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

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[*Here Ms Lanteri continues the discussion begun in Part I ((1980) 12* M.U.L.R.*) of the payment of compensation under the Town and Country Planning Act 1961 (Vic.). Ms Lanteri examines, by way of comparison, some recent proposals for reform and the practice in some other jurisdictions. She also examines the interrelation between betterment payments and compensation payments.*]

RECENT PROPOSALS FOR REFORM

During the 1970s the Victorian government's land use planning activities increased. Growth in the number of regional planning authorities and in the number of schemes being implemented[1] resulted *inter alia* in an increased public awareness of the effects of planning and consequently of the defects in the current legislation covering compensation. For example, discussion following the exhibition and re-exhibition of the Western Port Regional Plan revealed serious conflicts between public and private interests in land use control.[2] Similarly, the construction, completion and opening in Melbourne of the F19 Freeway (The Eastern Freeway) was accompanied by public demonstrations against what was seen as non-compensable loss and damage caused by its operation.

Out of these and other experiences, public dissatisfaction mounted. Partly in response to these pressures the Victorian government moved to investigate the problems of compensation for town planning schemes. A Committee of Inquiry into Town Planning Compensation was established, and following its Report,[3] a Bill was drafted to implement some of its recommendations.[4] Examination of these two responses to pressure for reform of the compensation provisions may indicate the particular areas of public concern and the attitude of government to them.

Inquiry into Town Planning Compensation

The Committee of Inquiry was appointed in March 1976 under the chairmanship of Mr J. A. Gobbo Q.C. and the Report was tabled in May

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1 Compare Town and Country Planning Board 33rd Annual Report (1977-1978) with 25th Annual Report (1969-1970).

2 See for example the discussions reported in Town and Country Planning Board, 'How Much Planning? How Much is Too Much?', Proceedings of a Talk-in and Workshop, 8th November, 1976.

3 Victoria, *Report of the Committee of Inquiry into Town Planning Compensation* (1978) (The Gobbo Report).

4 Public Works and Planning Compensation Bill 1978.

1978 by the then Minister for Planning, Mr Hayes.[5] The terms of reference of the Committee were to clarify entitlement to compensation in respect of decisions or proposals of a planning nature and to recommend measures to remove or mitigate hardship arising from such decisions, proposals, policies and procedures. The Committee found that there were three main areas of inequity or hardship revealed by the evidence put before them. These were cases involving firstly, planning blight arising from either public discussion or investigation of planning proposals which result in uncertainty as to future controls, or where formal reservations are not acquired by the authority for some considerable time, secondly, certain types of zoning changes where stringent controls are imposed on land use, and thirdly, injurious affection caused by public works where no land is taken. Apart from these the Committee also referred to complaints received in respect of rezoning generally where the result was to reduce the development potential of land, in respect of procedures for planning and compensation and in respect of policies relating to control of buildings on old and inappropriate sub-divisions.

Blight: In respect of planning blight arising from proposals which are not formalized, it was recommended[6] that the authorities should have power to acquire in advance of formalization. The procedure for this was indicated broadly; the Minister would have power to deem areas to be within the provision of sections 41 and 42(1)(c) thus providing for the basis of a claim for compensation. The planning procedures and practices which result in blight — the proposal to the public of alternative scenarios for works for example — were criticized and the Committee emphasized the need for procedures to avoid or minimize delays in decision making.[7] This view clearly reflects a high value placed on certainty — and some scepticism of the value of debate and public participation in the planning of specific undertakings as distinct from the broad fixing of priorities.

In respect of blight arising from long delays in acquisition following the formalization of proposals into schemes, the Committee considered that it was impossible to set time limits for acquisition realistically, and that with certain minor amendments to the Town and Country Planning Act, any owner could either force acquisition by making a development application, or sell and recover any loss on resale suffered under existing provisions. In both cases, however, it seems that the Committee was prepared to let the existing procedural policy continue, placing the onus to act and the burden of action on the claimant.

Zoning changes: The Committee recognized the fundamental significance of claims for compensation arising out of zoning controls:

[5] The Gobbo Report and see Ministerial Statement 'Town Planning Compensation' 16th May, 1978.
[6] *The Gobbo Report*, para. 4.1.
[7] *Ibid.* 19.

> The Committee rejects the notion that an owner should be regarded as having unlimited rights to development of his land and that any zoning restrictions should result in compensation. The Committee equally rejects the notion that an owner whose land was in all but name set aside for the public benefit should not be compensated unless it was in fact to be physically taken. Somewhere between these extremes lies the answer.[8]

In expressing this view, the Committee indicated that the general approach adopted by the planning legislation in Victoria at least since 1954, was acceptable in the main, and that any hardship suffered could be remedied by specific amendments to the provisions relating to compensation. They recommended that as a general rule there should be no provision for compensation for zoning controls.[9] This view was propounded even in cases where *bona fide* purchasers distinct from 'mere gamblers' suffered financial loss through the imposition of controls which altered prospects for development.[10] In cases involving urban-rural fringe areas where farmers labour under the disadvantages of the proximity of urban development but cannot enjoy the advantages of sub-division for development, the Committee recommended that relief be provided in ways other than the provision of compensation payments.[11] These included rate relief and limited relaxation of subdivision controls.

The exception proposed by the Committee to the general rule against compensation for zoning depended upon showing that the zoning restriction itself had been imposed to preserve some 'feature on the land . . . for the public benefit' and that the land had become through rezoning, 'incapable of any reasonable development'.[12] The Report details the reasoning behind this view and the recommendations spell out in some detail the procedure to be followed in making a claim on these grounds, and the criteria which could be used to determine whether these grounds are in fact made out.

It is worth noting that in the course of the Report the second branch of the test is modified. What was originally referred to as 'incapable of reasonable development' becomes 'incapable of reasonably beneficial use'.[13]

The test proposed takes account, firstly, of the purposes for which the controls are imposed in order to ascertain the degree of public interest involved — it is acknowledged that to some extent all controls are in the public interest — and secondly, of the beneficial use to which land can still be put in order to ascertain the degree of interference with private rights. Thus the recommendations embody recognition of the problem of balance fundamental to the issue of compensation, and propose a solution which implies that only the most severe restrictions equal to *de facto* acquisition should be compensable. Although the Committee was sanguine about the

[8] *Ibid.* 20.
[9] *Ibid.* 20 f.
[10] *Ibid.* 31 f.
[11] *Ibid.* 31.
[12] *Ibid.* 20.
[13] *Ibid.* Compare the reference made on page 20 of the Report with the references on pages 26 and 27.

application of the first arm of the test, it envisaged some difficulty in applying the second. It suggested that all surrounding circumstances be taken into account in determining reasonable beneficial use and lists — perhaps not exhaustively — a number of specific considerations. Of the four factors mentioned three appear to relate to expectations of development potential rather than existing use and imply that in some cases investors with some cash outlay already made to development should be compensated if their expectations are reduced by the imposition of zoning changes. It would appear that such an implication would be contradictory to the statements made elsewhere in the Report which indicate that interference with existing use rather than expectations should be compensable.[14] On the other hand, the Report goes on to list reasons why the costs involved in payment of compensation under the proposals should not in fact involve enormous outlays. These reasons relate largely to stringent and restrictive interpretations of beneficial use, but also include matters going to the first arm of the test.[15] In fact the Report clearly indicates that the only types of zoning likely to be covered by the first arm of the test are those of conservation or historical preservation zones.

Injurious affection: The discussion in the Report of injurious affection where no land is taken centres on the impact of public works such as freeway construction where the damage caused is said to be capable of some objective measurement and calculation. Thus recommendations are directed to provide relief through compensation for noise but not for non-physical factors such as personal inconvenience or loss of view. The degree of compensation recommended is quite limited.[16] It is suggested that it should be available as of right only in respect of residential buildings, schools and hospitals; that it should be related to the use of the works and not the transitory effects of construction; that it should be restricted to loss caused by the new construction and not extend to increased traffic on adjacent feeder thoroughfares, and that a minimum compensable claim be established and the base measure for loss be related to property values. It is important to recognize that compensation is seen as relieving property loss and does not perform the function of providing damages to relieve personal injury or loss. However at the same time, the difficulties inherent in establishing a right to damages against a public authority in this context must not be under-estimated. Indeed it is doubtful if any successful action

[14] The use in the Report of the term 'reasonable beneficial use' is clearly derived from English legislation. However the phrase has been interpreted by English courts more restrictively than might be suggested by the factors considered in this Report. The loss of opportunity cost as a measure of reasonable beneficial use was rejected in the following cases: *R. v. Minister for Housing and Local Government, Ex parte Chichester R.D.C.* [1960] 2 All E.R. 407; and *Brookdene Investments Ltd v. Minister for Housing and Local Government* (1970) 21 P. & C.R. 545.

[15] *Ibid.* 26 f.

[16] *Ibid.* 32 f.

could be brought against a public authority acting reasonably and within power in view of cases such as *Metropolitan Asylums District Managers v. Hill.*[17]

Although the recommendations of the Committee in this matter would allow for an extension in the availability of compensation, the difficulties foreseen in assessment and 'drawing the line for entitlement or finding the edge of the ripple' have resulted in a limited response to what is acknowledged as an area of some considerable individual loss.

Other recommendations: In the case of old and inappropriate subdivisions where building controls are strictly imposed, the Committee recommended that programmes for the repurchase and restructuring of allotments which were already on foot should continue.[18] It also emphasized that the cost of repurchase or compensation should not be allowed to stand in the way of providing relief for *bona fide* purchasers who find themselves burdened with sterile allotments.

In respect of planning procedures, the Committee made several points directed towards their improvement and the consequent reduction in the possibility of claim for compensation arising.[19] These referred to the need to provide for procedures for notice of impending zoning changes to be served on individuals and objections heard, not only to improve the equity of the procedure but to reduce the political pressure which is brought to bear when the procedure is shown to be inadequate. The procedure for securing compensation was also criticized as being fraught with delay, and thus increasing the burden thrown onto the claimant. An amendment to section 42(5) of the Town and Country Planning Act was suggested to extend its operation to sales of vacant land,[20] and improved appeal provisions in respect of demolition permits were suggested. The Report then proceeded to consider — fairly briefly — the related issue of proposals for financing compensation schemes but did not reach any positive conclusions as to the most appropriate.[21]

Summary: The primary concern of the Committee was to identify and relieve cases of hardship from the effects of planning decision and controls. In so far as it proposed extended rights to compensation, it did so on a limited scale and adhered to the orthodox view of a distinction drawn between taking and regulation. To some extent the Report falls between two stools; not all private losses are compensated but on the other hand, the collective interest of the community is clearly relegated to an inferior

[17] (1881) 6 App. Cas. 193; however recently in *Anns v. Merton London Borough Council* [1978] A.C. 728, the House of Lords seems to have opened the way towards a more liberal attitude to the liability of public authorities.
[18] *Ibid.* 36 f.
[19] *Ibid.* 38 f.
[20] Now see s. 42(5) as amended by Town and Country Planning (General Amendment) Act 1979, s. 18.
[21] *Ibid.* 39 f.

position. The view taken of private proprietary interests is a conservative one which does not explore the possibility of rethinking the nature of property rights in the light of changing community expectations and interests. The Report did however imply that residential rights are of high priority while also indicating that some protection should be afforded to development expectations.

Public Works and Planning Compensation Bill (1978)

This Bill was tabled on 6 December 1978 at the end of the Spring session, and remained when Parliament rose on December 12th.[22] It has not yet been retabled. It was directed towards implementing the recommendations of the Gobbo Committee Report and was introduced at that time to allow for public discussions of its terms. A detailed analysis of its provisions is unlikely to be fruitful in the light of its present uncertain future. However some implications can be drawn from its broad effects, which might throw light on the Government's perception of the problems revealed in the Report and the solutions posed to them. It should be considered in the context of the Reports of the Building and Development Approvals Committee which were directed to a reconstruction of certain planning procedures and decision making.[23] Finally, the political climate which surrounded the tabling of the Report and later of the Bill itself must also be borne in mind.

On its face the Bill adopts the philosophy of planning and compensation which apparently underpins the Report, and also on its face appears to implement the recommendations made in the Report for increased levels of compensation. However on closer examination the extensions made by the Bill to the availability of compensation are largely illusory, and overall, the provisions of the Bill do not ensure a right to compensation arising in the circumstances dealt with by the Report.

The Bill envisaged the establishment of a Lands Compensation Advisory Board but did not spell out its membership. The Board would act as an investigatory and advisory body for the relevant Minister, in relation to claims for compensation made under the Bill. The main thrust of the Bill dealt with the three major areas covered by the Gobbo Report.

In respect of land affected by proposed public works, blighted land in the terms of the Report, a procedure was described which opened up the possibility of acquisition of affected land in advance of the finalized plan. Acquisition would depend upon the Governor-in-Council, acting upon the Minister's recommendation, making an Order declaring land to be 'affected by' a notice or statement of planning proposals. Applications could then be

[22] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 1978, V. 342, 7199, 7510.

[23] Victoria, *Report on the Building and Development Control System in Victoria: Part I* (1977) and *Part II* (1979).

made to the Minister by persons having an interest in such land for early purchase of land by the responsible authority. The Minister, acting upon recommendations made by the Board, could direct that such purchase take place within sixty days.

Compensation for depreciation in land value caused by use of certain public works was dealt with by Part III of the Bill. It covered loss caused by noise arising from road works. Claims for compensation could be made by owners or tenants with at least three years tenancy to run and only in respect of losses over the value of $1,000. Details of assessment of compensation were set out.

In the case of planning restrictions generally, the Bill provided that loss of reasonable beneficial use in certain cases may be compensable. Applications for compensation could be made to the relevant Minister who would then refer the matter to the Board for report. A conference to facilitate settlement would be arranged between the applicant and the authority; agreements reached could be proceeded upon by the Minister; if the Minister's discretion. In considering the application, the Board was to the Minister but the decision to act in any particular way was to be within the Minister's discretion. In considering the application, the Bord was to reflect upon the primary purpose of the controls complained of, specifically whether they were imposed to preserve a feature of the land or building for the public benefit, and any loss of reasonable beneficial use.

There were also specific amendments to be made to section 42(5) of the Town and Country Planning Act 1961[24] and improvements were made in respect of recovery of costs by applicants.

Whether by accident or design the form of the Bill largely obscured the fact that the extensions made in favour of claimants were minimal. With the exception of the extremely limited rights to compensation for noise provided under Part III, the success of applications for relief depended ultimately upon the exercise of Ministerial discretion, and success in an action under the terms of the Bill could result in the termination of any further rights under the Town and Country Planning Act itself.[25] In addition the procedures envisaged cut across the established planning structure to an alarming degree,[26] with no guarantee that a considered balance between public and private interests could be struck. The dangers of arbitrary and *ad hoc* decision making were increased without any substantial reform of the availability of compensation.

It may be that some aspects of the Bill were the result of influences towards conciliation as a method of resolution of dispute in the planning area which were also manifested in the Report on the Building and

[24] See above n. 20.
[25] Public Works and Planning Compensation Bill 1978 (Vic.) Clause 13(9)v.
[26] See for example clauses 13(8) and (9).

Development Control System in Victoria published in 1979.[27] In that Report it was recommended that the town planning and related appeals systems be consolidated and streamlined with the introduction of a system of compulsory conferences. However the clauses of the Planning Compensation Bill which adopted the concept of compulsory conferences were formulated without adequate provision for the details which would replace the procedural protections evolved over time in the adversary process.

The overall effect of the Bill was to further complicate an already difficult area of law. It was the subject of numerous critical submissions from a range of interested groups[28] and the public debate which followed its tabling has illustrated that it has been seen as jeopardizing proper planning while failing to satisfy the demands for relief from noncompensable loss. Perhaps the Bill was merely the product of hasty and ill conceived attempts to deal with political pressures of the time. The session of Parliament which saw its tabling was the last before the 1979 State elections, and it may be that it was seen as desirable that some evidence be produced of the concern of the Government for reform in this field. If so — and this view would fit comfortably with the history of legislative reaction to problems associated with the implementation of planning generally and to the issue of compensation in particular — then it is not surprising that the provisions of the Public Works and Planning Compensation Bill were such an inadequate response to the complex problem of balance which it addressed.

Australian Law Reform Commission Report No. 14[29]

In 1977 the Australian Law Reform Commission was given a reference by the Attorney-General to inquire into and review the law and practices concerning compulsory acquisition of land by the Commonwealth and compensation payable in respect of both acquisition and injurious affection of land arising from Commonwealth works. The Report on this Reference was published in 1980. It reviews both Australian State and some overseas law and practices and includes consideration of recent reform proposals. In the course of the Inquiry a number of public hearings and seminars were conducted, a Working Paper and a Discussion Paper were published for comment[30] and written submissions received on the proposals outlined in them. The Report itself includes a Draft Bill to implement the final

[27] Victoria, *Report of the Buildings and Development Approval Committee: Part II* (1979).

[28] Submissions were made *inter alia* by the Town and Country Planning Association, the National Trust, the Municipal Officers Association, and the Royal Australian Institute of Planning; see also *The Gobbo Report Implemented* Australian Seminar Services, Conference Proceedings, December 15th, 1978.

[29] Australia, Law Reform Commission, *Lands Acquisition and Compensation,* Report No. 14 (1980).

[30] Australia, Law Reform Commission, *Lands Acquisition Law*, Working Paper No. 8 (1977); Australia, Law Reform Commission, Discussion Paper No. 5 (1978).

recommendations made by the Commission. It is confined to Commonwealth powers and consequently is of limited practical significance in areas where Commonwealth involvement is constitutionally constrained. For example the Commonwealth has no general town planning powers and thus land use control through devices such as zoning is beyond its compass. However there are recommendations made which are directed towards problems which are common to Commonwealth and State government activities. Injurious affection caused by public works and blight arising from delayed acquisition or proposals for future public works are important losses which are discussed in the Report. The significance to the States of the recommendations made in the Report concerning these matters should not be underestimated. The direction in which they point reform may influence State trends whether or not the proposals are immediately adopted by the Commonwealth.

The weight of the Report as a document involving a comprehensive survey of law and practice is added to by its foundation upon consideration of a wide range of views and information. The history and implementation of acquisition legislation is viewed in the light of the Australian experience of land ownership. For example, the significance of Australia's high rate of owner occupation of residential land on the effect of public works and acquisition processes is referred to early in the Report.[31] It is clearly of relevance to the direction given to the Commission by the Attorney-General to have regard *inter alia* to '. . . the need to strike a balance between the rights of private property on the one hand and the legitimate need of society for land for public purposes and public works on the other.'[32]

The Recommendations and Draft Bill illustrate an approach which is founded upon the broad requirement imposed by the Constitution that acquisition be on just terms. The conclusions reached by the Commission as to what this requirement involves are illustrated most clearly by treatment of three related matters; the interests which should be compensable, the procedures which should be followed in acquisition and compensation claims, and the measure of compensation payable.

The Draft Bill provides that compensation should be available to persons having an 'interest in land' which is divested, extinguished or diminished by acquisition, or depreciated by an injurious factor.[33] 'Interest in land' is defined as meaning:

(a) a legal or equitable estate or interest in the land or in any part of the land;
(b) a right power or privilege over or in connexion with the land or any part of the land; or
(c) an enforceable option to acquire an interest in land.

'Owner' is defined only in respect of land subject to a mortgage to include

[31] *Op. cit.* paras. 39-40.
[32] *Ibid.* Terms of Reference p. vi.
[33] *Ibid.* Appendix C: Draft Bill; clauses 32 and 85.

the person who has the right to redeem the land; 'land' includes an interest in land, and mortgage interests are defined specifically.[34]

These definitions are intended to cast the net of compensation as widely as possible. It is also important to note that it is contemplated that an acquisition might encompass:

> an interest that did not previously exist as such in over or in connexion with the land; an easement in gross over specified land; or a restriction on the use of specified land that is not annexed to particular land.[35]

The Report itself indicates that such interests might include a licence or other limited interest, but the exact boundaries of these categories are left unclear.[36] Arguably a zoning type restriction on use would under clause 14 amount to an acquisition of land and consequently give rise to a right to compensation if the Commonwealth in fact exercised such control. Perhaps the absence of such a general planning power in the Commonwealth has allowed the Commission to be adventurous in this respect.[37] At least it is clear that the Commission considered it fair that the holders of all interests in land presently known to law however characterized should be entitled to compensation for the loss or diminution of their interest in the assertion of a public interest by the Commonwealth.

The procedure of acquisition was also seen by the Commission as being affected by the Constitutional requirement of just terms. It was recommended that there be, and the Draft Bill provides for, some protection to affected owners from the exploitation of their weak bargaining position vis a vis the acquiring authority. The procedure prescribed by the Report[38] requires that the first step towards acquisition would be service of a declaration of intention to acquire accompanied by information regarding the proposed acquisition, reasons for the decision to acquire the land in question and a statement of the rights of the owner. Opportunity for an independent review of the decision would be made available through the Administrative Appeals Tribunal.[39] A number of consequences would flow from the service of the declaration including in particular the power to force speedy acquisition on the acquiring authority. It was intended that the provision of this procedure would enable an affected owner to take steps to minimize any blighting effect the declaration might have through delayed acquisition. The Draft Bill provides[40] that after 28 days from the service of the

[34] *Ibid.* clause 4.
[35] *Ibid.* clause 14(3)(a), (b) and (c).
[36] *Op. cit.* para. 281. *Quaere* whether the provisions of the Draft Bill are sufficiently specific regarding the creation of new interests in land to overcome the approach taken in *Hill v. Tupper* (1863) 2 H. & C. 121.
[37] The controls on land use exercised in the Australian Capital Territory are imposed through lease-covenants rather than blanketing Ordinances. They are discussed briefly below.
[38] *Op. cit.* para. 140 Appendix C: Draft Bill clause 17(1) and (2).
[39] The review principles and procedure are discussed at length in the Report; *op. cit.* para. 107 f.
[40] *Op. cit.* Appendix C: Draft Bill clause 26.

declaration an owner may serve notice on the acquiring authority requiring his interest to be acquired pursuant to the declaration. If no acquisition is then made within 3 months, the declaration itself would be deemed to be revoked. There is further provision to take account in this context of cases where the review procedure has been invoked. The Draft Bill also allows for compensation to be payable in respect of loss suffered or expense incurred as a natural consequence of the service of a declaration where the declaration is later revoked or deemed to be revoked.[41] It is clearly envisaged that the combination of these provisions should discourage acquiring authorities from hasty decisions followed by service of notice to acquire and also from delaying acquisition for lengthy periods following the service of such notice. The provisions of the Bill which cover the registration of declarations of intent on the title to land[42] and the publication of declarations in the Gazette and local newspapers[43] ensure that the effects of impending acquisition are adequately publicized. Generally, the onus is on the claimant to seek independent review of decisions to acquire,[44] and to take steps to force early acquisition under clause 26. However the procedure to be followed in these cases is clear and is not as cumbersome as for example the provisions in the Town and Country Planning Act 1961 (Vic.) said to provide protection from blight.[45]

The problem of blighted land value arising from public hearings or speculations concerning future acquisitions prior to a decision to acquire being made by a government authority remains. However, ideally, when a decision is made and publicized the depressive effect on market value should be focussed on affected land and values of unaffected land would recover. Any blighting effect would presumably be temporary; public knowledge of the availability of compensation for land ultimately affected would in any case dampen the blighting effect and little need for compensation would arise.

The third main category of provisions which illustrates a determination on the part of the Commission that the requirement of just terms places a high responsibility upon an acquiring authority is one which is central to the whole issue of compensation for acquisition: the measure or assessment of compensation payable. The overriding principle applied in the recommendations made is that compensation should be such amount as will justly compensate for the acquisition. The Draft Bill sets out a series of factors

[41] *Ibid.* clause 27.
[42] *Ibid.* clause 28.
[43] *Ibid.* clause 17(5).
[44] Where prior to the making of a decision to acquire, an inquiry has been held under the Environment Protection (Impact of Proposals) Act 1974 (Cth), the review procedure before the Administrative Appeals Tribunal is not available; however an independent examination of the decision will by definition already have taken place.
[45] Town and Country Planning Act 1961 (Vic.) s. 42(5); and see discussion in *The Gobbo Report.*

which will normally provide the basis for assessment,[46] factors which are to be disregarded in assessment,[47] and special provisions relating to special cases.[48] The basis of assessment is the market value of the interest on the date of acquisition. The discussion of market value and the other factors which are to be regarded as relevant[49] indicate that the Commission considers that development potential of land which may be reflected in market value is an appropriate factor to be compensable in cases of compulsory acquisition. Clause 36 of the Draft Bill specifically envisages calculations which include assessment of such potential. This does not represent a departure from the general rules relating to assessment based on market value which are presently followed.[50] Although it is necessary that a claimant seeking to rely on development potential in boosting compensation calculations, be able to prove that such development potential was a real possibility,[51] it is normally assumed that a figure reached as 'market value' reflects these factors affecting land value.

The emphasis throughout the Report on the requirements of justice have a particular application in the case of householders displaced by acquisition.

This approach follows the attitudes expressed in the Final Report of the Commission of Inquiry into Land Tenures.[52]

Broadly, the recommendations of that Commission reflect attitudes favourable to limiting private property rights in land, although it saw the need to preserve and protect residential users from undue interference and to compensate them generously for unavoidable disturbance. For example, the Report stated, in the context of discussing procedures for compensation:

> We are quite opposed to the notion that if the community for its own purposes deprives a person of his house, that person must become a suppliant to a government committee for assistance . . . or be required to borrow on a limited scale and in restricted circumstances the money which he needed to reinstate himself elsewhere. We consider that equity demands that if the community requires a person's home . . . it should provide such funds as will enable him as a matter of right rather than grace to make reasonably comparable alternative provisions.[53]

The provisions made in the Draft Bill for solatium and loans for reinstatement support this approach to the problem of fixing a compensation figure which comes to grips with the particular losses suffered in such circumstances.

[46] *Op. cit.* clauses 35 and 36.

[47] *Ibid.* clause 40.

[48] *Ibid.* clause 37 (zoning for public use); clause 39 (land with no general market); clauses 41 and 42 (householders solatium and loan provisions); clause 44 (acquisition of Crown land and limited interests) and Part XII (mortgages). Compensation for injurious affection is dealt with as a separate issue.

[49] *Op. cit.* para. 238 f.; these factors are special value to the owner, severance, disturbance and costs.

[50] *Spencer v. Commonwealth* (1907) 5 C.L.R. 418, 441.

[51] *Payne v. Commissioner of Road Transport* (1965) 11 L.G.R.A. 16. *Cf.* the approach adopted to compensation for land ripe for sub-division in *Turner v. Minister of Public Instruction* (1956) 95 C.L.R. 245.

[52] Australia, *First Report of the Commission of Inquiry into Land Tenures* (1973); *Final Report of the Commission of Inquiry into Land Tenures* (1976).

[53] Australia, *Final Report of the Commsision of Inquiry into Land Tenure* (1973) para. 6.9.

A similarly generous approach characterizes the recommendations made for dealing with the vexing issue of compensation for injurious affection where no land is actually acquired. The solution adopted in the Law Reform Commission Report is to provide for a general right to compensation to owners of land which is diminished in value by reason of works carried out on Commonwealth land.[54] In effect the right to recover damages for nuisance lost through the statutory authorization of public works would be returned to landowners. Action would be based upon the statutory provision for compensation rather than pursuing a civil action in nuisance, although it is provided that any civil actions available should be specifically preserved.[55] The list of factors which are defined in the Draft Bill as 'injurious' include both 'construction' factors such as denial of access, loss of air and overshadowing, and 'use' factors such as noise and artificial lights. In addition a catch-all clause includes anything else which would give rise to an action for nuisance in the relevant jurisdiction.[56] Thus the factors which would become compensable cover a wider range than a common law action would allow although they are clearly derived from common law concepts. The effect of these provisions would be to allow for a greater opportunity to recover compensation in respect of public works than would be the case in respect of works carried out by private landowners.

The measure of compensation in claims for injurious affection was prescribed as being the comparison in value between the land in its affected condition and in an unaffected condition. The first anniversary of the completion of construction or commencement of use is used as the 'relevant' day upon which such a comparison would be made.[57] The fear frequently expressed that expansion of rights to claim for injurious affection would result in greatly increased costs of public works was considered in some detail by the Commission.[58] In reviewing the implementation of the provisions of the Land Compensation Act 1973 (U.K.) it was reported that such a fear had in fact proved groundless. For example it was estimated that costs of the trunk road programme had been increased by approximately 0.25 per cent through injurious affection claims. It was suggested that the insignificant increase in costs was worthwhile in providing justice in the relatively few cases where individuals suffered extraordinary damage through road construction and that design improvement to avoid such injury was a bonus to the programme. The limitations on recovery for injurious affection proposed by the Gobbo Committee and followed

[54] *Op. cit.* Appendix C: Draft Bill clause 85.
[55] *Ibid.* clause 89.
[56] *Ibid.* clause 82.
[57] *Ibid.* clauses 83 and 86.
[58] *Op. cit.* para. 319 f.

by the Victorian Bill lose their justification if costs are in fact shown to be inconsiderable.

Overall the thrust of the Law Reform Commission's Report was to provide generous and imaginative rights to compensation for compulsory acquisition and injurious affection. The most radical variation made to existing concepts in reaching these conclusions was in opening the way for the definition of new interests in property which could be the subject of compensation claims. The acquisition of future user rights through town planning restrictions for example could conceivably give rise to a multitude of claims for compensation involving considerable cost to the community. Indeed it is not easy to see how the market value of a limited interest in future use could be assessed independently of existing use rights.[59] Although this is not a real problem for the Commonwealth to confront, it is important to consider the implications of such a proposal in the context of State town planning controls. The approach widely adopted at present is, as has already been seen, to distinguish restrictions on use from acquisitions of interests in land in order to draw a line against many potential compensation claims. This approach is reinforced by the traditional interpretation of property rights. The Law Reform Commission has indicated a willingness to extend compensation through a redefinition of rights or interests in property. An alternative solution would be to conclude that future user rights are indeed interests in property but ones which are properly vested in the state. The consequence of this would be to avoid any need for compensation for their acquisition. Such an approach was recommended by the Uthwatt Committee in Britain in 1942[60] as the solution to problems of land control which stem from a fundamental conflict between private and public interests in land.

THE UTHWATT APPROACH

In the 1940 Report of the Barlow Commission it was found that the compensation provisions of the then current Town and Country Planning Act 1932 (U.K.) were a serious constraint on the progress of planning throughout the country.[61] The burden of compensation for planning was borne by local authorities — often the least able to respond — although that burden arose in the wake of much wider regional or national interests, and the costs were said to be excessively high when they included inflationary elements. While, in theory, authorities were able to recoup such expenses

[59] Such an exercise would seem to be the reverse of that followed in determining compensation for loss of reasonable beneficial use and would involve varying levels of speculation regarding possible or appropriate future uses and their values in money terms.

[60] United Kingdom, *Report of the Expert Committee on Compensation and Betterment* (1942) Cmd. 6386.

[61] United Kingdom, *Royal Commission on the Distribution of the Industrial Population* (1940) Cmd. 6153, para. 248.

by means of a betterment levy, in practice, they could rarely secure it. Acting on the advice of the Barlow Commission, the Government set up a committee to report on compensation and betterment under the chairmanship of Lord Justice Uthwatt. The report of the committee was published in 1942 with an elaborate scheme of proposals directed towards a fundamental resolution of the issues of compensation and betterment.[62] The Committee described the problem as being one of determining the point at which restrictions on users of land could fairly be said to amount to more than requirements directed towards 'good neighbourliness' and to give rise to an expectation of compensation for taking of property interests. When restrictions arose out of considerations of general or national policy and required so great a destruction of landowners' user rights as to amount to expropriation of his interest, it is natural, it was said that such an expectation should arise.[63] The general conclusion which was reached by the Committee was that

> the solution lies in a measure of unification of existing rights in land as will enable shifts in value to operate within the same ownership, coupled with a land system which does not contain within it contradictions provoking a conflict between private and public interests and hindering the proper operation of planning machinery.[64]

The recommendations which were made based on this formulation of the underlying problem were seen as the most practicable and equitable solutions to the problem of removing the public interest-private interest conflicts inherent in the traditional system of land tenure and management. They involved four points: first, a general prohibition on development of land and the payment of fair compensation for the lost development rights; secondly, planning machinery to determine where and when development of land should take place; thirdly, purchase of such land when it was needed by the state at existing use value; and finally, release of that land to private developers when the development was undertaken for private purposes.

It was recommended that at a given date the owners of undeveloped rural land would be deprived of their rights to develop in return for a once and for all payment of compensation.[65] Thus prospective development value would go to the state and the potential for conflicts in respect of that value arising in the future between public and private interests would be removed at one stroke. This proposal to vest development rights in the state had been made to the Barlow Commission itself.[66] It involved the simple concept of the temporal separation of user rights in land. While existing use rights properly belong to the owner for the time being,

[62] United Kingdom, *Report of the Expert Committee on Compensation and Betterment* (1942) Cmd. 6386.
[63] *Ibid.* para. 35.
[64] *Ibid.* para. 38.
[65] *Ibid.* para. 49.
[66] *Op. cit.* para. 250 f.

development — defined as a change from existing use rights — should be retained by the whole community in the interests of efficiency and justice. The global approach to the payment of compensation would overcome the inflationary effect of 'floating' and 'shifting' value on the amounts payable as compensation when it is made piecemeal. The former relates to the overvaluation inevitably the result of speculative assessment of potential developments; the latter relates to the effect on land values of restrictions on development, which increase some values and decrease others.

In conjunction with these recommendations for the acquisition by the state of development rights, the Committee made certain proposals relating to the imposition of a betterment levy. It was recognized that the causes of betterment could not in practice be identified with certainty. It was impractical to isolate the effect of planning controls on land prices in the complex of influences causing change. The proposal was to cut the Gordian knot by taking for the community a fixed proportion of the whole of any increase in site values. A levy of 75% would be made of any increase in value. An initial valuation on a prescribed base date would set the *datum* line and revaluations at five year intervals would reveal any changes in value upon which the levy would be struck. Some allowance would be made for the value of improvements to the land but no attempt would be made to identify the causes of betterment beyond that.[67]

In addition to the overall scheme of compensation and betterment, the Report considered the existing provisions of the Town and Country Planning Act 1932 (U.K.) relating to compensation. It proposed that instead of the list of specific matters which could be determined by the Minister to be non-compensable, the Minister should have a general power to exclude compensation with guidelines set out for its exercise, plus specific limitations on that power in the case of interferences with existing user rights and any permanent restrictions on building on land.[68] Thus again the Report emphasized the preservation of existing rights in favour of private owners in accordance with the general principles identified as applicable.

In 1944 a White Paper[69] was produced which considered the Uthwatt Report and foreshadowed its legislative interpretation. Although it approved the analysis of the Committee it proposed to modify the recommendations

[67] It is interesting to note a slide in the definition of betterment within the Uthwatt Report. The initial definition involved the narrower interpretation, while the definition used in the proposals was wider. Note also that the payments of compensation envisaged by the proposals for lost development rights were not considered as the payment for a taking of betterment. Betterment charges would apply to such land after development — see Davies K., *Law of Compulsory Purchase and Compensation* (3rd ed., 1978) 301.

[68] *Op. cit.* para. 235 f.

[69] United Kingdom, *The Control of Land Use* (1944) Cmd. 6537.

made by the Committee. For example instead of a purchase of development rights being made by the state in one blow, it proposed that no money would be paid until the point had been arrived at of actually depriving the landowner of development potential; in the case of the betterment levy the White Paper proposed that an 80% levy be charged but only when permission to develop was given. The view taken of the proper relation between compensation and betterment was a modest one. It suggested that the betterment levy would over a period of years and over the country as a whole provide a fund to supply compensation payments. This would lead ultimately to a balance between the problems of planning and development.

The Town and Country Planning Act 1947 (U.K.) enacted a comprehensive reform of the system of land use control in the United Kingdom. The system of planning control of development which it introduced has survived, but that part of the Act directed to control of land values disintegrated under a succession of political changes. Davies has pointed out that the survival of one part without the other was bound to produce highly anomalous results.[70] In any event, the 1947 Act had not truly reflected the Uthwatt proposals, nor those of the White Paper although the philosophy on which it was based owed much to them. Prospective development values were to be taxed as betterment based on the assumption that the community owns the prospects of development in land, and the individual owner is only entitled to existing use rights. The payment of any compensation at all was perhaps a pragmatic acknowledgment of the political realities; an *ex gratia* payment rather than a necessary concomitant of any acquisition.[71]

The Act provided for an appointed day in July 1948 when prospective development value of all land was transferred to the state. A Central Land Board would deal with claims for compensation for this 'expropriation' on a once and for all basis. A fund of £300 million was to be established to cover these claims by a specified date in 1953. Also from July 1948 a development charge in respect of 100% of prospective development value was to be raised when permission to develop was given in respect of land. It was not necessarily the case that a payment of compensation would cancel out the development charge should permission to develop be granted.

In 1951 there was a change of government and shortly after, the development charge system was abolished, the compensation scheme was

[70] Davies, *op. cit.* 302.

[71] See discussion of the 1947 Act in Haar C. M., *Land Planning Law in a Free Society* (1951) especially at pp. 101-5; Haar refers to explanations given in the House of Commons of the nature of the £300 million compensation fund, which clearly indicate the belief of the Government of the time that the fund was properly an *ex gratia* payment made available only to relieve hardship in the interests of fairness and not a purchase price for the acquisition of rights.

consequently dropped and the fund and the Land Board became redundant.[72] In 1964 another change of government saw the reintroduction of the notion that the community should share in bettermnet. However it was treated as a taxing question rather than a concomitant of land use planning. A capital gains tax introduced in 1965 included a 30% tax on betterment,[73] which rose to 40% in 1967 and was clearly linked to the idea of development value belonging to the community.[74] In 1970 with a change of government and a swing away from this idea the percentage of the tax was lowered and it was again transformed to a capital gains tax.[75] After a period during which betterment value was taxed as income,[76] an 80% development tax was reintroduced in 1976[77] but since the change of government in 1979 has been reduced. As the betterment and compensation proposals of the Uthwatt Report passed through their various manifestations; ultimately as part of Britain's fiscal history, the planning control systems also developed, waxed and waned.[78] An examination of these events is not appropriate to this article. However in passing it is worth noting that the history of British planning structure has been haunted by the ideological dichotomy pinpointed by the Uthwatt Report; whether the community or the individual owns or should own the development potential of land. The type of structure to implement the planning system and the tools used to achieve its objectives depend primarily on the answer given to that question.

The Uthwatt proposals had the merit of internal logical consistency. An examination of the failures of post-war planning experiments in the United Kingdom reveals, if anything, a series of conflicting decisions and pragmatic concessions which result in overall failure to explore fully the recommendations of 1942. The shape and form of planning controls, particularly in respect of the provisions for compensation and betterment, have undergone transformations almost with each change of government. This in itself indicates the political nature of the conflicts addressed by these provisions.

The reevaluation of land development controls and the relationship between private rights and public interest is an exercise long overdue in Victoria. The principal legislation has been amended many times without comprehensive redrafting. New legislation in land use controls has been implemented without any overall policies being enunciated. The recommen-

[72] Town and Country Planning Act 1953 (U.K.).
[73] Finance Act 1965 (U.K.).
[74] Land Commission Act 1967 (U.K.).
[75] Finance Act 1971 (U.K.).
[76] Finance Act 1974 (U.K.).
[77] Development Land Tax Act 1976 (U.K.).
[78] Note: The Town and Country Planning Act 1954 (U.K.); The Town and Country Planning Act 1959 (U.K.); The Control of Office and Industrial Development Act 1965 (U.K.); The Town and Country Planning Act 1968 (U.K.); The Town and Country Planning Act 1971 (U.K.); The Community Land Act 1975 (U.K.).

dations of the Building and Development Approvals Committee[79] have involved a reconsideration of many important issues but the reports have not addressed the fundamental conflicts of planning in a private enterprise economy. Although there have been some experiments in Australia, Fogg has pointed out that these have usually adopted a 'multiple pragmatic' approach rather than a 'rational comprehensive' one.[80] Perhaps the decision to retain all land in the Australian Capital Territory as Crown land released on long-term lease is the most comprehensive of Australian schemes for land control. Some consideration should also be given to the Land Development Contribution Act 1970 of New South Wales. These schemes involve attempts to place problems of compensation for the effects of planning control in a broader context of land supply and management and to provide for the juxtapositon of betterment recovery with outgoing payments.

AUSTRALIAN CAPITAL TERRITORY LAND POLICY

The Seat of Government (Administration) Act 1910 (Cth) provides that 'no Crown lands in the Territory shall be disposed of for any estate of freehold'. There was expressed in debate at the time a strong commitment to the idea that the Commonwealth should retain control of Capital Territory lands and that a leasehold rather than a freehold system of tenure should be adopted.[81] Underlying this is the assumption that a leasehold system would facilitate management and development in the wider public interest. This assumption itself must be based tacitly upon an appreciation of the essentially competitive nature of public and private interests in land, and the resolution of this conflict through protection of temporary user rights in the hands of the individual and preserving future use for the community.

Allied to the tenure system, Canberra's land use control system is based not on a legislated zoning scheme but through enforcement of lease purpose clauses or covenants. The lease purpose clauses do in fact form zones where like uses are permitted and other uses excluded. There is a provision for some flexibility in the purposes for which land can be used; for example, an occupier may gain approval to use a residential lease for the purposes of carrying out his or her profession or occupation and variations of purposes may be granted by the Supreme Court subject to the Minister's approval on town planning grounds.[82]

[79] Victoria, *Report of the Building and Developmental Approvals Committee on The Building and Development Control System in Victoria: Part I* (1978) and *Part II* (1979).

[80] Fogg A. S., *Australian Town Planning Law* (1974) 527 ff.

[81] Australia, *Parliamentary Debates*, House of Representatives, 10 November 1910 V. LIX, 5989.

[82] City Areas Leases Ordinance 1936 (A.C.T.) ss. 9, 9A, 10, 11, 11A.

The dual system of leasehold tenure and restrictive covenant planning was seen as ensuring a fine degree of land use control and also that the increments in unimproved capital values would accrue to the community through the collection of land rents. However both the Australian Commission of Inquiry into Land Tenures[83] and the Joint Committee on the Australian Capital Territory[84] found from evidence presented to them that the system was failing to achieve these objectives.

The Final Report of the Commission was tabled in 1976. It emphasized the need for a coordinated and comprehensive land policy on a national scale. It spelt out the objectives such a policy should set out to achieve — namely efficiency and equity — and considered a number of goals and guidelines for the evaluation of the policy in practice. These criteria admittedly involved a number of value judgments concerning community or national goals and priorities. It was significant however that after their publication in the First Report of the Commission in 1973 the only serious criticisms made of these criteria were directed towards that one relating to the desirability of the state reaping unearned increments in value arising from land use changes. The Final Report considered this critical response in some detail, but concluded nevertheless that it was an appropriate criterion to consider in a national land policy.[85] Thus the considered opinion of the Commission on the matter of profits from land value gains arising from changes in use echoes the philosophy of the Uthwatt Report. Although it is not uncontroversial — it has not yet been implemented — it was reached after some consideration and in a context of carefully enunciated goals for urban land policy. In view of this the Reports of the Commission deserve close attention in any reevaluation of planning land use systems and their broader implications.

The recommendations of the Commission favoured limiting private property rights in land, subject to the need to preserve and protect residential users from undue interference and to compensate them generously for unavoidable disturbance.[86]

When considering the basic recommendations going to land tenure, residential land was treated quite differently from commercial or industrial land. The tenure system which was considered most appropriate to the balance of public and private interests was that land disposed of for non-residential purposes should be granted by lease, while residential properties should be disposed of on a freehold basis.[87] These differences in tenure were indicated principally by cultural expectations, which reflect

[83] *Op. cit.*
[84] Australian Capital Territory, *Report of the Joint Committee on the Australian Capital Territory* (1979).
[85] *Ibid.* para. 2.18 f.
[86] *Ibid.* para. 6.9.
[87] *Ibid.* Summary of Final Recommendations, clause 7 f.

the common law protection of private property most strongly asserted in respect of home ownership. It was recognized of course, that it is more difficult to capture betterment under a freehold system, but in any case the Commission took the view that 'it is inappropriate to seek to capture that increment in the case of residential land, but that it is desirable and necessary to do so in the case on non-residential land'.[88]

The Report indicates clearly that recovery of betterment is an essential feature of a comprehensive land policy. Thus a recommendation not to seek betterment recovery in the case of residential land highlights the recognition of entrenched cultural attitudes to private rights in land which are most strongly asserted in the context of residential users. In point of fact, the Commission saw the appropriation by the public sector of unearned increments as being the only attribute of a desirable urban land policy which actually depends upon the system of tenure itself for its achievement. Other desirable attributes such as provision of cheap land for residential purposes were seen as being practical under either leasehold or freehold systems.[89]

The Reports of the Commission devoted some attention to the operation of the leasehold system of land tenure current in the Australian Capital Territory. The main features of such a system of tenure were seen as being facilitation of the recouping of betterment and the opportunity to control land uses through lease covenants. However the Commission noted that neither of these features had been conspicuously present in the practical experience of the Territory, and the criticisms made by the Land Tenures Inquiry were reinforced some years later by the Report of the Joint Committee on the Australian Capital Territory in 1979.

The Commission noted that the leasehold system in the Territory was no longer an example of pure leasehold in that many of the essential characteristics of that system of tenure had been modified by changes over the years. For example, it was noted that payment for land use rights is now made by means of a lease premium or capital sum instead of by rent; compensation for improvements is paid at the expiration of the lease, and there are opportunities provided for redevelopment of sites with no practical attempt to collect unearned increment arising from community growth and only a partial attempt to collect development value increments arising from permitted changes in land use.[90] The provisions of the Ordinance which allow for the capture of half the unearned development value of leased land had also been criticized by the Commission in its First Report as being too weak.[91] The recommendations that residential land

[88] *Ibid.* para. 8.4.
[89] *Ibid.* para. 8.1 f.
[90] Australia, *First Report of the Commission of Inquiry into Land Tenure* (1973) para. 6.4.
[91] *Ibid.* para. 8.18.

should be released on a freehold tenure with non-residential lands retained on limited leaseholds reflect an attempt to come to grips with the failure of the Territory system to produce the level of efficiency for which it was designed. Any inhibitions against rigorous recovery of betterment which flowed from a desire to protect residential users would be removed if it was only to be recoverable from non-residential land.

The other major criticism of the Capital Territory experience which was made by both the Commission and the Joint Committee related to the failure to enforce the lease covenant system of land use controls. It was found that there were many cases of lease purpose infringements within Canberra due partly to failure to enforce the provisions of the City Areas Leases Ordinance 1936 (A.C.T.) on the part of the Department of the Capital Territory. It was suggested that the fines prescribed were too low and that termination of lease was too severe a penalty to be effective.[92] In 1977 amendments to the Ordinance resulted in provisions allowing a private citizen resident in the Territory to take action to enforce lease purpose clauses where the Minister is not prepared to act. However the Joint Committee Report of 1979 adverted to leases being the subject of speculation and lessees applying pressure to bring about changes in land use to achieve financial gain. For example deliberate neglect of premises to create a 'blighted' area and thus a favourable climate for approval of changed land uses were noted.[93] It was proposed by the Commission in its Final Report that all development or new use rights in land now obtained by rezoning or changes in lease covenants should be acquired by government in order to eliminate private speculation in land and to enhance the likelihood of success of government planning controls.[94] Speculation in land was seen as an undesirable development and contrary to the philosophy on which the Australian Capital Territory land policy had been based.

In so far as the Commission and the Joint Committee found that the land policy of the Capital Territory had failed to achieve its objectives, it is important to recognize that they also attributed this failure to the undermining effects of inadequate implementation and enforcement of the provisions designed to give effect to the policy.

LAND DEVELOPMENT CONTRIBUTION ACT 1970 (N.S.W.)

Although most Australian States have made provision for the collection of betterment in relation to land use planning they have usually chosen the direct charge solution propounded by the British legislation up to and including the Town and Country Planning Act of 1932.[95] An exception is

[92] *Op. cit.* para. 64 f.
[93] *Ibid.* paras. 71, 74 f.
[94] *Op. cit.* Summary of Final Recommendations, clause 4 (a-f).
[95] See for example, Town and Country Planning Act 1961 (Vic.) Schedule 3, clause 13, which allows schemes to provide for the collection of a betterment charge

New South Wales, which introduced the Land Development Contribution Act 1970 (N.S.W.) constructed along the lines of the Land Commission Act 1967 (U.K.). The failure of the direct charge of betterment levies to achieve any real effect on recouping unearned land value or holding down land prices led to the adoption in New South Wales of this legislation. In conjunction with the Land Development Contribution Management Act 1970, the legislation was aimed at making collection of betterment a 'worthwhile and financially rewarding exercise for government',[96] and at confronting the problems of the price and supply of residential and commercial land around the city of Sydney.

The scheme envisaged by the Acts involved the levy of 30% of the increase in the value of non-urban land covered by the Acts on each date that ownership of the land was transferred. The Minister for Local Government was to determine which land would come under the scheme, and upon his Order land became liable for contribution. A base value was set as at 1 August 1969 with a 2% p.a. allowance for inflation. Although the system was clearly an attempt to integrate the solutions to problems of land supply and price in the urban fringe, and was hailed by Fogg, for example, as standing a decent chance of succeeding in a practical way;[97] it was shortlived in fact. The scheme was effectively repealed by the Land Development Contribution Management (Amendment) Act 1973 (N.S.W.).

The debates in the New South Wales Parliament which accompanied the passage of the Amending Bill identified the inflationary effect of the contribution on land prices. However they also point to the vagaries of the market at the time as being the primary cause of this effect.[98] Demand for development was high and in what was a vendor's market it was invariably the case that the amount of the contribution was passed on to the purchaser of land. The rise in prices had been so great over a period of years that pressure to have the scheme abolished was successful in an election year. The Labor Opposition did not oppose the Bill. It was suggested however that the pressure for land development was itself at least partly due to the Government's failure to take an active part in the provision of land for housing. It was hoped by all that a promised influx of federal money to local government would relieve the effects of the loss of the contribution scheme as a source of finance for local authorities.[99]

of 50% on increases in value derived from the planning scheme. No collection of betterment has ever been made under this provision.

[96] Fogg, *op. cit.* 515.

[97] Fogg, *op. cit.* 516 f.

[98] New South Wales, *Parliamentary Debates*, 44th Parlt. 1st session, Legislative Council 186 f.

[99] The history of the Land Development Contribution Act is discussed at length in Hagman D. G. and Misczynski, *Windfalls for Wipeouts; Land Value Capture and Compensation* (1978) 453 f.

The Uthwatt recommendations broadly covered a national scheme to purchase development rights from rural land holders, to levy a betterment tax of 75% on site value increases however caused, and to set up authorities to carry out all urban development. Although the Town and Country Planning Act 1947 (U.K.) partly implemented these proposals, no state authority was established to carry out development programmes and the scheme was dismantled during the 1950s. Since then, although a betterment tax has been part of the fiscal policy of the United Kingdom, its rate has varied considerably, and the shape and form of the schemes have undergone transformations with each change in government. This in itself, perhaps, highlights the political nature of the conflicts which are addressed by such schemes. A close examination of the failures of the post war experiments should reveal that a series of pragmatic concessions has resulted in a failure to fully explore the recommendations of 1942. Thus conclusions about the viability of betterment taxes as part of development control schemes must be speculative.

The land policy implemented in the Australian Capital Territory was intended to facilitate a high standard of land use management in a context which militated against private speculation affecting the supply and price of land for development. Failure to enforce the system rigorously and modifications to the details of tenure have resulted in failure to achieve the original objectives. The recommendations made by the Commission of Inquiry into Land Tenures and the Joint Committee on the Australian Capital Territory were directed towards eliminating these defects. These recommendations have not yet been implemented.

The Land Development Contribution Act of 1970, introduced in New South Wales to confront and resolve problems of the price and supply of land around Sydney, was repealed in 1973. Perhaps that scheme, although broader based than other Australian provisions, also fell short of a 'rational comprehensive' model. For example, development was still seen as a task for private enterprise and arguably a more active role played by government in the provision of land and its development may have tipped the scales. Nevertheless it is by a process of examination of these proposals and their defects that a better idea of the dimensions of the problems of land control will be achieved, and more comprehensive solutions can then be proposed.

Each of these schemes represented attempts to integrate the solutions to land use, supply and price problems in a comprehensive response founded upon broadly conceived policy. Each to a greater or lesser extent failed to achieve these goals but a study of their underlying philosophy and their attempts to implement it may provide some insight to the dimensions of the problems of which compensation is only one particular manifestation.

Each of these schemes, for example, recognized the existence of a relationship between the payment of compensation for planning loss and the taxation of planning gains manifested in increased land values. Indeed any consideration of the issue of payments to compensate landowners for financial losses suffered as a result of planning controls should also logically involve consideration of the possible taxation of benefits traceable to the same source.

It has been suggested that if compensation for planning loss is to be payable it could be funded from a programme of 'betterment' taxation. It has also been suggested that if compensation for planning loss is payable then planning betterment should be taxed whether or not the taxes so raised are used as the prime source of funding compensation disbursements. These two attitudes must be distinguished. They raise different issues. The first addresses betterment as a solution to the problem of funding. The second involves broader considerations of individual equities and distributive justice. It argues that consistency demands that individual gains, the loss of which might be the basis for a claim for compensation, must equally be the legitimate objects of taxation. It implies that unless betterment is taxed then compensation should not be payable. However, the logical conclusion of this view of the relationship between compensation and betterment is that if all prospective development value when it accrues was to be taken away in betterment tax, then *no* compensation should be paid for loss of prospective development value is consequence of planning restrictions. and if there is to be *no* betterment tax, there ought to be *full* compensation.[1]

The first view of 'betterment' — as a source of funding for compensation — was canvassed by the Victorian Committee of Inquiry into Town Planning Compensation.[2] It was among the schemes proposed to the Committee as a source of funding extensions to compensation payable under the Town and Country Planning Act which were the subject of submissions received by the Committee. Betterment rates were suggested which ranged from those based on increases in land values associated with public works to those which would base taxation on any increases in land values. Although these versions of betterment taxation raise quite different issues of purpose and policy, they were all rejected by the Committee. It concluded that for various reasons it would be unwise to introduce any betterment scheme to Victoria at this stage in its planning history. The Committee placed some emphasis on the view put in 1971 by the Melbourne Metropolitan Board of Works that a betterment scheme would fail to raise amounts of any significance.[3] This would indeed be a relevant matter if such a scheme is to be considered simply as a fund raising

[1] Davies, *op. cit.* 323.
[2] Victoria (1978).
[3] Melbourne Metropolitan Board of Works, *Planning Policies for the Melbourne Metropolitan Region* (1971).

exercise. Other reasons put by the Board for not introducing a betterment scheme were also referred to in the Report of the Committee. They are not all referable to betterment seen purely as a fund raising exercise and will be considered below.

The view of betterment as a more integral concomitant of compensation received some attention by Phillips in his article on compensation and planning in Victoria.[4] In his opinion, the two are not logically related so as to run together although he recognizes that arguments for the use of a betterment tax to fund compensation may be of practical significance. He makes the point that the demands of justice in relation to individual claims for compensation are not logically affected by any other individual claim for compensation nor by any possible collection of a betterment tax from a wider group. Thus whether or not it is feasible to collect betterment should not be considered relevant to the equities of compensation. The policy of refusing compensation because the reclamation of betterment is frustrated is, he says, a 'natural expression of human weakness . . . but lacking in any logical basis'. The mere fact that one landowner enjoys unearned appreciation in value does not provide a justification for failure to compensate for depreciation suffered by another. Although Phillips takes this view of the moral obligations of the case he recognizes that if the sums involved in paying compensation would be large than there may be no practical alternative to ignoring compensation claims. If this is to be the case, then the issue must be determined as a value judgment about the relationship of private rights and public interest. It must be recognized that the effects of community objectives may be to infringe private rights. Phillips stresses that common law lawyers will not take readily to a problem which involves issues devoid of authority and demanding social value judgments. The view taken by him is thus based on a presumption that individual equities should be the prevailing consideration on moral grounds unless it can be demonstrated that after proper consideration a collective decision has been made to suppress them to some extent in favour of a wider public interest.

Wilcox, in his book, *The Law of Land Development*,[5] refers to the demands of 'commonsense and justice' which require that sacrifices and gains resulting from planning controls be balanced out. He refers to the underlying problem of conflict between public and private interests and mentions briefly some of the difficulties associated with collection of betterment before passing on to a close examination of statutory provisions relating to compensation. Although he recognizes the relationship of compensation and betterment to broader issues he does not explore it in depth. A more comprehensive approach is adopted by Fogg in *Australian*

[4] Phillips P. D., 'Compensation and Planning in Victoria' (1960) 2 *M.U.L.R.* 331.
[5] Wilcox M. R., *The Law of Land Development* (1967) 278 f.

Town Planning Law.[6] He devotes several chapters to consideration of both compensation and betterment in the broad context of 'Town Planning and Land Values'. He discusses the practical problems associated with implementing betterment schemes and critically appraises compensation provisions. He treats both as being logically connected as symptoms of the impact of planning and development controls on land prices and availability. However he is prepared to recognize that, although interrelated, there may be pragmatic reasons for implementing one without the other. Thus providing for compensation without betterment can be justified on the grounds that the effect of reducing opposition to planning controls is worth any logical discrepancy involved. Fogg makes it clear that without adopting any politically sectarian position, should there be a choice between the progress of the collectivity and the interests of individuals, then, on balance, preference should go to the collectivity. This attitude to the resolution of public versus private interests problem is unusual for a lawyer. It distinguishes his point of view from most other commentators who adopt a narrow approach to problems of compensation and betterment. Their approach necessarily focuses upon these issues from the point of view of the individual rather than the collective and consequently their preoccupation is with individually equitable compensation rather than an overall view of both compensation and betterment schemes as planning tools to achieve a collective equity.

Nevertheless, however uncomfortable or unfamiliar such problems may be to the legal profession, the distributive effects of planning decisions cannot be ignored. The proper perspective from which to view the compensation and betterment issues may be one which shows them in a broader context than that of individual claims.

The relationship between compensation and betterment as explained by Davies[7] is fundamental to an appreciation of their roles and limitations in planning law: given that it is assumed that development value in the form of land values and development value in the form of money are the strict equivalent of each other, the basic relationship is seen as being an inverse one. It would be absurd, it is said, to pay compensation for loss of development value when an increase in value would be taken in betterment tax and would never have accrued to the individual. Provided that betterment tax is comprehensive, the individual suffers no loss of development value and can thus claim no compensation; conversely, if there is no betterment taxation at all on development gains, and benefits from land control strategies are allowed to lie where they fall, then a loss of such benefits should be fully compensable. To both compensate and tax fully would be to give with one hand and take with the other and would be patently

[6] Fogg, *op. cit.* 426 f.
[7] Davies, *op. cit.* 323.

absurd. However the validity of the absolute approach clearly depends upon the completeness of the tax or compensation. Any partial tax policy will have to be balanced out with partial compensation. Thus if an individual were to retain say 60% of accrued gain and pay 40% in tax, there should be provision for 60% compensation in cases where development is restricted and gains reduced. It also follows that tax should be payable when betterment has been realized in moneys worth and with some allowance made for incidental expenses.

On this analysis the possibility that the extreme propositions may be politically unacceptable can be accommodated. Provided that any compromise recognizes the inverse relationship between compensation and betterment no logical inconsistency will result from a failure to push for the extremes of full compensation or full betterment taxation.

On any view it seems clear that to treat either compensation payments or betterment taxation in isolation from each other or from their context in the broad policies of the control of land prices and supply is short-sighted and likely to result in the adoption of ineffective and inconsistent measures. An attempt to resolve problems of the implementation of a betterment tax may fail to be effective if the objectives of the imposition of the rate are not clearly thought out. For example, the Gobbo Committee, in considering the possible implementation of the provisions in the Victorian legislation for a betterment rate, relied upon conclusions reached in the Planning Policies for Melbourne Metropolitan Region document of 1971. That document adverted to the difficulties experienced and associated with such rates and concluded that for a number of reasons it would not be advisable to introduce such a scheme to Victoria. The reasons advanced for this conclusion were as follows: it is difficult to prove that betterment has been caused by a planning scheme; betterment rates have an inflationary effect on homesite prices; this is partly because they are passed on and do not effect the rural landowner against whom they are aimed; there are variations in the incidence of betterment; there is no direct relationship between betterment and the cost of servicing blocks for development; there would be little financial gain in the short term for the collector of betterment because of (then) current land stocks. The Committee added to these points that in view of the expectations of persons who have bought land without betterment provisions in mind and the threat which a betterment scheme would pose to existing practices of securing to government instrumentalities some of the windfall profits associated with development, it would be unwise to implement existing betterment provisions, or to replace them with some other similar scheme.

The arguments raised by the 1971 document referred to above were not all relevant to a single end which might be the objective of a betterment levy. For example, the reference to the lack of a relationship between

betterment and servicing costs seems to be based on a view of betterment as a funding source for development costs, currently borne by servicing authorities and ultimately by all tax and rate payers. The ground relating to the inflationary effect of such a scheme and the assertion that it is 'invariably passed on to the final owner of a homesite' rather than affecting the person to whom it is directed, the 'original owner of broad acres who achieved his urban value through no effort of his own' also places the justification for betterment on some idea of broad distributive justice. However apart from the fact that there has been dispute and speculation about the inevitability of any inflationary effect,[8] the argument is not consistent with other grounds put forward. If speculation is to be discouraged and unearned profits to be taxed then it really does not matter if there is no relationship between increased values generally and the servicing costs in any particular area. If speculation is aimed at as part of a broad problem of land supply and pricing, then the original owner of broad acres is not even necessarily the person to aim at; it is the purchaser from him that a betterment tax or a site-withholding tax will seek to discourage from holding on to land in the hope of a profitable resale. If this is the general idea behind betterment taxation then it should be seen properly as a capital gains tax; increase in value need not be related to any particular cause and the difficulty of proving its relationship to planning schemes is immaterial.

These inconsistencies surely result from the view the Committee took of betterment as a tax base to fund compensation without paying attention to its role as a planning and fiscal tool, in itself capable of achieving effects in a broad context of planning policy and control. The use of betterment taxation as a planning tool deserves closer attention than it will get in any study where it is seen in isolation as a money raiser for compensation schemes.

Similarly, compensation provisions, although capable of procedural improvement will not resolve problems which stem from a more fundamental conflict between private and public interests so long as they are seen as an isolated issue.

CONCLUSION

As land use controls proliferate, their effects — both positive and negative — become more apparent to a greater number of people. Problems of implementation and policy are more clearly perceived and more publicly discussed. Public attitudes to planning range from polarized opposition and support through milder expressions of opinion and shades of indifference. Opposition is usually stimulated by experience of negative effects and thus shifts with the cutting edge of control; attitudes to planning may be affected

[8] See for example: *Australian Institute of Urban Studies, First Report of the Task Force on the Price of Land* (1971).

by changes in economic climate; priorities will change, financial detriments assume greater significance and public expenditures become subject to more rigorous scrutiny. These shifts in opinion and pressure are to some extent reflected in the development of the compensation provisions.

At present the Victorian legislation regarding compensation for planning, permits only a narrow range of recovery for loss although this is obscured by the format of the provisions themselves. The procedure for pursuing a claim for compensation is borrowed from those provisions dealing with compensation for outright acquisition and is unnecessarily intricate. Amendments have been introduced from time to time to respond to particular problems as they arise, with no overall reconstruction of the provisions as a whole. This *ad hoc* incrementalism has obscured the underpinning policy of the legislation and, masking the basic issue, has failed to provide a satisfactory, comprehensive framework against which specific issues can be measured and resolved. The result is an intricate and misleading format which provides fertile ground for dispute.

However rather than acting to revise the existing provisions for compensation under the Town and Country Planning Act of 1961 as an isolated and discrete exercise, ideally attention should be directed to the need to explore the full implications of development control in the current social and economic climate. The recommendations which were made by the Gobbo Committee and their original manifestation in Bill form, are inconsistent with a programme of rational comprehensive planning for land use while failing at the same time to remedy the worst inequities suffered by individuals claiming compensation. They fall between two stools partly because of a failure to place the issues of compensation and betterment in their broader context.

There is considerable evidence to support a view that 'in order to introduce any fundamental reform one must return to the question of who owns the land that is to be used and how that ownership is to shape land use'.[9] Unless policy decisions are made at a politically significant level which would guide the broad reform of planning land use in the State, the best that can be achieved in any particular area is clarification of the current position. Of course clarification is itself worth pursuing; it would relieve responsible authorities from vague but awful fears of crippling compensation claims against them, and by elucidating the limits to rights of ownership would reduce unfounded expectations of compensation. However the advantages to be gained from a coordinated and comprehensive approach to the problems of land use control are important in terms both of efficient administration and fairness to the individual. The overall effect of such an approach should be to ensure that disputes over compensation are reduced to a minimum.

[9] Roberts N. A., *The Reform of Planning Law* (1976) 242.