Scottish Law Commission
140 Causewayside
EDINBURGH
EH9 1PR

5th June 2015

For the attention of Mrs Lucy Galloway

Dear Sirs

Consultation on Reform of the Compulsory Purchase Legislation

We write as landowners affected by the Fastlink section of the Aberdeen Western Peripheral Road ("AWPR").

Background to our situation

Proposals for the AWPR have been under discussion for over 20 years. During winter 2001/2002 an Environmental Consultant was commissioned to carry out a Stage 1 Environmental Assessment, in accordance with the Design Manual for Roads and Bridges (DMRB), over a defined study area. The original preferred route, developed from this work over a period of 4 years, and announced in Spring 2005 would have affected the Camphill campus, a Rudolf Steiner school for children and young people with special needs.

In December 2005, in response to lobbying against that route, the Scottish Ministers announced a different route involving a direct link, now known as the Fastlink, joining the A 90 at Stonehaven.

The Fastlink option route selection was developed between December 2005 and May 2006 when the preferred route was announced. All the 9 options were based on a link with the A 90 at the Netherley junction to the NW of Stonehaven.

My brother and I owned land (known as Field 52) at that junction on which we had plans to develop a supermarket. The family had discussions with Transport Scotland at the time and, at a meeting on 28th August 2006, we were informed by them that the Stonehaven junction did not involve our property. Shortly thereafter, at the 4th September 2006 we learnt of an alternative design of this junction which did affect our development plans. This was the design eventually forming the draft CPO. Transport Scotland refused to consider any alternative to that design, stating that it would delay implementation.

As a consequence of such failings we had to spent in the order of £500,000 to fully develop our alternative junction design to present to the Public Inquiry which was held between 9th September and 10th December 2008. Closing submissions were lodged by 16th February

2009 and a report was submitted to Scottish Ministers on 30th June 2009[1]. The Reporters were clearly concerned that any consideration of our option would affect the timings for delivery of the scheme. The Scottish Ministers in confirming the order concluded that Transport Scotland's option was preferable to the alternative designed and presented by ourselves. A CPO was made in 2010 with land vesting in the Ministers on 11th January 2013 following various appeals culminating in a Supreme Court hearing in July 2012[2].

Notwithstanding the planning history of our site the Scottish Ministers offered compensation based on agricultural value at about £4,700 / acre and the matter was referred to the Lands Tribunal for Scotland (LTS)[3]. The LTS awarded compensation of £1.7M on the basis of the current legislation notwithstanding the fact that had the scheme not affected our property we would have been able to obtain planning consent and sell the land to Sainsbury for £10.25M.

The stress caused by the route selection led to my father suffering a stroke following the public inquiry from which he never recovered. He died in 2011.

You will understand therefore why we welcome reform to the current CPO legislation and why we consider the present regime is unfair on affected landowners.

We comment on aspects of the questions raised in the consultation process dealing with aspects of the CPO process relevant to our situation based on our experience:-

Chapter 5 Procedure for obtaining a CPO

The procedure for confirmation of CPOs by the Scottish Ministers has given rise to questions in our case. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter clearly recommended[4] that the Scottish Ministers should consider carefully the compensation payable in respect of the AWPR preferred route, as against our Alternative. From evidence led at the LTS hearing, it appears that this recommendation was not followed when the Scottish Ministers confirmed the CPO..

You ask:-

> Should all CPOs made by local authorities and statutory undertakers require to be confirmed by Scottish Ministers and, if not, in what circumstances should acquiring authorities be able to confirm their own CPOs?
>
> (Paragraph 5.41)

Comments on Proposal 17

There needs to be judicial oversight in the exercise of compulsory powers to avoid potential misuse.

The decision and reasoning of the confirming authority in such circumstances should be transparent and public. This is particularly so when confirmation is carried out by an arm of the promoting body.

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[1] http://www.dpea.scotland.gov.uk/Document.aspx?id=135841

[2] *Walton et al –v- the Scottish Ministers* [2011] CSOH 131, *Walton –v- Scottish Ministers* [2012] CSIH 19 and *Walton v The Scottish Ministers* [2012] UKSC 44

[3] *Strang Steel –v- The Scottish Ministers* LTS/COMP/2013/12

[4] Paragraph 9.297

We consider it essential that any CPO legislation should set out a clear legal obligation on any confirming authority to act independently and judicially in order to emphasise that this is not merely a rubber stamp exercise as often appears to be the case.

Chapter 6 Challenging a (confirmed) CPO

Public schemes are frequently delivered by private companies (in our case Jacobs advised Transport Scotland on route selection, design and implementation). Private companies are not directly accountable to the community and are profit orientated.

We therefore consider it important that there should be a clear statutory duty placed on acquiring authorities to carry out any work necessary leading to the preparation of a CPO such as in route selection or Environmental Impact Statements. There should be a clear duty of care towards affected parties.

In their CPO application for the AWPR Transport Scotland relied upon work undertaken by Jacobs and the Scottish Agricultural Colleges (SAC). Much of that work appeared to have been insufficiently researched without due care and attention for affected parties. This gave rise to affected parties on the AWPR having to promote alternative junctions/routes which should have been properly considered as part of the route selection process.

Examples of failing in the EIA include: -

1. It was stated by the managing agents at a meeting at Carlton House, Stonehaven on the 19th February 2008 that the design brief in respect of the AWPR only included one end point to the Fastlink – the existing link with the A90 at Mains of Ury. We have been informed that only two alternatives for this were considered. From our perception the current proposal for the Fastlink evolved following a meeting between the managing agents and John Harrison, the Scottish Office roads engineer, on the 29th August 2006 and was decided by the 1st September when shown to Mr Robert Strang Steel. The EIA did not apparently consider any further wider options for the Fastlink route linking to the A90 and local roads into Stonehaven.

2. The original plans for the Stonehaven junction did not involve Field 52 as was made clear to us at a meeting on 28 August 2006.

   The EIA states that the land use on the neighbouring New Mains of Ury Farm was 3.2. At 37.3.6 the EIA states that there are "*...isolated pockets of prime quality land of land capability Class 3.1*" but failed to mention any in the vicinity of the Stonehaven Junction. Indeed at 37.3.7 it referred to the Southern end of the Fastlink as being of land capability 3.2. The 1:50,000 Soil Survey of Scotland sheet 45 Stonehaven prepared by the Macaulay Land Use Research Institute (MLURI) clearly shows areas of 3.1 around this junction.

The evidence of Dr Henderson for Transport Scotland at the PI was that sampling "*..in most cases..*" took place over 250 – 500 on both sides of the alignment[5]. A linear sampling method was adopted at 100m intervals along the line of the route. It would appear that no land sampling took place to the east of the A90 (i.e. on our field). A field by field survey or inspection of MLURI maps would have identified that the majority of the land in Field 52, and on land immediately to the west of the junction is classified 3.1 not 3.2.

It would seem therefore that land use was only considered after route selection. This is a material issue given the reliance placed upon the land use in the ES to assist in route selection; DMRB clearly makes reference to the 1:50,000 MLURI maps as a tool in route selection.

On this basis, Graham Kerr[6], at Appendix A37.2 of his Precognition to the Public Inquiry stated that the Land Use Classification was Macaulay LCA 3.2. This was shown to be incorrect by a detailed survey carried out by MLURI upon our instigation.

3. Contrary to the EIA provided by Transport Scotland[7] Field 52 was in agricultural use[8]

   There is also reference to "*...winter and spring cereals, oil seed rape, potatoes, turnips and daffodils*" being grown on land reference 627 (Ury Estate – subsequently FM Developments). The interests of FM Developments to the east of the Netherley road is only in respect of the Megray Wood and the adjoining ground to the south of the Aquhorthies road (cf Plots 3602 and 3608). This area is mainly gorse and some scrub birch and includes wetland from the Limpet Burn. It is classified land use 5.1[9] not 3.2 as set out in the EIA Appendix A37.2. Even a cursory inspection would have shown that this land was clearly not cultivated as is suggested in the EIA.

4. It was stated by SAC that remedy / offset measures for mitigation included compensation and it was upon this basis that Mr Kerr of SAC concluded that the Fastlink proposals of the AWPR would not affect the viability of any farm[10].

   In the AWPR EIA and in Mr Kerr's evidence in his supplementary Precognition of the 6th November at 8.0, Mr Kerr referred to his findings in the ES at 37.6 and to Appendix A37.2, but went on to say at 8.2 "*...no commercial agricultural units will have their viability affected...*". Mr Kerr suggested at the PI that the impact of the Fastlink on Field 52 was LOW.

   The purpose of any EIA is to inform on a particular proposal which may lead to a CPO and to incorporate into the scheme measures to avoid or mitigate adverse impacts. The elimination of adverse environmental impacts, or their reduction to an acceptable level is at the heart of the EIA process[11]. One of the main purposes of an

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[5] page 34 paragraph 6.55
[6] Mr Kerr worked for the SAC and co-ordinated and delivered input to the ES specifically in relation to the effects of the project on Agriculture, Forestry and Land Use Capability.
[7] EIA Table 37.2,
[8] Reiterated in his precognition at the PI by Graham Kerr at paragraph 4.3.
[9] MLURI report prepared for Environ dated June 2008 for the PI
[10] EIA (CD) Chap 37 para 37.6.11 to 37.6.16
[11] PAN 58 (Scottish Executive 1999)

EIA is to ensure that potentially significant environmental effects of proposed projects are avoided or reduced as far as possible or practicable[12].

The EIA however did not adopt this approach. Mr Kerr as part of the EIA assumed that remedy/offset measures for mitigation included compensation. Compensation is to address any losses arising out of any implemented scheme so as to place the claimant in the same position (insofar as financially possible) as he would have been before the scheme.

On this basis Mr Kerr's adopted methodology was flawed in that under his approach differing schemes resulting in widely differing damage to agricultural interests would be given the same residual impact because he specifically incorporated financial compensation as mitigation. Proper consideration of alternatives was therefore not possible.

It is not clear what (if any) prevention and reduction measures were considered as part of the EIA. For example I am aware that the siting of SUDS ponds on the neighbouring New Mains of Ury utilises the best land on that holding. This had been raised in meetings with the AWPR team. The evidence of John Riddell for the farmers at the PI identified alternative locations for these ponds which do not appear to have been considered in the final scheme.

Mr Kerr's evidence was that the Fastlink would make no agricultural business unviable[13]. Other witnesses for the Scottish Ministers relied upon this conclusion[14], which was clearly flawed, as did the Reporter (see paragraph 10.242). It is significant in respect of that statement to the PI that Transport Scotland subsequently accepted our notice of severance and that our farming business is now terminated. Transport Scotland have also accepted that other businesses are also unviable[15]. We are aware of three farming businesses (along with our own) which have had to close as a direct consequence of the CPO.

5. It was alleged in the EIA that there was no prospect for development in the vicinity of the Stonehaven junction.

   If Jacobs did not properly consider soil sampling east of the A90 was their reference to lack of planning potential a result of not having considered Field 52 at all in the ES? After all there had been planning applications in respect of Field 52. The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995.

   By the time of the PI there was a live planning application for the erection of a class 1 retail store, petrol filling station, parking, servicing, access and internal roads. There were concluded missives for the sale of this site to a major retailer.

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[12] SNH Handbook on EIA 2005 (TS 70)
[13] page 31 paragraph 10.2 and also ES Part D Fastlink.
[14] e.g. Catherine Quinney evidence to the PI page 22 paragraph 3.60
[15] E.g. Elrick poultry unit.

> In addition, FM Development entered into a Section 75 agreement with Aberdeenshire Council which effectively gave Aberdeenshire Council land adjoining Field 52 in lieu of their affordable housing liability which is a further indicator of the development potential of this land.

This illustrates the poor quality and lack of diligence in work carried out as part of the AWPR EIA that led to the CPO. The process for selecting the Fastlink took 5 months and could not have been informed by any EIA which only appears to have been completed after the route was selected. It is no surprise therefore that much of the controversy over the AWPR centred on the Fastlink.

Had the EIA been properly carried out the Fastlink may have been along the alternative route promoted by the Claimant. Stonehaven would have had its long awaited supermarket and the issue before the PI and the LTS would not have arisen resulting in considerable savings for the acquiring authority. We are very concerned that other CPO projects may give rise to similar issues (we note proposals for the improved A96 between Aberdeen and Inverness are being managed by the same agent.

In effect those preparing EIA's etc are experts who's professional judgement has to be relied upon by any Reporter[16]. Those promoting schemes must have properly informed, weighted and considered alternatives. In any new legislation there should therefore be a clear duty on any acquiring authority to carry out such an assessment leading to the implementation of a CPO with due care and diligence and there should be clear sanctions for noncompliance.

If agents for an acquiring authority adopt a partisan approach in respect of such work leading to any CPO process or refuse to consider alternatives put forward, the likelihood of challenge and potential injustice increases. It is entirely reasonable therefore to ensure that in any new CPO legislation that there should be such obligations. It is also an important facet where private property rights are being overridden.

You ask:-

> Should the proposed new statute make it clear that objections to a CPO, on the basis of allegations of bad faith on the part of those preparing the Order, are not competent under whatever provision will replace paragraph 15 of Schedule 1 to the 1947 Act?
>
> (Paragraph 6.38)

Comments on Proposal 29

We would not support such a proposal given our concerns regarding the nature of EIA's prepared in support of CPOs.

[16] Cf the rules for such expert witness set out in the *Ikerian Reefer* [1993] 2LL Rep 68 Cresswell J; *Anglo Group plc – v- Winther Brown & Co & others* (2000) etc

You ask:-

> Should the proposed new statute make it clear that applicants claiming that there has been bad faith in the preparation of a CPO have a right to claim damages from those allegedly responsible?
>
> (Paragraph 6.38)

Comments on Proposal 30

It seems to us that to protect the rights of those affected in any CPO procedure should be based on proper consideration of alternatives. If there has been a breach of the duty of care in preparing a CPO then there should be a right for affected parties to claim damages against those responsible.

You ask:-

> Where an applicant has been substantially prejudiced by a procedural failure, should the court have a discretion to grant some remedy less than the quashing of the CPO, either in whole or in part?
>
> (Paragraph 6.48)

Comments on Proposal 34

Yes, this would seem to accord with ECHR requirements.

You ask:-

> Should the time period of validity of a confirmed CPO be expressly extended, pending the resolution of any court challenge to the CPO?
>
> (Paragraph 6.51)

Comments on Proposal 35

There has been discussion about objections 'stopping the clock' because of the situation that arose in the AWPR.

We consider this to be unreasonable given the uncertainty that would result for affected landowners.

In our case we were effectively 'in limbo' for some 6 years much of this as a consequence of the judicial challenge to the CPO. If such measures are introduced there will need to be a much clearer process for the service of blight notices.

Chapter 7 Implementation of a CPO

In our case the LTS found that "*there was no reason to doubt that the Council would have granted planning* [for a retail store and petrol filling station]...*in the no scheme world*"[17]. They went on to state "*on the balance of probability* [planning consent] *would have been granted on or before 2009*"[18]. Had this been the case we could have purified the missives at the time for a sale of the site to Sainsburys for £10.25M. By the time of the GVD the potential sale price had fallen to £8M. In the event we were awarded only £1.7M based on hope value. It is difficult to escape the injustice of this situation

You ask:-

> Compensation should be assessed as at the date when the property vests in the acquiring authority, and interest should run on the compensation from that date.
>
> (Paragraph 7.97)

Comments on Proposal 53

We accept the basis of this proposal subject to concerns about losses incurred prior to this date as a consequence of delays between any draft order and the GVD.

In respect of the AWPR 6 years elapsed between the draft order and the vesting date. During that time our planning application for a supermarket in Field 52 could not be determined.

Statutory interest is linked to the Bank of England Base rate and does not reflect the commercial rates on interest incurred by claimants which are at much higher rates and compounded rather than simple. District Valuers currently refuse disturbance claims based on overdraft costs on the grounds of the statutory interest provisions.

Chapter 13 Valuation of land to be acquired – establishing development value

You ask:-

> What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?
>
> (Paragraph 13.22)

Comments on Proposal 87

There is considerable issues here with the existing legislation which requires to be addressed.

Firstly the very existence of a scheme may involve an element of protection in respect of any planning application on the affected land. The route for the AWPR was protected meaning

[17] Paragraph 102
[18] Paragraph 109

that any planning application could not be determined as would have been the case in a no scheme world. It was for this reason that our planning application was not determined and we were unable to conclude our sale to Sainsbury.

It is difficult to see why such planning protection should be allowed to continue. A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the GVD, when market factors may have changed only due to the time delay.

We are aware of a situation in Angus where a potential acquiring authority has used general planning conditions regarding protection of potential infrastructure to object to a planning application purely to reduce its exposure to compensation even although no draft orders are in place.

We note your deliberations in respect of a Notice to Treat at 7.26 – 7.29. If a planning restriction is to be placed over affected land to protect land which might be subject to a CPO then it would seem reasonable that that should trigger compensation from the promoting authority.

You ask:-

> Should the provisions of Part V of the 1963 Act, relating to compensation where there is permission for additional development after the compulsory acquisition, be repealed and not re-enacted?

(Paragraph 13.76)

Comments on Proposal 96

There should instead be some clawback provision, as might well be the case with a commercial transaction, and noted in *Crichel Down* cases in favour of the authority.

You ask:-

> If not, should the period for considering subsequent planning permission remain as 10 years?

(Paragraph 13.76)

Comments on Proposal 97

The period should reflect what would happen in commercial transactions.

Chapter 14 Valuation of land to be acquired - CAADs

In January 2009 we applied for a CAAD in terms of the provisions of sec 25 of the 1973 Act, as amended. This was in respect of a supermarket and petrol station. On 14 July 2009, Aberdeenshire Council granted a positive CAAD and added an observation on the possibility of use of the land for residential development. The Scottish Ministers appealed against that decision and on the 24 January 2011, the Scottish Ministers cancelled the initial CAAD in terms of sec 26 of the 1973 Act.

In the LTS case it was not disputed that the critical issue was the question of whether or not there would have been planning permission for development of our land as a supermarket if there had been no scheme requiring the field. It was established that a supermarket of suitable size could have been built on the site and that there was "*a sustained need for a large scale supermarket in Stonehaven*". The need for a large supermarket to satisfy an acknowledged retail deficiency had been identified in the 1999 Aberdeenshire Towns Shopping Study and was confirmed by the 2004 Aberdeen and Aberdeenshire Shopping Study and the 2006 Imagine Stonehaven Capacity Study. Field 52 had been identified as a possible location for development as early as 1995.

An application for planning permission was submitted to Aberdeenshire Council as planning authority on 18th October 2007. That application was never determined solely because of the AWPR proposal. In the no-scheme world, the Council would have had the opportunity to determine the application for planning permission for retail development in or before the end of 2009 and the LTS considered that it would probably have determined the matter by that time. The only technical objection to the planning application was by the Scottish Ministers because of the AWPR. In the no-scheme world the LTS concluded that it would have been very unlikely that the Scottish Ministers would have been objectors.

Missives had been agreed with Sainsbury in 2009 for the sale of the land conditional on planning permission being granted for retail development at an agreed sum of £10.25 million

Essentially the question for the LTS was whether the relevant planning authority might have been expected to allow that consideration to dominate in the apparent absence of any better site.

CAAD procedures can be referred to as evidence of what would have happened in an assumed no scheme world. The relevant planning authority received a report from the local officials supporting the grant of a CAAD. In that report all aspects of the proposed development were considered in the same way as would have been done in a report on an actual application for planning permission. The officials' advice was that there was no available site closer to the town centre which did not have a physical impediment to its development; that despite the difficulties with location it was likely that public transport would be able to access the Field 52 site; and that although some junction improvements might be needed, there was no suggestion that practical or engineering solutions could not be found to the identified traffic concerns. The planners view was that existing outlets would not be so affected that overall vitality and viability of the town centre would be at risk. The report also dealt with alternative developments and expressed the view that there was no reason to consider that the subjects were wholly unsuitable for residential development.

Aberdeenshire Council granted the CAAD for retail development. The LTS saw no reason to doubt that the Council would have reached the same conclusion on the actual application for planning permission in a no scheme world.

The acquiring authority challenged the grant of the CAAD and it was cancelled. The LTS had to consider the element of 'hope value' as a consequence.

The changes introduced by section 232 of the 2011 Act in England do not apply here. The assessment of compensation differs markedly north and south of the Border[19]

You ask:-

> Should there be a time limit for applying for a CAAD following the making of the CPO and, if so, what should that limit be?
>
> (Paragraph 14.6)

Comments on Proposal 98

We understand that it is 6 years from the GVD, which seems reasonable.

You ask:-

> Do CAADs currently provide sufficient information and, if not, what further information should they provide?
>
> (Paragraph 14.12)

Comments on Proposal 99

We believe considerable changes should be made to the current CAAD provisions. CAAD applications should not be considered to be a full planning application.

At present CAAD applications are restricted to land acquired and does not extend to retained land. This enables an acquiring authority to argue that development outside the acquired land is mainly to be valued on a "hope" basis. Based on the LTS decision (in our case this would be 20% of development value).

You ask:-

> Provision along the lines of section 30(2) of the 1963 Act should be included in the proposed new statute and should apply to statutory planning assumptions as well as to CAADs.
>
> (Paragraph 14.19)

Comments on Proposal 100

We do not agree with this proposal.

[19] See paper by R L Martin QC to the CPA Scottish National Conference 24th October 2012.

You ask:-

> When an acquiring authority are considering a CAAD, the proposal to acquire the relevant land, and the underlying scheme, should be assumed to be cancelled at the time when the CPO is first published, with no assumption to be made about what may or may not have happened before that date.

(Paragraph 14.30)

Comments on Proposal 101

We support this proposal.

You ask:-

> The cancellation assumptions in relation to CAADs should be set out expressly in the proposed new statute.

(Paragraph 14.30)

Comments on Proposal 102

We support this proposal.

You ask:-

> The same cancellation assumptions should apply to consideration of all potential planning consents, including CAADs.

(Paragraph 14.30)

Comments on Proposal 103

We support this proposal.

You ask:-

> Should the relevant date for determining a CAAD be linked to the date for cancellation of the scheme for the valuation of planning assumptions?

(Paragraph 14.31)

Comments on Proposal 104

We do not agree with this proposal.

You ask:-

> Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?
>
> (Paragraph 14.33)

Comments on Proposal 105

We consider that any right of appeal should be limited to the landowner as they are the ones where property rights are being extinguished.

You ask:-

> Should there be any change in the current (one month) time limit for appealing against a CAAD?
>
> (Paragraph 14.36)

Comments on Proposal 106

If there is a right of appeal the time limit should be extended to 3 months, to give proper time for meetings to be convened etc. This is the time allowed for an appeal against a refusal of planning permission.

You ask:-

> Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?
>
> (Paragraph 14.53)

Comments on Proposal 107

Where the promoter of a scheme is a Government department, the Reporter is employed and paid by another government department and the appeal is to the Scottish Ministers, there is a perception of a conflict of interest.

In the light of the LTS decision in *Strang Steel –v- Scottish Ministers* the Law Commission should not be surprised at our very strong view in favour of such a proposal since the Scottish Ministers cannot be seen to be a disinterested party in a scheme promoted by themselves. It is difficult to escape the fact that we suffered an injustice as a consequence of this anomaly between CAAD procedures and a planning decision.

There appears to be no good reason for an acquiring authority to have such a right of appeal when it would not in respect of a planning application (save in respect of judicial review).

Any appeal should be to the LTS since a CAAD is a valuation tool.

You ask:-

> If so, should the inquiry procedure before a DPEA reporter be retained, with the reporter reporting to the LTS rather than to the Scottish Ministers?
>
> (Paragraph 14.53)

Comments on Proposal 108

We would agree with this proposal if it were felt necessary to allow the acquiring authority a right of appeal but a SPEA Reporter is not entirely independent in that they are instructed and paid ultimately by their Ministers.

This gives rise to a perceived conflict of interest.

A *perceived* conflict of interest is a situation which a reasonable person would consider likely to compromise objectivity. A *potential* conflict of interest is a situation which could develop into an actual or perceived conflict of interest.

The integrity of the individual Reporter is not in question here. It is necessary for the standing of the individual and the CPO process that members of the public have confidence in the independence and impartiality of any appeal procedure.

Where the Scottish Ministers are the confirming body and the acquiring authority and a CAAD results in increased costs for the acquiring authority there is clearly a potential conflict.

You ask:-

> Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?
>
> (Paragraph 14.64)

Comments on Proposal 109

We support this proposal.

You ask:-

> Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?
>
> (Paragraph 14.64)

Comments on Proposal 110

We consider there is still need for a CAAD process to allow an accurate compensation assessment.

You ask:-

> In any event, should the same criteria be applied in relation to all relevant planning assumptions?

(Paragraph 14.64)

Comments on Proposal 111

We support this proposal.

Chapter 15 Consequential loss – retained land

The EIA acknowledged that the land take in respect of Field 52 would leave other land in our ownership landlocked. Upon service of the GVD we served notice of severance.

An issue in respect of the subsequent valuation dispute was that compensation in respect of agricultural severance land is to be assessed on the basis that there is no permission for development in terms of section 50(5) of the 1973 Act. This provides that the compensation payable in respect of severance land following the acceptance by an acquiring authority of a counter-notice under sec 49, is to be assessed on the assumptions mentioned in section 5(2), (3) and (4) of the 1973 Act. Section 5(4) is in the following terms:-

> *"It shall be assumed that planning permission would not be granted in respect of the relevant land or any part thereof for any development other than such development as is mentioned in subsection (2) above; ..."*

Provision is made in terms of section 50(3) for recall of the notice:-

> *"at any time before the compensation payable ... has been determined by the Lands Tribunal or at any time before the end of six weeks beginning with the date on which compensation is so determined".*

As a consequence of this drafting we would not have obtained full value had we proceeded with the severance notice. The notice was therefore withdrawn.

As a result of us not having disposed of all of our holding in this way we were not entitled to various tax reliefs which would otherwise have been available.

You ask:-

> The statutory definition of retained land should continue to be based on the effect of the acquisition on that land and not merely on the physical proximity of the retained land to the acquired land.

(Paragraph 15.18)

Comments on Proposal 112

We support this proposal.

You ask:-

> The proposed new statute should provide that the assessment of compensation for severance or injurious affection should be carried out on a "before and after" basis.
>
> (Paragraph 15.25)

Comments on Proposal 113

There are two main methods of assessing disturbance: -

- "before" and "after"
- Value land acquired on open market basis and the diminished value of the retained land.

The latter is used where the parts are used for different purposes and/or land development potential for different uses.

Both should be retained.

You ask:-

> Claims for injurious affection should be assessed as at the date of severance.
>
> (Paragraph 15.37)

Comments on Proposal 114

The claims should certainly be at the date of severance, but should be able to take account of factors only known about after the date – say a planning permission refused or granted. We would perhaps disagree that it would be to the disadvantage of the landowner to defer the date, as it would be more likely to get the correct result. If less damage to the owner, then less paid out, and it would be more certain.

You ask:-

> Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.
>
> (Paragraph 15.44)

Comments on Proposal 115

We agree with the Law Commission's comment at 5.40 that:-

> *'compensation for injurious affections will not cover loss of profitability of the retained land or the costs incurred by the claimant in terms of remedying the*

detriment caused to the land by the compulsory acquisition.'

We agree with this proposal provided loss of profits etc as noted are clearly and expressly dealt with elsewhere.

You ask:-

> The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.
>
> (Paragraph 15.49)

Comments on Proposal 116

We do not agree with this proposal - it leaves the acquiring authority too much scope to underspecify works such as fences.

You ask:-

> Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?
>
> (Paragraph 15.59)

Comments on Proposal 117

The rules pertaining to betterment are confused and inconsistent. From other cases we have heard about on the AWPR they are being used by the DV to counter any claim by affected parties for the market value of their property.

You ask:-

> The provisions which require any betterment to the retained land to be set off against any compensation paid to the landowner in respect of the acquired land should be repealed and not re-enacted.
>
> (Paragraph 15.70)

Comments on Proposal 118

Agreed, this makes sense given that neighbouring landowners who do not have land acquired may benefit from the scheme with no set-off.

Chapter 17 Non financial loss

As a family we suffered a considerable degree of strain as a consequence of the CPO. My father's stroke was, we believe, caused by the stress induced by the CPO and the Public Inquiry. The CPO process does not recognise the stress caused to affected parties by the forcible acquisition of property. In our experience this is compounded by the attitude of acquiring authorities and their agents in the process who resist sensible alternatives and mitigation measures and fight claims for compensation. That strain remains in that most major schemes are design & build, meaning that having promoted and obtained the CPO, an acquiring authority hands it over to a developer to build. That developer will have tendered the lowest price for the scheme and will be attempting to make savings throughout. It is our experience that the acquiring authority attempt to abrogate their responsibility to the contractor which leads to more work and hassle.

You ask:-

> Should the provisions relating to farm loss payments be amended so as to be more flexible and less onerous on the agricultural landowner?
>
> (Paragraph 17.28)

Comments on Proposal 141

There are significant issues regarding assessment of farm loss payments:-

- farm loss payments on the basis of average annual profit from the use of the land for agricultural purposes. This could be problematic after a few poor years, or where there is significant non-agricultural income.
- deduction of imputed rent figure, whether or not the farm is rented. Again problematic.
- if the land acquired is worth more than that given up, the farm loss payment will be reduced by that amount. This seems unreasonable.

We consider that there is justification of an additional premium based on a percentage of market value to be paid in CPO situations as is the case in other jurisdiction.

You ask:-

> The proposed new statute should provide for two supplementary loss payments, one for home loss, and one for farm loss, which would, in each case, compensate for all aspects of non-financial loss arising from compulsory purchase.
>
> (Paragraph 17.33)

Comments on Proposal 142

Yes, would simplify matters significantly and minimise disputes. We see no reason however why this should be confined to home and farm and not extend to other cases. Business loss is payable since 2003 in England but similar legislation was not enacted in Scotland.

We consider there is a strong argument for a premium over market value to be paid in CPO situations which may contribute to a more streamlined process.

Chapter 18 Process for determining compensation

A 90 day notice was served on the Acquiring Authority on the 31st January 2013.

On the 8th April 2013 Transport Scotland gave notification of the DV's assessment of our claim and requested bank details etc. On the 27th April they acknowledged they had all the requisite details and we were paid £45,900 on the 1st May 2014 (being 90% of the DV's assessment of the claim of £51,000). There appears no good reason why any acquiring authority should not put procedures in place to ensure payment is made timeously – we know that this has been an issue elsewhere on the AWPR.

The DV assessed the claim purely on agricultural value. He was made fully aware of our position in respect of hope value having been provided with information from our planning advisors by email on the 16th March 2013. At a subsequent meeting on the 3rd May 2013 to discuss the claim the DV expressed the view that there was hope value and that his understanding of the planning situation from Transport Scotland's planning advisors, Jacobs, that led to his valuation of £51,000 was incomplete and incorrect. He indicated that he would be independently investigating the matter with the planning authorities. He failed to do so.

The DV's assessment of value was £51,000. He had been given market evidence of higher agricultural land values at the meeting of the 3rd May 2013 but not revised his opinion as to value despite promising to do so until a meeting with our agents on the 9th June 2014 when he agreed £70,000 based on £7,500/acre for the arable land and £2,500/acre for the woodland (to include timber). We understand that there may have been issues with the DV obtaining instructions from Transport Scotland but, whatever the reason, there appears to be no incentive on an acquiring authority to deal timeously with claims.

At the LTS the DV gave evidence that there was no hope value whatsoever despite being aware that a considerable non-refundable deposit had been paid by Sainsburys as part of the missives for sale. This brings into question the impartiality of the VOA.

Even after the award delays incurred because Transport Scotland failed to deal timeously with the claim. There is simply no incentive for them to pay timeously with interest at less than base rate.

You ask:-

> Should it be made clear, in the proposed new statute, that a six-year time limit to claim compensation runs from the date of vesting (or from the date when the claimant first knew, or could reasonably have been expected to have known, of the date of vesting)?
>
> (Paragraph 18.22)

Comments on Proposal 146

This would seem reasonable.

We consider that it is not always possible to determine the extent of a claim until a scheme is completed and it might be better to consider a period of 6 years from a date of 'declared completion'.

You ask:-

> Should it be made clear, in the proposed new statute, that the same time limit operates for any claim of disputed compensation, regardless of whether it follows a notice to treat or a GVD?
>
> (Paragraph 18.22)

Comments on Proposal 147

We agree that standardisation would assist.

You ask:-

> What, if any, changes should be made to the time limit to claim compensation?
>
> (Paragraph 18.23)

Comments on Proposal 148

We consider there should be a single CPO system.

You ask:-

> Should the LTS be given discretion to extend the time limit in some circumstances?
>
> (Paragraph 18.23)

Comments on Proposal 149

We consider discretion to extend the time limit will lead to extensions becoming the norm. We do not support this proposal.

You ask:-

> Should the current rules on expenses be amended to allow the LTS a wider discretion to award claimants all of their reasonable expenses in some situations, even if they are ultimately awarded a smaller sum than had been offered?
>
> (Paragraph 18.26)

Comments on Proposal 150

This proposal would follow the provisions of the 2010 Act which, under Rule 62 of the Scottish Arbitration rules, requires the Arbitrator when making an Award of expenses to have regard to the principle that expenses should follow a decision made in favour of a party except where this would be inappropriate in the circumstances.

The principle for the exercise of such measure of discretion were set out by Lord Woolf in the English case of *AEI Rediffusion Music Ltd –v- Phonographic Performance Ltd*[20] approving an earlier judgement by Nouise LJ in *Re Elgindata Ltd No2*[21]. These are:-

a) *Costs are at the discretion of the Courts.*

b) *They should follow the event except where it appears to the Court that in the circumstance some other order should be made.*

c) *The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs.*

d) *Where a successful party raises issues and makes allegations improperly or unreasonably the Court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs.*

The Court of Appeal in England has recently held that the burden of proof is on the unsuccessful party to show that there should be any departure from the general rule that costs follows success[22], the fundamental principle being that any departure is not justified unless it had been shown that the successful party had acted unreasonably and added to the costs of the dispute.

We believe that this should be enshrined in legislation regarding costs.

You ask:-

> Should provision be introduced to allow the LTS to make an order at an early stage, to limit the expenses of a claimant in appropriate cases?
>
> (Paragraph 18.27)

Comments on Proposal 151

This would follow Rule 65 of the Scottish Arbitration Rules.

The wording of this question is however of concern. It suggests that claimants are being unreasonable in their representation which is not our experience.

In the PI the AWPR team comprised a team of professional advisors led by Senior Counsel. Faced with such, any affected party has to seek adequate professional representation to stand a reasonable chance – the same is true in respect of compensation claims.

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[20] [1999] 1 WLR 1507
[21] [1992] 1 WLR 107
[22] *Halsey –v- Milton Keynes General NHS Trust: Steel-v- (1) Joy (2) Halliday* (2004) (LTL 11/5/2004) EWCA (Civ) 576 CA (Civ Div)

You ask:-

> There should be a prescribed form to claim an advance payment.

(Paragraph 18.29)

Comments on Proposal 152

No, as this may unfairly rule out claims not following such format.

If however such a measure is introduced, the acquiring authority must be under a clear obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form.

The courts must also be given some discretion in determining claims which do not strictly follow the prescribed format.

You ask:-

> Are there circumstances in which an acquiring authority should be required to make an advance payment before taking possession?

(Paragraph 18.31)

Comments on Proposal 153

In our situation we were not able to serve a blight notice (as it was development land rather than agricultural land) and so was precluded from raising funds until the GVD had been issued, it would have been fairer for a payment to have been made sooner if requested.

You ask:-

> Should it be competent for the LTS to provide an enforceable valuation figure for an advance payment?

(Paragraph 18.33)

Comments on Proposal 154

We consider that such a procedure would be cumbersome and by the time LTS make an order, it might be irrelevant and a waste of all parties' time. We consider it would be better to have some legislative compulsion for realistic advance payments to be made within the due period.

The response to a 90 day notice is a good indication to any claimant of the stance of the acquiring authority in respect of compensation. It was the failure of the Scottish Ministers to provide a realistic figure in response to our 90 day notice and subsequent failure to amend that stance in the light of information provided that led us to lodge the LTS action.

There is also a potential issue with regard to 90 day notices. There appears to be a view that a landowner has to serve a 90 day notice and that this triggers a review of the compensation payable. Acquiring authorities appear to be under the impression that there is no duty on them to update compensation payments despite a DV increasing his opinion of the compensation claim. This would lead to the ridiculous proposition that an claimant has to raise multiple 90 days notices to obtain realistic advances as a claim progresses. Any new legislation should place a clear duty on acquiring authorities to make advances as a claim progresses (with an appropriate sanction in the event of a failure to do so).

Any acquiring authority should not be surprised (as the Scottish Ministers claimed to be) at any referral of a claim to the LTS if a response to a 90 day notice is inadequate.

We are aware of other cases on the AWPR where landowners are raising LTS actions as a consequence of unrealistic advance payments.

You ask:-

> At what rate should interest be paid on advance payments, and should the acquiring authority be liable for an increased rate if payment is delayed?
>
> (Paragraph 18.34)

Comments on Proposal 155

The statutory interest rate payable has been 0% since 2009 whereas, like most landowners, we incur interest on our overdraft at 3% over base and arrangement fees. A penal rate of interest is essential for the validity of the advance payment process, otherwise why would they pay timeously.

It is for the acquiring authority to ensure that it has proper valuation and payment procedures in place prior to exercising compulsory powers. It is our experience that this simply was not the case in respect of the AWPR despite the time Transport Scotland had to do so. (8 years).

To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that they be required to pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 on any balance outstanding from the date that payment under a 90 day request should have been made.

In the LTS case we claimed the expenses incurred in relation to the CAAD application and the CAAD Appeal Inquiry of £130,233. This expense had been incurred as part of the consequences of properly establishing the compensation due as a result of the CPO. The Scottish Ministers resisted this claim on the grounds that it had been initiated before any compensation had been applied for. The LTS determined that they could make no award for the appeal but found in our favour in respect of the initial CAAD application. The LTS awarded all the costs of the LTS application to us, around £200,000.

Transport Scotland offered compensation for our professional fees on the basis of Rydes Scale plus 25%. Rydes Scale was prepared by the Valuation Office Agency (VOA). In an announcement on 18 July 2002 the Office of the Deputy Prime Minister (ODPM – now DCLG) stated:-

> *'....there is widespread agreement that the archaic Rydes Scale for determining Surveyors' fees should be abandoned and that Surveyors should be reimbursed in full in line with all other professional advisers. We do not therefore intend to commission any further reviews of the non-statutory Rydes Scale, and expect that fees will normally be assessed henceforth on a reasonable basis agreed between the parties'.*[23]

The Scottish Government appeared to ignore calls for a similar statement in respect of CPO fees in Scotland and continued to base all payments on Rydes Scale notwithstanding the anti-competitive nature of that scale.

In 2010 organisations such as the Scottish Arbitrators and Valuers Association agreed scales with other acquiring authorities on the basis of the 1996 Scale (the last one prepared by the VOA) uplifted by 40% (and more recently to Rydes plus 50%) but Transport Scotland insisted on retaining the previous rate of Rydes plus 25% declining to change their basis of assessment.

We understand that the VOA has advised Transport Scotland that Rydes plus 25% is not an appropriate basis for the reimbursement of professional fees. Notwithstanding this the Scottish Ministers are only offering landowners reimbursement of professional fees based on Rydes Scale with a 25% uplift notwithstanding any agreement between affected landowners and their agents. DV's, notwithstanding their impartial role, are following this line. At the LTS hearing we did not pursue this issue because of the time of so doing and as a consequence were only reimbursed professional fees on this basis.

This illustrates the attitude of acquiring authorities in the CPO process which has brought the current system into disrepute.

In drafting recommendations and legislation for a revised CPO regime the Law Commission should clearly state the obligation for the reimbursement of professional costs.

You also ask:-

> Should the LTS have discretion to:
>
> (a) provide for interest from a date earlier than its award, and
> (b) increase the rate of interest where it finds that there has been unreasonable conduct by an acquiring authority?
>
> (Paragraph 18.38)

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[23] http://www.voa.gov.uk/corporate/Publications/Manuals/LandCompensationManual/sect5/c-lc-man-s5-pt2.html

Comments on Proposal 157

Like many fellow landowners affected by the AWPR, Transport Scotland failed to deal with our 90 day notice timeously. Notwithstanding the LTS decision, Transport Scotland still have not settled the claim at the time of writing, despite the fact that the judgement was issued in October 2014 and all outstanding matters have been resolved. There is no incentive for them to do so.

Where the conduct of an acquiring authority has failed to comply with such a notice then it is reasonable that a higher interest rate prevail.

Notwithstanding any statutory basis of interest the legislation must not rule out any entitlement for a claimant to seek a higher rate interest as part of a disturbance payment if that is what he suffers as a consequence of the Scheme. It is currently argued by DVs that such a claim is incompetent because of the existence of the statutory rate notwithstanding the fact that claimants may be incurring bank costs well over such interest rate provisions, such as arrangement fees and bank charges..

You ask:-

> What are the advantages and disadvantages in resolving disputes in compulsory purchase cases by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 158

ADR may be cheaper than the LTS and may be suited for lower value claims.

You ask:-

> Can consultees provide evidence of costs incurred in relation to resolving disputes by (a) ADR, and (b) a reference to the LTS?

(Paragraph 18.50)

Comments on Proposal 159

Our costs for taking our claim to the LTS were around £250,000. The Land Accountants have also advised that our legal costs in formulating our account are not reclaimable, a further cost of seven thousand pounds, our award of expenses circa £200,000. The judicial scale of expenses is lower than lawyers currently charge so a further cost to the affected party.

Chapter 19 Crichel Down Rules

The Scottish Ministers in our valuation dispute sought to ransom any potential supermarket on Field 52 by virtue of land which the Secretary of State for Scotland acquired from our predecessors in title for the purposes of the A92 Stonehaven Bypass.

It is therefore now clear that landowners need to consider carefully the extent of any land take in a CPO in that any excess may be used to create a ransom at some point in the future. I understand that this is already a point of contention in other AWPR land acquisitions.

To a certain extend such an issue could be addressed in modifications to the Crichel Down Rules

You ask:-

> Should the Rules for giving former owners of compulsorily acquired land a right of pre-emption, where the land is no longer required for the purpose for which it was purchased, be placed on a statutory footing?

(Paragraph 19.5)

Comments on Proposal 160

Yes, avoids the disputes noted in the text, we believe this should be nominal value to encourage Acquiring Authorities to properly assess their actual need in respect of any CPO.

You ask:-

> Should the Rules apply to all land acquired by, or under threat of, compulsion?

(Paragraph 19.9)

Comments on Proposal 161

We believe this would be fair and reasonable.

To provide that this would only be in the case of land acquired compulsorily could lead to a requirement for affected landowners having to resist CPO's in order to have such protection.

You ask:-

> Should the obligation to offer back land continue to be limited to cases where the land has undergone no material change since the date of acquisition?

(Paragraph 19.11)

Comments on Proposal 162

"Changed in character" is a very subjective test made even more difficult by the expiry of time.

In our case plans of the 1982 land-take show that a wide strip was taken to the field access west of the road itself. The land was regraded to adjust levels in order to allow the road to be constructed. A track now exists, providing access from the B979 to Field 52 (which would otherwise have been landlocked by the scheme. The track was constructed over this land at the expense of the Scottish Office as part of accommodation works carried out following the 1982 CPO. These accommodation works were referred to in a 1984 receipt by the Sluie Trust (our predecessors in title) in favour of the Secretary of State.

Even in cases where the land has changed in character, such as having buildings, dwellings or trees planted upon it should be offered back. There may be a very good reason for a landowner to be able to have back land taken for mitigation works etc.

You ask:-

> Are the current provisions setting out the interests which qualify for an offer to buy back land satisfactory?
>
> (Paragraph 19.12)

Comments on Proposal 163

We do not consider these to be satisfactory.

At the moment we understand that surplus land is offered to other Government departments or to conservation bodies before being offered to the successors of those from whom it was acquired.

You ask:-

> Should the same time limit apply in relation to the obligation to offer back land, regardless of the type of land acquired, and how long should that time limit be?
>
> (Paragraph 19.15)

Comments on Proposal 164

We would support a limit to ease administrative burden but this should be 20 years.

You ask:-

> Should a time limit be introduced for land purchased between 1 January 1935 and 30 October 1992?
>
> (Paragraph 19.15)

Comments on Proposal 165

See above.

You ask:-

Should the seven exceptions to the obligation to offer back, currently provided for in the Rules, be retained and are there other exceptions which should be included?

(Paragraph 19.16)

Comments on Proposal 166

There should be no exception but there should be an obligation on the acquiring authority in respect of the process of declaring land surplus to requirements.

You ask:-

Should the special procedure in paragraph 23 of, and Annex 1 to, the Rules, relating to the obliteration of boundaries in agricultural land, be retained?

(Paragraph 19.17)

Comments on Proposal 167

This should be retained.

You ask:-

Do time limits in the current Rules to carry out the process to offer back land operate satisfactorily?

(Paragraph 19.21)

Comments on Proposal 168

This does not appear unreasonable.

You ask:-

. Should clawback provisions in terms of the development value of surplus land be time limited and, if so, to what extent?

(Paragraph 19.24)

Comments on Proposal 169

No time limit should apply. The acquiring authority should not gain financially and there should be no limit to clawback. Surplus land should be returned to the landowner if not used for the scheme.

You ask:-

> Should the proposed new statute provide that any tax liability which the landowner incurs as a result of the compulsory acquisition may be recoverable under the head of disturbance?
>
> (Paragraph 20.27)

Comments on Proposal 176

Yes. A landowner normally has a choice of when to dispose of property and the tax regime will influence such a decision. Where land is acquired compulsorily a landowners has no such option and this should be taken into account in assessing disturbance.

In our case because of issues in respect of notice of severance discussed above we may lose the opportunity to claim Entrepreneurs relief.

In addition, taxation needs to be amended such that rollover relief extends to investment in a building on remaining land.

As both a landowner, farmer and chartered surveyor, having gone through this process, I believe I am uniquely placed to comment on the current CPO provision.

There should be a one system arrangement for the process incorporating the fundamental democratic rights to object; the process must recognise private property and human rights.

The use of CPOs should be strictly controlled and any CPO process should be properly carried out with due regard to those affected by the scheme. An acquiring authority should not be able to abrogate its responsibility to private firms and there must be sanctions for non-compliance.

There should be a flexible and sympathetic compensation regime, recognising the problems arising between claimants and acquiring authorities inherent in the existing process. A premium over and above market value for land acquired would go a long way in breaking down the current antagonistic attitude towards schemes for those affected and would make the system smoother and easier.

I would be happy to meet you or your colleagues if you wish me to expand to elaborate on any of the issues raised in the consultation response.

Yours faithfully

David Strang Steel