titles or interests of the parties claiming, upon application of any party making claim to the money.

These sections have been used to provide a forum for the determination of adverse claims to the same interest, in respect of which moneys have been deposited, and to enable distribution to the party entitled if that party has made a proper claim or, for instance, one party abandons a claim. No other provision is made for any procedure to be adopted by a resuming authority to resolve a conflict between claimants asserting adverse claims to compensation moneys. Except in this limited way, however, the summary jurisdiction
to enable distribution should not be used to divide up a deposited fund among those who seek to establish there an interest in the land resumed. Provided, however, the petitioner makes out a title to the interest to which he makes claim in accordance with the Public Works Act, and a valuation has been made, section 62 enables payment out whether after notice to other persons who appear to have an interest or ex parte.

Disputes about Amount

The compensatory machinery established by the Public Works Act contemplates agreement about, or ascertainment of, compensation preceding the actual payment of compensation.

'The policy of the Act is this. The Crown is entitled to resume land, and the Act proceeds to enact provisions which may have the effect of preventing litigation in order to ascertain the amount of compensation. It, therefore, in the first place, required the claimant to send in particulars of his claim, & c., and then the Minister has to say what he is prepared to offer. In other words the parties are bound to come into the position of two parties negotiating as to the proper price to be paid. If after that they fail to agree, then, of course, the claimant is in the position of a person entitled to sue for compensation for the land resumed.'

Where the council and the claimant do not agree on the amount of compensation, then section 536D of the Local Government Act provides that the claim may be heard and determined as provided in section 9 of the Land and Valuation Court Act, 1921. While section 104 of the
Public Works Act sets out that the parties have a specific period of ninety days in which to fail to reach agreement before resorting to court proceedings, no time period is mentioned in section 536D. The condition precedent to court proceedings is satisfied simply by a failure to agree on a compensation figure.

Whether an agreement has been reached will be decided by ordinary rules of contract, and the rules applicable to concluded agreements will apply also with the consequence that neither party could resile unilaterally from a properly made agreement. In *Mead Johnson v. Public Works Minister* the resuming authority sought to withdraw from an agreement on the basis of a new valuation made after the agreement. It was argued that a valuation under section 103 is an indispensable prerequisite to the resuming authority having any power to agree upon quantum of compensation, and that the only valuation made directly on the plaintiff's claim was a subsequent variation of the original valuation agreed to by the plaintiff. It was argued further that agreement cannot be reached independently in point of time from actual payment being made, and that it is not open to the resuming authority to pay more to an applicant than is the proper sum for the estate or interest of the applicant.

Street J. (as he then was) did not accede to any of these arguments. After indicating that the propriety of the value is, so far as concerns agreement between the parties, committed to the opinion or judgement of the acquiring body he said:

'Either the parties have agreed or they have not. The freedom of the Constructing Authority to vary a valuation cannot be used as a means of re-opening an agreement already reached
in negotiation following upon the due process of the statute having been followed through by the parties'. *(307)*

Where a dispute does exist, the jurisdiction of the court determining compensation is highly specific and may be seen as promoting unnecessary litigation. In an action for compensation there is no jurisdiction to entertain a claim for trespass or other wrongful acts committed by the acquiring authority. *(308)* Likewise, the Land and Valuation Court has no power to determine questions of title and must assume that the plaintiffs have the title claimed by them, and assess compensation on this basis. *(309)* This means that after a possibly lengthy compensation action, if a dispute arises about the claimant's title, it must be determined in another proceeding in another court.

The action for compensation is limited further by certain ancillary rules. *(310)* For one, there is the important consequence of the Privy Council decision that the Valuer-General's valuation under the Valuation of Lands Act, 1916, is irrelevant and inadmissible in evidence. *(311)* There is also the lack of an appeal on questions of fact or on questions whether the determination is against the weight of evidence, although the New South Wales Court of Appeal has been prepared to compel a case to be stated in respect of the 'many questions of law to be decided explicitly or implicitly before there can be a determination of value'. *(312)*

**Costs in Compensation Proceedings**

Costs are another matter in which the jurisdiction of the court awarding compensation is curtailed. Prior to the coming into force in 1922 of section 9 of the Land and Valuation Court Act, 1921, all
actions for compensation in respect of resumptions under the Public Works Act were dealt with under the provisions of that Act. The various tribunals vested with the power of determining the amounts of compensation had no discretion as to costs, the incidence and amount of which were fixed entirely by the Act and depended upon the amount of the verdict. The effect of section 9 was merely to substitute the Land and Valuation Court as the appropriate tribunal on the question of the amount of compensation so that in regard to costs the provisions of section 106 of the Public Works Act continued to apply and, as a necessary consequence, the powers of that court conferred in respect to costs under section 18 of the Land and Valuation Court Act, 1921 do not apply to cases under section 9 of that Act.\(^{(313)}\)

An argument to the contrary was pressed in Woollams v. The Minister\(^{(314)}\) when counsel for the plaintiff applied for a special order for costs, submitting that the Court has a discretion as to costs notwithstanding the rigid provisions of section 106 of the Public Works Act. It was urged that the earlier cases had been decided without advertence to the principle of construction applied by the High Court in Electric Light & Power Supply Corporation Ltd. v. Electricity Commission of N.S.W.\(^{(314)}\) namely that, when a statute refers a matter or class of matters to an established court, it imports, unless the contrary intention appears, that the ordinary incidents of the procedure of that court are to attach. One such incident, in this case, was said to be the discretion of the court to award costs.

Since no part of the Public Works Act was expressly repealed, the court had to consider whether there was repeal by implication and decided there was not.
The apparent intention was to set up one tribunal and create a uniform procedure, for all such cases of compensation, whether arising under the **Public Works Act** or under any other Act then in existence, or thereafter to be passed. Sub-section (1) (of s. 9) gives effect to that intention. Other sub-sections, although general in their terms, seem to have been drafted with an eye, primarily, to the relevant provisions of the **Public Works Act**, which were not being expressly repealed. The purpose appears to have been to retain the framework of an action in the Supreme Court for which the **Public Works Act** provides (and which, in that Act, is closely bound up with provisions as to the notice of claim and the notice of valuation which must precede litigation - s.104 (1)), and thus to tie in the new procedure with the existing and unrepealed provisions of that Act. At the same time, and within that general framework, the changes and adaptations were to be made which were necessary for, or incidental to, the dominant object of replacing trial by jury in the Supreme Court by trial without a jury in the Land and Valuation Court'.

Since there was no implied repeal of the Public Works Act provisions, the court's discretion had to be treated as limited to the extent of excluding therefrom such costs as are governed by special provision. It was stressed, however, that section 106 applied only to the 'costs of the action' referred to in section 106 (1).

The costs of a compensation action in the Land and Valuation Court are governed, therefore, by section 106 which provides that costs are payable as between the parties *pro rata* to result, namely costs follow automatically depending upon the amount of valuation which has been notified by the resuming authority to the claimant, the amount
of the claim, and the amount of the compensation awarded, and are not
within the discretion of the court. There has been much criticism
of this inflexible approach to costs since it is believed 'to create
an impression in the minds of the public that the Government or
resuming authorities do not want dispossessed landowners to litigate
their claims for compensation and this in turn suggests that they have
some policy of paying less than a fair value for land resumed', but
recommendations that the court should have a discretionary power have
not been implemented by legislation.\(^{(317)}\) The court, however, does
have discretion as to what constitutes the appropriate notice of
valuation upon which the costs rule operates. Thus in \textit{Minister for
Public Works v. Hart}\(^{(318)}\) the court fixed compensation based on an
amended valuation, which was an irregular amendment, and costs were
related to the amendment on the ground that it would be unjust to allow
the claimant to take advantage of the irregularity which was attributable
to his own conduct.

\textit{In Kennedy Street Pty. Ltd. v. The Minister}\(^{(319)}\) it was argued
that no valuation at all had been made or notified prior to commencement
of action, and accordingly the formula for ascertaining how and in
what fraction costs were to be borne could not be applied. The pleadings
conceded, and proceeded on the basis, that a valuation of the plaintiff's
interest had been made and notified, although in fact there was merely
a valuation of the whole property which did not apportion between various
interests (of vendors and purchaser). Subsequent to the commencement
of the action, and shortly before the date fixed for hearing, a formal
notice of valuation was given. The court disregarded the last valuation
as not falling within the meaning of section 106 (1), but did treat the
earlier valuation as \textit{consisting of} a valuation of the plaintiff's
interest. The section was applied, in these circumstances, to apportion
costs and it was not necessary to express an opinion on the consequences of no valuation. It was said, however, that the consequence may be that, where a plaintiff is unable to provide the factual basis for the use and application of the statutory formula, he is not entitled to a proportion, or any portion, of the costs of the action.

Finally, it should be noted that the expression 'the amount of the claim of the claimant' in section 106 (1), which also provides part of the basis for the operation of the statutory formula, refers to the amount claimed in a claim lodged pursuant to section 102 (that is, the claim served on the council after gazettal of the resumption). It does not refer only to the amount claimed in any originating process pursuant to which a claim for compensation for resumption is made. (320)

Completion of Claim

Once the compensation claim is finally agreed upon or determined, and any requisitions directed towards satisfying the council as to the claimants' right to the compensation have been answered and a release executed, completion will be effected. In cases 'where compensation or costs are awarded or adjudged to be paid', section 126 (1) of the Public Works Act provides for payment to the party lawfully entitled (or to his duly authorised agent) within one month after the amount is determined. The remainder of the section, including sub-section (2) which provides for part payment of compensation, does not apply to a council resumption. Nevertheless, that sub-section merely restates a practice which is implied in section 126A (1) (a) (which does apply to a council acquisition). It would appear, therefore, to be properly within council discretion to accede to a request for an advance payment,
based on some percentage of the Valuer-General's valuation, before the amount of compensation has been finally agreed upon or determined, say where the claimant has to meet a mortgage instalment. However, there is merely a power in the authority, not a right in the claimant. (321)

The compensation moneys, once settled, have interest added to them in accordance with the provisions of section 126 A (1) which requires interest to be paid from the date of notification of resumption until the payment is made (or each instalment payment as the case may be). For a council acquisition, however, payment of interest is made subject to the proviso included in section 536 C (2) (f), that where a claim is not served within ninety days of gazettal the compensation bears interest only from the date of notice of claim.

Section 126 A (1) makes explicit what was decided about its predecessor (section 126 (2)), namely that the right to interest vests at the moment the notification is published (subject to section 536 C (2) (f)), not when the amount has been awarded or adjudged. (322) The right to interest is dependent solely upon two conditions being fulfilled; establishing title and the fixation of the amount of compensation properly payable. The amount of interest is fixed according to rates set by statute from time to time, (323) but the total amount payable will be affected, by virtue of the proviso in section 536 C, by failure to serve a claim in the time provided.

Costs of Conveyance

By section 135 (1) of the Public Works Act the costs of all conveyances and assurances of the resumed land are to be borne by the
resuming authority, and a bill of costs, itemised in accordance with
the Schedule Two allowances, may be taxed under section 136. Section
135 is restricted to the allowance of conveyancing costs only (as
amplified in sub-section (2) of the section). Consequently, it has
been held that there is no liability to pay costs under section 135
except where there has been a conveyance or assurance executed, and
that the only jurisdiction to tax the costs mentioned in the section
is by virtue of the statutory authority conferred. (324)

An unchallenged decision of the Deputy Registrar, on taxation
under section 136, has established the practice whereby costs of
negotiation and valuations, and also fees of counsel incurred as a
result of a brief to advise on a basis of valuation, are disallowed. (325)
This limitation may be avoided by claiming such costs as a separate
head of damages flowing from the resumption or by negotiating an
agreement with the resuming authority to include all costs properly
incurred, including costs associated with negotiations and valuations.

Costs Where Money Paid into Court

Where money has been paid into court, except in the circumstances
set out in section 61 (1) (a), (b) or (c) of the Public Works Act,
section 64 enables the court to order reasonable costs (as described
in the section) to be paid by the resuming authority. The many
reported decisions on the predecessor to section 64 indicate: the
payment in must be by the authority itself or with its consent; (326)
the costs must be incurred in consequence of the resumption; (327)
the costs must not be unreasonably incurred; (328) undue delay on the part
of the authority in paying money into court will justify an award of
costs; (329) the costs of an unsuccessful claim are to be borne by the
party making the claim. (330)
Substitute Compensation

There is no prohibition, contained in either the Public Works Act or the Local Government Act, on a resuming authority giving some form of compensation in lieu of monetary compensation.\(^{(331)}\) The Public Works Act in fact makes provision in section 91 for the making and maintenance of certain works for the accommodation of owners and occupiers of lands adjoining any public work, except where there is an agreement for, and payment of, compensation instead. While this section does not apply to council acquisitions carried out under the Local Government Act, a council no doubt could make a grant of similar or even more extensive substituted rights provided the grant was within council power\(^{(332)}\) and did not amount to an abdication of power.\(^{(333)}\)

In *Ayr Harbour Trustees v. Oswald*,\(^{(334)}\) the Harbour Trustees, in order to save money in respect of severance, offered the landowner a perpetual covenant not to construct their works on the acquired land so as to cut off the owner from access to the harbour, or otherwise affect him injuriously in respect of land not taken but from which the acquired land was severed. Although the covenant was held to be *ultra vires* on the ground that it tied the hands of the successors to the then trustees and, in effect, sterilised part of the acquisition so far as the statutory purpose of the undertaking was concerned, Lord Sumner later commented in *Birkdale District Supply Co. Ltd. v. Southport Corporation*\(^{(335)}\) that:

'It if the Ayr trustees had reduced the acquisition price by covenanting with the respondent for a perpetual right to moor his barges, free of tolls, at any wharf they might construct
on the waterfront of the land acquired, the decision might, and I think would, have been different.

In some cases, there would be obvious advantages to both council and owners if the council could substitute similar land to that which has been taken, or provide substitute access if the acquisition has merely resulted in disruption of access to retained lands. In the absence of express provision in the Local Government Act, however, the major difficulty facing a council in granting substituted rights arises where the council does not have already the necessary proprietary rights to effect the substitution. If the council needs to acquire property of a third party for the purpose of exchange with the owner of the property required for the statutory purpose the question is essentially whether the acquisition of the substitute property may properly be characterised as an acquisition for local government purposes in order to fall within power.

The importance of access is accepted in section 524 (3) (b) of the Local Government Act by stipulating that the power to take temporary possession of land must be exercised so as to provide, where necessary, other means of access or works of accommodation in place of any taken away or interrupted by the temporary possession. The validity of an acquisition for the purpose of providing substitute access could be inferred from such a recognised necessity, by regarding such an acquisition as an incidental part of an authorised statutory undertaking. Provided the test of bona fides is met, it may not matter that acquisition for the purpose of giving access is not authorised specifically.

This was certainly the approach adopted in Earl Beauchamp v. Great Western Railway Co. (36) where the building of a road over land
acquired from one owner in order to give access to another owner was held to be valid on the ground that, if the company was acting 
bona fide, what land was required for the purpose of the works was to be left to the company's own judgement. By contrast, a note of warning may be discerned in Boland v. Canadian National Railway\(^{(337)}\) where acquisition of land for the purpose of giving access to other owners was held to be invalid on the assumption that, if the acquisition power was construed too widely, acquiring authorities could gain immunity from giving explanations and could acquire lands which had no connection with the primary undertaking. This latter attitude is indicative of a tendency in the courts to more readily doubt the \textit{bona fides} of an acquiring authority in this type of case and place the onus on the authority to establish clearly that its primary purpose is not to promote a private undertaking.\(^{(338)}\)

Alternatively, the question of the validity of an acquisition for compensation purposes could be formulated in terms of whether it is, as a matter of construction, expressly or impliedly authorised. There is no authority on the scope of the local government powers in this context. The 'recoupment' provision in section 532 contemplate surplus land being acquired for 'sale or re-sale and applying the proceeds thereof', that is, for raising money, and the application of the money so raised is limited to defraying expenses incurred by the council in carrying out works upon the acquired land. Substitute acquisition is clearly outside the scope of this section.

The power to 'exchange' land under section 518 is an ancillary power and probably could not be construed as a 'purpose' of local government. Sale and lease also are ancillary powers but, unlike exchange, are envisaged as purposes of the Act in a number of sections.
For instance, section 477 allows the council to acquire land where the council deems it expedient to sell or let land 'in the interests of the area'. While section 477 may have to be regarded with some circumspection, section 321 (1) (b) (viii) provides that a council may acquire land for the purpose of selling or leasing whole or portion of the land 'as elsewhere provided' in the Act and section 321 has a recognised wide scope.

There is no specific relocation power, but relocation may be inferred as an incidental consequence of section 475P (Part XXIIB Industrial Development) and the housing power under section 496. It is thus conceivable that where land is acquired under the wide development and redevelopment powers conferred by section 321, say for an urban renewal project, the proposal could be carried into effect by relocating displaced persons. This could involve acquisition of additional land for that purpose as an integral part of the overall project. The land taken for relocation would not in fact be surplus, but part of the 'necessary' land. The relocation portion of the land could be sold on terms which would set off in whole or in part the compensation owed by the council to the displaced persons, and the sale effected under the council's powers of contract and sale. (The council, of course, would still have to pay compensation to the owners of the land on which the relocation was to take place).

In the United States, it has been held lawful for the government to condemn private land for the relocation of a town which was to be flooded in reliance on wide powers. Although there may be no analogy to be drawn from this case in view of the necessity in New South Wales to isolate a clearly authorised local government purpose, it does not seem too far-fetched to suggest that, where the acquisition
is bona fide for the purposes of development and redevelopment, relocation (like access) may be regarded as at least incidental to the primary purposes, if not part of them. On the other hand, there is no implied support under other powers of the Act for a council to take land to suit the convenience of another private owner. Such a taking would be primarily for a private purpose.

The above analysis of what may be achievable under the Act reveals a need for clear statutory guidelines similar to recommendations which have been made elsewhere in respect to authorising acquisition for exchange purposes. The recommendations acknowledge the wisdom of conferring an authority to acquire 'substitute property' for exchange with 'necessary property', but in order to safeguard the rights of the third party, the authority is restricted. Where the necessary property is devoted by its owner to a public use and that owner itself could exercise the power of compulsory acquisition to obtain substitute property for the same public use from a third party, it was proposed that an acquiring body should be permitted to acquire substitute property provided the owner of the necessary property has agreed to the exchange and it is clear that the substitute property will be devoted to the same public use as the necessary property. In other cases, the burden should be on the acquiring body to satisfy these criteria: that the owner of the necessary property has agreed to the exchange; that the substitute property is in the same general vicinity as the necessary property; and that, taking into account the relative hardship to both owners, the exchange would not be unjust to the owner of the substitute property.

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CHAPTER FIVE FOOTNOTES

253. "Land" includes a mine, and also includes any river, water-course, or inland water, tidal or non-tidal. See Ditchworth v. Commission of Stamps [1899] A.C. 99 at 105-106 re use of the word 'includes' in a statutory definition.

254. 'In this Part, unless inconsistent with the context or subject matter - "land" means either land in fee simple or any easement, right, or privilege in, over, or affecting land and includes Crown lands and land owned by or vested in the Crown'.

The definition recommended by the New South Wales Interdepartmental Committee in its 1978 Report, was: "land" includes an interest in land, and without limiting the generality thereof, includes a stratum and any easement or right over, through of above any land.

255. S.531 (3), Local Government Act. The Interdepartmental Committee believed the 1976 amendments were unsatisfactory and proposed new provisions to achieve a balance between the protection of public works and the working of mines and minerals.


257. Id 33.

258. Commonwealth v. Hazeldell Ltd. (1920) 29 C.L.R. 448; Castle Hill Brick, Tile & Pottery Works Pty. Ltd. v. Baulkham Hills Shire Council (1961) 7 L.G.R.A. 139. Generally, by s. 6, Mining Act, 1973, 'mineral' means any substance prescribed as a mineral, but does not include petroleum or coal or shale.

259. See Midland Railway Co. of Western Australia v. Western Australia [1956] 3 All E.R. 272, where the railway company did not assert that the legislature did not have power to enact general vesting legislation, but unsuccessfully argued on other grounds that the terms of its original grant from the Crown would exempt the operation of the vesting legislation on its lands. Note the legislature may also pass legislation reserving 'non-mineral' substances, such as petroleum, to the Crown.

260. At common law, the royal metals are recognised as being excluded under prerogative rights of the Crown: The Case of Mines (1568) 1 Plowd 310 at 336. By the Constitution Act, 18 and 19 Vict., C. 54, s. 2, the control of minerals in New South Wales was vested in the colonial legislature: Attorney-General v. Great Cobar Copper Mining Co. (1900) 21 N.S.W.R. 351; 17 W.N. 194. But the royal metals still are presumed not to pass in a Crown grant unless expressly included: Woolley v. Attorney-General (Vic.) (1877) 2 App. Cas. 163.
261. In particular:

'(2) Subject to this section, the council shall be entitled to all minerals other than -

(a) minerals that are expressly excepted in the notice of resumption or appropriation; or

(b) minerals that were vested in Her Majesty immediately before publication of that notice in the Gazette, not being minerals that -

(i) are expressly appropriated as such in the notice; or

(ii) necessarily must be dug or carried away or used in the construction by the council of any works upon the land resumed or appropriated,

but any exception referred to in paragraph (a) shall be deemed not to include minerals that necessarily must be dug or carried away or used in the construction by the council of any works upon the land resumed or appropriated*. (Italics added.)


264. This legislation was held by the High Court of Australia to be a valid law of the Commonwealth: N.S.W, & Ors. v. Commonwealth (1976) 8 A.L.R. 1.

265. Macnamara v. Minister for Works (1896) 17 L.R. (N.S.W.) 10; 12 W.N. 82. Cf. The Law Reform Commission (Australia), Working Paper No. 8, 'Lands Acquisition Law' (December, 1977) at 91, recommended that no time limit be placed on a claimant, but the Interdepartmental Committee would introduce a new s. 106 to permit the acquiring authority itself to initiate proceedings.

266. (1902) 19 W.N. (N.S.W.) 39.

267. [1976] 1 N.S.W.L.R. 165. The council had forwarded a claim form seven years previously and invited application to the Supreme Court two and a half years before this action.

268. The Interdepartmental Committee's proposed procedures would still require a claim to be lodged prior to valuation, but the Law Reform Commission (Australia), Discussion Paper No. 5, 'Land Acquisition Law: Reform Proposals', (1977), at 11, and Working Paper No. 8, 'Lands Acquisition Law', (December, 1977), at 90, recommended that a valuation be made available within 14 days of resumption and before the owner submits any claim.
29. In Minister for Public Works v. Hart [1904] A.C. 259, where the acquiring authority had amended a notification (made in the scheduled form) but had not made the amendment in the scheduled form, it was considered that any irregularity in the notification had been waived by the claimant.


71. (1907) 7 S.R. (N.S.W.) 565; 24 W.N. 119.

72. (1904) 4 S.R. (N.S.W.) 662; 21 W.N. 225.

73. (1891) 12 L.R. (N.S.W.) 276; 8 W.N. 72.

74. Commissioner for Main Roads v. North Shore Gas Co. Ltd. (1967) 41 A.L.J.R. 183; cf. Plummer v. Wellington Corporation (1882-84) 9 A.C. 699. The Interdepartmental Committee proposed new claim forms which would quickly, and with precision, indicate the nature of the interest. It also proposed special provisions in respect to strata titles: see 1080 of the Report.

75. Where a road which was compulsorily acquired had vested earlier in the acquiring authority under statute, the landowner could not claim the value of the road as part of his compensation entitlement: Anthony v. Commonwealth (1973) 47 A.L.J.R. 83. Cf. If a body with powers to resume land without compensation, say in reliance upon the terms of an original grant, chooses to invoke the compulsory acquisition procedure, it is bound by the terms of the legislation relating to compulsory acquisition including the payment of compensation: City of Keilor v. O'Donohue (1971) 27 L.G.R.A. 13 at 23; Blackwell v. Railway Commissioners (1931) 10 L.G.R. (N.S.W.) 147.

76. A claim of a shareholder in respect to resumed company land was held to be preposterous in Roberts v. Coventry Corporation [1974] 1 All E.R. 308.

77. [1907] A.C. 73.

78. Id 80.


80. Re Clissold (1907) 7 S.R. (N.S.W.) 638; 24 W.N. 154. Cf. Milirrup v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141, where it was held that the words 'right, power or privilege over,
or in connection with land" in section 5 (1), Lands Acquisition Act, 1955 (Com.) were not wide enough to embrace persons who occupy land under communal native title, as there is no known form of proprietary interest in such occupation. Similarly, mere possession or occupation of Crown land without title thereto was held not to be an interest in land giving a right to compensation on resumption in Wm. Collin & Sons Pty. Ltd. v. Co-Ordinator-General (1971) 38 Q.C.L.R. 30.

281. Perpetual Trustee Co. Ltd. v. Railway Commissioners (1904) 4 S.R. (N.S.W.) 259. Also see Saunders v. Capelin [1967] 1 N.S.W.R. 567, where it was held a lessee had a right to make a claim for compensation under s. 102 where the interest of the lessor was purchased without compulsory acquisition.

282. Dunn v. Manly Municipal Council (1967) 14 L.C.R.A. 242. S. 536A (1A) and (1B) provide for specific exemption from vesting of any easement specified in the resumption notice.


286. (1913) 16 C.L.R. 654.

287. (1919) 26 C.L.R. 159.


291. The Interdepartmental Committee Report at 1062. The Committee recommended substantial changes, at 1064-1066, based on the Commonwealth outstanding balance approach with the addition of the opportunity for two or more persons to make a joint claim and special provisions concerning the rate of interest payable under the mortgage after resumption. The choice between the traditional balance of outstanding principal and interest as opposed to market value as constituting the proper entitlement for a mortgagee much exercised the Law Reform Commission of
Canada in its 1975 Working Paper on Expropriation. The Law Reform Commission of British Columbia in its 1971 Report on Expropriation and the Alberta Institute of Law Research and Reform in its 1973 Report on Expropriation both recommended the market value method, but the Ontario Law Reform Commission preferred the traditional approach, being influenced by the fact that the mortgagee's interest is not confined to an interest in land but is extended by the contractual obligation of the mortgagor to pay outstanding principal and interest. Special provisions, however, had to be designed to counter possible harsh effects of the outstanding balance method in respect to both mortgagees and mortgagors. The Law Reform Commission (Australia), Working Paper No. 8, 'Lands Acquisition Law', December, 1977, likewise opted for maintenance of the outstanding balance rule in the relatively unsophisticated Australian mortgage market, on the assumption that neither mortgagors nor mortgagees are likely to be under-compensated in view of 'disturbance' rules.


293. Ibid.


296. Ex parte Minister for Education; Re Henry Lawson Development Pty. Ltd. (1970) 91 W.N. (N.S.W.) 624 and see ss. 61 and 62 discussed infra.

297. Minister of State for Home Affairs v. Rostron (1914) 18 C.L.R. 634 affords a good example of the innumerable interests that may be present.


299. See, for instance, McMahon v. Sydney City Council (1940) 40 S.R. (N.S.W.) 427; 57 W.N. 142; 14 L.G.R. 187.

301. Id 431. The Interdepartmental Committee rejected submissions to return to the pre-Rosenbaum position.


304. Ibid. By consent of the respective parties to the s.62 proceedings, the court held that since they satisfied it that they had interests which together made up all the interests outstanding in the resumed land, it could make a division of the deposited fund upon such basis as might be considered satisfactory to all.


307. Id 713. Cf. agreements which fetter discretion.


309. Brown & Brown Ltd. v. Sydney Municipal Council (1925) 4 L.V.R. (N.S.W.) 27; 7 L.G.R. 60. The Interdepartmental Committee proposed that the Land and Valuation Court should also decide entitlement issues, that proceedings all be instituted and finalised in that court, and that the court be empowered to join parties to prevent a multiplicity of proceedings in respect of the one resumption: see 1067-1068 of the Report.

310. The action has been described as being 'bedevilled by serious procedural defects': Else-Mitchell J., 'Unto John Doe His Heirs and Assigns Forever - A Study of Property Rights & Compensation', (1967) A.P.I.J. 5.

Domain Law of December 1974, was that there should be pre-trial exchanges of valuation data, plus time for follow-up discovery.

312. Ex parte Stocks & Parkes Investments Pty. Ltd.; Re The Minister (1969) 90 W.N. (Pt. 2) (N.S.W.) 132. Ironically, the order was directed to the author of the criticisms in his capacity as a Judge of the Land and Valuation Court.


315. (1956) 94 C.L.R. 554 especially at 559-560; 1 L.G.R.A. 206.

316. Woollam v. The Minister id 390-391. It is interesting that the N.S.W. Law Reform Commission in its 1975 'Report on the Land and Valuation Court', at 9, now recommends its abolition as a separate court.

317. Else-Mitchell J., 'The Role and Work of Valuation Boards and Courts in the Community', (1966) The Valuer, Vol. XIX No. 1; and see Final Report of the Commission of Inquiry into Land Tenures presented to the Australian Government in February, 1976. The Law Reform Commission of Canada in its 1975 Working Paper on Expropriation preferred to give discretion to the court to assess whether it would be fair or just and equitable not to indemnify owners for their costs, but recommended that generally owners should be fully indemnified for all reasonably incurred costs from the date of expropriation to the date of award of compensation or to the termination of related proceedings. The Law Reform Commission (Australia), Discussion Paper No. 5, 'Land Acquisition Law: Reform Proposals', (1977) at 17 and Working Paper No. 8, 'Lands Acquisition Law', December, 1977, Ch. VI, goes further and recommends payment in advance of standard costs to enable access to advice and preparation of a claim. The Interdepartmental Committee did not go this far and was content to repeal s. 106 and leave powers over costs to s. 18 of the Land and Valuation Court Act, 1921.


319. (1962) 80 W.N. (N.S.W.) 1251; 8 L.G.R.A. 221.

321. Cf. s. 11D, **Lands Compensation Act, 1973** (Vic.); s. 23 **Acquisition of Lands Act, 1967** (Qld.). The Law Reform Commission (Australia), *ibid.*, considered it 'elementary justice' that an owner should promptly receive the bulk (90%) of conceded compensation and the majority view of the Interdepartmental Committee, at 1059-1060, was that advance payments should be available as of statutory right up to 100% of the amount offered to be paid or estimated payable by the acquiring authority. The Committee also could see no reason why advance moneys should be paid into court, as they are under the South Australian system.


323. There is no automatic indexation of the interest rate, and the Interdepartmental Committee was concerned to ensure a more equitable rate of interest at 1049-1051.


325. **Re Flynn** (1964) 82 W.N. (Pt. 1) (N.S.W.) 260, relying on the interpretation of a provision in similar terms in **Re Hampstead Junction Railway Co.; Ex parte Buck** (1863) 1 H. & M. 519; 71 E.R. 227. The Interdepartmental Committee suggested, at 1073-1075, that s.135 be replaced and that in addition to costs now allowed, all reasonable costs, charges and expenses of valuation and negotiation necessarily incurred for the purpose of making a claim for compensation or determining the amount of compensation should be allowed. It also suggested the **Conveyancing Act** should be amended to include a fixed scale for solicitor's remuneration.


329. **In re Lacey** (1902) 19 W.N. (N.S.W.) 45.

330. **In re Glover** (1902) 19 W.N. (N.S.W.) 228; **Re Cahill** (1903) 20 W.N. (N.S.W.) 192; **In re Assets Realisation & General Finance Co. Ltd.** (1904) 4 S.R. (N.S.W.) 555; 21 W.N. 167.

331. Cf. **Public Roads Act, 1902** which specifically provides that compensation may be made in terms of land or money or a combination of both.
332. For instance, the council would need to observe the limitations attached to its exchange power under s.518, or under its leasing power in s.519.

333. N.S.W. Trotting Club Ltd. v. Glebe Municipal Council (1937) 37 S.R. (N.S.W.) 288; Watson's Bay & South Shore Ferry Co. Ltd. v. Whitfield (1919) 27 C.L.R. 265, discussed previously in Chapter Three in the context of 'Agreements not to Acquire Compulsorily'.

334. (1883) 8 App. Cas. 623.


336. (1868) 38 L.J. Ch. 162 at 163.


339. See Minister for Public Works v. Duggan (1951) 83 C.L.R. 424 discussed in Chapter Two.

340. See discussion of the section under the heading of 'Bad Faith' in Chapter Three.


The compensation payable for compulsory acquisition, like normal damages at law, is intended to secure for the landowner an amount of money equivalent to the value of what he has lost. The measure of the compensation is the loss which the owner has sustained by reason of his land being taken, and its purpose is to place the landowner in a position, in terms of money, similar to that which he was in immediately prior to the acquisition. How and when compensation for compulsory acquisition is to be fixed are governed by special rules based in statutory provisions regarding the establishment of title and other matters prescribed in the acquisition process, as supplemented, in large measure, by judicial decisions.

In arriving at a value for resumed land, or interests, the figure must be fixed according to the circumstances existing at the date of resumption. Thus in Willoughby Municipal Council v. Valuer-General, where a council which had been negotiating with the owner for the acquisition of certain lands as a site for an incinerator carried out certain road formation work on the land prior to the date of resumption, the court took the possibly extreme view that, the work having been carried out prior to resumption, the owner was entitled to the increased value of the land accruing therefrom. Some regard may be paid also to conditions likely to arise soon after the relevant date for valuation but not to what might happen in the dim and distant future.

The basis of assessment is set out in section 124 of the Public Works Act (as substituted by section 536C (2) (e) of the Local Government
Act). The section primarily prescribes an assessment according to the value of the land taken, but with regard to damage caused by severance or injurious affection and subject to any enhanced value in retained land, as well as to special rules regarding the construction of underground tunnels. The courts, however, have extended the rights of a claimant beyond the matters specified in the section, although they have made no special allowance for the fact of the 'forced sale'.

The foundation principle applied by the courts to the assessment of the value of the land is attributed to Spencer v. The Commonwealth, where it was said that the value was to be arrived at by supposing the land to be sold at the date of acquisition:

'Not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration'.

Spencer's Case, however, did not provide the ultimate test of compensation.

'An observation made in Minister for Public Works v. Thistlethwayte ([1954] A.C. 475) shows that it does not. "It must not be forgotten", said Lord Tucker for the Privy Council, "that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and convenient method of arriving at a basic figure to which must be added in appropriate cases further sums for disturbance, severance, special value to the owner and the like" (id at 491)'.

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The modern view accordingly is that the process of ascertaining market value by the hypothetical sale method, based on the notion of a single hypothetical purchaser for the property being valued, is not in all cases an essential ingredient of the valuation process, and primary regard must be had to the facts and circumstances of each particular case.\footnote{51} This may best be demonstrated by a survey of the operative heads of compensation.

**Special Value to the Owner**

The phrase 'value of the land taken' in section 124 has been interpreted by the courts to mean 'value to the owner'.\footnote{52} This notion represents the high point of judicial creativity but while it has given rise to numerous reported decisions, the type of situation in which it is taken into account and how it is calculated remain incapable of precise definition. The judges themselves do not exhibit any clear consensus on the notion beyond their willingness to use it as a form of elementary justice.

In *Kennedy Street Pty. Ltd. v. The Minister*\footnote{53} the claimant had incorporated for the purpose of acquiring, developing and selling certain land. After the contract for the purchase had been signed and the deposit paid, but before completion, the land was resumed. The local council subsequently approved in principle a subdivision application in respect to the resumed land which had been lodged prior to resumption. The court said there was a special value by reason of the special relationship between the development company and the resumed land. Consequently, the additional sum the claimant would have been prepared to pay over and above the market value of the land was added to the compensation figure.
A more narrow view was taken in Chong v. Fairfield Municipal Council, where it was thought that not only must the special factors not be something purely personal to the owner but they must be 'a quality of the land itself which is special only in the sense that it is potentially demonstrated by the use to which it has been put by the owner'. In that case, the claimant had realised profits on sale of certain subdivided lots without being taxed because the land sold had not been acquired for resale at a profit. The profits were intended to be used to finance further subdivisions of the balance of the land owned by him. When the remaining land was resumed by the council, the claimant argued that the land had a special value to him on the supposition that he would not have been assessable to income tax on the proceeds of sales after further subdivision. In the course of rejecting this argument, the court passed general comments about special value which appear to conflict with the decision of the Privy Council in Pastoral Finance Association Ltd. v. The Minister, where it was held that the special suitability of the land for a business (which the owner carried on elsewhere but intended to transfer to the resumed land) and the savings and additional profits which he would derive from so doing were elements of special value to the owner to be included in the compensation.

Later, Bray C.J. in South Australia stated in Arkaba Holdings Ltd. v. Commissioner of Highways that the special value must arise 'from some attribute of the land, some use made of it or advantage derived or to be derived from it, which is peculiar to the claimant and would not exist in the case of the abstract hypothetical purchaser', but he did not find it necessary to decide whether the law was stated too widely in the Kennedy Street Case or too narrowly in Chong's Case. There has been no later case dealing with the point, but in Chapman v.
The Minister of the New South Wales Court of Appeal believed that to the extent that the Kennedy Street Case included expenses of incorporation of the development company in the special value, it was a special case. The other two members of the court approved such an inclusion on the basis that the decision recognised a modern reality, namely that incorporation of a company is a usual, although not necessary, step in carrying out land subdivision. All three members allowed expenditure on surveyor's plans of subdivision.

These differences in approach, to what constitutes special value in a particular situation, have turned largely on the facts. None of the approaches denies that the special value must have some connection with the land itself; the connection simply is more tenuous in some cases than in others.

There would seem to be no dispute that a claim based entirely on family, prestige and sentimental considerations would be rejected, as it was in *Payne v. Commissioner of Road Transport*. There the land at the date of resumption was vacant and unimproved. One of the owners hoped that, at some time in the future, all or some of the brothers who owned the property might construct and operate a picture theatre on the site if economic and business conditions became favourable. That thinking had no commercial basis and no steps had been taken by the owners to develop or bring the land into operation as a site for a picture theatre. Similarly, the fact that a claimant spent considerable time in unrealistic preparation for subdivision of his land would not constitute special value, where it is clear that those exertions would be strenuously opposed and rendered fruitless by the local council's attitudes on development in its area.
Additionally, it is clear that actual amounts expended by the plaintiff prior to resumption, although affecting market value, have only a limited relevance in estimating the value of the land to the claimant at the date of resumption. In *Morrison v. Commissioner for Main Roads*, (360) for instance, the workmanship and materials used in the building of the house were of a quality superior to that generally found in the locality in which the house was situated. It was held that, although the superior quality and workmanship should not be disregarded in assessing compensation for the dwelling house, they were reflected in the market value of the completed building (which incidentally was affected by the fact that the design was not one which would be attractive to every purchaser). Likewise, in *Baringa Enterprises Pty. Ltd. v. Manly Municipal Council* (361) where special value was claimed in respect to moneys expended in holding charges and fees in contemplation of proposed development, it was held that the relevant matter was not the amount expended by the plaintiff prior to resumption but the special advantage which a prudent purchaser would have assessed as being available to the plaintiff in successfully undertaking its proposed development. Of course, the incurring of expenditure calculated to inflate compensation would not be included at all by way of special value. (362)

Finally, although in many cases the purchase of land by an adjoining owner of property will reflect special value to the purchaser rather than market value, there is no rule that this is the case. Where there are no other sales available to support a party's contention that the sale to an adjoining owner reflects something more than market value, it is encumbent on such party to point to some circumstances associated with the sale or with the property itself or its position and the needs and desires of the purchaser in order to justify the inference that the selling price was an excessive one. (363)
Disturbance. Disturbance is not included as a separate item of compensation is section 124. Nevertheless, the person whose land is expropriated may be compensated for incidental loss which is sustained through being turned out of possession to the extent to which 'the amount necessary to avoid or make good the loss can be regarded as a sum which he, if a buyer, would be willing to pay in excess of the ordinary market value, and as being therefore an element in value, that is, in the value to him'. This decision was affirmed by the High Court, where Latham C.J. said:

'But 'value' in cases of compulsory acquisition has proved to be a word of very elastic meaning. It is not necessarily the 'mere saleable value'. It may include compensation for loss of business or goodwill - costs of removal - value of fixtures taken, or loss if not taken, but these items are, theoretically, considered only as factors or elements affecting what is called the value to the owner'.

In Commonwealth v. Milledge, it was explained that disturbance is relevant only to the difference between, on the one hand, the value of the land to the hypothetical purchaser for the kind of use to which the owner was putting it at the date of the resumption and, on the other hand, the value of the land to the actual owner himself for the precise use to which he was putting it at that date. It followed that if the land was valued on the basis of its suitability for a more profitable form of use than that to which it was being put at the date of acquisition, there would be no justification for making an addition to the value so ascertained because of disturbance. The High Court was simply adopting the reasoning in Horn v. Sunderland Corporation where acquired land had been used by the claimant in connection with his business of horse breeding. The best value of the land was as
building land which could only be realised by the removal of the business. It was held that compensation for disturbance could not be awarded unless the sum of the value of the land as agricultural land plus loss by disturbance exceeded the value as building land.

Compensation for disturbance very clearly raises the demarcation issue which exists in the concept of special value to the owner and the courts again have made only sweeping statements. In Harvey v. Crawley Development Corporation, Romer L.J. (with Sellers L.J. concurring) said that the authorities establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided, first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner. A similar view was taken in Howard & Ors v. Commissioner for Railways where it was said that the test propounded by Moulton L.J. in the Pastoral Finance Association Case recognises that a prudent man in the position of the owner of the land is entitled to weigh into the price he would give for the land, sooner than fail to obtain it, every item of personal loss which results to him as owner of the land and flowing directly and not too remotely from the resumption.

Sometimes the distinction which the courts are attempting to make will be capable of reasonable application as it was in Bailey v. Derby Corporation. There a local authority compulsorily acquired a builder's yard and workshops and the builder obtained alternative premises in the vicinity. Owing to ill-health, however, he was unable to transfer his business. He, therefore, leased the new premises to a firm of decorators who employed him in their business. He claimed
compensation for disturbance on the basis that his business had been totally extinguished as a result of the compulsory acquisition. The builder was held entitled, as compensation for disturbance, to a sum which represented the loss which was the natural and reasonable consequence of the acquisition of the land, which was the cost of removal and the loss of profits immediately and directly consequent on his having to move. He was not entitled to compensation for the extinguishment of the business which was a loss attributable to ill-health and not produced by the acquisition.

However, it is not always so easy to draw distinctions and, despite the required outlook of the 'prudent man', this head of compensation must remain subject to many uncertainties.

**Reinstatement.** Compensation may also be awarded under the principle called reinstatement, where losses incurred through the necessity of a claimant reinstating himself on comparable land or premises are losses consequent on the compulsory acquisition. Like disturbance, reinstatement is not a separate head of compensation under section 124 and is really an application of the special value principle which sometimes is treated under disturbance.

Compensation for reinstatement expenses is confined 'within the limits of reasonableness', which means that any expenditure must be such as can in all the circumstances be said to have been reasonably incurred. The circumstances surrounding a lease afford an example:

'Within those limits it is not an objection to resort, for the purpose stated, to the reinstatement principle that a dispossessed lessee, being unable to acquire another suitable leasehold, has
been constrained to purchase a freehold. However, when compensation in respect of the acquisition of a leasehold is in question it is necessary to have regard to certain further factors, namely the limited duration of the interest which has been taken and the expenditure which would in any event have been incurred for rent and otherwise under the covenants of the lease: see A and B Taxis Ltd. v. Secretary of State for Air ([1922] 2 K.B. 328); Metropolitan Railway v. Burrow (Cripps on Compulsory Acquisition of Land, 10th ed. (1955), vol. 2, p.1811); Wright v. Sydney Municipal Council ((1916) 16 S.R. (N.S.W.) 348); Sydney Ferries Ltd. v. The Minister ((1923) 6 L.C.R. (N.S.W.) 156; 2 L.V.R. 187); Cook v. Commissioner for Railways ((1954) 19 L.C.R. (N.S.W.) 226). If transfer of the business to another situation is impossible because other suitable premises cannot be obtained, it may be necessary to take the total destruction of the business into consideration as a factor in assessing compensation: see Commonwealth v. Reeve ((1949) 78 C.L.R. 410); Eastaway v. Commonwealth ((1951) 69 W.N. (N.S.W.) 25).

As for other items of special value, the circumstances in which the reinstatement principle will be applied by the courts have no special characteristics, although there is an ill-defined notion that the principle applies where there has been no market or general demand for the acquired land. In Minister of State for Army v. Parbury Henty & Co. Pty. Ltd., Latham C.J. referred to the adoption of the principle in 'some special cases, e.g. hospitals, schools, churches, for which there is ordinarily no market' and where 'probably the property taken would not bring in the market any sum approaching the cost of reinstatement'.
However, even if the acquired land falls within one of the 'special cases', this will not guarantee the application of the principle. In *Feiglin v. Housing Commission (Vic.)*, where a synagogue which had a declining congregation was resumed, it was emphasised that for compensation to be claimable on the basis of reinstatement there must be: an identifiable and clearly defined body of people who are to be reinstated; a specific site for the new premises already identified at the date of the assessment of compensation; and a firm intention to reinstate in substantially the same form. There being no evidence to identify sufficiently the body of members of the synagogue or a firm intention to reinstate the synagogue and no site for a replacement synagogue having been obtained or identified, compensation for reinstatement was unavailable.

It is clear also that the principle has had a more general application than in these 'special cases'. In *Cook v. Commissioner for Railways*, it was held that, under the circumstances of the case, reinstatement was available even though there was no actual reinstatement. In that case, no alternative site could be obtained unless conversion into conditional purchase could be obtained of land held under special lease. It was reasonable to anticipate such conversion would be obtained, and the plaintiffs accordingly were entitled to be compensated for loss incurred while awaiting conversion of the special lease.

The notion of 'special cases' nevertheless has had an influence in restraining the application of the principle to residential property, on the basis that there is generally a ready market for residential property. The 'failure in all cases to provide a right of reinstatement to dispossessed home owners' consequently has been identified by
the Commission of Inquiry into Land Tenures as a major deficiency in existing Australian legislation:

'In times of rapidly rising home and land prices, assessment of compensation by reference to fair market value at the date of acquisition may occasion substantial loss. Even with the most diligent attention on both sides and without disagreement as to the amount of compensation, it is likely to be three to six months between the date of acquisition and the date of payment of compensation. Where there is delay or litigation the elapsed time can extend to years. In such cases, an owner may find that compensation which was appropriate at the date of resumption is completely inadequate to enable him to buy a comparable home or vacant block of land when he finally receives payment. We regard this as unfair and consider that the principle should be that, if a home or site for a home is compulsorily acquired, the owner should receive compensation sufficient to enable him to provide for himself a reasonably comparable home or site'. (378)

The Commission recommended that provisions modelled on the Expropriations Act, 1969 (Ontario) should be incorporated in all legislation governing the assessment of compensation after compulsory acquisition. This is the 'home for home' principle which enables an owner of residential property, the value of which is less than the minimum amount sufficient to enable the owner to relocate his residence in or on premises reasonably equivalent to the acquired property, to be awarded an additional amount to constitute the difference. It was recommended further that the 'home for home' principle be supplemented by two explicit additions: that the principle be extended to include vacant land which is capable of lawful use for the construction of a single dwelling, where the owner does not already own a dwelling;
and that the relocation sum should include all expenses reasonably incurred in moving, such as legal expenses and charges on purchase of the new home, removalists' charges, and so on. Nevertheless, the intrinsic merit of the 'home for home' principle is not without its critics, on the basis that it operates inequitably between resumnees, and it has been rejected by the Australian Law Reform Commission in favour instead of loans to the owner. (379)

Both Australian Commissions would include, however, in respect to a home owner, a 'removal solatium' to compensate for the largely intangible losses and inconveniences caused by resumption of a home (necessity to change schools, dislocation of social, sporting and recreational associations, and so on). These are factors which would not be taken into account under an extended reinstatement principle, and since they are almost unquantifiable in money terms, both Commissions opted for a lump sum payment as the more equitable mode of compensation for them. The Law Reform Commission stressing that the amount, as an element of disturbance, should be entirely discretionary with the court which fixes the compensation. (380)

Goodwill. In resuming land, the acquiring authority does not acquire any business conducted on the land; but where goodwill of a business is localised in the land taken it may affect the value of the land to the owner, or the interests therein, whereas personal goodwill does not. (381) Goodwill is characterised as 'local' to the extent to which the trade connection depends upon the place in which the business is carried on, and 'personal' to the extent to which it is the personality, ability and good reputation of the trader which attracts the trade and not the place where it is carried on. To determine the nature of goodwill in any given case, it is necessary to consider the type of business
amid the type of customer which such a business is inherently likely to attract as well as all the surrounding circumstances. The goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and in part to the likelihood of competition, many customers no doubt being actuated by mixed motives in conferring their custom.\(^{(382)}\)

In *Commonwealth v. Reeve*,\(^{(383)}\) it was established that, although the profits of the business cannot simply be capitalised at a rate of interest and added to whatever is thought to be the value of the land (by reliance on *Pastoral Finance Association Ltd. v. The Minister* [1914] A.C. 1083), the assessment of the special value to the owner of his proprietary interest may be guided 'by weighing the effect such a consideration would have upon a person anxious to step into the owner's shoes in making his estimate of what he would give in order to do so and what effect it would have upon the owner in fixing an amount for which he would be ready to part with his interest'. Loss of goodwill, therefore, is not an independent item in the computation of compensation but, like disturbance, enters as part of the value to the owner.

An argument was put in *Reeve's Case* that it was improper to take account of the local goodwill in assessing compensation for a lessee's interest, where the lessee had remained in occupation of the premises after acquisition at the same rent for almost a year. This contention was answered by treating the continuance in possession merely as a postponement of the actual accrual of the claimants' loss and not as a reduction of the loss. In this case, the right or expectation of remaining tenants was of indefinite duration, but it was explained that different considerations would apply in the case of a defined term where an extension of the de facto possession of an expropriated owner
might operate in substance as a reduction of the residual period of which he had been deprived.

Pengley v. Commissioner for Railways\(^{(384)}\) is a case of the latter kind. The claimants occupied the premises as monthly tenants, and this occupation was protected by special legislation which was to remain in force until some six months after the resumption. The claimants were allowed to remain in possession of the premises for several years and paid rent at a rate equal to that paid prior to the resumption. It was held that the interest of which the resumption had deprived the tenants was confined to a limited right to remain in occupation of the premises until the expiry of the protective legislation. Since what was acquired, and had to be valued, was not the goodwill of the business but the claimants' interest in the land, the possibility that a purchaser of the goodwill might have been prepared to pay as much for it as if the vendor had a right to an occupancy of indefinite duration, taking a chance of either an extension of the protective legislation or the continued willingness of the landlord to continue the tenancy, was not a factor in assessing the compensation.

Special Value of Leases. Special value to the owner is not a concept applied exclusively to freehold interests. On the other hand, leasehold interests raise considerations of special value peculiar to those interests. The concept of special value, as applied to a lessee for a fixed term, involves paying regard to what a prudent hypothetical purchaser would consider were the prospects of being able to assert a right to retain possession for some period beyond the date of expiry of the lease and regard to any likely fluctuations in the agreed rent.\(^{(385)}\)
The interest of a lessee being limited to his right of occupancy for a definite period, the court's assessment of a leasehold interest will not take into consideration the possibility of the lessee obtaining further occupation at the expiry of the lease dependent merely upon the personal relations existing between the lessor and lessee. The rationale is that, while the claimant is entitled to be compensated for the residue of the term, changeable intentions about the residue do not constitute an interest in land. Only the ordinary business prospects of a renewal of a lease may properly be taken into consideration in determining the value of the unexpired term.

Attention is not restricted to the position of the lessee so that any enhancement of the reversionary interest of a lessor due to any special factors will also be considered. In Tooheys Ltd. v Housing Commission (N.S.W.), the plaintiff was the registered proprietor in fee simple of certain land upon which was erected a hotel. At the date of resumption the hotel was occupied by a licensed publican under a lease from the plaintiff for a term of three years. It was held that the plaintiff was entitled to have compensation assessed on the basis of the value of its interest in the land and also on the basis of improvements as licensed premises.

Similarly, in Bickle v. Commissioner of Main Roads, the impact of special covenants in a lease were taken into account. It was held that the value of the interests of the lessor in the premises should be fixed having regard to the capacity of the shop portion used for a breadmaking business, after termination of the existing tenancy and repossession, for any type of business appropriate to it, as reflected by the full economic rental which tenants would be prepared to pay for it, but without any special reference to the use of the
premises for the business of a baker. The factors which were considered were the fact that the agreed rent of the premises was less than the economic rent but in excess of the amount which probably would have been fixed if an application was made for determination of the fair rent, and the fact that the first half of the term of the lease had expired without manifestation of the tenant's unwillingness to adhere to his bargain and pay the full amount of the agreed rent.

Restrictions peculiar to the land. In assessing the special value of land, or an interest therein, conditions, reservations and restrictions on the use to which the land may be put must be taken into account. In Corrie v. McDermott, Crown lands were vested in trustees subject to restrictions as to use and alienation and to reservation of certain mineral rights. It was held that the value which had to be assessed on resumption was the value to the old owner who parted with the property and not the value to the new owner who took it over. In assessing such value the reservations and restrictions had to be taken into account, although the absence of a power of alienation did not necessarily reduce the value of the land to nil.

Insofar as this principle was not applied in A. G. Robertson v. Valuer-General or in Commissioner for Railways v. Andreas, in relation to an owner's interest in property which was affected by restricted tenancies, these cases are probably incorrectly decided. In the latter case, if the owners had submitted the premises for sale subject to the tenancies, the best price which could have been realised would have been substantially less than the price which could have been obtained if they had been able to sell them with vacant possession. It was held that the value of the fee simple was to be ascertained upon the hypotheses that the vendor could and did sell with a right to vacant possession. Not only is such a conclusion inconsistent with
the reasoning in *Corrie v. McDermott*, but the cases were decided before *Rosenbaum v. The Minister*, where the High Court established that the compensation payable to the owner in fee simple was the value of his interest after taking the tenancies into consideration.

**Potentialities of the Land**

The concept of special value to the owner, although not without its speculative elements, involves demonstrating that there is a quality of the land which is special by reference to the actual use to which it has been put by the owner. The value to the owner must be paid even if that value exceeds the market value. Where the market value of the land is being sought a different inquiry is undertaken in which reference has to be made to the best uses to which the land is reasonably capable of being put in the future. Ascertainment of market value, therefore, involves a far more obvious hypothetical exercise under which the valuation must take account of the possibility of the land being used for certain purposes without proceeding on the assumption that it is already being used for those purposes.

Determination of the economic potential of the land, therefore, proceeds on a different footing to determination of special value to the owner based on the land's special adaptability for the owner in a particular use. The facts of *Gunson v. Municipal Tramway Trust*, illustrate the difference. There it was said to be correct to assess the value of the land for a commercial purpose, where the acquired land comprised a residence and adjoining consulting-rooms of a medical practitioner and was situated in a position which was more suitable for a business site than a medical practitioner's residence. The special value of the property as a place for carrying on a medical practice was a separate consideration.
The distinction between the potentiality of land and its special adaptability to the owner is further illustrated by the fact that a court would not consider as relevant to a determination of value, based on potential, matters which affected the land after the date of resumption, since the determination by its nature is a speculative one related to the assessment of the land by a hypothetical purchaser at that date. By contrast, if subsequent events had the effect that 'uncertainty as to the future had been replaced by certainty' in respect to the question whether land had any special value to the owner in a particular use, a court undoubtedly would take account of those latter events, as was done in *R. Fowler Ltd. v. Department of Road Transport & Tramways.* (398) There an ordinance, subsequent to resumption, which had the effect of prohibiting extractive industry on the subject land, was considered to be immaterial to the market value of the land but material to the question whether the land had any special value to the owner for use in extractive industry.

Whether intentionally or otherwise, the subjective scope of the one concept and the objective scope of the other have been somewhat fused in certain cases in order to extend the principle regarding potentialities of the land to cases where there is but one likely purchaser: the authority which possesses compulsory powers of acquisition. The result is a concept of 'special value to the acquiring body'. In *Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam,* (399) the only possible purchaser of the special adaptability of the claimant's land as a water supply was the acquiring authority, and the water could not have been exploited by the claimant himself. The Privy Council held that the amount of the peculiar value to the resuming authority had to be taken into account and the compensation increased above the 'market' value of the land (although strictly speaking...
there was no 'market' as such). This approach has been adopted by the High Court as being correct in a case where there really is no market, but does not sit easily with the rule that no increase in value is permitted due only to the necessities of the resuming authority in acquiring the land.

Arising out of *Vyricherla's Case*, another factor which the High Court has taken into account, in measuring the value of land with all its potentialities at the date of resumption, is the construction of any improvements on the land by the acquiring authority prior to the resumption. Such construction may indicate that the land has a peculiar value to the acquiring authority within the meaning and context of the *Vyricherla* principle. In the *Geita Sebea Case*, improvements were made by the Crown and its licensees during the term of a lease and not in anticipation of resumption, whereas in the *Collins' Case* the improvements were made unlawfully by the council in anticipation of resumption. In both cases it was considered proper to fix the compensation figure by reference to the increased value given to the land by the improvements, but being careful, as was explained in the latter case, not to treat the costs of the improvements as coterminous with value.

In the *Collins' Case* the council had constructed a water reservoir and surrounding fence on subsequently resumed land without the consent of the owners. Barwick C.J. said the court was entitled to regard the council as a willing buyer, though the only buyer, and to have regard to the cost of construction of the part of the reservoir constructed on the land as a factor in the consideration of what the council as such a purchaser would give and the claimants accept for the land and all the improvements thereon. Gibbs J. pointed out it would
not be the first local authority which has been required to pay for resumed land compensation which has been fixed by reference to the increased value given to the land by work carried out thereon by the local authority prior to the date of resumption, and referred to Willoughby Municipal Council v. Valuer-General\(^{(402)}\) where the owner was entitled to the increased value of land accruing from road formation work carried out by the council prior to resumption. The court drew the distinction, however, between allowing this type of consideration and giving the owner the benefit of any enhancement in value of the land the existence of which was entirely due to the scheme underlying the compulsory acquisition: \(^{(403)}\) a very fine distinction indeed in the light of the circumstances surrounding these cases.

In *Anthony's Case*, Walsh J. applied the *Collins' Case* by explaining that while the claimant could not hold out for a very high price in order to secure, by that means, some recompense for the prior use of the land by the acquiring authority, the Commonwealth had to be considered as a potential purchaser which was likely to pay more for the land, in view of the improvements, than any other purchaser would pay. It was legitimate to take into account the fact that in the claimant's hands the improvements (pipelines) as structures or scrap would be of little value and that the unimproved value of the land was relatively small. Nevertheless, the claimant was entitled to the benefit of any addition to the value of the land which arose from the inducement that the Commonwealth would pay more for it then its ordinary unimproved value. In the result, it was probable that the claimant would be willing to sell at a price several times higher than the unimproved value, without insisting upon receiving as much as the full (depreciated) replacement costs of the pipelines.
It is interesting that the impulsiveness exhibited by the superior courts was not emulated by the New South Wales court in Bezjak v. Blacktown Municipal Council, where, for reasons which are not entirely persuasive, the court anticipated the distinction so imperfectly applied in Collins' Case. In that case the plaintiff claimed that the land should be valued upon the basis that it had a potentiality for commercial development or alternatively that it should be valued as land available for civic purposes. The court rejected an argument that since the owner had lost some economic potential of his land and that this potential had passed to the acquiring authority which would be able to exploit it commercially in a manner precluded to the resumed owner, the principle in Vyricheria's Case applied. That principle, it was said, should not provide a basis for its indiscriminate application to acquisitions for public purposes which do not entail profit-making or the conduct of any commercial or quasi-commercial enterprise.

In any event (and, it is submitted, for far better reasons), such an approach was not open where 'there was no prospect, or at the best only a remote and speculative possibility, of the subject land having any realisable potentiality for business or commercial development' at the date of resumption. Had the land not been proposed to be zoned for civic purposes, the probabilities were that it would have been reserved as open space or zoned residential 'A' so that commercial development would have been prohibited. Consequently, the proper approach was to value the land upon the basis of its residential use, since the land did in fact have a market for residential purposes.

Outside the special cases relating to the absence of a market, as Bezjak's Case illustrates, the economic potential of the land
generally will be influenced by planning restrictions and the like, although no weight has been given to a proposition that interim development controls affecting the subject land should be ignored on the basis that they may have been invalid. The land, therefore, normally will be valued according to the purpose for which it is zoned at the date of acquisition together with some assessment of the likelihood of any necessary consents being obtained. The provisions of a draft planning scheme likewise are relevant in the assessment of value.

Additionally, where land is suitable for subdivision its commercial potential will be considered, although the land must not be valued as if subdivided and planning restrictions, of course, could not be ignored in calculating the subdivision potential. The method of valuation in such a case was set out at length in Turner v. Minister of Public Instruction. There, no steps had been taken to subdivide the land in question, but it was considered proper to estimate the amount which the land, if promptly subdivided and placed on a ready market, would have realised, subject to deductions for an amount in respect of expenses of subdivision (including road construction), interest and rates incurred during the intervals between the date of resumption and disposal of allotments and probable expenses of selling. Further deductions were appropriate in respect to the risk of realisation (in other words, in case the first amount to be deducted was underestimated) and for an amount equal to the profit which a purchaser buying the land at the date of resumption would expect to make by reselling it in subdivided allotments.

Some confusion exists, however, as to the timing of application of the public restrictions which may properly be taken into the
Else-Mitchell J. noted that some distinction needs to be made between restrictions imposed as part of the acquisition process and those which arise in other ways. He said:

"In illustration, I should not have thought there can be any doubt that a law or regulation of general application imposing restrictions on the purpose for which lands in an area or locality can be used from time to time by all owners and occupiers is to be taken into account in determining compensation for resumption: residential district proclamations under s.309 of the Local Government Act, 1919, and zoning restrictions ... are of this character ... The reservation of land for a public purpose to be perfected or implemented by acquisition immediately or ultimately may be of the same character so that, with one possible exception compensation for the resumption of such land ought to be assessed on the basis of the diminished value of the land consequent upon the restriction to which it is subject, and the creation by s.342 AC of the Local Government Act of a right to claim injurious affection reinforces such a view. The one possible exception may arise, however, when the restriction is created or imposed by the acquiring authority solely for its own purposes and in anticipation of acquisition, because it is clear law that an acquiring authority cannot by administrative action sterilize or devalue a parcel of land in the course of and for the purpose of making it capable of acquisition at a reduced price: Woollams v. The Minister ((1957) 2 L.G.R.A. 338); East Sydney Australian Football Club Ltd. v. Woollahra Municipal Council (unreported)'.

That a distinction had to be drawn between the purpose for which
particular restrictions or reservations were created or imposed by the acquiring authority was said to derive 'covertly', in respect to price fixing restrictions in *Nelungaloo Pty. Ltd. v. Commonwealth*, and 'patently', in respect to other kinds of restrictions. His Honour acknowledged, however, that confusion existed as to the extent to which planning restrictions which affect the marketability of land must be taken into account, since earlier cases, such as *Cattanach v. Water Conservation & Irrigation Commission* and *Chapman v. The Minister*, had left unresolved the question in what circumstances, if any, under section 124, it is legitimate to depreciate the value of the land as a consequence of action taken by the resuming authority as a preparatory step to, or as part of the scheme of, resumption. In other words, the question relates to the converse of the distinction made in *Collins' Case* in respect to enhancement of value.

*Chapman's Case* did resolve any doubts which may have existed about the relevance of restrictions arising out of the reservation of land for public purposes where the restrictions are accompanied by a compensation right pursuant to section 342 AC of the Local Government Act. It remained, however, for the *Stocks & Parkes Investments' Case* to raise squarely the question 'which was found in *Chapman v. The Minister* not directly to arise', namely, whether a proposed scheme should be disregarded when the proposal is for the very works for which the land is resumed and there is no inchoate right to compensation under section 342 AC. The High Court responded with a seemingly simple distinction between a proposed zoning which affects the development potential of land and a proposal for a public purpose which entails acquisition of land and the development of some public work upon it. Only the former type of proposal was to figure in the estimate of value for compensation purposes. By reason of section 124,
which directs the court to assess compensation without reference to any alterations in value of the resumed land 'arising from the construction of any works upon the land taken', it was held that proposals of the latter kind always had to be disregarded (an interpretation which is discussed infra). The temporal point of application of the test, however, is not without its difficulties in the operations of a market where even unfounded rumours are critical.  

Alteration in value arising from Construction of Works

The words in section 124, as modified by section 536 C of the Local Government Act, relating to alteration of value arising from construction of works on the land taken, have not been the subject of definitive judicial interpretation. The wording in the unadapted section includes the rider 'or for which such land was resumed', and decisions relating to that particular formula may not be applicable, in all cases, to the Local Government Act requirement. Certainly, the axiomatic proposition that alteration in value means both increases and decreases in value is applicable. There is also support for a wide rather than a narrow construction of both versions of section 124, based in the principle of compensation established by English case law, independent of statutory provision, whereby the impact on value of resumed land brought about by the proposals underlying an acquisition was to be ignored.

The phrase, common to both versions of the section, 'arising from the construction of any works on the land taken', therefore, was construed generously by the Court of Appeal in Stocks & Parkes Investments Pty. Ltd. v. The Minister. The unmodified section 124
was simply accepted as having an established meaning for which reference was made to Woollams' Case; Black v. Commissioner for Railways (N.S.W.); Davy v. Leeds Corporation; and Nelungaloo Pty. Ltd. v. Commonwealth. These cases were relied on for a proposition that it is 'appropriate to forbid the taking into account of any "blight" which may have affected the land as a result of long public foreknowledge of the establishment of public works'. Accordingly, it was said that section 124 could not be regarded as dealing only with actual establishment of works on the land taken, but must deal also with a notional establishment relating back to a time before actual establishment. On appeal to the High Court, there is merely a passing reference that insofar as any alteration in value arose from the proposed establishment of works on the land, it had in accordance with section 124 to be disregarded.

Whether the modified section lends itself to any added wide construction, in the absence of the concluding words, is undecided. Without paying much heed to the exact formula, it was said in Woollams' Case:

'Properties resumed for public works are normally acquired during the period between the date on which the works are authorised and the date on which they are completed. In some cases they are acquired before any construction work ... commences; in other cases they are acquired whilst construction is proceeding. In either type of case the acquisitions of properties are part of the process of establishing the public works, just as the carrying out of construction work is part of that process. It matters not whether the construction work is to be carried out on the resumed properties so long as those
properties will ultimately constitute part of the public works'. (426)

Woollams' Case is also noteworthy for the observation that where a public work is proceeding during a period of high inflation (when values of real estate generally, and particularly the value of land used for primary production, are increasing), the depreciatory effect on value caused by the public work may not be to reduce value in terms of money but to retard the inflationary process and thus diminish the increase in value that would otherwise take place. The view of the court was that such an effect on value constituted an alteration in value within the meaning of section 124.

Severance

Compensation for severance has express provision in section 124, and compensation under this head is dependent upon an acquisition in which part only of the claimant's land is taken. The lands taken must be so connected with or related to the retained lands that the claimant is prejudiced in his ability to use or dispose of them to advantage by reason of the severence. The bare fact that before the resumption the claimant was the common owner of both parcels is insufficient, since in such a case taking of some of his land would have no different impact on the remainder than it would on his neighbour's land. (427)

It is a question of fact in each case, dependent upon its own circumstances whether what is called 'the unity of estate' is interfered with. As Lord Watson stated in Cowper Essex v. The Local Board of Acton: (428)

'I shall not attempt to lay down any general rule on this matter.
But I am prepared to hold that where several pieces of land, owned by the same person, are so near to each other and are so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act, so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

In Wilson v. The Minister, it was held that the land resumed and the land retained need not be absolutely contiguous in order that there should be a 'severing', so that the fact that a public road intervened did not prevent land being severed within the meaning of the then Public Works Act. The Queensland Land Court has held also that, where several groups of lands owned by the claimant were not adjoining one to the other but were worked as one station property, the properties were sufficiently unified to entitle the claimant to compensation for severance.

The Queensland court pointed out that the statutory additions to compensation, of damages for severance (and injurious affection), while they may add to the market value of the land, are generally part of the value of the land to the owner. This meant that the value of the land to the owner in his actual use of it had to be assessed together with damages due to severance and injurious affection (if any), but if in the result this total was less than the true potential market value of the land resumed, due to the fact that the owner was not making the best use of it, and it did in fact have a higher potential use and value, then that higher value became the appropriate value and severance was no longer relevant.
The method of determining the compensation payable in respect of severance is based on the difference between the value of the whole area of land before resumption and the value of the residue after resumption.\(^{(431)}\) Although the 'before and after' method is generally accepted as working fairly, its use has been criticised in a situation where there are no willing buyers, say for a one metre strip of land. In such a case the 'before and after' comparison is said to lead to inflated valuations, and the comparison should be made by valuing interests for which there is likely to be a market; in other words, it has been recommended that in such cases there should be a valuation of the whole plot of land before resumption and afterwards.\(^{(432)}\)

**Injurious Affection**

Where part of the land is taken and part retained, section 124 provides additionally for compensation to be paid in respect to damage caused by injurious affection, that is, damage to the retained part by reason of the proposed use to which the acquiring authority intends to put the resumed part.

'It may be that justice is administered of a somewhat rough character; yet that is the mode of ascertaining the compensation provided by the Legislature'.\(^{(433)}\)

A claim in respect to damage to adjoining lands, incurred prior to resumption is not competent under the head of injurious affection.\(^{(434)}\) Where a claim is competent, the purpose for which the resumption was effected, the powers which will be exercised, and the effect that these will have on the value of the remaining land of the owner must be
considered. Consequently, evidence of facts arising after the date of resumption, showing how the carrying out of the works for which the resumption was made actually affect the other land of the owner is admissible, since the description of the works and their operation are essential in order to found and test the opinions expressed about the injurious effect they would have. (435)

Where there is no evidence of subsequent events, the court has regard to the facts and circumstances, existing at the date of resumption, which the hypothetical purchaser and vendor would ascertain by reasonable and normal inquiries, including the possibility that forecasts might prove to be inaccurate. (436) Documentary evidence brought into existence in anticipation of the hearing, therefore, will be admissible if it is in accordance with the plans, proposals and intentions of the acquiring authority existing at the date of resumption and is ascertainable by a hypothetical purchaser negotiating for the acquisition of the property on, or immediately after, the resumption date.

The necessarily speculative nature of the assessment of compensation for injurious affection thus operates in favour of the acquiring authority where the precise nature and situation of any works are unknown at the date of the compensation claim. This is a consequence of applying the normal rule in assessing damages, namely that the figure must be fixed once and for all. It does appear, however, that a more lenient approach may have been taken when juries were used to assess compensation for resumption. In Wilson v. The Minister, (437) for instance, several parcels of land of a total area of 230 acres were resumed for the purpose of erecting powder magazines and associated purposes. No work had been done on the resumed lands and evidence was given to show that it was not proposed to erect the magazines on the plaintiff's land.
Nevertheless, the jurors were held entitled to take into consideration the fact that there was a possibility of the magazine being erected on the plaintiff's land and that there might arise injurious affection to the plaintiff's retained land.

There is some uncertainty as to whether compensation for injurious affection is limited to allowance for depreciatory effects exclusively traceable to the construction and use of works on the acquired land. In *Commonwealth v. Morison*,(438) it was held that the effect produced in relation to the retained land by the use partly of former land of the claimant and partly also of land in different ownership (in this case, for the extended use of an airport) could not be ignored. Barwick C.J., McTiernan and Walsh JJ. were of the opinion that where it is possible to isolate the depreciatory factors to the specific use of the acquired land, it would be proper to confine the depreciation in value to the effect of those factors. By contrast, Menzies and Gibbs JJ. took the view that regard is to be had to the whole purpose for which the land was acquired and not merely to so much of the purpose as is to be fulfilled upon the acquired land.

The wording in section 124, 'the damage caused by the severing of the land taken from other lands of the owner or by the exercise of any statutory powers by the council otherwise injuriously affecting such other lands', differs from the wording of the section before the High Court, but is similar to the wording of section 63 of the *Land Clauses Consolidation Act, 1845* (U.K.), decisions upon which were not 'necessarily inapplicable to the assessment of compensation' under the section in question. Those decisions probably would not support the wider view.(439) It is in recognition of this interpretation that Part 1 of the *Land Compensation Act, 1973* (U.K.) now specifies that
injurious affection compensation is to be assessed by reference to the whole of the works and not only to the part situated on the acquired land. It is significant, however, that the provisions extend to persons adversely affected by public works who did not have land acquired, and thereby meet the criticism from the federal Canadian Law Reform Commission, that the wider approach was unsuitable if other landowners in the area who had no land taken, but who suffered similarly, have no compensation. (440)

The narrow view emphasises that, although there is an apparent resemblance between injurious affection and private nuisance, there is a clear division between them. Injurious affection is confined to damage done to retained land arising out of depreciatory impacts of the exercise of statutory powers on acquired land, and this necessitates some fine distinctions being drawn on the question whether annoyances such as odours, smoke, fire risks, smuts and vibrations may be considered as depreciatory effects on the money value of retained land. (441) On the other hand, this valuation approach, as compared to a tort approach, extends to a consideration of what is expected to happen and includes any loss in land value so that injurious affection may cover circumstances beyond the traditional scope of private nuisance. (442)

It also is important not to confuse injurious affection in the above sense, and confined to severed property, with the limited right to compensation for injurious affection arising under planning scheme proposals, as created by section 342 AC of the Local Government Act. Provided that a prospective right to compensation in the latter sense exists, (443) then a resumed owner is entitled to have it taken into account as a loss attributable to the resumption. However, the prospective restrictions under the proposed planning scheme cancel out the
(444) The land, therefore, in such a case is valued by ignoring both factors, as if the possibility or prospect of both the planning scheme and the attendant injurious affection did not exist. No departure from this approach is warranted by the fact that, despite the accrual of a claim for compensation under section 342 AC, the restrictions on use would limit the field of actual purchasers or even reduce the field to nil in some cases. (445)

A similar approach has been adopted for land subject to interim development restrictions. In Commercial Banking Co. of Sydney Ltd. v. Penrith City Council, (446) it was held that, although no express provision was made for injurious affection in respect of land subject to interim development control, compensation for acquisition of land zoned or reserved under an interim development order for a public purpose must be assessed on the assumption that the land would, at the date of prescription of the scheme, be so zoned as to give rise to an injurious affection claim. Thus the hypothetical purchaser at the date of resumption would regard himself as having an inchoate claim for compensation for injurious affection, which would cancel out any decrease in value resulting from restrictions imposed by the zoning.

Enhancement

Linked to injurious affection, but by no means its antithesis as the name may suggest, is the concept of enhancement. Under Section 124, the court's obligation to assess compensation, without reference to any alteration in value of the resumed lands arising from the construction of any works upon the land taken, is subject to a significant qualification:

'Provided that the court in ascertaining such compensation shall take into consideration and give effect to, by way of set-off or
abatement, any enhancement in the value of the interest of any such owner in any land adjoining the land taken or severed there-from by the construction of any works on the land taken, but in no case shall this proviso operate so as to require any payment to be made by such owner to the council in consideration of such enhancement of value as aforesaid.

This proviso to the modified section 124, varies from its Public Works Act prototype which uses the expression 'construction of the authorised work' in lieu of 'construction of any works on the land taken'. A submission that the variation in expression was a variation in substance was rejected in Brell v. Penrith City Council. The court would not accept an interpretation of the section which would require it 'to shut its eyes to the fact that such works were part of an entire project'. It was considered to be an unrealistic approach to take into account only enhancement by the construction of works 'on the land taken' and an approach which was not justified by the terms of the relevant section. The phrase 'on the land taken' accordingly was treated as referring to the whole of the land taken by notification of resumption and not merely land of the claimant.

In Brell's Case it follows also that the value of the residue may be increased to such an extent as to extinguish any claim for compensation in respect of the resumed land. In point of principle, the court could see no reason why the assessment of compensation in cases where an enhancement factor is entailed cannot be reached by the same process which is applied where diminution by severance is alleged, namely by ascertaining the difference between the value of the whole area of land before resumption and the value of the residue after resumption. On this basis, the claimant was deprived of any compensation.
While such a result may seem unjust, it arises from legislation which:

'... embodies a crude and limited attempt to establish the "betterment" principle, which contemplates making the member of the public whose property derives advantage from a public undertaking pay for that advantage, or under the Act now in question (Public Works Act, 1888), account for it, when he seeks compensation for any deprivation of or injury to his property in the carrying out of that undertaking'.

The final words to the proviso limit, however, the extent to which the resumed owner may be made accountable.

In arriving at the enhancement which has to be set off, regard must be had to the owner and the manner in which he is using the residual land at the time when it is suggested the enhancement has accrued, or will accrue, and the court has to determine what a prudent person in the position of the claimant, and acting reasonably, should do.

In the Blackwell Case, the issue was whether the claimant should continue to work the unresumed portion as loam pits or apply the land to sub-division. The court considered the former pursuit as the more reasonable, in which case there was no enhancement effect by the construction of a railway, and enhancement was allowed only in relation to a small portion of land which the claimant intended to retain for a home.

The operational effect of the proviso depends also on the nature of the 'works' underlying the resumption. In Parkes Development Pty. Ltd. v. Burwood Municipal Council it was submitted that any increase in value to the residual land of the claimant resulted, not from the

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carrying out of work on the resumed land, but rather from the manner in which the land would be used (as a public park). Hardie J. was satisfied that the proviso in section 124 did apply and his decision was upheld by the Court of Appeal. However, while the latter court held that the construction of a park was capable of being a 'work' within the proviso enhancing the value of adjoining land, it suggested that if land resumed for a park was going to be left as it was in an undeveloped state then its mere reservation would not amount to 'the construction of any work'.

Wallace P. and Walsh J.A. also were of the opinion that the operation of the proviso is not limited to deducting an amount for enhancement only where there is a claim for damage by severance, otherwise the final words to the proviso would serve no purpose. This observation is in keeping with the decision of an earlier section providing for enhancement, namely that the proviso did not make lands injuriously affected correlative with the lands which may be enhanced in value.

344. Cf. The Law Reform Commission in Ontario concluded that there should be complete indemnification for losses resulting from acquisition and that the items should be explicitly stated rather than left to judicial deliberation. This was done in the Ontario Expropriations Act, 1968, and The Law Reform Commission of Canada, Working Paper 9, 'Expropriation', 1975 concluded that the modified code approach adopted in the federal legislation in Canada greatly assisted the determination of compensation. Similarly, The Law Reform Commission (Australia), in Discussion Paper No. 5, 'Land Acquisition Law: Reform Proposals', (1977) at 14-15, and Working Paper No. 8, 'Lands Acquisition Law', December 1977, at 121, recommended that loss should be no more than that actually suffered, and that compensation rights should be specified by statute commencing with a principle to that effect and followed by statutory guidance in its application. The Interdepartmental Committee on Land Acquisition Procedures in New South Wales (January, 1978) at 1002-1003, rejected a statutory 'just terms' approach and likewise favoured an explicit statutory code.


347. The Interdepartmental Committee, at 1037, recommended that the latter special rules should not be retained.


349. (1907) 5 C.L.R. 418 at 432, 435, 436, 440, 441.


351. Nelson v. Housing Commission (N.S.W.) (1962) 8 L.G.R.A. 408 at 411. The courts also pay attention to principles of compensation applied


358. (1965) 11 L.G.R.A. 16. In rejecting an argument advanced in favour of abolition of the value to the owner test, The Law Reform Commission (Australia) in Working Paper No. 8, 'Land Acquisition Law', December, 1977, at 120 commented that there is no evidence to suggest that Australian lawyers or valuers have ever laboured under a misconception that sentimental value is recoverable under the formula.

359. *Parkes Development Pty. Ltd. v. Burwood Municipal Council* (1968) 16 L.G.R.A. 6. See also C. A. MacDonald Ltd. v. South Australian Railways Commissioner (1911) 12 C.L.R. 221. *Unlawful users,* of course, are excluded as a matter of public policy, but the law Reform Commission (Australia), in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 138 recommended that the court should be specifically directed to disregard 'any increase in value occasioned by use in a manner contrary to law'.


363. *Hurd v. The Minister* (1957) 2 L.G.R.A. 132. The Law Reform Commission (Australia), in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 133, pointed out that the hypothetical purchaser is an anonymous purchaser. Although he may be a speculator, this aspect is taken into account in valuing the potential of the land, as discussed infra.


365. (1945) 70 C.L.R. 459 at 492.


367. [1941] 2 K.B. 26; 1 All E.R. 480. This position was codified in the Canadian federal legislation to eliminate the possibility of double recovery. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 154, likewise recommended retention of the rule which had been criticised but which had not resulted in any apparent injustice.

368. [1957] 1 Q.B. 485 at 507.

369. 34 Q.C.L.L.R. 140. Cf. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, considered that the requirement of directness may result in a too narrow approach, and recommended the natural and reasonable consequence test.

370. [1965] 1 All E.R. 443. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977 at 152, agreed with criticism of the decision and with a recommendation that an analogy should be made with tort liability, whereby the wrongdoer is required to take his victim as he finds him, and that accordingly the personal circumstances of the claimant, such as age and state of health should be taken into account.

371. See, for example, *Langer v. Brisbane City Council* 11 Q.C.L.L.R. 138 where the court left unanswered the issue whether a contract with an apprentice was part of the claimant's interest in a lease or merely a personal matter between him and his apprentice.

372. Cf. A delay in an orchadist being able to prepare new ground, for the same purpose of business which was disrupted by resumption, was treated under the heading of disturbance in *Lanarkshire and Dumbarton Railway Co. v. Mann* [1895] 22 S.C. 912.

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374. Id 219.

375. (1945) 70 C.L.R. 459 at 491.


380. The Law Reform Commission went into further detail about repayment facilities and transfer rights at 175 of the Working Paper.

381. See Munro v. Commissioner for Railways (1951) 11 Valuer 332, where the relevant authorities were referred to as being clear on the point. Cf. Brown, Land Acquisition (1972) at 251, where he states that it is not clear whether local goodwill is to be reflected in market value or special value to the owner.


384. (1951) 69 W.N. (N.S.W.) 25.


390. [1914] A.C. 1056. Restrictions of a more general kind will be discussed infra in relation to the economic potential of the land. More general restrictions are also relevant, of course, in the assessment of the viability of particular projects which are relied on to establish special value, as noted at fn. 359.

391. (1952) 18 L.G.R. (N.S.W.) 261.


396. C. A. MacDonald Ltd. v. South Australian Railways Commissioner (1911) 12 C.L.R. 221.

398. (1951) 18 L.G.R. (N.S.W.) 113.


401. Geita Sebea v. Territory of Papua ibid; Commonwealth v. Reeve (1949) 78 C.L.R. 410 at 418. The approach, in fact, was strongly criticised by The Law Reform Commission (Australia), Discussion Paper No. 5, 'Land Acquisition Law : Reform Proposals', (1977) at 14-15 and Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 127. The Commission believed 'value to the taker' should be excluded on both an actual and hypothetical basis, in order to prevent windfalls due only to the particular need of a statutory authority. (The issue is pursued further in non-market valuations in Chapter Seven).

402. (1934) 12 L.G.R. (N.S.W.) 41.

403. Enhancement is discussed as a separate topic infra.


410. (1956) 95 C.L.R. 245.


412. (1948) 74 C.L.R. 495 at 513.

413. Id at 541, 544, 587-588.


416. Discussed under Injurious Affection, in this Chapter infra.

417. The Law Reform Commission (Australia) in Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 145-146 described the distinction as 'unworkable', a description found demonstrated by the cases which attempted to apply it, such as Pandu v. Colo Shire Council (May 25, 1976, Land and Valuation Court). Cf. Bezjak v. Blacktown Municipal Council (1969) 18 L.G.R.A. 281, decided before the Stocks & Parkes Investments Case, where the court ignored the specific proposal for the public purpose but took into account the likely development potential of the land in the light of general zoning proposals.

418. But are in issue in Pandu v. Colo Shire Council noted above, and currently on appeal.


421. [1971] 1 N.S.W.L.R. 932.

422. (1890) 11 L.R. (N.S.W.) 160.


424. (1947) C.L.R. 495 at 571.

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426. (1957) 75 W.N. (N.S.W.) 103 at 108. See also Brell v. Penrith City Council (1965) 11 L.G.R.A. 156 discussed infra.


428. (1889) 14 A.C. 153 at 166.

429. (1908) 8 S.R. (N.S.W.) 427; 25 W.N. 117.


436. Cohen v. Commissioner for Main Roads (1968) 15 L.G.R.A. 427, the court indicating that insufficient regard was paid to such a possibility in Moad v. Orange City Council (1957) 2 L.G.R.A. 171 at 175.

437. (1908) 8 S.R. (N.S.W.) 427; 25 W.N. 117.


442. In Duke of Buccleuch v. The Metropolitan Board of Works (1872) L.R. 5 H.L. 418, compensation for injurious affection included depreciatory effects attributable to loss of privacy. Cf. The Law Reform Commission (Australia), ibid suggested that it may be possible to frame entitlement by reference to the law of nuisance, with the addition of specific factors.

443. Discussed in more detail infra.


448. Some support for this view was seen in Woollams v. The Minister (1957) 75 W.N. (N.S.W.) 103; 2 L.G.R.A. 338 at 344-346.

449. Harris v. Lee (1900) 21 L.R. (N.S.W.) 173 at 186; 17 W.N. 39, dealing with a forerunner to the present section 124. Cf. The Law Reform Commission of Canada, in its Working Paper 9, 'Expropriation', 1975, recommended that only increases in value of the remaining land flowing from the construction or use or anticipated construction or use of the work in question which are 'beyond the increased value common to all lands in the locality' should be set off against the total compensation payable. The Law Reform Commission (Australia) in its Working Paper No. 8, 'Lands Acquisition Law', December, 1977, at 281-282 took the extreme opposite view and did not countenance any allowance either
for injury to or enhancement of retained land, and recommended instead adoption of a broad-based injurious affection approach, with questions on enhancement excluded from compensation for compulsory acquisition. The public purse, said the Commission, should be replenished by general betterment legislation.


CHAPTER SEVEN

EVIDENCE OF VALUE

Despite the liberalisation of the concept of value in compulsory acquisitions by use of the 'value to the owner' principle, market value is still the primary basis for determining compensation. Market valuation entails questions of mixed law and fact, in which each of the factors relevant to value has to be weighed and its influence on the market estimated and evaluated. The process of determining the value requires presentation of evidence of the physical and other attributes of the land and of its potentialities. The task of the court assessing the compensation is to accept in whole or in part such of the evidence as it regards cogent and to weigh it in the light of established rules. The exercises which this task involves are far from scientific, and the force of the following observation by Lord Hobhouse has not been diminished with the passage of time:

'It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinions which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has his own set of conjectures, of more or less weight according to his experience and personal sagacity'.

Nevertheless, the courts in receiving value factors must follow rules of evidence. In general terms, the rules which are invoked have been described as relating to evidence of two classes:
'The first class of evidence is that which has a direct bearing on the subject matter. The second class is evidence relating to collateral facts which if proved tend to throw some light on the subject matter. With regard to the first class, that evidence is absolutely admissible. With regard to the second class the presiding judge has a discretion as to its admissibility'.(455)

The wide range of circumstances which may be found relevant to the value of the land, and hence admissible, include:

'(The land's) situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the fair value of the property'.(456)

Since the value of land, therefore, necessitates an inquiry into questions on which inexperienced persons are unlikely to be capable of forming sound judgements, the opinion of witnesses possessing peculiar skill in forming such judgements is also admissible to assist in the inquiry.

The rules do not prescribe any particular method for assessing the factors, rather it is considered wise:

'To pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment to fix what, upon considerations this process suggests, appears to be a fair compensation'.(457)
This does not mean, however, that where valuations are made on different bases by different experts that the court should average them out.\(^{(458)}\)

**Comparative Sales**

Since the value of land is essentially a matter to be proved by expert evidence, the principal evidentiary issue in resumption cases is the relevance of matters which test the opinion of experts and other witnesses.\(^{(459)}\) One of the strongest factors in the formulation of expert opinion is the price at which comparable land is being sold. This also is said to be one of the most effective tests of the worth of an expert's opinion.\(^{(460)}\)

The expert must give legal evidence of comparative sales. The expert may give evidence that he has experience of sales in the district in which land is resumed and that he has kept in touch with sales not made by himself. He may give direct evidence of comparative sales to support his valuation of the land in question, but 'he has no privilege beyond any other witness to speak in detail of the prices realised for other lands unless he can give legal evidence of such sales, or that evidence has already been given'. In other words, the expert witness has no special immunity from the hearsay rules and this principle applies whether the evidence is given in chief or in reply.\(^{(461)}\)

The sales relied upon must be truly comparative, and their relevance must be proved by adducing evidence of the conditions attending the transactions to show they were so nearly like those relating to the resumed land.\(^{(462)}\) Where there are abnormal external circumstances alleged, such as where there is a boom in land, such circumstances must
also be evidenced by transactions. It is not enough simply to state that the sales were made under boom conditions. The abnormality may, however, merely relate to the transaction in question. 'Off market' sales, for instance, have been given little, if any, evidentiary weight where effected between relatives, by mortgagees, or between two companies which although distinct personae in law, are in a business sense identical. On the other hand, a sale which is said to be for a special purpose, in the sense that the purchaser's needs are urgent and there is a shortage of available land, will not be rejected as not being comparable unless there is clear evidence to that effect.

In the Hollinsworth Case one of the experts had discarded certain sales, not primarily on the ground of incomparability, but on the ground of lack of prudence in the purchasers. The court found that the purchaser in each case was acting under expert advice and was itself a well-established and experienced organisation. On this basis, there was no evidence that the purchasers were other than 'willing but not anxious' purchasers. On the question of imprudence, the court held that if 'a sale, regular on the face of it, is to be criticised on the basis that the purchaser was in some sense imprudent, then evidence in support of that criticism must be adduced conformably with the recognised rules of evidence'.

Where sales are not strictly comparable then all relevant adjustments must be made in accordance with the particular circumstances of the case. In a recent case before the Privy Council, an expert valuer had made adjustments to cover differences in the date of sales, in size, in situation, in level and in access. The subject land was largely undeveloped while the comparable land contained some improvement.
The High Court of Sarawak gave judgment based on these adjusted figures, but the Federal Court, on a rehearing, reduced the award because the valuer had not taken into account risks associated with developing the subject land.

On appeal, it was contended that there were two clearcut and alternative methods of valuation, one being derived from comparable sales and the other based on an estimate of the value of the land as developed with deductions of an appropriate amount for delay and other contingencies, and since the valuer had adopted the former method it was false criticism that he had omitted factors appropriate to the latter. The appeal was dismissed, however, inter alia on the ground that if the comparison was to be relevant it was necessary to take account of the different potentialities of development, even though the figures for sales of the comparable land already reflected development potential.

Sales to the Acquiring Authority. Evidence of comparative sales has been equated with evidence of voluntary sales of similar land in the same locality at or about the date in question. (469) 'Voluntary' sales were said to exclude 'sales by the sheriff, sales in bankruptcy, resumptions and similar sales where the owner of the land is not free to do as he likes'. (470) On the other hand, in Woollams v. The Minister (471) there was said to be no principle of law which required the court to reject completely evidence of sales to the acquiring authority shortly before or after the relevant date. Such sales had to be used with considerable caution, however, bearing in mind that the vendors would know that the statutory power of resumption would be resorted to if a negotiated sale was not made.

The latter view was accepted in Jovist Pty. Ltd. v. Campbelltown
City Council,\(^{(472)}\) where sales to the acquiring authority represented the only evidence on which to base a valuation. It was decided that a hypothetical purchaser, purchasing at the date of resumption, would appreciate that the best value of the land lay in a sale to the defendant council as the authority entrusted with the redevelopment of the area. Similarly, in Brell v. Penrith City Council,\(^{(473)}\) evidence of businessmen who released the council from claims of compensation was accepted as being relevant to valuation for enhancement purposes since the releases evidenced sales to the council at a minimum or no price, despite the fact that the council had powers of compulsory acquisition. The court found 'it difficult to believe that experienced businessmen and established companies carrying on business for profit should relinquish claims if they did not really believe they had gained an overall advantage from the resumption'. The case also postulated further departure from a narrow approach to comparable sales by rejecting evidence of sales of comparable sites in Parramatta, not on the basis that they were sales from a different locality, but 'for one main reason, namely, the existence of a prescribed planning scheme for Penrith and the absence of such a scheme for Parramatta'.

The more liberal approach adopted in recent years by the New South Wales courts also has support outside New South Wales. Prices paid on purchases made by the acquiring authority were held to be admissible in evidence on a compensation claim, in Dixon v. Glenorchy City,\(^{(474)}\) in the following circumstances: where there is no other evidence of value in the locality; where the acquiring authority bought the properties on the open market; or, at a time when there is no thought of compulsory acquisition, the owner offered the property to the acquiring authority at a figure about which there is no query.
Sales subsequent to acquisition. Comparable sales subsequent to resumption may be taken into consideration. The tendency of the courts is to admit evidence of any events prior to the date of the trial which will throw any real light on the issues, as in Bowden v. Housing Commission (N.S.W.), where subsequent sales of comparable land in the vicinity of resumed land were taken into consideration when valuing the resumed land. Although at the time of such sales it was known that the subject land had been resumed, it was proper to have regard to them in view of the fact that the value of the land resumed was ascertained on a subdivisional basis and the subsequent sales were made upon the assumption that the resumed land would be so subdivided.

Other Dealings with the Acquired Land

Earlier sales. The price paid for the acquired land, within a reasonable time of the resumption, in a genuine transaction, is admissible evidence on the market value of the land. All the terms of the sale, however, must be considered in order to see whether the price is the best evidence of its value. Where the price paid is imprudent it will not provide cogent evidence of value. Where the plaintiff was an over-anxious buyer and there was a downturn in values in the locality between the dates of sale and resumption, the total purchase cost would be only some evidence of value. Even a price paid only some eight weeks before a resumption may not be a true indication of market value if the land was bought below the then current market value.

Offers in relation to the Acquired Land. The early established view was that an offer made to an owner is not evidence of value.
In *McDonald v. Deputy Federal Commissioner of Land Tax (N.S.W.)*\(^{(483)}\) the rejection of evidence of an offer to purchase the subject land was said to be based in the reasoning that, whereas a concluded contract established a definite concrete fact by indicating a consensus of opinion between two adverse parties in the community, negotiations which do not end in a concluded bargain leave the field open to a multitude of other considerations before the same point of opinion is reached. The court was prepared to say only that an offer of sale by the owner, at the most, would constitute evidence of the owner's *bona fide* belief at that time as to the value of his land. The decision in *Harris v. Sydney Municipal Council*\(^{(484)}\) was also approved, where the weight of authority (mostly American) was said to justify holding inadmissible evidence of a witness, not an expert in land values, who had made an offer to purchase land in the vicinity of resumed land.

Thus, in a case dealing with compulsory acquisition of a ship, William J., after stating that he could see no reason why the amount of compensation for the taking of a ship should not be ascertained in accordance with the ordinary principles relating to the compulsory taking of any property (real or personal), referred to *McDonald's Case* when holding that offers are not evidence in Australia of the value of property taken compulsorily.\(^{(485)}\) However, he also rejected the evidence on the ground that it was not a firm offer but only a request for information. A few years later, the High Court in *Nelungaloo v. The Commonwealth*\(^{(486)}\) had occasion to consider the issue *obiter*, and queried the confining of admissible evidence to concluded contracts. In doing so, reference was made to English authority which appeared to admit evidence of offers to purchase.

Those comments of the High Court, and others in *Marcus Clark &
Co. Ltd. v. Commissioner for Railways (487) were taken up in Blefari v. The Minister. (488) Though conscious that evidence of such a character may not be properly admissible in determining market value, the Land and Valuation Court, nevertheless, admitted a written offer of purchase received by the claimant prior to the resumption. It was said that the probative value of an offer must depend upon it being in the nature of an open offer by a potential purchaser, but when, as in this case, the offer was conditional upon acquisition of adjoining land its weight was slight, if not negligible.

Courts in other State jurisdictions likewise have been inclined in recent years to minimise the influence of McDonald's Case. The Queensland Land Appeal Court drew a factual distinction between McDonald and the case before it in Remanous v. Brisbane City Council. (489) That court held admissible a contract entered into between the dispossessed owner and the resuming authority prior to resumption, and later abandoned at the request of the owner, because it represented a concluded bargain even though the full purchase money did not pass in exchange for possession of the land. In Phillipou v. Housing Commission of Victoria (490) it was held that although offers made by an owner of adjoining property to buy the property in question are not proof of value, they are to be taken into consideration in determining the value of the land. The likelihood of the owner of the adjoining property buying the property and being willing to pay something more than market value for it because of its position in relation to his property was just another question of fact for the relevant tribunal.

Valuation made for Other Purposes

The Privy Council has held that principles which determine questions
of compensation for resumed property are not of assistance on questions of rating assessment.\(^{(491)}\) The converse also is true by inference from Commissioner for Railways v. Andreas\(^{(492)}\) where the court emphasised the difference in the basis of valuation for rating and other purposes and for the improved value of resumed land. That difference had earlier been explained in dictum of Dixon C.J. as follows:

>'There is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation, doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate'.\(^{(493)}\)

Although it appears from an application of sections 5, 68, 70 and 76 of the Valuation of Land Act, 1916 that a valuation by the Valuer-General would provide \textit{prima facie} evidence of value of land for the purposes of compensation on resumption, except for items of special value or disturbance, and, therefore, provide the same base value for revenue and compensation purposes, the position is not that simple. It has been held that the result of section 9 (1) of the Land and Valuation Court Act, 1921, which requires the court to give effect to any provision of the Act under which the valuation is required, is to repeal the application of those Valuation of Land Act provisions. Since the Valuer-General's certificate is confined to valuations for purposes of Part VI of the 1916 Act and the purpose of compensation
for resumption under the Public Works Act may be regarded as repealed, the certificate is not a certificate under section 70 and is not admissible in evidence under section 76 of that Act. (494)

Provided, however, there is some common factor between a valuation made for other purposes and the valuation of the land for resumption purposes, that other valuation may be admissible. In Harris v. The Minister for Public Works, (495) a stamp affidavit had been sworn for probate some thirteen years before the land was resumed. The Court of Appeal held this evidence had been wrongly rejected. Although it was quite clear that it would not be evidence of the value of the property when it was resumed, there being no sufficient connection between the values at the two dates, it was said to be admissible because one of the witnesses stated in cross-examination that the value of the property had doubled easily since the date of the affidavit and the affidavit thus became relevant in establishing a standard of comparison between the values at the two dates in question. By a majority, the High Court reversed the Court of Appeal but on the basis that the affidavit could not be made relevant simply by putting the question in the form of a proportion between two sums, if the proportion itself is irrelevant. (496) Isaacs J. believed it was admissible, but if it had been admitted a verdict based upon it would, in view of the other evidence, have been such as no reasonable jury could have found.

Other Methods of Valuation

Although the courts have indicated a preference for the comparable sales method, this evidence is not always available. Even where it is, the courts often pay regard to other methods as a check on accuracy. The choice of other methods is a matter primarily for the expertise of
professional valuers, but subject to the control and guidance of the courts. Thus the courts may disapprove of the manner in which value has been ascertained because the method chosen by the valuer is inappropriate having regard to the particular circumstances of the case, as in *Brell v. Penrith City Council* where the court was unimpressed with the valuer's use of the Somer's depth curve to discount the frontage value of land according to the depth where the rear portions had independent access to a public lane.

The appropriateness of the method, however, should not be confused with the relevance of matters which affect compensation rather than market value. For instance, the valuer's choice in valuing improvements does not extend to making qualitative judgements about how an improvement came to be there: he is to recognise it as being there and value it. Thus the landowner is entitled to the benefit of any work done by bush fires, being the difference between the value of improvement as done by the bush fires and what it would have cost to carry out the work himself. Even where an improvement derived from illegally-taken filling, the improvement had to be valued, although the court doubted that the claimant could make advantage for compensation purposes of his tort as compared to pure accident in contributing to the improvement.

**Non-market Valuations.** There are cases where evidence is not available at all by means of sales of comparable properties because, for instance, the market may be artificially controlled, no similar land may be available for purchase, or similar land may be subject to such restrictions on sale as to preclude comparable data. In these cases, an alternative to the comparable sales method obviously has to be relied upon.
To cope with the special circumstances of war-time controls on land prices, where the controls were of a temporary nature only, the High Court developed the notion of a 'retention value'. The test of market value was adapted in recognition of the fact that it would be 'unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held that land until controls were abolished, to be able to sell the land at an enhanced price' (501). An additional sum, therefore, was allowed to represent the value of the land to the owner, founded on his loss of liberty to retain the land until he would have been free to dispose of it for more than the controlled price.

In Thistlethwayte's Case, the Privy Council approved the reasoning of the High Court and admitted evidence of prices obtained on the cessation of land sales control shortly after resumption. This evidence was said to be relevant in giving some indication of the volume of demand and level of prices which might have been expected to have existed at the date of resumption. It was a question of degree in every case at what stage such evidence became inadmissible or wholly irrelevant, but in the case before the Privy Council the conditions prevailing when land sales control ceased were not so different from those which must have been deemed to have existed at the time of the hypothetical sale assumed in the formula for assessing the measure of compensation.

Subsequent considerations of the retention value approach in New South Wales have suffered from the uncertainties surrounding the whole concept of special value (or value to the owner). For instance, in Millgate v. The Minister (502), the court found that land subject to sales control at the time it was resumed must be valued at the sum which a vendor could reasonably expect to obtain if the market were
free, but from a purchaser who was himself subject to control. By contrast, in *Ryde Brick & Tile Works Pty. Ltd. v. The Minister*, it was held that in valuing land, the sale of which is subject to control, there should be taken into consideration the fact, inter alia, of the presence in the market of an uncontrolled purchaser as to whom there is sound foundation for the belief that he would be prepared to pay a higher price for the land than that which any other purchaser could lawfully pay. Although this court also said that the value is not necessarily the same as it s value would be during a period of no control, it does depart from the established retention value approach.

In other cases where a free market is absent, as where the acquiring authority is the only possible buyer, little assistance has been provided by the courts. While maintaining that the scheme of acquisition itself should be left out of account, insofar as it may affect value of the land taken, the courts have given no guidance as to what may be considered by the valuer beyond inviting him to present the court with 'such materials as are available'. *Vyricherla's Case* contributed nothing by the generality of the court's holding that, where the acquiring authority is the only possible purchaser, an arbitrator must ascertain to the best of his ability the price which would be paid by a willing purchaser to a willing vendor, having regard to the particular potentiality of the land, in the same way as he would where there was a number of purchasers.

The trenchant remarks of The Law Reform Commission (Australia) that it is wrong, in fairness and logic, to allow an owner a sum representing value which could only be realised by a statutory authority with special powers, did not deal directly with how the land is to
be valued where there is no market. However, while the remarks predicate that in the cases criticised by the Commission there was some market value to which a figure was simply added, there is also an implication in the remarks that where no market can be identified then there is nothing to value. (507) Furthermore, the issue was taken up indirectly in respect to relocation losses in the suggested compensation formula as follows:

6. Where, at the date of acquisition, land is, and would but for the acquisition continue to be, devoted to a purpose of a nature for which there is no general demand or market for land and the claimant has re-located, or genuinely intends to re-locate, that purpose in reasonably alternative land suitable for such purpose the Court may assess compensation by adding:

(a) the cost of acquiring such alternative land and
(b) the cost and losses incurred or likely to be incurred by the claimant as a result of, or incidental to, re-location;

in each case calculated as at the date when, in all the circumstances, it was or would be reasonably practical for the claimant to incur the cost or losses and:

(c) by deducting from such sum the amount, if any, by which the owner has improved, or is likely to improve, his financial position by such re-location'.

In other words, comparable relocation costs would be the measure of compensation rather than a value derived from a fictitious market (508) for the sale of the land, and the current difficulties associated with determining what is relevant evidence in setting up the fictitious market would disappear, on the assumption that the land, being worthless
on an open market, would not figure at all in the compensation estimate. Any doubts as to whether relocation was in fact intended, or possible, could be resolved by postponing payment of compensation until costs of reinstatement were actually incurred.
CHAPTER SEVEN FOOTNOTES

454. Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co. [1901] A.C. 373 at 391; see also similar comments in Hazeldell v. Commonwealth (1924) 34 C.L.R. 442 at 452.


456. Spencer v. Commonwealth (1907) 5 C.L.R. 418 at 441; Minister for Home Affairs v. Rostron (1914) 18 C.L.R. 634 at 636.


459. Other issues, of course, may arise as in Tooheys Ltd. v. Housing Commission (N.S.W.) (1953) 53 S.R. (N.S.W.) 407; 20 L.G.R. 261, which decided that the rule about privileged communications applies in a compensation hearing.


469. **Harris v. Minister of Public Works** (1912) 12 S.R. (N.S.W.) 149 at 156.

470. See also **Reading v. Valuer-General** (1923) 6 L.G.R. (N.S.W.) 132; **Re Gorman** (1912) 29 W.N. (N.S.W.) 195.

471. (1957) 75 W.N. (N.S.W.) 103; 2 L.G.R.A. 338.


475. **McCathie v. Federal Commissioner of Taxation** (1944) 69 C.L.R. 1 at 16; **Daandine Pastoral Company Pty. Ltd. v. Commissioner of Land Tax** (1943) 7 The Valuer 299 at 304.

476. (1948) 17 L.G.R. (N.S.W.) 34. The principle also was referred to favourably in **dicta** in **Commonwealth v. Arklay** (1952) 87 C.L.R. 159 at 170.


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482. Kilpatrick v. Board of Land and Works (1897) 5 V.L.R. (L.) 122.

483. (1915) 20 C.L.R. 231.

484. (1910) 10 S.R. (N.S.W.) 860; 27 W.N. 223.


486. (1948) 75 C.L.R. 695 at 507.


489. (1968) 35 Q.C.L.R. 249. Cf. the Canadian decision in R. v. W. D. Morris Realty Ltd. [1943] Ex. C.R. 140 that offers by the resuming authority and offers to sell by the owner in order to avoid litigation are not a fair test of value, but in Loblaw Groceterias Co. Ltd. v. Minister of Highways [1964] 1 O.R. 271 it was said that an offer by the acquiring authority may be regarded as evidence of a floor price.


492. (1955) 72 W.N. (N.S.W.) 209 at 213.

493. Commissioner of Succession Duties (S.A.) v. Executor Trustee & Agency Co. of South Australia (1947) 74 C.L.R. 358 at 373.


496. (1912) 14 C.L.R. 721.


499. Alison v. Valuer-General (1922) 6 L.G.R. (N.S.W.) 25; Morrison v. Federal Commissioner of Land Tax (1914) 17 C.L.R. 498. The burning off, of course, must actually add to the economic value of the property and not merely improve its appearance: L. W. Friend v. Patrick Plains Shire (1932) 2 The Valuer 177; McKeeken v. Valuer-General (1933) 3 The Valuer 41.


504. Commissioners of Inland Revenue v. Glasgow & South-Western Railway Co. (1887) 12 A.C. 315.

505. Discussed in Chapter Six in respect to Potentialities of the Land.


507. Cf. Starke J.'s rejection of such an argument in Geita Sebea v. Territory of Papua (1943) 67 C.L.R. 544. The solution put forward in Working Paper No. 8, at 127, was to exclude any potentiality realisable only by a statutory authority, except where the authority is but one of a number of possible purchasers.

508. The fiction, of course, also is applied where there is an apparent market for land since strictly speaking there is never anything but a hypothetical market value in the context of compensation (K. Davies, Law of Compulsory Purchase and Compensation (1972) at 111). The Commission was concerned about the more blatant use of the fiction.

CHAPTER EIGHT

POLICY CONSIDERATIONS I:
REASONS FOR QUESTIONING EXISTING POLICY

The matters canvassed in the foregoing pages, in total, depict a policy, or the lack of commitment to an alternative to the existing course of action, which we may term 'the present acquisition policy' for local government purposes in New South Wales. The difficult question remains: to what extent do the present posture of the law and its implementation reflect 'public policy' in the sense of what present society might expect to be not only the substance of such a law but its metes and bounds?

'It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from the blind imitation of the past'.

The principal acquisition statute in New South Wales, the Public Works Act, having been proffered as 'the most venerable relic of all: quite untouched by 20th century thought', the ensuing inquiry will concern itself with those aspects of modern thought which might be considered to wield an essential influence on the choice of an acquisition policy. Although such an inquiry presents many perspectives, this chapter will concentrate on the damage effects of compulsory acquisition and the related influence of general land-use controls. As a preliminary matter, however, some brief reference needs to be made to the hiatus which exists between authorised local government purposes

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Local Government Functions

As Chapter Two shows, and the good sense of the doctrine of ultra vires dictates, it is not sufficient for local government baldly to maintain that certain takings are required for public purposes; an acquiring council must be able to point to some authorised local government purpose. A threshold consideration, therefore, is the appropriateness of the grant of local government powers for present day conditions. While it is not the source but the exercise of the State power to take private property which poses the real problem of legal significance, there are issues of political and economic significance about what field of activities government should legitimately engage in and what agency of government is best equipped for particular undertakings: issues which are beyond debate in the legal forum and which are not referable to any legal normative criteria.

Without attempting to explore which particular functions local government is most suited to undertake for an efficient delivery of total community services within the State, one can at least recognise that there is a demand for a basic reappraisal. Needs and attitudes are outstripping functions. Whereas early moves for local government stemmed not from local demand but from the State government, and the functions which were imposed were essentially for the provision of physical services, today local government embraces diverse activities covering environmental, health, welfare, recreational and cultural aspects of local communities and supporters of local government are vocal in forcing it into consideration in all fields of State concern.
Had there not been a parallel development towards financial independence of local government within the Australian federal financing structure, the functional developments would have been of no more than historical interest, local government still being tied legally and financially to State government. Initiatives for greater fiscal independence were first given positive recognition by the McMahon government which established the National Urban and Regional Development Authority in 1972. They then telescoped into the political debate which surrounded the 1972 federal elections, with the Labor Party promising 'to make the third tier of government a genuine partner in the system and to give local government adequate access to the nation's finance'. (514)

Although Labor's attempt to amend the Constitution so that the federal government might be empowered to make grants or borrow directly on behalf of local government was defeated dramatically in the 1975 referendum (New South Wales being the only State in which the referendum was carried), some measure of financial independence had been introduced already as a result of the Grants Commission Act, 1973 (Cth.), which gave the Commonwealth Grants Commission the responsibility of recommending grants for local government. The reversal of government later in 1975 meant the replacement of federal distribution by State distribution, thereby putting local government 'back in its place' (in the State). However, by agreement with the States, local government now receives a fixed share of income tax collection. Local government, therefore, subject to unresolved issues about fiscal equalisation on an areal basis, is in a much improved financial position but, since it remains a creature of State government, it must await State action for any re-definition of its function in accord with its (and others') new perception of itself as a viable force in local community life.
Re-definition of function may also bring with it a re-assessment of the powers with which functions are carried out. Even accepting that the State has the power and the right to expropriate private property in the furtherance of public service, if, for instance, the viewpoint that services ideally should be provided according to some common and co-ordinated strategy was to prevail, then there may well be an argument that acquisitions for those services should be the responsibility of one central body. This is particularly so when one considers that the services which are provided by the State are all of the same kind; whether they lie in the responsibility of local government or some other State agency, they are all 'public' and what is 'local' is often a matter of custom rather than logic. After all, it was only when functional overlay began to develop between local government functions and activities administered by central State agencies that general responsibility for council acquisitions was shifted from the Minister for Public Works to the acquiring council itself. While such a step certainly recognised the increasing importance of local government as a provider of community services, introduced as it was without a rational reorganisation of all State functions, the arrangement does not have any necessary claim to supremacy. However, that and other issues about the future of local government must await resolution in the political arena, unguided by any special legal philosophy.

Do the Ends Justify the Means?

While the powers of local government are singularly related to the functions of local government, the exercise of its acquisition power, ancillary to the performance of its general functions, raises issues of public policy which are not peculiar to local government: namely, what ought to be the constitutive rules of acquisition. However,
it is only after what may loosely referred to as the 'ends' of acquisition, meaning both its direct and indirect consequences, have been isolated that one can logically proceed to any useful discussion about what the rules of acquisition should be.

The 'ends' of acquisition may be seen as falling within the following categories:

1. The primary statutory purpose of acquisition;
2. Incidental purposes of the acquiring authority; and
3. Consequences neutral to the objectives of the acquiring authority.

The first and second categories, but not the third, cover consequences which at the stage of actually carrying out the public purpose, may be accepted as advancing or at least maintaining the 'public' interest, if they are in furtherance of an authorised public purpose. Those in the third category may have a public character in the sense that they have social, political, economic, physical or psychological significance for the general community, but they have no particular claim to be 'in the public interest'. Included in all three categories are consequences of a 'private' nature insofar as they effect individuals in a way which is different to the collective impacts on individuals at large. The private impacts range from the direct physical removal of the resumee's property, the incidental effects of that removal on the resumee, the incidental effects of that removal on persons other than the resumee, and the once-removed effects on both the resumee and other persons deriving from the consequential carrying out of the public purpose on the resumed land. The effects on the individual may be neutral, detrimental or beneficial in each case, and the public effects likewise.

The current law accommodates these consequences by seeming to attempt
a crude balance between the public and private interests which are involved. It assumes, without opportunity for argument, that the acquisition is beneficial in the public interest and only recognises as detrimental the direct economic effects from an actual taking which occur solely within the boundaries of the resumee's confiscated property and, where there is a 'partial taking', the direct economic effects which are anticipated to occur on retained property of the resumee as a consequence of carrying out the public purpose on the resumed land. All 'acceptable' harmful effects are redressed by a payment of monetary compensation. Even in respect to persons with a recognised detriment, there is no requirement for payment of compensation 'in kind' or other more appropriate adjustment mechanisms to minimise the impacts of acquisition. Moreover, if the proposed undertaking does not reach fruition, there is no compensation for any blighting of the subject land.

The answer to whether that is a 'proper' way to view the consequences of acquisition, on its face, would appear to warrant resort to what has been identified as 'the usual sense of justice', which 'is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims'. (517) In the words of Dean Pound:

'This is what we mean when we say that the end of law is justice. We do not mean justice as an individual virtue. We do not mean justice as the ideal relation among men. We mean a regime. We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste'. (518)
Pound's criteria, however, are not necessarily accepted by all scholars, since normative standards of justice prove somewhat illusory. Without becoming overly embroiled, therefore, in the philosophical debate which surrounds competing theories of justice it may be instructive, nevertheless, to survey the various principles which have been put forward to assist in the choice of policy alternatives. A rudimentary division of the various schools of thought may be made into the Utilitarians, the Non-Utilitarians and the hybrid Rawlsians. They offer criteria for evaluation of just solutions as follows:

1. Utility theory based on the classical Benthamite thesis (to which Pound adheres). This theory holds that society must evaluate activities according to their beneficial and detrimental effects and select that solution which advances 'the greatest happiness for the greatest number' or, in 'modern' terminology, 'the greatest average utility'.

2. Fairness theory. This is the Anti-Utilitarian hypothesis that certain interests are too valuable to be weighed along with all the rest so that some individual interests ought not to have to yield to the 'public interest'.

3. Rawlsian 'fairness'. This is a complicated notion of distributive justice which seeks to maximise the economic and aggregate social benefits of the people receiving the least benefit. Its major principle is that justice is equality and that a just society distributes all goods and honours equally, save where inequalities favour the worst off most.

The theory of Utility is intimately concerned with broad social objectives but provides a compensation framework for accommodating
particular claims so as to minimise the disutility caused by interference with particular interests. Fairness is more concerned with the impacts which it recognises as injuring conventional legal rights. Rawlsian theory subsumes the utility of specific social objectives under a general inquiry as to what interests a just society would protect. All three approaches present certain intellectual difficulties when the attempt is made to translate them from the above plane of abstraction to the specific activity of compulsory acquisition of property.

The first major difficulty is how to decide which specific claims merit compensatory adjustment. Since a rule of law is no more than a working hypothesis to be used in the framework of particular fact situations, it is within that framework that decision-makers ultimately face the choice of surrendering individuals to the demands of social ends or protecting individual interests in the face of community needs. Consequently, it is important to ascertain which interests should be protected and how they are to receive special adjustment in a particular situation.

The justice theories do not offer much assistance in this direction. The Utilitarian conception of justice defines an individual 'right' in terms of the 'good' (doing that which gives the most good), and the good is defined independently of the right. The theory says nothing as to what interests are to be counted legitimately as good; good is pleasure or utility and how it is obtained and how it is distributed is irrelevant. The Non-Utilitarian refers goodness back to justice, but individual claims only become legitimate through artifice and human convention. The Rawlsian relies upon the choice made by 'rational men'. Subject to his two principles (that liberty shall be shared
equally to the greatest extent possible consistent with liberty to all and that all other goods shall be shared equally save where unequal distributions are attached to offices and positions open to all), Rawls would assume that a principle of efficiency (such as in Pareto Economics) will lead to a 'just distribution'. That principle, however, only provides the answer in aggregate terms. (520)

There being no normative criteria for the selection of the individual claims requiring special protection, one must fall back on the notion of 'public opinion' as a determinant of the ideal. It is clear, however, that public opinion could only best define the ideal in a totalitarian state. In the Australian political system one is probably left with no alternative but to substitute public opinion with prevailing political ideology tempered by such social and economic facts as the political system see fit to receive.

Although value-judgements must enter the inquiry at this point, there is no warrant to depart entirely from all current moral and intellectual reasoning. A proper judgement should be made. To borrow the words of J. M. Keynes:

'Practical men who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madman in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back ... soon or late, it is ideas not vested interests, which are dangerous for good or evil'. (521)

and R. Dworkin:
'When men disagree about moral rights, there will be no way for either side to prove its case, and some decision must stand if there is not to be an anarchy. But that piece of orthodox wisdom must be the beginning and not the end of a philosophy of legislation and enforcement. If we cannot insist that the Government reach the right answers about the rights of its citizens, we can insist at least that it try'. (522)

Dworkin developed a thesis about rights in terms of existing political and legal conventions and his analysis offers a convenient framework for evaluating the compensatory scope of existing acquisition policy in a non-emotional way. The analysis does not answer the questions which the justice theories leave unanswered, but it does teach us that if rights are to be created and treated seriously then a rational process must be employed. Dworkin maintains that a distinction must be made between rights 'in a strong sense' and other types of right. Strong rights have legal and political legitimacy. A claim of strong right against the State does not mean that the State is never justified in over-riding that right, for instance, when it is necessary to obtain a clear and major public benefit. A strong right simply implies that it would be wrong to interfere with it without special grounds to justify the interference.

By way of elaboration, Dworkin asserts that 'balancing' is appropriate when the State must choose between competing claims of rights of a similar status, in which case the State must estimate the merits of the competing claims and act on its estimate. Although balancing is assumed to incorporate the 'right' of the public at large as a competing right, even where the public interest may be enhanced, it is obvious that the community rejects this model where the stakes for the individual
are seen to be highest (as in the criminal process). Therefore, where abridgement of a right occurs, it must be treated more seriously than a counter-balancing of rights would allow. In order to justify interference with a right, the State must present a compelling reason which is consistent with the supposition on which the original grant of right is based, otherwise the original recognition of the right is a sham.

In order to both justify an abridgement of a right and not take back its original recognition, Dworkin posed certain tests. The State should be able to show that the values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. However, if the right is defined to include the marginal case then some competing right would have to be abridged, and/or the cost to society would have to be not simply incremental but of a degree far beyond the cost paid to grant the original right (a degree great enough to justify whatever assault on dignity or equality must be involved).

The rights which appear to be at risk in an acquisition include: those which are interfered with by the actual confiscation of the property; those which are interfered with by the consequential effects of carrying out the works for which the land is taken; and those which are interfered with incidentally to the above. They may be identified more specifically as the legal and equitable interests in the acquired land; the interests in any retained land of resumees; and the interests of non-resumee property-holders not to be subjected to nuisance. The incidental private interests which may be affected say in trespass, contract or negligence, arise to be considered only in ad hoc fashion and, since nothing positive may be said about them in abstraction, they may properly be seen as falling outside the limits of acquisition policy.
In order to 'justify' interference with any of the relevant interests, Dworkin would ask the State to comply with one of his tests and this necessitates examining the conventions which now govern the interests. The interests of resumees and non-resumee property-holders are in the nature of dominion over a resource: the power to use, control and dispose of property to the exclusion of others. Only the interests in the confiscated property have any conventional claim to be strong in the face of governmental acquisition:

'So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even a public tribunal, to be the judge of this common good, and to decide whether it be expedient or no ... In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained'.

(523)

In other words, the interests in the acquired property have a genesis which could withstand interference under the tests of justification. Justification, however, becomes irrelevant at the point of taking because the State confiscates property by virtue of its sovereign right and might.
As was seen in Chapter One, there is simply no question of justification, only naked power, although the otherwise 'strong' rights of the resumee in the confiscated property are preserved by the common law requirement of indemnification. This has represented the limits of the legal system's concern because all other interests which seem impaired by acquisition and subsequent execution of works have a significantly lesser status and are subject to institutional limitations which both permit the interference and do not require the exaction of a quid pro quo.

Given the existing conventions, present policy is quite rational and the maintenance of the limitations is justified by reference to the governmental objectives of acquisition and the values underlying any grant of rights. For instance, the institutional limitation which supports non-recognition of injurious affection claims (524) reflects an understanding that the values inherent in the use and enjoyment of non-resumed property as a resource are inconsistent with an efficient allocation of community resources. On that basis, the availability of injurious affection to resumeees who retain some land is a generous bonus. The fact that there is pressure to extend its availability to non-resumeees must be based in a different set of values which as yet have no strong status.

The foregoing survey, therefore, does not throw up any inconsistencies between conventional theory and practice requiring a major overhaul of acquisition policy by reason of its failure to extend its compensatory scope outside the boundaries of the confiscated property. Nor are there justificatory reasons for widening the base for challenge of particular exercises of the acquisition power. Since citizen interests in functional decision-making have never been given status at all in legal convention (525) or only in an attenuated form which precludes inquiry
into the 'merits' of particular exercises of governmental power,\(^\text{526}\) as being inconsistent with the objectives of orderly government, there is simply no room to question the assumption of public benefit. The policy merely operates in a system of conventions which 'permit' all the present consequences. Disenchantment with the policy must be attributable to changing notions about the affected interests. There must be new influences at work in general law which are bringing into focus different values of old,\(^\text{527}\) or more forcefully articulated values.

These conclusions prompt the comment that acquisition policy in New South Wales certainly may be accused of being 'untouched by 20th century thought', although it cannot be accused of being entirely 'thoughtless' in the sense that Dworkin and Keynes warned about.

Attention now passes to the question how current ideas about rights may influence the future of acquisition policy, before turning, in the final chapter, to the implications of specific rights - adjustment strategies.

The Impact of Changing Notions About Rights

The impetus for change is broadly based. On the one hand, there is an increasing willingness to cut down the individual power associated with property rights, regardless of whether it is in the context of a competition between 'public' and 'private' interests or between two sets of 'private' interests.\(^\text{528}\) On the other hand, there is a corresponding move away from the identification of 'interest' or 'grievance' with economic, and particularly property, interests to broader social criteria.\(^\text{529}\) The result in each case represents a shift in the traditional borderlines between public and private interest.\(^\text{530}\) Although the notion of property itself has also been subjected to
persistent attacks, conservative defences in that regard appear to hold firm. (531) The dual thrust of changing attitudes to property rights and public rights, therefore, requires acquisition policy to provide, consistently with 'the ends' of acquisition, a structure which will take account of both the awareness that any surviving myths about the omnipotence of private property should be displaced and the pressure for recognition of broader-based claims within the legal system.

If one starts with the catalogue of presently uncatered-for claims which have confronted the law reform agencies, without pretending to be exhaustive, one could include from an individual's viewpoint:

- expanded rights of compensation to include all proven losses on both a property and non-property basis; rights to substitute compensation, either in property form or in some other form such as interest-free loans; 'repurchase' rights where a project is abandoned; rights to payment of compensation at earlier dates; rights to an independent assessment of the decision to acquire and/or rights to participate in that decision; rights to more information about valuation; rights to more flexible rules in compensation proceedings; and rights by non-resumees for losses sustained by the construction and use of works.

From the viewpoint of the public at large there are claims which include:

- rights to participate in decision-making; rights to an independent assessment of the decision to acquire; and rights to the 'future use' value of private property.
From the viewpoint of the acquiring body, its basic claim is that, in the interests of both flexibility and certainty, its existing 'rights' will not be abrogated by the introduction of any of the above claims.

From the Dworkin analysis an extension or introduction of rights would require no particular justification outside the political process, provided it did not involve a diminution of existing rights, in which case justification would be necessary. It is clear from preceding analysis that the only 'strong' rights which do exist in acquisition law at the moment are the rights of the acquiring body and the compensable rights of the resumee. Insofar as any of the above claims had a detrimental effect on these rights, justification should be shown before granting special status to the claims. Also, it is clear that if special protection is to be granted to certain interests, the protection should operate in a way which is consonant with the reasoning which led to the selection of those interests:

'I do not believe that the new developments in the control and regulation of property and the new status and administrative demands which citizens make on bases other than property can or need be systematised within the tradition of the Common Law or the concept of private law by attempting to write them into the definition of the concept of property, though I do believe that the concept of property as such cannot be and must not be excised from the law. The rights linked to the traditional concept of property have always been defeasible and men have always had claims and rights not based on property. It would be odd to elevate property into a ubiquitous concept at the very time that its social role and importance are being seriously diminished'. (532)
It is not clear, however, whether that protection operates better in a structure where all the desirable features of the rights are specifically identified beforehand or in a structure where they are left 'at large'. The arguments in favour of both are concerned with ensuring maximum flexibility in processes where rights are important. Like the debate about 'bill of rights', the answer depends upon where one puts one's faith in protection: in the courts or in administrative discretion.\(^{(533)}\) There is no reason why the judiciary should be the ultimate guardian of rights. In fact, in an ideal world, legislatures and administrative bodies are the most representative and responsive public agencies (subject to the possibility of 'majority' tyranny). However, where self-interested and powerful 'minorities' influence decisions, as they tend to do in public resource decisions, then there is a necessity for the promotion of equality in political power for the disorganised and diffuse 'majority'.\(^{(534)}\)

**Claims for Participation and Scrutiny.** By leaving open the choices about how particular claims should be recognised and protected, it is necessary initially to heed only the plea that any grant of status to the claims should be brought about in an intelligent and consistent fashion. The claims for participation and scrutiny spring from notions of 20th century popular democracy: 'Better-educated citizens demand an increasing part in the running of their society and the decisions of their government', and diffuse interests, while touching individual liberty or property are chiefly 'expressions of the values individuals wish their society to respect'.\(^{(535)}\) 'Rights' are required, therefore, to adjust the political imbalance which exists in a real world in respect to decisions about public activities: a truism which requires no elaboration in this paper.
In the face of such strongly articulated claims, and in the light of steps already undertaken by legislatures, there appears to be merit in the proposition that a grant of status to both claims would constitute an essential advance in acquisition policy. However, how these demands should be most appropriately met is very much in issue, when one considers that there are certain advantages in non-legal flexibility and broad discretions. The difficulty is to find an adjustment mechanism (a topic which will be taken up in Chapter Nine) that preserves those advantages yet does not betoken absence of commitment by the State to a safeguarding of the claims.

**Public Demands for Future Use Value.** Apart from a dubious notion that the general public should be viewed as a property-holder in the fullest sense, there is no well-conceived doctrinal basis which supports a theory under which public claims for future use value are entitled to special status. There are, however, a mix of ideas which have been summarised by Professor Sax as follows:

1. Historic public rights, as in fishery and navigation, which reflect a feeling that certain interests are so intrinsically important to every citizen that they should be freely available to all, and it is necessary to be especially wary lest any particular individual or group acquire the power to control them.

2. The notion underlying the creation of national parks, that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.

3. An irregularly perceived recognition that certain uses, such as water uses, have a peculiarly public nature that makes their adaption to private use inappropriate. Any private
rights which are permitted must incorporate the needs of others, and it is incumbent upon the State to take account of the public nature and interdependency which the physical quality of the resource implies.

Land in general usage, as opposed to specific usages, has not been a serious candidate for application of these notions in democratic States. Instead, the inherent values in private property claims come into direct conflict with community claims to regulate and use land. The Uthwatt Report, as long ago as 1942, isolated the conflict thus:

'(L)and is held by a large number of owners whose individual interests lie in putting their own particular piece of land to the most profitable use for which they can find a market, whereas the need of the State and of the community is to ensure the best use of all land of the country irrespective of financial return'.

If the conflict is permitted to continue its resolution must be imperfect since it requires 'balancing' of incompatible interests. If it is to be removed, an institutional 'weighting' is required so as to favour always one set of interests over another. For instance, if the interests of the public in the use of land demand special protection along the lines suggested by Professor Sax and one is not prepared to go so far as to remove all private property rights, then some aspects of the private claims must be ousted or significantly diminished in status so that those aspects accrue to the community. Conversely, if one decides that individual interests are too important to discount, public claims must be rejected or diminished in status at the outset. In either case, resolution requires an understanding of the root causes of the conflict.
It is not a modern philosophy that the rules assigning all aspects of property rights ought to be understood in a framework of resource allocation, but only of late has there been a strong articulation of the notion that the 'keystone of government policy must be a recognition that land is both a basic national resource of limited or finite extent and a necessity of life'. The difficulty is that, if total nationalisation of land is not acceptable, some other method must be made available to ensure that land is indeed a public resource. In order to evaluate land policy as a resources policy, therefore, the Commission of Inquiry into Land Tenures, suggested two general criteria, namely economic 'efficiency' (the best use of land) and 'equity' (the reduction of inequalities and the guarantee of similar treatment).

Among the more specific criteria set by the Commission were:

'Efficiency

(a) Land policy must be geared to the requirements of community growth by helping to ensure that land is made available where and when it is wanted, for the purposes for which it is wanted, at a price which reflects its value in use and thereby excludes any speculative element.

(e) Decisions in land use must be taken, in both the private and public sectors of the economy, with full regard to their social consequences, and not merely by reference to their effects on the profitability of individual landholders or the budgets of public authorities.

(f) Land policy must treat land as a scarce resource by ensuring that it is used effectively and not held idle for purposes of speculative gain ...

(g) Land must be made available for any given purpose at a minimal cost in terms of labour and other resources ...
The use of the market as a resource allocating device must be reconciled with the application of social controls intended as far as possible to prevent the market from being exploited or manipulated by sectional interests.

**Equity**

(f) Land policy must be directed towards ensuring the landholders are restricted to gains from the development or use of land and are excluded from gains associated merely with the passive holding of land. This involves action to leave individuals and organisations in the private sector with the fruits of their enterprise while reserving for the whole community the benefits which flow from public authority decisions over land use'.

The Commission believed that there was virtual unanimity in respect to its policy goals and criteria, although it did acknowledge that there was some minority support for a retention of the speculative system in principle. It favoured a system which distinguishes between 'use value' of land (the capitalised value of the future benefits, less expected costs, from using land for its present purpose) and its 'development value' (the capitalised value of future benefits, less expected costs, of holding land in expectation of a change in use). The difference between the two values were to accrue to, or be borne by, the community rather than an individual landholder, since it was desirable as a matter of social equity: based in a recognition that decisions about which land should be used for which purpose are largely arbitrary; it would improve the planning process in that decisions could be made on the basis of public needs, not private interests; it would probably reduce costs and prices and also benefit government finances. Further, it was pointed out that the reservation of future increments
in development value on behalf of the community would not cut down any existing benefit: it simply would remove the opportunity of making windfall gains as a result of public decisions based on perceived community needs, as well as reducing the inefficiency of the current system.

On the other hand, the opponent in principle is able to argue that equity is served in the present practice of the owner retaining the unearned increment, since that represents a social cost which the community pays to insure its individual members against an unwarranted invasion of their private domain (again based in a recognition that planning and valuation processes are arbitrary and imperfect); that there is no such thing as the community viewpoint to which decisions about needs could be referred; that 'black markets' could arise under a system like the one suggested; and that the individual opportunity of making windfall gains has at least de facto status and should be protected as of right. (542)

The strong status quo position and the Commission's proposals permit of no compromise; it is a question of choosing one or the other. Issues of practical implementation aside, however, the Commission is able to claim majority support for views which have a good ancestry. (543) On this basis, it would be desirable for acquisition policy, as an adjunct of general land policy, to give special status to public claims for new use values. This would appear to be the most rational way of removing the present conflict and would greatly influence adjustment strategies in acquisition.

Claims re Injurious Affection. What are the implications of the above line of reasoning in respect to individual claims to expand

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the range of compensable rights? The proposals for new use values only go this far: that a landholder should not benefit from any accrual of development value. Since claims in respect to actual use are untouched by the analysis, should the principles isolated by Professor Sax extend to existing use value? There is no reason in logic why they should not and, in fact, they do under present land policy. An historical practice has ensured, however, that only some, not all, existing use values are permitted to accrue to the community in a way which avoids any need for 'balancing'.

This practice was summarised by the Uthwatt Committee as follows:

'Ownership of land involves duties to the community as well as rights in the individual owner. It may involve complete surrender of the land to the State or it may involve submission to a limitation of rights of user of the land without surrender of ownership or possession being required. There is a difference in principle between these two types of public interference with the rights of private ownership. Where property is taken over, the intention is to use those rights, and the common law of England does not recognise any right of requisitioning property by the State without liability to pay compensation to the individual for the loss of his property ... In the second type of case, where the regulatory power of the State limits the use which an owner may make of his property, but does not deprive him of ownership, whatever rights he may lose are not taken over by the State; they are destroyed on the grounds that their existence is contrary to the national interest. In such circumstances no claim for compensation lies at common law ...' (544)

In general land policy, there have been attempts for some time to
introduce symmetry into the practice by providing an adjustment mechanism in those cases where the rights are not 'confiscated' but are regulated out of existence. Emphasis has been placed on re-defining what constitutes a 'taking' in order, seemingly, to give use rights a status which they do not enjoy universally, but which they have achieved indirectly where the physical property they are attached to is taken. That is, the thrust of the attempts is to give more weight to the private claims rather than the public claims, unlike the position in respect to future use rights. Whether such an adjustment fits within acquisition policy has been contentious, on the premise that consequential effects attributable to the subsequent use of acquired land fall for consideration in the general area of torts. Such a premise is worthless, however, in the light of the current shifts in the labelling of legitimate grievances. The issue simply is whether such claims, whether they arise from public land regulation or public land usage, ought to be given recognition under the conventions which acquisition policy draws on.

Rather than quibble over the appropriate area of law for treatment, it is more useful to examine the underlying reasons for the present practice, which is anomalous in allowing many people no compensation but a few people some. The basis for the anomaly is discoverable in the fiction that once compulsion has been exerted to confiscate proprietary interests, the interest-holder and the resuming authority are to be regarded as willing negotiators as to a price for the resumed land. Because compulsory acquisition is possibly never 'justifiable' under societal values, there is an attempt to retrieve the situation at the adjustment stage by ignoring the public character of what has gone before. On the other hand, since interference on a lesser basis may be justified, there is no conventional right to compensation and the interference maintains its public character throughout.
In order to remove the anomaly, it is not necessary to upset the long tradition that interests in land carry with them only a qualified right of user. What is necessary is a guarantee that public benefits are obtained at market price, just as private benefits are. Accordingly, the values which are demanding attention are only nominally located in existing use rights since they establish a different genus of claim which seeks adjustment from actions of social benefit on a cost basis. While present society may be prepared to accept restraints on the private power to use the control of property as a means of private control over national resources, it will not tolerate, it seems, substantial restraints on the personal enjoyment of property without exacting a price for the individual whose enjoyment is impaired. The restraints in question are those which prevent the landholder from doing what he has hitherto been doing or from doing what he has been given permission to do.

When applied specifically to acquisition policy, the claims seek adjustment for the impacts of acquisition which subsume private interests by the subsequent development of acquired land. Hence the Commission of Inquiry into Land Tenures deliberated as follows:

'We consider that there is much to be said for the view that compensation rights should be enlarged so as to enable affected landowners to recover the injurious affection sustained by them from public (and even private) development, notwithstanding that no land is taken from them. In principle, this is equitable; in practice it would require any developer to pay the true cost of his development, offsetting the advantage gained by the development against the losses thereby occasioned'. (548)

The Commission, however, made no firm recommendations since it baulked
at the prospect of fixing a line which would separate out rights of people seriously affected yet which would avoid 'a great number of claims involving massive payments of compensation'.

It is here then that one sees more marked the significance of the dual aspects of changing property notions. Diminution of private property power is conceded because of the importance of public services or because of difficulties in pricing such services to particular users and because of the dangers of monopoly. Efficiency' dictates an effective 'nationalisation' of the power components of private property. 'Equity', however, safeguards whatever fruits are left to private enterprise, and acknowledges that the actual siting of public activities has all the hallmarks of a lottery. While the chance aspects may be rendered less arbitrary by permitting participation in decision-making and scrutiny of the 'merits' of particular decisions, they cannot be eliminated altogether. 'Equity' consequently has as its objective the reduction of 'the hardships imposed by one of the great factors of inequality in society - inequality of luck'.

This is not a 'new' philosophy, nor is it novel in acquisition law, but it has only recently gained strong momentum as a serious factor in governmental policy.

The difficulties which daunted the Commission of Inquiry into Land Tenures in the implementation of such an objective were considered in more detail by the Australian Law Reform Commission, which examined proposals and practices elsewhere. It noted that the Land Clauses Consolidation Act, 1845 (U.K.) although containing no express provision for adjustment for injurious affection where no land was taken, had been interpreted by the courts as providing a basis for the payment of such compensation. The correctness of the interpretation has been doubted, but the underlying rationale is still relevant. The remedy
was said to be given because the statutory authorisation of works causing the injuries prevented damage being actionable and the adjustment was introduced as a **substitute** for damages at law.\(^{(553)}\)

Therefore, the prerequisites which the courts laid down for adjustment had the effect of placing the acquiring authority in a position comparable to that of a private person: the damage must have been actionable at common law **but for** the statutory authority. At the same time, limitations were placed on the right to adjustment: the damage had to be an injury to the land itself and not personal or an injury to business or trade (unless reflected in depreciation of the value of the land), and the damage had to be occasioned by the **construction** of the public work and not its **user.**\(^{(554)}\)

The Justice Report ("Compensation for Compulsory Acquisition and Remedies for Planning Restrictions", 1969) favoured maintaining a distinction between the situation where land had been partially acquired and where no land had been acquired but supported legislative adoption of the common law rationale, in respect to **use**, provided that there were adequate time delays to enable ascertainment of the full extent of the injury. It also drew a distinction between damage caused consequentially by a taking of land and damage caused solely by the exercise of regulatory powers, maintaining that any adjustment for the latter type of loss had to be governed by the particular code of law granting the regulatory powers.\(^{(555)}\) The supplementary report of 1973 dealt with the difficulty that some kinds of public works (chiefly highways) would not give rise to common law nuisance claims irrespective of statutory authority considerations, and proposed a statutory list of public works and activities deemed to be actionable nuisances.

The deliberations of the Justice Committee and a White Paper
prepared in 1972\(^{(556)}\) gave birth to the **Land Compensation Act, 1973**, which provided that compensation was payable where the value of an interest in land was depreciated by specified physical factors caused by the use of public works, where there would have been common law immunity from nuisance actions (but with the addition of highways). This legislation was to operate alongside the common law approach to construction of public works.

In the light of its examination, the Australian Law Reform Commission made an overall assessment as follows:

'At the least it seems desirable that an affected landowner should be given a statutory right to claim compensation in lieu of a nuisance action. There is more scope for dissension on the issue of whether one should go further than this and if so where the line should be drawn. An important consideration is the potential cost to the government, and the community, of compensation; but the cost, whatever it may be, is already there. The only question is whether it should be borne by the community whose representatives plan the work in the perceived public interest or by particular unlucky land-owners'.\(^{(557)}\)

Its tentative views supported an approach which would both extend the premise that a statutory remedy should be given in lieu of a common law right of action in nuisance and extend the English statutory provisions. It believed that the present system of injurious affection should be abolished and that injurious affection should be available to adjust a loss of value, sustained to an interest in land, whether or not land is acquired from the claimant. It would not be necessary to establish that there was an actionable nuisance (but for the statutory
authority), only that there was a loss caused by the construction (existence) of public works or by specified factors (not solely physical) resulting from the use of the public works. The resumees whose land is partially acquired and non-resumees would be in the same position. In addition, some of the confusion which exists under the present system, confined to partial takings, would be removed such as where the construction or use of works would not be wholly sited on the partially-acquired land. Even more importantly, since the Commission favoured the English practice in relation to the timing of claims, then the present position would be further improved by calculations of loss based on actual experience, not surmise.

Of course, it has been pointed out earlier that no special justification is required for the introduction of new claims (save where they cut down existing rights). None of the alternatives canvassed by the Commission cut down any existing rights, but it is clear that within the general parameters of the possible moves in this area that there is much room for compromise, since lines may be drawn in any number of places and still constitute an improvement within the current philosophical framework. However, by reason of the thoroughness with which the Commission has sought to introduce the new claims and remove anomalies created by arbitrary distinctions, there is much to be said for its approach as the ultimate one in future acquisition policy.

Other Private Claims. The claims for expanded rights of compensation in relation to resumees are really claims for 'appropriate adjustment': to cover all proven losses; to allow substitute compensation; to allow 'repurchase'; to allow earlier payment; to obtain more information about valuation; to have more flexible rules in compensation proceedings. Since the adjustment should suit the loss, a closer
study of the make-up of the interests affected by acquisition is required. Their broad '20th century' features have been identified in the shifts between public and private interests in property but it is also necessary to consider their most appropriate form of adjustment.
CHAPTER EIGHT FOOTNOTES

510. O. W. Holmes Jr., 'The Path of the Law', (1896-97) 10 Harvard Law Review 457 at 469. This sentiment is also expressed in Else-Mitchell J.'s keynote address to the West Australian Division of the Australian Institute of Valuers Seminar, April 4, 1974: 'The security which property ownership confers must, however, not be eroded by legislative measure or administrative systems which are less than just or which do not engender the confidence of the people'.


513. See, for example, Report of the Committee of Inquiry into Local Government Areas and Administration in New South Wales (1973).


515. A move in this direction is foreshadowed in the Interdepartmental Committee recommendations at 1071 that a computer index be established to record each acquisition as it occurs and vests in each acquiring authority in the State, and to record the acquisition purpose and any change in purpose. It is interesting, however, that the Committee accepted that the present lack of uniformity led to anomalies but was cautious about recommending any sudden changes towards centralised administration.

516. Local Government (Amendment) Act, 1951, No. 18.


519. 'We may conclude ... that the sense of justice is not founded on reason, or on the discovery of certain connexions and relations of ideas, which are external, immutable, and universally obligatory': D. Hume, A Treatise of Human Nature (1739) Book III, Part II, Sec. II, extracted in Justice and Equality, op. cit. at 77.


524. Chiefly, that where a nuisance is generated as a necessary consequence of a public undertaking it may be treated as authorised.


526. Under the *ultra vires* doctrine.

527. For a strong argument that there are new values emerging in society, see I. Davison, *Values, Ends and Society* (1978).


530. Friedmann, ibid. Professor Tay likewise sees the distinction as no longer simply being between private and public interest, but between 'an adjudicatory system of justice and an administrative one': 'Law, The Citizen and The State', Paper No. 55, World Congress on Philosophy of Law and Social Philosophy (August 1977), at 22.

531. See, for the attack, Kehoe, Morley, Proudfoot & Roberts (Eds.), *Public Land Ownership: Frameworks for Evaluation* (1976); for the defence, Tay at 20. The conservative emphasis 'is on finding ways by which development or redevelopment may take place through a sacrifice of some of the rights of ownership, but not of ownership itself': T. Raison, *Why Conservative?* (1964) at 39.

532. Tay at 20.


Ibid.


Posner, 'Economic Approach to Law', (1975) 53 Texas Law Review, 757, maintains that economists have recognised this function of property rights but that lawyers usually have not.

Generally see the First and Final Reports of the Commission of Inquiry into Land Tenures (1973) and (1976) at paras. 2.3 and 2.6 respectively.

Id at paras. 2.6 and 2.7 of the First Report and 2.8 of the Final Report.

Id at para. 2.19 of the Final Report and paras. 4.15 and 4.19 of the First Report.


For instance, the Uthwatt Report, op. cit. which itself dealt with deliberations of the Barlow Commission appointed in 1937.


The courts, therefore, have expressed the opinion from time to time that a restriction on user may be so extreme that in substance, though not in form, it amounted to a 'taking': Belfast Corporation v. O. D. Cars Ltd. [1960] 1 All E.R. 65 per Lord Radcliffe and Westminster Bank Ltd. v. Minister for Housing and Local Government [1970] 1 All E.R. 734 per Lord Reid. See also the Uthwatt Report, op. cit., at para. 35.

547. 'The public is now considered as an individual, treating with an individual for an exchange': Blackstone, ibid.

548. At para. 6.35 of the Final Report.


550. E. G. Whitlam, talking about a different matter again - the proposed National Compensation Scheme - but voicing the current philosophy in the Labor Party's policy speech, November 1972.

551. For instance, early New South Wales legislation did provide for compensation for injurious affection where no land was taken in the Lands for Public Acquisition Act, 1880, s.18; the Public Works Act, 1888, s.34 and the Sydney Water Supply Act, 1853, s.15.


553. Horn v. Sunderland Corporation [1941] 2 K.B. 26 at 42, per Scott, L.J.


555. At para. 59. Cf. a minority view was expressed in the supplementary report of 1973 at para. 120, that there should be defined standards which, if impinged, would entitle adjustment for damage caused by regulatory or other measures not connected with acquisition.


557. Working Paper No. 8, at 263.
CHAPTER NINE

POLICY CONSIDERATIONS II:
APPROPRIATE ADJUSTMENT STRATEGIES

It has been shown that local reform bodies are far from impervious to current societal demands and have actively embraced them in the formulation of new acquisition policy. Since the several justice theories influence the shape of the structure in which demands are accommodated, what pre-disposition do the theories manifest in respect to the mode of adjustment?

Law is but one of many responses to social changes, and in certain respects it is the most important, since it represents the authority of the State and its sanctioning power. As such, the legal response to a given problem is in itself a major social action which may either aggravate or alleviate the problem. Consequently, it would be desirable that the legal solution not be considered as a separate problem of legislative drafting or of distribution of legal powers, and that various aspects - economic, sociological, legal, political - be integrated and co-ordinated with each other. (558)

The Non-Utilitarian emphasis would be to guarantee adequate and fair adjustment for individuals regardless of the costs involved: it would not necessarily accept the above proposition. Utilitarian theory, on the other hand, would regard a just practice as one which trades off deductions in low utilities for sufficient gains in larger utilities, and is more likely to be attuned to the composite natures of the demands which are made and to provide an 'appropriate' structure in terms of wider objectives although it may be inappropriate in terms of narrow
objectives of individual fairness.

Similarly attuned, but capable of individual fairness, is Rawlsian theory which holds that a practice is just if everyone is treated alike, unless a discrimination in favour of some is an advantage to everyone. However, it must be remembered that Rawlsian theory is an ideal theory for a world inhabited by rational men. It aims for a system of laws and institutions which will guarantee the realisation of its two principles. There is an individual 'right' to this realisation and there is a corresponding 'duty' on the State and fellow rational beings to co-operate in redistributive enterprises which affirm the principles. The taking and conferring of property (if property even exists in a Rawlsian scheme as currently postulated) is open for distribution towards the ideal, and the 'right' to exercise dominion over particular property rights might be sacrificed for the right to a just distribution of goods and honours. Therefore, all one can conclusively determine about what significance Rawls has for adjustment strategies in acquisition policy is that Rawlsian notions might provide a possibly different structure to that offered by Utility and/or Non-Utility.

Non-Utility theory would consider a mechanism appropriate if it suited the loss occasioned to an interest. While the other theories travel beyond this point and require an integrative solution, they do not provide much insight into the mechanics of adjustment, a difficulty which has confronted welfare economics in grappling with the application of Utility and notions similar to Rawls'. In Utilitarian terms:

'(T)he economic causes of changes in the happiness of an individual are taken to be those things and services which the
individual consumes or enjoys, and which could be exchanged for money, together with the amount and kind of work which the individual does ... (and) ... the economic welfare of the community is, by definition, only affected by changes in the amount of things and services consumed, which could be exchanged for money, and the work done by each individual'.

Welfare conclusions, however, never tell us that gainers could actually compensate losers, only that they could conceivably compensate them if everyone was an 'economic man', so that it has been suggested that the advocation of actual compensation 'betrays a conservative bias', since Utility does not deny that a change may be an improvement although some lose.

If one moves away from classical Utility to a notion that maximisation of welfare implies the possibility of an ideal distribution, then one has to start with an ideal state of affairs in which it cannot be deduced that any change should be made unless, after compensation it makes someone better off and no one worse off. Since actual compensation of all losers would be required before any economic change could be said to be good, then probably no good economic changes could occur. Even if what is good could be defined (in a totalitarian State), the difficulties of trying to compensate all losers would not be removed: welfare effects may be extremely widespread and one is unable to escape from the conclusion that actual compensation (apart from being no more than a traditional solution) must be 'rough and ready'.

Existing Mechanisms

Since justice notions do not take us beyond a broad outline of an
adjustment structure, and since a conservative bias seems inescapable, it is useful to turn to existing mechanisms, of which the best established, from an integrative perspective, is to be found in torts law:

'... many modern writers regard the rules of torts as society's attempt to allocate or distribute various losses which are an inevitable result of normal activities in society. This involves a frank acknowledgement that the compensatory objective is the one of overwhelming importance in the law of torts ... It is obvious, of course, that no conceivable system of law could ever attempt to compensate individuals for every type of loss which they may suffer in the course of life: all that the law can do is to provide for the more frequent and the more serious types of loss'.

The general purpose of the law of torts is fashionably regarded as the securing of an indemnity against certain forms of harm, not so much because they are 'wrong' but because they are harms. General societal shifts in emphasis about interests are strongly reflected in this branch of law, but 'rights' of reparation appear not to be allied so much to the interest injured but the kind of conduct which engenders liability. Since it has been argued that the focus in land acquisition is really one of social regulation and resource allocation, meaning a concentration on 'activities, on the use made of property and its effect on other people, other activities, the national economy and the availability of resources', there is a certain attraction in an examination of the torts adjustment techniques.

Torts theory itself has undergone shifts. Fletcher asserts that:
... the thrust of academic literature is to convert the tort system into something other than a mechanism for determining the just distribution of accident losses ... Thus the journals cultivate the notion of cost-spreading, risk-distribution and cost-avoidance. Discussed less and less are precisely those questions that make tort law a unique repository of intuitions of corrective justice: What is the relevance of risk creating conduct to the just distribution of wealth? What is the rationale for an individual's "right" to recover for his losses? What are the criteria for justly singling out some people and making them, and not their neighbours, bear the costs of accidents? These persistent normative questions are the stuff of tort theory, but they are now too often ignored for the sake of inquiries about insurance and the efficient allocation of resources'.

Fletcher contrasts an adjustment technique concerned solely with the claims and interests of the parties with one which resolves seemingly private disputes in a way that serves the interests of the community as a whole, and he attempts to evaluate such compensatory practices against justice-type criteria. According to the former technique, which Fletcher terms the paradigm of reciprocity, the two central issues are whether the victim is entitled to recover and whether the defendant ought to pay: issues resolvable without looking beyond the case at hand. The first issue depends exclusively on the nature of the victim's activity when he is injured and on the risk created by the defendant. The second issue is one of fairness in holding the risk-creator liable for the loss: in other words, whether there is a rational, fair basis for distinguishing between the party causing harm and other people. Such a basis depends upon societal expectations of when people ought to be able to avoid risks, and Fletcher maintains that they should not always depend upon
the social utility of taking risks but should often depend upon non-instrumentalist criteria. The criterion for determining who is entitled to recover for loss is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant: a loss resulting from nonreciprocal risks. Fletcher's other paradigm, reasonableness, represents a rejection of non-instrumentalist values and a commitment to the community's welfare as the criterion for determining both who is entitled to receive and who ought to pay compensation. The reasonableness of the risk, determined by a straightforward balancing of costs and benefits, collapses the separate issues under the paradigm of reciprocity into a single test.

He concludes that all manifestations of the reciprocity paradigm - strict liability, negligence and intentional harm - express a principle, that all individuals in society have the right to roughly the same degree of security from risk, analogous to Rawls' first principle. This means that we are subject to harm, without compensation, from background risks, but that no one may suffer harm from additional risks without recourse for damages against the risk-creator. Nevertheless, the defendant may be excused upon the grounds of fairness, where compulsion and unavoidable ignorance are present. The reasonableness paradigm shifted the emphasis from fairness to both victim and defendant to an inquiry about the context and the reasonableness of the defendant's risk-creating conduct, abstracted from the personality of the risk-creator. The assumption emerged that reasonable men do what is justified by a utilitarian calculus, that justified activity is lawful, and that lawful activities should be exempt from tort liability.

Rather than favour one paradigm over another, Fletcher argues
that the individual cannot fairly be expected to suffer deprivations in the name of a utilitarian calculus, yet protecting the autonomy of the individual does not require that the community forego activities that serve its interests. He suggests that in the case of socially useful activities, insulation should take the form of damage awards shifting the cost of the deprivation from the individual to the agency unexcusably causing it; the fact that certain conduct may be justified according to community standards of reasonableness does not necessarily excuse the actor from making retribution to individuals who suffer loss. In other words, the tort system can tax, without prohibiting, socially useful activities.

The major divergence between the paradigms is where a socially useful activity imposes nonreciprocal risks on those around it. He explains that the courts' preference for reasonableness in these types of cases is attributable to the seemingly precise questions which lawyers ask, although upon closer examination the formulae of foreseeability and the like are merely tautological constructs to support an aura of utilitarian precision. By contrast, reciprocity poses questions about relationships among risks, based on perceptions of similarities, of excessiveness and of directness, and commands a level of abstraction that does not commend itself as precise and scientific. The time has come, however, says Fletcher, for lawyers to perceive that it is necessary to achieve their substantive goals and explicate their value choices in a simpler, sometimes metaphoric style of reasoning.

Fletcher, therefore, offers an adjustment approach which incorporates existing practices in torts law but which does not lose sight of the goal of a just distribution of accident losses. Its adaption to acquisition law requires only a little adjustment. General welfare
questions, as under the paradigm of reasonableness, figure in the initial justification of the risks created by acquisition, but the paradigm of reciprocity is not really apposite in respect to conduct which does not have a private character: it is nonsense to talk of any risks to the risk-creator in such a case. The conduct merely operates within a framework of mutually created background risks associated with the holding of property interests. However, while the interests are defined in terms of reasonableness (efficient allocation of resources), a sense of fairness was also seen in Chapter Eight to be important in defining the acquiring authority's obligations by reference to unifying features and causal links pertaining to private conduct of like consequence. In other words, since acquisition has the effect of accelerating risks by directing them at specific victims and depriving the victim of the security from risk enjoyed by other risk-holders, the resultant harm is as if it resulted from a nonreciprocal risk.\(^{(566)}\) The analogy goes no further, so that the issue of wrongfulness, or lack of excuse, under the reciprocity paradigm remains inappropriate (as it would be in any event, in respect to an activity which is typically voluntary and carried out with knowledge of the risks characteristic of the activity).

A composite adjustment approach of fairness and utility, therefore, is eminently applicable to acquisition law in view of the fact that it is a similar composite that has isolated those demands which require adjustment. An adequate adjustment of those demands, therefore, should serve to satisfy the sufferer by remitting him to the state he would have been in had he not been harmed, but also serve to satisfy community notions of reasonableness bearing particularly in mind that any adjustment for the disproportionate distribution of risk must not be economically tantamount to enjoining the risk-creating activity which society has 'justified'.\(^{(567)}\)
A working example of this strategy is provided by the case of Redland Bricks Ltd. v. Morris\(^\text{(568)}\) where a mandatory injunction was sought for loss of support of the plaintiff's land by reason of the defendant's excavation of neighbouring land. Compensation was paid for damage actually done, but the order sought would require expenditure of £30,000 for the benefit of land worth no more than £12,000. Different approaches to the evidence and hence to the issue of granting the order emerged in the Court of Appeal. On the one hand, the majority considered the injunction should be granted in order to prevent the court sanctioning an unjustified activity, namely 'to compel a man who is wronged to sell his property to the person who has wronged him'.\(^{569}\) On the other hand, Seller L.J. (dissenting) did not read the evidence as amounting to an 'oppression by the great against the small', and on that basis the court had to be cautious lest its order amounted to oppression of both the defendant and the community at large in a reasonable activity.\(^{570}\) The House of Lords confined itself to the fact that the defendants had behaved, although wrongly, not unreasonably. In allowing the appeal, it was said *inter alia* that the cost of remedy asked for was unreasonably expensive but the trial judge would have been justified in imposing an obligation to do some reasonable and not too expensive works which might have had a fair chance of preventing further damage.

The reasonableness of the remedy thus involves an instrumentalist exercise tempered by notions of fairness for victim and risk-creator alike. The classic statement on the instrumentalist nature of satisfaction or compensation was made by Bentham,\(^{571}\) who distinguished six different kinds of satisfaction, of which the two more significant are *pecuniary compensation* and *restitution in kind*. In choosing a particular kind of satisfaction, it is necessary to have regard to the
degree of readiness with which it can be supplied; the nature of the evil to be compensated; and the feelings which may be attributed to the party injured. He points out that pecuniary compensation is supremely appropriate when the damage sustained and the gain reaped are alike or a monetary character. However, in cases relating to property which possesses 'a value of affection', restitution in kind is preferable, and Bentham chides legislators and judges for too often reasoning 'like the common herd: they have applied rough-and-ready rules to what demanded nice discernment'. He claims that a 'value of affection is rarely appreciated by third persons: it requires highly enlightened benevolence, a philosophy quite out of the common, to sympathize with tastes that we do not share'. (572) Additionally, in respect to evils attributable to opinions or decisions on matters of fact, Bentham advocates a form of attestative satisfaction in order to secure a legal attestation on the matter.

Adjustment of Claims for Participation and Scrutiny

A variant of attestative satisfaction is obviously an appropriate way in which to adjust claims for participation in and scrutiny of the decision to acquire land. In terms of the nature of the evil to be compensated - political imbalance in decision-making - satisfaction could be obtained for individual citizens by providing an independent attestation about the merits of the decision. One possible avenue could be established by the courts' accepting, or being given, jurisdiction to withdraw the presumption that all relevant issues have been adequately considered and by the provision of some indicia to suggest when a particular case has not been properly handled on its merits. Alternatively, the scrutiny could be performed by a non-judicial body. One further ingredient for satisfaction of individual citizens would be the
provision of an opportunity to inject their own views prior to options being foreclosed.

The Australian Law Reform Commission has sought to accommodate such adjustments within an administrative strategy. It would require alterations in the acquisition decision-making process which, unlike the position under judicial review, would open up the possibility for a consideration of the merits of a particular acquisition in an independent inquiry prior to acquisition action. A particular acquisition consequently could not be considered 'good' merely because it was referable to an authorised head of power. In agreeing with the Canadian Law Reform Commission that 'Ministerial responsibility is not security enough', the Commission adopted a structure which would make the administration and the courts between them repositories for claims for proper decisions on acquisition: the courts under the traditional ultra vires doctrine. It believed that a pre-acquisition inquiry with public disclosure of recommendations provided a better safeguard than parliamentary veto, since Parliament hardly has the time or the means to carry out any significant inquiry and could provide only a theoretical brake which may disadvantage the resumee because of associated delays if the decision is in fact to allow the resumption to proceed. The Commission did, however, emphasise that in the end a Minister would have to take responsibility in the political and public arena for the decision (which may or may not follow the opinion of the inquiry officer).

It agreed in essence with the principles espoused by the Canadian Law Reform Commission for an effective public hearing:

1. The acquiring body should present the reasoning behind the proposal; necessity and location being proper issues for objections.
2. All persons participating at the hearing should have the right to cross-examine, although the hearing officer in his discretion may limit repetitious and irrelevant cross-examination.

3. The hearing officer should consolidate similar objections through pre-hearing conferences.

4. The hearing officer should make findings of fact and express an opinion on the issues involved.

The best implementation of the principles was considered to lie in a procedure which minimised delay (disastrous to public authority and affected landowner alike) and which preceded acquisition. The specific recommendations concerning the inquiry adopted, to a large extent, the procedure prescribed by the Environmental Impact Assessment of Proposals) Act, 1974 (Cth.), with these features:

The proponent of acquisition should notify all persons believed to have an interest in land which is required, or likely to be required, and supply sufficient details of the proposed work plus further details on request 'to the extent that it is reasonably practicable to do so'; interest-holders should be informed of a right to object (say in one month); if there is an objection an inquiry would be compulsory and should be appointed within a specified short time; the inquiry officer may hold a two stage inquiry; a report should be submitted to the Minister within a specified time and he should announce a final decision within a specified time; no voluntary acquisition for the proposal should occur prior to final decision, except where the Minister is satisfied that serious hardship on some person would otherwise result; acquisition should follow the
final decision within a specified time; any transaction in relation to the scheme in the period between notice of proposal and final decisions should be voidable unless the fact that notice has been given is disclosed; extension of nominated times may be granted by a court upon evidence that notwithstanding diligent efforts the particular stage cannot be completed within the specified limit; the only sanctions for breach of time limits should be an award of costs for objectors and public criticism; where there are cases which require dispensing with an inquiry in the national interest, the Minister should certify the reasons why and table the certificate in Parliament within say seven sitting days.

Insofar as certain features could be understood as having ramifications on 'rights' before acquisition, the Commission elaborated upon them. The recommendation that required land be acquired within a short time of a final decision, for instance, runs counter to conventional practice that exhaustive attempts should be made to purchase before compulsorily acquiring. It was pointed out, however, that the conventional practice results largely from resentment against the present acquisition rules and that the new practice would promote equity between landowners and avoid protracted negotiations. In relation to whether any attempt should be made to restrict, during the inquiry period, development of the land, the Commission would not recommend any embargo as such but would require the court in assessing compensation to disregard any increase in value caused by any improvement of land after service of notice without prior approval of the Minister.

The recommendations should be viewed against general English
practice which comprises these steps: making a 'compulsory purchase order' in draft; publicising the draft; dealing with objections; deciding whether the order is to be confirmed or rejected; and publicising the order if it is confirmed. A proposal must be advertised in the local press in two successive weeks stating where in the locality the draft order and its accompanying map may reasonably be inspected and specifying at least 21 days for objections. Interest-holders in respect to the required land are sent separate notices to the same effect, unless that requirement is dispensed with in favour of a conspicuous display of notice on the land. Objections, unless the 'confirming authority' (Minister) believes they can properly be dealt with when compensation is assessed, must be heard in a public local inquiry or at a private hearing. A report is then forwarded to the 'confirming authority' who considers it plus the objections and then makes a final decision, which in turn is communicated by advertisement in the press to the public and by separate notices to the interest-holders.

The final decision, at the instance of an objector, may be quashed or invalidated as contrary to law. Where the inquiry is the source of grievance, the decision may be challenged if the inquiry procedure did not accord with the rules of natural justice. In addition, certain statutory rules apply and inter alia require a written statement of reasons prior to the inquiry and permit objectors to apply, prior to the inquiry, for a representative of any government department whose views have been included in the written statement of reasons to attend the inquiry for examination and cross-examination concerning those views (so long as the 'merits of Government policy' are left alone).

There is also provision for special parliamentary procedure in respect to land of a special character (for instance, comprising an
ancient monument or belonging to the National Trust). In that case, after the usual procedure, the Minister may not confirm an order unless he gives three days' notice in the London Gazette that he will lay it before Parliament, it does lay for 21 days in which time petitions may be presented against it, and a resolution period of 21 days has expired during which time neither House resolves to annul it. If there are no petitions, and no resolution, the order may come into operation at the end of the resolution period or at some later date specified in the order. If there are petitions, and no resolution, they may be referred to a joint committee of both Houses which has various powers of refusing approval or approving with or without amendment. If the Committee report is not satisfactory to the Minister, he must promote a Bill which will be treated as a public Bill which has reached its report stage in each House.

The difference in approach between the Australian proposals and the English practice is quite marked on paper. Although referring to the pre-acquisition inquiry as a 'public one', the Commission seems to have omitted all the significant public aspects of English practice. Unless some of them may be inferred from its approval of the Commission of Inquiry into Land Tenures recommendations on the point and its adoption of the environmental legislation, the proposals grant satisfaction only to prospective resumees and possibly also those who will be affected by works. Certainly that is an advance in acquisition policy, but it is hardly an adequate response to claims of the public at large. If the Commission was pursuing a course, based in the view that only those members of the public who have some interest at stake can provide useful information to the decision-maker, it did not articulate it and, in any event, such a course presumes there is no political imbalance in decision-making: that the decision-maker is adequately apprised of public views at large.
One may also query, on the same grounds, the Commission's attitude that a pre-acquisition inquiry would always be adequate without further opportunity for more informed decisions. Even assuming its proposals are 'more public' than set out in its working paper and that they would be defined in such a manner that the decisions could be tested by judicial review to eliminate the possibility of the procedures amounting to a sham recognition of public claims, there may well be a need for some brake in special cases. The Commission's concern for the resumee (the 'still' owner) in recommending against a parliamentary veto is not really warranted where that owner is, in effect, a public trustee. In such cases, there should be the fullest possible airing of all views, as is provided by the English special parliamentary procedure, and there seems to be no real cause for limiting it on the supposition that the Houses of Parliament would manifest particular pre-dispositions to issues.\(^{(579)}\)

While it is not denied that there is much room for manoeuvre within the parameters of the claims for public participation and scrutiny, it does seem that, provided strict time limits are imposed, adjustment strategies do not need to interfere significantly with the advantages of a flexible administration nor enjoin acquisition itself. Primarily, the strategies need to be directed at more informed decisions on particular acquisitions and neither fairness nor utility would stand in the way of a reasonably complete strategy in that respect - more complete than that offered by the Australian Law Reform Commission, particularly since it did not present any cogent reasons against this proposition.

A similar accusation may be levelled at the 1978 Report of the New South Wales Interdepartmental Committee on Land Acquisition which, even after the benefit of discussions with the Australian Law Reform
Commission, appears not to appreciate fully the true nature of the demands. That Committee, quite rightly, was influenced by dual considerations of efficiency and public relations and, like the Law Reform Commission, recommended that there should be adequate safeguards against the arbitrary exercise of acquisition powers but without the Executive Government abrogating its final responsibility to determine whether or not a resumption should proceed. Its proposals were to introduce an 'effective' right to object at the planning stage to the designation of land for public use, that the machinery of Part XIIA of the Local Government Act should be utilised for this purpose and possibly amended, and that land should not be acquired under the Public Works Act unless at the time of acquisition the land was reserved, zoned or otherwise designated for the purpose for which it is proposed to be acquired (except where the acquisition is for a prescribed work or the relevant Minister tables a certificate in Parliament to the effect that the objection process is not to apply). The proposals, however, place a great deal of faith in administrative goodwill and do not press for amendments to Part XIIA which would necessarily ensure full public rights of participation and the independence of the Tribunal considering the objection, for instance where the council itself is the intending acquiring authority. Moreover, one wonders about the extent of the scrutiny which the Committee envisaged when it concluded that it did not favour a 'judicial type' of appeal but believed that a procedure similar to that provided by Ordinance 77 would be 'adequate'.

Adjustment of Claims by Resumees

Recompense for the resumee requires an adjustment strategy which would satisfy him for his loss of any interest in the land taken: a combination of pecuniary compensation and restitution in kind, in order
to suit the nature of the evil and the feelings which may be attributed to the resumee. Before even attempting to evaluate how that may best be supplied, it is necessary to consider the value of the affected interest and, as far as pecuniary compensation is concerned, that involves firstly a market valuation.

The recognition of claims for new use values would have the effect of excluding from the calculation of full open-market value the amount which represents the unearned increment. A lengthy consideration of the mode of achieving that exclusion has been undertaken elsewhere, but with inconclusive results in the practical arena. The final recommendations of the Commission of Inquiry into Land Tenures, nevertheless, are still instructive. They were:

To reserve for the community, as from a designated base date, the development or new use rights associated with permitted future changes in the nature or intensity of land use; to provide that, upon compulsory acquisition after the base date, compensation will be calculated as the higher of the market valuation at the base date (adjusted for inflationary effects) and the value under existing permissible use at the date of acquisition; to provide for implementation, either by public acquisition of the land or by imposition of development conditions designed to recover for the community the value of the new use rights; to provide for covenants in gross in favour of public authorities to enable development restrictions and improvement conditions to be enforced; to alter land tenure systems so as to reserve for the community the unearned value increments attributable to community growth and inflation in the case of non-residential lands but not in the case of residential lands.
These recommendations, *inter alia*, would simplify valuation procedures. In basing an assessment on sales of comparable land, the valuer has to be satisfied that the potential is the same and this requires a judgement about what type of development is likely to be permitted, and to what degree, and a judgement about the possibility of a change in zoning, and the probable new zoning, the scale of permissible development and the date of change. By securing the value of new use rights to the public, value would depend solely on the existing use and adjusted base values. After the once-for-all base date valuation, there would be no need to consider development potential, and this is the area in which most disputes about market valuation presently occur.

The Australian Law Reform Commission treated the financial implications of town planning as lying outside compulsory acquisition law, but conceded that there could be provision for compensation after acquisition on some restricted basis, such as on existing use. It was concerned, however, that a select provision of this nature in acquisition law would be 'no solution to the financial lottery arising from zonings', since publicly acquired land is only a small proportion of all zoned land. 'To have one market for land needed for public purposes and a separate one for other land would be unjust and politically unacceptable'. The Commission, therefore, would not consider it practicable to legitimate claims in respect to general land policy on a piecemeal basis in acquisition policy. It considered the alternative of a tax against increases on value after re-zoning along the lines of the English Finance Act, 1974, which in essence was also part of the Commission of Inquiry into Land Tenures recommendations about payment for new use rights, but again that required implementation in general land policy. On grounds of fairness (equality of risk), one must accept this reasoning.
Beyond issues of market valuation, a number of value-judgements have to be made about what would constitute appropriate satisfaction for the resumee and community alike. This will require a realistic valuation of the interest-holder's 'affection' for his lost property, bearing in mind that the amount and kind of satisfaction must not approximate enjoining the taking itself. The various possibilities in this regard have been noted in previous chapters, and one cannot argue with the general proposition of the Australian Law Reform Commission that, in principle, it is just that all losses actually and reasonably incurred should be compensable, that compensation should not be restricted to particular types of expenses and that it should be available to all persons having an interest in the resumed land.\(^{(583)}\)

It is clear in its detailed proposals, that the Commission has used the kind of discernment, which Bentham advocated: for instance, in the computation of a removal solatium for dispossessed residents. Although one could still debate specific niceties of judgement in the Commission's proposals, the satisfaction of resumee is paramount in the various recommendations. In retaining, by reason of fairness, the existing market base for valuation of the realty, the Commission has not succumbed by default to the argument that market value is the only fair test for compensating resumee. It has recognised that it is appropriate to take into the assessment more partial and personal factors, and regard as fundamental considerations the expectations and valuations of those who are deprived of their property, subject to the reasonable requirement that the resumee should not be seen to profit unduly by an acquisition in a situation where there is no apparent market for his land.

The Commission, consequently, has made a genuine endeavour to accommodate within the compensation mechanism the shifts in emphasis
between public and private interests, by relying on notions of both
fairness and reasonableness:

'... a decision not to compensate is not unfair as long as the
disappointed claimant ought to be able to appreciate how such
decisions might fit into a consistent practice which holds forth
a lesser long-run risk to people like him than would any con­
sistent practice which is naturally suggested by the opposite
decision';

and

'... according to the utilitarian model, compensation is due
whenever "demoralisation costs" exceed "settlement costs" and,
when it comes to calculating the former, "we are compelled ...
to frame the question about demoralisation costs in terms of
responses we must impute to ordinarily cognisant and sensitive
members of society"'. (584)

The Interdepartmental Committee pursued a similar course and
recommended against a return to the pre-Rosenbaum position which would
have precluded a separate valuation of all interests resumed; proposed
a series of provisions in which the 'value to the owner' concept would
be retained, the statutory provisions in respect to alterations in
value would be brought into line with the decision in Woollam's Case,
complementary modes of satisfying dispossessed home owners would be
introduced (with suitable upper limits for lump sum solatium payments
and loans); and specifically excluded special suitability or adaptability
of land for a purpose to which it could be applied only pursuant to
statutory powers and also excluded value arising from unlawful use of
the resumed land. (585)
Before leaving the resumees, however, some special mention should be made of the cases where acquisition is abandoned and where land is blighted as a result of acquisition proposals. The question whether the original owner of land, which is no longer needed for the purpose for which it was acquired, should have any special right to purchase it back from the acquiring authority was highlighted in England by the Crichel Down Affair. Land had been acquired compulsorily in 1937 for use as a bombing range. After the War, when the land was no longer required for this purpose, the former owners sought to purchase it, but the Government refused to sell to them. The refusal of the Government was justified in law, although it led to various political repercussions and the eventual establishment of the Franks Committee to examine the whole question of administrative tribunals and inquiries. (586)

Neither fairness nor reasonableness would support a special claim by the resumee to a pre-emption right after the land had properly changed ownership, since the special position of the owner is taken care of in a comprehensive compensation strategy. If there is nothing improper about the taking, there is no reason in justice to pursue restitution as an adjustment mechanism. However, if the taking itself is improper, fairness would urge that an offer of equivalents may not always be suitable and would provide an opportunity to the resumee to take back the property itself, but such a course could well be attended by practical difficulties so that the balance of reasonableness would render it inappropriate. That certainly appears to be the view of the Interdepartmental Committee in New South Wales, which did not refer to the matter explicitly but which stopped short at recommending a general power to rescind resumptions where compensation, other than advance payments, had been paid. (587)
Another aspect of abandonment, relates to the loss suffered by a prospective resumee where an acquisition scheme is proposed and then abandoned. His land may be blighted by the proposal, yet since acquisition does not eventuate, he has no right to compensation and this deficiency would be exacerbated by pre-acquisition inquiries publicising the proposal. The Australian Law Reform Commission considered that, in principle, it was beyond argument that there ought to be a right to compensation for losses occasioned by abandonment and that the real issue was the framing of the entitlement. It preferred the Canadian approach, and recommended that full compensation should be given for all provable losses incurred between the date of a proposal announcement setting out which land is subject to the proposal and the date of actual or deemed abandonment. The first date was not necessarily to be determined by a formal acquisition step, but there had to be a real expectation that the land would be acquired.

This remedy is obviously more appropriate than inverse acquisition, since, if proper inquiries have been conducted and there is no need to proceed to acquisition of the land in question, reasonableness would suggest that the land should not be forced upon a public body at greater public expense. Fairness is met by compensating the actual loss. The same kind of reasoning is evident in the Commission's recommendations that compensation should be abolished for the injurious affection of land zoned for public purposes, but that upon compulsory acquisition the land should be assessed on the basis of the zoning it would have had if not required for a public purpose: again on proof of actual loss. The effects of blight, therefore, would not be ignored, but the expense to the community would be contained. Although the recommendations in respect to planning blight would ideally necessitate an amendment of relevant planning policy as well as acquisition policy, since they
represent, in essence, a rationalisation of existing practice, that course of action would not be essential.

The New South Wales Committee did not elaborate upon the issues which concerned the Law Reform Commission, but its draft legislation provided for cessation of a public purpose designation by the revocation of a prescribed scheme, suspension of the provisions of a prescribed scheme, variation of a prescribed scheme or the alteration or rescission of an interim development order. By its proposed section 44(5), compensation would be available for the owner of land, which ceased to be designated before acquisition, 'for any loss or damage actually suffered by him as a direct consequence of the land having been so designated'. Additionally, the proposed section 53 power to rescind resumptions carried with it in subsection (4) an entitlement to compensation against the acquiring authority by the person in whom any land is revested 'for any loss or damage actually suffered ... as a direct consequence of the resumption and its rescission'. These recommendations likewise should be seen in the context of the recommendations to abolish the concept of injurious affection flowing from a planning restriction and to repeal section 342AC of the Local Government Act; to ignore the existence of any restrictions when calculating compensation for resumption; and to require revocation of the original designation of the land. It is interesting, however, that in so dealing with blight, the Committee also recommends that a right of inverse acquisition be given in respect to the original designation of the land for public purposes. Not only is such a right unnecessary for the benefit of the landowner in view of the other proposals, but its inclusion hardly seems an appropriate means for achieving the benefit to the acquiring authority which was envisaged by the Committee.
'Thereby an acquiring authority could avoid the consequences of land use changes which might enhance the value of land to be acquired for public purposes if their acquisition was long delayed'. (592)

Adjustment of Claims by Non-resumees

The deleterious effects on persons whose land is not taken were shown to demand a solution that adjusted a loss of value sustained to an interest in land irrespective of whether any land was acquired from the claimant. The same dictates of fairness and reasonableness apply as they do to resumees and the compensation base could take a number of different forms varying between monetary compensation and restitution in kind.

Among the various possibilities considered by the Australian Law Reform Commission (593) were the approaches of the Land Compensation Act, 1973 (U.K.), the 1973 Supplementary Justice Report and the Law Reform Commission of British Columbia. In general terms, the English statute provides compensation for depreciation to a value of an interest in land, caused by specified physical factors, calculated by reference to existing use value with no compensation for loss of prospective development value, and any increase in value attributable to the works must be set off against the compensation payable. There is a minimum compensable claim, and there is also provision for mitigation of injurious effect of public works and for the benefiting of persons displaced from the land. The 1973 Supplementary Report suggested that an owner should additionally be entitled to compel the authority to purchase affected land, and the British Columbia Commission had discussed, without recommending, a proposal that the authority from
whom the damages are claimed should have the option of paying the
damages or buying the property, with the owner having the right to
refuse to sell if he foregoes his claim for damages.

In respect to the date upon which the right to compensation
should arise, the Australian Commission held the opinion that the
English date, completion of the work, was 'the least unsatisfactory
date'. Any earlier date seemed administratively impractical. While
this date would give less than full compensation to a person selling
during the construction of the work, that person was considered to be
better off than now to the extent that the purchaser would be persuaded
by the prospect of compensation not to reduce fully his price. (594)

Aspects of loss recoverable under English law did, however, require
some adjustment. The Commission believed that losses caused by specified
physical factors (noise, vibration, smell, fumes, smoke, artificial
lighting and the discharge onto the land of any solid or liquid
substance) should be extended to include loss of sunlight and air,
although loss of view could be excluded on the ground that the public
authority should be able to estimate costs in advance and losses of
view were not readily calculable in advance. (595) In respect to loss
of access, the Commission proposed that there should be adjustment for
loss of value caused by the construction of public works, but that the
law should go no further and cover any consequence of reduction of access
imposed through restrictions under which all road users take their chance
in the interests of sensible traffic management. (596) Business losses
automatically would be compensable where land is used commercially for
its highest and best use, since any diminution in profitability of that
use would adversely affect its market value. A general right to
business losses, as given under Ontario legislation, would not be
appropriate since it could permit compensation for what was not really a loss to existing use caused by the works. Tenants holding an unexpired term, or unexpired term and option of not less than three years, should also be able to claim, but the inclusion of more limited interests would not justify the administrative cost in dealing with them. (597)

The monetary compensation available to meet the above losses could be varied in some cases by mitigating works. The Commission accepted a submission that the mitigation should not be mandatory in all cases, but that the public authority should be empowered to carry out, with the consent of an affected owner, such mitigation as it thinks proper. It also considered it appropriate to allow, as one method of assessing compensation in difficult cases, a court to award the cost of mitigating works. (598) In relation to inverse acquisition proposals, the Commission's attitude was that, where a person was badly affected, there would be a natural inducement on the part of the authority to acquire the property and re-sell it after completion of the project. The only specific recommendation it made was for loss of view since, not falling within the injurious affection formula, there would be no natural inducement. In such a case, the inquiry officer was to be empowered to make a binding determination that, if the work goes ahead, it be on the basis that a particular property which is severely affected by loss of view be acquired as part of the project. If there was any loss to the acquiring authority on re-sell that would be properly absorbed as a construction cost. (599)

Finally, the Commission concluded that if it is valid to delete the element of injurious affection from the assessment of compensation on acquisition, and introduce general injurious affection after completion
of public works, it seems equally valid to delete enhancement. As in
cases of injurious affection, the relationship between the taking of
the land and effect on retained land is purely fortuitous. The solution
to the problem that some people will reap private benefits from the
public undertaking was seen to lie in general betterment legislation,
avessed after disposal of the land and after the public work is
operative. (600)

In tackling the task which overwhelmed the Commission of Inquiry
into Land Tenures, it is interesting that the Commission makes no
specific mention of two further possibilities referred to by the other
Commission. (601) One is the approach suggested by the South Australian
Land Acquisition (Legislation Review) Committee that losses occasioned
by public works should not be compensated pursuant to land acquisition
legislation but should be adjusted by administrative action or in
legislation of a social nature specifically directed to the social
problems involved. The other is like that suggested in the Supplementary
Justice Report, that developers should be made to acquire any property
sufficiently affected by development if the owner so requests within a
specified time.

Although the recommendations do provide for works of mitigation
for particular affected owners, and it was noted that such works may
give rise to economies of scale such as where fences are re-built in
conjunction with road widening, the Law Reform Commission's solution
is still governed by a reflex which dictates compensation in traditional
form and based in a property concept. It is necessary to draw the line
between those who may recover compensation and those who may not, and
between those impacts which are compensable and those which are not.
The solution falls within the bounds of reasonableness by omitting
from consideration small non-nuisance type impacts on individual interest-holders but otherwise endeavours to achieve fair adjustment on an individual basis.

As admirable as this approach is, it conveniently ignores the aggregate social impact to the individuals omitted from the compensation equation. Reasonableness may yet support an aggregate adjustment, both for these additional impacts and for some impacts which have been brought within the equation. A provision of a public facility, such as a park or new road, may in fact provide a fairer and more reasonable solution in some cases than that confined to one-for-one compensation issues. Such a notion is quite familiar in respect to conditions imposed on private development, and if the objective of new policy is to remove as far as possible the distinctions between private and public development in the interests of effective resource allocation, then an approach similar to the South Australian proposal has much to commend it. This would require policy-style legislation permitting ad hoc remedies at individual and/or community levels, backed up by an effective administrative control process to enable flexibility to, but ensure accountability of, public authorities. It would run counter to the ready belief that simplicity, as enshrined in line-drawing, is a good indicator of reasonableness.

The other notion that the development could absorb some losses, and that a real incentive to reduce the losses would be created, by imposing an obligation on the developer to acquire seriously affected land does form some part of the Commission's recommendations. It is difficult, however, to understand why the Commission should halt at inverse acquisition for loss of view alone. In accepting that there should be compensation for public development blight, the Commission
accepted a proposition that adjustment is desirable for the effects of development in any situation where existing use value is impaired. In other words, compensation should be given not for the consequences of mere planning proposals but for the planning action of public development following upon compulsory acquisition. It is not a necessary ingredient of that reasoning that the compensation should be less than appropriate and the same considerations do not apply as they did to planning blight, to mitigate against the reasonableness of requiring the developer, as opposed to the planner, to acquire seriously affected land. Leaving the choice to the acquiring authority is far from adequate.

The New South Wales Committee arrived at substantially the same conclusions as the Commission in respect to the general issue of injurious affection. It relied heavily on the English Land Compensation Act, 1973 to recommend a general entitlement, but brought under the one umbrella statute. Like the Commission it did not regard the English list of physical factors as exhaustive and would contemplate loss of air, over-shadowing, denial of access and even loss of view in extreme cases. However, it would otherwise follow the English lead and establish a minimum claim limit ($300 was suggested) and provide for set-off for enhancement both in respect to resumees and non-resumees. In respect to works of mitigation, a regulation made pursuant to the proposed section 87 would cast a duty upon the constructing authority, or a council as its agent, to carry out work of noise insulation; a discretion would be given under the proposed section 88 to execute other works of mitigation; a discretion would be given under the proposed section 89 to use additional powers to mitigate the effects of public road works; and under the proposed section 90 powers would be available to pay reasonable expenses incurred by the occupier of a dwelling in
obtaining suitable alternative accommodation during the carrying out of the public work.

Cost controls dominate the Committee's recommendations. Most significant is the proposal that injurious affection claims do not arise as of right until an area is declared by the Governor to be an 'affected area' under the proposed section 86. The notification may also limit the grounds upon which compensation for injurious affection may be claimed. The relevant date for the purpose of claims is recommended to be twelve months after the date on which a public road is first opened to public traffic or twelve months after other public works are first used after completion. The claim would have to be made within two years following the relevant date. The compensation would be assessed according to the depreciation due to the use of the public work on the relevant date together with any reasonable expectation of intensification in use and allowing for the benefit of any works of mitigation. Personal injury or trade losses would be expressly excluded, but the new rules relating to payment of costs, charges and expenses (including expenses of valuation and negotiation) in a resumption claim would apply to an injurious affection claim. There is no right to compel acquisition of seriously affected land, but the powers of mitigation enable the constructing authority to:

'(A)cquire land by agreement for the purpose of mitigating any adverse effect ... being (a) land the enjoyment of which is seriously affected by the carrying out of work by the Constructing Authority for the construction or alteration of any public work; or land the enjoyment of which is, or will be, seriously affected by the use of any public work'.
The Committee would also continue to draw a distinction between resumees and non-resumees in some instances. In relation to injurious affection caused to retained land, other than by severance, the proposed section 96 (1) (d) provides for injurious affection which has been caused by factors which affect only the value of the land in which the claimant has an interest, and which are not of such a nature as to cause injurious affection of other land in the vicinity. There is no set-off in regard to enhancement in such a case, but the compensation will be limited to compensation for injury attributable to the construction or use of works on the land taken from the claimant. (604)

Conclusion

The demands which could be met by changes in acquisition policy are largely demands of land use and planning law since acquisition itself is a selective mechanism for achieving land use and planning objectives. The best acquisition policy will obviously be one which considers acquisition as a means to these ends and as part of a comprehensive resource policy. There is no basis for different policies for different types of acquiring bodies, since the impacts of acquisition do not differ depending upon the particular public agency which acquires the land, although some acquisition proposals may require specialist statutory rules, as they do now, according to the nature of the consequent development and societal expectations about it (such as large scale re-development and airports). (605)

Local authorities, as acquiring authorities, therefore, require no special consideration beyond that first raised in Chapter Eight: what ought to be the proper province of their functions? Indeed, the New South Wales Interdepartmental Committee made no special recommendations in respect to local councils and would assume that its
recommendations in respect to the Public Works Act would be generally adopted. Local authorities, however, as planning and development authorities, are highly conspicuous in the whole area of demands and, as such, are placed in a more invidious position than other agencies when the demands are not met.
CHAPTER NINE FOOTNOTES

558. Friedmann, op. cit. at 514-516.

559. Little, op. cit. at 6.

560. Id at 95-96.

561. Id at 120-121.


563. Friedmann, op. cit. at 161-162.

564. Tay, at 18.


566. It is analogous with intentional torts: Fletcher, at 550.

567. Id at 550-551.


569. Per Sachs L. J. at 10.

570. At 12.


572. Id at 78.

573. The Commission rejected a more restricted inquiry which would have excluded evidence as to whether the public work contemplated was necessary from a policy point of view: Working Paper No. 8, at 39.
574. Id at 38. See also parallel case law developments in the obtaining of injunctions in respect to public rights, discussed in H. Whitmore and M. Aronson, op. cit. at 329-337.

575. At 48, but it did leave some options open.

576. At 46.

577. At 49.

578. For a fuller exposition, see K. Davies, Law of Compulsory Purchase and Compensation, (1975) at 44-58.


580. Generally, see the Report at 1015-1016, 1023-1029 and 1078.

581. See, for instance, the Barlow Commission Report, (1937); the Uthwatt Committee Report, (1942); The Justice Report, (1969 and 1973); White Papers on Widening the Choice: The Next Steps in Housing (Cmnd. 5280), and Land (Cmnd. 5730); and the Commission of Inquiry into Land Tenures Reports (1973 and 1976).

582. Working Paper No. 8, at 141-143. The Interdepartmental Committee did not pursue this line of reasoning at all.

583. See suggested compensation formula at 189-193. Not surprisingly, however, many issues of practicality and implementation were raised at the seminar on the proposals held by the Australian Institute of Valuers on May 2, 1978.

584. P. McAuslan, Land, Law and Planning, (1975) at 679, citing F. I. Michelman, 'Property, Utility and Fairness' at 1215-16 and 1223. McAuslan, at 682, reports that a survey undertaken by the Commission of Inquiry into the Siting of the Third London Airport, in 1971, found that the average excess subjective value of a house over market value was 39%. If the difference between this figure and that found by the 'reasonableness' requirements in detailed compensation principles is not great, one wonders whether reasonableness would not still be served in the light of time delays and costs associated with contested compensation proceedings by eliminating so-called objective valuations altogether. McAuslan offers no figures in this regard, and neither do the Australian Commissions.

585. See the Report at 1016-1017 and 1030-1034.

587. The Report at 1061. That clearly was the view of the California Law Revision Commission (see footnote 252), but the Australian Law Reform Commission expressed no view at all.


589. Cf. 'blight' which arises not as a consequence of public proposals but as a result of public development action, discussed infra.

590. The Report at 1038-1039. The Planning and Environment Commission would determine the status of the land if it had not been zoned or reserved for the public purpose, and objections re status could be made to the Commission whose decision would be final.

591. Id at 1061.

592. Id at 1038.


594. Id at 276.

595. At 271-272.

596. At 273.

597. At 273-275.

598. At 277-278.

599. Ibid.

600. At 280-283.

601. At paras. 6.37-6.38.

602. At 1047.

603. At 1018 and 1045.
604. At 1048.

605. The Interdepartmental Committee at 1009-1011 stressed the need not only for an eventual move towards a uniform code of land acquisition law in New South Wales but for 'a basic similarity if not uniformity in Commonwealth and States lands acquisition law'.
APPENDIX

QUESTIONS AND ANSWERS ON NOTICE IN THE NEW SOUTH WALES LEGISLATIVE ASSEMBLY

In order to establish the magnitude of land acquisition in New South Wales by local authorities as a fraction of the total governmental acquisitions within the State, nineteen questions were asked of relevant Ministers in the State government. No one person could answer all questions and at the date of compilation of this thesis, eleven of those questions remained unanswered. The lack of answers, however, does not pose the real difficulty in view of the answer supplied by the Minister for Local Government. His answer revealed that the collection of statistics in respect to local authorities would involve a lengthy exercise which would be out of all proportion to the needs of this thesis. Also, since the Member responsible for putting the questions was informed that although statistics could be compiled for the Department of Public Works they were not already available, one is left with the astounding conclusion that not only are the people of the State uninformed about the scope of governmental land acquisitions but so too is the government of the day. The announcement, in April of 1978, that the government will, however, establish a Public Lands Data Bank, like the attention now being given to the various facets of acquisition policy, indicates that the State of New South Wales is only just emerging into the twentieth century.

Copies of the questions and answers (where supplied) are set out in the following order:
1. Minister for Local Government
2. Minister for Local Government
3. Attorney-General
4. Minister for Conservation and Minister for Water Resources
5. Minister for Consumer Affairs and Minister for Co-operative Societies
6. Minister for Decentralisation and Development and Minister for Primary Industries
7. Minister for Education
8. Minister for Health
9. Minister for Industrial Relations and Minister for Mines and Energy
10. Minister for Industrial Relations and Minister for Mines and Energy
11. Minister for Justice and Minister for Housing
12. Minister for Lands
13. Premier
14. Minister for Services and Minister Assisting the Premier
15. Minister for Services and Minister Assisting the Premier
16. Minister for Sport and Recreation and Minister for Tourism
17. Treasurer (but see 13)
18. Minister for Public Works and Minister for Ports
19. Minister for Youth and Community Services
20. Multiple questions about one local government area (Campbelltown)
1976-77-78

New South Wales

LEGISLATIVE ASSEMBLY

No. 107

QUESTIONS AND ANSWERS

THURSDAY, 16 FEBRUARY, 1978

(Notice given, 31 January, 1978.)

+ 1104. Land Acquisitions by Local Government Authorities.—Mr Moore asked the
Minister for Local Government—

(1) What area of land was acquired for what purposes at what total value for
each purpose by all local government bodies in New South Wales in 1976 and
in 1977?

(2) What is the basis of collection of these statistics as to minimum area or
value of purchase?

Answer—

(1) and (2). There are 257 councils in New South Wales. These authorities
are autonomous bodies and may acquire land for a wide range of public pur­
poses without, except in cases of compulsory acquisition, reference to my
Department. No statistics are kept by my Department from which the infor­
mation sought might be extracted.
Mr Moore asked the Minister for Local Government—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and in 1977?

(2) If no such statistics are recorded, why not?

Answer

Of the Departments and instrumentalities under my control, namely the Department of Local Government, the Metropolitan Waste Disposal Authority and the Sydney Cove Redevelopment Authority, only the latter two bodies are involved in acquiring land from time to time.

The Metropolitan Waste Disposal Authority acquired no land in 1976. In 1977 the Authority bought 2.276 hectares in Lindsay Street, Rockdale, for $700,000 for a waste transfer station for acceptance of waste from the Municipalities of Rockdale and Kogarah.

The only lands acquired by the Sydney Cove Redevelopment Authority during 1976 and 1977 were two parcels, 327.4 square metres and 168.3 square metres off Circular Quay West between the Old Ordnance Stores Building and Campbells Storehouse, said to have been in the possession of the Maritime Services Board and the Council of the City of Sydney, respectively, by declaration in the Government Gazette of 22/4/77. The valuation of the improved capital value has yet to be determined by the Valuer-General.
(Notice given, ...-7 FEB 1978, 19 ...)  

Mr. TIM MOORE, M.L.A.

to ask the ATTORNEY-GENERAL

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
NOTICE OF QUESTION
(see reverse)

(Notice given, 27 FEB 1973, 19[...]

Mr. TIM MOORE, M.L.A.

to ask the MINISTER FOR CONSERVATION AND
MINISTER FOR WATER RESOURCES

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
LEGISLATIVE ASSEMBLY

NO. 109

QUESTIONS AND ANSWERS

WEDNESDAY, 1 MARCH, 1978

(Notice given, 31 January, 1978.)

* 1114. Acquisition of Land for Public Purposes.—Mr Moore asked the Minister for Consumer Affairs and Minister for Co-operative Societies—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and 1977?

(2) If no such statistics are recorded, why not?

Answer—

(1) Nil.

(2) See (1).
NOTICE OF QUESTION

(see reverse)

(Notice given, 7 Feb 1978, 19)

Mr TIM MOORE, M.L.A.

to ask the MINISTER FOR DECENTRALISATION AND DEVELOPMENT AND MINISTER FOR PRIMARY INDUSTRIES

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
QUESTIONS AND ANSWERS

(Notice given, 31 January, 1978.)

§ 1106. Acquisition of Land for Public Purposes.—Mr Moore asked the Minister for Education—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and in 1977?

(2) If no such statistics are recorded, why not?

Answer—

(a) Site Acquisition by the Department of Education

Expenditure

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>$5,578,927</td>
</tr>
<tr>
<td>1977</td>
<td>$13,207,551</td>
</tr>
</tbody>
</table>

Purpose of Acquisition

The land in question was acquired for school purposes.

Area of Land

The area of land acquired is irrelevant as one acre in Sydney could be equivalent in cost to 20 acres in a country centre.

(b) Site Acquisition by the Department of Technical and Further Education

Expenditure

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>$2,551,125</td>
</tr>
<tr>
<td>1977</td>
<td>$664,450</td>
</tr>
</tbody>
</table>
**Area** | **Property**
--- | ---
0.032 ha | Armidale—Pt 203 Rusden Street
0.068 ha | Bankstown—Raw Avenue
0.151 ha | Finley—Lot 2, Denison Street
0.015 ha | Finley—Lot 3, Denison Street
17.00 ha | Goulburn—Argyle School
0.045 ha | Granville—12 Malcolm Street
0.092 ha | Granville—6 Malcolm Street
0.054 ha | Granville—21 Malcolm Street
0.033 ha | Lismore—64 Conway Street
0.04 ha | Lismore—127 Dawson Street
0.076 ha | Narrabri—79 Barwan Street
1.35 ha | Newcastle—Laundry Site and 7 Clyde Street
0.108 ha | Newcastle—2/4 and 6/8 Clyde Street
0.067 ha | Orange—285 Anson Street
0.058 ha | Penrith—Additional Land
0.111 ha | Sydney—N.C.R. Building, corner Harris and Mary Ann Streets, Ultimo
1.981 ha | Taree—Additional Land
0.068 ha | Wauchope—30 Campbell Street
0.081 ha | Wyong—9 Porter Street
2.135 ha | Tumut—Howick appropriation

With the exception of Tumut and Goulburn, which were new sites, all land was acquired for additions to existing technical college sites. The Goulburn site, the former Argyle School, was secured as a terms purchase and is being used for the redevelopment of Goulburn Technical College. The former N.C.R. Building at Ultimo is being converted for specialist training purposes as part of Sydney Technical College.

**Purchases of Land—1977**

<table>
<thead>
<tr>
<th>Area</th>
<th>Property</th>
</tr>
</thead>
</table>
0.025 ha | Armidale—Pt property 195 Rusden Street
0.085 ha | Bankstown—23 French Avenue
0.07 ha | Bankstown—480 Chapel Road
0.07 ha | Bankstown—476 Chapel Road
0.068 ha | Bankstown—6 Raw Avenue
0.084 ha | Bankstown—8 Raw Avenue
0.067 ha | Bankstown—21 French Avenue
10.05 ha | Belmont—Pt lots 1, 2 and 3, section T
0.062 ha | Gosford—115 Gertrude Street
0.45 ha | Hornsby—Pts 211 and 213 Pacific Highway
0.108 ha | Moree—22 Frome Street
0.186 ha | Macksville—Lots 5–8, D.P. 9947
0.061 ha | Newcastle—101 Chin Chen Street
0.102 ha | Newcastle—95 Chin Chen Street
0.047 ha | Newcastle—93 Chin Chen Street
0.061 ha | Newcastle—103 Chin Chen Street
0.067 ha | Orange—287 Anson Street
2.42 ha | Werrington—Lot 1, D.P. 205204
0.046 ha | Wyong—92 Alison Road
0.055 ha | Meadowbank—Adjoining public lane
2.164 ha | Tweed Heads—New Site
1.626 ha | Cohar—New Site
0.565 ha | Wollongong—Northfields Avenue

All land was acquired for technical college purposes. Macksville, Tweed Heads and Cobar are sites for new colleges. All other acquisitions were additions to existing sites.
(c) Site Acquisition by the New South Wales Higher Education Board

The following unimproved and improved sites and properties were acquired by the Board in 1976. There were no acquisitions in 1977.

<table>
<thead>
<tr>
<th>Location</th>
<th>Area</th>
<th>Cost</th>
<th>Purpose for Acquisition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brush Road, Ourimbah</td>
<td>65.3 ha</td>
<td>$339,000</td>
<td>Future Development of tertiary educational facilities for Gosford/Wyong</td>
</tr>
<tr>
<td>58 Allen Street, Glebe</td>
<td>1013 square metres</td>
<td>$300,255</td>
<td>For use as a central campus for Cumberland College of Health Sciences</td>
</tr>
<tr>
<td>Henrietta Street, Waverley, Land and Buildings</td>
<td>1 ha</td>
<td>$750,000</td>
<td>For use by Sydney Kindergarten Teachers' College—a College of Advanced Education</td>
</tr>
</tbody>
</table>

It should be noted that negotiations for the acquisition of the above sites was initiated in the 1973–75 triennium and funded as follows—


(d) Site Acquisition by the Teacher Housing Authority

<table>
<thead>
<tr>
<th>Year</th>
<th>Location</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td></td>
<td>$35,320</td>
</tr>
<tr>
<td></td>
<td>Barraba</td>
<td>620</td>
</tr>
<tr>
<td></td>
<td>Culcairn</td>
<td>5,000</td>
</tr>
<tr>
<td></td>
<td>Ivanhoe</td>
<td>200</td>
</tr>
<tr>
<td></td>
<td>Jindabyne</td>
<td>17,000</td>
</tr>
<tr>
<td></td>
<td>Walcha</td>
<td>1,000</td>
</tr>
<tr>
<td></td>
<td>Culcairn</td>
<td>2,000</td>
</tr>
<tr>
<td></td>
<td>Crookwell</td>
<td>3,000</td>
</tr>
<tr>
<td></td>
<td>Yass</td>
<td>6,500</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Location</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td></td>
<td>$45,050</td>
</tr>
<tr>
<td></td>
<td>Cooma</td>
<td>7,125</td>
</tr>
<tr>
<td></td>
<td>Dubbo</td>
<td>18,000</td>
</tr>
<tr>
<td></td>
<td>Gilgandra</td>
<td>900</td>
</tr>
<tr>
<td></td>
<td>Gulgambone</td>
<td>625</td>
</tr>
<tr>
<td></td>
<td>The Rock</td>
<td>3,000</td>
</tr>
<tr>
<td></td>
<td>Ashford</td>
<td>500</td>
</tr>
<tr>
<td></td>
<td>Barraba</td>
<td>900</td>
</tr>
<tr>
<td></td>
<td>Trangie</td>
<td>850</td>
</tr>
<tr>
<td></td>
<td>Bourke</td>
<td>1,500</td>
</tr>
<tr>
<td></td>
<td>Trangie</td>
<td>1,400</td>
</tr>
<tr>
<td></td>
<td>Tenterfield</td>
<td>6,000</td>
</tr>
<tr>
<td></td>
<td>Karuah</td>
<td>4,250</td>
</tr>
</tbody>
</table>

$80,370

The Authority purchased the abovementioned vacant land in 1976 and 1977 for teacher housing purposes.
NOTICE OF QUESTION

(see reverse)

(Notice given, 7 FEB 1978, 19)  

Mr TIM MOORE, M.L.A.

to ask the MINISTER FOR HEALTH

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
NOTICE OF QUESTION
(see reverse)

(Notice given, 7 February 1978, 19)

Mr. Tim Moore, M.L.A.

to ask the MINISTER FOR INDUSTRIAL RELATIONS AND
MINISTER FOR MINES AND ENERGY

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES
UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT
OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE
YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

Tim Moore

P 27152
NOTICE OF QUESTION

(see reverse)

7 FEB 1973

(Notice given, ________________, 19 ___)

Mr. TIM MOORE, M.L.A.

to ask the MINISTER FOR INDUSTRIAL RELATIONS AND
MINISTER FOR MINES AND ENERGY

LAND ACQUISITIONS BY LOCAL GOVERNMENT ELECTRICITY AUTHORITY

WHAT AREA OF LAND WAS ACQUIRED FOR WHAT PURPOSES AT WHAT TOTAL VALUE FOR EACH PURPOSE BY ALL LOCAL GOVERNMENT BODIES IN NEW SOUTH WALES FOR EACH OF THE YEARS OF 1976 AND 1977?

WHAT IS THE BASIS OF COLLECTION OF THESE STATISTICS AS TO MINIMUM AREA OR VALUE OF PURCHASE?

Signature of Member

P 27152
(Notice given, 31 January, 1973.)

1115. Acquisition of Land for Public Purposes.--Mr Moore asked the Minister for Justice and Minister for Housing--

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and in 1977?

(2) If no such statistics are recorded, why not?

Answer--

(1)

The Housing Commission of New South Wales.

The Housing Commission of New South Wales does not maintain a central record of the area and value of land acquired by it. This information is available only by reference to the specific files for each transaction, and something in the order of 400 such transactions occurred in 1976 and 1977. Each member of the Legislative Assembly is advised direct of every acquisition of land by the Commission within his electorate.

N.S.W. Superannuation Office.

Nil. No land acquired for public purposes. Funds have acquired buildings as investments only.

Builders Licensing Board.

The Builders Licensing Board did not acquire any undeveloped land in the years 1976 and 1977. It has acquired the following properties as investments under the building and Construction Industry Long Service Payments Act, 1974 (as amended).
### Building | Type | Site area | Consideration
---|---|---|---
109 Woodpark Road, Smithfield | Factory | 237 sq. m. | $155,000
5 Ludbrooke Street, Bunkstown | Factory | 1,290 sq. m. | $310,000
23 Berry Street, North Sydney | Office block | 291 sq. m. | $550,000
124 Vincent Street, Cessnock | Retail store | 737 sq. m. | $130,000
584 Pacific Highway, Belmont | Retail store | 544 sq. m. | $150,000
288 Main Road, Cardiff | Retail store | 433 sq. m. | $95,000
137 Ballandella Road, Pendle Hill | Factory | 4,363 sq. m. | $240,000
21 Brighton Avenue, Croydon Park | Factory | 1,540 sq. m. | $275,000
Main Road, Kelso, Bathurst | Transport Depot | 15,453 sq. m. | $399,000
275 Milperra Road, Milperra | Factory | 3,105 sq. m. | $25,000
49-52 Beecroft Road, Epping | Shopping Arcade | 1,099 sq. m. | $870,000
221-3 Macquarie Street, Liverpool | Retail outlets | 589 sq. m. | $390,000

### Land Commission

The Commission did not acquire land in 1976. Acquisition for 1977 totalled 642 hectares with a cost of $12.6 million. In addition the Commission in 1977 appropriated 558 hectares costing $9.3 million from the Housing Commission which had acquired the land on behalf of the Urban Land Council of New South Wales. This land was acquired for present and future urban development.

### Justice Department

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-5-76</td>
<td>Burwood—New Site (part)</td>
<td>$117,354.94</td>
</tr>
<tr>
<td>22-12-76</td>
<td>Gosford—New Site (part)</td>
<td>$62,895.93</td>
</tr>
<tr>
<td></td>
<td>Total for year</td>
<td>$180,250.87</td>
</tr>
</tbody>
</table>

### 1977

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>24-3-77</td>
<td>Gosford—New Site (part)</td>
<td>$56,880.00</td>
</tr>
<tr>
<td>7-4-77</td>
<td>Gosford—New Site (part)</td>
<td>$65,000.00</td>
</tr>
<tr>
<td>22-6-77</td>
<td>Gosford—New Site (part)</td>
<td>$48,872.90</td>
</tr>
<tr>
<td>30-6-77</td>
<td>Gosford—New Site (part)</td>
<td>$42,630.00</td>
</tr>
<tr>
<td>1-7-77</td>
<td>Gosford—New Site (part)</td>
<td>$43,052.00</td>
</tr>
<tr>
<td>30-8-77</td>
<td>Gosford—New Site (part)</td>
<td>$247,987.00</td>
</tr>
<tr>
<td>9-11-77</td>
<td>Gosford—New Site (part)</td>
<td>$86,039.24</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>$590,461.14</td>
</tr>
</tbody>
</table>

The area of the Burwood purchase was 796.7 square metres whilst the total area of the individual purchases shown for Gosford (1976 and 1977) is reported to be 1 hectare (2.47 acres).

(2) The information requested in respect of the Builders Licensing Board and the Department of Justice are set out in answers to question (1). In so far as the Housing Commission and the Land Commission are concerned, to maintain statistics in the form suggested or requested by the Honourable member having regard to the extent and number of their acquisitions would be a very extensive and time consuming operation which would serve no useful purpose.
NOTICE OF QUESTION
(see reverse)

(Notice given, 7 FEB 1978, 19...)

Mr TIM MOORE, M.L.A.

to ask the MINISTER FOR LANDS

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
(Notice given, 31 January, 1978.)

* 111. Acquisition of Land for Public Purposes. Mr Moore asked the Premier—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and in 1977?

(2) If no such statistics are recorded, why not?

Answer—

(1) No Department or Instrumentality within the administration of the Treasurer acquired land for public purposes in 1976 or 1977. However, the Rural Bank of New South Wales and the Government Insurance Office of New South Wales did acquire land at various locations with a view to fulfilling their statutory functions.

(2) Not applicable.
NOTICE OF QUESTION
(see reverse)

(Notice given, 7 FEB 1978, 19)

Mr. TIM MOORE, M.L.A.

to ask the MINISTER FOR SERVICES AND
MINISTER ASSISTING THE PREMIER

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES
UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT
OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE
YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152

-303-
NOTICE OF QUESTION
(see reverse)
(Notice given, 7 FEB 78, 19___)

Mr. Tim Moore, M.L.A.

to ask the MINISTER FOR SERVICES AND
MINISTER ASSISTING THE PREMIER

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES
UNDER THE CONTROL OF THE MINISTER FOR PLANNING AND ENVIRONMENT

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT
OR INSTRUMENTALITIES UNDER THE CONTROL OF THE MINISTER FOR PLANNING AND
ENVIRONMENT FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
(Notice given, 31 January, 1978.)

1116. Acquisition of Land for Public Purposes.—Mr Moore asked the Minister for Sport and Recreation and Minister for Tourism—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and 1977?

(2) If no such statistics are recorded, why not?

Answer—

Department of Sport and Recreation

The Totalizator Agency Board acquired 8793.8 square metres valued at $924,500 to provide for Head Office expansion and accommodation for agencies.

The Department of Sport and Recreation acquired four areas totalling 433.1 hectares to provide for future sport and recreation centre sites and expansion of existing sites.

The four areas are:

- Minnamurra (39.3 hectares valued at $30,000.)
- Borambola (3.8 hectares valued at $44,670. Another adjoining portion previously acquired is included in this valuation.)
- Grose Wold (320 hectares. No valuation is available as the land is held as reserves and is not rateable.)
- Narrandera (70 hectares. No separate valuation is available as the land is held as a reserve and is not rateable.)

Department of Tourism

(1) The Department of Tourism acquired no land in 1976 or 1977.

(2) If land had been acquired statistics would have been recorded.
NOTICE OF QUESTION
(see reverse)

(Notice given, 7 FEB 1978, 19....)

Mr. TIM MOORE, M.L.A.

to ask the TREASURER OF NEW SOUTH WALES

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152
NOTICE OF QUESTION
(see reverse)

(Notice given, 7 FEB 1373, 19___)

Mr. TIM MOORE, M.L.A.

to ask the MINISTER FOR PUBLIC WORKS AND
MINISTER FOR PORTS

ACQUISITION OF LAND FOR PUBLIC PURPOSES BY DEPARTMENTS OR INSTRUMENTALITIES
UNDER YOUR CONTROL

WHAT AREA AND VALUE OF LAND WAS ACQUIRED BY WHAT DEPARTMENT
OR INSTRUMENTALITIES UNDER YOUR CONTROL FOR WHAT PURPOSES IN EACH OF THE
YEARS 1976 AND 1977?

IF NO SUCH STATISTICS ARE RECORDED, WHY NOT?

Signature of Member

P 27152

-307-
1976-77-78

New South Wales

LEGISLATIVE ASSEMBLY

No. 108

QUESTIONS AND ANSWERS

TUESDAY, 28 FEBRUARY, 1978

(Notice given, 31 January, 1978.)

* 1118. Acquisition of Land for Public Purposes.—Mr Moore asked the Minister for Youth and Community Services—

(1) What area and value of land was acquired by what department or instrumentalities under his control for what purposes in 1976 and in 1977?

(2) If no such statistics are recorded, why not?

Answer—

(1) (a) No land was acquired by the Department of Youth and Community Services in 1976.

(b) In relation to 1977, negotiations are proceeding towards the acquisition of the following parcels of land for the construction of small remand centres.

Wagga Wagga—4.48 hectares.

There is no cost involved as the land is being transferred from the Department of Education.

Grafton—10 hectares.

Cost—$16,000.00.

(2) Not applicable. See (1) above.
QUESTIONS AND ANSWERS ABOUT THE CAMPBELLTOWN AREA

1152. Land Owned by the Planning and Environment Commission in the Campbelltown Local Government Area. Mr Mallan to ask the Minister for Services and Minister Assisting the Premier:

(1) What is (a) the amount and (b) zoning of land owned by (i) the Planning and Environment Commission and (ii) the Macarthur Development Board in the Campbelltown Local Government Area?

(2) What is the amount of rates paid on this land?

(Notice given, 14 February, 1978.)

1153. Land Owned by Campbelltown City Council. Mr Mallan to ask the Minister for Local Government:

(1) What is (a) the amount and (b) zoning of land owned by Campbelltown City Council?

(2) What would be the amount of rates paid on this land if it were privately owned?

(Notice given, 14 February, 1978.)

1155. Land Owned by Department of Public Works and Ports in the Campbelltown Local Government Area. Mr Mallan asked the Deputy Premier, Minister for Public Works and Minister for Ports--

(1) What is (a) the amount and (b) zoning of land owned by department under his jurisdiction in the Campbelltown Local Government Area?

(2) What is the total amount of rates paid on this land?

Answer:

The Department of Public Works does not own any lands for its own purposes within the boundaries of the City of Campbelltown, but land has been acquired for the various authorities and purposes listed below, and title has vested in the Minister for Public Works. Under the provisions of Section 132 of the Local Government Act, 1919, these lands are not subject to council rates. Information relating to the zoning of these lands is not available within the Department, being the responsibility of the MacArthur Development Board.

(1) Department of Agriculture

Glenfield Veterinary Research Station
- Resumed by the Public Works Department with title vesting in the Minister for Public Works.
- Approximate area 127 hectares.

(2) Department of Youth and Community Services

Lyn Hill Child Welfare Home
- Purchased by the Public Works Department but title vested in Her Most Gracious Majesty Queen Elizabeth II.
- Approximate area 3.4 hectares.

Reedy Grammar School for Girls
- Resumed by the Public Works Department and vested in the Minister for Public Works.
- Approximate area 6.5 hectares.

(3) Police Purposes

Police Station and Courthouse
- Purchased by the Public Works Department but title vested in Her Most Gracious Majesty Queen Victoria.
- Approximate area 2,750 square metres.

Police Residence
- Corner of Lindsay and Broughton Streets.
- Site was resumed by the Public Works Department and vested in the Minister for Public Works.
- Area 550 square metres.
Insofar as the Metropolitan Water, Sewerage and Drainage Board is concerned, the position is as follows:

<table>
<thead>
<tr>
<th>Lot or Por. No's</th>
<th>Street Name</th>
<th>Area</th>
<th>Zoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upper Canal Lands</td>
<td></td>
<td>7.628 hectares</td>
<td>Special Uses (Water Supply)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.194 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.782 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.326 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.376 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.000 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>750 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.366 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>9.602 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.109 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.175 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.047 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>12.727 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.113 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.384 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.916 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>29.347 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>14.490 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.1 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.102 hectares</td>
<td>Non-Urban (40 hectares min.)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.661 hectares</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.060 square metres</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.010 square metres</td>
<td></td>
</tr>
<tr>
<td>Pt. Por. 17</td>
<td></td>
<td>4.400 square metres</td>
<td>Special Uses (Water Supply)</td>
</tr>
<tr>
<td>Pt. Lot 58</td>
<td>Cor. Fitzpatrick and Cummins Streets</td>
<td>1.75 square metres</td>
<td>Non-Urban (40 hectare min.)</td>
</tr>
<tr>
<td>Lot 2</td>
<td></td>
<td>140 square metres</td>
<td></td>
</tr>
<tr>
<td>Lot 3</td>
<td></td>
<td>3.375 square metres</td>
<td>Special Uses (Water Supply)</td>
</tr>
<tr>
<td>Lot 5</td>
<td></td>
<td>5.845 square metres</td>
<td>Special Uses (Water Supply)</td>
</tr>
<tr>
<td>Lot 6</td>
<td></td>
<td>4.680 square metres</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Ingleburn Dam No. 2</td>
<td>1.795 square metres</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lot 2 Ingleburn Dam</td>
<td>2.512 hectares</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lot 3 Ingleburn Dam</td>
<td>3.417 hectares</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lot 1 Venturi Meter House</td>
<td>2.461 hectares</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pt. Lot 2</td>
<td>Sydney Rd. or Queen St.</td>
<td>4.407 square metres</td>
<td>Special Uses Water Purpose</td>
</tr>
<tr>
<td>Lot 1 Georges River Road</td>
<td>8.22 square metres</td>
<td>Special Protection 'D'</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Wedderburn Road</td>
<td>4.578 square metres</td>
<td>Special Uses Pumping Station</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Old Kent Road</td>
<td>35.7 hectares</td>
<td>Special Uses Waste Water Treatment Wks. Special Uses Road—Open Space</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Glenfield W.P.C.P.</td>
<td>6.685 square metres</td>
<td>Non-Urban (100 hectare min.)</td>
</tr>
<tr>
<td>Lot 1 Appin Road</td>
<td></td>
<td>6.449 square metres</td>
<td>Non Urban</td>
</tr>
<tr>
<td>Lot 1 Dumaresq Street</td>
<td>2.024 hectares</td>
<td>Uses Reservoir</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Off Oxford Road</td>
<td>739.8 square metres</td>
<td>Living Area</td>
<td></td>
</tr>
<tr>
<td>Lot 2 Hansens Road</td>
<td>4.382 square metres</td>
<td>Uses Reservoir</td>
<td></td>
</tr>
<tr>
<td>Lot 1 &amp; 13 Elizabeth Street</td>
<td>2.028 hectares</td>
<td>Non-Urban (40 hectare min.)</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Railway Parade</td>
<td>809.4 square metres</td>
<td>Residential 'D'</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Harrow Road</td>
<td>175.2 square metres</td>
<td>Rural Area</td>
<td></td>
</tr>
<tr>
<td>Lot 1 St. Andrews Road</td>
<td>317.3 square metres</td>
<td>Proposed Open Space</td>
<td></td>
</tr>
<tr>
<td>Lot 128 Campbeltown W.P.C.P.</td>
<td>589.2 square metres</td>
<td>Special Uses Pumping Station</td>
<td></td>
</tr>
<tr>
<td>Lot 1 Loftus Road</td>
<td>459.8 square metres</td>
<td>Special Protection Area</td>
<td></td>
</tr>
<tr>
<td>Lot 1</td>
<td></td>
<td>1.312 square metres</td>
<td>Open Space (Regional)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.116 hectares</td>
<td>Uses Reservoir</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.847 hectares</td>
<td>Special Uses Pumping Station</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.384 hectares</td>
<td>Special Uses Pumping Station</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.458 hectares</td>
<td>Special Uses Water Purpose</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5.116 hectares</td>
<td>Uses Reservoir</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.847 hectares</td>
<td>Special Uses Pumping Station</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.384 hectares</td>
<td>Special Uses Pumping Station</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.458 hectares</td>
<td>Special Uses Water Purpose</td>
</tr>
</tbody>
</table>

With one minor exception, these parcels of land are not ratable, and have been acquired for service reservoirs, canals, water pollution control plants and similar purposes.

(Notice given, 14 February, 1978.)

1156. Land Owned by the Department of Education in the Campbeltown Local Government Area.—Mr Mallam asked the Minister for Education—

(1) What is (a) the amount and (b) zoning of land owned by the Department of Education, and by the Department of Technical and Further Education, in the Campbeltown Local Government Area?

(2) What is the total amount of rates paid on this land?
Answer:

(1) The Department of Education owns a total of 157.6 hectares of land in the Campbelltown Local Government Area. This land is zoned "special uses-school".

Land held by the Department of Technical and Further Education in the Campbelltown Local Government Area is as follows:

<table>
<thead>
<tr>
<th>College Site</th>
<th>Area</th>
<th>Current Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Macquarie Fields Technical College,</td>
<td>6.58 ha</td>
<td>Special Uses. Technical Colleges.</td>
</tr>
<tr>
<td>Victoria Road, Macquarie Fields</td>
<td>15.00 ha</td>
<td>New urban 40 ha, minimum under LGO No. 15</td>
</tr>
<tr>
<td>Campbelltown Technical College,</td>
<td>23.00 ha</td>
<td>New urban 40 ha, minimum under LGO No. 15</td>
</tr>
<tr>
<td>Camden Road, Campbelltown*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Known as the &quot;Precinct Site&quot;.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Queen Street, Campbelltown (This land is under offer to the Macarthur Development Board)</td>
<td>1.82 ha</td>
<td>Living area (County of Cumberland Planning Scheme)</td>
</tr>
</tbody>
</table>

| Total Area                             | 31.10 ha|

(2) Under the provisions of the Local Government Act, normal rates are not payable on properties administered by the Departments of Education and Technical and Further Education. Payments are made for services provided such as water and garbage collection.

(Notice given, 14 February, 1978.)

(1) 119.7. Land Owned by the New South Wales Housing Commission in the Campbelltown Local Government Area.- Mr. Mallam asked the Minister of Justice and Minister for Housing:-

(1) What is the total amount of land owned by the Housing Commission of New South Wales in the Campbelltown Local Government Area?

(2) What is the total amount of rates paid on this land?

Answer:

(1) 319.8 ha approximately.

(2) $391,550.57 per annum, based on rates paid in 1977.