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Dear Mrs Galloway

Consultation on Reform of the Compulsory Purchase Regime in Scotland

As a family we have owned and farmed land in Kincardineshire for over 100 years. We write as landowners recently affected by a compulsory purchase scheme, albeit a CPO of rights under the Gas Act 1986 (as amended by the Gas Act 1995 and the Utilities Act 2000). Over the years we have had other experience of CPO powers being invoked by Transport Scotland, electricity and telecoms operators as well as Scottish Water over our property.

In October 2002 Bell Ingram, a firm of land agents acting on behalf of National Grid (NG – then Transco), unannounced, approached us in order to reference a pipeline route. Bell Ingram was unable to confirm the exact route in that alternatives were being considered by NG at the time. They merely indicated that a pipeline might go through our farm. NG were there and then we were planning to build a wind farm, however this was not heeded.

We sought details of the proposed routes from NG. We were told that two routes were under investigation and plans were enclosed in a letter dated 11th March 2003.

Less than a month later, on the 8th April 2003, A Reynolds of Bell Ingram wrote to us seeking signatures on formal consents for one of two routes. By letter of the 17th March 2003 we reiterated our request for further information and were informed in a letter from Bell Ingram on the 20th March 2003 that plans for the routes were still "evolving"; clearly this draws into question why we should have been asked for a formal servitude at this stage.

We received a compulsory purchase order (CPO) for a heritable and irredeemable servitude across our property on the 15th July 2003. Section 9 (3)(a) and Schedule 3 Parts I and III of the Gas Act 1986 (as amended by the Gas Act 1995 and the Utilities Act 2000) (the 1986 Act) empowered National Grid to acquire interests in land by the exercise of compulsory acquisition powers.

At previous meetings with National Grid our agents had made it clear that our intention to develop a wind farm on the line of the pipeline. By letter dated 8 August 2003 we formally intimated an objection to that portion of overall route that crossed our property because of its effect on the existing land use and the potential threat to the future development of the property.

With such CPO powers to hand, and the expense of legal or other representation not being a cost that can be recovered from the acquiring authority and the Environmental Impact Regulations that accompany such sizable schemes, the burden of questioning the reason of a particular route makes it virtually unfeasible for an alternative to be fully considered without great financial risk and the uncertainty of a Public Inquiry.

The Scottish Ministers granted the CPO on 2nd June 2004 following the Inquiry in which the Reporter had found, in view of their evidence, that NG had "…*demonstrated a clear and immediate need in terms of its licence obligations to increase the capacity of the existing system*." This statement should be considered in the light of criticism of the need for the scheme by the industry regulator Ofgem shortly thereafter.

In the event the pipeline was only built as far as Lochside near St Cyrus where that the pipe connects with an existing gas pipeline. The planned route further south was at some point cancelled by NG. NG had not acted in good faith and had both mis-led and mis-informed the Reporter about an earlier decision by shippers to land the gas by a pipeline from Norway to England instead of Scotland which had been made well over a year before the Public Inquiry. The Scottish Ministers likewise failed to investigate such a key component to prove the need and would or should have had access to such strategic information; however we as landowners did not. The burden to prove a need for a scheme before confirmation of a CPO for taking of lands or rights over lands should be greater and a means to compensate in the event that a CPO scheme fails or is cancelled before entry is taken. We subsequently applied for planning consent for a reduced wind turbine project in May 2006 as a result of the constraints imposed by the pipeline. A positive CAAD was obtained in respect of the servitude strip, however the process was delayed by NG who wrote to the planners that they wished the planners to consider the CAAD decision after a planning appeal made to the DPEA. Once granted the CAAD itself was then subject of an appeal raised by NG which they later withdrew.

The construction work on the wind farm commenced in Spring 2011 and the four Siemens SWT 1.3MW turbines were erected in January 2012and came into production in March 2012.

We are clearly entitled to compensation for losses arising out of the laying of the pipe and these fall to be assessed as at the valuation date (7th June 2004), being the date of entry. NG was fully aware of the proposed wind farm on Clochnahill as is evident from the Reporter's findings at the Public Inquiry yet they claim that they were unaware of the turbine issue.

A claim was lodged in the Lands Tribunal on 4th June 2009 and sisted to allow agreement to be reached and to enable us to gather data on the income generated by the built turbines because of the requirement to prove our loss.

It is understood that NG's position in respect of the heads of claim relating to lost turbines is that £nil compensation is payable. The agricultural disturbance claim has been agreed between our agents and Messrs Bell Ingram acting for NG since September 2014.

Notwithstanding this, NG has made no attempt to resolve the outstanding issues. A formal notice in terms of Section 48 of the Land Compensation (Scotland) Act was served on NG on 24th October 2014 by recorded delivery. There has been no response to this notice; this despite David Harper MRICS FAAV, a senior surveyor for NG, in an email dated 26th February 2015, stating that this would be dealt with. The claim is now preceding as a consequence of the acquiring authorities failings in this regard.

You will understand therefore why we consider the current legislation to provide inadequate protection for landowners affected by such powers and welcome reform.

As the legislation stands, a landowner "sells" his property for a scheme for an unknown sum, payable at some indeterminate date in the future with no interest payable on that sum until settlement. What property owner would allow such a situation in the real world?

Furthermore in our experience with the gas pipeline the pipeline operators use a 'CPO gun to your head' approach with regard to the 'forced' signing of 'standard Deed of Servitudes' which they claim are non-negotiable and seek rights far beyond the rights granted by statue to gas transporters such as NG. Again this is something that was not understood by the Reporter at the Public Inquiry in our case as the rights can only be conveyed by means of a Schedule A which itself is not in a strict legal form of a servitude. There is a misconception led by acquiring authorities that as all other landowners sign up it must be fair and reasonable. That is quite simply not the case. It is the CPO process and cost implications that mean that landowners cannot 'risk' being treated fairly as expert and legal costs out way many potential claims. If the system was fair then many more would and should be able to challenge the settlement offered and terms. It appears that the Tribunal system itself is barrier because of the legal and expert costs and preferred procedural method that becomes entrenched in to the mind sets of the lawyers etc. and quite obvious simple wish to reduce the workloads of the Tribunal. If the system was operating correctly clearly landowners should not fear it, there would be more challenges by the simple law of averages as it stands now it is like a flip of the coin and the coin has 'tails you loose' on both sides. The overriding principle is that it should be fair and no more rights sought by acquiring authorities than provided for under statue.

We have tried to respond to the specific points in your consultation paper where we have strong views or comments on the issues raised.

3. *Should the general power to acquire land compulsorily include power to create new rights or interests in or over land?*

Comments on Proposal 3

Whilst we accept the need for this, we agree with your comments that acquiring authorities attempt to impose conditions as part of servitudes. This is an issue of concern in any widening of current powers.

It is our experience that operators such as NG seek servitudes over a limited width albeit the effects of the rights being granted are far greater than the servitude width.

In their literature and in letters to affected landowners NG attempt to impose on landowners a requirement to contact them in respect of digging near the pipeline (not just over the servitude area). They even seek to charge for works undertaken to protect the pipe.

There is a causal link between the presence of the pipe in the land and planning restrictions imposed via the HSE. This restrictive zone is determined by the thickness of the pipe and the pressure of the gas; both of which are controlled by the acquiring authority. In our case the consultation zone led to the inability of us to construct turbines within a distance greater than the CPO servitude width of 24.4m.

You will note that the recent need to move the concert T in the Park from Balado Airfield in Kinross was as a consequence of safety issues arising from the presence of BP pipe installed under CPO powers.

Clearly these rights need to be set out in the CPO conveyance document in such a manner that the rights are as granted by statute and cannot be increased or permit change of use

etc. Likewise it is not acceptable for governments or licencing authorities to create by provision of later statute changes to increase change or add on a use to a CPO acquired right as there is no provision for further compensation after the CPO claim procedure is agreed. That is not fair as an additional burden is created on the land in question which is simply 'stolen by statue'

4. *What comments do consultees have on the relationship between the compulsory acquisition of new rights or interests in or over land and general property law?*

Comments on Proposal 4

We are aware that electricity undertakers frequently seek CPO rights for electricity cables (e.g. for offshore wind farms) where less intrusive powers exist (necessary wayleave procedure). The CPO route is sought by cable operators in preference to necessary wayleaves solely because they are selling on any rights they acquire for monetary gain.

If the general power to acquire new rights or interests in or over land are to be included, there should be a general duty on an acquiring authority to use the least intrusive mechanism available, in effect enshrining in law the comment at paragraph 3.4.2.

5. *Would a general power to take temporary possession, as described in paragraphs 2.71 to 2.73, be useful for acquiring authorities, and, if so, what features should it have?*

Comments on Proposal 5

Temporary rights were granted in the NG servitude imposed on us which were time limited to five years, yet the Schedule A conveyance does not have provision for such an important element. The 5 years temporary occupation rights itself was over and above the required need and places the landowner unnecessary disadvantage The Scottish Ministers should make it their scope to establish and only confirm a CPO temporary rights for a minimum necessary period.

In exercising such rights it must be made clear in what state the land is to be returned to the landowner as well as the timing as this is a factor in assessing compensation. This was an issue for us in that NG failed to put the land into good agricultural condition before handing it over.

6. *The right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the proposed new statute.*

Comments on Proposal 6

We agree that this should be expressly stated.

11. *Do the powers to survey land, contained in section 83 of the 1845 Act, operate satisfactorily in practice? If not, what alterations should be made?*

Comments on Proposal 11

We understand why all acquiring authorities would prefer to have powers of entry for survey purposes, but that provision itself is a major infringement on landowner rights. It may be the case that that would be more acceptable once a formal need for the scheme had been confirmed but random search areas without the landowner's permission having been obtained is another potential example of 'stolen by statue'. For Acquiring authorities, including those with best intentions they should be required to make good that all loss or damage or failing this it should be paid for by the acquiring authority at the time and no landowner or occupier should be left worse off following exercise of such rights.
In our experience acquiring authorities frequently fail to point out the right to compensation or the ability to engage professional advice to assist in such claims. We consider there should be an obligation on acquiring authorities to point this out.

We consider that a notice period of 28 days would be more reasonable than the current short notice provisions. Survey work is planned some time in advance and a longer notice period should not unduly inconvenience acquirers in most circumstances.

Intrusive survey works, such as the digging of trail pits and boreholes, have a significantly greater impact on the occupier of the land than non-intrusive works. There is a growing tendency of acquiring authorities to carry out such work as a result of many schemes being 'design & build." We therefore suggest that a longer notice period should apply for intrusive works where the surface of the land is disturbed.

Compensation must also include a clear obligation to reimburse landowner's time and any professional fees incurred. In our experience some acquiring authorities claim the statutory right of access but fail to point out the right to compensation in so doing. There should be some mechanism to encourage swift payment otherwise the survey work can be done but the compensation not paid for years, or decades.

17. *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?*

Comments on Proposal 17

In our considerable experience of dealing with acquiring authorities we have not found them to be self-regulating enough to be granted such power. They are obliged to act in good faith

however in reality that is never the case. Many now have shareholders to satisfy and the integrity of acquiring authority cannot be assumed – we have direct experience of this. In theory in our CPO case the need for the NG pipeline to be proven required to satisfy both the Public Inquiry Reporter and the Scottish Ministers - obviously a check did not happen.

It seems wholly unreasonable to grant an acquiring authority the ability to confirm its own CPO because of the perceived conflict of interest. We accept that a democratically elected body should be the confirming authority but as a clear safeguard we consider it important that any enactment should set out an obligation on the confirming authority to act independently and judicially in order to emphasise this process is not merely a rubber stamp exercise.

The procedure of confirmation of CPOs by the Scottish Ministers has given rise to local issues recently. The Public Inquiry for the AWPR was presented with two alternative routes. The Reporter recommended that the Scottish Ministers consider carefully the compensation payable in respect of the AWPR preferred route, as against an Alternative put forward by affected landowners[1]. From evidence led at a subsequent Lands Tribunal hearing in *Strang Steel –v- The Scottish Ministers*[2], it appears that this recommendation was not followed.

Likewise there was considerable surprise at the refusal of the Scottish Ministers to ratify the Reporter's decision rejecting the need for a CPO on the M74 extension.

As landowners to we would look for the acquiring authority to be required to prove the need to a confirm authority before a CPO notice can be made, otherwise it creates undue expense on affected landowners.

Once the need was established the notice could be served but not before, whilst retaining the ability to challenge the CPO. This would insure that only feasible schemes reach the CPO stage. The requirement to prove the need in the Public Inquiry would remain but should not be burden-some if it has already been proved at the Notice stage and would serve as a check that need requirement is still up to date.

19. *An acquiring authority should be able to revoke a CPO.*

Comments on Proposal 19

Yes, but if this occurs it would be reasonable for the acquiring authority to pay any affected party for its costs and time not only in respect of loss arising out of the CPO but also for opposing the CPO. A revoked CPO causes loss to the landowner and the threat of this should be minimised. In our case Ofgem in their rice review process penalised NG for not cancelling the pipeline, when it knew the gas was to be landed elsewhere. At present if this had happened no compensation was payable to affected landowners, clearly that would not

[1] The Reporter's findings are at http://www.dpea.scotland.gov.uk/Document.aspx?id=135841
[2] LTS/COMP/2013/12

be fair and yet statute has no provision for this.

So there is a need for revoke, but applied for to the granting body and there should be a severe penalty to the acquiring authority if it is found to have misled the decision maker in any way to discourage misuse.

20. *Should any conditions be attached to a revocation, so that the acquiring authority cannot initiate the same proposal within a certain period, or without specific consent of the Scottish Ministers?*

Comments on Proposal 20

There is potential for blighting values of an affected property unless such a measure is introduced. We consider that a specified time limit introduced (say 15 years) in which a substantially similar scheme cannot be introduced (to prevent minor changes being introduced as a means of getting round such time limit).

21. *Any person directly affected by the revocation of a CPO should be able to recover reasonable out-of-pocket expenses.*

Comments on Proposal 21

This should be wider to expressly include any objection to a CPO (see above). It would otherwise be unreasonable for an acquiring authority to put landowners to considerable expense etc. as a consequence of their proposal to exercise compulsory powers only for the authority to withdraw.

29. *Should the proposed new statute make it clear those 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?*

Comments on Proposal 29

We are concerned at such a proposal.

There should be clear duties in any new legislation placed upon any acquiring authority in the design and implementation of any scheme which could lead to a CPO. These are necessary so that any acquiring authority and its agents properly carries out appraisals for alternatives before promoting any scheme and properly assesses impact on affected parties. It is our experience that this is necessary because of the difficulties faced by an affected party at public inquiry in raising alternatives. Such a measure should ensure that at the stage of implementation only properly researched and developed schemes arise. In turn this is likely to mean that savings are likely in public inquiries etc.

In our case it appears that NG promoted the CPO before a Reporter notwithstanding the fact

that, at the time of the CPO hearing, there were issues regarding its necessity. The EIA was dated September 2003 a few months after the CPO Notice was given.

Ofgem criticised the building of this pipeline in their Transmission Price Control Review (TPCR4), having commissioned a technical report by TPA Solutions; Efficiency Study and Forecast of the capital programme for the period 2002/3 – 2004/5. In their findings of September 2006 Ofcom stated:-

- *TPA believes that, whilst there was a Business Case in December 2002 for the £58m investment for the Aberdeen-Lochside pipeline, with a justification solely on the basis of avoiding buy-back costs in Summer 2005, within two months of the December 2002 Project Approval that case had been significantly weakened as a result of two developments in January 2003 – the absence of St Fergus auction signals and the decision to land Ormen Lange gas at Easington rather than St Fergus. TPA believes that National Grid should have raised these fundamental changes in assumption with Ofgem in Q1 2003 with an outcome that this project should have been cancelled and additional investment focused on Easington.*

- *Further, it appears likely that the £169m capacity expansion programme to increase St Fergus peak capacity from 140-160 mcmd between 2002 and 2005 (St Fergus to Aberdeen pipeline, Aberdeen to Lochside pipeline, pipe uprating and 45 MW increase in power at Bathgate/Avonbridge) will have limited future utilization due to Ormen Lange landing at Easington and the forecast (at the time) decline of UKCS in the sector supplying St Fergus. The maximum flow of 145 mcmd was reached in 2004/2005 and this is still below the level of capacity, 147.5 mcmd, prior to Aberdeen to St Fergus, Avonbridge (expansion part), Aberdeen to Lochside and associated uprating projects.*

- *TPA believes that more consideration should have been given to the cancellation of this project in Q1 2003. It could have been cancelled at a cost of around £4m. TPA believe that National Grid and Ofgem should have discussed the issues associated with Ormen Lange and summer capacity / buy-back in February 2003 and the project probably should have been cancelled at that time.*

As a consequence of their findings in this regard Ofgem have disallowed the capital expenditure on this pipeline in respect of the gas pricing regime.

The CPO was served by NG in July 2003 (Q3). Despite the issues identified by Ofgem in respect of the need for this pipeline set out above, the Board of National Grid took the decision in 2004 to pursue compulsory purchase powers against us in respect of rights over Clochnahill and asserted the necessity for the pipeline at the Public Inquiry at a time when the relevant industry regulator has found otherwise.

There is evidence of acquiring authorities exercising CPOs on the basis of poorly researched schemes elsewhere.

The Fochabers bypass was forced through a design landscape to the east of the town. As in

our case when objections were raised to the scheme the Reporter was unable to consider alternatives. The fact that the alternative mooted to the west of Fochabers was practicable is clearly illustrated that it now forms part of the A96 improvements!

The route selection for the Fastlink element of the AWPR was carried out between its announcement in 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 at Stonehaven. The process could not have been informed by an 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 centered on the Fastlink. It is therefore entirely possible that, had the acquiring authority followed proper route selection procedures, Stonehaven and the surrounding community would have had a supermarket and the Scottish Ministers would have saved the cost & time involved at public inquiry and in respect of the subsequent compensation dispute.

30. *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?*

Comments on Proposal 30

There should be a clear duty on any acquiring authority to promote any CPO with due care and diligence. There should be a clear duty on the authorities and any agents involved in a CPO scheme towards those affected by the Scheme and if not the correct procedures are not followed then there should be a clear right for affected parties to claim damages.

PART 3: COMPENSATION

We note the statement at 10.4 that compensation has always been paid in the UK where a Public Authority acquires the property of an individual. Scottish Water appear to be able to acquire rights to lay pipelines through land and pay no compensation for the presence of the pipe in the land, merely the disturbance arising from installation. The presence of the pipe does have a diminution in value but Scottish Water point blank refuse to pay for this.

87. *What should be the relevant date for determining whether there is existing planning permission over land to be compulsorily acquired?*

Comments on Proposal 87

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

A new route was chosen for the AWPR in 2006 and given protection by the planning authority. The route affected land (known as Field 52) which was promoted for a

supermarket. In a subsequent compensation claim 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"*[3]. They went on to state *"on the balance of probability* [planning consent] *would have been granted on or before 2009"*[4]. Had this been the case the claimant could have sold the site to Sainsburys for £10.25M and the local community would have the benefit of a supermarket. By the time of the GVD the potential sale price had fallen to £8M. In the event the claimant was awarded only £1.7M based on hope value and we still do not have an adequate supermarket.

It is difficult to see why such planning protection should be allowed to continue. In this context we note the Law Commission deliberations in respect of a Notice to Treat at 7.26 – 7.29, A landowner is prevented from exercising his normal property rights and has no means of obtaining compensation for any losses arising until the CPO is implemented.

We note the Law Commission 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.

On balance we consider that any new legislation should provide that a landowner is free to act on his land as he sees fit until the CPO is implemented. If safeguarding is an issue in the refusal of any planning consent then a landowner should be able to require the authority promoting the scheme to purchase the property at market value (ignoring the effect on the value of the scheme). We consider that there should be a single mechanism and the valuation date should be the vesting date or in the case of Notice to Treat, the date of entry, or if a positive CAAD is granted, then the date of this.

98. *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?*

Comments on Proposal 98

It is considered that an application for a CAAD should be able to be made any time after the draft CPO has been formally promoted and all statutory and non-statutory objectors have been informed of this decision. This is when the acquiring authority giving the "green light" to its scheme.

After a draft Compulsory Purchase Order has been promoted there may be a considerable time lapse until it is confirmed and a vesting date occurs (note the AWPR draft orders in 2007 vesting date 2013).

The process for a CAAD to be determined can also be time consuming as in the first instance careful consideration requires to be given to any such application by the Local

[3] Paragraph 102
[4] Paragraph 109

Planning Authority and that there is currently a right of appeal to that decision that lies both with the acquiring authority and the landowner.

We believe that there should be no time limit on making an application for a CAAD. We do not find it in order that the acquiring authority can input to the deciding authority that they wished the determination to carried out after the planning appeal decision was known.

99. *Do CAADs currently provide sufficient information and, if not, what further information should they provide?*

Comments on Proposal 99

Aberdeenshire Council has not had reason to deal with a CAAD for over 25 years prior to our application in 2006 for a CAAD in respect of the land affected by the pipeline.

Better guidance may be necessary but we consider that the current provisions are workable.

CAAD applications should not be considered to be a full planning application.

The main issue is however that as legislation currently stands a CAAD can only be obtained for the area affected by the scheme (in our case the servitude width although a greater area is impacted). For the reasons set out at Proposal 3 the CAAD we obtained is of limited assistance. The acquiring authority are able to argue that whilst a positive CAAD has been granted for the strip there is only hope value for turbines off the servitude. This is clearly inequitable.

100. *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.*

Comments on Proposal 100

We consider that there needs to be some consistency of approach, and acknowledge that, as noted in 14.18, *'depending on what changes have taken place, this may work to the advantage of one of the parties.'* At least it would settle matters.

The important issue is that a landowner should be free to deal with his property interest as he sees fit up to the valuation date. If the scheme impacts on that use he should be free to require any promoting authority to acquire his interests at that point.

101. *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.*

Comments on Proposal 101

We agree with the Commission's comments regarding the present state of Scots Law in relation to the 2011 Act in England. We are concerned however with regard to the issues that arose in respect of *Strang Steel –v- The Scottish Ministers.*

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

Comments on Proposal 102

We agree clarity is necessary.

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

Comments on Proposal 103

We agree.

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

Comments on Proposal 104

We disagree. The date of valuation for a positive CAAD should be the date this was granted if earlier than the vesting date/or in the case of Notice of Treat the date of entry.

105. *Should the parties continue to be entitled to insist upon a public inquiry when appealing against a CAAD decision?*

Comments on Proposal 105

We have considerable concerns about the operation of section 26 of the 1963 Act.

NG initially sought to challenge the CAAD granted to us.

As illustrated by *Strang Steel –v- Scottish Ministers* a CAAD in respect of what was known as Field 52 was challenged by Transport Scotland on behalf of the Scottish Ministers and overturned. Had this been a planning application no such appeal rights would have existed and as the LTS observed "*there was no reason to doubt that the Council would have granted planning consent*". It is difficult to escape the fact that a potential injustice arose as a

consequence. 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).

We consider that only the landowner of the land subject to the CAAD should be entitled to appeal. We note that this would reflect existing planning legislation.

106. *Should there be any change in the current (one month) time limit for appealing against a CAAD?*

Comments on Proposal 106

We consider the time frame to be tight. It would be logical to tie the appeal date to that in the planning process (i.e. three months).

107. *Should an appeal against a CAAD be made to the LTS rather than to the Scottish Ministers?*

Comments on Proposal 107

Since the Scottish Ministers cannot be seen to be disinterested in any scheme promoted by themselves so this would seem reasonable.

108. *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?*

Comments on Proposal 108

We agree with this proposal. Since a CAAD is a valuation tool this would seem sensible.

109. *Should planning permission, which could reasonably have been expected to be granted as at the relevant valuation date, be assumed to have been granted?*

Comments on Proposal 109

We consider that such planning permission which could reasonably have been expected to have been granted at the relevant valuation date should be assumed to have been so granted.

110. *Where none of the statutory assumptions apply should such planning permission be reflected, for the purposes of valuation, in hope value only?*

Comments on Proposal 110

We agree that there is no justification for the higher test imposed by section 25.

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

Comments on Proposal 111

The same criterion should apply.

112. *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.*

Comments on Proposal 112

We agree.

113. *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.*

Comments on Proposal 113

We are concerned about the drafting of such a provision. Severance and injurious affection should not be confined to capital value as may be implied by the "before" and "after" valuation proposed.

Often injurious affection losses are best considered by a DCF type approach such as in loss of wind turbines on retained land as a consequence of a CPO scheme.

114. *Claims for injurious affection should be assessed as at the date of severance.*

Comments on Proposal 114

We agree that the claims should certainly be at the date of severance and should take into account factors known or foreseeable at that date.

115. *Compensation for injurious affection, properly so called, should be limited to damage caused to the market value of the retained land.*

Comments on Proposal 115

We consider this proposal to be unnecessary restrictive and one which could lead to potential injustice. There is often interlinking between injurious affection, severance and disturbance claims and flexibility is necessary.

In our case the pipeline resulted in the loss of the ability to install two wind turbines out of a six turbine scheme.

A capital valuation on a before and after basis would result in a lower value than an assessment of lost profits because comparable sales reflect risk to a potential purchaser who would have to outlay considerable capital which is not the case for ourselves in our situation – i.e. giving rise to the issues referred to at 15.41.

We consider that the wording of any injurious affection/severance claim should not be restricted to market value but sufficiently wide as to avoid the situation that arose in *Cooke -v- Secretary of State for the Environment*.

116. *The proposed new statute should confer a discretion on an acquiring authority to carry out accommodation works.*

Comments on Proposal 116

In our case NG gave undertakings to the Reporter with regard to accommodation works (ducts for pipes and pipe protection over crossing points) but failed to carry out such works.

Requirements for accommodation works (new accesses, water troughs, fences etc.) are common in agricultural claims.

In practice, because most large projects are design and build and accommodation works are on retained land over which the contractor has no access, claimants are paid for accommodation works.

The issue is that acquiring authorities insist on landowners obtaining multiple quotes etc. giving rise to considerable additional time and effort which they then are reluctant to reimburse and cause undue expense with delay tactics.

117. *Is the current rule, that set-off for betterment applies to land which is "contiguous with or adjacent to the relevant land", satisfactory?*

Comments on Proposal 117

We agree with this proposal.

118. *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.*

Comments on Proposal 118

We strongly agree with this proposal. Betterment gives rise to considerable aggravation.

In our experience the Law Commission's statement at 54 that "*it is for the acquiring authority to establish that betterment has occurred and that the value of the land would not have increased, but for the scheme*" tends to be ignored and betterment is argued on behalf of acquiring authorities without adequate justification.

We are aware from affected farmers on the AWPR that the DV is using examples of betterment set off on the A74 as 'evidence' for the same occurring on the AWPR without reference to the actual planning situation.

Given that neighbouring landowners who do not have land acquired benefit from the scheme

with no set-off, it means that those with land acquired bear a greater burden of funding new schemes.

We had direct experience when the A94 was upgraded to build the A90 dual carriageway. The argument put forth by the roads authority was that the dual carriage way had created betterment as the farm cottages located at the road side would experience only half the amount of traffic noise as the south bound carriage way was further away. In reality what happened that more traffic use the road and the cottages easily experience double the traffic going past if not more.

Betterment is an unproductive argument in CPO compensation.

119. *The assessment of compensation for disturbance should be carried out separately from the assessment of the market value of the property*.

Comments on Proposal 119

Note our comment above in respect of Chapter 15.

In many instances market value and disturbance issues are closely related such as in our dispute. The valuation concept of 'value to owner' is what requires to be clearly established.

120. *There should be an express statutory provision for disturbance compensation*.

Comments on Proposal 120

We agree with this but are concerned that: -

- A claim may fall between the wording of "market value" per proposal 115 and the nature of claim envisaged under this Head.
- The potential for double counting.
- The drafting of these proposals needs to be carefully thought through.

121. *Should the principle of causation in relation to disturbance compensation be set out in the proposed new statute?*

Comments on Proposal 121

Yes, although it might be difficult to do more than to set out an outline in the same way as Lord Nicholls did in *Shun Fung*.

122. *The proposed new statute should make it clear that compensation for disturbance is payable from the date of publication of notice of the making of the CPO.*

Comments on Proposal 122

There may be a disconnect between the date of publication of the notice and the actual acquisition (6 years in the case of the AWPR).

The Law Commission should consider their findings at 16.43 and provide that disturbance should be valued as at the date of vesting with provision for payment of earlier losses where the claimant can establish the same.

123. *The proposed new statute should make it clear that compensation is payable in respect of costs incurred in relation to a compulsory acquisition which does not ultimately proceed.*

Comments on Proposal 123

Agreed, this makes sense. Please note however, our comments in respect of withdrawal of notices.

124. *If compensation for disturbance is to be payable from before the confirmation of the CPO, should it include losses caused as a result of lost development potential?*

Comments on Proposal 124

In many cases the mere threat of compulsory acquisition creates a negative perception of property leading to blight. A potential CPO scheme can and does influence the thinking and policies of Local Planning Authorities (cf the Seagreen influence in the determination for a solar farm scheme at Tealing in Angus – Angus Council planning application 14/00428/FULM).

Any losses caused as a result of lost development potential should form a legitimate heading of compensation.

125. *Should the proposed new statute enable investment owners to claim a wider range of disturbance compensation?*

Comments on Proposal 125

We believe it should include such provision

126. *Do the current rules of compensation for disturbance work satisfactorily where there are issues of corporate structuring involved?*

Comments on Proposal 126

Subject to causation this may seem reasonable but we are aware that the current rules do cause issues with many corporate structures. A claim for compensation should not be restricted due to a prudent corporate structure in place. A flexible approach is necessary.

128. *Should claimants' personal circumstances be taken into account when considering the assessment of disturbance compensation?*

Comments on Proposal 128

We consider this important. Our scheme was not a lease of turbines as is usual but we ourselves developed the wind farm and are the owner operator.

A liberal and flexible approach is necessary. It is our view that "personal circumstances" are relevant to loss under the general head of "disturbance" and should be taken into account.

The circumstances of a claimant are relevant to the options open to him at the valuation date, to his taxation position.

The suggestion for *"compensation for the effect of the compulsory purchase on a person in those particular circumstances"* would seem to somewhat overlap with the '*impecuniosity'* query of the previous question.

129. *Claimants should be under a duty to mitigate loss in terms of compensation for disturbance from the date of publication of notice of the making of the CPO.*

Comments on Proposal 129

This would be unreasonable given compensation may only be payable from the date of entry.

130. *It should be made clear that relocation compensation may be available even where this exceeds the total value of the business.*

Comments on Proposal 130

We agree with the Commission's remarks at 16.92 that the evidential onus is on the party looking for extinguishment of the business and that relocation compensation should be available even when this exceeds the total value of the business.

131. *Should the rules regarding disturbance compensation for the displacement of a business be set out in the proposed new statute and, if so, what, if any, modifications should be made to them?*

Comments on Proposal 131

We agree with the Commission's leaning towards disturbance as very definitely the "default setting" with extinguishment only being a last resort.

We agree with the finding at 6.96 that it is often difficult to assess disturbance compensation until the scheme is complete, especially when relocation of a business is involved.

132. Should the valuation date for disturbance compensation be different from the valuation date in relation to the compulsorily acquired land, in particular where GVD procedure is used?

Comments on Proposal 132

We consider that the valuation date for disturbance compensation should be the vesting date on the basis that there is a single compulsory purchase system. However, this valuation date should not preclude any claimants being able to claim reasonable disturbance compensation that may have been incurred some considerable time prior to vesting i.e. any time after any approach has been made by an acquiring authority subject to the usual causation rules.

133. Should it be made clear, in the proposed new statute, that a claim for disturbance compensation on the basis of relocation of a business will only be determined when sufficient time has elapsed following the relocation to enable the extent of the loss to be quantified?

Comments on Proposal 133

This seems to raise uncertainty regarding when a claim might be payable and when it might be resolved.

142. *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.*

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 payments and not extend to other cases. Business loss is payable since 2003 in England but similar legislation was not enacted in Scotland.

We consider that there is a case to be made for a statutory uplift to market value to be applied to all cases of compulsory acquisition, returning the situation to that which existed before 1919, in recognition of the fact that the seller is unwilling. This model continues to be upheld in some other jurisdictions, including on the Isle of Man where the Acquisition of Land Act 1984 states that the value of land is:

> *"…the amount which the land if sold in the open market by a willing seller might be expected to realise, with an addition of 10 per cent. on account of the acquisition being compulsory"*

We are not convinced that a 10% uplift would be sufficient to remove some of the resistance to CPOs and therefore remove some of the costs involved in forcing through a scheme.

We understand from the workshop meeting we attended as part of this consultation process that Aberdeen University are currently comparing CPO practices across the world. We consider that a study of the cost benefit of such a proposal would provide justification for the level of uplift.

148. *What, if any, changes should be made to the time limit to claim compensation?*

Comments on Proposal 148

There should be consistency with regard to time limits to avoid confusion.

In the vast majority of cases (but not necessarily in each and every case), claimants will be aware that their interest in property has been compulsorily acquired and that there is a right to claim compensation. There should however be a statutory obligation on the acquiring authority to make this quite clear to all claimants.

It is not unreasonable that there should be a time limit within which that claim should be lodged. Accordingly, the time limit should coincide with the six year time limit from the date of vesting/Notice of Treat to lodge an application to the Lands Tribunal for Scotland in the event of disputed compensation. We were faced with this in respect of our compensation claim. We had to lodge an application and then sist proceedings in order to allow us to gather the necessary evidence to support our claim from the performance of the turbines

that we were actually able to install following the scheme.

There may be other occasions where, for whatever reason, a claimant is not aware that his/her property interest has been compulsorily acquired until sometime after vesting but this should not fundamentally preclude the right to claim compensation.

The six year time rule for an application to the Lands Tribunal should only commence from the date that the claimant was aware that his/her interest had been compulsorily acquired or the completion of the scheme.

149. *Should the LTS be given discretion to extend the time limit in some circumstances?*

Comments on Proposal 149

We had to lodge our claim in the LTS to avoid being time barred but before we had sufficient evidence of the performance of the remaining turbines to justify our claim.

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

Comments on Proposal 152

We do not agree with this proposal as it may unfairly rule out claims not following such format. If however such a measure is introduced, the acquiring authority must be under an obligation to properly inform all potential claimants of the advance payment procedure and the prescribed form.

The current procedure of an acquiring authority being able to avoid making any reasonable payment to account and paying no interest is wholly unfair to those most affected by CPO schemes – those who land is taken.

We consider that a process should be introduced whereby claims are stated in an approved format to assist payment of advances but there must be appropriate sanction for non-payment or for wilful under assessment of the claim.

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

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.

We consider that acquiring authorities require a proper incentive for settling claims timeously. At the moment the 0% interest is a positive invitation on any acquiring authority to delay as in many instances they would be paying more for the cost of capital.

155. *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?*

Comments on Proposal 155

The statutory interest rate payable has been 0% since 2009 whereas most overdrafts are 3% over base. A penal rate of interest is essential for the validity of the advance payment process.

The standard rate used in commercial contracts is more often at around 4 per cent over base and the rate of interest on late commercial payments is 8 per cent over base as set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002:

It is for an acquiring authority to have adequate valuation and payment procedures in place in anticipation of such requests. In our case NG took no steps to deal with the advance payment request. We understand from landowners affected by the AWPR not one payment has been made timeously following such notice. Such failures make a mockery of the process of advance payment requests and effectively might mean that landowners are bankrolling schemes.

To encourage acquiring authorities to make proper assessment of compensation timeously in response to such notices it would seem reasonable that they pay interest on the basis on any balance outstanding from the date that payment under a 90 day request should have been made.

In the event that an affected party is incurring a loss greater than this it should be open for this to form part of any claim. At the moment acquiring authorities use the wording of the current legislation to argue that any claim for a higher rate because of an overdraft situation is not competent.

This behaviour by acquiring authorities should be proof alone of the attitude landowners face, not only are they not minimising the loss to the claimant they are ignoring the statute legislation as there is no penalty.

156. *It should be competent, where all the parties agree, for an advance payment to be made to the landowner where the land is subject to a security.*

Comments on Proposal 156

We agree with this proposal.

However a payment made to the party holding security may result in penalties under certain mortgage / security arrangements. If this does occur then this should form part of any disturbance claim.

157. 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?

Comments on Proposal 157

Where the conduct of an acquiring authority has been unreasonable (such as a failure to deal with 90 day notices timeously or reasonably) then a higher rate should prevail. It would seem reasonable that an acquiring authority pay interest on the basis set out in the Late Payment of Commercial Debts (Scotland) Regulations 2002 from the date that payment should have been made.

Notwithstanding any statutory rate basis of interest the legislation must not rule out any entitlement for a claimant to seek a different rate of interest as part of a disturbance payment, such as in cases where the claimant incurs a greater interest. It is currently argued by DVs that such a claim is incompetent notwithstanding the fact that the lack of compensation payment and delays in dealing with claims is resulting in claimants incurring bank costs well over the current statutory interest provisions.

Question 177.

On the subject of taxation, be it Stamp Duty, VAT, Inheritance tax, Income tax or rates etc. the Acquiring authority should be liable to pay these as a result of CPO purchases.

A prime example of this is our own case where we as a family with an intergenerational farm business that have been disturbed in our own rights to use our land should not incur tax costs that we would otherwise not incurred but for the CPO process.

We hope this assists the Law Commission in their deliberations,

Yours sincerely,

Isobel Gordon

HUGH GORDON (A FIRM)