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THE APPLICATION OF SOLATIUM PAYMENTS
IN THE ASSESSMENT OF PUBLIC WORKS
COMPENSATION

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EXECUTIVE SUMMARY

The need for public infrastructure is essential in modern society, efficient transport and communications networks are the grease in the machinery of any economy while provisions of hospitals, schools, modern sewerage and water systems provide the lifestyle that all of us want – consider what life may be like without these.

The ability to compulsorily acquire land is an essential element for those authorities that provide public works. Such projects often require the assemblage of many individual land parcels which would be near impossible, or impossibly costly to achieve without such legislation.

Where land is acquired by compulsion in New Zealand under the Public Works Act 1981, the compensation provided for is based on the principle of equivalence – that the landowner should be in a position no better or worse than before the land was acquired. In practice this means compensation based on the assessed market value of the land or interest acquired.

A review of the literature on the subject along with analysis of public submissions to a review of the Act which was undertaken in 2001 indicate that the principle of equivalence, while accepted as a reasonable basis for the payment of compensation, may well not be adequately compensating all landowners when their properties are taken compulsorily. Further the lack of compensation for injurious affection (depreciation) incurred when no land is taken is contentious, with landowners suffering from this extremely unhappy current legislation despite evidence that the actual losses incurred as a result of injurious affection are usually quite small.

The literature and the submissions to the Public Works Act review suggest that the payment of a small premium over and above the market value mandated by the principle of equivalence would be appropriate.

There are sound social and economic reasons why compensation should be paid to those who suffer a loss as a result of some public work.

Balanced against these considerations is the need to have a regime for the assessment of compensation that does not get bogged down in dispute, encourage spurious claims or allow landowners to be excessively overcompensated. To do so would put at risk any necessary and worthwhile public infrastructure projects.

It is very common for overseas jurisdiction to make an allowance in legislation for the payment of small premiums in the range of 5% to 10% over the market value when land is acquired using an element of compulsion. This premium is often (but not always) reserved for the purchase of residential property. Often the payment of the premium is discretionary up to the maximum, particularly in cases where the premium is allowed for all classes of land. The New Zealand Act contains a similar provision, referred to as a solatium and payable on the acquisition of a residence from an owner, however this has been fixed at \$2,000 for many years and is therefore too low a figure to be relevant in the overall compensation consideration.

The submissions to the Public Works Act review indicated that public works providers may be willing to consider an expansion of the compensation provisions to take account of some of these concerns, but this was tempered by a concern about opening themselves up to significant future costs and the problems that will be created for them in delivery of facilities and services into the future.

It is considered that a review of the current solatium provisions could provide ability to both, offer a premium in acquisition and to offer some compensation to those suffering from injurious affection when no land has been taken and at the same time keep a reign on costs.

A look at the “solatium” provisions of overseas legislation shows that within reason these can be constructed to manipulate the payment in almost any manner desired so it is clearly possible to engineer a clause which would enable useful premiums to be paid but still place a reasonable limit on owners expectations. The provisions could also be extended to cover those suffering injurious affection as in most cases the losses suffered would be within the scope of a solatium payment or premium being offered to those from whom land is acquired.

It is accepted that such proposals would add to the cost of public works projects but in most cases this would probably be not much more than 10% of the total property cost which is many projects is not a significant component of the overall cost of the project.

On this basis it is recommended that further investigation into the possible extension of the solatium provisions of the Act be undertaken with some cost/benefit modelling against actual projects to determine the viability of the proposal.

INTRODUCTION

The development of public infrastructure is synonymous with developed or first world countries. It is necessary for the basic functioning of modern societies to have efficient transport and telecommunications systems, electricity production and distribution grids, reticulated water and sewer systems and countless other infrastructure systems which provide for the functioning of modern society.

The development of public infrastructure in many countries serves two purposes, firstly and obviously it provides services to the benefit of the wider community and secondly it is an important part of many countries economy. Even in New Zealand the economic stimulus package announced by the government in early 2009 was largely a government spend on public infrastructure designed to preserve jobs and 'get the country working'.

For these reasons the ability to undertake and complete public works projects is important and all countries appear to have some legislative authority on their books that allows them to undertake such works.

Because of its physical nature public infrastructure of almost any sort requires land or an interest in land for its placement. Very often this will require the acquisition of land from a private person. As infrastructure projects are often site specific or large scale and require the assemblage of multiple land parcels the laws of most countries (certainly every country reviewed in the completion of this paper) allow land required for authorised public works projects to be compulsorily acquired. The right to compensation for land so acquired is virtually universal however there are differences in the application of compensation provisions. These differences affect who gets compensation and the quantum of the amount paid.

Most legislative provisions operate on the principle of equivalence, that is, the person whose land is acquired should be put into a position equivalent to that which they enjoyed before the land was taken, neither better nor worse off.

This is generally achieved through the payment of monetary compensation based on the fair market value of the land acquired. This is calculated on the basis of what a willing (but not anxious) seller would sell the land for and what a willing (but not anxious) buyer would pay for the land.

There has been much speculation, debate and some research suggesting that the payment of compensation on this principle does not adequately compensate for the compulsory acquisition of a persons property.

In New Zealand compensation rights are contained within the Public Works Act 1981. Compensation is based on the willing buyer/willing seller principle as well as the payment of a claimants reasonable costs (e.g, legal and valuation expenses) and (in certain circumstances) a solatium payment. The solatium payment is a sum of \$2,000 made in recognition of the compulsory nature of the acquisition. The solatium can only be claimed by the owners of a residential property acquired when it was their principal place of residence.

This dissertation contrasts the New Zealand rules with those contained in overseas legislation and research and to try and identify some improvements that could be made to the solatium payment provisions of the New Zealand Act making the compensation paid more satisfactory for those who suffer the compulsory acquisition of their property and also potential benefits to acquiring authorities from this approach.

BACKGROUND INFORMATION/LITERATURE REVIEW

Overview of Land Ownership History in the Western World

In any discussion on the compulsory acquisition of land and payment of compensation it is informative to have a little understanding of the fundamentals and history of land ownership.

In New Zealand (and most other western countries) the absolute ownership, or allodial title to land remains with the Crown (or State as the case may be). The highest form of ownership that a person can hold is an estate in fee simple (meaning that the owner has 'time in the land forever') with the Crown retaining the underlying ownership (Gerbic & Lawrence, 1998).

The right to alienate land (i.e. to sell a fee simple estate) in England was created in 1290 by the statute *Quia Emptores* however at this time society was still feudal and therefore land ownership was very much in the hands of a small minority of nobility with most of the population serfs. Land was essentially the only source of wealth and as such was seldom traded, instead being passed from one generation to the next as inheritance. This lord-serf relationship continued to exist for over two hundred years and did not evolve into one of landlord and tenant until the 1500's when economic organisation started to impact Europe, aristocratic power waned and was replaced with a political regime (North & Thomas, 1973).

At this time widespread trade became established and land became recognised as a tradable commodity, the most noticeable affect being an increase in the value of land keeping it well out of the reach of the normal person. However this period also saw the rise of merchants and specialised tradesmen many of whom were able to earn sufficient revenue from their labours to purchase land and buildings.

The industrial revolution also brought a revolution in land ownership, the average person was able to earn sufficient money in their lifetime that they could aspire to own land and thus in the sixteenth and seventeenth centuries ownership of land became more widespread, a trend which has continued to the modern day.

Public Works Legislative History (Early England)

The history of the development of public works legislation and in particular early New Zealand legislation is very well covered in the work of Cathy Marr (Marr, 1997).

According to Marr there have been at least 20 major pieces of legislation dealing with public works in New Zealand along with dozens of amendments and literally hundreds of other Acts dealing with land taking provisions for public purposes.

The principles underpinning New Zealand Public Works legislation were originally developed in English law and imported and further developed in New Zealand.

The ownership of land became sacrosanct with the restrictions on the power of the English King traced back to the Magna Carta of 1215. This prohibited the deprivation of freehold interest by royal prerogative. 'No free man shall be ... disseised of his freehold or liberties or free customs but ... by the law of the land' – Magna Carta, c 29.

These principles were confirmed and upheld in the following period although Marr notes that the restrictions on the King did not extend to times of great emergency and great danger where land could be taken or entered upon for the defence of the realm or to protect other property, for example in the case of a fire (Marr, *ibid*). It is likely that there was seldom any requirement for the Crown to assert this right before the industrial revolution as pre-industrial Britain had remained unchanged for centuries with the roading and communications system's being little better than those developed in Roman times (Perkin, H. (1970) cited in Marr, *ibid*).

The development of the principles of land ownership, the right of the Crown to take land and the requirement for compensation when this occurred were confirmed in 1765 by Sir William Blackstone in his Commentaries on the Laws of

England (the first methodical treatise on the common laws of England) where he described the need for legislative authority for taking of any land and for ‘full indemnification and equivalent’ (i.e. full compensation) for the land taken. (Blackstone Commentaries, Book 1 – Rights of Persons, Page 139).

The term full compensation is used in every public works act in New Zealand from 1876 on. The term full compensation is taken to mean putting the owner in a financial position as close as possible to what he or she would have enjoyed had acquisition not occurred (Davies, 2000). This is the principle of equivalence. Davies emphasises this when he goes on to state that “compensation is just that – a payment to compensate for damage or loss, not an opportunity to obtain maximum profit from the sale”.

The industrial revolution brought a flood of special acts to authorise the development of public works and the associated use of compulsory acquisition of land. According to Turner (2004) the system of introducing a private members bill to effect a compulsory acquisition was extremely expensive, slow and not always successful.

As can be seen from the above discussion, in early public works legislation the power to acquire land had to be conferred by special Acts – a system that made parliament the arbiter of what land could be acquired and for what purpose (Davies, *ibid*). This probably stems from the fact that in 19th century England public works such as railways were almost universally promoted and developed by private companies (Marr, *ibid*). Therefore there was a need to control the use of the power of compulsory acquisition.

In response to the increasing need to acquire land for public works two major consolidating Acts were passed in England in 1845. These were the Land Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845. These Acts codified the processes for land taking, determining compensation and resolving disputes. This has been likened to acting as a

neutral umpire between the private promoters who had obtained compulsory powers and the landowners subject to them (Justice Else-Mitchell, (1974) cited in Marr, *ibid*)

Special legislation was still required to authorise land taking for a public work, however the Land Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845 ensured consistency of process and compensation provisions as the subsequent Acts incorporated the relevant provisions.

While these early Acts preserved the well established entitlement to compensation of anyone who suffered the taking of land compulsorily they were virtually silent on the methodology to be used to establish the quantum of compensation to be paid (Turner, *ibid*). This situation changed in 1919 with the passing of the Acquisition of Land (Assessment of Compensation Act) in England. This Act set out the 'rules' for the assessment of compensation derived from case law and would later be substantially reproduced in New Zealand legislation.

Public Works Legislative History (New Zealand)

As previously noted the early to mid 19th century was a period of massive expansion of public works in England however, in New Zealand this was the period of major European colonisation. Initially very little land was privately owned with most either owned by Maori or the Crown.

The Crown policy at this time was to make provision for public purposes well in advance of settlement and therefore there was little need for Crown purchase of land for public works (Marr, *ibid*).

Because of these factors the responsibility for public works generally lay with provincial government rather than central government which was more concerned with the settlement of the country.

On the seldom occasions when land was required to be taken compulsorily English law was relied upon (Marr, *ibid*).

In 1863 the government passed the Land Clauses Consolidation Act 1863. This was essentially a New Zealand version of the English Act of the same name with the same wording used in many clauses.

In 1870 the Immigration and Public Works Act was introduced to facilitate a massive programme of public works devised by the government of the time to improve infrastructure, attract immigration and encourage economic development in what at the time was an embattled economy (this being the period following the end of the Maori wars).

Public works of this scale, undertaken by central government was a departure from the norm. Prior to 1870 almost all public works had been developed by provincial governments and with the exception of the wealthier regions of the South Island little progress had been made with most European settlements struggling to provide even basic facilities (Noonan, (1975) as cited in Marr, *ibid*).

Like the legislation before it the 1870 Act also preserved the well established processes for the taking of land and preserved the entitlement to compensation.

In 1876 provincial governments were abolished in favour of local authority bodies and the Public Works Act 1876 was introduced to consolidate legislation in this regard. Once again no significant changes were made to the general principles of compensation in the Act.

Numerous amendments and updates followed but the next major update of the legislation occurred with the passing of the Public Works Act 1928. Once again the principles relating to entitlement to compensation were not significantly changed, however this Act brought on board in large part the 'rules' for the assessment of the compensation entitlement from the English legislation - Acquisition of Land (Assessment of Compensation Act) 1919 (Turner, *ibid*).

By the mid 20th century ownership of land amongst the middle and working classes was of course widespread and inevitably the assessment of compensation began to be challenged through the court system. One judgement of 1941 identified by Marr, *ibid* is particularly interesting as the court outlined the principle of compensation applied in the judgement. This was that the court should '...make an award which shall be just to both parties. On the one hand the respondent must not be required to pay more than the land is worth on a fair consideration of all the evidence before the Court, while, on the other, the Court must see that the claimant receives the fair value of the property taken...' (Napier Harbour Board v Minister of Public Works (1941) NZLR 186. This approach more or less confirms that nothing much had changed since Blackstones summary of the law in 1765 and also endorses the doctrine of the principle of equivalence as the basis for assessing compensation.

Turner (*ibid*) tells us that during these early years the government took land by proclamation without attempting to purchase by negotiation. This left the owner in a situation of having to make a formal claim through the court for compensation.

This approach was eventually recognised as unacceptable and a system of negotiation of land purchase applying the lessons learned from case law was implemented.

By the 1960's the compensation provisions contained in the Public Works Act were the subject of strong criticism (Marr, *ibid*) as more and more people were affected by public works projects (particularly urban motorway projects proposed for the main centres). A government review of the compensation provisions was undertaken in the late 1960's which resulted in more liberal compensation provisions being inserted in the 1970 amendment of the Public Works Act 1928 including for the first time a solatium payment.

This first solatium payment was set at \$500 and was in fact paid (by central government at least) from the time that it was first announced by Percy Allen, Minister of Works in November 1969, almost a full year before the legislative amendment was passed (Hansard Parliamentary Debates (1970) pp 538, 4199). The solatium at the time was paid to anyone from whom a principle place of residence was acquired and where there was a 'shadow of compulsion' in the purchase (that is, where the Crown approached the owner to purchase the land).

The \$500 allowance for solatium was increased to \$1,500 in the 1973 amendment of the Act and again to \$2,000 in the 1975 amendment (once again payment of the \$2,000 was applied and backdated from the end of 1974). A review of the parliamentary records in Hansard for this time shows that there was support for these provisions from both sides of the house (indeed they were introduced first by a national government and increased under a labour government). There is no clear statement as to how the amount of \$500 was arrived at or why the amounts were increased so much over such a short period of time but it is known that the early 1970's was a period which saw a dramatic boom in house prices around the country, possibly even more significant than that of the mid 2000's. In 1970 the average house price in Auckland was around \$12,000 and by mid 1974 had increased to around \$25,000 (Hickey, 2008).

Of course the Auckland prices would have been a little higher than the national average of the time, but it is clear that the solatium as originally created and subsequently modified represented a payment of approximately 5 – 10% of the price of the average house at the time.

It is also noted that mid 1974 saw a sharp correction in house prices prompted by the 'oil shocks' of the period. This was followed by a long period which saw high general inflation eating away at real house prices and by the time the 1981 Public Works Act was introduced to parliament the average house price, once adjusted for inflation, had only just reached back to the level of 1974 (Hickey, *ibid*)

However by 1981 despite a slow housing market, the solatium provisions had been undermined by inflation and represented approximately 4% of the average house price in Auckland. Hansard shows that there was no discussion in the house at all regarding the level of the solatium payment. At the time \$2,000 probably still represented at least 5% of the national median house price and as there was (relatively) little inflationary pressure on prices it may have been that the existing level was simply seen as adequate for the time.

Contemporary Public Works Legislation (New Zealand)

The current legislation dealing with public works in New Zealand is the Public Works Act 1981. When introduced this Act was a significant expansion of the statute law on compensation, codifying most of the extensive body of case law that had been developed (Turner, *ibid*). The provisions of this Act relating to compensation are largely intact to the present day.

Part V of the Act outlines the compensation provisions with Sections 60 – 71 setting out a claimants entitlement, Sections 72 – 76 setting out rights to additional compensation and Part VI of the Act setting out the provisions for alternative compensation.

As this dissertation is concerned with the application of solatium payments and the payment of compensation where no land is taken for a public work these parts of the statute only will be looked at in detail. It is however useful to look at the basic entitlement set out in Section 60 of the Act;

60 Basic entitlement to compensation

(1) *Where under this Act any land*

(a) *Is acquired or taken for any public work; or*

(b) *Suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or ...*

... the owner of that land shall be entitled to full compensation from the Crown (acting through the Minister) or local authority, as the case may be, for such acquisition, taking, injurious affection, or damage.

This clause then sets out clearly the expectation that has existed from the time of Blackstone that full compensation is payable where land is taken for a public work.

The term 'injurious affection' was first used in the Land Clauses Consolidation Act 1845 (i.e. the English version). The term is a valuation concept rather than a

legal one and refers to a nuisance which causes the value of a property to depreciate (Turner, *ibid*).

Importantly Section 60 of the Act provides for compensation for injurious affection only where the owner has had land taken. It therefore applies only where a part title is acquired with the injurious affection assessed against the balance of the owners property.

Section 63 of the Public Works Act 1981 does provide for injurious affection to be compensated where no land is taken in some circumstances;

63 Compensation for injurious affection where no land taken

(1) *Where*

- (a) *Substantial injurious affection to a person's land is caused by the construction (but not the maintenance or operation) of a public work; and*
- (b) *The injurious affection is not caused by changes of traffic flows arising out of the opening of any new road or motorway or the widening, upgrading, or deviation of an existing road; and*
- (c) *There would exist a right of action at common law in respect of the injurious affection by the owner of the land against the Crown or the local authority, as the case may require,*

the Crown (acting through the Minister) or local authority shall compensate that person to such extent as the injurious affection warrants ...

- (3) *The provisions of this section shall not apply where construction of that part of the public work which causes the injurious affection has been commenced before the claimant acquired the land that is injuriously affected.*

This section provides that in order for any claim to be successful the depreciation must be substantial, the owner must have acquired the land prior to the commencement of the work, the claim must be one that would succeed under common law and claims can only be made for injurious affection resulting from the construction of the work – not its operation or maintenance.

Davies (*ibid*) notes “English common law has recognised since the nineteenth century that there is a limit to the matters which are actionable – construction of buildings and works is something that people need to recognize as one of the realities of life and a reasonable amount of noise and dust is allowed without any person affected being empowered to pursue court action. Thus there is a very high threshold to meet before the requirement of an actionable common law claim is reached.”

Combined with the other restrictions in section 63 this means that in practice any claim for injurious affection under section 63 would be very difficult to sustain – in fact Turner (*ibid*) goes so far as to say “it is considered that not one instance can be foreseen of section 63 allowing the recovery of compensation”. A virtually identical rule applies in Scotland (initially introduced there in 1947) but it also is accepted as having limited application because of the stringent limitations applying (Dundas & Evans, 2001).

The current Act provides no other clauses dealing with compensation where no land is taken, therefore it is shown that the current Act does not provide any compensation for a third party (i.e. someone who does not have land acquired) when the use and/or maintenance of a public work causes injurious affection to their property, nor does it provide any practical relief for a third party affected by the construction of the public work.

Turning to the other aspect of this dissertation, the payment of solatium is covered by Section 72 of the Act as follows;

72 Additional compensation for acquisition of notified dwelling

- (1) *Subject to the provisions of this section, where any land that has been notified and that contains a dwelling used as a private residence is taken or acquired for the public work for which it was notified there shall be paid to the owner of the land the sum of \$2,000 by way of solatium ...*
- (3) *Compensation shall not be payable under subsection (1) of this section unless the person giving vacant possession*

- (a) *Was the owner, or the spouse, civil union partner, or de facto partner of the owner, of the land on the date on which it was notified, or, where the owner has died since that date, was the person beneficially interested in the land; and*
- (b) *Was the owner of the land on the date on which vacant possession of the land and all buildings and structures on the land was given to the notifying authority; and*
- (c) *The dwelling on the land was the principal place of residence of that person for a substantial part of the period between the date of notification and the date of so giving vacant possession; and*
- (d) *Was not a willing party to the taking or acquisition of the land, or was a willing party to the taking or acquisition principally because the land had been notified.*

This section provides for the payment of a solatium of \$2,000 provided the property acquired was the principle place of residence of the owner, was owned at the time of notification and there was an element of compulsion in the acquisition.

Contemporary Public Works Legislation (Overseas)

How does the legislation used in New Zealand compare to that used in other countries? We have already seen that New Zealand practices have evolved from English law. This is a common scenario in most English speaking countries, the law was exported along with the language. Overall the principles used in Australia, Canada, United Kingdom and the United States are very similar to those used in New Zealand. All are rooted in the concept of compensation for land taken developed in English law. However there are important differences in what is compensated and who can claim.

The following sections provide an overview of the legislation for each country (or state) as it pertains to the payment of compensation where no land is acquired for a public work and the payment of additional compensation (i.e. solatium payments, although the actual term used does vary between jurisdictions).

Australia

The law relating to public works compulsory acquisition in Australia is split with each state and the federal government having their own particular legislation regarding the resumption of land (this being the term used to describe compulsory acquisition in Australia).

Federal (Commonwealth):

The federal government legislation is the Lands Acquisition Act 1989. Sections 52 – 65 of the Act specify who can claim compensation, what can be compensated and how compensation should be assessed. In general the provisions are similar to New Zealand in that only a person with an interest in land acquired can claim and the compensation is based on the market value of the interest acquired.

There is no provision to pay compensation to an affected third party where no land or interest in land has been acquired.

Section 61 entitles the owner to additional compensation where a dwelling is acquired;

61 Acquisition of a dwelling

(1) This section applies where:

(a) an interest in land is acquired from a person by compulsory process;

(b) the interest entitled the person to occupy a dwelling on the land;

(c) immediately before the acquisition the person was occupying the dwelling as his or her principal place of residence; and

(d) because of the acquisition, the person has ceased to be entitled to occupy the dwelling as his or her principal place of residence.

(2) The amount of compensation to which the person is entitled in respect of the acquisition is the sum of \$10,000 (or that amount as indexed by section 126) ...

Section 126 of the Act provides for the \$10,000 entitlement in Section 61(2) to be indexed against the Australian All Groups Consumer Price Index from 1 April 1989.

Northern Territory:

The Northern Territory legislation is the Lands Acquisition Act 1978. The Act does not provide for the payment of any compensation except to those whose land has been acquired. The rules for the assessment of compensation are set out in Schedule 2 of the Act. Rule 9 of Schedule 2 provides for the possibility of a payment of additional compensation for 'intangible disadvantages' resulting from the acquisition where a dwelling of an owner is acquired.

9 INTANGIBLE DISADVANTAGES

(1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition:

(a) occupied the acquired land as his principal place of residence; and

(b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land,

the amount of compensation otherwise payable under this Schedule may be increased by the amount which the (Lands, Planning and Mining) Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.

The legislation does not prescribe any limit on the level of this payment, however subrule 2 does outline a number of factors to be considered in the assessment of this amount;

(2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to:

(a) the interest of the claimant in the land;

(b) the length of time during which the claimant resided on the land;

(c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;

(d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;

(e) the period during which the claimant would have been likely to continue to reside on the land; and

(f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant.

Clearly this provision is intending to provide the same type of compensation as the solatium payment in the New Zealand Public Works Act.

Western Australia:

The Western Australian legislation is the Land Administration Act 1997. Part 10 of the Act limits compensation to those who have had an interest in land acquired or those whose land has been entered or occupied but not acquired.

Section 241 of the Act sets out how compensation should be assessed with subsections 8 and 9 providing for an additional payment not exceeding 10% (except in exceptional circumstances) when the land has been taken without agreement;

- (8) *If the interest in land is taken without agreement, an amount considered by the court or the State Administrative Tribunal or, for the purposes of making an offer, by the acquiring authority, appropriate to compensate for the taking without agreement may be added to the award or offer.*
- (9) *The additional amount under subsection (8) must not be more than 10% of the amount otherwise awarded or offered, unless the court or the State Administrative Tribunal, or, for the purposes of making an offer, the acquiring authority, is satisfied that exceptional circumstances justify a higher amount.*

This provision differs from the New Zealand solatium provisions in that it applies to any land acquired compulsorily and not just a residence occupied by the owner.

South Australia:

In South Australia the legislation is the Land Acquisition Act 1969. Compared to most of the other legislation reviewed this is a fairly basic Act containing only 33 clauses. There is no provision for payment of compensation for anyone other than a claimant who has their land acquired.

Section 25 outlines the principles to be used in the assessment of compensation;

25 Principles of compensation

- (1) *The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles:*
 - (a) *the compensation payable to a claimant shall be such as adequately to compensate him for any loss that he has suffered by reason of the acquisition of the land; and*
 - (b) *in assessing the amount referred to in paragraph (a) of this section consideration may be given to*
 - (i) *the actual value of the subject land; and*

(ii) the loss occasioned by reason of severance, disturbance or injurious affection; and ...

(g) no allowance shall be made on account of the fact that the acquisition is effected without the consent, or against the will, of any person; ...

As indicated by section 25(1)(g) the Act does not contain any allowance for additional compensation in the form of a solatium payment or the like.

Tasmania:

In Tasmania the relevant legislation is the Land Acquisition Act 1993. Entitlement to compensation is covered in Part 3 of the Act, with Section 24 dealing with the right to compensation and Section 27 outlining the basis for the assessment of compensation. Part 3 of the Act was reviewed and there is no provision for payment of compensation other than to claimants from whom land has been acquired. There is also no provision for additional compensation in the form of a solatium or similar.

Victoria:

In Victoria the relevant legislation is the Land Acquisition and Compensation Act 1986.

Section 30 of the Act provides that any person from whom land or an interest in land has been acquired can claim compensation – the right to claim compensation is not extended to any other persons. Section 41 sets out the basis of the assessment of compensation, as is the norm this is based on the market value of the property and any special value to the claimant, disturbance costs and depreciation to the balance of the land.

The Victorian legislation also provides (at Section 44) for the payment of a solatium;

44 Solatium

- (1) The amount of compensation may be increased by such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition.*
- (2) In assessing the amount payable under subsection (1), there must be taken into account all relevant circumstances applicable to the claimant including, without limiting the generality of the foregoing-*
 - (a) the interest of the claimant in the acquired land; and*
 - (b) the length of time during which the claimant had occupied the land; and*
 - (c) the inconvenience likely to be suffered by the claimant by reason of removal from the land; and*
 - (d) the period of time after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land; and*
 - (e) the period of time during which, but for the acquisition of the land, the claimant would have been likely to continue to occupy the land; and*
 - (f) the age of the claimant; and*
 - (g) where the claimant at the date of acquisition is occupying the land as the claimant's principal place of residence, the number, age and circumstances of other people (if any) living with the claimant.*

It is interesting that the payment of a solatium under this act is not necessarily restricted to the circumstances where a principal place of residence is acquired, though purchase of a residence appears to be a significant factor in calculation of the quantum of the payment.

ACT:

In the Australian Capital Territory the relevant legislation is the Lands Acquisition Act 1994.

The provisions contained in the Act as to who can claim compensation and how that compensation is assessed are contained in sections 42 to 52 of the Act.

These appear to be more or less identical to the rules contained in the Federal legislation outlined earlier with the exception of the solatium payment in Section 51 which is set at \$15,000 and indexed to the All Goods Consumer Price Index for Australia. In practice there would be little if any difference between the solatium payments payable under these Acts as the indexing of the payment under the earlier Act is likely to have bought the payment up to a comparable level to the \$15,000 provided for in the 1994 Act when it was introduced.

NSW:

In New South Wales the relevant legislation is the Land Acquisition (Just Terms Compensation) Act 1994.

The entitlement to compensation is set out in Section 54 of the Act as 'just compensation' to the person from whom the land is acquired (i.e. there is no provision for payment of compensation to a person who does not have land acquired). The term 'just compensation' is not defined, however section 55 of the Act stipulates the matters to be considered in determining the amount of compensation as the market value of the land (further defined in section 56 as the value that would be paid in a willing buyer/willing seller scenario), special value to the owner of the land, loss attributable to severance, loss attributable to disturbance, solatium and any increase or decrease in the value of any balance land owned.

The criterion for payment of the solatium is outlined in Section 60 of the Act;

60 Solatium

- (1) *In this Act:*
"solatium" means compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of the acquisition.
- (2) *The maximum amount of compensation in respect of solatium is:*
 - (a) *except as provided by paragraph (b)-\$15,000, or*
 - (b) *such higher amount as may be notified by the Minister by notice published in the Gazette.*
- (3) *In assessing the amount of compensation in respect of solatium, all relevant circumstances are to be taken into account, including:*
 - (a) *the interest in the land of the person entitled to compensation, and*
 - (b) *the length of time the person has resided on the land (and in particular whether the person is residing on the land temporarily or indefinitely), and*
 - (c) *the inconvenience likely to be suffered by the person because of his or her removal from the land, and*
 - (d) *the period after the acquisition of the land during which the person has been (or will be) allowed to remain in possession of the land.*
- (4) *Compensation is payable in respect of solatium if the whole of the land is acquired or if any part of the land on which the residence is situated is acquired.*

The solatium is payable on all purchases that are programmed (i.e. initiated by the acquiring authority) only purchases that are open market transactions or forced by the owner on the grounds of hardship are ineligible for the payment.

It is noted that the Act provides for the maximum amount of the solatium to be altered from time-to-time by the Minister by notice published in the gazette. According to the NSW Roads and Traffic Authority (RTA) Lands Acquisitions Policy Statement this amount was increased to \$16,821 effective from 1 July 1998. It seems almost certain that there will have been further increases since

that time but it was not possible to ascertain the current level of the maximum payment.

Queensland:

In Queensland the relevant legislation is the Acquisition of Land Act 1967. This legislation was extensively reviewed and amended in February 2009. The amendments included updates clarifying who could make a claim and what could be claimed (clarification of what costs could be claimed as disturbance and also allowing loss of profits to be claimed).

The amended legislation does not provide for compensation to be paid to anyone other than a person with an interest in the land acquired, nor does it provide for any additional compensation in the form of a solatium or the like.

The failure to incorporate a solatium payment has been criticised in some quarters. Missingham (2009) says that a resumption is usually devastating for those that experience it with the “emotional trauma caused by an acquisition of residential property particularly horrific and very real”. He argues that a failure to provide for a solatium or some other form of premium when land is resumed by the state is a failure to properly compensate the claimant (i.e. to ensure that they are no worse off after the acquisition).

It is noted that in a review of the Australian process for compulsory acquisition Campbell, *et al* (2009) mentions that Main Roads (the Queensland government transport authority) had tried to get a solatium incorporated into this amendment but was unsuccessful. This may be seen as an indication that the practitioners who have to work with the Act see some benefit in payment of a solatium to help them achieve an outcome when acquiring a property, or it may be simply have been a desire to bring Queensland into line with their neighbouring states.

Canada

Canada, like Australia and the United States has a system of federal and state legislation covering the compulsory acquisition of real property (expropriation is the term used in Canada). Also like Australia these acts are considered to be generally complimentary, all of them deriving originally from the English common law basics previously discussed (Kirk, 2000).

Kirk (ibid) says that the Canada federal act (Expropriation Act 1985) was based on the Ontario Expropriation Act 1968-69 and that these statutes in turn provided the basis for the other state laws.

A review of these statutes shows that there are significant differences between jurisdictions on who can make a claim and what can be claimed.

Federal

In the Canadian federal Expropriation Act the rights to compensation and rules for determination of compensation are laid out in sections 25 and 26 of the Act;

25 Right to compensation

- (1) *Compensation shall be paid by the Crown to each person who, immediately before the registration of a notice of confirmation, was the owner of a right, estate or interest in the land to which the notice relates, to the extent of his expropriated interest, the amount of which compensation shall be equal to the aggregate of*
 - (a) *the value of the expropriated interest at the time of its taking, and*
 - (b) *the amount of any decrease in value of the remaining property of the owner, determined as provided in section 27.*

26 Rules for determining value

- (1) *The rules set out in this section shall be applied in determining the value of an expropriated interest.*
- (2) *Subject to this section, the value of an expropriated interest is the market value thereof, that is to say, the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.*

- (3) *Where the owner of an expropriated interest was in occupation of any land at the time the notice of confirmation was registered and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the expropriated interest is the greater of*
- (a) the market value thereof determined as set out in subsection (2), and*
 - (b) the aggregate of*
 - (i) the market value thereof determined on the basis that the use to which the expropriated interest was being put at the time of its taking was its highest and best use, and*
 - (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance, including moving to other premises, but if those costs, expenses and losses cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set out in subparagraph (i)...*

As is shown there is no allowance made in the Act to compensate any person except those from whom an interest has been acquired.

There is also no specific provision to pay a premium for the interest acquired except that 26(3)(b) provides for the payment of costs expenses and allowances to the claimant or a sum of 15% in lieu if these cannot be estimated. No information relating to the actual payment of this allowance was found however as it is clearly intended to cover the actual costs incurred by the claimant it is not considered to be a premium or additional compensation in the manner of a solatium payment.

Northwest Territories

The Expropriation Act for the Northwest Territories contains (Sections 26 – 30) the same provisions as the federal Act in terms of who is entitled to claim and the manner of determining the compensation to be paid.

Yukon Territory

The Yukon Expropriation Act compensation provisions are contained in Sections 7 – 10. These provisions are similar to the federal Act with the important exception that the Yukon Act in Sections 7 and 10 provides for claims for injurious affection where no land has been taken;

7 Right to compensation

- (1) *If land is expropriated or is injuriously affected by an expropriating authority in the exercise of its statutory powers, the expropriating authority shall make due compensation to the owner of the land for the land expropriated or for any damage necessarily resulting from the exercise of those powers, as the case may be, beyond any advantage that the owner may derive from any work for which the land was expropriated or injuriously affected.*

10 Claim for compensation for injurious affection

- (1) *Subject to subsection (2), a claim for compensation for injuriously affected land caused by an expropriating authority if no land was expropriated shall be made by the owner of the land in writing with particulars of the claim within one year after the damage was sustained or after it became known to the owner, and, if not so made, the right to compensation is forever barred*

Ontario

The Ontario Expropriation Act (sections 13 – 18) is also very similar to the federal Act. The only significant difference being the payment of an allowance of 5% for residential owners contained in Section 18;

18 Allowance for disturbance Owner other than tenant

- (1) *The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,*
 - (a) *where the premises taken include the owner's residence,*
 - (i) *an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation.*

This payment differs from the payment in the federal Act as it is paid in addition to actual costs rather than as an in lieu payment, as is the case with the federal Act. Therefore this payment does represent a premium in the compensation paid to an owner, the same as a solatium payment.

Nova Scotia

The Expropriation Act for Nova Scotia (Sections 26 and 27) contains the exact wording of the federal Act in terms of who is entitled to claim and the manner of determining the compensation to be paid.

Newfoundland

The entitlement and rules for assessing compensation are found in sections 17 and 27 of the Newfoundland Expropriation Act. This appears to be an older Act and provides for compensation based on fair market value but does not authorise compensation for any costs incurred, in this regard it is out of step with most of the other Canadian legislation reviewed and more closely aligned with the approach used in the United States. Certainly there is no allowance within the legislation for a premium or solatium payment, nor is there any consideration of injurious affection for parties who have had no land acquired.

Prince Edward Island

The Expropriation Act for Prince Edward Island is a comparatively brief piece of legislation of only a few pages. The entitlement to compensation is set out in Section 11 of the Act and like the Yukon legislation includes provision for payment of injurious affection to owners where no land has been taken.

The Act does not outline the rules for the determination of compensation, it provides for compensation to be agreed between the claimant and the acquiring authority or if no agreement reached to be determined by a judge of the supreme court.

British Columbia

The entitlement and rules for assessing compensation are found in sections 30 – 34, 38 and 41 – 42 of the British Columbia Expropriation Act. The basic rights are the same as the federal Act, however, like the Ontario Act an allowance is made at Section 38 for the payment of a 5% premium (over and above disturbance costs) where a residence is acquired;

38 Occupiers and lessees

- (1) *If expropriated land includes a residence that is*
- (a) *occupied by a person who, in respect of that residence, would be entitled to a grant under the Home Owner Grant Act, and*
 - (b) *not being offered for sale by him or her on the date the expropriation notice under section 6 (1) (a) or order under section 5 (4) (a) was served on him or her,*

the person is entitled to be paid, in addition to the amount required to be paid to him or her under section 34, an amount equivalent to 5% of the market value of his or her estate or interest in that part of the land, not exceeding 0.5 ha, that is used personally by him or her for residential purposes.

It is noted that the legislation provides that this payment will only be payable where the owner would qualify for a grant under the Home Owner Grant Act. This Act was not investigated but it is assumed that this restriction would have the effect of limiting payments to those whose assets and/or income fall below a predetermined threshold.

Like the Yukon and Prince Edward Island Acts provision is also made in section 41 of the Act for the payment of compensation for injurious affection where no land is taken.

Manitoba

The entitlement and rules for assessing compensation are found in sections 25 – 28 of the Manitoba Expropriation Act. The provisions are nearly identical to those contained in the British Columbia Act with the exception that the 5% premium provided for when a residence is purchased is available in all cases (i.e. the same as the Ontario Act).

Alberta

The provisions in the Alberta Expropriation Act (sections 41 – 42, 44, 47 and 50) are the same as the federal Act with the exception of the payment of costs in Section 50. This section represents a hybrid between the federal Act (which provides for payment of costs or a payment in lieu if they can not be determined) and the Ontario Act (which provides for a payment of 5% in addition to actual costs).

50 Disturbance compensation to owner

- (1) *The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,*
- (a) *when the premises taken include the owner's residence,*
 - (i) *an allowance of*
 - (A) *5% of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or*
 - (B) *the actual amount proved with respect to those items,*
- whichever is the greater, to compensate for inconvenience and the costs of finding another residence, if the part of the land so used was not being offered for sale on the date of the expropriation, and*

Saskatchewan

The Expropriation Act for Saskatchewan is like that of Prince Edward Island, a brief and basic Act. The entitlement to compensation is set out in Section 10 of the Act but the rules for the determination of compensation are not outlined. The Act provides for compensation to be agreed between the claimant and the acquiring authority or if no agreement reached, for compensation to be determined by a judge of the supreme court acting as arbitrator and to be ascertained by him “in such way as he deems best.”

The Act does not provide for the payment of any premium nor does it make any provision for the payment of compensation where no land is taken

New Brunswick

The entitlement and rules for assessing compensation are found in Part II of the New Brunswick Expropriation Act. The provisions are nearly identical to those contained in the Manitoba Act (payment for injurious affection where no land acquired and payment of 5% premium where a residence is acquired) but the New Brunswick Act contains a further provision at Section 37(4) for the payment of a further 5% of market value when any property is acquired and the owner is required to surrender physical possession of the land;

37(4) Where, pursuant to an order of the Lieutenant-Governor in Council under subsection 22(3), an owner in occupation of land that has been expropriated is required to surrender physical possession of the land, totally or to such extent as is specified in the order, the expropriating authority shall pay the owner additional compensation equal to five per cent of the value of that portion of the land of which the owner is required to surrender physical possession.

Quebec

The entitlement and rules for assessing compensation are found in Chapter II of the Quebec Expropriation Act. This Act is fairly disjointed and difficult to follow however as far as could be ascertained the provisions contained within the Act apply a basic right to compensation only, with no allowance for a premium or injurious affection where no land is taken. In fact the provisions appear to be similar to those contained in the Newfoundland Act with no obvious right to claim disturbance costs.

United Kingdom

Unlike New Zealand the UK law regarding compulsory purchase is not codified and is spread across a number of statutes as well as case law. It is estimated that in excess of 500 statutes in the UK contain reference to compulsory purchase powers and procedures (Kirk, *ibid*).

However the compensation provisions appear to be consolidated within the following core statutes;

- Acquisition of Land Act 1981
- Land Compensation Act 1961
- Compulsory Purchase Act 1965
- Land Compensation Act 1973

The Land Compensation Act 1973 is the most relevant to the matters reviewed in this paper as it provides for the payment of compensation for depreciation caused by public works where no land is taken and also provides for the payment of a premium in some land acquisitions.

Part I of the Act provides for the payment of compensation where the value of land is depreciated by noise, vibration, smell, fumes, smoke, artificial lighting and the discharge onto land of any solid or liquid. Compensation can be claimed where the works are a highway, aerodrome or other works undertaken under statutory powers;

1 Right to compensation

- (1) *Where the value of an interest in land is depreciated by physical factors caused by the use of public works, then, if ...compensation for that depreciation shall, subject to the provisions of this Part of this Act, be payable by the responsible authority to the person making the claim (hereafter referred to as "the claimant").*

- (2) *The physical factors mentioned in subsection (1) above are noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance.*
- (3) *The public works mentioned in subsection (1) above are—*
 - (a) *any highway;*
 - (b) *any aerodrome; and*
 - (c) *any works or land (not being a highway or aerodrome) provided or used in the exercise of statutory powers.*

In respect of residential properties a claim may be lodged by an owner provided they owned the property at the time the depreciation was caused and they occupy the property or have the right to occupy the property (i.e. normal residential landlords may claim compensation for tenanted properties), for other types of property only an owner-occupier may claim.

Section 20 of the Act authorises payment of a grant to help insulate properties from the affects of noise and this is required to be considered in the assessment of the amount of depreciation compensated under the Act. That is, the benefit of the insulation in mitigating the affects will offset the depreciation to some extent and if the insulation has been refused by the claimant the benefit that they would have had is still considered (Section 4).

The actual amount awarded in compensation will depend on the amount of depreciation that exists. The webpage of English chartered surveyors Samuel Rose suggests that “Claimants can usually expect to receive between 2% and 5% of the capital value of the property, with larger amounts being paid in many circumstances”. Section 21 authorises purchase of the entire property if the depreciation caused is substantial.

In addition to the Part I compensation outlined above the Act also provides additional compensation to some claimants for land purchase in the form of ‘home loss payments’ and ‘farm loss payments’.

The home loss payments are provided for in Section 29 and 30 of the Act and apply to anyone who legally occupies a property as their main place of residence. For owners the home loss payment is 10% of the assessed market value of the property (or that part of the property containing the dwelling used as the residence) subject to regulated minimum and maximum payments. For tenants the home loss payment is the regulated minimum payment.

29 Right to home loss payment where person displaced from dwelling

- (1) *Where a person is displaced from a dwelling on any land in consequence of—*
 - (a) *the compulsory acquisition of an interest in the dwelling;*
 - (e) *...he shall, subject to the provisions of this section and section 32 below, be entitled to receive a payment (hereafter referred to as a "home loss payment")*
- (2) *A person shall not be entitled to a home loss payment unless the following conditions have been satisfied throughout the period of one year ending with the date of displacement—*
 - (a) *he has been in occupation of the dwelling, or a substantial part of it, as his only or main residence ...*

30 Amount of home loss payment in England and Wales

- (1) *In the case of a person who on the date of displacement is occupying, or is treated for the purposes of section 29 above as occupying, the dwelling by virtue of an interest in it which is an owner's interest, the amount of the home loss payment shall be 10 per cent. of the market value of his interest in the dwelling or, as the case may be, the interest in the dwelling vested in trustees, subject to a maximum of £15,000 and a minimum of £1,500.*
- (2) *In any other case, the amount of the home loss payment shall be £1,500.*

The amounts contained in Section 30 have been regularly reviewed with adjustments made in regulations (e.g. *The Home Loss Payments (Prescribed Amounts) (England) Regulations 2008*). The current amounts provided for are;

- a maximum of £47,000 and a minimum of £4,700 in England
- a maximum of £44,000 and a minimum of £4,400 in Wales
- a maximum of £15,000 and a minimum of £1,500 in Scotland

The home loss payment is “an additional sum to reflect and recognise the distress and discomfort of being compelled to move out of your home” (Department for Communities and Local Government, 2004) and as such it is clearly the exact equivalent of the New Zealand solatium payment.

Sections 34 and 35 of the Act also provide for a farm loss payment in circumstances where a farm (or a substantial portion of a farm) have been acquired.

The payment equates to one years profit from the farm purchased and is payable when the Owner of the farm commences farming at a new location.

34 Right to farm loss payment where person displaced from agricultural unit

- (1) *Where land constituting or included in an agricultural unit is land in respect of which the person in occupation of the unit has an owner’s interest, then if—*
 - (a) *in consequence of the compulsory acquisition of his interest in the whole, or a sufficient part, of that land, he is displaced from the land acquired; and*
 - (b) *not more than three years after the date of displacement he begins to farm another agricultural unit (“the new unit”) elsewhere in Great Britain,*
he shall, subject to the provisions of this section and section 36 below, be entitled to receive a payment (hereafter referred to as a “farm loss payment”) from the acquiring authority...
- (4) *No farm loss payment shall be made to any person unless on the date on which he begins to farm the new unit he is in occupation of the whole of that unit in right of a freehold interest therein or a tenancy thereof, not having been entitled to any such interest or tenancy before the date on which the acquiring authority were authorised to acquire his interest in the land acquired.*

35 Amount of farm loss payment

- (1) *Subject to the provisions of this section, the amount of any farm loss payment shall be equal to the average annual profit derived from the use for agricultural purposes of the agricultural land comprised in the land acquired...*
- (4) *In calculating the profits mentioned in subsection (1) above there shall be deducted a sum equal to the rent that might reasonably be expected to be*

payable in respect of the agricultural land comprised in the land acquired if it were let for agricultural purposes to a tenant responsible for rates, repairs and other outgoings...

- (6) *Where the value of the agricultural land comprised in the land acquired exceeds the value of the agricultural land comprised in the new unit the amount of the farm loss payment shall be proportionately reduced.*

This payment would appear to be designed to encourage farmers displaced from their properties to re-establish and continue farming rather than applying the capital released on the sale of the original property to other ventures.

United States of America

The law relating to compulsory acquisition (referred to as land condemnation in the States) is, like both Australia and Canada covered by both federal and state jurisdictions and legislature.

As such there is a huge amount of legislation (and case law) related to land condemnation in the states and these laws can be quite diverse (Kirk, *ibid*).

All of the various legislative provisions governing the condemnation of land in the United States are based around the observance of Constitutional Rights.

The fifth amendment to the US constitution requires that no person shall "...be deprived of ...property, without due process of law; nor shall private property be taken for public use, without just compensation..."

The fourteenth amendment reiterates these sentiments "...nor shall any state deprive any person of ... property, without the due process of law"

The term 'just compensation' is not defined but most jurisdictions in the United States appear to interpret it as market value of the interest acquired based on the willing buyer, willing seller test, a position generally upheld by the Courts (US Supreme Court Centre, n.d.)

As the constitution requires the payment of compensation for the taking of "property" there is assumed to be no constitutional requirement to pay consequential damages (i.e. legal, valuation, moving costs etc) to an owner when taking their property. This position though harsh has been confirmed in case law many times (US Supreme Court Centre, *ibid*).

Notwithstanding the constitutional loophole federal and many state laws (but by no means all) do provide for reimbursement of at least some costs incurred.

The federal law on land condemnation is contained in US Code – Title 42, Sections 4651 and 4653;

4651 Uniform policy on real property acquisition practices

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

- (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.*
- (2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.*
- (3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established...*
- (7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.*
- (8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.*

4653 Expenses incidental to transfer of title to United States

The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

- (1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;*
- (2) penalty costs for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering such real property; and*

- (3) *the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.*

In this example it can be seen that the additional costs that are covered are minimal and amount to mortgage break fees, a rates apportionment and normal conveyancing costs.

As noted previously many states pay only the compensation for the interest in the land acquired itself, with no allowance for costs of any kind all though this does appear to be changing with some states even covering relocation costs (Leroy, n.d.). Certainly there was no suggestion in any of the material covered of any form of premium or solatium paid when land condemnation occurs.

The payment of compensation for property injuriously affected by a public work where no land has been taken is termed inverse condemnation. No legislation covering this type of scenario was uncovered and it appears that the payment of compensation in this scenario can only be obtained through a damages claim and litigation.

What is clear is that land condemnation is actively pursued on a large scale in the United States with federal, state and city bureaucracies across the country taking thousands of properties every year. In past it has been common for private property to be acquired by condemnation and then transferred to private interests for development on the basis that it is 'in the public interest' even if the only obvious public good achieved is an increase in the property taxes collected by the city.

Not surprisingly an industry of lawyers and land valuation experts have sprung up around land condemnation as in a litigious society like the US compensation is invariably decided by the courts.

Other Countries

Research into land acquisition practices used in other countries is significantly more difficult due to the language problem. Of course public infrastructure is in place in virtually every country of the world and private ownership and/or occupation of land is also the norm so it follows therefore that most if not all countries will have legislative provisions for the state to acquire land for public works.

The rules for expropriation and the payment of compensation in Scandinavia (Viitanen, 2002), (Kalbro, 2008) and Malaysia (Alias & Daud, 2006) appear to be very similar to those of the United States. The right to compensation is clearly very much weaker in China (Chan, 2006).

Other countries that were covered are India and Pakistan where the compulsory purchase of land is covered by the Land Acquisition Act 1894 (same name different [although nearly identical] legislation).

The Indian legislation provides the rules for the establishment of compensation in section 23. This provides for the compensation to include the market value of the land acquired, the value of any crops or trees on that land, business loss and injurious affection, costs of moving to a new residence or place of business and at section 23(2) a premium in recognition of the compulsory nature of the acquisition.

23(2) In addition to the market value of the land as above provided, the Court shall in every case award a sum of [thirty per centum] on such market value, in consideration of the compulsory nature of the acquisition.

There is anecdotal evidence (Wikipedia) that the Act has been criticised by groups that view the act as weak and ineffective, and by groups that view the Act as draconian.

People who feel the act is weak argue that the procedure followed is cumbersome and costly, often resulting in a delay in land acquisition. There is also opposition to the additional payment of solatium to land owners, over and above the property value.

Those that feel the Act is draconian claim that it has been used to acquire land which has no public purpose attached and that the actual compensation assessed and paid is well below market value for the land. This has in some instances lead to violent outbreaks (as in the Nandigram incident where several people were killed resisting compulsory purchase of property).

The Pakistani legislation is almost identical with regard to section 23 but substitutes a new section 23(2);

23(2) In addition to the market-value of the land as above provided, the Court shall award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition, if the acquisition has been made for a public purpose and a sum of twenty-five per centum on such market-value if the acquisition has been made for a Company.

A summary of the various provisions in the legislation reviewed is set out in table 1 below.

Table 1 – Summary of Legislative Provisions reviewed.

	Compensation where no land Taken?	Premium or solatium payment?
New Zealand	In part, construction only with severe limitations	Yes, \$2,000 for acquisition of a residence
Australia (federal)	No	Yes, \$10,000 (indexed to inflation since 1989) for acquisition of a residence
Northern Territory	No	Yes, for acquisition of a residence – quantum not stipulated
Western Australia	No	Yes, up to 10% of market value
South Australia	No	No
Victoria	No	Yes, Up to 10% of market value
Tasmania	No	No

ACT	No	Yes, \$15,000 (indexed to inflation since 1994) for acquisition of a residence
NSW	No	Yes, up to \$15,000 for acquisition of a residence with provision for adjustment
Queensland	No	No
Canada	No	No
Northwest Territory	No	No
Yukon	Yes, actual loss based on market value	No
Ontario	No	Yes, 5% of market value for acquisition of a residence
Nova Scotia	No	No
Newfoundland	No	No
Prince Edward Island	Yes, actual loss based on market value	No
British Columbia	Yes, actual loss based on market value	Yes, 5% of market value for acquisition of a residence where claimant meets income threshold
Manitoba	Yes, actual loss based on market value	Yes, 5% of market value for acquisition of a residence
Alberta	No	Partial, 5% of market value to cover disturbance costs <u>or</u> actual costs if greater than 5%
Saskatchewan	No	No
New Brunswick	Yes, actual loss based on market value	Yes, 5% of market value or 10% of market value for acquisition of a residence
Quebec	No	No
United Kingdom	Yes, but only for some effects - actual depreciation based on market value	Yes, 10% of market value for acquisition of a residence subject to a maximum level which is regularly adjusted for inflation.
USA	No	No
India	No	Yes, 30% of market value
Pakistan	No	Yes, 15 – 25% depending on who is acquiring

Review of other Literature

There has been over many years a huge amount of literature published on compulsory acquisition around the world. In reviewing this information an attempt has been made to concentrate on the aspects most relevant to this paper – that is the payment of a premium or solatium in compensation and the payment of compensation for the detrimental effects of a work on a property when no land has been acquired.

Other than the fact that it is enshrined in law there are important social and economic reasons for adequate compensation to be paid when land is taken compulsorily.

If adequate compensation is not paid there is a demoralisation affect on those who are penalised and their acquaintances which if measured in monetary terms can have a far greater cost than the money initially saved (Michelman, 1967). That is to say – it does not pay to save money in the short term if the consequence is a group of people who feel they have an axe to grind against society (as represented by government authority).

In economic terms the problem is one of 'fiscal illusion', a theory developed by Amilcare Puviani in the early 1900's. This term refers to the scenario where the true cost of a proposal or project is hidden. In general terms if the proper amount of compensation is not paid then the full extent of the cost of a project is not disclosed. Projects which might otherwise have not been approved are implemented and the costs are transferred from society as a whole to a small number of individual claimants (Guerin, 2002).

Premiums in Compensation

The most detailed and comprehensive study of the subject found was that completed by Dundas & Evans, *ibid* for the Scottish Executive.

The issue of compensation is possibly best summed up in the following quote from the Dundas & Evans report “It has been said that “compulsory purchase is one of the harshest impositions by the State upon its citizens” (Rowan Robinson J (1990) *Compulsory Purchase and Compensation; The Law in Scotland*). A citizen’s abstract view of the reasonableness of compulsory purchase as benefiting the wider community may suddenly change with the realisation that it is his own property that is affected. Even worse can be the situation where, although affected by nearby acquisitions (or works), there may be no legal redress or compensation for a reduction in the value of property brought about either by the presence or use of a public scheme”.

These issues are a common thread through the material reviewed with many arguments that the notion of market value based on a willing buyer and willing seller model and the principal of equivalence does not adequately compensate a landowner where the control of the option to sell or keep has been removed from them (Alias & Daud, *ibid*; Miceli & Segerson, 1999; Werin, 1978 as cited in Kalbro, 2008). These authors all cite the subjective value to the owner of the emotional and sentimental value attaching to property as the reason why equivalence does not necessarily equal fair compensation. It does however seem to be generally accepted that as the true value of property to an owner is unobservable the payment of compensation based on market value is the best available compromise (Miceli & Segerson, 2007)

In many instances this connection with property does seem to be acknowledged in compulsory purchase legislation around the world in the payment of a solatium which is often specified in the legislation as being for intangible or non-pecuniary disadvantages.

Indeed the sentiment behind these payments is well summed up in the following quote from the report of the Urban Motorways Committee shortly before the introduction of the home loss payment in the UK (Dundas & Evans, *ibid*).

"...It will not be sufficient to assume that in the case of those who have to move, the cost of compensation or rehousing fully reflects the burden that is put on them. Many individuals are attached to their particular house or their particular neighbourhood and would not freely move simply for the market value of their property. They suffer an additional loss - sometimes called loss of householders surplus - which is real for them but for practical purposes very difficult to value in specific cases.The non-Departmental members of the Committee recommend establishment of an additional head of compensation, payable occupiers of dwellings, in recognition of the real personal disturbance is inflicted on them when they are required to move.....To attempt such payments to individual circumstances would be a considerable complexity.....the amounts will at present therefore to be set by some general and fairly arbitrary formula..."

Dundas & Evans, *ibid* note that the debate about the appropriateness of paying a premium for compulsory acquisition has been going on for 150 years and that many landowners feel aggrieved that market value only is paid in compensation. Dundas & Evans cite several earlier studies recommending payment of a premium over and above market value to provide an incentive for owners to sell and to "protect them against the uncertainties of valuation practice" (Franks, 1957; Goodchild, 1996; RICS, 1995; Rowan-Robinson et al, 1995; DETR, 1997). It is worth considering too that these views come from the UK which we have already seen has comparatively generous compensation rules. Dundas & Evans comment that Scottish and English practitioners believe that the home loss payments in the UK legislation should be extended to all acquisitions and not just those of residences.

A comparative study of several countries found that with the exception of the UK practitioners in most countries add a premium of 10 – 25% to market value based assessments in negotiation with owners provided they were prepared to complete the sale of the property by negotiation (Dowdy, 1998 as cited in Dundas & Evans, *ibid*). This does not happen in the UK, the market value is strictly applied, and it is the writers' experience that it does not occur in New Zealand either although there is some anecdotal evidence that local authorities in New Zealand do practice this to some extent.

It has been reported that in Ontario, the Ministry of Transportation is beginning to experiment with various incentives to encourage property owners to complete the

acquisition process quickly. One of these measures is an inconvenience allowance. This allowance is for property owners who accept an agreement before expropriation to speed up and simplify the acquisition process (e.g., \$1,000 if the owner agrees to sell within 30 days, \$500 if the owner agrees to sell within 45 days, and so on). Also being used is a signing bonus based on the property value. Reported as 25 percent of the offered compensation for acquisitions under \$10,000, a sliding scale for acquisitions between \$10,000 and \$1 million, and \$50,000 for acquisitions over \$1 million (Campbell, *ibid*). This is a recent report, could not be corroborated and it is difficult to reconcile these initiatives with the Ontario Expropriation Act previously examined.

A recent article in the Otago Daily Times newspaper (19 June 2009) quoted Maurice Williamson, Minister for Land Information and the Minister responsible for the Public Works Act 1981 as saying that the French Government pay compensation for land taken "...at a rate of up to twice the assessed value, because that saved costly delays..." – a comment that tends to confirm the work of Dowdy, *ibid*.

It is noted that some express doubts about the need to pay a premium. This is usually the users of legislation who are concerned about the additional costs affecting the viability of schemes (Dundas & Evans, *ibid*) or concerned about the potential for above market compensation to lead to property speculators targeting land required for projects, further increasing costs (Alias & Daud, *ibid*).

Overall the viewpoint expressed in the material reviewed was that there should be a premium paid when land is acquired by compulsory process.

Compensation when no Land Taken

As noted in the previous section on legislation the payment of compensation for injurious affection when no land is taken is very rare with some Canadian states accepting responsibility and others not while there is limited recourse in the UK.

As noted previously (Davies, *ibid*) English common law recognises that there is a limit to the matters which are actionable – construction of buildings and works is something that people need to recognize as one of the realities of life.

No doubt the inability to extract compensation when affected by a development on adjoining land or land in the vicinity is a major factor in NIMBYism. One only has to look at the press associated with any significant public infrastructure project to see that a significant and vocal portion of those opposed to it are neighbours or people who live in the general vicinity and a staple concern is the effect on the value of their property. Recent New Zealand examples are the Waterview motorway connection in Auckland and the Transpower North Island Transmission Grid Upgrade (which is the establishment of a new overhead cable route of 400kv and substantial pylons associated with it).

This view is supported by Kiefer (2008) who points out that most often opponents are homeowners who very often have the majority of their wealth tied up in their home and as such are very sensitive to any risk that may affect the value of their property. The fact that often the effects of a development on future prices are unknown makes people assume the worst and a kind of snowballing hysteria ensues, fuelled by a fear of the unknown (or at least the uncertain).

The catalyst for the introduction of the limited compensation rules in the UK was a public backlash from the urban motorway development programme of the late 1960's. Very heavy traffic on the new motorways created interference and depreciation to properties nearby causing distress to many thousands of property owners. Questions were asked about the extent to which the community was benefiting at the expense of these private property owners whose properties had been permanently depreciated in value. Eventually this led to the injurious affect rules in place today (Dundas & Evans, *ibid*).

Given that there is some recognition and compensation in the UK for the injurious affection of public works on property in the vicinity does this appease the

NIMBY's? Some insight is given by Dundas & Evans (ibid) in their quote of a speech given by a Mr Whitlock in the second reading of the Land Compensation Bill which later became the Land Compensation Act 1973.

"to bring about a fair balance between provision for the community as a whole and the mitigation of harmful effects on individual citizens, and it does not, as the White Paper claimed it would, put people first. They will still have the same upsetting impact on all our lives. Noises, smells, danger and visual pollution will still be there, even though a little more money changes hands. The loss of a beloved home in a cherished spot will still be just as hard to bear under the Bill's proposals."

The British Wind Energy Association has also been recently quoted as saying that 'There is now a direct correlation between nimbyism and the curtailment of the economic benefits of wind power...' (Environmental Research Web, n.d.).

Thus it seems that providing for compensation to mitigate the depreciation caused by public works on land in the vicinity is no guarantee that public opposition to a project will be negated or even reduced. However there is good argument that compensation should be paid in any case to avoid the effects of demoralisation and fiscal illusion previously discussed. One relevant question therefore is just how much depreciation is caused by public works on surrounding properties?

The evidence suggests that such affects will be determined by the land use of the property (residential being most sensitive, especially high value residential) and the type of works (Sims, 2002). Facilities which have real or perceived health & safety concerns associated with them and/or are visually intrusive, such as high voltage overhead transmission lines or cell phone towers do have a permanent affect on the value of surrounding land, this has been calculated at between 15 - 30% for residential properties located in close proximity to a power pylon (Bond & Hopkins, 2000; Elliot & Wadley, 2002; Sims & Dent, 2005) but decreasing rapidly with distance from the structure with negligible effect within around 200 metres.

Other uses such as schools, hospitals and even landfills and prisons are likely to cause a dip in property values when announced and during planning and construction phases but once up and running the effect is more than likely negligible. This trough effect is put down to the fact that once people can see what they are dealing with, though it may put some off, enough are still interested to keep prices up at, or near the level that they would have been previously, especially if the project has beneficial spin-offs to the area (such as improved employment or recreational opportunities (Beagly, n.d.).

SURVEY/SAMPLING

As the focus of this dissertation is the appropriateness of current compensation rules in the compulsory acquisition of land it is considered desirable to sample as wide a base of interested parties as possible including members of the public.

Due to the difficulties of identifying a relevant sample group for this study it was decided to instead review the survey that was conducted by Land Information New Zealand (LINZ) in 2001 for the review of the Public Works Act 1981. It would have been easy to identify and sample certain interest groups such as local authorities or government departments who use the compulsory acquisition procedures of the Act however this would have produced a completely one sided view. It was not considered practical to identify and conduct a survey with a wider sample as there was no way to identify that sample.

Although the review of the Act was never completed there was a thorough public consultation process, which entailed public advertising, the publishing of an issues and options paper, public meetings and hui and a template submission document to assist those wishing to make submissions.

The template for submissions contained a number of questions relating to the acquisition process, compensation provisions and disposal of property held for public works purposes. The template prompted submitters to answer yes or no to the questions asked but also provided encouragement and space for submitters to elaborate on their answers.

Four of the questions posed were considered to be relevant to the setting of a solatium and the wider use of a solatium in the determination of compensation for injurious affection. These questions are;

Q1 Are landowners entitled to compensation for injurious affection through the operation of the public work if their land has not been acquired?

Q2 *Should the solatium payment be widened to include those who did not have a residence purchased?*

Q3 *Should the solatium payment be increased to keep pace with inflation?*

Q4 *Should the solatium payment be widened to provide for flexible negotiations with landowners, and for compensation for the intrinsic value of land to the landowner who has an attachment to the land?*

It was worthwhile looking at the issues and options paper that was produced (LINZ, 2000) as this helped frame the questions that were being asked.

It was clear that question 1 was to gauge opinion about the need to provide compensation for injurious affection probably in a manner similar to the UK Land Compensation Act 1973 as identified cons for introducing compensation are an increase in costs and difficulty in determining loss. Likewise the possibility of widening solatium payments to provide for flexible negotiations appears to have been considered purely in the context of an acquisition of land.

Although the options considered in this dissertation were a little outside the scope of the thinking in the LINZ issues and options paper it was considered that the questions asked and feedback provided in the review were directly relevant to this dissertation as they provide an insight into thinking regarding the current compensation provisions of the Public Works Act.

This review took place some years ago now, but no action has occurred and the Act remains unchanged therefore the comments made were considered to be as relevant now as they were in 2001.

In order to review the submissions made the files were requested from LINZ under the Official Information Act. All submissions were reviewed and relevant excerpts from each submission were copied for further analysis before the files were returned to LINZ.

Not all submitters chose to use the template provided by LINZ for making submissions and a number were narrative in nature, where this occurred an attempt has been made to interpret the views expressed in terms of the four questions being analysed.

ANALYSIS

A total of 278 submissions were received by LINZ (including summaries from hui and public meetings). Of course not all submitters answered the questions being reviewed in this paper, many of them were only interested in aspects of the acquisition process or disposal of land held for public works and confined their submissions to these topics. Nevertheless 128 submitters or 46% of the total submissions answered at least one of the questions raised, with the majority of those answering one question going on to answer all the questions.

The lowest number of responses was to question 2 with 101 while the highest was question 3 with 116. This represents a minimum of 79% and a maximum of 91% response rate to the questions asked.

In analysing the submissions it was anticipated that there would be different points of view expressed depending on the submitters situation – clearly someone who has had land acquired compulsorily will have a different take on the compensation provisions than a local authority who is using the Act to acquire land. With this in mind the submitters were grouped into three groups based on what it was anticipated their responses would be. The group that it was anticipated would be urging reform of the compensation provisions and increased compensation were private individuals and maori submitters, this group made up almost 48% of submitters. The group that it was expected would want to retain the status quo were the users of the Act – government departments, territorial local authorities (TLA's), SOE's and network utility operators, this group made up just under 30% of submitters. A third group were put in the middle as being somewhat more neutral, this being legal and land professionals, NGO's and public meetings/hui, this group accounted for just under 23% of the relevant submissions received.

A statistical analysis of each question has been completed and presented in table form followed by a discussion of the statistics and other comments that came out of the public submission process.

Table 2 – Analysis of Question 1

Are landowners entitled to compensation for injurious affection through the operation of the public work if their land has not been acquired?			
Type of Submitter	# of Subs	Agree	Disagree
Individuals	37	30	0
	28.91%	100%	0%
Maori	24	21	3
	18.75%	88%	13%
Subtotal	61	51	3
	47.66%	94%	6%
Hui/Public Meetings	6	4	0
	4.69%	100%	0%
NGO's	8	5	2
	6.25%	71.4%	28.6%
Legal	9	5	2
	7.03%	71%	29%
Land Professionals	6	5	1
	4.69%	83%	17%
Subtotal	29	19	5
	22.66%	79%	21%
Local Authorities	20	4	10
	15.63%	29%	71%
Govt Departments	2	0	2
	1.56%	0%	100%
SOE's, Networks	16	2	12
	12.50%	14%	86%
Subtotal	38	6	24
	29.69%	20%	80%
Total	128	76	32
		70%	30%

The outcome of this question was not surprising with the public heavily in favour of payment of compensation for injurious affection where no land is taken and public works providers heavily opposed (a trend expected with all questions of compensation). There was also a high level of support from the neutral group.

Somewhat surprising is the showing from TLA's with almost one third of this group in favour of compensation. It is possible that this reflects that fact that most truly large public works projects which have significant affects on surrounding land (such as motorways, electricity transmission grids etc) will usually be

completed by the Crown or an SOE, thus they don't feel the same level of exposure as some of the other public works providers.

Looking at the comments that were made on this question it is apparent that many providers are warm to the idea of paying compensation in these circumstances but are concerned that they would be overwhelmed in claims the costs of which both in terms of processing and payment of compensation would be prohibitive.

It appears therefore that a major impediment to many providers supporting such a proposition is the difficulty in defining parameters for compensation, measuring the actual affects on properties and the resultant high levels of risk and uncertainty that would be created for the providers. One submitter described it as 'opening Pandora's box'.

One submitter (a land professional involved in public works acquisitions) made the observation that injurious affection associated with public works is often a temporary thing observed at the time projects are announced, land purchase is occurring and during construction but rarely evident once a project is operating (i.e. observance of the 'trough' effect identified in the literature review).

The message from the other side is clear and unequivocal – it is simply unfair not to compensate people who have suffered injurious affect to their properties even if no land has been taken. One person likened it to being stolen from for the public good.

Another submitter pointed out that failure to pay compensation in these circumstances resulted in the real cost of the project being understated and not recognised in cost/benefit analysis or considered in the decision making process (i.e. recognition that failure to pay compensation is in fact creating fiscal illusion in regard to these projects).

Another submitter suggested that if compensation were paid for injurious affection where no land is taken a significant amount of the public opposition to projects would be removed.

Overall there appeared to be a strong desire that compensation should be paid in these circumstances but a recognition that it would be very difficult to come up with rules that fairly applied compensation without the resulting liability and costs of processing becoming unmanageable for public works providers.

For their part many of the providers appeared to be receptive to the concept of paying compensation but don't consider it feasible due to the overall cost implications.

Table 3 – Analysis of Question 2

Should the solatium payment be widened to include those who did not have a residence purchased?			
Type of Submitter	# of Subs	Agree	Disagree
Individuals	37	22	3
	28.91%	88.0%	12.0%
Maori	24	17	5
	18.75%	77.3%	22.7%
Subtotal	61	39	8
	47.66%	83.0%	17.0%
Hui/Public Meetings	6	0	0
	4.69%		
NGO's	8	4	3
	6.25%	57.1%	42.9%
Legal	9	5	2
	7.03%	71.4%	28.6%
Land Professionals	6	5	0
	4.69%	100.0%	0.0%
Subtotal	29	14	5
	22.66%	73.7%	26.3%
Local Authorities	20	5	12
	15.63%	29.4%	70.6%
Govt Departments	2	0	2
	1.56%	0.0%	100.0%
SOE's, Networks	16	4	12
	12.50%	25.0%	75.0%
Subtotal	38	9	26
	29.69%	25.7%	74.3%
Total	128	62	39
		61.4%	38.6%

This question also drew overall affirmative support but was not as quite as heavily supported by the public nor as heavily opposed by public works providers.

Overall there was not a lot of comment regarding this question. Generally service providers were opposed because once again they saw considered that most likely it would become automatically payable in all situations and therefore would add to the overall cost of providing public works.

One TLA was agreeable but suggested that the payment and the amount should be discretionary, another suggested that that solatiums should not be payable in open market transactions – an interesting comment given this is the current situation.

An NGO submitted that solatium payments should be widened to include all purchases and anyone who suffers injurious affect but does not have land taken.

As noted there appeared to be relative apathy to this question. It had the lowest number of responses and very little additional comment.

Table 4 – Analysis of Question 3

Should the solatium payment be increased to keep pace with inflation?			
Type of Submitter	# of Subs	Agree	Disagree
Individuals	37	31	0
	28.91%	100.0%	0.0%
Maori	24	23	0
	18.75%	100.0%	0.0%
Subtotal	61	54	0
	47.66%	100.0%	0.0%
Hui/Public Meetings	6	4	0
	4.69%	100.0%	0.0%
NGO's	8	7	1
	6.25%	87.5%	12.5%
Legal	9	7	1
	7.03%	87.5%	12.5%
Land Professionals	6	6	0
	4.69%	100.0%	0.0%
Subtotal	29	24	2
	22.66%	92.3%	7.7%
Local Authorities	20	17	3
	15.63%	85.0%	15.0%
Govt Departments	2	1	1
	1.56%	50.0%	50.0%
SOE's, Networks	16	11	3
	12.50%	78.6%	21.4%
Subtotal	38	29	7
	29.69%	80.6%	19.4%
Total	128	107	9
		92.2%	7.8%

As expected this question drew overwhelming support from all the groups submitting. Given that at the time of the review it had been over 25 years since the level of the solatium had been set and the subsequent effects of inflation on the set amount any other result would have been most surprising indeed.

One or two submitters recognised that the payment of a solatium was in fact a premium on the market value of the property acquired and were opposed on the basis that they did not think payment of a premium was necessary.

There was a lot of comment from submitters on how the solatium should be set. Most considered that a percentage of the value of the property taken was appropriate and pointed out that this would avoid the need for future adjustments.

The suggested range as a percentage of value was from 5% to 20% with the majority in the 10 – 15% range. One submitter suggested a solatium of 10% for residential properties and 5% for all others. Another submitter suggested that the residence issue was irrelevant and a solatium of 10% - 15% should be paid on all purchases as in Australia and Canada (it has already been shown that this is not in fact the case at all in Australia and Canada).

Several suggested the solatium be set in the range of \$10,000 - \$15,000 dollars and adjusted as required to keep pace with inflation (bearing in mind that this survey was completed several years ago).

One submitter (a lawyer) suggested that the solatium be set at \$100,000 and adjusted for inflation – justified on the basis that this would remove the stigma associated with public works projects and reduce or eliminate public opposition to them.

Generally speaking those submitters suggesting a fixed dollar amount where public works providers, the amounts suggested by them would equate to (for the most part) around 5% of the average house price at the time of the review. Fixing the price at the lower end does of course allow providers both certainty in budgeting and also keeps the overall property costs of a project down compared to the alternative % approach.

This fact appears to have been recognised by the public who were universally in favour of a percentage of value as the basis of a solatium.

Regardless of the methodology used there is clearly overwhelming support for a review and increase in the solatium provided in the Act to a figure somewhere in the range of 5 – 10%.

Table 5 – Analysis of Question 4

Should the solatium payment be widened to provide for flexible negotiations with landowners, and for compensation for the intrinsic value of land to the landowner who has an attachment to the land?			
Type of Submitter	# of Subs	Agree	Disagree
Individuals	37	27	2
	28.91%	93.1%	6.9%
Maori	24	20	1
	18.75%	95.2%	4.8%
Subtotal	61	47	3
	47.66%	94.0%	6.0%
Hui/Public Meetings	6	3	0
	4.69%	100.0%	0.0%
NGO's	8	4	2
	6.25%	66.7%	33.3%
Legal	9	3	5
	7.03%	37.5%	62.5%
Land Professionals	6	4	1
	4.69%	80.0%	20.0%
Subtotal	29	14	8
	22.66%	63.6%	36.4%
Local Authorities	20	4	12
	15.63%	25.0%	75.0%
Govt Departments	2	0	2
	1.56%	0.0%	100.0%
SOE's, Networks	16	4	12
	12.50%	25.0%	75.0%
Subtotal	38	8	26
	29.69%	23.5%	76.5%
Total	128	69	37
		65.1%	34.9%

Perhaps not surprisingly this question yielded a similar outcome to question 2 with the only significant difference being a drop in support from the neutral group.

On analysis it appears that the legal profession have concerns about how things such as 'intrinsic value' can be quantified with one lawyer describing it as "a can of worms". Similar comments were made by at least a couple of individuals who were concerned about emotive issues being manipulated to abuse such a provision.

In terms of public works providers most seem to see it as unworkable and another layer of cost in providing public works however at least one commented that they thought “this would lead to a significant reduction in the time taken to acquire land from owners and a reduction in overall transaction costs.”

A land professional commented that the main problem occurring at present is that landowners are able to hold acquiring authorities to ransom simply through time delays and further suggested that the use of a solatium to provide for flexible outcomes could be used in tandem with a speeded up process.

One NGO commented that “fairer solatium provisions would ease the burden on landowners, enable more reasonable negotiations to take place and ultimately reduce the level of conflict involved in the designation process.”

Overall this appears to be similar to question 1 – there is general support for it and the potential benefits can be seen by many, but public works providers are concerned that it would be unworkable and add significant cost to projects.

Additional Comments about Compensation

In addition to answering the four main questions above regarding compensation many submitters went on with some additional thoughts on the matter of compensation.

Most of these comments came from NGO’s or individuals and tend to show a common theme.

Undertaking a compulsory acquisition is a costly business for the acquiring authority. The ability and a willingness to pay a premium in the first place could avoid the necessity to undertake this process and also help in getting through the RMA process. In the long run and particularly when the economic costs of delays are factored in, paying a premium will almost certainly be cheaper than the status quo.

No less than 6 submitters put forward more or less this same argument and significantly one TLA also considered that authorities should have the flexibility to pay a premium based on a cost/benefit analysis which recognised the costs of a compulsory acquisition.

Other comments of interest were from a person who said she found the land acquisition process “brutal and inhumane” and suggested the authorities using it offered landowners grief counselling.

Another person said that landowners only agreed to a negotiated outcome because of the background threat of compulsory acquisition.

Someone else described the “current rules allow acquiring authorities to run roughshod over people and result in owners feeling disempowered, coerced, financially disadvantaged and highly vulnerable” – i.e. the demoralisation affect described by Michelman (*ibid*)?

Also noted was that the effect of only paying market value has the potential to be particularly harsh for those on low incomes and can leave them particularly vulnerable as they have difficulty finding an alternative house that is affordable. There are provisions in the Public Works Act that are designed to help people in these circumstances (Section 73 – assistance to purchase a dwelling), however these are discretionary and in the writers experience, very rarely used.

CONCLUSIONS

It has to be accepted that there is a need for legislation empowering the Crown to take land compulsorily for the development of public infrastructure. Such projects often require the assemblage of many individual land parcels which would be near impossible or impossibly costly to achieve without such legislation.

It can be concluded from the material in the literature review and the feedback obtained from the submissions to the review of the Public Works Act 1981 that the principle of equivalence while accepted as a reasonable basis for the payment of compensation may well not be adequately compensating land all landowners when their properties are taken compulsorily. Further the lack of compensation for injurious affect incurred when no land is taken is seen as a significant fault of the Act notwithstanding that such a position is the norm internationally.

No evidence was found that the assessment of compensation based on the principle of equivalence is dramatically shortchanging landowners. It appears that more often than not it is the mere fact that there is a lack of recognition of the fact that they are being forced into something that is the problem. On balance both the literature review and the submissions to the Public Works Act review suggest that the payment of a small premium over and above the market value mandated by the principle of equivalence would be appropriate.

There are sound social and economic reasons why compensation should be paid to those who suffer a loss as a result of some public work. To not do so shifts the burden of the cost of the public work from the general public (who receive the benefit of the project) to a relatively small collection of landowners. This can result in the demoralisation of those affected with potential long term social consequences as well fiscal illusion – the appearance that a project is cost effective when it may not be as not all costs are recognised.

Balanced against these considerations is the need to have a regime for the assessment of compensation that does not get bogged down in dispute, encourage spurious claims or allow landowners or other claimants to be excessively overcompensated. To do so would put at risk many necessary and worthwhile public infrastructure projects.

The literature review shows that that it is very common for overseas jurisdictions to make an allowance in legislation for the payment of small premiums in the range of 5 – 10% over market value when land is acquired using an element of compulsion. This premium is often (but not always) reserved for the purchase of residential property. Often the payment of the premium is discretionary up to the maximum, particularly in cases where the premium is allowed for all classes of land.

The literature review also identified that, while quite uncommon, there are instances where injurious affection caused by public works where no land has been taken is compensated. This occurs most obviously in some Canadian states while the UK also has limited provisions for the payment of injurious affect where no land is taken.

While it is clear that public works can cause depreciation in the value of nearby property there is significant evidence that the worst affects are temporary and only the most intrusive works or those with perceived health and safety issues will have a significant permanent affect (up to a maximum of around 30% of property value for residential property), other uses will have a minor to negligible impact once they have been established.

Many submitters to the review of the Public Works Act suggested that establishment of rules for compensation that were more generous would have the effect of quelling public opposition to projects. Evidence from the literature review relating to English public works where the compensation provisions are significantly more generous do not support that contention. However one trade-

off for enhanced compensation that could realistically be considered is a more streamlined process for the compulsory acquisition. The rationale for this being that if it is reasonably certain that a landowner has been offered in excess of the market value for his property and still won't accept that offer there is no good reason not to acquire the land compulsorily.

Although statistically the submissions to the Public Works Act review indicated the public works providers were generally opposed to a loosening of current compensation provisions the comments that several made tend to indicate a willingness to improve compensation but this is clearly tempered by a concern about opening themselves up to significant future costs and the problems that will create for them in delivery of facilities and services into the future.

So the question then is how to provide for the increase in compensation without risking opening up public works providers to the risk of significant escalation in property costs?

Bearing in mind the evidence that a large premium is not considered necessary one possible option is a significant updating and broadening of the solatium provisions of the Act.

Because the solatium is additional compensation the basic principles for the assessment of compensation (which are generally agreed as sound) could be left as they are with the solatium manipulated so as to provide the premium generally considered appropriate to recognise the unfavourable nature of a acquisition with a compulsory aspect.

A look at the 'solatium' provisions of overseas legislation shows that within reason these can be constructed to manipulate the payment in almost any manner desired so it is clearly possible to engineer a clause which would enable useful premiums to be paid but still place a reasonable limit on owners expectations.

An example of a broader rule that could be applied in the New Zealand Act is that from Western Australia which provides for a discretionary payment up to 10% of market value to be paid where land has been acquired under the shadow of compulsion. The West Australian legislation imposes almost no rules on how this payment should be determined and so there is a great degree of flexibility contained therein – something that may be seen as both a strength and a weakness of this particular Act. In Western Australia, the actual determination of this amount is decided by a tribunal which would ensure consistency of approach.

The Victorian legislation provides for a similar payment but inserts a number of factors for the assessment of the quantum of the payment but allows acquiring authorities to determine the payment.

It is also considered that there is scope to modify the solatium provisions to provide for compensation for injurious affection where no land is taken. As has been demonstrated that actual losses in most of these situations is quite small, especially if assessed once the works have been established (anecdotal evidence from England that this is usually in the range of 2% to 5%) and therefore a solatium provision that allowed for payment of up to 10% of property value would certainly be sufficient to cover the majority of claims for injurious affection.

It is accepted that such proposals would add to the cost of public works projects, but in most cases this would probably be not much more than 10% of the total property cost which in many projects is not a significant component of the overall cost of the project. While there is no obvious evidence to support a reduction in opposition to projects based on better compensation even a small benefit in this regard would very likely offset the additional costs incurred.

It is not necessarily suggested that these are the best models – the point is that, the solatium is not compensation per se, therefore the well accepted rules regarding compensation do not need to be applied and the solatium provisions can be modified to provide a suitable premium in compulsory acquisition without the risk of overall compensation liabilities becoming excessive.

On this basis it is recommended that further investigation into the possible extension of the solatium provisions of the Act be undertaken with some cost/benefit modelling against actual projects to determine the viability of the proposal.

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APPENDICES

Appendix 1 - Excerpt of relevant parts of Hand book for the Acquisition of Land under the Public Works Act 1981.

Appendix 2 - Copies of relevant parts of public submissions to the 2001 Review of the Public Works Act 1981