

# COMPENSATION UNDER THE TOWN AND COUNTRY PLANNING ACT 1961 (VIC.) — Part I

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*[In the first part of her article Ms Lanteri discusses the payment of compensation under the Town and Country Planning Act 1961 for loss or damage where no land is acquired. Competing public and private policy considerations underlying the Act are emphasised and relevant provisions are examined in detail in this context.]*

## INTRODUCTION

The promulgation of legal controls on land use may result in depreciation in the value of some lands and in appreciation in the value of others. Restrictions as to the range of uses to which land can be put legally may reduce its market value. The removal of such restrictions may have the opposite value. The development of public services or facilities may have either a negative or positive effect on the market value of nearby lands. The construction of a freeway for example, may reduce the value of adjacent residential land, but may increase the value of commercial land nearby. The financial gains made by some landowners may or may not equal the losses suffered by others. Some planning controls may result purely in gains, while others may result in losses. These individual gains and losses give rise to arguments for and against compensation for planning loss suffered in order that the collective interest be advanced.

Compensation is not an issue in itself, to be resolved in isolation from its context. Government intervention to control the supply and price of land for development raises a number of issues of which compensation is only one. To treat these issues without considering the policies out of which they arise will in all likelihood result in the adoption of ineffective and inconsistent solutions. The debate over compensation is a focus of conflict between government intervention for the public good and the traditional rights associated with private property.

The provisions of the Town and Country Planning Act 1961 which deal with the payment of compensation for loss or damage arising out of the exercise of certain powers under the Act illustrate the uneasy balance which has been struck in the legislation between private interests in real property and public interest in the control of land use. Although town planning controls advance private interests in land by preserving or improving amenity, they also represent an intervention by government in

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the free market in pursuit of greater efficiency and equity in the management and distribution of resources and thus are primarily a manifestation of collective interest. The compensation sections focus attention sharply on this conflict. The effects of the confusion about values and priorities embodied in the legislation are particularly felt by individual members of the community when private rights are restrained.

The compensation provisions of the Town and Country Planning Act are concerned both with payments in respect of land acquired by a planning authority and in respect of land which suffers loss or damage as a result of the operation of a planning scheme or interim development order. This article is concerned with compensation for loss or damage where no land is acquired. It is suggested that in such cases the relationship between public interest and private rights is delicately balanced and that the point of balance struck is fundamental to a fair and efficient system of land use planning.<sup>1</sup>

Although the rights of the fee simple owner at common law were the broadest known in real property, they were always subject to resumption by the Crown in the exercise of its prerogative power. Such a power was probably limited in its operation to occasions of emergency arising from war or imminent war, but at least in early times was not subject to the payment of compensation.<sup>2</sup> However the power to acquire land has long been recognized as an inherent and necessary function of government and virtually from the inception of Parliament it was accepted as established that compulsory dispossession might be effected by Parliament through appropriate legislation and that in such cases any right to compensation for dispossession would depend solely upon the provisions of the legislation.<sup>3</sup> The common law courts have always strictly construed legislation which interferes with property interests. They presume that the legislature did not intend to confiscate without compensation unless there is the

<sup>1</sup> For a discussion of some related issues see Brookes R. O., 'A Jurisprudence of Planning: Notes on the Outline of Law Required to Support and Control Planners' (1978) 24 *Catholic Lawyer* 1; Huffman I. L. and Plantico R. C., 'Toward a Theory of Land Use Planning: Lessons from Oregon' (1979) 14 *Land and Water Law Review* 1.

<sup>2</sup> *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co. Rep. 12 (1606) 77 E.R. 1294. Cf. *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508; *Burma Oil Company (Burma Trading) Ltd v. Lord Advocate*; *Burma Oil Company (Burma Concessions) Ltd v. Lord Advocate*; *Burma Oil Company (Pipelines) Ltd v. Lord Advocate* [1965] A.C. 75; *Attorney-General v. Nissan* [1970] A.C. 179; *Johnson Fear and Kingham and the Offset Printing Co. Pty Ltd v. The Commonwealth* (1943) 67 C.L.R. 314.

<sup>3</sup> *Magna Carta* 1215, C 29, guaranteed that 'no free man shall be . . . disseised of his freehold . . . but . . . by the law of the land' cited in Commonwealth, *Final Report of the Commission of Enquiry into Land Tenures*, 1976, para. 6.1. The extract from Blackstone's Commentaries I 139, also cited therein perhaps idealizes the concern with which Parliament in 1765, or today, exercises its absolute powers over the individual but it clearly indicates the supremacy of Parliamentary powers over the property of the individual; see also *Sisters of Charity of Rockingham v. The King* [1922] 2 A.C. 315, 322 (P.C.); *France Fenwick & Co. Ltd v. The King* [1927] 1 K.B. 458, 467.

clearest expression of contrary intention.<sup>4</sup> In fact, most statutory provisions in Australia relating to acquisition of property do provide for compensation. However whether such provisions arise out of concern to recognize the individual over the community or for the more pragmatic reasons of facilitation of the process of acquisition adverted to by Fricke<sup>5</sup> is doubtful.

Compensation for loss suffered by a landowner where no part of the land is physically acquired is more problematic. In cases where the loss is occasioned by activities on neighbouring land which are not authorized by statute, there may be an action for damages or injunctive relief available on the grounds of nuisance.<sup>6</sup> This provides only a limited prospect for relief and involves different considerations from those at hand. In cases where the loss is occasioned by restrictions on the use of the claimant's land imposed by legislative controls, relief is rare. Here restrictions imposed on the use to which land may be put are not traditionally characterized as amounting to the acquisition of property and thus are not accorded the same scrutiny by the courts. The classification of proprietary interests followed by orthodox writers such as Megarry does not accommodate such an approach. He says:

Planning control affects the use and enjoyment of land, but not the estates or interests in it. . . . Planning matters are not technically matters of title. The right to use property in a particular way is not in itself property.<sup>7</sup>

The Victorian Constitution has no provision similar to that of the Commonwealth requiring acquisition of 'property' to be on 'just terms'.<sup>8</sup> In any case it is doubtful whether such a clause would have made any difference to the width of the Victorian provisions for compensation. Although the interpretation which has been placed on the word 'property' in s. 51(xxxi) has been wide<sup>9</sup> it has not been extended to allow for compensation for the type of interference with user rights which results from land use planning controls. The Town and Country Planning Act reflects

<sup>4</sup> *The Commonwealth v. Hazeldell Ltd* (1918) 25 C.L.R. 552, 563; *Colonial Sugar Refining Co. Ltd v. Melbourne Commissioners* [1927] A.C. 343, 359 (P.C.); *Protean (Holdings) Pty Ltd v. Environment Protection Authority* [1977] V.R. 51, 55 f.

The relationship between the legislative powers of Parliament and the prerogative or executive powers in respect of acquisition of property is unclear. In *Burma Oil Pty Ltd v. Lord Advocate* [1965] A.C. 75, the House of Lords rejected the idea that a legislative power to acquire land coexisted with an unrestrained prerogative power to acquire without compensation. However in *Johnson Fear and Kingham and the Offset Printing Co. Pty Ltd v. The Commonwealth* (1943) 67 C.L.R. 314, 318, Latham C.J. suggested *obiter* that the requirements of s. 51(xxxi) might not exclude the Commonwealth exercising its executive power to acquire property without compensation.

<sup>5</sup> Fricke G. L., *Compulsory Acquisition of Land in Australia* (1975) 2.

<sup>6</sup> See *Metropolitan Asylum District v. Hill* (1881) 6 App. Cas. 193. Cf. *Hammer-smith and City Rail Co. v. Brand* (1869) L.R. 4 H.L. 171. Some of the problems associated with private actions arising out of nuisance are explored in *Howes v. Victorian Railway Commissioners* [1972] V.R. 103.

<sup>7</sup> Baker P. V. (ed.), *Manual of the Law of Real Property*; (5th ed. 1975), 259. A similar view was taken by the Supreme Court in *Yammouni v. Condidorio* [1959] V.R. 479.

<sup>8</sup> Commonwealth of Australia Constitution, s. 51(xxxi).

<sup>9</sup> e.g. *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1, 349-350; *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222.

an intention to restrict compensation to acquisition or to cases which closely approximate acquisition of some property rights without actually falling under that rubric. It may be appropriate to reconsider this approach based as it is upon a conception of property interests which is narrow and restrictive. There is a point at which restraints on user may be so strict as to amount to a qualitative alteration to the bundle of rights associated with enjoyment of property. This is the point at which the balance between public and private interests needs careful resolution.

### THE LEGISLATION

The relevant provisions of the Town and Country Planning Act 1961 are sections 41 and 42. The former provides what appears to be a general right to compensation for losses arising from controls imposed under the Act.

41. (1) Subject to this Act compensation shall be payable by the responsible authority to the owner or occupier of any land or the owner of any interest therein for loss or damage suffered by or as a result of the operation of any interim development order or of any planning scheme under this Act where no part of that land was purchased or acquired by the responsible authority.

The substantive operation of section 41(1) is considerably restricted by section 42. This provision effectively restricts compensation to cases where planning controls have negatively affected existing user rights or where they amount to a *de facto* reservation for public purposes, with or without transfer of title.

42. (1) No compensation shall be payable under any provision of this Act in respect of —

- (a) any matter or thing done by any person or on his behalf after the date upon which a copy of or the notice of approval of the interim development order or planning scheme or of the relevant amendment or variation thereof is published in the *Government Gazette*, unless the matter or thing was done pursuant to and in accordance with a permit granted by the responsible authority and that permit did not contain a notice to the effect that compensation would not be payable in respect of anything done thereunder: provided that, where the matter or thing was done pursuant to and in accordance with a permit granted by the responsible authority and that permit contained a provision relating to the amount or the method of ascertainment of the amount of compensation to be paid in such circumstances as are specified therein, compensation shall be paid in accordance with that provision;
- (b) the operation of any provision in a planning scheme or interim development order which requires or enables to be required in relation to any use or development of any land, the provision of accommodation for parking loading unloading or fuelling vehicles with a view to preventing obstruction of vehicular traffic;
- (ba) the provision of regulations made under Part IA;
- (c) any provision in an interim development order or planning scheme which specifies or enables to be specified the purposes for which land may be used or which prohibits restricts or regulates the use of land for specified purposes, except where —
  - (i) the land is pursuant to the order or scheme reserved or deemed to be reserved for a public purpose; or
  - (ii) application is made for a permit to use the land for any purpose and the application is refused on the ground that the land is or will be required for a public purpose; or
  - (iii) the order or scheme or any action taken thereunder closes stops up diverts limits or prohibits access to any existing street or way —

but subject to sub-section (1B) nothing in this section shall exempt a responsible authority from the payment of compensation under this Act in any case where the responsible authority pursuant to an approved scheme — requires the removal or substantial alteration of any building or works which was or were lawfully in existence on any land before the publication in the Government Gazette of the notice of approval of the scheme; or prohibits the continuance of the use of any land or of any existing building or works for any purpose for which the land or building or works was or were being lawfully used immediately before the said publication.

The remaining sub-sections of section 42 provide for further restrictions on the availability of compensation in the following ways; first, by direct restrictions in respect of specific types of loss and secondly, indirectly through the procedure which is prescribed to be followed before a claim can succeed. These will be discussed below. The broader scene however is set by the provisions referred to above.

### HISTORICAL DEVELOPMENT OF COMPENSATION PROVISIONS

The history of formal town planning in Victoria properly begins with the passage of the Metropolitan Town Planning Commission Act in 1922.

The Report of that Commission in 1929<sup>10</sup> proposed a plan for Melbourne based largely on transport needs which has never been fully implemented and the statutory controls in Victoria until 1944 remained based on health and local government by-law powers. In that year the Town and Country Planning Act was passed, clearly derived from the then existing British legislation. In fact it seems that the 1944 Act was passed as a response to the initiatives of the Federal government of the time, rather than as a reflection of forward-thinking in the Victorian Parliament. The Commonwealth proposed a comprehensive scheme of regional planning and development involving all levels of government in a national plan for growth after the War. It was in conjunction with initiatives in housing that part of this scheme was implemented. In order to take advantage of Commonwealth funds available for the States under the Commonwealth-State Housing Agreement Act 1945, the States were required to pass legislation which provided for town planning control. A State Regional Boundaries Committee in Victoria had reported in 1944 and defined the Port Phillip Area as an appropriate region for planning purposes, and the 1944 Act concentrated upon control of that area.<sup>11</sup>

The 1944 Town and Country Planning Act provided that compensation would be payable to ‘. . . all persons interested in any lands’ which were ‘. . . injured or prejudicially affected’ by planning controls made under the Act.<sup>12</sup> There were two provisos to section 22. The first excluded claims in respect of activities taking place after notice of the approval of the scheme

<sup>10</sup> Victoria, *Metropolitan Town Planning Commission: Plan of General Development: Melbourne, Report 1929*.

<sup>11</sup> See Sandercock L., *Cities for Sale* (1977) ch. 3, for a thorough treatment of the history of Victorian statutory controls.

<sup>12</sup> Town and Country Planning Act 1944 (Vic.), s. 22.

or order had been given either through the Government Gazette or personal service. The second proviso excepted from compensation three categories of claims: first, those arising from restrictions which could have been imposed without liability for compensation under some prior legislation; secondly, those arising from requirements directed to provisions for parking and loading of vehicles and thirdly, those arising from zoning of areas for particular uses, being 'residential, shopping, factory or like purposes'. There would seem to be some overlap between the first and third of these categories. In fact the third category was adopted specifically to fill a gap created by the repeal by the Town and Country Planning Act 1944 of Part V of the Slum Reclamation and Housing Act of 1938, which dealt with the powers of the Housing Commission to require local councils to zone areas for certain specific purposes.

The provisions of the Local Government Act 1928 Part XI were incorporated by reference to deal with the procedures for claims to be made under section 22.

The general principle apparently underlying these original compensation provisions was that compensation should be available on a broad front for landowners negatively affected by the new town planning controls. The exceptions introduced by the second proviso were fairly limited but do foreshadow the direction in which later amendments were to move. These particular provisions attracted little general debate during the passage of the Act through both Houses.<sup>13</sup> However the remarks of Mr Oldham in moving the inclusion of the second proviso to section 22 are worth noting. He said:

payment of compensation is a difficult matter to be determined in connection with any town planning legislation and even with the proviso added I fear it will not be the last we shall hear of the subject. . . . The purpose of the proviso is to limit the field in which compensation is payable. One of the factors which militate against the success of planning schemes is the fear that a municipality may be involved in with claims for payment of large sums by way of compensation.<sup>14</sup>

Equally prophetically in reply Mr Merrifield warned of the probable increase in zoning controls and the consequential 'loss of private equities overnight' as the result of planning schemes.<sup>15</sup> It is perhaps surprising that the lengthy speeches made in both Houses on the introduction and debate of the Bill did not treat the issue of compensation more thoroughly. In fact the 1944 provisions are a truncated version of the compensation provisions of the 1932 United Kingdom Town and Country Planning Act. They seem to have been adopted as part of the exercise of transplanting

<sup>13</sup> Victoria, *Parliamentary Debates*, V. 217: Legislative Assembly, 6 September 1944, 755; 12 September 1944, 839; 11 October 1944, 1433. Victoria, *Parliamentary Debates*, V. 218: Legislative Assembly, 17 October 1944, 1475, 1504; 7 November 1944, 1948, 1962; Legislative Council, 8 November 1944, 1978; 21 November 1944, 2229; 28 November 1944, 2383, 2396, 2402.

<sup>14</sup> Victoria, *Parliamentary Debates*, V. 218: Legislative Assembly, 7 November 1944, 1959.

<sup>15</sup> *Ibid.* 1960.

aspects of that Act to Victoria to comply with Commonwealth Government pressures swiftly enough to take advantage of Commonwealth funds.<sup>16</sup>

In 1948 certain amendments were made to the compensation provisions.<sup>17</sup> The requirement that notice of the approval of a scheme or orders under section 22 be served personally on owners was removed. The publication in the Gazette could from then on be the factor which would limit a right to claim arising from activities prohibited under the scheme or order. The rationale for this effective but marginal restriction was the cost and difficulty of furnishing individual notices to persons interested in lands which were possibly affected. The other amendment to the compensation section was the rephrasing of the exception in respect of zoning controls. The specific reference to particular uses, namely, residential shopping factory or like purposes was replaced with general phrases indicating more broadly the controls on land use which could be imposed. Arguably this change in wording extended the compass of the restriction on the availability of compensation, but if so this point was not taken up specifically in debate.<sup>18</sup> There was a brief reference made to explain that it covered the possibility of the introduction of 'green belt' zones<sup>19</sup> but the issue of a possible further inroad on private property rights was not discussed. There was an interesting exchange in the Assembly when Mr Reid compared the Victorian Act with the recently passed United Kingdom Act of 1947. He described the latter as totalitarian and said '... we must preserve the liberty of the individual through the authority of Parliament' but did not take issue with the problem of compensation directly.<sup>20</sup> Mr Keon replied:

the whole conception of town and country planning is an interference with individual rights. It involved a conscious direction or correction of individual interests in the interests of the community as a whole. That is the fundamental basic conception of Australian society.<sup>21</sup>

In 1954 there were more radical amendments made to the Act as a whole and in particular to section 22, which was completely redrafted.<sup>22</sup> The persons who could claim compensation under the Act were described in the terms now contained in section 41(1). It has been argued that the change effected from prejudicial affection to 'loss or damage' was intended to reduce the availability of compensation, although again this point was

<sup>16</sup> The relevant provisions of the Town and Country Planning Act 1932 (U.K.) are ss. 18, 19 and 20. S. 21 provided for the recovery of 75% of increased land value due to planning schemes through a betterment levy.

<sup>17</sup> Town and Country Planning Act 1948 (Vic.), ss. 3(2), 5(1).

<sup>18</sup> Victoria, *Parliamentary Debates*, V. 226: Legislative Council, 27 April 1948, 661; 5 May 1948, 844; 8 June 1948, 1011; Legislative Assembly, 8 June 1948, 1041; 15 June 1948, 1115. Victoria, *Parliamentary Debates*, V. 227: Legislative Council, 6 July 1948, 1490, 1501.

<sup>19</sup> Victoria, *Parliamentary Debates*, V. 226: Legislative Council, 8 June 1948, 1012-3.

<sup>20</sup> Victoria, *Parliamentary Debates*, V. 227, Legislative Assembly, 6 July 1948, 1514.

<sup>21</sup> *Ibid.* 1515.

<sup>22</sup> Town and Country Planning (Amendment) Act 1954 s. 8.

not canvassed in debate.<sup>23</sup> The amendments also eased earlier restrictions by providing for exceptions to the limitations set out in the provisos to section 22. By allowing for compensation where the regulation of land use was a reservation for public purposes or where there was a prohibition on the continued use of land for an existing purpose the most severe effects of zoning restrictions were tempered. The remainder of section 22 was redrafted to provide for the time at which liability arose and for the assessment of compensation in the terms which are now in force. The issue which attracted the greatest attention in debate was the need to provide for the case where there is delay in dealing with an application for a permit. The failure to issue or refuse a permit within two months was agreed to give rise to liability in the terms set out now in section 42(2)(b), but no issue was taken with the other aspects of the redraft which are at least arguably of greater significance to the general availability of compensation. Phillips writing in 1960 saw the 1954 amendments as a watershed in the restriction on compensation for town planning control. He saw moral and sociological problems presented by the new formulation of the law especially in the context of the wide planning powers effected by the establishment in 1949 of the Board of Works as the planning authority for the metropolitan area<sup>24</sup> and the increased scope for zoning controls. He wrote:

It will be seen that examination of the course of the legislation reveals a *volte face* upon the basal issue. At the beginning, individual owner prejudice resulting from the assertion of supposed community interest is covered by compensation, with a limited exception apparently derived from an historical example and unrelated to principle. At the end of the development, individual owner prejudice is left to lie where it may fall with minor exceptions substantially connected with the resumption of property or the destruction of existing vested rights.<sup>25</sup>

This attitude to amendments which were introduced at the suggestion of the Town and Country Planning Board illustrates the confrontation approach natural to lawyers when presented with extensions of power to affect private rights coupled with, at best, limited rights to compensation. Whether the issues of balance between public and private interests were thought out in any comprehensive way is doubtful; at best the point of balance reflected in the 1954 amendments was probably the result of growing practical experience of the pragmatic difficulties of implementation of planning coupled with some pressure to relieve its more obvious detrimental effects. The *ad hoc* incremental approach to legislative change has continued up until the present. However the changes to the compensation provisions since then have not redirected the emphasis made clear so early in the piece. The amendments which have been made to these provisions since 1954 have been to relocate, consolidate or to make

<sup>23</sup> Phillips P. D., 'Compensation and Planning in Victoria' (1960) 2 *M.U.L.R.* 331, 345. Victoria, *Parliamentary Debates*, V. 243: Legislative Assembly, 6 April 1954, 10, 14; 22 April 1954, 174, 180; 28 April 1954, 300, 308; Legislative Council, 28 April 1954, 291, 392; 4 May 1954, 370, 382, 384.

<sup>24</sup> Town and Country Planning (Metropolitan Area) Act 1949 s. 3.

<sup>25</sup> Phillips, *op. cit.* 345-6.



piecemeal additions to the lists of exceptions to the general principle or to extend the exceptions to those exceptions.

After the 1958 Consolidation, the Town and Country Planning Act was redrafted and reprinted in 1961,<sup>26</sup> and although it has undergone considerable amendment since then has not been redrafted comprehensively. In 1961 the compensation provisions were redrafted and relocated to their present position. Although the broad outline of the 1954 provisions was not modified there were some specific changes worth noting. In introducing the Bill to the Council Mr Chandler remarked of the compensation provisions:

The whole question of compensation has been carefully reviewed. The existing law on the subject is generally satisfactory as far as it goes, but changes are desirable.<sup>27</sup>

However, the changes introduced in the Bill both restricted and broadened different aspects of the compensation provisions. Compensation was extended to cover cases where access had been lost by street closures, through the introduction of the provisions now in section 42(1) c(iii) and an extension to the availability of compensation in the 'public reservation' cases was made by the introduction of what is now section 42(1) c(ii).<sup>28</sup> On the other hand the provisions refusing compensation in cases where a scheme requires land to be set aside for vehicle parking and loading were extended to cover not only business and industrial uses but 'any use or development', and the wording of section 41 was amended to allow for compensation for loss arising from the operation rather than the making of schemes. From these changes it does not appear that the careful review referred to by Mr Chandler had revealed any fundamental dissatisfaction or jurisprudential misgiving as to the overall position. However it is interesting to note that the government agreed to an amendment to the vehicle bay provisions. It had been proposed that setbacks required for carparking would be noncompensable and amount to a dedication of the areas involved as public streets. These proposals were dropped on the ground that they amounted to acquisition without compensation.<sup>29</sup> This view highlights the distinction drawn by the legislature between regulation and taking of land and the tacit understanding that the former should not be compensable.

In 1968 the Act was again amended quite substantially.<sup>30</sup> It was in the course of these amendments for example, that the provisions relating to statements of planning policy and the establishment of the Appeals Tribunal and State Planning Council were introduced. The compensation

<sup>26</sup> Town and Country Planning Act 1961 (Vic.).

<sup>27</sup> Victoria, *Parliamentary Debates*, V. 265: Legislative Council, 28 November 1961, 1540.

<sup>28</sup> See discussion above.

<sup>29</sup> Victoria, *Parliamentary Debates*, V. 265: Legislative Council, 7 December 1961, 2111; Legislative Assembly, 13 December 1961, 2176.

<sup>30</sup> Town and Country Planning (Amendment) Act 1968 (Vic.).

provisions also were amended. The most significant changes made to them were the insertion of sub-sections 5A and 5B to section 42,<sup>31</sup> and the modification of section 42(2) to establish that the time at which a right to compensation arises is the same as the time at which liability to pay arises in the responsible authority.<sup>32</sup> Section 41 sub-sections (3), (4) and (5) were also introduced at this time.<sup>33</sup> Although the debates in both Houses involved general consideration of the aims and experiences of town planning, no issue was taken up which specifically considered the problems of compensation.<sup>34</sup> Mr Cathie devoted some time to a discussion of the desirability of betterment taxation to deal with land speculation,<sup>35</sup> but apart from this the broader issues of land development controls were hardly canvassed.

In 1969 and 1975 the specific restrictions on the availability of compensation in the cases involving extractive industries<sup>36</sup> and outdoor advertising controls<sup>37</sup> were inserted, again without debate on the general trend illustrated by the compensation provisions as a whole. The only other significant extension to compensation had been in 1959 when the provisions now in section 42(5) were introduced to relieve certain procedural difficulties facing owners of developed land in a limited range of cases.<sup>38</sup> These provisions were extended to cover undeveloped land in 1979.<sup>39</sup>

## SUMMARY

The history of the development of the present controls on compensation illustrates that the legislature has acted to protect the planning authorities except in cases where controls have amounted to a virtual taking of land. This attitude to compensation was maintained by both Labor and Liberal governments. Despite frequent and complex amendments to the Act as a whole, there has been consistency in the outline of policy reflected in the compensation provisions, and there has been no attempt to restructure the balance of public and private interests in this context.

<sup>31</sup> *Ibid.* s. 22(2)e.

<sup>32</sup> *Ibid.* s. 22(2)b.

<sup>33</sup> *Ibid.* s. 22(1)c.

<sup>34</sup> Victoria, *Parliamentary Debates*, V. 289: Legislative Assembly, 20 February 1968, 3218, 3226. Victoria, *Parliamentary Debates*, V. 290: Legislative Assembly, 12 March 1968, 3555, 3591; Legislative Council, 13 March 1968, 3591; 19 March 1968, 3656; 27 March 1968, 3864, 3891; 10 April 1968, 4182, 4197.

<sup>35</sup> Victoria, *Parliamentary Debates*, V. 290: Legislative Council, 27 March 1968, 3881.

<sup>36</sup> Town and Country Planning (Compensation) Act 1969 inserting ss. 42(1B) and (1C) and 48A; these amendments were introduced to deal with a specific problem arising out of quarrying activities at Arthur's Seat. See *Shire of Flinders v. T.W. Maw and Sons (Quarries) Pty Ltd* [1971] V.R. 484.

<sup>37</sup> Town and Country Planning (Outdoor Advertising) Act 1975 which introduced *inter alia* s. 42(1)(ba).

<sup>38</sup> Town and Country Planning (Amendment) Act 1959.

<sup>39</sup> Town and Country Planning (General Amendment) Act 1979, s. 18(2)b.

### WHO MAY CLAIM

Section 41(1) provides that the 'owner or occupier of land' or the 'owner of any interest therein' may claim under the provisions governing compensation. The words 'owner' and 'land' are defined in section 3.

'Owner' in respect of any land means the person for the time being entitled to receive or who if the same were let to a tenant at a rack-rent would be entitled to receive the rack-rent thereof.

This definition is derived from one used in the early public health legislation of the United Kingdom and taken up by the subsequent town planning Acts.

'Land' means land of any tenure and includes works buildings and parts of buildings whether the buildings are divided horizontally or vertically or in any other way.

'Rack-rent' is not defined in the Act, but is a common law term meaning the highest rent possible, or the full annual benefit of the tenement in question.<sup>40</sup> In respect of the same piece of land, there may be a number of contemporaneously existing estates each capable of being let for a rent which would be the 'rack-rent' for the value of that estate. For example a fee simple owner may have let his land on a long term lease and that lessee may have sublet for a shorter term. Both the fee simple owner and the lessee from him would be entitled to 'rack-rent'; the first for the value of the first lease, and the second for the value of the sublease. Thus 'owner' as defined in section 3 apparently would cover both as possible claimants under section 41(1). This view is reinforced by the terms of section 42(5A) which defines to whom compensation may be payable.

(5A) Except where otherwise expressly provided, compensation in respect of any land or any matter or thing relating to any land shall not be payable to any person who was not the owner or occupier of the land or the owner of any interest therein at the time the right to claim the compensation arose.

The wording of this provision envisages the possibility of more than one claim being successful in respect of the same land.

However in *Spurling v. Development Underwriting (Vic.) Pty Ltd*<sup>41</sup> the meaning of the word 'owner' when used in section 18 of the Act was considered and a different conclusion was reached. In that case an argument was put that by virtue of the definitions of 'owner' and 'land' in section 3, an application for a permit under section 18 would not be complete unless accompanied by certificates furnished by any tenants as well as by the fee simple owner of the land in question. The court rejected the argument. It concluded that the Act was concerned with control of land use and this directed attention principally to the physical concept of land rather than the estates in land which might coexist and that there was no room for an interpretation which encompassed a number of 'owners' coexisting, despite the wording of section 3. Stephen J. regarded the proper approach to be to treat the definition of 'owner' as having two distinct limbs, one only of which can in any particular case be applied. If the first limb is exhausted

<sup>40</sup> *Blackstone's Commentaries* (1st ed.), Vol. II, 43.

<sup>41</sup> [1973] V.R. 1, 17 f.

by finding a person who has leased at a rack-rent then there is no room for the second limb to operate. Although the court did not specifically confine its consideration to matters under section 18, it did not advert to any wider implication such an interpretation might have. It is submitted that *Spurling* should be regarded as authority only on the use of the word 'owner' in respect of the requirements of section 18. Otherwise the view taken in that case would limit the availability of compensation and such a restriction on the class of claimants would not be consistent with case law nor the clear words of the provisions of the sections 41 and 42.<sup>42</sup>

In the reported cases concerning the operation of sections 41 and 42 the claimants have in fact been the owner-occupiers of land in question.<sup>43</sup> However in respect of claims for compensation arising under similar legislation both in Victoria and elsewhere the view has been taken that claims may be entertained which arise contemporaneously and from a wide range of interests. Thus, the provisions of the Valuation of Lands Act 1960 (Vic.) have been held to cover the interests of sharefarmers<sup>44</sup> and lessees<sup>45</sup> as well as the freehold owner and in *S.J.R. Investment Co. Pty Ltd v. Housing Commission of Victoria*<sup>46</sup> to allow the assignee of a vendor's interest under a terms contract to recover compensation. In that case the land was compulsorily acquired by the Housing Commission when there was still a substantial sum owing under the contract. A dispute as to the availability of compensation for the appellant arose and was dealt with under the Valuation of Land Act 1960 which does not make provision specifying who can pursue a claim. The Land Valuation Board of Review dismissed the appellant's claim for compensation on the ground that he had no interest in land which could be the subject of compensation. It was held by Lush J. on appeal, that in the circumstances, the appellant was entitled to the benefit of the unpaid vendor's lien in the land which was in fact an interest in land which would found a claim for compensation. In *Rugby Joint Water Board v. Footitt*<sup>47</sup> claims were entertained for compensation arising from a compulsory purchase in respect of both owners of the freehold and their tenants, and in a number of cases decided on the

<sup>42</sup> In *London Corporation v. Cusack-Smith* [1955] A.C. 337, the House of Lords considered the interpretation which should be placed on the word 'owner' in the Town and Country Planning Act 1947 (U.K.) for the purposes of ascertaining who could serve a purchase notice on the responsible authority. The definition of 'owner' in that Act is similar to that used in the Victorian legislation. The majority held (Lord Reid, Lord Tucker and Lord Keith of Avonholm, Lord Oaksey and Lord Parker dissenting) that although the word 'owner' as defined envisaged the possibility of a number of 'owners' coexisting it did not allow a freeholder who let at what was in fact less than the rack-rent to serve such a notice. The anomalous effects of this decision were discussed in Compensation for Compulsory Acquisition and Remedies for Planning Restrictions, a 'Justice' Report of the International Commission of Jurists (1973) 20 *Law Pamphlets*.

<sup>43</sup> See later discussion.

<sup>44</sup> *Smith and Wines v. Dandenong Valley Authority* [1974] V.R. 276.

<sup>45</sup> *Keogh v. Housing Commission of Victoria* [1969] V.R. 809.

<sup>46</sup> [1971] V.R. 211.

<sup>47</sup> [1972] 2 W.L.R. 757.

Public Works Act 1912 (N.S.W.) a variety of interests were similarly protected.<sup>48</sup>

The assumption made by the courts generally is that proprietary interests should not be restricted without compensation in the absence of clear words to the contrary. It seems unlikely that taking account of the cases on analogous legislation and the provisions of sections 41 and 42 the view taken in *Spurling* case could be used to refuse compensation where there are claimants in respect of several estates. Although the court in *S.J.R. Investments* case was not considering the Town and Country Planning Act provisions, the incorporation of the Lands Compensation Act 1968 and the Valuation of Land Act 1960 into that Act by virtue of the provisions of section 41(2) provides a firm basis for adopting the wider view of compensable interests taken therein. There could be no reason for regarding claims for compensation arising under the Town and Country Planning Act differently in this context from those arising under the provisions of for example, the Housing Act 1958.

### WHAT IS COMPENSABLE?

#### *Loss or damage*

The original version of section 41(1)<sup>49</sup> was amended in 1954 to substitute the words 'loss or damage' for 'injured or prejudicially affected'.<sup>50</sup> Whether this change was intended to reduce or extend the possibility of claims for compensation is unclear. The point was not discussed during the passage of the amending Bill through Parliament.<sup>51</sup> It has been suggested that 'loss or damage' is less extensive than prejudicial or injurious affection,<sup>52</sup> a phrase which had a respectable history in earlier statutory provisions both in

<sup>48</sup> See *The Railway Commissioners of New South Wales v. The Perpetual Trustee Co. Ltd* (1906) 3 C.L.R. 27 (holder of mining rights); *Ex parte The Minister for Education; re Henry Lawson Development Pty Ltd (in liq.) and another and Public Works Act* (1970) 91 W.N. (N.S.W.) 624 (mortgagees and purchasers); *Perry v. Clissold* [1907] A.C. 73 (squatter); *Rosenbaum v. The Minister* (1965) 114 C.L.R. 424 (weekly tenants). Cf. *Commissioner of Main Roads v. The North Shore Gas Co. Ltd* (1967) 120 C.L.R. 118 where the Company's rights in mains and service pipes were neither land nor an interest in land capable of founding a claim for compensation. Note also *Para Vale Estates Pty Ltd v. Minister of Works* [1964] S.A.S.R. 286 (holder of option to purchase entitled to compensation under the Compulsory Acquisition of Land Act 1925-59 (S.A.)). In the recent case of *Lensworth Finance Ltd v. Commissioner of Main Roads (Qld)* (1978) 5 Q.L.C.R. 261 the Queensland Land Court held that the right to compensation given by section 12(5) of the Acquisition of Land Act 1967-77 (Qld) is not restricted to persons in possession of or able to use the land, but will extend to include a mortgagee or the persons holding the power of attorney for the mortgagor. That Act provides that the estate or interests of every person entitled to the whole or any part of the land be converted to a claim for compensation upon acquisition. Land is defined to include any estate or interest in land.

<sup>49</sup> Town and Country Planning Act 1944 (Vic.) s. 22.

<sup>50</sup> Town and Country Planning (Amendment) Act 1954 (Vic.) s. 8.

<sup>51</sup> Victoria, *Parliamentary Debates*, V. 243: Legislative Assembly, 6 April 1954, 10, 14; 22 April 1954, 174, 186; 28 April 1954, 308; Legislative Council, 28 April 1954, 291; 4 May 1954, 384.

<sup>52</sup> Phillips P. D., 'Compensation and Planning in Victoria' (1960) 2 *M.U.L.R.* 331, 345.

Australia and the United Kingdom.<sup>53</sup> However there is no real evidence offered to support this view. Certainly the approach of the judiciary to the pertinent provisions of the Lands Clauses Consolidation Act was to award limited rights to compensation for land injuriously affected where no land was taken from the claimant.<sup>54</sup> Whether the change was made to prevent such an approach being adopted in respect of the town planning legislation or to shake off the possible limitations implied by a phrase historically connected with public works activities can only be the subject of speculation.

On its face, the wording of section 41(1) would seem to cover two broad types of loss or damage: first, loss or damage of a physical nature such as noise, fumes, vibrations and so on which might be associated with the construction and use of public works undertaken in pursuance of a planning scheme and secondly, losses in land values associated with restrictions on permitted uses limiting future development or redevelopment, or the loss of amenity suffered by the establishment of permitted uses in the neighbourhood. However, the wording of section 42 indicates that compensation will not in fact extend to cover all or even most of the cases where some loss or damage is in fact suffered. Paragraph (c) of section 42(1) proscribes compensation for loss arising out of any provision of a scheme or order which 'specifies or enables to be specified the purposes for which land may be used, or which prohibits restricts or regulates the use of land for specified purposes'.<sup>55</sup> The three exceptions to this proscription are extremely limited in their operation. They are directed to land 'reserved or deemed to be reserved for a public purpose' or which will be 'required for a public purpose' and to the closure or diversion of access to streets and roads.

The primary effect of section 42(1)(c) is to reduce the categories of loss or damage in respect of which claims might be made. It clearly directs itself to removing the possibility of claims of the second type referred to above, where values are reduced by virtue of restrictions imposed on the

<sup>53</sup> Land Clauses Consolidation Act 1845 (U.K.) s. 68; this section was copied in various State Acts in Australia; see for example Public Works Act (1865) (Vic.) s. 326.

<sup>54</sup> The case of *Metropolitan Board of Works v. McCarthey* (1874) L.R. 7 H.L. 243, gave rise to the so called McCarthey Rules developed in a line of cases which built upon elements therein. For a detailed description of the rules see Davies K., *Law of Compulsory Purchase and Compensation* (3rd ed. 1978) 189-97; and Butt P., 'Some Aspects of Injurious Affection; A Case for Reform' (1978) 52 *Australian Law Journal* 72. There is some doubt as to whether these rules were ever adopted by the Australian courts.

<sup>55</sup> Fricke, *op. cit.*, 130 n. 16, 'Suppose the scheme includes a provision that an historic building is to be preserved, but which does not purport to regulate the purpose for which the building and land may be used (cf. 3rd schedule, clause 8). It is arguable that such a provision is not caught by the paragraph, so that the right to claim compensation is not excluded. The argument may require a distinction to be drawn between "use" and "purpose"; cf. *Baker v. Cumberland County Council* (1956) 1 L.G.R.A. 321, 330 f. and cf. definition of "use" in s. 3 of the Act.' It is also possible that compensation in such cases could be based upon the approach to 'reserved for public purposes' adopted by the Planning Appeals Tribunal in a number of cases; see later discussion of this point.

use of land by the scheme or order. The 'zoning losses' probably represent the largest category of possible claims. The restrictions also remove any real possibility of a claim being made in respect of damage caused by neighbouring public works provided for in a planning scheme where no part of the claimant's land was acquired for them. An argument could be mounted that the 'land' referred to in section 42(1)(c)(i) and (ii) as being reserved for public purposes and excepted from the restrictions, does not of necessity have to be the land which is the subject of the claim. It could be neighbouring land the reservation of which affects the value of the claimant's land. Such an interpretation would then allow claims to be made for consequential loss in such cases. This is probably placing a strain on the true construction of the provisions for it seems clear that the land referred to in section 42(1)(c)(i) and (ii) must be the land referred to in section 41.

In any case, it has been accepted by the courts and textbook writers that the true limit to compensation for loss or damage of this type is that it will only lie if part of the claimant's land has been acquired for public works in question.<sup>56</sup> The cases normally quoted as authority for this proposition are, with one exception, decisions on the interpretation of various acquisition Acts.<sup>57</sup> The exception is *Folkestone v. Metropolitan Region Planning Authority*<sup>58</sup> which dealt with an action for injurious affection based upon a provision of the Town Planning and Development Act 1928-1967 (W.A.). The relevant provisions of that Act were broadly similar to those of the Victorian legislation. However, in two respects, differences in wording should be noted. The Western Australian provisions conferred rights to compensation for 'injurious affection' rather than 'loss or damage' and the injurious affection had to arise from the 'making' of the scheme rather than its 'operation'. In this case a major highway was shown on the regional planning scheme map which covered the area in which the plaintiffs lived. The highway was shown passing just beside the plaintiff's land, but no part of their land was to be acquired for it. It was not denied that the realizable value of their land would be affected by the carrying of the scheme into effect. Virtue J. considered the issue in the context of other provisions of the Act and the state of the law regarding compensation for

<sup>56</sup> *Laycock v. Victorian Railway Commissioners* [1917] V.L.R. 556; *Commonwealth v. Morison* (1972) 46 A.L.J.R. 453, 455, 458; and see also Butt P., 'Some Aspects of Injurious Affection: A Case for Reform' (1978) 52 *Australian Law Journal* 72; Fricke G. L., *op. cit.*, 32 f., Gifford K., *The Victorian Town Planning Handbook* (5th ed. 1978) 406 f.

<sup>57</sup> In *Laycock's* case the legislation in question was the Land Compensation Act 1915 (Vic.) s. 35, in *Morison's* case the Lands Acquisition Act 1955-66 (Cth). See also *Howard v. Commissioners for Railways* (1968) 34 C.L.L.R. 140; *Thorpe v. Brisbane City Council* (1962) 29 C.L.L.R. 367; *Curtis v. The Crown* (1961) 28 C.L.L.R. 310 and *Westaway v. Landsborough Shire Council* (1963) 31 C.L.L.R. 1, on the The Public Works Land Resumption Acts 1906-55 (Qld). Cf. *Edwards v. Minister of Transport* [1964] 2 Q.B. 134 (Lands Clauses Consolidation Act 1845 (U.K.)).

<sup>58</sup> (1967) 16 L.G.R.A. 286.

injurious affection before the passage of the Act. He pointed out that the authorities on the Lands Clauses Consolidation Act (U.K.) and legislation in Australia derived from it clearly laid down that a claimant in the plaintiffs' situation would have no right to compensation under them, and concluded that Parliament had not intended that the position should be any different under the Planning Act where the injurious affection complained of did not arise from a restriction placed upon the claimants' lands, but from uses of neighbouring works.<sup>59</sup> In support of this interpretation he referred to the wording of the relevant section. The use of the words 'making of the scheme' as being the foundation of a claim indicated an intention to restrict compensation to cases where the loss arises from the imposition of restrictions on the subject land and can be distinguished from cases of loss resulting from the carrying into effect of the scheme by the construction and use of works. He also relied upon provisions in the Scheme itself which postponed the recovery of compensation for land reserved for public purposes until the land in question was sold. This provision was not seen as consistent with an intention to allow for compensation where no restrictions were placed on the land in respect of which the claim was to be made.<sup>60</sup>

This argument relies in part on the precise working of the Western Australian provisions — and it would be considerably weakened in Victoria by the use here of the words 'operation' of the scheme rather than 'making'.<sup>61</sup> However the provisions of section 42(2) in the Victorian Act which require that a permit for use of the claimant's land be refused before liability to compensate arises could be seen as inconsistent with an intention to allow for compensation for pure injurious affection. It is difficult to see that a permit for use or development would be refused in such cases, where public works have merely impinged upon the claimant's enjoyment of his land. As a matter of justice if a permit was refused on the grounds that the use sought would interfere with the public works it is difficult to see why compensation should not be payable. Unless refusal of a permit in such circumstances could be read as *de facto* reservation of the claimant's land for public purposes, it does not seem to be covered. However it must be recognized that the restrictions which have been placed upon the availability of compensation for injurious affection have been fairly openly acknowledged by the judiciary at least as being an arbitrary line drawn to minimize the claims for compensation which might have to be met.<sup>62</sup> They do not purport to manifest any logical or fair process or policy.

<sup>59</sup> *Ibid.* 290.

<sup>60</sup> *Ibid.* 291. The scheme referred to was that of the Metropolitan Region Town Planning Scheme Act 1959-66 W.A.; see also *Konowalow and Felber v. Minister of Works* [1961] W.A.R. 40, per Virtue J.

<sup>61</sup> 'Operation' was substituted for 'making' by the amendments to the original provisions introduced by the Town and Country Planning Act 1961 (Vic.) s. 41.

<sup>62</sup> See for example *Folkestone's case* (1967) 16 L.G.R.A. 286, 288, per Virtue J. and *Laycock's case* [1917] V.L.R. 556, 567, per Hodges J.



The acceptance of a rule which arbitrarily and harshly limits compensation where no land is acquired but where significantly damaging nuisances or loss might be suffered seems at least inconsistent with the traditional approaches adopted by the courts in restrictively interpreting legislation which provides for acquisition without compensation. Such a rule is of course justified in part by the distinction traditionally drawn between rights of ownership and rights of use. Whether such a distinction is still a valid one to make in respect of real property is an issue deserving particular attention in this context. It may also be useful to recall the existence of another thread running through the general attitude of the courts to statutory interpretation. The courts will as a general rule be loath to require a public instrumentality to expend money if it can be avoided by adopting an alternative interpretation of relevant provisions. The spectre of calls upon the purse of the Crown or its instrumentalities which cannot always be satisfactorily met has haunted the judiciary in a variety of contexts.<sup>63</sup> In this context it is then, perhaps not so surprising that the problem of recovery of individual damages *versus* public expenditure has been resolved in favour of restricting the former to prevent the latter being overburdened.<sup>64</sup>

Thus the type of loss or damage in fact covered by the combined operation of sections 41 and 42 will *not* include (i) mischief caused by public works, unless part of the claimant's land is acquired for the works in question and consequently a claim can be brought under the acquisition provisions, (ii) loss caused by mischief flowing from neighbouring land uses where the uses have been permitted by the planning scheme or ordinance in force, (iii) loss caused by the zoning provisions of a scheme or ordinance which limit the future development of the claimant's land, (iv) loss of land from productive use through the imposition of requirements in specific cases for the provision of parking and loading bays;<sup>65</sup> (v) loss through the controls imposed on outdoor advertising under Part 1A.<sup>66</sup> Section 42(1)(a) provides that once the order or scheme has been approved under section 30 no compensation will be payable in respect of

<sup>63</sup> The distinction between misfeasance and nonfeasance in the 'highway' cases is explored by Fullagar J. in *Gorringe v. Transport Commission (Tas.)* (1950) 80 C.L.R. 357; [1950] A.L.R. 277. It illustrates a device of interpretation to avoid imposing what might be seen as onerous duties upon public authorities; see also *East Suffolk Rivers Catchment Board v. Kent* [1941] A.C. 74; [1940] 4 All E.R. 527; for an illustration of the same underlying theme in quite a different context see *Booth v. Dillon (No. 2)* (1976) V.R. 434, 439.

<sup>64</sup> There is a pragmatic consideration which must be borne in mind when calculating the types of injuries compensable under section 41(1). Many of the undertakings which cause mischief of the kind complained of in *Folkestone's* case for example, and which operate so as to diminish owner's enjoyment and the value of the land may not be included in a planning scheme so as to be caught by section 41(1). They may be carried out by the various departments concerned with construction of specific works under their enabling statutes. See Fogg A. S., *Australian Town Planning Law* (1973) 491.

<sup>65</sup> S. 42(1)(b).

<sup>66</sup> S. 42(1)(ba).

actions taken after that date; if the actions were done pursuant to a permit which allowed compensation then rights to compensation will be restricted to the provisions of the permit.<sup>67</sup>

If the restriction is not a mere zoning but amounts to a reservation of land for public purposes, then the loss can be compensable, provided the remaining provisions of section 42 are satisfied. Similarly loss caused by the stopping up of access from land to streets or roads by the operation of a scheme may be compensable. There is specific reference to the liability of responsible authorities to compensate for interference with buildings works or uses lawfully in existence when the approval of the scheme was published. This is an affirmation of the underlying assumption that actual restrictions on existing users should be compensated although losses which arise from activities of a speculative nature should be excluded.

### *Reservations for public purposes*

The meaning of the words 'reservation' and 'public purposes' contained in section 42(1)(c) are crucial to a complete survey of the ambit and availability of compensation under the planning legislation. If a claim can be made where land is reserved for public purposes, how far will this go towards extending relief for loss or damage suffered by the imposition and operation of planning controls?

The Victorian planning schemes rely heavily upon the zoning of land as a planning tool. It is important to distinguish between zoning and reservation of land. The Melbourne Metropolitan Planning Scheme Ordinance creates both zones and reserved lands.<sup>68</sup> Reserved lands cater *inter alia* for public open space, roads, railways, airfields, cemeteries, hospitals and schools and uses associated with the functioning of various government departments and instrumentalities such as the State Electricity Commission and the Country Roads Board. They are clearly distinguishable from zones which in most cases broadly categorize a range of uses allowed as of right and other uses which can be permitted within the zone. The special use zones are designed to cater more specifically with the environment of certain identified localities, such as the Shrine of Remembrance locality under Special Use Zone No. 8, or in respect of types of uses which require special adjustment such as Training Stables under Special Use Zone No. 3. An argument could be made that land reserved for public purposes should

<sup>67</sup> Compare section 42(3); see also the comment made by Fricke, *op. cit.*, 129 f. He points out that as liability to pay compensation does not arise until after a permit has been refused (s. 42(2)) it is difficult to see how circumstances could arise in which the exception of s. 42(1)(a) could operate. However, if the permit referred to in s. 42(1)(a) is one issued pursuant to other legislation before the operation of a scheme or order under the Town and Country Planning Act 1961, it could have some effect. Whether there was any such power to issue permits is doubtful.

<sup>68</sup> Melbourne Metropolitan Planning Scheme Ordinance 1968 clauses 6 and 7 deal with zones, clauses 32 and following deal with reservations. In *Whiteway Sign and Lighting Co. Ltd v. City of Fitzroy* (1975) 1 V.P.A. 214, 215, the distinction between zones and reservations was specifically noted by the Town Planning Appeals Tribunal.

be restrictively interpreted to cover only reserved land within the Ordinance or perhaps to relate to the types of uses revealed by a study of the clauses relating to reservations for public purposes under the Ordinance.<sup>69</sup>

It should be noted that the effect of reservations under the Ordinance is not to reserve the land solely for public purposes. Clause 33 allows the responsible authority power to permit other uses. The ambit of this power was considered in *Leahy v. City of Camberwell*.<sup>70</sup> In that case it had been proposed that part of a public open space reservation be used by a private tennis club. The Responsible Authority decided to grant the permit sought, and an appeal was taken to the Appeals Tribunal. After hearing argument, the Tribunal referred questions of law as to the proper exercise of the power prescribed under Clause 33 to the Supreme Court under s. 22B(1) of the Town and Country Planning Act 1961. Adam J. found that the proposed use would be inconsistent with the use indicated by the reservation in that the reservation for public open space envisaged that the land be available for the public to use as of right.<sup>71</sup> However he held that although uses permitted by the Responsible Authority under Clause 33 normally should be consistent with the reserved use, they could be inconsistent and still be valid. In determining the appeal before it after receiving the opinion of the Supreme Court on the issue of law,<sup>72</sup> the Tribunal concluded that the interests of the community should prevail and the permit be refused. Uses inconsistent with the reserved use should only be permitted, it was said, in cases of urgency or where they would not significantly interfere with the reserved use. The Tribunal decided that neither situation obtained in the case before it.

Thus although reserved lands may be used for private purposes, the range of uses which are likely to be permitted must in practice be limited by reference to the principal purpose defined or indicated by the reservation. It would seem that the possibility raised by Gifford that reservation *per se* might not attract rights to compensation is a remote one.<sup>73</sup> The suggestion that compulsory acquisition would be necessary before a right to compensation would arise ignores the plain words of section 42(1)(c)(ii) and the deeming power referred to in section 42(1)(c)(i).

The Supreme Court has maintained a strict interpretation of the words 'public purposes' when they have been used in related legislation. In *Rodgers v. Attorney-General for Victoria*<sup>74</sup> a provision of the Land Act

<sup>69</sup> Cf. the definitions of 'public purposes' in Lands Acquisition Act 1955 (Cth) s. 5(1); Local Government Act 1958 (Vic.) s. 251(1) as discussed in *City of South Melbourne v. State Electricity Commission of Victoria* [1968] V.R. 684; Crown Lands Consolidation Act 1913-48 (N.S.W.) as discussed in *Wheeler v. War Veterans' Homes* (1953) 89 C.L.R. 353.

<sup>70</sup> [1973] V.R. 589.

<sup>71</sup> *Ibid.* 591.

<sup>72</sup> *Leahy v. City of Camberwell (No. 2)* [1973] V.P.A. 140.

<sup>73</sup> Gifford, *op. cit.* 399.

<sup>74</sup> [1944] V.L.R. 55.

1928 was considered which covered the resumption of land 'for . . . public purposes'. Martin J. held that purported acquisition of land under this provision for the purpose of erecting a hospital which would be subsidized in part by State funds was not a valid exercise of power. He considered that 'public purposes' in that context would cover only purposes related to the business conducted by the State or its instrumentalities.<sup>75</sup> Those reported cases which illustrate the operation of section 42(1)(c) involve reservation for public purposes within the Ordinances framework.<sup>76</sup>

Although the distinction between zoning and reservation under the Ordinance is clear, and the courts have maintained a narrow interpretation of 'public purposes', the Victorian Town Planning Appeals Tribunal has taken a wider view of the operation of section 42(1)(c) than these factors would indicate. In a number of cases the Tribunal has adopted the line that compensation should be available where there has been no reservation in the strict sense, but where development rights have been severely restricted by the operation of zoning controls.<sup>77</sup> Several of these cases involved applications for permits in respect of land zoned 'conservation' or which was subject to investigation by the Ministry of Conservation. The most noteworthy are *Woods v. Shire of Lillydale*<sup>78</sup> and *Dingli v. Shire of Sherbrooke*.<sup>79</sup> In each of these the Tribunal directed that the permits sought should be refused and the grounds for refusal set down as being 'required or deemed to be reserved for a public purpose'.<sup>80</sup> In *Woods* the Tribunal said in respect of the possibility of restructuring holdings in the Dandenongs to prevent small scale subdivision that such plans were:

clearly based on environmental grounds and are part of the general policies of the various authorities to preserve the natural state of the Dandenongs. We think that these factors bring the appeal within the provision of section 42 of the Town and Country Planning Act 1961 and that the refusal of the application on the grounds contended by the responsible authority must amount to a refusal on the ground that the subject land is or will be required for a public purpose or is deemed to be reserved for a public purpose, the public purpose being the preservation of the environment of the Dandenongs. . . . The disallowance of the appeal on this ground should now enable [the owner] to take appropriate proceedings to obtain compensation in respect of his land.<sup>81</sup>

<sup>75</sup> *Ibid.* 58, 59. Fricke, *op. cit.* 48 notes that the problem of acquisition disclosed by *Rogerson* would be obviated by the powers now provided in the Hospitals and Charities Act 1958.

<sup>76</sup> *Yarn Traders Pty Ltd v. Melbourne and Metropolitan Board of Works* [1970] V.R. 427 (public open space); *Gross v. Shire of South Barwon* [1969] V.R. 815; *Melbourne Saw Manufacturing Co. Pty Ltd v. Melbourne and Metropolitan Board of Works* [1970] V.R. 394 (roads).

<sup>77</sup> *Dingli v. Shire of Sherbrooke* (1976) 5 V.P.A. 221; *Wood v. Shire of Lilydale* (1977) 7 V.P.A. 5; *Prisk v. Shire of Eltham* (1976) 5 V.P.A. 83; *Robinson v. Melbourne and Metropolitan Board of Works* [1973] V.P.A. 174.

<sup>78</sup> (1977) 7 V.P.A. 5.

<sup>79</sup> (1976) 5 V.P.A. 221.

<sup>80</sup> *Quaere* whether strictly speaking the Appeals Tribunal can so specify the grounds upon which a permit is to be refused by the Responsible Authority. See s. 22(1), (2) Town and Country Planning Act 1961.

<sup>81</sup> *Wood v. Shire of Lilydale* (1977) 7 V.P.A. 5, 6. Cf. *Bennett v. Melbourne and Metropolitan Board of Works* [1972] V.P.A. 163 where the Tribunal refused to vary the grounds set down for refusal of a permit sought in similar circumstances to *Wood*.

In both *Woods* and *Dingli* no final decision had been made as to whether the subject lands would be acquired, zoned 'conservation' or consolidated with other lands to raise the minimum allotment size. In *Prisk v. Shire of Eltham*<sup>82</sup> and *Robinson v. Melbourne Metropolitan Board of Works*<sup>83</sup> the Tribunal allowed the issue of permits to build houses on land within conservation zones subject to conditions designed to preserve the amenity of the zone.<sup>84</sup>

A clear distinction can be made between these cases and *Merry v. Shire of Phillip Island*.<sup>85</sup> An appeal from a refusal to issue permits for the erection of houses on land reserved as public open space and car park was brought before the Tribunal. Before the hearing came on, the Responsible Authority decided to issue the permits subject to conditions. The appellant did not indicate to the Tribunal that these conditions would be acceptable. In determining to refuse the permits the Tribunal made the following remarks:

The only justification for the grant of a permit seems to be the Council's wish to avoid payment of compensation in the circumstances. It was mentioned during the course of argument that the reservation had only been introduced by the Council as a result of certain assurances given in relation to the payment of compensation. The reasons for the introduction of planning controls are not a matter for us.<sup>86</sup>

The Tribunal went on to indicate that grant of the permits would make a mockery of the reservation and after referring to *Leahy's* case concluded that there were no reasons before them which would justify their issue in light of the reservation for public purposes. Despite the problems which an authority might have in meeting a compensation claim, the Tribunal clearly sees that in cases of 'true' reservations there might be no alternative to forcing the compensation issue.

The conservation zone controls provided for by the Town and Country Planning Act give extremely wide powers not only to restrict use and development but to require positive conformity with aesthetic standards which might be prescribed.<sup>87</sup> They can cover both rural or urban lands where there is some area of natural or scientific interest or architectural or historic significance. The restrictions on private user rights which may be

See also *Townshend Homes Pty Ltd v. Shire of Gisborne (No. 2)* (1979) 12 V.P.A. 167; *Melplan Pty Ltd v. Shire of Lilydale* (1979) 11 V.P.A. 174.

<sup>82</sup> (1976) 5 V.P.A. 83.

<sup>83</sup> [1973] V.P.A. 174.

<sup>84</sup> In her unpublished thesis 'Compensation for Planning Restrictions in Victoria' submitted for Dip. T.R.P. 1977 Melbourne University, Kelleher shows that the number of permits granted for the erection of detached houses in conservation zones far outweighs the number granted for other purposes such as plant nursery, which on the face do not seem to be any more incompatible with the zoning. This lends some weight to the suggestion that residential uses will be accorded particular protection as a rightful expectation of landowners, even at the expense of broader planning considerations.

<sup>85</sup> (1976) 9 V.P.A. 167.

<sup>86</sup> *Ibid.* 169. See also *Davie v. Shire of Phillip Island* (1979) 12 V.P.A. 281.

<sup>87</sup> Town and Country Planning Act 1961, Schedule 3 clauses 8, 8A and 8B; Melbourne Metropolitan Planning Scheme Ordinance 1968 clause 20B.

imposed under the conservation zone controls are arguably the most stringent under Victorian planning legislation. In blurring the distinction between reservations and zones, and in characterizing the purpose of such zones as being preservation in the public interest so as to enable compensation claims to be made in respect of lost development rights, the Appeals Tribunal may be seen as moving towards a redefinition of the balance between private and public interest independently of both the legislature and the judiciary. Certainly the Tribunal has been prepared to force the issue of compensation payments on to Responsible Authorities whether or not it will be difficult to accommodate them.

The practice of the Tribunal in cases such as *Woods* and *Dingli* was recently considered in the Supreme Court in the case of *Melbourne and Metropolitan Board of Works v. Van Der Meyden*.<sup>88</sup> That case involved applications for permission to subdivide land which was covered by planning controls imposed by both the Shire of Eltham and the Melbourne and Metropolitan Board of Works. Neither responsible authority made a decision on the applications within two months of their being made and an appeal was brought to the Tribunal. The Tribunal considered that the planning controls in force over the land required that the permits be refused because the land was or would be 'required for public purposes for conservation for the benefit of members of the public of Victoria'. It directed that the permits be refused and that the grounds for refusal be given to fit the provisions of section 42 and thus to attract to the owners of the land rights to compensation. Both responsible authorities sought to avoid this effect.

Mr Justice Anderson held that the direction of the Tribunal that particular reasons be given for the refusal of the permits was *ultra vires* its power under section 22. The Tribunal could only direct that a permit be refused and any attempt to stipulate reasons for refusal to be given by the responsible authority would be invalid. He also considered the meaning of the words 'public purposes' used in section 42 and concluded that they could not be stretched to cover the case of general conservation zoning as the Tribunal had suggested. The interpretation of 'public purposes' should be limited to cases where some physical occupation or use by the public is envisaged by a reservation under the Planning Scheme Ordinance clause 32. This would not extend to cases where there was no physical infringement upon private proprietary interests but a mere restriction of user rights.

The decision in *Van Der Meyden* would appear to put an end to the outflanking movement of the Appeals Tribunal in respect of conservation type zonings and to refocus attention upon the need to consider the reevaluation of proprietary interests and their depletion by planning controls.

<sup>88</sup> Unreported decision of Mr Justice Anderson, Judgment given 28/11/1979.

### WHEN LIABILITY FOR COMPENSATION ARISES

The general provision concerning the time at which liability to compensate arises is section 42(2). It provides that no liability will arise until an application has been made to the responsible authority for a permit for use or development and the application has been refused, or the Appeals Tribunal directs that it be refused. If the permit has been granted subject to conditions which are unacceptable to the applicant, or if no decision has been made within two months of the application then the applicant must lodge an appeal in accordance with the provisions of the Act. In such cases it is only when the appeal is disallowed that rights to compensation will arise.

In order for a claim to be successful it should be recalled that the grounds for refusal, which are required to be stated specifically by section 18(4), should be given so as to be caught by section 42(1)(c).

There are two cases where liability can arise without the refusal of a permit as a prerequisite. These are situations where the loss or damage complained of arises from the closure of an existing street under section 42(1)(c)(iii), or where the provisions of section 42(5) apply. This latter provision is directed to affording the owner of land the opportunity to resell and claim within two years of the sale in respect of any lesser price received as a result of the reservation of the land for public purposes, rather than requiring him to apply for a permit and await its refusal. Should an owner want to take advantage of this provision, he must have complied with the requirements of section 42(5)(c) and (d) as to serving notice of intention to sell on the responsible authority, seeking a direction from the Minister and taking all reasonable steps to obtain the best possible price. The operation of section 42(5) depends to some extent upon the Minister's discretion. He must be 'satisfied' that the preconditions have been met and 'may' direct that compensation is payable pursuant to section 41(1). He also has a discretion to waive the requirements of sub-paragraph (c) in cases of undue hardship. Whether the Minister under section 42(5) should be characterized as having a duty to act or a mere power is not clear.<sup>89</sup>

### OTHER RESTRICTIONS ON AVAILABILITY OF COMPENSATION

In addition to the limits placed on the availability of compensation by the general provisions of sections 41(1) and 42 and the requirements as to the procedure to be followed in claims, there are certain specific restrictions which should be noted:

<sup>89</sup> Compare *East Suffolk Catchment Board v. Kent* [1941] A.C. 74; with *R. v. Mahony: Ex parte Johnson* (1931) 46 C.L.R. 131. See 'Compensation for Loss on Sale: the M.M.B.W. Position' (1977) *Real Estate and Stock Journal*, 10. The implication given there is that the Minister has a power to allow for payment of compensation in the circumstances of section 42(5) rather than a duty to do so; see also Gifford, *op. cit.*, 399-400, where he suggests that the element of uncertainty involved in an application under section 42(5) is so great that a sale by a trustee hoping to recover loss under that provision would amount to a breach of trust.

Section 42(1A) excludes compensation when the use of land which is affected by the planning controls commenced after the coming into operation of the controls and does not conform with them.

Section 42(1)(ba) excludes the possibility of any claims being made in respect of the restrictions on outdoor advertising imposed by Part 1A.

Section 42(1B) is directed particularly to restrictions imposed upon extractive industries in certain areas. The Governor-in-Council may declare an area to be one where the natural conditions are of unusual interest or beauty and should be preserved in the interests of the people of Victoria. Where the Governor-in-Council has considered a recommendation in these terms made by the Town and Country Planning Board and is of a like 'opinion', an order declaring the area to be a scenic area is Gazetted and a copy of the Order is also published within eight days in a newspaper circulating in the vicinity. Once these steps have been taken a prohibition on the use of land for the purposes of an extractive industry in such an area will not attract rights to compensation. This restriction will only affect loss in respect of land which was not actually being used for extraction before the controls were imposed.<sup>90</sup> In this respect the restriction on the possibility of claims for compensation could be seen as minimal. Existing use of land is protected, but extensions or developments are not.

Section 42(3) operates to ensure that the provisions of the Town and Country Planning Act have not altered the position of claimants who were covered by controls imposed under prior legislation, or who are affected by controls imposed by the Act itself which could have been imposed under prior legislation. If they were or would be entitled to compensation under prior provisions they are restricted to the rights therein; if they were or could have been outside the ambit of compensation under prior legislation then the provisions of the Town and Country Planning Act are not to extend their rights.

It is arguable, for example, that a prohibition on the demolition of an historic building under a planning scheme should not give rise to a right to compensation, whether or not it is characterized as a reservation for a public purpose, because of the operation of section 42(3). The Historic Buildings Act 1974 provides a procedure whereby 'a building of architectural or historic importance' may be designated and thus protected from demolition. There is no provision for compensation in such cases. Any provision under a later scheme or interim development order would be caught by the operation of section 42(3).<sup>91</sup>

#### PROCEDURE

Assuming that a claimant can bring his action within the narrow boundaries defined above and liability has arisen in that a permit has been

<sup>90</sup> *Shire of Flinders v. T.W. Maw and Sons (Quarries) Pty Ltd* [1971] V.R. 484.

<sup>91</sup> Bayne P. J., 'Legal Perspectives of Planning the Inner City' (Unpublished paper presented at 48th Congress of A.N.Z.A.A.S., University of Melbourne 1977) 10.



refused or otherwise dealt with in accordance with section 42(2), the matter of determination of the claim must be considered.

It is expressly provided in section 41(2) of the Town and Country Planning Act that the basis of determination of claims is to be found in Part III of the Valuation of Land Act 1960. These provisions are to 'extend and apply' to claims made under section 41(1) with 'such adaptations as are necessary'. Part III is concerned with establishing a Valuation Board of Review and lays down procedures for determination of claims for compensation arising from compulsory acquisitions in a variety of contexts. Some of the difficulties of adapting procedures which were designed for acquisitions, to claims in respect of damage or loss where no land has been taken have been considered in two cases before Barber J.

In *Gross v. Shire of South Barwon*<sup>92</sup> the problem of adaption involved the reference in section 27 of the Valuation of Land Act to the service of a notice to treat. Failure to make a claim within two years of such service amounts under that provision to a waiver or abandonment of a claim. In *Gross* there had been no notice to treat but an appeal made to the Minister against the refusal of a subdivision permit in respect of land which was reserved under a planning scheme for use as a road had been disallowed more than two years before the claim was made. It was argued on behalf of the responsible authority that the adaption of the Land Valuation Act provisions under section 41(2) required that the applicant's claim should be barred by analogy. Barber J. rejected this argument. He held that it was the service of the notice of the Minister's disallowance which should be compared with the service of notice to treat. As two years had not elapsed since service of notice in *Gross* the claim would not be barred.<sup>93</sup>

In *Melbourne Saw Manufacturing Co. Pty Ltd v. Melbourne and Metropolitan Board of Works*<sup>94</sup> the court had to consider whether 'solatium' under section 26(c) of the Valuation of Land Act could be awarded in respect of claims made under section 41(1).<sup>95</sup> Barber J. in this case, held that such an award was inappropriate to a claim for loss in respect of town planning controls. This was principally because 'solatium' is payable because of the 'compulsory nature of the acquisition', and also because the measure of compensation under the Valuation of Land is tied to a percentage of market value — a calculation which might not be appropriate in cases where there has been no acquisition but a mere restriction on development rights.<sup>96</sup>

<sup>92</sup> [1969] V.R. 815.

<sup>93</sup> The Town and Country Planning (Amendment) Act 1968 s. 22 amended section 41(2) by the addition of the final words 'and notice to treat had been served at the time liability to pay compensation first arose'. Now see also s. 42(2).

<sup>94</sup> [1970] V.R. 394.

<sup>95</sup> Section 26(c) was later repealed and replaced by section 11B(1)(a) of the Lands Compensation Act 1958. These changes do not affect the conclusion reached by Barber J. in the *Melbourne Saw Case*: see Lands Compensation Act 1973 ss. 2, 3.

<sup>96</sup> 'Market value' is a term which is not intrinsically inappropriate in all respects to consideration of compensation for planning controls. In *Spencer v. The Common-*

The provisions of Part III of the Valuation of Land Act require that claims for compensation be made within two years of the right to compensation arising.<sup>97</sup> Matters in dispute between claimants and the acquiring, or responsible, authority may be referred to the Land Valuation Board of Review or the Supreme Court depending upon the amount claimed. The Board has jurisdiction in respect of claims under \$75,000, subject to the power of the Court to take over claims where questions of 'unusual difficulty' or 'general importance' are raised.<sup>98</sup> Claimants seeking more than \$75,000 have an option to go before the Supreme Court in preference to the Board, but must exercise this option within one month of being required to do so by the acquiring authority. Failure of the claimant to choose the forum passes the option to the authority.<sup>99</sup> The Boards of Review are each made up of a chairman and two persons chosen from a panel of registered valuers.<sup>1</sup> The chairman is to be a barrister and solicitor or a person with special skill in the law and practice of valuation.

Appearance before the Board may be personal or through a legal representative or an agent authorized in writing.<sup>2</sup> Determinations are not to be void merely through an error of form, sums awarded should be paid by the acquiring authority within one month of determination and there is provision for interest to be included. The claimant must satisfy the authority as to his title and interest in the land before payment.<sup>3</sup> Determination of the Board are to be delivered in writing to the authority and to the claimant within fourteen days of their conclusion.<sup>4</sup> Appeals may be taken to the Supreme Court on questions of law or the Board may reserve questions of law for the Court but apart from that, the decision of the Board is final.<sup>5</sup>

The principles to be applied in determining compensation are set out in the provisions of section 11B of the Lands Compensation Act 1958. These are incorporated by reference through the provisions of section 26 of the Valuation of Land Act 1960 under section 41(2) of the Town and Country Planning Act.

Section 11B does not apply unmodified to claims under the Town Planning legislation.<sup>6</sup> However, those parts of section 11B dealing with

*wealth* (1907) 5 C.L.R. 418, 432, Griffith C.J. defined 'value of land' in the Property for Public Purposes Acquisition Act 1901 (N.S.W.) in terms of market value. His remarks have been accepted as setting the definition of market value for such cases. The phrase 'value of land' in section 42(6) is used with no *prima facie* inconsistency with the concept of market value.

<sup>97</sup> Valuation of Land Act 1960 s. 27. See *Gross v. Shire of Barwon* [1969] V.R. 815.

<sup>98</sup> *Rex Tyre & Auto Services (Richmond) Pty Ltd v. Country Roads Board* [1979] V.R. 608.

<sup>99</sup> S. 25.

<sup>1</sup> Ss. 15, 16.

<sup>2</sup> S. 46.

<sup>3</sup> S. 32.

<sup>4</sup> S. 30.

<sup>5</sup> S. 47.

<sup>6</sup> *Melbourne Saw Manufacturing Co. Pty Ltd v. Melbourne and Metropolitan Board of Works* [1970] V.R. 394.

legal costs and enhancement set-offs do not seem to be inconsistent with this type of claim. Section 11B must however be read in conjunction with section 42(6) of the Town and Country Planning Act. That section sets the maximum amount recoverable as being the difference between the value of the land as affected by the scheme or order and the value of the land not so affected. Clearly there will be problems in some instances in showing whether it is the scheme or ordinance which has affected the value of land or whether it is some other cause. For example in *Albert House Ltd (In Voluntary Liquidation) v. Brisbane City Council*<sup>7</sup> (No. 2) it was argued that a drop in land value was caused by public knowledge of the probability of ultimate acquisition of the subject land rather than the operation of any ordinance or scheme. The court held there that the loss was caused by the restrictions on use imposed by an ordinance, but also adverted to the possibility that the loss even if immediately caused by public knowledge of imminent acquisition could through that knowledge be traced to the operation of the ordinance.

Section 11B (2) however goes some way towards meeting this problem. It provides,

In determining the market value of any land for the purposes of this Act any change in the value of the property caused by the publication by or on behalf of the Crown or any public statutory authority of any notice or statement relating to the proposal to investigate or to carry out works or undertaking prior to the service of the notice to treat shall be disregarded.

There may of course be cases where land values drop as a result of discussions, surveys or investigations carried out by planning authorities which found an expectation of imminent restrictions but which would not be covered by section 11B (2) because of the absence of a 'notice' or 'statement' within its terms. Apart from these instances, there will be in other cases genuine difficulty in showing a connection between changes in land values and planning controls as distinct from unrelated economic pressures.

A full consideration of the problems of land valuation is beyond the scope of this discussion. However it should be borne in mind that there may be cases where the vicissitudes of the valuation process result in the ultimate failure of a claim which is substantively sound.<sup>8</sup>

Apart from the provisions of the Land Compensation Act, the Town and Country Planning Act also requires that compensation previously paid in

<sup>7</sup> (1968) 21 L.G.R.A. 94.

<sup>8</sup> In *Walton Properties Pty Ltd v. Brisbane City Council* (1967) 14 L.G.R.A. 379 for example, no comparison sales figures were available, and due to a long-standing policy against the granting of site approval for developments applied by the responsible authority, although not as the result of the operation of a scheme, it was not possible to reach a figure representing the 'unaffected' land value for comparison: see the discussion in Fogg, *op. cit.* 462 f. Also on assessment of compensation see *March v. City of Frankston* [1969] V.R. 350; *Yarn Traders Pty Ltd v. Melbourne and Metropolitan Board of Works* [1970] V.R. 427; *Turner v. Minister of Public Instruction* (1956) 95 C.L.R. 245; *Spencer v. Commonwealth* (1907) 5 C.L.R. 418.

respect of land, whether by the same Responsible Authority or not, must be taken into account in calculating the sum payable under section 41(1).<sup>9</sup> Under section 41(3) and (4) a statement of compensation paid is to be lodged with the Registrar-General or Registrar of Titles and an entry to that effect made on the title itself. Section 41(5) provides that title entries may be cancelled if the Responsible Authority notifies the Registrar in question that notice is no longer necessary.

#### SUMMARY

The Victorian provisions relating to compensation for planning loss are characterized by a broad grant of rights to recovery subject to a series of exceptions. This format masks the effective denial of compensation in a wide range of cases. In point of fact compensation where no land is taken is restricted to cases where there has been a reservation for public purposes or a deemed reservation; where existing buildings or works are immediately affected; or where access to streets or roads is affected. Compensation is thus available only for some restrictions on use which are closely analogous to actual acquisition. Procedural requirements are such that the claimant must bear the burden of time and expense in bringing claims to fruition and there is no duty to expedite matters cast on the responsible authorities. The assessment of compensation is made difficult by the absence of specific guidelines beyond the broad instructions of section 42(6). Notable losses which are not covered by the Act may arise through the effect of public works or undertakings on neighbouring land, through publication of projected plans affecting land uses and through the imposition of zoning controls restricting use and development. Although complaints relating to procedural difficulties in cases where compensation is available are made regularly these three categories of naked loss are currently the focus of some attention. They are the most obvious symptoms of dissatisfaction with the resolution of conflicts between private and public interests.

The legislature's approach to compensation has been to distinguish between acquisition and broad based restriction of rights. This is a view which was put in the Uthwatt Committee's report and has been affirmed since then by the judiciary and in the texts.

Ownership of land involves duties to the community as well as rights in the individual owner. It may involve complete surrender of the land to the State or it may involve submission to a limitation of right of user of land without surrender of ownership or possession being required. There is a difference in principle between these two types of public interference with the rights of private ownership. Where property is taken over, the intention is to use those rights, and the common law of England does not recognize any right of requisition in property by the State without liability to pay compensation to the individual for the loss of his property. . . . In the second type of case, where the regulatory power of the State limits the use which an owner may make of his property, but does not deprive him of ownership, whatever rights he may lose are not taken over by the State, they are destroyed on the grounds that their existence is contrary to the

<sup>9</sup> Town and Country Planning Act 1961, s. 42(4).

national interest. In such circumstances no claim for compensation lies at common law. Cases exist where this common law is modified by statute and provision is made for payment of compensation. The justification is usually that without such modification real hardship would be suffered by the individual whose rights are affected by the restrictions, but there is no right to compensation unless that right is either expressly or impliedly conferred by the statute.<sup>10</sup>

However such an approach in practice raises certain problems. If there is an intrinsic difference between restriction and acquisition which justifies a distinction being made in respect of entitlement to compensation, should there have been any inroad made in the rule against compensation for planning loss at all? If there is no difference in substance but only one of degree, then is the point at which the line has been drawn in respect of compensation the appropriate one?

In considering these issues it may be valuable to examine recent suggestions for reform of the Victorian legislation and some comparative approaches to the problem of compensation for planning controls. This will be the task undertaken in the concluding part of this article.

<sup>10</sup> United Kingdom, *Report of the Expert Committee on Compensation and Betterment* (1942) Cmd. 6386 para. 32; quoted in *Folkestone v. Metropolitan Region Planning Authority* (1967) 16 L.G.R.A. 286 at page 288; see also Fricke, *op. cit.* 127; cf. Baker, *op. cit.* 539.