LAW REFORM COMMISSION

REPORT

# COMPULSORY ACQUISITION OF LAND

(LRC 127-2023)

LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

# Report

# Compulsory Acquisition of Land

(LRC 127 - 2023)



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Our purpose is to review Irish law and make proposals for reform. We also work on modernising the law to make it easier to access and understand. Our proposals are developed in a process which starts with a Consultation Paper. Consultation Papers examine the law and set out questions on possible changes to the law. Once a Consultation Paper is published, we invite submissions on possible changes to the law. We consult widely, consider the submissions we have received and then publish a Report setting out the Commission's analysis and recommendations.

Many of the Commission's proposals have led to changes in Irish law.

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# Glossary

The following abbreviations are used throughout this Report:

| Abbreviation | Definition |
|---|---|
| 1845 Act | Lands Clauses Consolidation Act 1845 (9 & 10 Geo 5 c 57) |
| 1919 Act | Acquisition of Land (Assessment of Compensation) Act 1919 (8 & 9 Vict c 18) |
| 1960 Act | Property Values (Arbitrations and Appeals) Act 1960 |
| 1966 Act | Housing Act 1966 |
| 2000 Act | Planning and Development Act 2000 |
| 2001 Act | Valuation Act 2001 |
| 2010 Act | Arbitration Act 2010 |
| A1P1 | Article 1 of Protocol 1 of the European Convention on Human Rights |
| Court | High Court, unless the context provides otherwise |
| ECHR | European Convention on Human Rights |
| Kenny Report | Report of the Committee on the Price of Building land (1973) |
| Land Value Sharing Bill scheme | General Scheme Land Value Sharing and Urban Development Zones Bill 2021 |
| Owner | Owners, occupiers or lessees can be subjected to compulsory acquisition, and are entitled to receive compensation as a result. While the Commission uses owner, occupier or lessee in its draft Bill, for the sake of ease of reading, the Commission uses the term owner throughout this report. This should be interpreted, unless |

| Abbreviation | Definition |
|---|---|
| | the context requires otherwise, as including owners, occupiers and lessees |
| Reference Committee | Land Values Reference Committee which consists of the Chief Justice, the President of the High Court, and the President of the Society of Chartered Surveyors |
| Tribunal | Valuation Tribunal |

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# OVERVIEW AND EXECUTIVE SUMMARY

## 1. Introduction

1. This Report is exclusively concerned with what might be described as the second half of the compulsory purchase process. It is not concerned with whether a compulsory purchase order should be permitted but how and when the land will be taken and the amount the owner will be compensated for the loss of their land.

2. In making its recommendations, the Commission's core goal is to replace the existing law with a modern and simple legislative structure that would significantly reduce the existing delays at the acquisition stage. The Commission has worked hard to ensure its proposed system adequately balances the rights of owners whose land is being acquired, including the right to compensation, against the entitlement of acquiring authorities to quickly and efficiently acquire land the subject of a compulsory purchase order so that the purpose of the acquisition can be progressed in the public interest. The Commission has sought to minimise the legal and administrative costs of acquiring authorities in achieving acquisition, while ensuring that owners have their costs, including the costs of assessing compensation, covered by the acquiring authority.

3. The report consists of the Commission's proposed draft Bill, entitled the Acquisition of Land Bill 2023 as well as five chapters explaining the approach behind the Bill.

4. Before describing the content of the report and the draft Bill, it is important to briefly describe what the Bill is intended to replace. Parts of Irish law on compulsory acquisition of land or interests in land after the compulsory purchase order is made pre-date the foundation of the State in 1922. In particular, two important pre-1922 compulsory acquisition codes were inherited and carried over: the Lands Clauses Consolidation Act 1845 (the "1845 Act"), as modified and applied in different legislative schemes and the Acquisition of Land (Assessment of Compensation) Act 1919 (the "1919 Act"). These Acts remain the principal legislative frameworks that apply in Ireland for compulsory acquisition and compensation, respectively. Many Acts, although not all, providing for compulsory purchase in various contexts incorporate the provisions of these two basic codes. Where those codes do form the basis of the law, they have been overlaid with many amendments that make the law difficult to properly understand. As noted, this Report deals only with the

transfer of the land and compensation after the compulsory purchase order becomes operative. That necessitates entirely repealing the 1919 Act and some provisions of the 1845 Act.

## 2. Scope of the Report

5. The scope of the Commission's examination of compulsory purchase law was initially wider and extended to the process leading up to the making of the compulsory purchase order as well as the steps taken after it. An Issues Paper on Compulsory Acquisition of Land was published by the Commission in 2017 as part of the Commission's Fourth Programme of Law Reform. It concerned a review of the current law on compulsory acquisition of land with a view to the clarification, reform and consolidation of the principles and rules that underlie the process. The Issues Paper contained 23 issues on which the Commission sought views. The Commission identified a number of those issues as being of special importance, including the notice to treat and the date when the property is valued, the power of entry onto land before payment of compensation, the principles and rules to be applied to assess compensation, the arbitration process and the consolidation of compulsory acquisition legislation. All those issues are covered in whole or part in this Report. The Commission received submissions in response to its Issues Paper and commenced work on the project. In late 2020 the Commission designated this project as a high priority to complete. Because of the length of time that had elapsed since publication of the original Issues Paper, a renewed consultation process with stakeholders was engaged in and the Commission received further observations.

6. However, during this latter period of review, the Commission became aware that the Government was preparing a revised Planning and Development Bill and that provisions relating to compulsory purchase orders, that is, the process up to the confirmation stage of a compulsory purchase order, would be included in that revised legislation. This Planning and Development Bill 2022 addresses in very significant part the procedure for making and confirming a compulsory purchase order as it applies to local authorities, including in the context of road schemes. Given the proposed scope of the Planning and Development Bill 2022 as far as compulsory acquisition was concerned, the Commission decided to focus its efforts on the areas of law reform not being addressed by the Planning and Development Bill 2022, that is, the process after confirmation of the compulsory purchase order.

7. For this reason, the scope of this Report is narrower than anticipated in the 2017 Issues Paper. For example, it does not deal with the question, upon which a number of submissions were made, as to whether compulsory purchase powers should be extended to permit acquiring authorities to

acquire land and interests owned by State bodies, as opposed to private bodies only, as is the current position. It might be noted that this bifurcated approach to reforming compulsory acquisition has been adopted in other jurisdictions. For example, in 2003 the Law Commission of England and Wales, in its review of compulsory purchase law, published a Report addressed entirely to the question of compensation and followed it the year after with a separate report on aspects of procedure.

8. In this Report and the draft Bill appended, the Commission has attended principally to the case of an acquiring authority taking land permanently and in freehold. However, it is aware that other modalities of acquisition—for example, temporary acquisition, and the acquisition of lesser interests in land or the imposition of burdens on land—are significant aspects of the practice of compulsory acquisition. The Commission has drafted its Bill to include, so far as possible and particularly with regard to the principles of compensation, these other modalities. This is in line with the approach taken in the Planning and Development Bill 2022. However, it is aware that such acquisitions may raise further questions that may require refinement to some proposals or the addition of other provisions.

9. The draft Bill appended to this Report is quite separate to the Planning and Development Bill 2022 and does not depend on the adoption of that Bill. In this Report, the law is stated as of 29 March 2023, that is, prior to any changes that may be introduced by the Planning and Development Bill 2022. However, the Commission has sought to achieve consistency of language with that used in relation to compulsory purchase in the Planning and Development Bill 2022.

## 3. Interaction between the Commission's draft Bill and existing compulsory acquisition legislation

10. At present, once a compulsory purchase order becomes operative, the acquisition of the land is achieved by use of the notice to treat procedure, which includes an entitlement on the part of the acquiring authority to enter into possession of the land prior to it being conveyed to the authority. Chapter 1 of this Report identifies the multiple deficiencies in the notice to treat procedure. Chief among these are:

(a) that there is no time limit within which an acquiring authority must serve a notice of entry following service of a notice to treat;
(b) where a notice of entry is served, the period in which the acquiring authority may enter possession is not limited; and
(c) no compensation is payable at the time when the owner loses possession but only much later when compensation is determined (although interest

is payable on the compensation sum from the date of possession by the acquiring authority).

11. Perhaps the most serious problem with the notice to treat procedure is that the date upon which the land is valued to assess compensation is the date on which the notice to treat is served, yet the owner will lose possession on a different, later date, and the compensation will not be assessed until a considerably later date again. Therefore, unlike the position in a voluntary conveyance, the owner is not compensated on the basis of the value of the land at the date of transfer, or loss of possession, but at a date prior to those events. That rule may operate unfairly depending on how land values fluctuate over the relevant time period.

12. Because of those and other disadvantages with the notice to treat procedure, the Commission believes it should be repealed in its entirety and replaced with the vesting procedure recommended in its draft Bill. That procedure has been designed to avoid delays in compulsory acquisition, to provide good title to authorities, to ensure owners lose possession of their land only when title has been vested in the acquiring authority, and to remove the uncertainty for owners as to when their land will be acquired. The land is valued for the assessment of compensation at the date of service of the vesting order, and the vesting date (being the date upon which the authority obtains title and is entitled to possession) must be no more than six months later. This avoids the problem described above of the gap between the date of valuation of the property and the loss of possession, and conveyance of the land.

13. However, the repeal of the notice to treat procedure is a very significant exercise due to the multiplicity of compulsory purchase schemes for different acquiring authorities. The Commission has identified over 50 different legislative schemes containing compulsory acquisition powers or similar powers.[1] Some of these schemes explicitly include notice to treat provisions.

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[1] Sections 14 and 15 of the Railway Regulation Act 1842, the Lands Clauses Consolidation Act 1845 (which is incorporated entirely or in part by many of these Acts); section 203 of the Public Health (Ireland) Act 1878; section 1 of the Dublin Reconstruction (Emergency Provisions) Act 1924; section 68 of the Local Government Act 1925; section 4 of the Shannon Electricity Act 1925; section 5 of the River Owenmore Drainage Act 1926; section 7(c) of the Barrow Drainage Act 1927; sections 45, 47, and 83 of the Electricity (Supply) Act 1927; section 8 of the National Monuments Act 1930; section 5 of the Electricity (Supply) (Amendment) (No 2) Act 1934; section 37 of the Slaughter of Cattle and Sheep Act 1934; sections 41 and 43 of the Air Navigation and Transport Act 1936; section 17 of the Air Raid Precautions Act 1939; section 5(i) and para 19(e) of the Schedule to the Hospitals Act 1939; section 19 of the Tourist Traffic Act 1939; section 57(1)(a) of the Land Act 1939; sections 21 and 22 of the Saint Laurence's Hospital Act 1943; section 14 of the Arterial Drainage Act 1945; section 8 of the Tuberculosis (Establishment of Sanatoria) Act 1945; sections 7, 15 and 30(2)(a) of the Electricity

Others avail of the notice to treat procedure identified at section 18 of the 1845 Act or that under section 79 of the Housing Act 1966 (the "1966 Act"). To comprehensively repeal all notice to treat provisions, it would be necessary to individually consider each legislative scheme. The Commission considers that task is better left to the individual government departments responsible for the various schemes. Pending such repeal, the Commission has designed a system whereby acquiring authorities that have granted to them by any enactment a power to compulsorily acquire relevant land or an interest in land will be able to make a vesting order, thus providing the vesting process as an alternative to the notice to treat process.

14. The Commission strongly recommends that all acquiring authorities operating under diverse compulsory purchase legislation replace the provisions providing for the notice to treat procedure with a vesting procedure. However, this may take some time and/or proceed at an uneven pace. To ensure maximum application of the Commission's draft Bill pending these wider changes, the draft Bill is designed so that the provisions on advance payment, the replacement of the property arbitrator by the Valuation Tribunal and the principles of compensation apply to all acquisitions, whether done by way of the vesting procedure established by this Report—the approach endorsed by the Commission—or by way of the existing notice to treat procedure.

(Supply) (Amendment) Act 1945; section 29 of the Turf Development Act 1946; section 82 of the Local Government Act 1946; section 78 of the Health Act 1947; section 2 of the Garda Síochána (Acquisition of Sites and Retention of Premises) Act 1948; section 17 of the Transport Act 1950; section 7 of the Tourist Traffic Act 1952; section 2 of the Local Government (Sanitary Services) (Joint Burial Boards) Act 1952; section 33 of the Defence Act 1954; section 4 of the National Monuments (Amendment) Act 1954; section 23 of the Petroleum and Other Minerals Development Act 1960; section 10 of the Local Government (No 2) Act 1960; section 11(1)(c) of the Coast Protection Act 1963; section 6 of the Local Government (Sanitary Services) Acts 1964; section 76 and the Third Schedule of the Housing Act 1966; section 3 of the Fishery Harbour Centres Act 1968; sections 32 and 39 of the Gas Act 1976; section 44 and the Second Schedule to the Postal and Telecommunication Services Act 1983; sections 16(1)(a), 16(1)(b) and paras 1 to 7 of the Third Schedule to the Industrial Development Act 1986; sections 14 and 19 of the Derelict Sites Act 1990; section 2(f) and the Schedule to the Shannon Navigation Act 1990; sections 19(7)(b) and 52 of the Roads Act 1993; section 11(1) of the National Monuments (Amendment) Act 1994; section 7 of the Casual Trading Act 1995; section 16 and the Fourth Schedule to the Harbours Act 1996; section 13 of the Transport (Dublin Light Rail) Act 1996; section 27 of the Dublin Docklands Development Authority Act 1997; section 17 and the Second Schedule to the Air Navigation and Transport (Amendment) Act 1998; section 12 of the British–Irish Agreement Act 1999; section 213 of the Planning and Development Act 2000; section 45 of the Transport (Railway Infrastructure) Act 2001; section 3(1)(a) of the Minister for Community Rural and Gaeltacht Affairs (Powers and Functions) Act 2003; section 91(5)(b)(iii) of the Water Supplies Act 2007; section 44(1)(c) of the Dublin Transport Authority Act 2008; section 158 of the National Asset Management Agency Act 2009; sections 60 and 61 of the Inland Fisheries Act 2010 and section 26 and Schedule 2 of the Sport Ireland Act 2015.

15. The only exception in the draft Bill to this approach are the provisions on unidentified owners or owners who cannot prove title. These provisions apply only where the Commission's recommended vesting procedure is used. Where the notice to treat process is used the acquiring authority may execute a deed poll to address the situation where owners cannot be found/title cannot be established.

## 4. Vesting Procedure

16. Chapter 1 of the Report introduces an entirely new system for acquiring compulsorily land by using a vesting order procedure. It is true that under existing statutory provisions, compulsory acquisition of land may be achieved by using vesting in narrowly defined circumstances, for example, in respect of derelict sites, protected structures and open spaces, as well as in cases of delay in conveying title where the notice to treat procedure has been used. However, a vesting procedure is not available to acquiring authorities save in the limited cases identified above.

17. This Commission considers a vesting order procedure should be the default way of acquiring property compulsorily given its clear advantages. Most obviously, it permits the acquiring authority to obtain an unencumbered title since it operates not by conveying the existing title, but rather by vesting in the acquiring authority any relevant land or interest to which the vesting order relates in fee simple free from encumbrances and all estates, rights, titles and interests on the vesting date. A further advantage is that, because of the nature of the proposed vesting order procedure, title can pass to the acquiring authority prior to compensation being determined and this allows the authority to go into full possession of the land in a reasonably short period after the confirmation of the compulsory purchase order. From an owner's point of view, vesting provides certainty as to when and how its land will be acquired.

18. These advantages of vesting have meant that it has become the model of choice for acquiring authorities in compulsory acquisition schemes around the world. Extensive comparative research was carried out by the Commission in respect of schemes in:

    (a) England and Wales;
    (b) Northern Ireland;
    (c) Australia including the Federal State, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia;
    (d) Canada including the federal state, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Quebec.

19. That research shows that in the various states of Australia and Canada, as well as in Northern Ireland, all compulsory purchase takes place by way of vesting order. In England and Wales, an acquiring authority may choose between vesting and the traditional notice to treat procedure.

20. The Commission has taken the view that, to ensure the recommended procedure works to the benefit of both acquiring authorities and owners, the following features need to be part of the vesting order procedure. First, clear time limits need to be put in place to ensure that vesting delivers efficient acquisition of properties. The Commission has recommended that the acquiring authority will have 12 months from the date that the compulsory purchase order becomes operative to decide whether it wishes to proceed with the acquisition. If it does not proceed, and did not reach an agreement to extend the 12-month period with owners affected by a vesting order, then the compulsory purchase order will lapse. This 12-month period is shorter than the current 18-month or 3-year period under the notice to treat procedure. This is because the Commission considers that, once land is the subject of compulsory acquisition, it effectively sterilises the use of that land for the owner. The owner cannot easily sell or let the land during that period. The owner should know within a relatively short period if the compulsory acquisition is going ahead, with due regard to the entitlement of the acquiring authority to have time to decide whether to proceed with the compulsory purchase order.

21. The Commission is aware that some acquiring authorities may need longer than 12 months to decide whether to proceed, as they may not know whether they will need certain land covered by the compulsory purchase order. This difficulty is most pronounced in the case of major infrastructure projects, for example, Metro North. However, the Commission takes the view that specific situations should not determine the general approach. Accordingly, the Commission's draft Bill permits the Minister to make regulations extending the 12-month period for particular types of acquisition.

22. Time limits also come into play once the acquiring authority has decided to proceed with the acquisition by the service of a vesting order. An owner must be given at least three months' notice of the authority's decision to proceed so that they can organise their affairs and put in place the necessary arrangements. But there is also an outer limit within which to complete the vesting process; the authority must ensure that the vesting takes place no later than six months from the date it serves the vesting order. This means that once an owner is aware that the acquiring authority is going ahead with the acquisition, they know that the acquisition will be completed within six months. This deadline also offers predictability of acquisition date for the authority. Nonetheless, the Commission is aware that sometimes, it will suit both parties to have a longer vesting date. For that reason, the Commission

has provided in its draft Bill that the six month completion deadline may be extended by the agreement of both parties.

23. Separately, the Commission has concerns about the present notice to treat system, which allows an authority to go into possession of land, potentially on a permanent basis, by serving a notice of entry without providing any interim monetary compensation pending the final resolution of compensation and the conveyance of the land. Experience suggests that these latter steps can take many years following the notice of entry. It is true that the owner is entitled to interest on the compensation amount ultimately awarded or agreed upon. Nonetheless, requiring an owner to give up possession without making monies available to them either when the authority enters onto the land or shortly thereafter is obviously undesirable. For that reason, the Commission has recommended a system of advance payment that will, subject to proof of title being provided by the owner, ensure interim compensation is made available when the authority takes possession on the vesting date, or shortly thereafter.

24. As noted above, existing compulsory purchase legislation provides for vesting procedures in narrowly defined situations. The Commission recommends that such legislation should be repealed as acquiring authorities will be entitled to use vesting in all compulsory purchase scenarios. Moreover, if acquisition is effected using existing vesting legislation, no advance payment will be available as the Commission's draft Bill provides for same only where the vesting procedure proposed by the Commission is used.

25. The Commission's recommended vesting order procedure is summarised in the Vesting Order Flowchart appended at the end of this Executive Summary.

## 5. Advance Payment

26. Chapter 2 of the Report deals with the issue of advance payment. This is a novel concept in Irish law but not in other comparable jurisdictions. The Commission's wide-ranging research on this point demonstrates that advance payment regimes are a feature of compulsory purchase procedures in England and Wales, Northern Ireland, Canada and Australia. In fact, Ireland is something of an outlier by not providing for advance payment. The advantages of advance payment are obvious in the Commission's view. First, from the owner's point of view, it provides immediate, albeit partial, compensation at or near the time the owner loses title through the vesting process, and therefore possession of its land. This allows more scope for the owner to mitigate the effects of the loss of their land. Second, from the point of view of the acquiring authority, advance payment has the advantage that a significant portion of the compensation ultimately payable is paid out when the authority receives title, thus avoiding the need to pay a significant amount

of interest on compensation sums that may often not be determined until many years later.

27. The Commission's proposal is that, as with similar schemes around the world, the authority will estimate the award of compensation based on material provided by the owner which provides proof of title and details of compensation sought. The authority will pay no less than 90% of the estimated amount, where a request has been made by the owner, and will be obliged to explain how it has arrived at the compensation figure. An authority will not be obliged to make an advance payment where it is not satisfied as to the title of the purported owner or where the owner does not ask for an advance payment. In all other situations the authority is obliged to make an advance payment.

28. In many compulsory acquisition situations, once the owner has provided information on title and made a compensation claim, it will be possible for the parties to agree the amount of compensation. But that is not possible in all cases and sometimes it is necessary for the compensation to be assessed by an expert body. In those situations, the determination of compensation will take place in a context where the owner has already received partial compensation by way of an advance payment and the authority has already paid out a portion of the monies that will be due. Indeed, the making of an advance payment may make it easier for compensation claims to be resolved at the determination stage, as by that stage, title will have vested in the acquiring authority (unlike the present situation where title does not pass until after compensation is determined) and the owner will have received an interim amount of compensation. That state of affairs may promote settlement.

29. As noted above, the Commission has designed the advance payment provisions so that they are applicable whether the vesting procedure—the option endorsed by the Commission—or the notice to treat procedure is used.

30. The Commission's recommended advance payment regime is summarised in the Advance Payment Flowchart appended at the end of this Executive Summary.

## 6. Where owners cannot be found or fail to prove title

31. Chapter 3 focuses on the situation where the acquiring authority is using the vesting procedure and cannot identify the owner of land sought to be acquired, or where a person claiming ownership fails to provide evidence of title to the acquiring authority's satisfaction. The approach adopted by the Commission, that is, a requirement that the acquiring authority pay into court

the full amount of its estimate of the amount of compensation due, is not new. A similar procedure exists under the 1845 Act although in that situation the land is transferred by way of deed poll rather than by way of vesting order.

32. Under the payment into court system contained in the Commission's draft Bill, a person claiming the money paid into court will have 25 years to make an application to the court to have the monies released to them. In making an application, the person claiming to have an interest in respect of which the money was paid into court, must provide the Court with proof of title to secure the release of the money. Once the Court orders the distribution of the money, the owner may make an application to the Valuation Tribunal where they are dissatisfied with the sum paid into Court (the acquiring authority's estimate). Where the money paid into court is not claimed within 25 years, under the Commission's proposed scheme the acquiring authority may request that the monies be released to it.

33. The Commission's recommendations regarding situations where owners cannot be found or fail to provide title are summarised in the Payment into Court Flowchart appended at the end of this Executive Summary.

## 7. Who should determine compensation

34. Chapter 4 considers the optimum process for resolving disputes as to the amount of compensation payable by the acquiring authority. At present, where the parties cannot agree compensation, the amount is adjudicated upon by an arbitrator, known as the property arbitrator. Under the 1919 Act, such disputes as to compensation are to be resolved by an arbitrator appointed by the Land Values Reference Committee ("the Reference Committee") consisting of the Chief Justice, the President of the High Court and the President of the Society of Chartered Surveyors. Little or no change has been made to that system of arbitration since 1919. Essentially, it takes the private law concept of arbitration—normally a voluntary process that parties agree to submit to—and places it in a public law context, where the parties have no choice but to have recourse to the property arbitrator if they cannot agree on compensation.

35. The Commission received a substantial volume of submissions from diverse bodies and individuals in the course of its extensive consultation process. A very large percentage of the submissions commented upon the unsuitability of the current arbitration model as a means for determining compensation, pointing to various challenges with the system, including long delays in having a case fixed for hearing, lack of consistency among arbitrators, lack of transparency in circumstances where the reasoning for the awards is not publicly available and the expense and complexity of the system. Since 2021,

property arbitrators are drawn from a panel of property arbitrators established by the Reference Committee with the assistance of the Courts Service.

36. The Commission took the view that arbitration in the modern era, being primarily a private law arrangement (albeit one subject to statute in certain respects), is not the most suitable way to determine compensation disputes. A permanent adjudicative body established by statute with expertise in matters of valuation and with transparent rules relating to procedural matters such as hearings, witnesses, written decisions, costs and other related matters was considered a more suitable forum in which claims for compensation could be heard and determined. The Commission was anxious to avoid recommending the establishment of a new body, given the relatively limited number of applications to appoint an arbitrator each year, typically between 50 and 100 each year, and the even smaller number that are not settled and that go to hearing.

37. Having considered various existing statutory bodies, the Commission was persuaded that the Valuation Tribunal (the "Tribunal") was a suitable body to recommend due to its existing functions in valuing property for rating purposes. The Commission therefore recommends the ending of the functions of the property arbitrator by repealing the entirety of the 1919 act and proposes the Tribunal as the body responsible for determining compensation.

38. Members of the Tribunal are appointed by the Minister of Housing, Planning and Local Government after a competitive recruitment process by the Public Appointment Service. The Commission considers that it is of the upmost importance that the Tribunal members are perceived as wholly independent in the carrying out of their functions. For this reason, the Commission's draft Bill provides that the Tribunal shall be independent in the performance of its functions in relation to determining compensation for land compulsorily acquired.

39. In respect of the approach to determining compensation, the focus of the Commission has been on simplifying the compensation process and ensuring the determination of claims in a timely and low-cost fashion. The Commission has identified that the Tribunal will endeavour to deliver its decision within six months from the date it receives an application to determine compensation. This approach emphasises the desirability of prompt disposal of claims, consistent with good decision-making. Second, as discussed below, the Commission has for the first time in Irish law codified the principles governing the assessment of compensation. It is hoped that the clarity and certainty this will bring to the determination of claims will permit claims to be resolved without an oral hearing where appropriate, or, at an oral hearing without lawyers where appropriate, for example, where no disputed issue of legal principle arises. The Commission is conscious of the expertise of surveyors in

valuing land and the assistance they can provide to the Tribunal in this respect. The requirement in the Commission's draft Bill that decisions are to be made available to the public (with the necessary redactions to protect the confidentiality of parties) will also assist in promoting understanding of the applicable principles.

40. As with advance payment, the Commission considered that even where the notice to treat procedure remains in use in respect of certain acquisitions, owners whose land is acquired by that procedure should be entitled to have their compensation determined where necessary by the Tribunal. Moreover, where the 1919 Act is to be repealed in its entirety, it would not be practicable or desirable to re-enact a property arbitrator system simply for acquisitions under the notice to treat procedure. The Commission's draft Bill therefore provides for determination of compensation by the Tribunal irrespective of which procedure is used to acquire the land.

41. The determination of compensation process as recommended by the Commission is summarised in the Determination of Compensation by the Valuation Tribunal Flowchart appended at the end of this Executive Summary.

## 8. Principles of Compensation

42. The final chapter, Chapter 5, proposes a much overdue codification of the existing principles governing the evaluation of compensation claims. Those principles were contained in part in the 1919 Act and were subsequently developed over the next hundred years through case law of the English, Irish and Welsh courts. The codification exercise in the Commission's draft Bill is inspired in part by the equivalent exercise carried out by the Law Commission of England and Wales in its 2003 Report but has departed from this approach in certain key respects having regard to Irish jurisprudence. Certain submissions received by the Commission suggested a codification exercise having regard to the antiquity of the existing statutory provisions.

43. In codifying the legislation, the Commission has borne in mind that these principles of compensation identified in the 1919 Act have stood the test of time and therefore it has been careful to retain the core principles, in particular, in relation to market value, disturbance, equivalent reinstatement, severance and injurious affection where those are still in daily use and well understood by practitioners in the area. For that reason also, the Commission decided not to change the description of the heads of claim, although some of the language, such as injurious affection, is not in common usage in 2023.

44. Changes in the uses for which land is zoned as well as proposed developments to that land may significantly alter the market value of land and, thus, the compensation due to the owner. The existing rules 11 and 13 in

the 1919 Act, and the case law on those rules, address how such changes in value should be accounted for. Rule 11 requires disregard of actual or potential schemes of development to land by acquiring authorities, and rule 13 requires disregard of the reservation of land for a specific purpose other than that for which it is zoned or that for which the land around it is zoned. Both of these important rules are included in the Commission's proposed code in its draft Bill.

45. The rules relating to injurious affection (that is, loss or damage to land retained by the owner, lessee or occupier from whom other land is compulsorily acquired), including the *McCarthy* rules and the rule in *Edwards v Minister of Transport*, are not in need of significant change but would benefit from codification. The Commission proposes a codification of these rules in its draft Bill.

46. The rules relating to disturbance—which the Commission terms "consequential personal loss"—are among the most in need of codification as they do not currently have a statutory basis (they were taken as implied by the 1845 Act and subject to a saver in the 1919 Act). Consequently, the Commission proposes a codification of these rules in its draft Bill.

47. The rules relating to equivalent reinstatement—which arises less frequently than other heads of compensation—are broadly satisfactory. The Commission proposes some additional provisions to address the issue that arose in *Dublin Corporation v The Building and Allied Trade Union* (the "Bricklayers' Hall" case); however, in the main, what is proposed is a codification of existing principles. This codification is contained in the draft Bill.

48. Certain rules (rules 8, 9, 10 and 14) under the 1919 Act require a property arbitrator to specifically have regard to certain matters when considering the market value of land. In the Commission's view these matters are all now well-established and would be taken as a factor in the valuation of land even in the event of an ordinary sale. This being the case, they could likely be safely omitted from a new code and the Commission has not provided for them in its draft Bill.

49. In other jurisdictions it is common to offer an additional payment, over and above the standard measures of compensation, to people displaced from their homes by compulsory acquisition. The Commission proposes that an additional payment of this kind should be considered in this jurisdiction; however, as this raises many issues of policy it is a question that should be resolved by the Oireachtas.

50. Certain rules under the 1919 Act (the second clause of rule 3 and the entirety of rule 16) no longer have any application and should be omitted from a modern code. The Commission's draft Bill omits these rules.

51. As with advance payment, the provisions on determination of compensation in the Commission's draft Bill apply to acquisitions carried out both by way of vesting and by way of notice to treat.

## 9. Uplift in value of land/acquisition below market value

52. The Commission acknowledges that this project is set against a background of considerable debate concerning the use of land in the State, particularly with a view to providing housing. The compulsory acquisition of land by the State is one of various measures that Government may employ in response to these issues. Current compulsory purchase law permits the acquisition of land by authorities for purposes connected with housing.

53. However, the Commission emphasises that this Report is concerned with particular policy debates regarding the use of land. It is addressed only to the legal principles and procedures that govern compulsory acquisition. Nonetheless, the consolidation and reform proposals in this Report would, in the Commission's view, streamline the use of compulsory purchase to achieve public policy objectives in general.

54. Section 2(2) of the 1919 Act defines market value as the value that the land would be expected to realise if sold in the open market by a willing seller. The Commission has adopted this same understanding of market value for the purposes of this Report and attached Bill. The Commission understands that to be the standard approach in valuing land in the context of compulsory acquisition in several common law jurisdictions. This also follows the approach of the case law under the Constitution and the European Convention on Human Rights. Insofar as that case law may be easily summarised, it suggests that, as a matter of general principle, compensation to full market value is normally required, but that it is possible that just compensation in particular circumstances could be less than the market value of the acquired property, having regard, in particular, to the provisions of the Constitution on property rights.

55. In some cases, part of what constitutes market value of a property may be considered "betterment" or an "unearned increment". This is value attributable to infrastructural circumstances rather than direct investment in the property. The most common source of this is public works enhancing land by providing it with enhanced amenity, utilities connections or public transport. Decisions about the possible future use of land—for example, zoning decisions or planning permission—may also generate value without requiring much or any direct investment in improving the land.

56. Since in so many cases this additional value is generated by State action, it is a general question in land-use policy the extent to which, and how, this value

should go to the State and not to the private landowner who would otherwise get the benefit. This is a complex constitutional and policy question that goes well beyond the compulsory acquisition context (although compulsory acquisition is one way in which the State can pursue its land-use policy). However, it is more common to pursue land-use objectives through negative incentives such as contributions under Part V of the Planning and Development Act 2000 (and those contemplated in the Scheme of the Land Value Sharing and Urban Development Zones Bill 2021) or taxation measures such as the residential land tax.

57. It should be emphasised that existing rules on assessing compensation, which are codified in the Commission's draft Bill, prevent the fact of compulsory purchase for the purposes of a scheme being taken into account when valuing the land for compensation purposes. The no-scheme rule—as established by the *Pointe Gourde* case and under rule 13 of the 1919 Act—means that when valuing the land, the valuer is obliged to disregard the effects of action taken by an acquiring authority wholly or mainly for the purposes of the project for which the land is being acquired. The Commission has included a more detailed codification of the no-scheme rule in its Bill.

58. In its Issues Paper, the Commission did not address the general issue of capturing "betterment" value. Because of the complex and difficult questions of socio-economic policy that arise in this context, which extend well beyond the area of compulsory acquisition, the Commission considers it is a matter more appropriate for resolution by the Government and by the Oireachtas.

59. In summary, the Commission has not considered the question of whether the law should provide for the assessment of land at a value below market value. This is because the question of whether a social good should be achieved by way of obliging owners to sell their property to the State at below market value, either to take into account "betterment" or more generally, is a question of policy more properly addressed by the Executive and the Legislature.

# Vesting Order Procedure

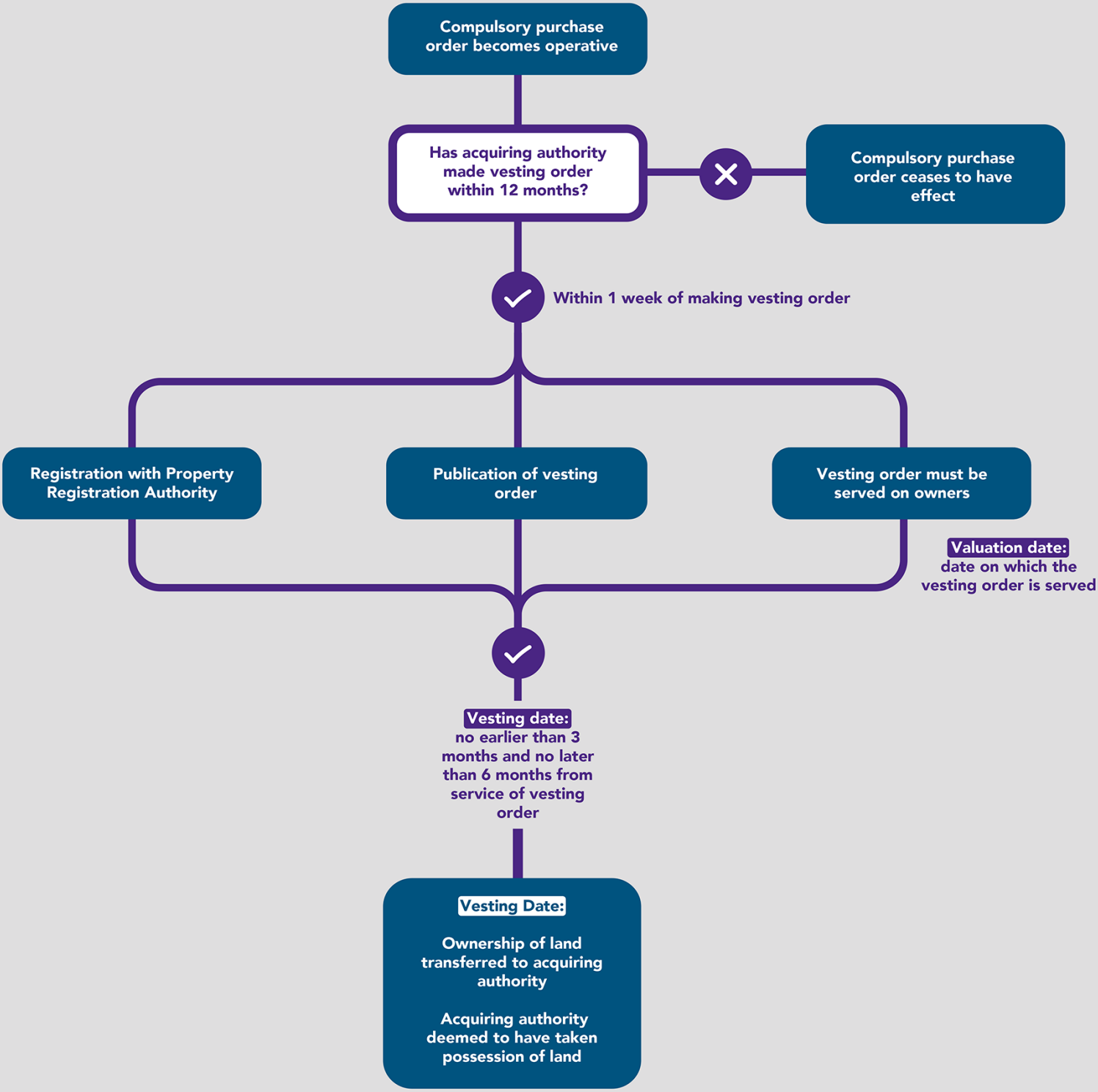


Figure 1 Flowchart of vesting order procedure

# Advance Payment Regime

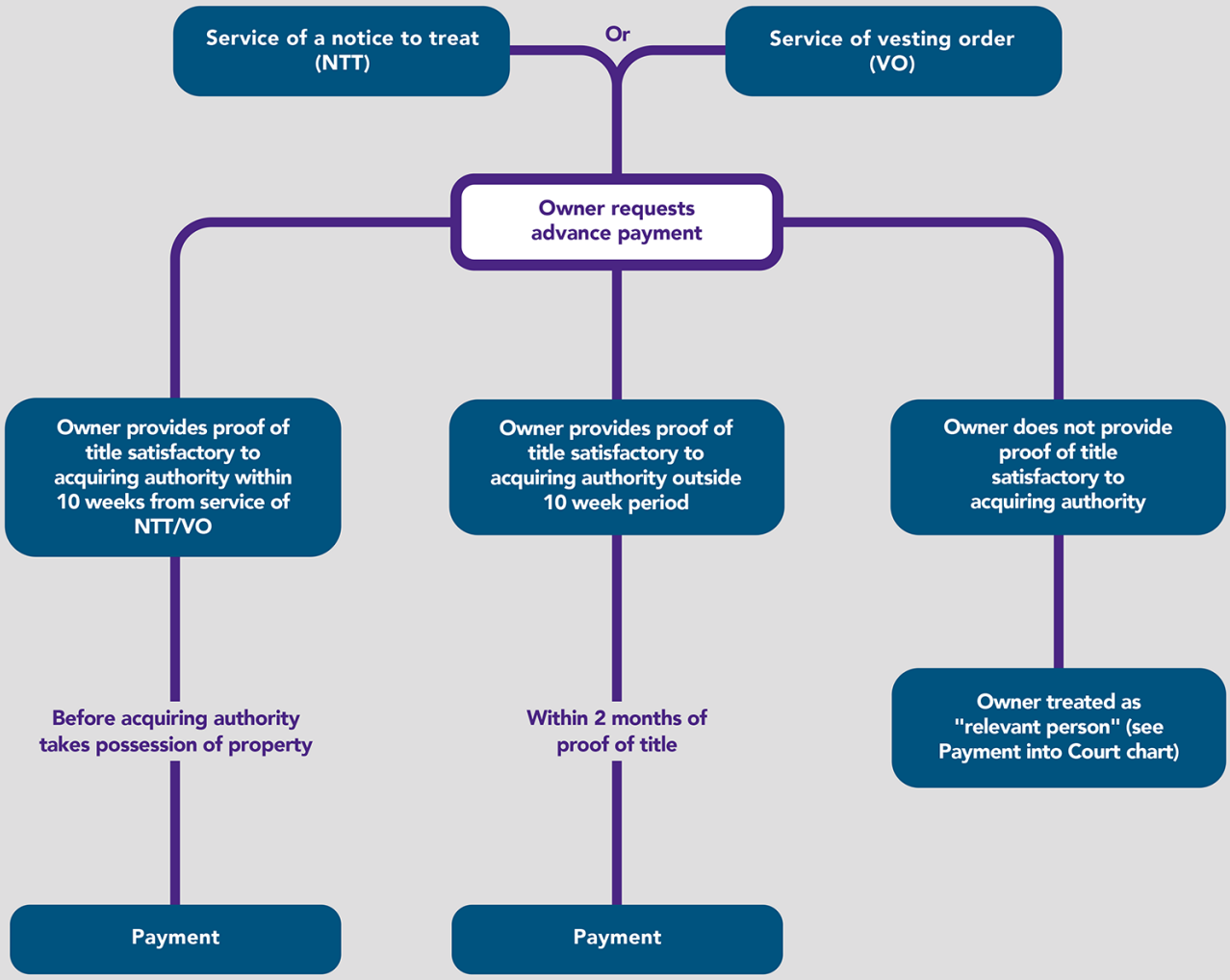


Figure 2 Flowchart of advance payment procedure

# Payment into Court

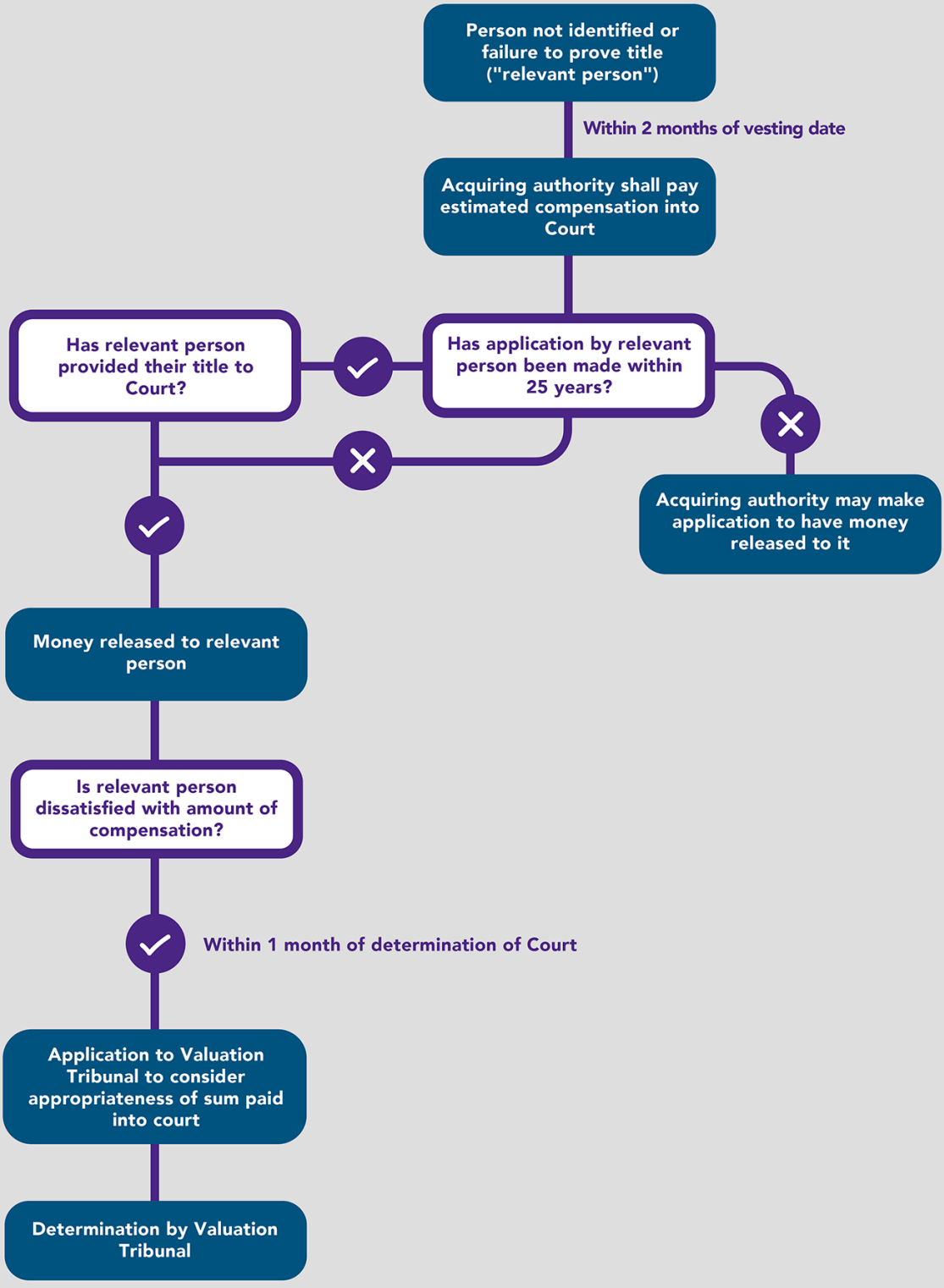


Figure 3 Flowchart of payment of money into court

# Determination of Compensation by the Valuation Tribunal

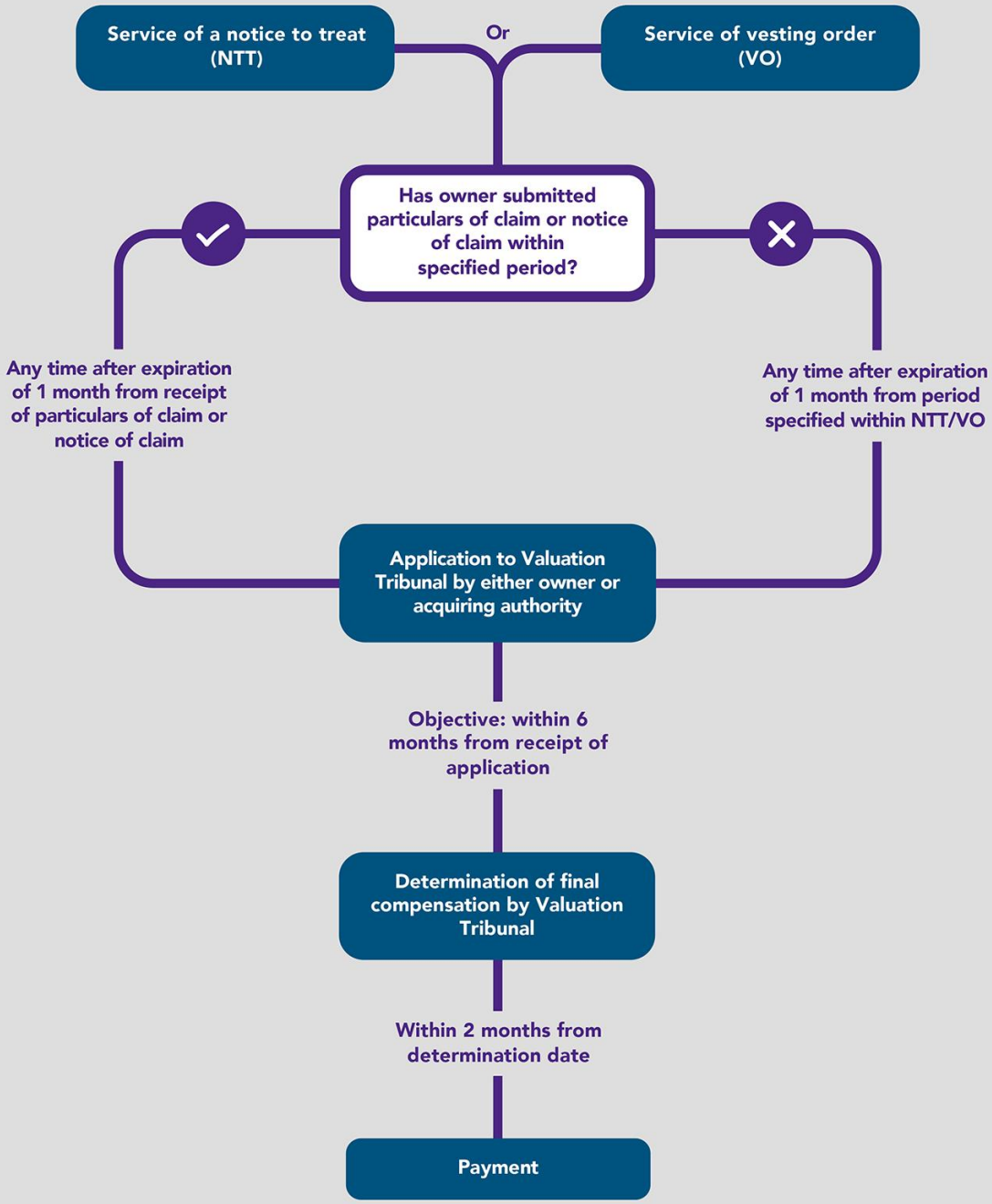


Figure 4 Flowchart of process for determination of compensation

# CHAPTER 1
# VESTING ORDERS

**Chapter Contents**



## 1. Introduction

[1.1] In this chapter the Commission addresses the implementation of a compulsory purchase order after the confirmation stage. This is a crucial stage in the compulsory purchase story as it describes when, and how, the acquiring authority comes to own the land it is acquiring. The Commission proposes that a general vesting procedure is the best way to do this and so this chapter presents the core elements of a recommended vesting order model.

[1.2] In Ireland, the notice to treat procedure is, at present, the default mechanism to compulsorily acquire land.[2] Most compulsory purchase orders are subject to confirmation by an independent body; in most cases this is An Bord Pleanála.[3] Where this confirmation step exists in a compulsory purchase process it is only after the order is confirmed that the acquiring authority may proceed to acquire the land. In most cases, the next step for the acquiring authority is to serve a notice to treat on affected owners. The notice to treat is how the acquiring authority indicates (a) its intention to proceed with the acquisition, and (b) that it is willing to negotiate for the purchase. It is, in some respects, similar to an "invitation to treat" in contract law. Invitations to treat invite a purchaser to offer a price and begin to negotiate with the seller. However, a crucial difference is that a potential purchaser can walk away from an invitation to treat and refuse to purchase anything, whereas a notice to treat in a compulsory purchase requires both the buyer and the seller to go ahead with the transaction.

[1.3] The service of a notice to treat has other implications, including permitting the acquiring authority to serve a notice of entry onto the target land, which entitles the acquiring authority to possession of that land. In addition, the service of a notice to treat crystallises the date for assessment of the market value of the land for the purposes of compensation.[4] Finally, the notice informs those on whom it is served that they must state their interest in or title to the relevant land to the acquiring authority and submit their claims for compensation within a specified period. In other words, it triggers an obligation on the owner to proceed with the assessment of compensation by submitting a notice of claim.

[1.4] The second step after the service of notice to treat is entry into possession. It is at this point that the owner will be compulsorily deprived of the use of their land. The acquiring authority must pay interest on the award of compensation from the date of entry into possession until compensation is paid.

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[2] It is important to note that not all statutory provisions relating to compulsory acquisition require a notice to treat to be served. The service of notice to treat is required under, for example: section 18 of the Lands Clauses Consolidation Act 1845, section 79 of the Housing Act 1966 (also referred to by section 217(6) of the Planning and Development Act 2000) and section 164 of the National Asset Management Act 2009. Most compulsory purchase orders are made pursuant to the Housing Act 1966 and the Planning and Development Act 2000.

[3] See paragraph 1.10 of this Report.

[4] The service of notice to treat is the date used to determine the market value of the land, but other elements of the compensation (for example, disturbance) are valued at other dates. This is discussed further in Chapter 5.

[1.5] This chapter identifies the main problems of the notice to treat procedure before progressing to a discussion of the recommended vesting order model that seeks to address problems with the existing system.

[1.6] The Commission's discussions and recommendations in this Chapter correspond to the provisions of Chapter 1 of Part 2 of the draft Bill appended to this Report.

[1.7] The Commission's recommended vesting order procedure is summarised in the Vesting Order Flowchart appended at the end of the Executive Summary.[5]

## 2. Problems with the notice to treat procedure

[1.8] The notice to treat procedure begins with the service of a statutory notice on each affected owner, occupier and lessee to start the process of agreeing or determining compensation.[6] Before serving a notice to treat the acquiring authority is not committed to acquiring the land, even if the compulsory purchase order has been confirmed. However, once the notice has been served (and the period within which it may validly be withdrawn has elapsed) both parties are bound to the transaction in a way similar to having a binding contract for sale, but with the unusual feature of (in many cases) not having a settled purchase price. It is important to note that the notice to treat is not, in itself, an instrument of conveyance: no estate passes to the acquiring authority as a result of serving a notice to treat or a notice of entry.[7] Service of a notice to treat entitles an acquiring authority to enter on the land after certain procedural requirements have been observed. Where the acquiring authority takes possession of the land after serving a notice of entry, it does not usually get title to the land until compensation has been paid. This may necessitate a lengthy assessment process if compensation cannot be agreed upon.

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5 See page 16 of this Report.

6 Section 18 of the Lands Clauses Consolidation Act 1845 provides that a notice to treat must be served on all parties interested in the lands as are known to the acquiring authority following a diligent inquiry. Section 79 of the Housing Act 1966, as amended by section 198 of the Residential Tenancies Act 2004, provides that where the compulsory purchase order becomes operative and the acquiring authority decides to acquire land, it must serve notice on every owner, lessee and occupier of the land stating that it is willing to "treat" with them (that is, engage in relation to the payment of compensation) for the interest in the land which is to be acquired. The difference between the two provisions is that the 1966 Act identifies the parties to be served whereas the 1845 Act is potentially broader in scope insofar as it includes all parties "interested" in the lands.

7 *Irish Life Assurance v Dublin Land Securities* [1986] IR 332.

### (a) Period to serve a notice to treat

[1.9] The period between confirmation and the service of notice to treat provides time for the acquiring authority to decide whether to go ahead with the acquisition. This decision could turn, among other things, on a review of: any modifications the confirming authority may have made to the compulsory purchase order, the funds available to the acquiring authority, or the development plan and the likelihood that the project will proceed.

#### *(i) Statutory provisions on the period to serve a notice to treat*

[1.10] There are two different time periods within which the notice to treat must be served depending on the statutory regime used for the acquisition:

(a) Under section 217(6) of the 2000 Act, where a compulsory purchase order has been confirmed by a local authority or An Bord Pleanála,[8] a notice to treat must be served within 18 months of the order becoming operative.
(b) Under section 123 of the 1845 Act, where no specified time limit is prescribed in the Special Act, the prescribed time limit is within three years of the order becoming operative.[9]

[1.11] If an acquiring authority does not serve a notice to treat within the relevant statutory period, the compulsory purchase order ceases to have effect. In these circumstances, if an acquiring authority wishes to proceed with the acquisition it will have to start the process again by making an entirely new compulsory purchase order.

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[8] The 18-month period applies to compulsory purchase orders confirmed by An Bord Pleanála. Sections 214, 215, and 215A to 215C of the Planning and Development Act 2000 transferred the functions of the Minister as confirming authority to An Bord Pleanála for the following Acts: the Public Health (Ireland) Act 1878 (see section 203 of the 1878 Act as amended by section 68 of the Local Government Act 1925); the Local Government (Ireland) Act 1898 (as amended by section 68 of the Local Government Act 1925); the Local Government Act 1925; the Water Supplies Act 1942; the Local Government (No 2) Act 1960 (as amended by section 214(1) of the Planning and Development Act 2000); Local Government (Sanitary Services) Act 1964; Housing Act 1966; Gas Act 1976; Derelict Sites Act 1990; Roads Acts 1993 and 1998; Harbours Act 1996; Dublin Docklands Development Authority Act 1997; Air Navigation and Transport (Amendment) Act 1998; Planning and Development Act 2000 and Transport (Railway Infrastructure Act) 2001.

[9] Special Act refers to separate legislation providing the power to compulsorily acquire lands. In other words, Special Acts are about who can compulsorily acquire land; the 1845 Act is about how to compulsorily acquire lands. Section 2 of the 1845 Act provides that the "…expression "the special Act" used in this Act shall be construed to mean any Act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates…".

[1.12] Most compulsory acquisitions take place under the 2000 Act in which case the notice to treat must be served within 18 months of the confirmation order becoming operative. Prior to the 2000 Act, the most frequently used notice to treat procedure was that prescribed by Housing Act 1966 (the "1966 Act"). As that Act incorporates the 1845 Act and is construed as a "Special Act" for the purposes of the 1845 Act, the time limit under the 1966 Act was three years. It is not clear why the 2000 Act has a separate timeframe from section 123 of the 1845 Act.

[1.13] Submissions received in response to whether the time limit to serve a notice to treat should be amended were mixed. Approximately half of the submissions favoured the 18-month period under the 2000 Act, believing that it is a reasonable period and that it should be formalised as the standard maximum. However, other submissions described the 18-month period as restrictive and narrow. These respondents asserted that the period should be extended to either three years or 30 months to facilitate design and build contracts and for major infrastructural projects.

### *(ii) Pausing time for service and extending time for service*

[1.14] The 18-month period may seem especially short where legal proceedings challenging the confirmation decision are ongoing. Legal proceedings can take a significant amount of time to resolve. If the time for serving a notice to treat continues to run during such proceedings, the acquiring authority can be placed in an impossible situation. It cannot serve notice because there are ongoing legal proceedings challenging the validity of the compulsory purchase order, but it also must serve notice because, if it does not do so within the relevant time period, it cannot proceed with the compulsory purchase and must start all over again.

[1.15] This situation has been addressed in broadly two ways. Under the 1966 Act a compulsory purchase order became operative either: (a) after 21 days had passed since notice of the confirmation of the compulsory purchase order was made,[10] or (b) if legal proceedings (which had to be taken within three weeks of the publication of the confirmation notice) were taken, after the High Court made its determination in those proceedings.[11] Because the period within which an application to the High Court and the minimum period before which notice could be served were aligned (three weeks and 21 days, respectively, which cover the same span of time) it was not possible to have a compulsory purchase order become operative while proceedings challenging that order were in train.

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[10] Section 78(3)(a)(i) of the Housing Act 1966.

[11] Sections 78(3)(a)(ii) and 78(3)(b) of the Housing Act 1966.

[1.16] However, section 217(7) of the 2000 Act provides that a decision of the Board shall become operative three weeks from the date on which notice of the decision is first published. Section 217(7)(b) disapplies the provisions of the 1966 Act described immediately above. Thus, under the 2000 Act, a compulsory purchase order can become operative before legal proceedings challenging the confirmation decision have concluded. This led to the "impossible situation" for acquiring authorities described above becoming a reality in respect of a part of the Galway City Outer Bypass project, which in turn prompted the Oireachtas to pass emergency legislation—the Compulsory Purchase Orders (Extension of Time Limits) Act 2010—saving the compulsory purchase orders for that project.[12]

[1.17] That emergency Act amended section 217 of the 2000 Act to allow an acquiring authority to apply to the High Court to extend the 18-month period if legal proceedings regarding the order are still pending.[13] The Court may extend the period to cover either a further 18-month period or the period of time up to 30 days after legal proceedings are concluded. If the proceedings are still not concluded by the end of this second period, the acquiring authority may again apply to the Court for an extension, and at this point the Court may extend the second period to cover whatever span of time it considers "just and equitable".

[1.18] The draft Planning and Development Bill 2022 published in January 2023 retains the wording of sections 217(6) and 217(6A) of the 2000 Act as amended by the Compulsory Purchase Orders (Extension of Time Limits) Act 2010.[14]

### *(iii) Uncertainty puts owners and occupiers in limbo*

[1.19] The current notice to treat procedure potentially sterilises the use of the land for the period from the date of confirmation of the compulsory purchase order up to the point of service of the notice to treat, as an owner has no certainty as to whether the acquiring authority will go ahead with the acquisition. For instance, it is unlikely that owners would be granted planning permission for their land if it is subject to a compulsory purchase order and they would likely struggle to sell their land in such circumstances as well. At this point, this puts the owner in a difficult situation—if they want to divest themselves of the land they will find it difficult to get a buyer, but they cannot

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12 Dáil Éireann Debates 7 July 2010 vol 715 No 1.

13 Section 217(6A) as inserted by section 1 of the Compulsory Purchase Order (Extension of Time Limits) Act 2010. The extension application is only applicable to local authorities; agencies such as the National Roads Authority or the Irish Aviation Authority cannot apply for an extension of time under this section.

14 Section 370 of the Draft Planning and Development Bill 2022, as published in January 2023.

(yet) demand acquisition and compensation from the acquiring authority because the authority is yet to be legally bound to follow through on the compulsory purchase.

[1.20] It is worth noting that owners and occupiers are also burdened by uncertainty prior to the confirmation stage. The Commission has been informed in the course of its consultation process that projects may take up to 8 to 12 years from the time the preliminary steps towards a compulsory purchase order are taken until an acquiring authority applies to the Board to confirm a compulsory purchase order.[15] Therefore, to take one example, farmers may be undecided on whether it is worth investing in upgrades or improvements to their farms and this may impact the profitability of their enterprise and, ultimately, their livelihoods.

[1.21] In addition, an owner may take steps to prepare for a notice to treat by seeking to mitigate their likely loss caused by the acquisition but without any certainty as to whether the acquisition will in fact go ahead. If it does go ahead, then the case of *Gunning v Dublin Corporation*[16] establishes that acquiring authority may be liable to pay compensation for expenses or losses incurred before the service of the notice to treat provided certain conditions are met.[17] Nonetheless, as Carroll J observed, an owner by acting in anticipation takes the risk that the notice to treat will never be served in which case they can make no claim in respect of costs incurred. The longer the period of uncertainty between confirmation of the compulsory purchase order and service of notice to treat, the worse this problem becomes for owners.

[1.22] Due to the lack of detailed data in relation to the compulsory acquisition of land, it is difficult to assess the full magnitude of this problem in practice. However, in principle, the Commission endorses the shortest possible period

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15 This period is necessary for, among other things: (1) designing the scheme that the compulsory purchase order will facilitate, (2) identifying parties who will be affected by the compulsory acquisition scheme, and their legal estates or interests, (3) starting public consultations, and (4) selecting the most cost-effective sites for the proposed scheme.

16 [1983] ILRM 56.

17 See Carroll J in *Gunning v Dublin Corporation* [1983] ILRM 56, where she held that, where the owner takes reasonable steps to mitigate prior to the service of the notice to treat, the owner of the property should be reasonably and properly compensated where: (1) the steps taken in mitigation are clearly referable to the notice to treat; (2) it is possible to show that an inevitable loss which is consequent on the notice to treat has been avoided; (3) the steps taken were reasonable and prudent and not for a collateral purpose; and (4) the costs of the claim do not exceed the amount which would be awarded if no steps had been taken until after the notice to treat.

In Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at paragraph 29.19, the authors note that it is unclear if pre-notice to treat expenditure is recoverable if a notice to treat is withdrawn within six weeks of receipt of the claim form.

between the confirmation of the compulsory purchase order and the decision of the acquiring authority to go ahead with the acquisition or not. The Commission recognises that a certain period must be given to the acquiring authority to allow it to prepare its scheme, carry out public consultations, and so on. In recommending the time period of 12 months in respect of its proposed vesting scheme (discussed later in this chapter), the Commission has sought to strike a balance between an overly lengthy period of uncertainty for the owner and the requirement to give the acquiring authority a reasonable period of time after the confirmation of the compulsory purchase order to decide whether to proceed with the acquisition.

### (b) Period to act upon a notice to treat

[1.23] Once the acquiring authority serves notice to treat, there is no prescribed timeline requiring it to act on that notice. As identified above, the next step after serving a notice to treat is to serve a notice of entry, giving the acquiring authority possession of the land. However, there is no obligation to serve a notice of entry within a defined period. This leads to a different kind of uncertainty for owners to the one described in the previous section. At this point, an owner is certain that their land will be acquired and, accordingly, they will be compensated. However, they will be uncertain, absent communication and undertakings by the acquiring authority, as to when they will be deprived of possession of their land.

[1.24] If, after the service of a notice to treat, an acquiring authority wishes to abandon that notice it can only do so within six weeks from the receipt of the owner's notice of claim.[18] The wording of section 5(2) of the 1919 Act implies that an acquiring authority may abandon a notice to treat only if the owner has submitted their notice of claim. Otherwise, the acquiring authority can only abandon the notice to treat with the express agreement of the concerned owner(s). In *Cork County Council v Lynch and Boyle* the Court of Appeal held that:

> [t]he effect of the service of the notice to treat is to confer on the acquiring authority a right to acquire the lands, and a concurrent obligation to pay the proper and appropriate compensation … The right of the owner thus arising cannot be

[18] Section 5(2) of the Acquisition of Land (Assessment of Compensation) Act 1919 provides that "…when such a notice of claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on the claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn, and the amount of such compensation shall, in default of agreement, be determined by an official arbitrator." A notice of claim is a form completed by an owner to claim compensation.

> removed by unilateral action of the authority without the owner's agreement or, perhaps, his acquiescence in the new arrangements.[19]

[1.25] If no steps to abandon the notice to treat have been taken and the acquiring authority takes no steps to progress the compulsory purchase order, the owner is left in a very difficult position. The sterilisation issue described above is even more acute in these circumstances, as the owner is now certain that the land is to be acquired but they have limited options if the acquiring authority takes no further steps. Their only possible recourse is to apply to the High Court requesting prohibition of the enforcement of the notice to treat if the acquiring authority has not acted upon it within a reasonable time.[20] A similar issue arises once the notice of entry is served.

[1.26] The most common statutory basis for entry onto land is the 1966 Act.[21] Section 80(1) of that Act provides that an acquiring authority may, on giving no less than 14 days' notice, enter on and take possession of the land without the consent of the owner, lessee or occupier and before compensation is agreed, assessed or paid.[22] The acquiring authority may take possession of the land at any point after the 14 days' notice has expired; it is not required to specify in the notice the exact point at which it will take possession of the land. This may cause uncertainty and unpredictability for owners and occupiers, who remain in limbo if there is a significant delay between the acquiring authority serving the notice of entry and actually taking possession of the land. The owner, during this time, lives with a sword of Damocles over their head; they may lose possession, and potentially the use of their land at

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19 *Cork County Council v Lynch and Boyle* [2021] IECA 4 at para 48.

20 In *Van Nierop v Commissioners of Public Works* [1990] 2 IR 189 at page 198, the High Court (O'Hanlon J) held that certain notices that had been served by the Commissioners of Public Works should be declared invalid as the Commissioners had an obligation to seek to exercise their powers of compulsory acquisition within a reasonable time from the date of giving notice, which they failed to do in this case. In *Cork County Council v Lynch and Boyle* [2021] IECA 4 at para 48, the Court of Appeal (Murray J) held that "an acquiring authority may by either positive action (such as the giving of an undertaking) or by default (as where it fails to act on foot of its legal rights within a reasonable period of time) forgo the right to proceed on foot of a compulsory purchase order".

21 Section 10(4)(a) of the Local Government (No 2) Act 1960, as amended provides that section 80(1) of the 1966 Act shall apply to an order made under section 10 of the 1960 Act. Section 213(4) of the Planning and Development Act 2000 provides that section 10 of the 1960 Act applies to local authorities using the compulsory purchase order under the 2000 Act.

22 Section 80(1) of the Housing Act can be contrasted with sections 84 and 85 of the Lands Clauses Consolidation Act 1845. Under the 1845 Act, the acquiring authority may enter onto the land either: (1) with the consent of the owner or occupier, (2) after paying compensation to every entitled party, (3) by depositing the compensation as security or (4) issuing a bond equal to the amount deposited plus interest.

any point without having received any compensation. The acquiring authority is liable to pay interest on the full compensation from the date it enters onto the land;[23] however, owners will not benefit from this remedy until a future date (and potentially far into the future, depending on how long it takes to settle compensation) and to that extent this may be cold comfort.

[1.27] Occupiers may be required to vacate the land at any point after the 14 days' notice. This notice period is considerably shorter than that required in other jurisdictions, with a notice period of three months being common.[24] In Ireland, some compulsory acquisition provisions provide for a longer notice period in the case of occupation of a dwelling. For example, section 8(3)(a) of the Electricity Supply (Amendment) Act 1945 provides that "at least one month or, in the case of an occupied dwellinghouse, three months' previous notice in writing" must be given of intention to enter and take possession.[25]

[1.28] In addition, where an occupier is a leaseholder, they will carry certain liabilities—for example, the liability to pay rent to the landlord or to insure the premises—until the acquiring authority takes possession of the land. Such situations may complicate relocation for the leaseholder as they will not know when these obligations under the lease subject to compulsory acquisition will end. This could cause economic hardship, especially for individuals or small businesses. In practice, it is likely that the acquiring authority will engage with occupiers to inform them in advance of when they will need to vacate, but the authority is under no obligation to serve further formal notice after the initial notice of entry. The Commission considers that the current best practice of acquiring authorities to inform occupiers well in advance of the date they will be required to vacate should be reflected in a statutory provision in the context of the vesting procedure described below.

[1.29] In summary, the Commission takes the view that there are several problems with the current notice of entry procedure:

(a) there is no time limit within which an acquiring authority must serve a notice of entry following service of a notice to treat;

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[23] Section 80(1) of the Housing Act 1966.

[24] In England and Wales, the notice period is three months under Section 11(1B) of the Compulsory Purchase Act 1965 (England and Wales). In South Australia, in general, the date set must be "no less than 90 days after the date on which the notice of acquisition is published" under section 24(1) of the Land Acquisition Act 1969 (SA). In Alberta and Ontario, the acquiring authority may take possession no earlier than three months from the registration of the vesting order: see section 64(1) Expropriation Act 2000 (Alberta), section 39(2) of the Expropriations Act 1990 (Ontario).

[25] A similar provision is provided under section 3(6)(c) of the Fishery Harbour Centres Act 1968, section 30(3)(a) of the Turf Development Act 1946 and section 17(5)(b) of the Transport Act 1950.

(b) the period in which the acquiring authority may enter into possession does not have to be specified in the initial notice of entry;
(c) the occupier or owner may—in the absence of the express permission of the acquiring authority once it enters into possession—lose the use of the land at an indeterminate date after the 14 days' notice period, which could result in uncertainty and economic hardship.

[1.30] While most acquiring authorities tend to engage meaningfully with owners during all stages of the compulsory acquisition process, the Commission considers that, on their face, the existing provisions are unbalanced in favour of the acquiring authority. In summary, there are three different stages where an owner is exposed to uncertainty. First, an owner only knows that the acquiring authority is going ahead with the acquisition when they are served with a notice to treat, which may be up to three years after the confirmation order in some situations and 18 months under other statutory schemes. Second, after the service of the notice to treat, there is no time limit within which a notice to enter into possession must be served. Third, after the service of the notice to enter into possession, there is no time by which the authority must enter into possession.

### (c) Valuation date

[1.31] Under the notice to treat procedure, the valuation date for the purposes of the market value aspect of compensation is the date of the service of the notice to treat.[26] This means that developments and improvements made on the land after the service of a notice to treat will not be included in the compensation.[27]

[1.32] An issue arises when there is a significant delay between the date of service of a notice to treat and the payment of the compensation. There is no statutory time limit to determine and pay the compensation, so this delay may stretch on for a significant period. This can prejudice both parties as the value of the land may have increased or decreased in the interim, leading to an increase or reduction in the actual purchasing power of the compensation award when it is made. This may exacerbate a perception of over—or under—compensation.

[1.33] As further discussed below, the Commission's recommended vesting order procedure will prevent significant delay that has been identified as an issue above. The date of the conveyance of the land (vesting date) must be no later

[26] For instance, section 84(1)(a) of the Housing Act 1966 provides "…the value of the land at the time the relevant notice to treat is served assessed…".

[27] Article 2(1) of the Third Schedule of the Housing Act 1966.

than six months from the service of the vesting order, which will constitute the valuation date of the property.[28]

[1.34] In addition, the introduction of an advance payment regime will decrease the delay in receiving at least some compensation.[29] The acquiring authority will be obliged to pay a substantial amount of compensation to owners served a notice to treat or a vesting order and who provide satisfactory proof of title. The advance payment must be paid before the end of the day the acquiring authority takes possession of the land if the request has been made within 10 weeks from the service of the notice to treat or the vesting order. Otherwise, it must be paid within two months from the receipt by the acquiring authority of the required information.

## 3. Approaches to implementing a compulsory purchase order in common law jurisdictions

[1.35] Except for Ireland, the common law jurisdictions that the Commission examined use vesting orders as the standard mechanism to compulsorily acquire lands.[30] A vesting order procedure enables the acquiring authority, after confirmation, to vest title to the acquired land in itself, free of any incumbrances. Unlike under a notice to treat procedure, the acquiring authority receives title whether or not the full compensation has been paid to the affected owner.

### (a) The Lands Clauses Consolidation Act 1845

[1.36] In many common law jurisdictions, compulsory acquisition procedures originate from the 1845 Act.[31] Almost without exception those jurisdictions have either broken from, or substantially modernised, the 1845 Act provisions. One common development in other jurisdictions is the enactment of a vesting order procedure as the standard mechanism for compulsory acquisition. The 1845 Act proceeds under the model of a standard (albeit compelled) conveyance. The owner is forced to give their interest to the acquiring

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[28] See paragraph 1.69 of this Report.

[29] An advance payment is a payment of a part of the compensation payable to the owner before the final compensation has been agreed upon or determined. The introduction of an advance payment regime is further discussed in Chapter 2 of this report.

[30] Save that in England and Wales, the notice to treat and the execution of a vesting order are both available to compulsorily acquire land.

[31] In the course of preparing this Report, common law jurisdictions researched by the Commission included Australia including the federal state, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia; Canada including the federal state, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Quebec; England and Wales; and Northern Ireland.

authority. If, whether intentionally or unintentionally, the owner cannot or will not convey their interest, the acquiring authority can use a unilateral deed poll procedure to compel the conveyance to it of the interests described in the deed poll. An important common feature of these methods is that it is the owner's specific interest that is conveyed to the acquiring authority. This is in keeping with the maxim of property law *nemo dat quod non habet* ("no-one gives what they do not have").

[1.37] A vesting order procedure works differently. Rather than forcibly conveying the owner's interest (whatever it is) to the acquiring authority, the vesting order instead extinguishes that interest, while at the same time itself granting ("vesting") title to the acquiring authority. Because the owner's interest is extinguished, they are entitled to compensation just as they would be if their interest were compulsorily taken from them by the acquiring authority; however, the acquiring authority gets what is known as a statutory title from the vesting order, rather than becoming the owner's successor in title.

### (b) Vesting order procedures in other jurisdictions

[1.38] In most common law jurisdictions, a vesting order procedure is used as the standard procedure for compulsory acquisition. Only two jurisdictions have the notice to treat and the vesting order procedures:

(a) in England and Wales, both procedures remain,[32] and
(b) in Tasmania, acquiring authorities may acquire the land by vesting in the absence of agreement between both parties after the service of a notice to treat.[33]

[1.39] There are two approaches, alternative to each other, regarding how much time the acquiring authority has to make a vesting order to acquire land after the confirmation stage. As previously discussed, this period provides the necessary time for acquiring authorities to reflect on whether it will proceed with the acquisition.[34] In England and Wales, the acquiring authority must make a vesting order within three years from the date on which the compulsory purchase order becomes operative, allowing the acquiring authority to reflect during that period on whether it wishes to proceed with

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[32] The Compulsory Purchase Act 1965 (England and Wales) deals with the notice to treat procedure; the Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales) deals with the vesting declaration procedure.

[33] Section 11 of the Land Acquisition Act 1993 (Tas). The acquiring authority must specify that it is willing to negotiate for the purchase of the land, and the owner is entitled to compensation. Owners must provide particulars of their estate in the land. It also provides that the owner is prohibited from carrying out works "that will vary the nature or value of the land" under section 11(2) of the Land Acquisition Act 1993 (Tas).

[34] See paragraph 1.9 of this Report.

the acquisition. On the other hand, the Canadian and Australian approach leaves a much shorter period after the confirmation stage. In some Australian jurisdictions, the confirmation order is directly published in the Gazette by the confirming authority and this publication has the effect of vesting title in the acquiring authority. Since the vesting is automatic after the order is confirmed, the decision to go ahead with the acquisition must effectively be taken before submitting a compulsory purchase order to the confirming authority.

[1.40] Legislation in Northern Ireland does not provide a prescribed period to make a vesting order after a compulsory purchase order has been confirmed.[35] The Commission understands that acquiring authorities wait to secure the funding before making vesting orders. Unlike in England and Wales, the confirmation of a compulsory purchase order is not subject to evidence that the acquiring authority will have funding available.[36] Owners in Northern Ireland may therefore live under the threat of a vesting order for some considerable time unless they compel the acquiring authority to buy their land by using a blight notice.[37]

[1.41] In each of these jurisdictions, the occupier has time to vacate the land. The periods to vacate vary between jurisdictions but three months is the most common period. In England and Wales, occupiers are notified at least three months before osing possession of their property, and in Northern Ireland one month before. In Canada and Australia, an acquiring authority does not have the right to take possession automatically even after the vesting date (being the date upon which the acquiring authority obtains title).[38]

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35 See Local Government (Northern Ireland) Act 1972.

36 In England and Wales such evidence must be provided when applying for the confirmation of a compulsory purchase order. See the Office of the Deputy Prime Minister (ODPM) Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules* at page 13 which provides that "…funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period […] only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years".

37 Owners who may have difficulties selling their houses as they are living under the threat of a vesting order may serve a blight notice to the acquiring authority. Owners must show evidence of reasonable endeavours to sell the house for six months. The acquiring authority is then compelled to buy the property; see, for example the Planning Blight (Compensation) (Northern Ireland) Order 1981.

38 For instance, in Alberta and Ontario, the acquiring authority may take possession of the land no earlier than three months after the registration of the vesting order: see section 64(1) Expropriation Act 2000 (Alberta), section 39(2) of the Expropriations Act 1990 (Ontario). In South Australia, the acquiring authority may take possession of the land no earlier than three months after the date of acquisition of the land; see section 24(1)(b) of the Land Acquisition Act 1969 (SA).

| | England and Wales | Northern Ireland | Canada | Australia |
|---|---|---|---|---|
| **Period within which vesting order must be made** | Maximum three years from the date on which the compulsory purchase order becomes operative.[i] | No prescribed period to make a vesting order once the relevant Minister issued a "direction order".[ii] | Varies between 14 days (Manitoba) to three months (Ontario) from the confirmation of the compulsory purchase order.[iii] | Varies from 120 days (New South Wales) to 18 months (South Australia and Victoria) from the service of the notice of intention to acquire the land.[iv] |
| **Vesting date** | The first day after the end of the period specified in the vesting order.[v] | A month after the publication of the vesting order.[vi] | The date of registration of the certificate of approval with the Land Title Office.[vii] | The date of the publication in the Gazette.[viii] |
| **Effect of the vesting order** | Vest title in the acquiring authority on the vesting date free from any incumbrances.[ix] The vesting order does not automatically extinguish all easements or restrictive covenants. | Vest title in the acquiring authority on the vesting date free from any incumbrances.[x] | Vest title in the acquiring authority on the vesting date free from any incumbrances.[xi] | Vest title in the acquiring authority on the vesting date free from any incumbrances. |
| **Date of possession** | The acquiring authority may take possession from the vesting date, which cannot be earlier than three months from the service of the execution notice.[xii] | The acquiring authority may take possession from the vesting date, which cannot be earlier than one month from the service of the execution notice.[xiii] | The date of possession is not the vesting date. It must be indicated in a notice served to occupiers and a compensation offer must have been made.[xiv] | The date of possession is not the date of acquisition of the land. |

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|---|---|---|---|---|
| **Compensation** | A substantial amount of the compensation is available from the confirmation stage by requesting an advance payment.[xv] | From the vesting date a compensation fund is available for any person who has an interest in the land acquired. An advance payment must be made: (1) from the date the vesting order became operative and (2) if it has been requested.[xvi] | If the owner accepts the offer of compensation made before the acquiring authority takes possession of the land, this payment must be made immediately. The acceptance of this payment does not prejudice their right to appeal against the offer. | Formal offer of compensation made within a period after the acquisition.[xvii] |

Table 1 Comparative analysis of vesting order procedures

**Notes to Table**

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[i] Section 5A of Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales) as inserted by section 182(2) of the UK Housing and Planning Act 2016.

[ii] Schedule 6 of the Local Government (Northern Ireland) Act 1972. An acquiring authority submits to the Ministry for Development an application in a prescribed form for a vesting order in respect of the land to be acquired. After reviewing any objections submitted, the Ministry for Development may make a vesting order, with modifications if necessary, or refuse to make it. The Commission understands that, in practice, the Minister issues a "direction order" which, in effect, authorises the acquiring authority to proceed with the scheme. The acquiring authority then makes the vesting order itself after receiving the funding.

[iii] Section 11(1) of the Land Acquisition Act 1987 (Manitoba) and section 9(1) of the Expropriations Act 1990 (Ontario).

[iv] For instance, in South Australia, the notice of intention to acquire the land is served before a compulsory purchase order is confirmed. The notice of acquisition may be published after 3 months, but not later than 18 months after the service of the notice of intention; see section 16(1) of the Land Acquisition Act 1969 (SA). In Victoria, the notice of intention to acquire lapses at the expiration of 6 months after the service of such notice; see section 16 of the Land Acquisition and Compensation Act 1986 (Vic). See also section 14(2) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

[v] Sections 4(3) and 8 of the Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales).

[vi] Sections 5(c) and 6(1) of schedule 6 of the Local Government (Northern Ireland) Act 1972.

[vii] Section 19(1) of the Expropriation Act 2000 (Alberta); section 23(1), (2) of the Expropriation Act 1996 (British Columbia); section 13(1) of the Expropriation Act 1987 (Manitoba); section 11(1), (2) of the Expropriation Act 1989 (Nova Scotia); section 9(1) of the Expropriations Act 1990 (Ontario).

[viii] Section 41(4) of the Lands Acquisition Act 1989 (Australia); section 20(1) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW); section 9(8) of the Acquisition of Land Act 1967 (Qld); section 16(2) of the Land Acquisition Act 1969 (SA).

[ix] Section 8 of the Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales). If the land is subject to a minor tenancy or a long tenancy about to expire, the land is vested to the acquiring authority but a notice to treat and a notice of entry must be served before the acquiring authority can take possession of the land acquired; see section 9 of the Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales).

[x] Sections 6(1) and 9 of schedule 6 of the Local Government (Northern Ireland) Act 1972.

[xi] Section 19 of the Expropriation Act 2000 (Alberta); section 23 of the Expropriation Act 1996 (British Columbia); section 13(1) of the Expropriation Act 1987 (Manitoba); section 11(2) of the Expropriation Act 1989 (Nova Scotia); section 9(1) of the Expropriations Act 1990 (Ontario); section 15 of the Expropriation Act 1985 (Canada).

[xii] Sections 4(1) and 8 of the Compulsory Purchase (Vesting Declarations) Act 1981 (England and Wales).

[xiii] Sections 6(2) and 9 of schedule 6 of the Local Government (Northern Ireland) Act 1972.

[xiv] For instance, in Quebec, the date of possession is included in the notice of transfer of title served before the registration of title. The date when the expropriating authority is to take the land must be at least 15 days after the notice's registration date; see section 53.3 of the Expropriation Act CQLR c E-24 (Quebec). In Alberta, the expropriating authority must serve a notice of possession within 30 days from the registration. The date when the expropriating authority is to take the land must be at least three months after the notice's registration date. Any person who received a notice of possession can apply to the court to change the date of possession; see sections 64(1) and 64(3) of the Expropriation Act 2000 (Alberta). In Ontario, there is no prescribed period to serve a notice of possession to the expropriated party, but the date of possession must be at least three months after the date of the serving of the notice of possession; see section 39(2) of the Expropriations Act 1990 (Ontario). In Manitoba, a notice of possession must be served at least 30 days before the date of possession. Any person who received a notice of possession can apply to a judge to change the date of possession; see sections 20(2) and 20(3) of the Expropriation Act 1987 (Manitoba).

[xv] Sections 52–52B of the Land Compensation Act 1973 (England and Wales).

[xvi] Section 19 of the Land Acquisition and Compensation (Northern Ireland) Order 1982.

[xvii] In New South Wales, an occupier is entitled to remain in occupation until either the agreed compensation is paid or at least 90% of the compensation offered is paid to the occupier or into the trust account. If the building is the person's principal place of residence or business, they can remain in occupation for three months even if they have received a compensation payment. Occupiers do not have to pay rent for the three months if they are also the owner of the building. See sections 34(1), 34(2) and (3A) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). In South Australia, a notice must be served to all occupiers with a date of possession that cannot be less than 90 days after the date on which the notice of acquisition is published; see section 24(1)(b) of the Land Acquisition Act 1969 (SA). In Victoria, an acquiring authority may not take possession before the expiration of three months after the date of acquisition unless it has given seven days' notice in writing to the occupier; see section 26(2) of the Land Acquisition and Compensation Act 1986 (Vic). In the federal state, the occupier is entitled to remain in occupation for the period of six months or for a longer period fixed by agreement between the Minister and the occupier; see section 47(2) of the Lands Acquisition Act 1989 (Australia).

### (c) Vesting order procedures in Irish law

[1.42] A small number of statutes containing compulsory acquisition powers provide for vesting procedures in Ireland. The use of vesting orders is generally restricted to specific circumstances.[39] They are usually employed by an acquiring authority as a measure of last resort for non-compliance with a request, for instance, if reasonable steps have not been taken:

(a) to ensure that the land does not continue to be a derelict site,[40]
(b) to safeguard protected structures,[41]
(c) to oblige the owner to comply with a planning condition,[42] or
(d) to prevent further delay once the acquiring authority has taken possession of the land.[43]

[1.43] The vesting procedures under the enactments that provide for them are swifter than the notice to treat procedure. The completion of the acquisition—giving title to the acquiring authority—does not depend on the service of notice to treat and notice of entry, the assessment of compensation, and the payment of the compensation. For instance, the vesting order procedure under the Housing Act 1966 provides an opportunity to expedite the acquisition when the acquiring authority needs the land immediately and the acquisition could not be completed using the notice to treat procedure.

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[39] For instance, sections 6 to 10 of the Local Government (Sanitary Services) Act 1964; sections 81 and 82 of the Housing Act 1966; sections 14 to 18 of the Derelict Sites Act 1990; section 45 and sections 71 to 75 of the Planning and Development Act 2000; schedule 4 of the Harbour Act 1996; schedule of the Shannon Navigation Act 1990 as amended, section 11 and schedule of the National Monuments (Amendment) Act 1994. Railways Procurement Agency or CIÉ is authorised compulsorily acquire land by the Railway Order. The compulsory acquisition procedure applicable is the Housing Act 1966 procedure pursuant to section 45 of the Transport (Railway Infrastructure) Act 2001. Waterways Ireland is authorised to compulsorily acquire land under section 12 of the British–Irish Agreement Act 1999. The compulsory acquisition procedure applicable is the schedule of the Shannon Navigation Act 1990 as amended by section 12(3)(a) of the 1999 Act. The list does not include vesting procedures where an acquiring authority must apply before the High Court to vest title to it such as under the National Asset Management Agency Act 2009.

[40] Sections 14 to 18 of the Derelict Sites Act 1990.

[41] Sections 71 to 75 of the Planning and Development Act 2000.

[42] Section 45 of the Planning and Development Act 2000.

[43] Sections 81 of the Housing Act 1966.

| | Sections 7-10 of Local Government (Sanitary Services) Act 1964 | Sections 81-84 of the Housing Act 1966 | Sections 17-19 of the Derelict Sites Act 1990 | Section 45 of the Planning and Development Act 2000 | Sections 71-78 of the Planning and Development Act 2000 |
|---|---|---|---|---|---|
| **Confirmation stage** | An Bord Pleanála must consent if objections have been submitted.[i] | n/a | An Bord Pleanála must consent if objections have been submitted.[ii] | By An Bord Pleanála if objections have been submitted.[iii] | An Bord Pleanála must consent if objections have been submitted.[iv] |
| **Period between confirmation and the making of a vesting order** | Not specified | n/a | Not specified | | Not specified |
| **Conditions** | The land is dangerous or ceased to be dangerous after the work carried out by the sanitary authority.[v]<br><br>Publication and service of a notice of intention to acquire the land.[vi] | A notice to treat and a notice of entry have been served.<br><br>(1) Several interests in the land have not yet been conveyed.<br>(2) It is urgently necessary.<br>(3) A proper offer in writing to each person having an interest in the land has been made.[vii] | The land must be registered in the Derelict Site Registry.[viii]<br><br>Publication and service of a notice of intention to acquire the land.[ix] | Failure to comply with a planning condition to provide an open space (s.45 of the 2000 Act).<br><br>(1) Written request to comply with the planning condition served.<br>(2) Publication and service of a notice of intention to acquire the land. | (1) Necessary for the protection of the structure.<br>(2) Not lawfully occupied as a dwelling.[x]<br><br>Publication and service of a notice of intention to acquire the land.[xi] |

| | Sections 7-10 of Local Government (Sanitary Services) Act 1964 | Sections 81-84 of the Housing Act 1966 | Sections 17-19 of the Derelict Sites Act 1990 | Section 45 of the Planning and Development Act 2000 | Sections 71-78 of the Planning and Development Act 2000 |
|---|---|---|---|---|---|
| **Vesting date** | The vesting date is the date specified in the vesting order, which cannot be earlier than 7 days from the making of the vesting order.[xii] | The vesting date is the date specified in the vesting order, which cannot be earlier than 21 days from the making of the vesting order.[xiii] | The vesting date is the date specified in the vesting order, which cannot be earlier than 21 days from the making of the vesting order.[xiv] | The vesting date is the date specified in the vesting order. | The vesting date is the date specified in the vesting order, which cannot be earlier than 3 weeks from the making of the vesting order.[xv] |
| **Effect of the vesting order** | Vest title to the acquiring authority on the vesting date. | Vest title to the acquiring authority on the vesting date. | Vest title to the acquiring authority on the vesting date. | Vest title to the acquiring authority on the vesting date. | Vest title to the acquiring authority on the vesting date. |
| **Occupier** | A notice must be served within 14 days from the making of the vesting order.[xvi] | No additional notice is served as a notice of entry has already been served before the making of the vesting order. | A notice must be served within 14 days from the making of the vesting order.[xvii] | n/a | A notice must be served within 2 weeks from the making of the vesting order.[xviii] |

Table 2 Vesting order procedures under Irish law

## Notes to Table

[i] Section 8(3) of the Local Government (Sanitary Services) Act 1964 as amended by section 217(2) of the Planning and Development Act 2000.

[ii] Section 16(3) of the Derelict Sites Act 1990 as amended by 217(2) of the Planning and Development Act 2000.

[iii] Section 45 of the Planning and Development Act 2000 provides that any person having an interest in the land may appeal to An Bord Pleanála to submit their objections against the compulsory purchase order. It is similar to the confirmation stage except that it is not the acquiring authority that makes the application but "any person having an interest in the land". Under the Housing Act 1966, the vesting order mechanism can be used once a notice to treat and a notice of entry have been served; therefore, in such cases, it must be the case that the compulsory acquisition has been already confirmed by An Board Pleanála as this must be done before notice to treat can be served.

[iv] Section 73 of the Planning and Development Act 2000.

[v] Section 6 of the Local Government (Sanitary Services) Act 1964.

[vi] Section 7(1) of the Local Government (Sanitary Services) Act 1964.

[vii] Section 81(1) of the Housing Act 1966.

[viii] Section 14 of the Derelict Sites Act 1990.

[ix] Section 15 of the Derelict Sites Act 1990.

[x] Section 71 of the Planning and Development Act 2000.

[xi] Section 72(a), (b) of the Planning and Development Act 2000.

[xii] Section 10(1) of the Local Government (Sanitary Services) 1964 Act.

[xiii] Section 82(1) of the Housing Act 1966.

[xiv] Section 18(2) of the Derelict Sites Act 1990.

[xv] Section 75(2) of the Planning and Development Act 2000.

[xvi] Section 9(3) of the Local Government (Sanitary Services) Act 1964.

[xvii] Section 18(2) of the Derelict Sites Act 1990.

[xviii] Section 75(2) of the Planning and Development Act 2000.

# 4. Recommended vesting order model

## (a) A standalone simplified procedure

[1.44] The Commission considers that there should be a move away from the notice to treat procedure towards a general vesting order model. This model should become the only procedure available to implement a compulsory purchase order. After a compulsory purchase order is confirmed and becomes operative, the question is not whether the acquiring authority can take the land, but whether it will do so, when it will do so, and how much it will pay for the land. Thus, the Commission considers that after a compulsory purchase order becomes operative, the acquiring authority should, in principle, implement it swiftly. As previously discussed, the notice to treat procedure creates several undesirable uncertainties on the part of both parties. A vesting order procedure addresses some of these issues by providing a certain and binding transfer of ownership within a prescribed time limit. Under the recommended vesting order procedure discussed below, there will be a 12-month period after a compulsory purchase order becomes operative to allow the acquiring authority to decide whether it wishes to go ahead with the acquisition. This is shorter than either the existing 18-month or three-year period in the context of notice to treat. This is because, as identified above, the Commission considers it important to maintain a balance between the requirement to give the acquiring authority a reasonable time to decide whether to proceed with the acquisition and the entitlement of the owner to know whether the acquiring authority is going to proceed to acquire their land.

[1.45] Second, as described below, once the acquiring authority decides to proceed with the acquisition and makes a vesting order,[44] the vesting date cannot be later than six months from the date on which the vesting order was served to owners. If the vesting date is later than the prescribed period, then the compulsory purchase order ceases to have effect. This is significantly shorter than the current notice to treat procedure, where there is no time limit either for serving a notice of entry or for completing the conveyance. The vesting model also offers clarity regarding title as previous estates and legal interests are extinguished.

[1.46] A vesting order model streamlines the process considerably and is beneficial for both parties. It serves to mitigate uncertainty for owners by reducing layers of process and compelling the acquiring authority to vest title to itself within a

[44] The vesting order is a legal order that transfers title to the acquiring authority. This order is binding and enforceable on the vesting date.

specific period. It will also reduce legal costs as it avoids the incurring of conveyancing costs. Under the recommended vesting order model that will be discussed below, a compulsory acquisition could be completed as early as 3 months and no later than 18 months from when a compulsory purchase order becomes operative.[45] From an acquiring authority's perspective, the main benefit of a vesting order procedure is to provide a streamlined path to ownership. The effect of a vesting order is to acquire the target land in fee simple free from incumbrances even if issues with the owner's title arise. This makes planning the project easier as an acquiring authority can acquire the necessary land very straightforwardly and at a specific date. This is particularly useful when the acquiring authority must take land from many owners for a particular project, as some may have complex title issues that could otherwise cause significant delay.

[1.47] Considering the deficiencies with the notice to treat procedure identified earlier in this chapter, the Commission recommends that it should not be retained. The UK Government considered that it was necessary to keep both procedures for more flexibility, so both procedures have remained available to acquiring authorities in England and Wales.[46] However, the Commission considers that this approach should not be followed in this jurisdiction. The benefits, such as they are, of the notice to treat procedure, are preserved in a vesting procedure. An acquiring authority is still given time to decide whether to go ahead with the acquisition, although it now has 12 months rather than 18 months or three years. As discussed in more detail below, the Commission recognises that there may be some projects—for example, large infrastructural projects—where the acquiring authority is not able to decide whether it should proceed within a 12-month period. There are too many variations in types of acquisition to articulate each in primary legislation, so the Commission has provided in its draft Bill that the Minister may make regulations to address categories of acquisition that may require a longer time period.

[1.48] Further, the acquiring authority may extend the period of 12 months to make a vesting order if each owner affected by the vesting order consents, in writing, to the extension of the period. The completion of the acquisition may

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45 This timeframe does not include an application to determine compensation.

46 The Government's view was set out in the Department for Transport, Local Government and the Regions' Policy Statement. One of the disadvantages of the vesting order "include the fact that the power to withdraw the notice to treat no longer applies once the declaration has been executed": see Law Commission, *Towards a Compulsory Purchase Code: (2) Procedure* (Law Com CP No. 169) at page 41. In addition, as explained by Barnes, *The Law of Compulsory Purchase and Compensation* (Bloomsbury Publishing 2014) at page 84, In England and Wales short tenancies are excluded from the general vesting order procedure. As these tenancies are, by definition, short, it is more efficient to simply wait for them to end.

also be extended by agreeing a later vesting date with the owner in cases where the land is not immediately needed and the owner prefers to remain on the land. However, unlike the current notice to treat procedure, a decision to extend the time limits would require the agreement of both parties.

[1.49] In addition, the Commission considers that if its proposed vesting procedure is adopted, existing vesting order procedures should also be repealed. As described above, there are several extant vesting procedures fragmented across different statutes. It is undesirable and complex to have different procedures for doing fundamentally the same thing: vesting title in the acquiring authority to effect a compulsory purchase order. Maintaining existing vesting order procedures alongside the Commission's recommended procedure would likely cause confusion and undermine the Commission's objective to bring clarity to this area of law.

[1.50] The Commission recognises that repealing the relevant statutory provisions containing notice to treat and vesting order procedures presents a significant challenge. It will be necessary to assess carefully any potential unintended consequences of such repeal, given that there are many compulsory acquisition provisions on the Irish statute book providing for purchase by many different acquiring authorities in a variety of situations. The Commission does not have the resources or the expertise to carry out an extensive risk and impact assessment of repealing the necessary provisions. Due to the complexity of that task, the policy considerations that arise, and the necessity to carry out a wider stakeholder engagement process, the Commission considers that necessary repeals should be considered further and proposed by relevant government departments.

[1.51] The draft Bill attached to this Report is designed to accommodate acquisitions done both by the Commission's proposed vesting procedure and by the existing notice to treat procedure. The entitlement to advance payment, the procedure for determination of compensation by the Tribunal and the principles of compensation will apply whether the acquisition is by way of vesting or notice to treat. The Commission recommends that, over time, the legislation providing for notice to treat and vesting in other statutory contexts should be repealed and the vesting procedure prescribed in the Commission's draft Bill should become the only way in which land can be acquired on a compulsory basis.

**R 1.1** **The Commission recommends that** a new, standalone and simplified vesting order procedure replaces the existing notice to treat procedure.

**R 1.2** **The Commission recommends that** on the vesting date, as specified in the vesting order, the land is transferred to the acquiring authority in fee simple free from incumbrances.

### (b) The structure of the vesting order model

[1.52] After a multi-jurisdictional comparative analysis, the Commission has developed a vesting order procedure that addresses the defects in the existing notice to treat procedure. The recommended vesting order model differs in some respects both from other vesting order procedures in the common law jurisdictions that the Commission examined,[47] and from other vesting procedures in this jurisdiction. Existing vesting order procedures in this jurisdiction do not have a time limit; the Commission's proposed vesting order procedure differs as it has a time limit of 12 months to complete the compulsory acquisition. If this 12-month period lapses, the compulsory purchase order ceases to have effect. Many other jurisdictions that have vesting order procedures do have a time limit,[48] although the Commission has recommended a time period of 12 months, which is longer than in Canada but shorter than in England and Wales.[49]

[1.53] The principal objectives of the new vesting order model are:

(a) to streamline the compulsory acquisition of land,
(b) to prevent delays after the compulsory purchase order is confirmed,
(c) to provide more certainty to persons affected by compulsory acquisition, and
(d) to address efficiently any title issues arising and to provide a quicker path to ownership for acquiring authorities.

[1.54] The remainder of this section of the chapter describes the Commission's proposed vesting procedure, which is given effect to in Chapter 1 of Part 2 of the Commission's draft Bill.

#### *(i) Making a vesting order*

[1.55] The Commission recommends that there should be a single, prescribed period of 12 months within which the acquiring authority must make a vesting order. This period is less than the current 18-month and 3-year periods to serve a notice to treat. However, due to the considerable uncertainty already endured by owners, it is desirable to keep the period between confirmation of a compulsory purchase order and confirmation of an acquisition going ahead under that order as short as possible.

[1.56] In addition, under the current vesting order procedures in this jurisdiction, statutory provisions provide that an acquiring authority may make a vesting

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[47] The Commission examined Australia, Canada, England and Wales, and Northern Ireland.

[48] Northern Ireland is an exception as it does not have a prescribed period to make a vesting order: see schedule 6 of the Local Government (Northern Ireland) Act 1972.

[49] Table 1 compares the jurisdictions examined by the Commission.

order after a compulsory purchase order has been consented to by An Bord Pleanála (if there were objections).[50] Therefore, as there is no prescribed period to make a vesting order, owners may live under the threat of a vesting order for a lengthy period but could potentially have to vacate their land within a short time.

[1.57] The Commission considers that a 12-month period is appropriate and should in most cases allow sufficient time for the acquiring authority to make its decision, whether to proceed on foot of the compulsory acquisition order. The 12-month period may be extended if each owner affected by a vesting order consents, in writing, to the extension of the period.

[1.58] Respondents to the Issues Paper, and other consultees, who were in favour of a longer period for service of the notice to treat asserted that acquiring authorities may need more time to consider whether they wish to proceed with acquisitions in the long horizon and for complex projects, such as Metro North. While the Commission acknowledges that in certain circumstances, an extension may be warranted, this should be the exception and not the rule. The Commission takes the view that there should be a relatively short default period for all compulsory acquisitions and that the relevant Minister should have the power to extend this period for certain types of project that may be described in regulations.

### *(ii) Form of vesting order*

[1.59] A vesting order must be in a prescribed form and include:

(a) the effect of the vesting order,
(b) the vesting date, and
(c) a map showing the land to which the vesting order relates.

[1.60] Acquiring authorities must serve on owners, within one week from the date on which they make the vesting order, the copy of the vesting order and a notice informing of:

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[50] The acquiring authority must apply for the consent of An Bord Pleanála if objections to the acquisition have been submitted to the acquiring authority, see section 8(3) of the Local Government (Sanitary Services) Act 1964 as amended by 217(2) of the Planning and Development Act 2000; section 16(3) of the Derelict Sites Act 1990 as amended by 217(2) of the Planning and Development Act 2000; section 73 of the Planning and Development Act 2000. Section 45 of the 2000 Act provides that any person having an interest in the land may appeal to An Bord Pleanála to submit their objections against the compulsory purchase order. It is similar to the confirmation stage except that it is not the acquiring authority that makes the application but "any person having an interest in the land". Under the Housing Act 1966, the vesting order mechanism can be used once a notice to treat and a notice of entry have been served; therefore, in such cases, the compulsory acquisition has been already confirmed by An Bord Pleanála as this must be done before notice to treat can be served.

(a) the owner's requirement to provide particulars of claim, and
(b) the owner's entitlement to an advance payment.

[1.61] At the vesting date, the land described in the order is vested in the acquiring authority in fee simple and free from any incumbrances and the acquiring authority is deemed to have taken possession of the land. Therefore, there is an obligation to serve a copy of the vesting order on owners to inform them of the date they will lose the use of the land. The service of the copy of the vesting order replaces the notice of entry under the notice to treat procedure as it informs owners of the date they must vacate the land.

[1.62] Under the Commission's recommended vesting order procedure, the vesting date cannot be earlier than three months from the service of the copy of the vesting order. Thus, the notice period to vacate has been extended to three months and occupiers will be informed of the actual date they will lose the land.[51] The notice period has been extended to provide sufficient time for the occupier to vacate the land and relocate in an orderly manner, minimising their losses and thus minimising the disruption caused to them by the compulsory acquisition.

### *(iii) Particulars of claim*

[1.63] The Commission recommends that an owner should submit particulars of claim to the acquiring authority within 10 weeks from the service of a copy of the vesting order. The information required in the particulars of claim includes:

(a) the exact nature of the owner's interest, and
(b) the amount of compensation claimed with the necessary documentation.

[1.64] The particulars of claim should be in a prescribed form, as this will provide greater consistency in approach among acquiring authorities.[52] The particulars should clearly set out the compensation claimed under each head of compensation.

[1.65] The Commission considers that a 10-week period is sufficient for an owner to assemble the required information for their particulars of claim, even for more

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[51] Under the Housing Act 1966, the notice period is 14 days. The 1966 Act is the most used CPO scheme: see paragraph 2.8 of this Report. Other Acts provides for a notice period of at least a month or three months if there is an occupied dwelling: see paragraph 2.9 of this Report.

[52] Currently, a notice of claim generally includes: the value of land acquired; the diminution in value of retained lands, if any; the costs resulting from acquisition; disturbance; loss of profits or goodwill; loss or depreciation of stock in trade; and professional fees necessary for the acquisition.

complex claims where several reports from experts may be necessary. This period is longer than the period allowed under existing statutory provisions.[53] The 10-week period strikes an appropriate balance between giving owners time to prepare their claim and ensuring that the application for compensation moves along briskly in order to facilitate compensation being assessed and agreed upon.

### *(iv) Vesting date*

[1.66] The vesting date is the date on which the vesting order operates to vest title in the acquiring authority. Under the proposed vesting order procedure, the vesting date cannot be:

(a) earlier than three months from the service on the owners of a copy of the vesting order, or
(b) later than six months from the service on the owners of a copy of the vesting order.

[1.67] If the vesting date is later than the six-month prescribed period, the compulsory purchase order ceases to have effect unless both parties agree to extend the date of the vesting order.

[1.68] The Commission considers that once an acquiring authority decides to go ahead with the acquisition of land, the compulsory purchase should complete as quickly as possible. As identified earlier in this chapter, under existing notice to treat and vesting order procedures, there is no prescribed period within which to serve a notice of entry, to enter the property after serving a notice of entry, or to make a vesting order. The absence of prescribed periods contributes to undesirable delays in the compulsory purchase order process. Introducing a six-month prescribed period within which an acquiring authority must complete the acquisition will provide more certainty for owners. As discussed above, the three-month prescribed period provides sufficient notice for occupiers to vacate the land in a timely manner.[54]

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[53] A notice to treat will require the submission of a notice of claim within a specified period, generally not more than six weeks: see Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury 2013) at page 483. Some statutory schemes provide for a shorter period. For instance, section 79 of the Housing Act 1966 provides that a person on whom a notice to treat has been served must respond to that notice within a month. Under section 18 of the Lands Clauses Consolidation Act 1845 the prescribed period to respond to a notice to treat is 21 days.

[54] See at paragraph 1.62.

### *(v) Valuation Date*

[1.69] The valuation date of the land for the purposes of compensation is the date on which the copy of the vesting order is served on the owners. Under the notice to treat procedure, the date of the service of the notice to treat is the valuation date. However, in that case, the land will often not be acquired and/or the compensation determined until many years after the service of the notice to treat. That can lead to a significant disparity between values at the date of the service of the notice to treat and those prevailing when compensation is assessed, which can have undesirable consequences. Such consequences are unlikely with the Commission's proposed approach, as no more than six months can elapse between the service of the vesting order and the vesting date.

### *(vi) Withdrawal*

[1.70] The Commission recommends that acquiring authorities should not be able to withdraw a vesting order. This is similar to the existing vesting procedures in this jurisdiction but different from the notice to treat procedure. Under the latter procedure, acquiring authorities may withdraw a notice to treat within six weeks from receipt of the notice of claim (claim for compensation).[55] The Commission considers that the 12-month period provides sufficient time for acquiring authorities to decide whether to proceed. If an acquiring authority needs more time, this period may be extended if each owner affected by a vesting order consents to it in writing. On the other hand, the possibility to withdraw a vesting order would increase uncertainty for owners.

**R 1.3** **The Commission recommends that** the vesting order model should include the following requirements:

(a) a vesting order shall be made within 12 months from the compulsory purchase order becoming operative,

(b) the vesting date cannot be earlier than 3 months from the service of a copy of the vesting order,

(c) the vesting date cannot be later than 6 months from the service of a copy of the vesting order, and

(d) the occupier loses possession on the vesting date.

[55] Section 5(2) of the Acquisition of Land (Assessment of Compensation) Act 1919.

# CHAPTER 2
# ADVANCE PAYMENT OF COMPENSATION

**Chapter Contents**



## 1. Introduction

[2.1] In this chapter, the Commission proposes the introduction of an advance payment regime. As its name suggests, an advance payment is a payment of a part of the compensation payable to the owner before the final compensation has been agreed or determined. As discussed in the previous chapter, the Commission recommends the repeal of existing notice to treat and vesting order procedures. Since the notice to treat and existing vesting procedures are well-established and embedded in practice and may take time to be repealed given the multiplicity of statutory schemes where they are deployed, it is likely that those existing procedures will co-exist with the recommended vesting order model for some time. The Commission, therefore, recommends that the advance payment regime should apply to all compulsory acquisition procedures, including the existing notice to treat and the Commission's recommended vesting order procedure.[56]

[56] The recommended advance payment regime was designed based on the vesting order procedure set out in the previous chapter. Under the recommended advance payment

[2.2] Acquiring authorities may need to take possession of the land before the compensation claim is resolved to commence the work and avoid undue delay in commencing the project they seek to undertake on the land. By the time the acquiring authority will be considering taking possession of the land three things will have happened:

(a) it will have notified owners of its decision to proceed with the acquisition,
(b) it will be bound to acquire the land, and
(c) owners will have been informed by the acquiring authority that it is bound to acquire their interest in the land.

[2.3] However, the owner will not have received any compensation at this point. The assessment of the final compensation may be lengthy depending on the facts of the particular case and the degree of agreement or disagreement between the parties. Also, some elements of the compensation—such as disturbance—require owners to vacate the land prior to being assessed. A long delay in the determination and payment of compensation in circumstances where the owner has lost the use of their land may pose considerable hardship for those owners. They may, in the worst-case scenario, have to relocate their home or primary business without having received compensation. To address these issues, the Commission recommends that acquiring authorities should be required to make a partial payment on account of the final compensation to owners who have, before the end of the day the acquiring authority takes possession of the land or, if later, within two months from the receipt of the request for an advance payment or of the necessary information, provided sufficient proof of their estate or legal interest in the land.

[2.4] The Commission's discussions and recommendations in this Chapter correspond to the provisions of Part 3 of the draft Bill appended to this Report.

[2.5] The Commission's recommended advance payment regime is summarised in the Advance Payment Flowchart appended at the end of the Executive Summary.[57]

regime, advance payment is available from the service of a notice to treat or a vesting order; neither notice exists under the current vesting order procedures. Therefore, the recommended advance payment regime would not be applicable to the existing vesting order procedures. If the Commission's recommendations were to be followed, the existing vesting order procedures would be abolished.

[57] See page 17 of this Report.

## 2. Entry into possession of land before the payment of compensation under current law

[2.6] If the acquiring authority proceeds with an acquisition by serving a notice to treat, an acquiring authority does not obtain title to the land until compensation has been paid. If the authority needs to enter into possession before the acquisition is completed it must observe certain procedural requirements, including the service of a notice of entry on the owner, lessee and/or occupier of the land.

[2.7] Under the 1845 Act, compensation must be paid if the owner and the occupier do not consent to the acquiring authority taking possession of the land. Sections 84 and 85 of the 1845 Act provide that the acquiring authority may enter and use the land if it has done any of the following:

(a) received the owner's and the occupier's consent,
(b) paid compensation to every entitled party,
(c) deposited the compensation as security, or
(d) issued a bond equal to the amount deposited plus interest.[58]

[2.8] Despite having these requirements on the face of the Act, the 1845 Act is often applied subject to certain modifications made to it by the 1966 Act.[59] Section 80(1) of the 1966 Act displaces the above 1845 Act provisions and instead provides that after the notice to treat has been served, the acquiring authority may take possession of the land following at least 14 days' written notice by serving a notice of entry under the notice to treat procedure.[60] The same section provides that the acquiring authority is liable to pay interest on the final compensation from the date it enters into possession.[61]

[2.9] Other compulsory acquisition procedures provide for the acquiring authority's power to take possession before the completion of the acquisition. These have also departed from the 1845 Act.[62] In some cases an acquiring authority may take possession of the land "before conveyance or ascertainment of price

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58 A bond is an agreement under seal to pay a sum of money.

59 Section 10(4)(a) of the Local Government (No 2) Act 1960, as amended provides that section 80(1) of the 1966 Act shall apply to an order made under section 10 of the 1960 Act. Section 213(4) of the Planning and Development Act 2000 provides that section 10 of the 1960 Act applies to local authorities using the compulsory purchase order under the 2000 Act.

60 Section 80(1) of the Housing Act 1966.

61 The rate of interest is the local funds rate, which is the rate of interest on money borrowed by local authorities from the local loans fund, in other words, the central fund: see *Murphy v Dublin Corporation* [1979] IR 115.

62 The service of a notice to treat is not required under all compulsory acquisition legislation; see paragraph 1.2 of this Report.

or compensation" following at least a month's written notice.[63] This notice period increases to three months if the dwelling is occupied.[64] The acquiring authority is, as under the 1966 Act, liable to pay interest on the compensation from the date of entry into the land.

[2.10] Under existing vesting order procedures, owners are likely to receive compensation after they have lost their legal interest in, and the use of, the land. The vesting order is a legal order that transfers title to the acquiring authority. At the vesting date, the acquiring authority is deemed to have taken possession. After making such an order, an acquiring authority must serve it including the enforceable date (vesting date), on owners.[65] An owner, occupier or lessee may only apply to the acquiring authority for compensation "immediately before a vesting order is made".[66] Under this procedure, it is very likely, if not certain, that the acquiring authority will obtain title to the land before the compensation is paid to owners unless the compensation is quickly settled by agreement and paid.

[2.11] The analysis above shows that, under current compulsory acquisition procedures (except for the 1845 Act, which is usually applied in a modified form), there is a real likelihood that owners may lose the use of their land before they receive an award of compensation. This can considerably disadvantage owners, as they could bear significant costs and expenses, such as relocation costs, without knowing the amount of the final compensation they will receive or when they will receive it. For instance, the relocation of a business may include: a loss of income while the relocation is finalised, securing a mortgage on new premises or paying rent for those premises, and the purchase of necessary equipment. The Commission considers that an advance payment regime would alleviate some of these financial burdens for owners deprived of the use of their land.

[2.12] The Issues Paper asked for respondents' views on whether compensation should be paid before the acquiring authority enters into possession of the land. Submissions were divided somewhat evenly on this issue. Some respondents considered that the current position does not impose a disproportionate burden. Points raised by these respondents included:

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63 For example, section 8(3)(a) of the Electricity Supply (Amendment) Act 1945, section 3(6)(b) and (c) of the Fishery Harbour Centres Act 1968, section 30(2) and (3)(a) of the Turf Development Act 1946 and section 17(5)(b) of the Transport Act 1950.

64 *idem*.

65 See Table 2 of this Report.

66 See section 19(1) of the Derelict Sites Act 1990 and section 77(1) of the Planning and Development Act 2000.

(a) The payment of compensation is swift if the owner or occupier provides the notice of claim along with the necessary title details in a timely manner.
(b) The payment of interest compensates for any delay in the payment of compensation from the date of entry.
(c) Owners or occupiers could, either deliberately or inadvertently, delay projects for unreasonable periods if the acquiring authority could not enter into possession until the payment of compensation.

[2.13] Other respondents considered that entry onto the land before the payment of compensation should not be permitted in any circumstances as it is completely out of line with ordinary conveyancing practices, where (absent express agreement to the contrary) possession will not be taken until the purchaser pays the vendor. One respondent suggested implementing an advance payment regime as exists in the UK.[67] The Commission found merit in this proposal.

[2.14] Submissions overwhelmingly favoured treating a dwelling differently in terms of entry before payment of compensation. The Commission understands that acquiring authorities are attuned to the sensitivities of acquiring dwellings. It would be highly unlikely that an acquiring authority would take possession of an occupied dwelling without paying compensation as, in the worst case, this could make the owner of the dwelling homeless. The Commission does not consider it necessary to have special provisions where lands include a dwelling as the recommended advance payment regime will apply more generally and include lands with a dwelling.

## 3. Approach in other jurisdictions

[2.15] An advance payment of compensation is available in many jurisdictions. In a small number of them, the entry into possession is conditional on advance payment. The remaining jurisdictions provide an interim payment until the final compensation can be assessed and agreed between parties.

[67] Sections 52-52B of the Land Compensation Act 1973 (England and Wales).

| | England and Wales | Northern Ireland | Canada | Australia |
|---|---|---|---|---|
| **When is the advance payment available?** | After the compulsory purchase order has been authorised.[i] | When a vesting order has become operative.[ii] | In Quebec and British Columbia before the registration of the vesting notice.[iii]<br><br>In other jurisdictions, an offer of compensation must be served to owners before taking possession. The payment of this offer must be made immediately after its acceptance.[iv] | After the acquisition of the land. |
| **Possession before advance payment?** | Yes | Yes | Yes, except in Quebec and British Columbia. | Yes, except in New South Wales.[v] |
| **Amount of advance payment** | 90% of the agreed amount or the acquiring authority's estimated compensation. | 90% of the agreed amount or the acquiring authority's estimated compensation. | Full compensation. | Varies between jurisdictions, from no more than 90% (Tasmania) to 100% of the compensation payable (Queensland).[vi] |
| **Prescribed period to make the advance payment** | The Acquiring authority must within 28 days, from receiving a request, determine if further information is needed. The advance payment must be made within 2 months after receiving the | No later than 3 months after the date on which a request for the payment is made.[viii] | It varies between jurisdictions. Usually a prescribed period of 3 months to make an offer but no prescribed period to pay. | It varies between jurisdictions from no prescribed period (Tasmania) to 90 days (Queensland).[ix] |

| | England and Wales | Northern Ireland | Canada | Australia |
|---|---|---|---|---|
| | requested information by the owner.[vii] | | | |

Table 3 Advance payment processes in other jurisdictions

## Notes to Table

[i] Sections 52-52B of the Land Compensation Act 1973 (England and Wales). Procedures for claiming advance payments in Scotland are nearly identical to those of England and Wales and are set out in section 48-48A of the Land Compensation (Scotland) Act 1973.

[ii] Section 19(1) of Land Compensation (Northern Ireland) Order 1982.

[iii] In Quebec, after the expropriation has been approved, the registration of the notice of transfer of title is subject to the proof that payment of at least 70% of the compensation has been made and a notice of transfer of title has been served to the expropriated party; see sections 53(4) and 53(11), (2) of the Expropriation Act CQLR c E-24 (Quebec). In British Columbia, payment must be made within 30 days after the approval of the compulsory acquisition proposal. The expropriating party must register a vesting notice with the Land Title Office within 30 days after complying with several conditions, including the payment of an advance payment, see sections 20(1) and 23(1) of the Expropriation Act 1996 (British Columbia).

[iv] Sections 31(1),(4),(5) and 64 of the Expropriation Act 2000 (Alberta); section 16(1) of the Expropriation Act 1987 (Manitoba); section 25(1) of the Expropriations Act 1990 (Ontario); sections 13(2), 15 and 16 of the Expropriation Act 1989 (Nova Scotia); section 19 of the Expropriation Act 1985 (Canada).

[v] Section 34 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

[vi] Section 50 of the Land Acquisition Act 1993 (Tas) and section 23(3) of the Acquisition of Land Act 1967 (Qld).

[vii] Section 52(2A) and (4ZA) of Land Compensation Act 1973 (England and Wales) as amended by the UK Housing and Planning Act 2016.

[viii] Section 19(4) of the Land Compensation Act 1973 (England and Wales).

[ix] Section 23(4) of the Acquisition of Land Act 1967 (Qld).

## 4. Benefits of an advance payment regime

[2.16] The Commission considers that an advance payment regime is helpful for both parties. Under the recommended advance payment regime, owners will be entitled to receive at least 90% of either the amount of compensation agreed or the acquiring authority's estimate of compensation where an agreement has not been reached. A request for an advance payment may be made from the service of the vesting order until the determination of compensation by the Tribunal. If the owner submits a written request for an advance payment accompanied by proof of their interest in the land within 10 weeks from the service of the vesting order, then the acquiring authority shall make the advance payment by the end of the day on which it takes possession of the land. Otherwise, the payment shall be made within two months from the day on which the acquiring authority received the request for an advance payment or the receipt of any further information requested by it. This is assuming that the acquiring authority is satisfied with the proof of interest. Accepting the offer of an advance payment does not prejudice the final compensation award or the possibility of applying to the Tribunal where parties have not reached an agreement on the full compensation.

[2.17] For the owner, the advance payment regime allows them to put some of their compensation to use at an earlier stage. If they need to relocate, the early payment will contribute to the necessary financial resources. Should either party apply to the Tribunal, the advance payment is also beneficial in providing a substantial payment before the final compensation is determined. Therefore, owners will be less impacted by any delay that may arise in the determination, and final payment, of the compensation award. Finally, an advance payment alleviates the financial strain endured by owners where their compulsorily acquired land is mortgaged. Under such circumstances, a displaced owner whose mortgaged property is their home may be liable to make repayments on the mortgage while also paying towards new accommodation. To address this, the recommended advance payment procedure provides that mortgagees may receive a portion of the advance payment necessary to secure the mortgage. This may significantly reduce, if not remove completely, the owner's financial liability arising from the mortgage.

[2.18] For the acquiring authority, the advance payment regime is advantageous as it has an opportunity to make some of its payments up-front as opposed to potentially waiting until the full determination of the compensation (which could be larger than estimated by the authority) and then being liable for the full amount. The request for an advance payment does not prejudice the validity of a vesting order or the entitlement of either party to make an application to the Tribunal to determine a claim for compensation. Finally, interest will be payable where entry occurs before the making of the advance

payment, and on any outstanding balance. As most of the compensation will be paid earlier, the overall interest on the award paid by the acquiring authority should be reduced.

[2.19] In summary, the purpose of introducing an advance payment regime in this jurisdiction is threefold:

(a) It provides an opportunity to receive a substantial payment before or close to the day the acquiring authority takes possession of the land.
(b) It provides a partial payment for owners until the final compensation can be fully assessed.
(c) In cases that do go to the Tribunal, the advance payment provides a substantial interim payment for the period before the Tribunal determines the final compensation.

## 5. The recommended advance payment procedure

[2.20] As discussed in more detail in the previous section there are different approaches in different jurisdictions to advance payments. In a small number of jurisdictions, an early payment must be made before owners lose their legal interest or the use of the land. For instance, in Quebec and British Columbia, the execution of a vesting order is subject to the payment of an advance payment.[68] In New South Wales, an advance payment must be made before an acquiring authority takes possession of the acquired land.[69] On the other hand, in other jurisdictions, taking possession of the land is not subject to an advance payment. In such cases the purpose of the early payment is to provide financial relief for owners until the final compensation can be fully assessed and agreed or determined. The full award of compensation may only be assessed after the work has been finished and, consequently, after the acquiring authority has taken possession.

[2.21] The Commission's proposed advance payment regime would resemble the statutory system in England and Wales, except that the advance payment is available after the confirmation of compulsory purchase orders in that jurisdiction. However, the Commission considers that an advance payment should not be offered before a notice to treat has been served or vesting order has been made. In England and Wales, acquiring authorities must provide more evidence regarding the source of funding and the timing of that funding than is the case in Ireland when applying for the confirmation of a

[68] Section 53.4 of the Expropriation Act CQLR c E-24 (Quebec) and section 23(1) of the Expropriation Act 1996 (British Columbia).

[69] Section 34(1) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

compulsory purchase order.[70] For that reason, the Commission has decided that the obligation to make an advance payment should only arise once the acquiring authority has indicated through the service of a notice to treat or vesting order that it is intending to proceed with the acquisition.

### (a) Right to advance payment

[2.22] The Commission recommends that owners may request an advance payment where they are served with a notice of entry (where a notice to treat procedure is used), or where a vesting order is made by the acquiring authority. The acquiring authority shall make the advance payment if it is satisfied, on the basis of the information submitted in the owner's particulars or any other information provided, that the owner holds the title they claim to hold.

[2.23] The level of the advance payment will be no less than 90% of either the agreed amount of compensation or the acquiring authority's estimated compensation in the absence of agreement between the parties. The Commission considers that the level of the advance payment must be substantial to put owners in a financial position to relocate or reorder their affairs as early as possible. In some cases, the owner will find it necessary either to move house—if their home is acquired—or to move to other business premises to avoid the closure of their business. The Commission understands that at that stage, the assessment of the full compensation is premature, but the amount of the advance payment should include any elements of compensation for which owners provided a valuation, (for instance, the market value, the disturbance costs,[71] the devaluation of land retained by the owner, and the legal and valuation costs incurred to date). In addition, costs incurred in mitigation of the effects of the acquisition before or after receiving a notice to treat or a vesting order should be included in the advance payment if owners provided the necessary documentation for the claim.[72] The Commission considers that owners should not have to wait for the final compensation to be assessed or determined to recover costs incurred to mitigate loss. The intention of the advance payment is, as far as practical

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[70] The "funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period [...] only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years"; see the Office of the Deputy Prime Minister (ODPM) Circular 06/2004, Compulsory Purchase and the Crichel Down Rules, at page 13. In addition, the acquiring authority must provide sufficient funding to "immediately" cope with any acquisition resulting from a blight notice.

[71] Disturbance costs may include removal expenses, the costs of a new mortgage, the cost of seeking and acquiring alternatives premises, the cost of adapting new premises.

[72] Mitigation is further discussed in paragraph 1.21, and in paragraphs 5.102 onwards.

and as early as possible, to put owners into the position they would have been in had the land not been taken.

[2.24] Under the Commission's recommended scheme, acquiring authorities are required to make an offer of an advance payment if an owner requests one. The authority must also supply a reasoned statement providing a justification for the figure offered if the owner requests such a statement. Any dispute as to the estimated compensation does not affect the validity of a vesting order (so the acquisition can still go ahead) and such disputes may be addressed by the Tribunal when determining the final compensation award. Equally, the acceptance of the advance payment by an owner does not prejudice the final amount of compensation that they will receive later. If the acquiring authority's advance payment is less than the award as ultimately determined (as, since it is 90% of the acquiring authority's estimate, it will always be unless the acquiring authority overestimates compensation) the acquiring authority will be required to pay the shortfall between its advance payment and the final award. In the event the acquiring authority does overestimate compensation and the final figure is less than that provided by way of advance payment, the owner will be liable to repay the excess money to the acquiring authority.

### (b) Request for an advance payment

[2.25] Under the Commission's proposals an advance payment shall be requested in writing in such form as may be prescribed by the relevant Minister. The Commission recommends that owners must provide proof of their interest in the land. An acquiring authority would make an advance payment if it were satisfied with the evidence provided by the owners regarding their interest in the land. Currently, the final compensation is not paid, even after it has been determined, until the owner has proved their interest in the land. A similar obligation should apply to the advance payment as the acquiring authority must pay a substantial amount of its estimate of the compensation at that stage.

[2.26] An owner does not necessarily have to provide details of the compensation they are claiming to be entitled to an advance payment. Owners who are served a notice to treat or a vesting order must submit particulars of claim (or its equivalent under the notice to treat procedure). A particulars of claim includes (1) evidence of the exact nature of the owner's interest in land and (2) details of the compensation the owner is claiming including documentation justifying the requested amount. However, the Commission considers that acquiring authorities often have sufficient available information, even without details of the comepnsation, to make an advance payment offer. When designing a compulsory purchase order scheme, acquiring authorities will have requested specialist valuers to assess the cost of a compulsory purchase order scheme, including the potential compensation payable to owners. The

information available to the acquiring authority will vary between schemes, so the advance payment offer may vary between simply a market value basis or a combination of market value with additional available information.

[2.27] The Commission understands that the acquiring authority is likely to have less relevant information on the compensation absent information provided by the owner on their claim. The information available to acquiring authorities does not include all the elements of compensation sought by owners including details of a claim for compensation. However, even if the owner provides no details of their compensation claim, the acquiring authority is obliged to make an advance payment offer based on the information it has. There is no obligation on the owner to accept an offer of advance payment. Therefore, it is in the owner's interest to submit completed particulars of claim to receive a more accurate advance payment offer.

[2.28] The Commission recommends that the advance payment should be available to owners at any time up to the determination of compensation by the Tribunal. The advance payment regime provides sufficient opportunity for owners to claim an early payment while waiting for the final compensation to be assessed and agreed upon between the parties, or determined by the Tribunal.

[2.29] If the owner makes a request for an advance payment and provides evidence of their interest in the land within 10 weeks, then the acquiring authority must make the advance payment by the end of the day it takes possession. The Commission considers that owners should receive an advance payment on the day they lose the use of the land. The 10-week period allows ample opportunity for:

(a) owners to provide proof of title and details of compensation, and
(b) the acquiring authority to process the request and make the advance payment before it takes possession of the land.

[2.30] Once an acquiring authority receives an advance payment request, it is required to determine within one month of receiving the request whether further information is needed.

### (c) Prescribed period

[2.31] The Commission recommends that the acquiring authority should pay partial compensation before the end of the date it takes possession, subject to certain conditions and clarifications. To allow the acquiring authority to process a request for an advance payment and to make the payment, it is necessary to provide a time limit of 10 weeks to make a request for an advance payment.

[2.32] However, the advance payment should also be available after the prescribed period if owners wish to receive an early payment after they lose the use of

their land. Therefore, the Commission considers that the advance payment should be available at any time until the final compensation is determined by the Tribunal.

[2.33] As discussed above, under the Commission's proposals there are two time limits to request an advance payment:

(a) within 10 weeks from the service of the vesting order or the notice to treat, or
(b) up to the determination of the full compensation by the Tribunal.

[2.34] These two periods do not impact on an owner's right to receive an advance payment, but they correspond to different dates on which, depending on the actions of the parties, the advance payment will be made. These dates and conditions are as follows:

(a) If the request, accompanied by the necessary documents, is received within 10 weeks from the service of the vesting order or the notice to treat, the acquiring authority shall make the payment before the end of the day it takes possession of the land.
(b) If the request, accompanied by the necessary documents, is received within 10 weeks from the service of the vesting order or the notice to treat, but the acquiring authority needs further documentation such as proof of title, then the acquiring authority shall make the payment within two months from the date it receives the additional information.
(c) If the request is not received within 10 weeks from the service of the vesting order or the notice to treat, then the acquiring authority shall make the payment within two months from the date it received the request for the advance payment or from the date it receives additional information from the owner if it requested such information.

[2.35] Finally, the Commission considers that an advance payment should not be a precondition for entry into possession as this would unduly delay the commencement of works in the public interest. This might occur where the owner or occupier is uncooperative in providing the necessary information. Securing possession of the land at an early stage provides certainty in timelines, which is in the interest of both parties. It also allows acquiring authorities to proceed with their plans for using the land in the public interest, including awarding contracts for construction and commencing work. Therefore, the Commission considers that disputes as to the estimated compensation should not affect the acquisition going ahead.

### (d) Mortgaged land

[2.36] The Commission considers that the advance payment regime should apply to lands subject to a mortgage.[73] Owners may have to vacate their properties and pay for alternative accommodation while still paying their mortgage debt until the final compensation amount is determined. In addition, it is important that security for the mortgagee's loan stays in place. The best way to meet the dual aims of releasing the owner from the burden of dual payments (on the land acquired and any new land) and securing the mortgagee's loan is for the acquiring authority to directly pay part (or all) of the advance payment to the mortgagee. Depending on the overall amount of compensation and advance payment, the owner may receive a portion of the payment. This is effectively the same situation as if the owner sold their property and was required to pay off their mortgage debt with some of the proceeds of sale.

[2.37] The conditions and procedure applicable for an advance payment when the land is subject to a mortgage are similar to those in respect of unmortgaged land. However, a distinction must be made between lands subject to one or more mortgages that, in aggregate, exceed 90% of the estimated full compensation:[74]

(a) If the amount of mortgage debt affecting the land does not exceed 90% of the estimated full compensation, the advance payment is based on the estimated full compensation, including the market value and the other elements of compensation. The first part of the advance payment will be paid to the mortgagee(s) and the remainder to the owner.
(b) If the amount of mortgage debt affecting the land exceeds 90% of the estimated full compensation, the advance payment is based only on the market value. The full amount of the advance payment will be paid to the mortgagee(s). The owner may still personally retain a portion of the full and final award of compensation, whether agreed with the acquiring authority or determined by the Tribunal, depending on the size of that award.

[2.38] In England and Wales, under the Planning and Compulsory Purchase Act 2004, if a property is in negative equity[75] the acquiring authority, mortgagor and mortgagee may agree on a compensation amount payable by the acquiring

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[73] Section 89(1) of the Land and Conveyancing Law Reform Act 2009 provides that a legal mortgage can only be created by way of charge.

[74] If there is more than one mortgagee, the standard rules of priority would apply.

[75] Negative equity occurs when the value of the land is less than the value of mortgage debt on that land.

authority to the mortgagee to release the mortgage.[76] In default of agreement, this is determined by the Upper Tribunal. This amount will be deducted from the final compensation due to the owner. To ensure that the advance payment does not prejudice the final amount of compensation agreed or determined by the Tribunal, the estimate for the advance payment is restricted to market value.

[2.39] A similar approach should be adopted in Ireland. Negative equity cases are complex to resolve. Many factors must be considered in determining the final amount of compensation to be paid in order to release the mortgage. An agreement may not be reachable within the prescribed period, rendering the payment of the advance payment unachievable. If the parties agree on the final amount of compensation, the full amount will likely be paid by the acquiring authority, rendering the advance payment redundant. Using only the market value considerably simplifies the situation as its valuation is more easily determined. In addition, if the advance payment is only 90% of the land's market value it is unlikely that the acquiring authority will overpay. It is preferable to avoid a situation where the mortgagee(s) will have to repay the acquiring authority.

### (e) Interest

[2.40] The changes proposed by the Commission above necessitate two different approaches to payment of interest, depending on whether an advance payment has been made or not. Where an advance payment is not requested, and therefore not made, the position would continue to be as it is now; interest on the award of compensation is payable from the date of entry into possession until the payment of compensation.

[2.41] Where an advance payment is requested and made, the payment of interest will depend on whether the acquiring authority has entered into possession before the making of the advance payment. If the acquiring authority enters into possession of the land before making the advance payment, it should be required to pay interest:

(a) from the date of entry into possession until the date the advance payment is made based on the full amount of the estimate,[77] and
(b) from the date of the making of the advance payment on the difference between the paid amount and the unpaid balance.[78]

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[76] Section 15(1) of the Compulsory Purchase Act 1965 (England and Wales).

[77] This should be paid when the advance payment is made; this squares with section 52A(2)(a) of the Land Compensation Act 1973 (England and Wales).

[78] This should be paid when paying the outstanding compensation, in other words, the compensation as finally determined or agreed.

[2.42] Where the acquiring authority has not entered into possession before making the advance payment, it should be required to pay interest on the difference between the paid advance payment amount and the total amount of the full compensation. For example, if the acquiring authority makes an advance payment that ultimately transpires to be worth only 80% of the final compensation award, it will have to pay interest on the outstanding 20%.

[2.43] If it turns out that the amount of interest paid based on the acquiring authority's estimate is higher than the compensation as finally determined and agreed—meaning the interest paid to the owner was excessive—the owner must return the excess payment to the acquiring authority.[79]

**R 2.1** **The Commission recommends that** the acquiring authority should be required to make an advance payment to an owner if:

(a) a vesting order has been made in respect of that owner's land or a notice of entry has been served on them, and

(b) the acquiring authority is satisfied that the owner holds the claimed title based on the information provided in the particulars of claim.

**R 2.2** **The Commission recommends that** the advance payment should be no less than 90% of the estimated full compensation as determined by the acquiring authority.

**R 2.3** **The Commission recommends that** any dispute on the amount of an advance payment should not affect the validity of the vesting order.

**R 2.4** **The Commission recommends that** the acquiring authority shall, upon request, provide a reasoned statement providing a justification for reaching the compensation estimate.

**R 2.5** **The Commission recommends that** if the request for the advance payment has been made within 10 weeks from the service of the vesting order or notice to treat, then the advance payment must be made before the end of the date of taking possession, or, if later, within two months from the day on which the authority received the additional information, whichever is later.

**R 2.6** **The Commission recommends that** if the request for the advance payment has not been made within 10 weeks from the service of the copy of the vesting order or notice to treat, then the advance payment must be made within two months from the day on which the authority received the request or the additional information, whichever is later.

[79] This is the case under the section 52A(10) of the Land Compensation Act 1973 (England and Wales).

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| **R 2.7** | **The Commission recommends that** the advance payment regime should apply to lands subject to a mortgage. |
| **R 2.8** | **The Commission recommends that** if an owner of land subject to a mortgage requests an advance payment, the mortgagee must consent to it. |
| **R 2.9** | **The Commission recommends that** the acquiring authority shall, in cases where the land is mortgaged, pay part (or all) of any advance payment directly to the mortgagee. |
| **R 2.10** | **The Commission recommends that** if the total amount of the mortgages on the land does not exceed 90% of the estimated full compensation, the first portion of the advance payment is paid directly to the mortgagee(s) and the reduced portion is paid to the owner. |
| **R 2.11** | **The Commission recommends that** if the total amount of the mortgages exceeds 90%, the full amount of the advance payment will be based on the market value of the land only and should be paid directly to the mortgagee(s). |

# CHAPTER 3
# OWNERS WHO CANNOT BE FOUND OR ASCERTAINED, AND PERSONS WHO FAIL TO PROVE TITLE

**Chapter Contents**



## 1. Introduction

[3.1] In some cases, the acquiring authority may have difficulty finding the owner of a particular interest in land that is being compulsorily acquired. It may be that the person's name or address is not known, or that the person is known but cannot be located. This can cause difficulties for the acquiring authority if it must serve that person with documents and compensate them for the loss of their land. There is always the possibility that such persons will appear at a later stage and mechanisms need to be in place to compensate them in such circumstances.

[3.2] Another issue that can arise during a compulsory acquisition is that a person may have difficulty proving title, even where they have been served with a notice to treat and compensation has been agreed or determined. At present, the owner cannot receive the compensation awarded by a property arbitrator until they produce good title to facilitate the transfer of ownership to the acquiring authority. The owner does not have to prove their title until the very end of the process.

[3.3] This chapter will consider the current position in law where the owner cannot be found or named, and where there are difficulties with proving title. As the Commission has recommended that a vesting order procedure should be the only mechanism for compulsory acquisition in this jurisdiction, the acquiring authority will have no difficulty obtaining ownership of the land in both scenarios identified above. There will be no need for a deed poll or other such mechanism, as the acquiring authority will gain ownership by way of vesting order. For that reason, the focus of this chapter will be on how compensation will be dealt with in such circumstances.

[3.4] The Commission's discussions and recommendations in this Chapter correspond to the provisions of Chapter 2 of Part 2 of the draft Bill appended to this Report.

[3.5] The Commission's recommendations regarding situations where owners cannot be found or fail to provide title are summarised in the Payment into Court Flowchart appended at the end of the Executive Summary.[80]

## 2. Service of notices

[3.6] Where an owner is unknown, or cannot be found, this poses difficulties for an acquiring authority in serving notice. Initial notice is crucial as the owner cannot effectively engage in the process to represent their interests if they are not even aware of the compulsory purchase order being made. Under the existing system, further notices must also be served on an owner, including, in most cases: confirmation of the compulsory purchase order, notice to treat and notice of entry.

[3.7] Where the owner has not been notified of the compulsory purchase order, their rights cannot be vindicated.[81] A countervailing consideration is that it would not be in the public interest for land to be incapable of being the subject of a compulsory purchase order because of a difficulty in notifying the owner. The Oireachtas has balanced those considerations in section 3 of the 1966 Act, which contains detailed provisions for the service of notices so as to

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[80] See page 18 of this Report.

[81] For example, through participation in the decision-making processes, an owner can seek, for instance, to persuade: (1) an acquiring authority that its powers should not be applied to their land, (2) An Bord Pleanála that it should not confirm the compulsory purchase order, (3) the acquiring authority or the property arbitrator that a particular sum of compensation should be awarded.

In *Dunraven Limerick Estates Company v The Commissioners of Public Works* [1974] 1 IR 113, in the Supreme Court, Budd J stated that the details of a proposed interference with property rights had to be clearly communicated to the rights-holder in order to allow him to make effective representations.

optimise the possibility of the notifiable person becoming aware of the making of a compulsory purchase order.

[3.8] Under the 1966 Act, the acquiring authority must make a "reasonable inquiry" to find the address and the name of the owner.[82] Sections 250(1)(d) and (2) of the 2000 Act also specify that the acquiring authority must undertake a "reasonable inquiry". Sections 18 and 19 of the 1845 Act require that there be a "diligent inquiry", which has been interpreted as meaning an inquiry involving "some reasonable diligence" but which does "not involve a great inquiry".[83] The use of the word "reasonable" to describe the "diligence" to be undertaken by the acquiring authority suggests that in substance, there is no difference between a "diligent inquiry" and a "reasonable inquiry". As "reasonable inquiry" has been used since 1966 without difficulty and is also used in planning legislation, the Commission sees no reason to depart from this term.

[3.9] Where the name of the owner "cannot be ascertained by reasonable inquiry", section 3(2) of the 1966 Act provides that the notice "…may be addressed to 'the owner' or 'the occupier', as the case may require, without naming him".[84] Where the owner is identified but cannot be located, section 3(1)(d) permits service on "…some person over sixteen years of age resident or employed on such land or premises or by affixing it in a conspicuous position on or near such land or premises".[85] This would arise, for instance, where the owner has

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82 Section 3(1)(d) and (2) of the Housing Act 1966.

83 *R v Secretary of State for Transport ex parte Blackett* [1922] JPL 1041. In this case, it was held that it was sufficient for the acquiring authority to make enquiries as to the existing interests on the Land Registry. The fact that no information was obtained in relation to certain interests that were awaiting first registration did not invalidate the entry made by the acquiring authority, even though notice to treat had not been served on the owners of the new interests.

84 Section 3(2) of the Housing Act 1966. See also section 250(2) of the Planning and Development Act 2000.

85 Section 3(1)(d) of the Housing Act 1966. Similar provisions to section 3 are contained in section 250 of the Planning and Development Act 2000, which governs service of notice for all aspects of the Act. In *Friends of the Irish Environment v An Bord Pleanála* [2020] IESC 14, [2020] 1 ILRM 487, the applicant challenged the decision of An Bord Pleanála that it was unable to decide a section 5 reference (as to whether a particular peat extraction activity was exempted development) because it was unable to notify the persons affected by the reference. The Supreme Court upheld the decision of the High Court, in agreeing with An Bord Pleanála. Dunne J stated at para 75:

> There were multiple owners involved, some of whom were capable of being identified by reference to Land Registry folios, although that was not entirely straightforward. Not all of the lands were registered. Therefore, not all of the owners could be identified by means of a Land Registry search. Identification of the owners of the lands alone would not have sufficed as there were others engaged in the activity of peat extraction. I have previously referred to a map depicting numerous

been identified from a property search, but that person no longer resides at the address given in the deed or the folio.

[3.10] For the purposes of this report, the Commission is only concerned with the notification of owners after the compulsory purchase order becomes operative. As the Commission has recommended a vesting order procedure, the most important document that must be served on the owner is the vesting order. The Commission considers that the means of service of notices before the compulsory purchase order becomes operative and after the compulsory purchase order becomes operative should be consistent with one another. For that reason, it has used the wording of section 3 of the 1966 Act and section 250 of the 2000 Act as the basis for a service of notice section in its draft Bill.

## 3. Compensation where owner cannot be identified or located

[3.11] Following the confirmation of a compulsory purchase order, most compulsory purchase schemes envisage the owner claiming compensation and more specifically, contending for a particular amount of compensation. However, where the owner cannot be identified or located, this procedure is unworkable.

[3.12] The 1845 Act addressed this issue by providing that in such circumstances, the compensation for the land should be assessed by a surveyor,[86] at the expense of the acquiring authority.[87] The acquiring authority must then pay the sum assessed into court.[88] Once this is done, the acquiring authority can then vest the land in itself by way of deed poll.[89] A deed poll is a special kind of deed or

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> subdivisions of the lands which appear to be demonstrative of this fact. How in those circumstances could the Board have given notice by, for example, affixing a notice to the lands involved? It would have been virtually impossible on a practical basis and to that extent I agree with the observations of the trial judge at paragraph 34 of his judgment. I simply do not think it would have been reasonable for the Board to have engaged in a process of affixing notice to the multiplicity of subdivisions of the land at issue.

86 Section 58 of the Lands Clauses Consolidation Act 1845.

87 Section 62 of the Lands Clauses Consolidation Act 1845. The surveyor will take into account the market value of the land and damage sustained to the owner by severance and injurious affection. See section 63 of the Lands Clauses Consolidation Act 1845.

88 Section 76 of the Lands Clauses Consolidation Act 1845.

89 Section 77 of the Lands Clauses Consolidation Act 1845.

declaration that is made by only one party.[90] By vesting the land in itself by way of deed poll, the acquiring authority becomes the legal owner of all estates or interests in the land previously owned by the party or parties in respect of whom that money has been deposited in court.[91]

[3.13] If the owner is later located or identified and they are unhappy with the figure deposited as compensation, before they apply to the court for the money to be paid out, they can require, by notice in writing to the acquiring authority, that the amount of compensation be arbitrated.[92] The arbitrator cannot award a lesser sum than was originally assessed.[93] If the arbitrator determines a further sum should be lodged in court, the acquiring authority must do so within 14 days from the making of the award by the property arbitrator.[94]

[3.14] On application by the owner, the court will order the payment of the money lodged in court to the owner where they can prove their title.[95] The court can distribute the money lodged "…according to the respective estates, titles or interests of the parties making claim…or any part thereof…".[96] In other words, the court may order that only part of the money lodged should be paid to a

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90 For example, people often use a deed poll procedure to change their name. A deed poll can effectively be thought of as a kind of contract except contracts require at least two parties and a deed poll has only one. The term "deed poll" is an archaic reference to smooth-edged paper in contrast to an "indenture". Indentures were binding legal documents between at least two parties. The agreement would be written out for each party on a single sheet of paper, which was then torn by cutting a jagged line on the sheet between each party's record of the agreement. This was effectively an early anti-fraud measure, since the parties could verify their agreement by joining the jagged ("indentured") edges of the agreement together to verify it. Since deeds poll have only one party they did not need to be cut in this way.

91 Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 1.38. This can be contrasted with the vesting order procedure which extinguishes any legal estate or interests affecting land. If a legal estate or an interest has been omitted or not included in the deed poll, that legal estate or interest has not been acquired and will still affect the land.

92 Section 64 of the Lands Clauses Consolidation Act 1845.

93 Section 65 of the Lands Clauses Consolidation Act 1845. Their jurisdiction is to determine whether the sum deposited in the court "…was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them". Where the arbitrator determines that the sum was sufficient, the costs of the arbitration are at the discretion of the arbitrator. If the arbitrator determines that a further sum ought to be paid, the costs of the arbitration are borne by the acquiring authority. See section 67 of the Lands Clauses Consolidation Act 1845.

94 Section 67 of the Lands Clauses Consolidation Act 1845. If the acquiring authority does not comply, the owner may seek enforcement of the award before the courts.

95 Section 78 of the Lands Clauses Consolidation Act 1845.

96 *Ibid*.

particular owner, with the rest remaining lodged in court on credit for any other interest holders.

[3.15] The issue of distribution among owners arose in the case of *Minogue v Clare County Council*.[97] The High Court held that only €50,000 of the total money lodged in court should be paid to the applicant (a yearly tenant with the right to renew but not enlarge the interest) for their interest in the property. On appeal, the Court of Appeal held that the appellant was entitled to the full sum lodged in court, €165,000, because on the balance of probabilities the applicant showed a sufficient intention to possess and therefore acquired the freehold reversionary title by adverse possession.[98] For that reason, the Court of Appeal found that the appellant should be treated as having the title of a freeholder for the purposes of compensation.[99]

[3.16] Submissions to the Issues Paper generally supported the procedures set out in the 1845 Act in relation to owners who cannot be identified or located. Some respondents suggested that if the money is not claimed within a specified period, the monies should be released back to the acquiring authority, the rationale being that it is not in the public interest for money that may never be claimed to lie dormant in a bank account indefinitely when it could instead be used for some other public purpose.

[3.17] One respondent submitted that, in practice, acquiring authorities who have the power will sometimes opt to use the vesting order procedure[100] in section 81 of the 1966 Act in circumstances where no owner comes forward to claim compensation. This is advantageous to the acquiring authority as it is not necessary to lodge money into court to obtain ownership.[101] However, section 81(1)(c) of the 1966 Act requires that an offer be made to each person who has an interest in the land being taken as a precondition to the use of the

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97 [2021] IECA 98. The case was pursued by the deceased interest holder's personal representative.

98 *Minogue v Clare County Council* [2021] IECA 98 at para 122.

99 *Ibid*.

100 The effect of a vesting order is that it vests the land in the acquiring authority "…in fee simple free from encumbrances and all estates, rights, titles and interests…", other than public rights of way, on a particular date, no earlier than 21 days after the making of the vesting order. See section 82(1) of the Housing Act 1966.

101 This can be contrasted with the Derelict Sites Act 1990 which also contains a vesting order procedure. Section 19(4) of that Act provides that sections 69 to 79 of the Lands Clauses Consolidation Act 1945 as amended or adapted, shall apply "…in relation to compensation to be paid…" by the acquiring authority as if it were compensation to be paid under the 1845 Act. Section 19(5) provides that where money is paid into court by the acquiring authority, no costs shall be paid by the acquiring authority "…in respect of any proceedings for the investment, payment of income or payment of capital of such money". See also sections 77(5) and (6) of the Planning and Development Act 2000.

vesting order procedure. That suggests this procedure is unsuitable in cases where an owner is not identified or cannot be located.[102]

## 4. Compensation where there is a dispute regarding title

[3.18] Where notices to treat are served, the owner will be required to state, within a specified period, the exact interest in respect of which they are claiming compensation.[103] At present, issues as to title can persist until near the end of the compulsory acquisition process, at the point where the acquiring authority wants to exchange the compensation for ownership of the land by effecting a conveyance. Title issues are outside the jurisdiction of the property arbitrator, who operates on the assumption that the title claimed is correct.[104] As such, title disputes, where they arise, must be resolved by the courts in separate proceedings.[105] The Commission understands from the submissions that it is only in very few cases that a person does not produce the title claimed. Even so, the Commission considers that this is an area of the law that warrants consideration in terms of reform.

### (a) The *Jackson Way Properties* case

[3.19] Where title disputes arise, particularly after compensation has already been agreed or awarded, this can give rise to huge delay and costs, as exemplified in the *Jackson Way Properties v Dun Laoghaire-Rathdown County Council*[106] case. During proceedings before the property arbitrator, the acquiring authority became aware of the contention of a neighbouring couple that their dwellinghouse benefited from a restrictive covenant which restricted the development of the plaintiff's land. For that reason, the acquiring authority

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[102] This can be contrasted with situations where there is a doubt about the title of the person claiming the interest in land. See Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 3.59.

[103] For example, see section 79(1) of the Housing Act 1966. Generally, under compulsory acquisition schemes, the acquiring authority is required to serve certain notices on persons with an interest in the land being compulsorily acquired including the notice to treat. Acquiring authorities do this after conducting reasonable enquiries into the ownership of the land, most frequently by searching the Land Registry. It appears that where the acquiring authority is not satisfied that a given person holds an estate or interest in the land being compulsorily acquired, it will not serve that person with the required statutory notices including the notice to treat. They would have to bring proceedings in court for a declaratory order to establish their ownership of a particular estate or interest in the land.

[104] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.22.

[105] *Ibid*.

[106] [2015] IEHC 619. See also *Jackson Way Properties Limited v Smith* [2018] IEHC 115.

disputed the plaintiff's claim that it had an unencumbered freehold title (subject only to certain easements). Counsel for the defendant asked the arbitrator to make an award by way of case stated,[107] giving two valuations depending on whether or not the title was subject to the restrictive covenant.[108] As the land at issue had been rezoned for development, the possibility of the existence of a restrictive covenant constraining development would have significant implications for the value of the land.

[3.20] The plaintiff argued that questions of title are outside the jurisdiction of the property arbitrator, who must determine the compensation based on the title as claimed.[109] The property arbitrator agreed with the plaintiff and proceeded to determine the compensation on the assumption that the title claimed was correct.[110] In 2003, the plaintiff was awarded the total sum of €12,860,700 of which €9,691,000 related to the value of the lands.[111]

[3.21] Later, in 2008, the plaintiff took steps to initiate proceedings to enforce the award in court, as the acquiring authority refused to pay the amount awarded until the plaintiff produced good title.[112] In 2010, the plaintiff brought proceedings to resolve the title issue against the couple who claimed their dwellinghouse benefited from a restrictive covenant over the plaintiff's land. In 2009, the couple had submitted their own claim for compensation for the

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[107] Section 6(1) of the Acquisition of Land (Assessment of Compensation) Act 1919 permits the property arbitrator to either (1) refer a question on a point of law to the High Court during proceedings or (2) state the award as to the "…whole or part thereof in the form of a special case for the opinion of the High Court". In other words, the property arbitrator can either consult the Court where a question of law arises during proceedings, or they may, for example, state the award in alternatives, so that once the question of law is determined, it will be clear on the face of the award what the figure payable to the owner is. This removes the need for the Court to remit the case back to the arbitrator as a mere formality.

[108] It was contended by counsel for the acquiring authority that this would avoid "duplicatory and unnecessary legal proceedings after the arbitration process has concluded and brings finality to the valuation process". The Court would determine the title issue, and because the arbitrator stated two figures, the valuation of the land would automatically be determined.

[109] *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619 at para 17.

[110] Therefore, the property arbitrator did not take into account the possibility of the existence of a restrictive covenant in valuing the plaintiff's land.

[111] *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619 at para 18.

[112] The plaintiff did produce a copy of the folio after the award was made but did not address whether the restrictive covenant was applicable to the folio or produce any evidence that it did not apply. See *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619 at para 38.

interest in the lands to the sum of €5,850,000.[113] Arising from this development, the plaintiff sought to enforce the arbitrator's award less the sum claimed by the couple (the difference being €7,010,700), as it asserted that there was no doubt that the difference between the two sums was payable to Jackson Way Properties. The Court refused to enforce part of the award by the property arbitrator until proceedings regarding the title dispute were determined for a number of reasons:

(a) The existence or not of the restrictive covenant preventing development has a significant impact on the value of the lands assessed by the property arbitrator, and as such it was not possible to enforce a partial amount of the award.[114]
(b) Second, the only authority put forward for enforcement of a part of the award in this context provided that the Court should only make the award where the part of the award sought to be enforced is not in dispute and the fixed amount can clearly be identified from the terms of the award, which was not the case here.[115]
(c) Third, it was possible that the couple claiming the restrictive covenant would amend their claim.[116]

[3.22] It was subsequently determined in *Jackson Way Properties Limited v Smith*,[117] that the couple did not benefit from a restrictive covenant over the lands compulsorily acquired and as such Jackson Way Properties Limited owned an unencumbered freehold title (subject to certain easements) as claimed before the property arbitrator.[118] It took almost 15 years for the title issue to be resolved from the date the arbitrator made the award in November 2003, owing to some delay in the plaintiff initiating proceedings.[119]

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[113] *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619 at para 22.

[114] *Ibid* at para 42. If it were found that the restrictive covenant restricting development did exist, this would mean the title as claimed was not correct, and the argument could be made that the land should not have been assessed based on its development value, but on its current use value. In such circumstances, paying out part of the award could result in a "substantial overpayment" to the plaintiff.

[115] *Ibid* at para 43. See *Danish Polish Telecoms v Telekomunikacja Polska S.A* [2011] IEHC 369, [2012] 3 IR 44.

[116] *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619 at para 44.

[117] [2018] IEHC 115.

[118] *Jackson Way Properties Limited v Smith* [2018] IEHC 115 at para 95.

[119] In the meantime, the acquiring authority had entered into possession of the lands and built the M50 through part of it before ever becoming the owner of the lands or paying any compensation, which it was entitled to do.

### (b) Submissions

[3.23] Many submissions to the Issues Paper expressed dissatisfaction with the current system whereby the property arbitrator must determine compensation on the basis of title claimed rather than proven. It was submitted that issues of title should be addressed much earlier in the compulsory acquisition process, rather than being left to the very end. Where title issues arise at the very end of the process, this can cause difficulties for the acquiring authority in obtaining ownership of the land where the notice to treat procedure has been pursued. This will not be an issue under the scheme proposed by the Commission, as vesting grants the acquiring authority statutory title. All that remains to be resolved in such circumstances is compensation, with the owner having to show that their title is in order to receive compensation.

[3.24] Some respondents submitted that the solicitor for the person claiming compensation should be required to give an undertaking as to title, or that the person should have a statutory obligation to provide *prima facie* evidence of their title when submitting a claim. One respondent considered that where title issues arise, it might be appropriate to have a mechanism whereby the President of the Law Society could nominate an expert conveyancer to issue an opinion that would be binding on the parties, as to whether the title is good title. Another submission contended that resort might be had to the arbitration process provided for in the Law Society Standard Conditions of Sale. Some submissions agreed with the suggestion in the Issues Paper that if a legal professional determined compensation alongside chartered surveyors as a panel, they could deal with title issues.

### (c) Payment into court

[3.25] Section 76 of the 1845 Act addresses the situation whereby the owner "…neglects or fails to make out" title of the lands to the satisfaction of the acquiring authority after compensation has been agreed or awarded. It provides that the acquiring authority may deposit the compensation payable into court and execute a deed poll to vest the title in itself.[120] On application of any person claiming the money lodged in court, the Court will distribute the sum according to the respective estates, titles or interest of the person claiming the money.[121] In effect, this means that in order for the Court to

[120] Section 76 of the Lands Clauses Consolidation Act 1845. It is not a requirement to pay money into court in such circumstances, but it is a condition precedent to exercising a deed poll under the 1845 Act.

[121] Section 78 of the Lands Clauses Consolidation Act 1845.

release the money held in Court, the person would have to prove their interest in the land.[122]

[3.26] The 1966 Act also enables the acquiring authority to pay money into the Circuit Court (if the purchase money does not exceed €50,789.52), where: (1) it appears to the acquiring authority that the person claiming the compensation is not absolutely entitled to the land, estate or interest, or (2) the title to the land, estate or interest is not satisfactorily shown to the acquiring authority.[123]

[3.27] Most acquiring authorities can enter into possession of the land and commence works before payment of compensation.[124] In other words, acquiring authorities do not need the transfer of ownership to be complete to proceed with projects. For that reason, payment into court in circumstances where there is doubt about the title at issue may not be necessary or an attractive option for acquiring authorities at present, particularly given the fact that there is no mechanism to recoup that money if it is not claimed. However, there are benefits to the acquiring authority in paying the money into court, which will be discussed below.

## 5. Discussion and recommendations

[3.28] The Commission considers that the concept of paying money into court where owners cannot be identified or located or where title is in dispute is sound. However, the language and structure of the 1845 Act and 1966 Act provisions are archaic and complex and should be reformed.[125] In considering reform,

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[122] It also means that the Court can make an order releasing part of the sum, say to someone claiming a leasehold interest, while retaining the remainder for other interest holders.

[123] Article 2(g) of Schedule 3 of the Housing Act 1966. It also provides that the Circuit Court shall have all the jurisdiction exercisable by the High Court under the Lands Clauses Acts in respect of the purchase money paid into court.

[124] This entitlement is subject to interest accruing from the date of entry until the date of payment of compensation.

[125] In England and Wales, the 1845 Act was repealed and re-enacted to an extent in plainer English with a more modern drafting approach in the Compulsory Purchase Act 1965. This Act included the sections related to owners who cannot be identified or located and disputed owners. See section 9 of the Compulsory Purchase Act 1965 (England and Wales) (which concerns refusal to convey, failure to make out title) and Schedule 2 (which concerns absent and untraced owners). It should be noted that the Compulsory Purchase (Vesting Declarations) Act 1981 excluded Schedule 2 from applying to vesting, but did not disapply section 9. The rationale offered for this in Honey, Pereira, Daly, Clutten, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at page 339 is that "…there is no need for any similar provisions…" for general vesting declarations as title vests automatically. This can be contrasted with some of the statutes containing vesting procedures in this jurisdiction that expressly apply the provisions of the 1845 Act in this context, in relation to the payment of compensation,

the Commission explored how best to simplify the payment into court procedure by rationalising the treatment of owners who cannot be found or located and disputed owners.

[3.29] In other jurisdictions that adopt vesting order procedures, it appears that special provision is not made for missing owners or persons with flawed title.[126] If an owner appears later down the line or resolves their title issues, it seems that they would seek compensation through the regular process. The Commission considers that, given the particular constitutional context in Ireland, and considering that, under the Commission's proposed scheme, it would be entitled to vest ownership in itself, the acquiring authority should pay money into court in circumstances where the owner cannot be identified or located or where there are title issues remaining to be resolved.

[3.30] Payment into court in these circumstances is advantageous to the acquiring authority as it allows it to spend the money allocated for a particular project while it is current, rather than incurring a future liability. Of course, it is possible that later down the line, the acquiring authority will be liable to pay a further sum and so some future liability may be incurred. However, payment into court allows it to offset some of this liability at an early stage when it is in the process of paying other owners for their land.

[3.31] The benefit for the person who cannot be identified or located is that a sum of money is lodged on credit for them in case they subsequently appear. This is particularly important where the acquiring authority has executed a vesting order that effectively turns the person's interest in the land into a claim for compensation. It would be undesirable if an acquiring authority were at a financial advantage as a result of it being unable to identify or locate the owner.

[3.32] Regarding disputed owners, one could argue that there are advantages for them in having title issues resolved at an earlier stage before going to the Tribunal. It avoids the disputed owner incurring costs before the Tribunal, and subsequently the Court, in either attempting to enforce the award of the Tribunal or seeking a declaratory order in respect of their title. Often where title issues arise there will be a long and complicated history where the land is

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despite obviously not applying a deed poll procedure. See the Derelict Sites Act 1990 for example.

[126] For example, in England and Wales, where an absent or untraced owner later appears and their interest has been vested in the acquiring authority under the general vesting declaration procedure, they make a regular reference to the Upper Tribunal (Lands Chamber). See Upper Tribunal (Lands Chamber), *Explanatory leaflet for: compulsory purchase compensation, land compensation disputed and other references: A guide for users* at page 14 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718587/t604-eng.pdf> accessed 25 January 2023.

not registered in the Land Registry and ownership has become fragmented over time, sometimes unbeknownst to the person who considers themselves the freehold owner of the land.[127] The Commission considers that in such circumstances, the acquiring authority should pay a sum of money into court, to be paid to the owner of the interest in land, if and when they provide evidence of title. This is particularly important as the Commission is recommending a vesting order model that will vest ownership in the acquiring authority before title is considered for the purposes of compensation.

### (a) Procedure for payment into court

[3.33] The Commission takes the view that the procedures for paying money into court for owners who cannot be found or located and disputed owners should be the same as this would simplify the process. Currently, the two circumstances are treated differently under the 1845 Act. The Commission considers that the acquiring authority should pay money into court where it is satisfied that a person (defined in the Commission's Bill as a "relevant person"):

(a) who holds title to the land or an interest in land subject to the vesting order who cannot be found or ascertained after reasonable inquiry by the acquiring authority, or
(b) served with a vesting order, who claims to hold title to the land or an interest, but fails to provide evidence to the satisfaction of the acquiring authority of such title.

[3.34] The money paid into court should be based on the acquiring authority's estimate of the compensation payable in respect of the land compulsorily acquired. The Commission does not favour an independent valuation at this juncture, because there are costs involved in providing this and the person may never appear or prove their title. In most cases, the acquiring authority will already have conducted its own valuation of the land, for the purposes of making an advance payment or for cost estimation purposes. The Commission has not recommended an independent valuation in the context of advance payments. To provide for an independent valuation would likely result in repetition in process, as the relevant person may wish to contest the acquiring authority's estimate at a later date.

[3.35] In England and Wales, where the owner is absent or cannot be found, their compensation is assessed by a surveyor "…selected from the members of the Upper Tribunal who are members or fellows of the Royal Institution of

[127] For a discussion on the fragmentation of ownership, see Wylie, *Wylie on Irish Land Law* 6th ed (Bloomsbury Professional 2020) at para 1.03.

Chartered Surveyors" and paid into court.[128] If the missing person subsequently appears or is located and they are unhappy with the amount paid into court, they can "…require the submission to the Upper Tribunal of the question whether the compensation paid into court was sufficient, or whether any and what further sum ought to be paid over or paid into court".[129]

[3.36] The Commission considers that an independent valuer assessing the money to be paid into court is unnecessary. Instead, the Commission considers that the money paid should be the acquiring authority's estimate of appropriate compensation and that the acquiring authority should be required to produce and preserve a reasoned statement of the estimate.[130] Where the person appears at some later juncture, or proves their title, and they are dissatisfied with the acquiring authority's estimate, the Commission takes the view that they should then have recourse to the Tribunal to seek a further sum.

[3.37] In terms of when the money should be paid into court, the Commission examined whether the payment should be made before the vesting date, on the vesting date, or a short specified period after the vesting date. Overall, the Commission concluded that the best solution is to require the acquiring authority to pay the money into court within two months of the vesting date. It may be the case that the owner is trying to satisfy the acquiring authority that title is in order very close to the vesting date, or that the acquiring authority only realises title is not in order at that point. In such instances, the acquiring authority may only be prepared to pay the advance payment (no less than 90% of its estimate) as opposed to its full estimate of the compensation into court. Providing that the money must be paid into court within two months of the vesting date, as opposed to on or before the vesting date, provides sufficient wiggle room for both parties. The Commission takes the view that where a person ultimately ends up being deemed a "relevant person", there is no immediate urgency in making the payment, because for the most part, the person will take time to come forward (if they are an owner who cannot be found or ascertained) or to prove their title.

**R 3.1** **The Commission recommends that** the acquiring authority should be required to pay money into court where it is satisfied that a person (a "relevant person")—

[128] Paragraph 1(1) of Schedule 2 of the Compulsory Purchase Act 1965 (England and Wales).

[129] Paragraph 4(1) of Schedule 2 of the Compulsory Purchase Act 1965 (England and Wales).

[130] This reasoned statement could be given, where requested, to the relevant person to whom the estimation relates. This will assist them in deciding whether or not they should pursue an additional sum before the Tribunal.

(a) who holds title to the land or an interest in land subject to the vesting order who cannot be found or ascertained after reasonable inquiry by the acquiring authority, or

(b) served with a vesting order, who claims to hold title to the land or an interest, who fails to provide evidence to the satisfaction of the acquiring authority of such title.

**R 3.2** **The Commission recommends that** the sum paid into court should be the acquiring authority's estimate of the compensation payable in respect of the land compulsorily acquired.

**R 3.3** **The Commission recommends that** the acquiring authority should produce and preserve a reasoned statement of the estimate, to be given, where requested to the relevant person.

**R 3.4** **The Commission recommends that** the acquiring authority should pay the money into court within two months of the vesting date.

[3.38] The Commission explored whether it would be preferable for the relevant person to go to the Tribunal before or after it makes an application to the Court to claim the money lodged.[131] The benefit of requiring the relevant person to apply to the Tribunal before applying to have the monies released by the Court, would be that any top-up amount awarded by the Tribunal could be paid into court by the acquiring authority, and the sum released and paid in full to the owner. However, the Commission considers that the downside to this is that proceedings may be brought before the Tribunal to assess whether an amount is sufficient before the Court adjudicates on whether the relevant person has an estate or interest in the land in respect of which the money was lodged.

[3.39] Requiring the relevant owner to first make an application to the Court for the release of the money lodged would prevent a costly and futile consideration before the Tribunal of whether the sum lodged in court was sufficient, only for it to turn out that the relevant person does not have an interest or estate to claim the money in court, or any further sum that might be awarded by the Tribunal.

[3.40] The Commission considers that the relevant person should make an application to the Court, on notice to the acquiring authority, to have the money released to them. This is without prejudice to the ability of the relevant person to subsequently apply to the Tribunal if they are dissatisfied with the

[131] Under Schedule 2 of the Compulsory Purchase Act 1965 (England and Wales) and section 64 of the Land Clauses Consolidation Act 1845 Act, where the person is dissatisfied with the sum, they must apply to have the question of whether it is a sufficient sum determined before applying to the Court to release the money.

acquiring authority's estimate. In making the application to the Court they should be required to provide evidence to the Court of their estate or interest in land. The Court can then distribute the money already lodged according to the titles or interests of the relevant person(s). This is another benefit of the recommended payment into court procedure for the acquiring authority. It provides a more effective mechanism for determining title disputes, and avoids the current situation where costly arbitration hearings may be followed by costly legal proceedings because the determination of compensation proceeds on the basis that the title claimed is correct. Here, the onus will be on the relevant person to prove their title to receive the compensation paid into court, and they will only be able to proceed to the Tribunal where it is confirmed that they have the title claimed.

**R 3.5** **The Commission recommends that** a relevant person should make an application to the Court, on notice to the acquiring authority, to have the money released to them.

**R 3.6** **The Commission recommends that** when making an application to the Court, a relevant person should provide evidence to the court of their title to the land concerned.

**R 3.7** **The Commission recommends that** on the application of the relevant person, the Court may order the distribution of the money paid into court as compensation according to the respective estates, titles or interests of the relevant person, if satisfied as to title.

[3.41] Given that it is only the acquiring authority's estimate of the compensation that is paid into Court, the Commission considers that the relevant person should have recourse to the Tribunal to seek a further sum, where they contend that the compensation paid into court was not sufficient compensation for the compulsory acquisition of their interest in the land. If the relevant person is dissatisfied with the amount of money released they should be permitted to make an application to the Tribunal within one month from the date of the determination of the Court. The Tribunal will consider whether the sum paid into court was sufficient or whether a greater or lesser sum of compensation ought to be paid. The Commission takes the view that it should be within the jurisdiction of the Tribunal to award, if appropriate, a lesser sum of compensation than what was initially paid into court; this would act as an incentive for the relevant person to consider in earnest the appropriateness of the figure paid into court by the acquiring authority before bringing proceedings to the Tribunal.

[3.42] Where the Tribunal determines that a further sum ought to be paid to the relevant person by the acquiring authority, the Commission considers that this should be paid to the relevant person no later than two months after the determination of the Tribunal. Where the Tribunal determines that a lesser

sum of compensation ought to be paid to the relevant person, they shall be required to pay the excess amount to the acquiring authority no later than two months after the determination of the Tribunal.

**R 3.8** **The Commission recommends that** where a relevant person considers that the money paid into court does not provide them with full compensation for their estate or interest in land, they may make an application, on notice to the acquiring authority, to the Tribunal within one month from the date the Court ordered the distribution of the money as compensation, to determine whether the money paid into court is sufficient or whether a further or lesser sum of compensation ought to be paid.

**R 3.9** **The Commission recommends that** where the Tribunal receives an application, it shall make a determination and:

(a) if it determines that a further sum of compensation ought to be paid to the relevant person, then the acquiring authority should pay the person the further sum no later than two months after the determination of the Tribunal, or

(b) if it determines that a lesser sum of compensation ought to be paid to the relevant person, then the relevant person should repay the excess amount to the acquiring authority no later than two months after the determination of the Tribunal.

[3.43] In terms of costs payable by the acquiring authority, the Commission considers that these should be considered separately: by the Court where an application is made to release the money by a relevant person, and by the Tribunal where the relevant person seeks a reassessment of the valuation.[132] Where an application is made to the Court for the money to be released, the costs and expenses payable to either the acquiring authority or the relevant person should be at the discretion of the Court. In contrast, the Commission considers that the costs and expenses to be paid by the acquiring authority or the relevant person in respect of the determination by the Tribunal should be dependent on whether a further or lesser sum of compensation ought to be paid, or whether the sum was sufficient.

[3.44] Where the money paid into court is held to be sufficient, the costs and expenses should be at the discretion of the Tribunal. Where it is determined that a further sum ought to be paid, the acquiring authority should be

[132] It is noted that some statutes that provide for payment into court expressly provide that where compensation is paid into court in accordance with section 69 of the Lands Clauses Consolidation Act 1845, "…no costs shall be payable by that acquiring authority to any person in respect of any proceedings for the investment, payment of income, or payment of capital of such money" as permitted by sections 69 and 70. See for example, section 19(5) of the Derelict Sites Act 1990.

responsible for the reasonable costs and expenses properly incurred by the relevant person. Where the Tribunal considers that a person is entitled to a sum lower than that which was paid into court, the relevant person should be liable for the reasonable costs and expenses properly incurred by the acquiring authority.

[3.45] The Commission also takes the view that where the acquiring authority has paid money into court it should not be liable to pay interest on that money, or any further sum as determined by the Tribunal from the date it pays the money into court. The acquiring authority should effectively be treated as having paid the compensation in the context of interest payable from the vesting date until the payment of compensation. This is another benefit for the acquiring authority because in paying the money into court, it reduces its liability to pay interest where it has vested the land in itself.[133]

**R 3.10** **The Commission recommends that** where money is paid into court, and an application is made by a relevant person to have money released, the costs and expenses payable to or by the acquiring authority or relevant person shall be at the discretion of the court.

**R 3.11** **The Commission recommends that** costs and expenses in respect of the determination by the Tribunal, shall be determined by the Tribunal and where the Tribunal determines that:

(a) the money paid into court is sufficient, the reasonable costs and expenses properly incurred shall be at the discretion of the Tribunal;

(b) a further sum ought to be paid by the acquiring authority, the reasonable costs and expenses properly incurred by the relevant person shall be paid by the acquiring authority;

(c) a relevant person is entitled to a sum lower than that which was paid into court, the reasonable costs and expenses properly incurred by the acquiring authority shall be paid by the relevant person.

**R 3.12** **The Commission recommends that** the acquiring authority should not be liable to pay interest on any money paid into court, or any further sum determined by the Tribunal, from the date it pays the money into court.

### (b) Acquiring authority reclaiming the money paid into court

[3.46] As noted in *Minogue v Clare County Council*, where the acquiring authority acquires land (whether by virtue of a deed poll or vesting order procedure) the "…statutory intention is that the owner's interest in the lands is converted

[133] For example, if the acquiring authority paid the money into court 2 months after the vesting date, it would only be liable to pay 2 months' worth of interest.

into the monies lodged…".[134] Humphreys J in his judgment, went on to say that:

> …such monies must remain in court unless and until duly claimed by the owner, absent statutory provision to the contrary. Certainly the council can't get those monies back, having already got the title to the lands.[135]

[3.47] Currently, there is no statutory mechanism to allow the acquiring authority to regain the money lodged into court if it remains unclaimed.[136] Nor is there a time limit for claiming compensation in most cases.[137] The Commission considers that there should be a time limit for claiming compensation, and this is discussed more generally in Chapter 4. In the case of owners who cannot be identified or located, or persons who fail to prove title, the Commission takes the view that the time limit for claiming compensation should be 25 years from the date the money is paid into court. This is longer than the general 20-year time limit for claiming compensation that the Commission recommends in Chapter 4. The reason the Commission considers that the time limit in circumstances where money has been paid into court should be 25 years rather than 20 years is to give the person who cannot be identified or located more time to claim compensation.[138] Such persons may not be aware that their land has been compulsorily acquired, despite attempts to notify them, and for that reason, the Commission takes the view that they should be given a slightly longer timeframe to come forward.

[3.48] The Commission takes the view that if the money is not claimed in that period, the acquiring authority should be permitted to make an application, on notice to the relevant person where they are known to the acquiring authority,[139] to the Court to have the money released to it. The rationale for this change is

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[134] *Minogue v Clare County Council* [2021] IECA 98 at para 59.

[135] *Ibid* at para 59.

[136] In England and Wales, where the money has remained unclaimed in court for more than 12 years, it may be reclaimed by an acquiring authority if it is a local authority. See section 29 of the Local Government (Miscellaneous Provisions) Act 1976.

[137] A few statutory schemes do provide a time limit. See section 33(4)(b) of the Gas Act 1976, section 55(7)(b) of the Wildlife Act 1976 and section 65(6)(b) of the Inland Fisheries Act 2010 which contain express six-year limitation periods from the date the compulsory acquisition power is exercised.

[138] The same time limit also applies to persons who fail to prove their title to the satisfaction of the acquiring authority. The Commission considers that it is simpler to not distinguish between the two categories of relevant person to provide that person experiencing difficulties proving title must claim compensation within 20 years, but the person who cannot be identified or found must claim compensation within 25 years.

[139] In the case of a person whose title is in dispute, the acquiring authority will likely know who they are, and should be required to serve notice of the application on them.

that money should not be lying dormant indefinitely in court when it could be returned to the acquiring authority or the State to be used in the public interest. This will not happen in every case where money is paid into court and not claimed as it may not be in the acquiring authority's interest to reclaim the money paid into court, particularly if it is a relatively small sum.

**R 3.13** **The Commission recommends that** in the case of a relevant person, the time limit for claiming compensation should be 25 years from the date the money is paid into court.

**R 3.14** **The Commission recommends that** where the money paid into court is not claimed within 25 years from the date the money is paid into court, the acquiring authority may make an application to the court, on notice to the relevant person where they are known to the acquiring authority, to have the money released to it.

# CHAPTER 4
# DETERMINATION OF COMPENSATION

**Chapter Contents**

# 1. Introduction

[4.1] Where land is compulsorily acquired, the owner will be compensated for the loss of their land.[140] The acquiring authority will typically enter negotiations with affected owners to try to agree on the amount of compensation. In most cases, the owner and the acquiring authority will reach a settlement. Where agreement cannot be reached,[141] or either party does not engage in negotiations, a property arbitrator will generally be appointed to determine the compensation under the 1919 Act, following an application by either the owner or the acquiring authority.[142]

[4.2] This chapter explores the property arbitration function with a view to identifying how the infrastructure for determining compensation should be reformed or replaced. In terms of principles guiding reform, the Commission considers that the infrastructure for determining compensation for land compulsorily acquired should be independent and low-cost, and provide a speedy and efficient service. Decision-making should be consistent and guided by clearly established procedures and case management to enhance predictability. Accessible and transparent information should be available on the operation of the function and determinations should be published to provide clarity, develop precedent and encourage settlements.

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[140] This is not to say that compensation must be provided in every instance. In *Dreher v Irish Land Commission* [1984] ILRM 94. Walsh J in the Supreme Court, reflecting on Article 43 and Article 40.3.2, stated at page 96 that "…it may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good". However, as discussed further in Chapter 5, it is only in exceptional cases that compensation will not be necessary where land is compulsorily acquired.

Owners are also compensated for the imposition of wayleaves on their land under the Electricity Supply Act 1927, as amended. In the case *ESB v Gormley* [1985] IR 129, the Supreme Court found that the lack of a right to compensation in section 53 made the section unconstitutional, as it infringed the owner's property rights by virtue of Article 40.3.2 of the Constitution. Subsequently, the law was changed to provide for a right to compensation. Section 53(5) of the 1927 Act now provides that compensation is to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919.

[141] Some statutes provide that a property arbitrator can only be appointed "in default of agreement", which means an attempt to reach agreement is a condition precedent to the appointment of a property arbitrator. For example, see section 33(3) of the Gas Act 1976.

[142] Where the 1919 Act does not apply, the High Court will determine the award of compensation according to the rules set out in *Comyn v Attorney General* [1950] IR 142. This rarely occurs as most post-1922 statutes expressly apply the 1919 Act for the assessment of compensation.

[4.3] The Commission's discussions and recommendations in this Chapter correspond to the provisions of Chapter 1 of Part 4 of the draft Bill appended to this Report.

[4.4] The determination of compensation process as recommended by the Commission is summarised in the Determination of Compensation by the Valuation Tribunal Flowchart appended at the end of the Executive Summary.[143]

## 2. Current law on property arbitration

### (a) The 1919 Act

[4.5] The 1919 Act assigns the role of determining disputed compensation for land compulsorily acquired to a property arbitrator,[144] who is appointed by the Land Values Reference Committee.[145] An application may be made to appoint a property arbitrator by any party involved in or affected by the acquisition "…at any time after the expiration of 14 days from the date on which the notice to treat was served…".[146] Property arbitrators are usually chartered surveyors or valuers. They are required to have "…special knowledge of the valuation of land or such other qualifications as the Reference Committee considers suitable".[147]

[4.6] Most legislation containing compulsory acquisition powers provides that compensation is to be determined by a property arbitrator and assessed in

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[143] See page 19 of this Report.

[144] Previously under the Lands Clauses Consolidation Act 1845 compensation was determined (1) by two justices where the claim for compensation was less than 50 pounds, and (2) by either jury or arbitrator depending on the preference of the owner where the claim exceeded 50 pounds. In general, arbitrators were appointed by agreement between the parties. Where they could not agree, each party appointed an arbitrator, and the arbitrators appointed an umpire.

[145] The Acquisition of Land (Reference Committee) Act 1925 reconstituted the Reference Committee. It now consists of the Chief Justice, the President of the High Court, and the chairman of the Society of Chartered Surveyors Ireland. The Property Values (Arbitrations and Appeals) Act 1960 assigned additional functions, not related to compulsory acquisition, to the arbitrator under the Finance (1900-1910) Act 1910 and the Arterial Drainage Act 1945. It also changed the title of the arbitrator from official arbitrator to property arbitrator.

[146] Rule 7(1)(a) of the Property Values (Arbitrations and Appeals) Rules 1961 (SI No 91 of 1961).

[147] Section 2(1) of the Property Values (Arbitration and Appeals) Act 1960. See Courts Service, *Criteria for Inclusion on the Panel of Statutory Property Arbitrators for Applications for Wayleaves and Compulsory Purchase Disputes* (6 April 2022) https://scsi.ie/criteria-property-arbitrator-panel-6-april-2022-final/ accessed 27 February 2023, which sets out the qualifications and knowledge required to be appointed as a property arbitrator.

accordance with the 1919 Act. The 1919 Act sets out both the general rules on compensation (discussed further in Chapter 5) and a small number of procedures to be followed in determining compensation.

[4.7] The jurisdiction of property arbitrators primarily relates to determining compensation for the compulsory acquisition of land. However, they have been assigned additional functions over the years. They were given two additional functions by the Property Values (Arbitrations and Appeals) Act 1960 (the "1960 Act") under the Finance (1909-10) Act 1910 and the Arterial Drainage Act 1945.[148] Property arbitrators also have a role in determining compensation under the European Communities (Assessment and Management of Flood Risks) Regulations 2010.[149] More recently, the Finance Act 2021 introduced a residential zoned land tax. Section 653(X)(2) of the Taxes Consolidation Act 1997 (as amended by section 80 of the Finance Act 2021) provides that an appeal against the market value of the land to which the residential zoned land tax applies is to a property arbitrator. Under section 96 of the 2000 Act, a property arbitrator also determines compensation where agreement cannot be reached between the developer and the planning authority in relation to social and affordable housing obligations attached to planning permission under the Act.

[4.8] The Commission has considered the reform of the property arbitration function and the benefits of repealing the 1919 Act and related legislation through the lense of compulsory acquisition. It understands that determining compensation for land compulsorily acquired is the the main function carried out by the property arbtitrators appointed by the Reference Committee. As the miscellaneous functions of the property arbitrators identified above primarily relate to the valuation of land, there appears to be no reason in principle why these functions could not be transferred to whatever infrastructure for determining compensation the Commission considers should replace the current functions of the property arbitrators in respect of determining compensation for land compulsorily acquired.

[4.9] The Commission considers that it would be preferrable for the 1919 Act and all associated legislation to be repealed and revoked in its entirety, to provide a modern legislative approach to the determination of compensation for land. Otherwise, the Reference Committee, the current panel of property arbitrators and parts of the relevant legislation would have to remain in situ to allow

[148] See sections 3 and 5 of the Property Values (Arbitration and Appeals) Act 1960.

[149] European Communities (Assessment and Management of Flood Risks) Regulations 2010 (SI No 122 of 2010). This statutory instrument enables the Reference Committee to appoint members to a "panel of property arbitrators", specifies some criteria for appointment to this panel, and details certain matters to be regarded in the assessment of compensation.

these miscelleneous functions to be carried out. The Commission has drafted its Bill on the assumption that these miscellaneous functions are capable of being transferred. The affects this would have on the miscellaneous functions of the property arbitrators, and the suitability of the Commission's recommendations in this respect, should be given further consideration by the Oireachtas in the event that the Commission's recommendations and draft Bill are considered for enactment.

[4.10] The 1919 Act is an archaic piece of legislation that predates the foundation of the State. It is very short by modern standards, running to just 12 sections, leaving many aspects of the process and procedure on determining compensation ill-defined or omitted entirely. The Commission considers that the 1919 Act and related legislation should be repealed and replaced with a modern and accessible statute that addresses the same general themes: (1) the structure for determining compensation and (2) principles of compensation.

**R 4.1** **The Commission recommends that** the following Acts should be repealed:

(a) The Acquisition of Land (Assessment of Compensation) Act 1919

(b) The Property Values (Arbitration and Appeals) Act 1960.

**R 4.2** **The Commission recommends that** the following statutory instruments should be revoked:

(a) The Acquisition of Land (Assessment of Compensation) Rules 1920 (SR&O No 600 of 1920)

(b) The Property Values (Arbitration and Appeals) Rules 1961 (SI No 91 of 1961)

(c) The Acquisition of Land (Assessment of Compensation) Fees Rules 1999 (SI No 115 of 1999).

### (b) The Arbitration Act 2010

[4.11] Typically, arbitration involves parties mutually agreeing—through an arbitration agreement—to refer a dispute to a neutral third-party for resolution.[150] The appointment of a property arbitrator to determine

[150] The authors of *Byrne and McCutcheon on the Irish Legal System* list the principal advantages of arbitration over litigation as including; "the choice of an expert adjudicator, whether an architect, engineer or lawyer, as opposed to the imposition of a particular judge who may have no particular expertise in the area; procedural flexibility, subject to the essential rules of fair procedures; choice of location, procedure and applicable law; enforcement of arbitral awards internationally; the possibility of a speedy decision; and confidentiality through a hearing in private". See Byrne, McCutcheon, Cahillane and Roche-Cagney, *Byrne and McCutcheon on the Irish Legal System* 7th ed (Bloomsbury Professional 2020) at para 8.28.

compensation for land compulsorily acquired is somewhat different. The owner and acquiring authority are required by statute to have disputed compensation determined by a property arbitrator.

[4.12] The Arbitration Act 2010 (the "2010 Act") applies the UNCITRAL Model on Commercial Arbitration to all arbitrations except where otherwise provided for in the Act.[151] The 2010 Act applies to an arbitration by a property arbitrator as if it were an arbitration pursuant to an arbitration agreement, except in so far as the 2010 Act is inconsistent with the relevant legislation or rules related to the property arbitration function.[152] Figuring out what is and is not consistent can be a difficult task as it is not always clear cut.[153]

[4.13] Galligan and McGrath consider that many of the provisions of the Model law could be said to be "…inconsistent on their face in so far as they are inextricably linked with consensual arbitration".[154] The authors note that:

> …the application of the 2010 Act to arbitrations relating to compulsory purchase of land is somewhat surprising as the UNCITRAL Model law is designed to apply to arbitration agreements. In that context, the parties are submitting on a consensual basis to the arbitrator's jurisdiction, together with any limitations on that jurisdiction, which include very limited recourse to Courts. However, on a compulsory acquisition, the affected owners do not consent to any of these limitations.[155]

[151] Section 4 of the Arbitration Act 2010.

[152] Section 29(1) of the Arbitration Act 2010.

[153] Only section 18 of the Arbitration Act 2010 (which concerns the power of the arbitrator to award interest) is expressly excluded from applying to an arbitration conducted by a property arbitrator. See section 30(2) of the Arbitration Act 2010.

[154] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.06.

[155] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.06.

## 3. Data on property arbitrators

[4.14] Property arbitrators operate individually and seperately, so there is no permanent decision-making body with a chairperson or Board that is responsible for oversight and governance. This means there is very limited data available on the operation of the property arbitration function. The only data that the Courts Service was able to share with the Commission in relation to the function is the number of applications made to the Reference Committee to appoint a property arbitrator each year. The data from 2008 to 2022 is shown in the graph below.

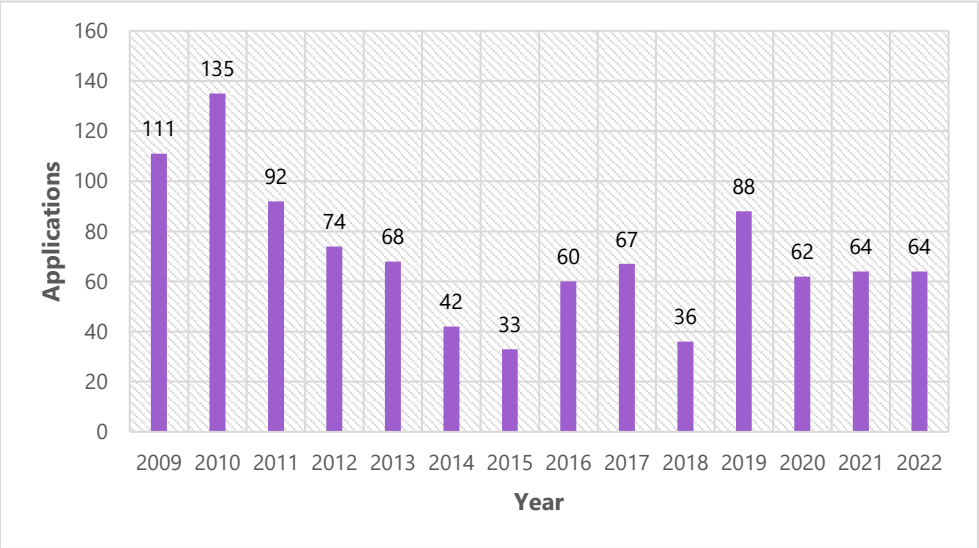


Figure 5 Applications per year to appoint a property arbitrator

[4.15] As the Courts Service is not responsible for overseeing the function, it has no data on:

(a) how many cases settle before hearing or during proceedings, following the appointment of a property arbitrator;
(b) how long hearings take to conclude;
(c) the rate of compensation awarded to owners; or
(d) how many applications for costs were made.

[4.16] In addition, no data is publicly available on how much is spent on operating the property arbitration function each year. It is unusual not to have this sort of data available on a public function, as it is generally made available in annual reports published by decision-making bodies.[156] This presents a transparency issue, especially considering the amount of public money that is expended on compensation for land compulsorily acquired by acquiring authorities. The lack of centralised data makes it more difficult to assess the

[156] There is no annual report produced by the property arbitration function and data on the function is not yet included in the Courts Service annual reports.

workload of property arbitrators and the efficiency of this resolution mechanism, which are important considerations in evaluating the need for reform.

## 4. Approach in other jurisdictions

[4.17] Table 4 below outlines the comparative approaches to determining compensation for land compulsorily acquired in other jurisdictions.

| | Forum | Membership | Appeals | Other Comments |
|---|---|---|---|---|
| **England and Wales** | Upper Tribunal (Lands Chamber)[i] | President who is a judge, judges or lawyers who are referred to as "judges" (including the deputy President) and chartered surveyors who are referred to as "members"[ii] | Determination by the Upper Tribunal (LC) is not an appeal; it is the only merits-based determination[iii]<br><br>It may review its decision on receiving an application for permission to appeal[iv]<br><br>While the decision is final, there is an appeal on a point of law to the Court of Appeal[v] | Decides appeals from the Valuation Tribunal in England and Wales |
| **Scotland** | Lands Tribunal for Scotland[vi] | President is a judge. Members are drawn from legal and surveying professions | Appeal on a point of law to the High Court and consultative case stated[vii] | Also determines any appeal under the Valuation Acts |
| **Northern Ireland** | Lands Tribunal for Northern Ireland[viii] | President is an experienced lawyer and other members are lawyers or persons with experience in valuing land[ix] | Appeal on a point of law only[x] | Also determines appeals against valuations for rating purposes |
| **New Zealand** | Land Valuation Tribunal[xi] | Each region has its own tribunal made up of a District Court Judge (who is the chairman) and two registered valuers[xii] | Final on the amount awarded, but not final as regards the right or title of the person claiming compensation to | Also determines objections to rating valuations |

| | Forum | Membership | Appeals | Other Comments |
|---|---|---|---|---|
| | | | receive the amount awarded. This is subject to the right to appeal by way of rehearing[xiii] | |
| **Australia (Federal)** | (1) Arbitrator of appointed expert<br>(2) Administrative Appeals Tribunal<br>(3) Federal Court[xiv] | President is a judge. Deputy president generally a judge or legal practitioner. Senior members and other members generally legal professionals or persons with special knowledge or skills relevant to the role[xv] | No express provisions in compulsory acquisition legislation. Appeal on both fact and law from decision of the Federal Court.[xvi] Appeal on question of law from decision of Administrative Appeals Tribunal[xvii] | |
| **Queensland** | Land Court[xviii] | Sole judge who is either a lawyer with specialist experience or a valuer or person professionally qualified in a land-related discipline with litigation or quasi-judicial experience[xix] | Final as regards the amount of compensation awarded. Only exception is where money is paid into court. In such cases award will not be final as regards title[xx] | |
| **Victoria** | (1) Civil and Administrative Tribunal<br>(2) Supreme Court[xxi] | Civil and Administrative Tribunal consists of senior and ordinary members who must be lawyers or people who, in the opinion of the Minister, possess | Appeal of determination of the Court to the Court of Appeal on a point of law only[xxiii] | |

| | Forum | Membership | Appeals | Other Comments |
|---|---|---|---|---|
| | | extensive knowledge or experience in relation to the functions[xxii] | | |
| **South Australia** | (1) Settlement Conference<br>(2) Supreme Court[xxiv] | Conference co-ordinator must be an experienced legal practitioner[xxv] | No specific provision in compulsory acquisition legislation. Compensation dispute can only be referred to the Court where the settlement conference fails | |
| **New South Wales** | Land and Environment Court[xxvi] | Judge or an experienced lawyer[xxvii] | Appeal to Land and Environment Court where a person is not offered compensation or their claim is rejected | |
| **Western Australia** | (1) Agree figure with acquiring authority<br>(2) Take an action for compensation against acquiring authority<br>(3) State Administrative Tribunal—both parties appoint an assessor each, who sits with senior member of the State | Assessors are experts with specialised knowledge who are appointed by both parties. | No specific provision in compulsory acquisition legislation. Appeal on point of law from decision of State Administrative Tribunal[xxix] | |

| | Forum | Membership | Appeals | Other Comments |
|---|---|---|---|---|
| | Administrative Tribunal together to constitute a Tribunal[xxviii] | | | |
| **Tasmania** | (1) Agreement<br>(2) Arbitration under Commercial Arbitration Act 2011<br>(3) Arbitration by Special Arbitrator appointed under the Land Acquisition Act 1993<br>(4) Determination by Supreme Court[xxx] | Special arbitrator required to have sufficient expertise in the assessment of compensation in relation to the acquisition of land[xxxi] | Appeal on a point of law by way of rehearing to the Supreme Court from determination of the Special Arbitrator or to Full Court of the Supreme Court from determination of the Court[xxxii] | |
| **Canada (Federal)** | Negotiation procedure overseen by a negotiator[xxxiii] | Negotiators are employed in public service[xxxiv] | If no agreement reached, can make an application to Federal Court | |
| **Denmark** | Compensation determined by the Expropriation Commission, which also confirms the compulsory acquisition[xxxv] | Multidisciplinary members, president is a lawyer. It can avail of the expertise of chartered surveyors | Appeal to Appraisal Commission, only then can it go to the Courts | |

Table 4 Determination of compensation in other jurisdictions

## Notes to Table

[i] The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 (England and Wales) and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600) (England and Wales).

[ii] Honey, Pereira, Clutten, Daly, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at pages 714-715.

[iii] Section 1 of the Land Compensation Act 1961 (England and Wales) and section 6 of the Compulsory Purchase Act 1965 (England and Wales).

[iv] See rules 77(1) and 56(1) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600) (England and Wales) and para 22.7 of the Lands Chamber of the Upper Tribunal Practice Directions 2020. The Upper Tribunal (lands Chamber) can only review its decision if it overlooked a legislative provision or binding authority when making its decision that would have affected the decision made, or a court has made a decision which is binding on the Upper Tribunal since its decision and which may have been material had the case been decided earlier.

[v] Section 13 of the Tribunals, Courts and Enforcement Act 2007 (England and Wales) and para 22.1 of the Lands Chamber of the Upper Tribunal Practice Direction 2020.

[vi] Section 14 of the Land Compensation Act 1973 (Scotland).

[vii] Section 11 of the Tribunals and Inquiries Act 1992 (Scotland).

[viii] Lands Tribunal and Compensation Act 1964 (Northern Ireland).

[ix] Section 1 of the Lands Tribunal and Compensation Act 1964 (Northern Ireland).

[x] Section 8(6) of the Lands Tribunal and Compensation Act 1964 (Northern Ireland).

[xi] Public Works Act 1981 (New Zealand).

[xii] Section 19 of the Land Valuation Proceedings Act 1948 (New Zealand).

[xiii] An applicant can only apply for an appeal by way of rehearing where there was a significant flaw in the judgment or proceedings. They cannot appeal simply because they disagree with the decision. It is not a *de novo* hearing. See section 95(1) of the Public Works Act 1981 (New Zealand) and section 26 of the Land Valuation Proceedings Act 1948 (New Zealand).

[xiv] Sections 80-82 of the Land Acquisition Act 1989 (Australia).

[xv] Section 7 of the Administrative Appeals Tribunal Act 1975 (Australia).

[xvi] Jacobs, *Law of Compulsory Land Acquisition* 2nd ed (Thomson Reuters 2009) at para 37.05.

[xvii] Part IVA of the Administrative Appeals Tribunal Act 1975 (Australia).

[xviii] Section 24 of the Acquisition of Land Act 1967 (SA).

[xix] Section 16(4) of the Land Court Act 2000 (Qld).

[xx] Sections 26(4), (5) and 29 of the Acquisition of Land Act 1967 (Qld).

[xxi] Part 10 of the Land Acquisition and Compensation Act 1986 (Vic). If amount in dispute does not exceed $400,000 then the matter must be referred to the Tribunal.

[xxii] Sections 8-14 of the Civil and Administrative Tribunal Act 1988 (Vic).

[xxiii] Section 89 of the Land Acquisition and Compensation Act 1986 (Vic).

[xxiv] Sections 23BA and 23C of the Land Acquisition Act 1969 (SA).

[xxv] Regulation 11 of the Land Acquisition Regulations 2019 (SA).

[xxvi] Only if person disagrees with amount of compensation offered. Section 66 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) and section 24 of the Land and Environment Court Act 1979 (NSW).

[xxvii] Section 7 of the Land and Environment Court Act 1979 (NSW).

[xxviii] Sections 223-226 of the Land Administration Act 1997 (WA).

[xxix] Section 105 of the State Administrative Tribunal Act 2004 (WA).

[xxx] Section 42 of the Land Acquisition Act 1993 (Tas).

[xxxi] Section 6(2) of the Land Acquisition Act 1993 (Tas).

[xxxii] Section 62 of the Land Acquisition Act 1993 (Tas).

[xxxiii] Sections 30-31 of the Expropriation Act 1985 (Canada).

[xxxiv] Section 30(3) of the Expropriation Act 1985 (Canada).

[xxxv] See Kommissarius ved Statens Ekspropriationer på Øerne, Guidance on the procedure for expropriations (accessed 15 February 2023).

## 5. The operation of the property arbitration function

[4.18] For many years until 2012, there were two permanently appointed property arbitrators. Up until 2021, there was one permanently appointed property arbitrator and a panel of temporary property arbitrators to be drawn upon as required. Since then, the function has operated solely through a temporary panel system. The Commission understands from recent discussions with stakeholders that this change has resulted in cases being resolved more quickly, although it was suggested that this has had a less positive impact in terms of consistency.[157] Property arbitrators are appointed for a period of three years.[158] While the Courts Service assists the Reference Committee in establishing and maintaining this panel,[159] neither has an oversight or monitoring role over the property arbitrators.

[4.19] There are a number of problems with the current property arbitration function including:

(a) archaic appointment mechanism,[160]

[157] At the time submissions were made to the Issues Paper in 2018, there was one permanent property arbitrator and a panel of temporary property arbitrators that could be called upon where the permanent property arbitrator was unable to act. Many respondents contended that the arbitration process at that time took too long and could be a lot quicker. The Commission acknowledges that the landscape has changed somewhat since then with the property arbitration function being carried out exclusively by temporary panel members. The lack of data in this area makes it difficult for the Commission to independently verify whether this has resulted in cases being resolved quicker.

[158] Courts Service, *Criteria for Inclusion on the Panel of Statutory Property Arbitrators for Applications for Wayleaves and Compulsory Purchase Disputes* (6 April 2022) https://scsi.ie/criteria-property-arbitrator-panel-6-april-2022-final/ accessed 27 February 2023 at page 1.

[159] In recent years, there has been a move on the part of the Land Values Reference Committee, through the Courts Service, to specify the criteria for appointment as a property arbitrator in more detail as demonstrated in the information booklet for prospective candidates. See Courts Service, *Criteria for Inclusion on the Panel of Statutory Arbitrators for Applications for Wayleaves and Compulsory Purchase Disputes* (6 April 2022) https://scsi.ie/criteria-property-arbitrator-panel-6-april-2022-final/ accessed 27 February 2023.

[160] Property arbitrators are appointed by the Reference Committee. This committee is made up of the Chief Justice, the President of the High Court, and the chairman of the Society of Chartered Surveyors Ireland. This is unnecessary and unusual in this day and age. Most appointments to similar public decision-making roles are made by the relevant Minister in modern legislation. There are also no statutory provisions on terms of appointment that typically appear in the legislation governing decision-making bodies including provisions on re-appointment, set periods of service, resignation, termination or cessation of appointments.

(b) no established decision-making guidance or procedures, or uniform case management system to ensure consistency,[161]
(c) no information available on the operation of the function online,[162]
(d) reasoned determinations not publicly available,[163] and
(e) no administrative support for property arbitrators.[164]

[4.20] Determining compensation for land compulsorily acquired is primarily a matter of quantum. However, to arrive at that final figure, property arbitrators must do more than just ascertain the market value of the land. The principles of compensation, discussed in Chapter 5 must be taken into consideration and this involves an in-depth expert knowledge of the relevant legislation and case law related to compulsory acquisitions and arbitrations. As public law decision-makers, property arbitrators must also conduct proceedings in accordance with fair procedures.

[4.21] Property arbitrators do not typically have a legal qualification and are more frequently drawn from the chartered surveyor and valuer professions. In principle, this should not pose a problem because:

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[161] The property arbitrators do not have to abide by set procedures or guidance, and this can result in a lack of predictability and consistency for owners and acquiring authorities. There is no governance structure, which means that individual property arbitrators can set their own procedures within the parameters of any governing legislation. This means that the process followed largely depends on which arbitrator is appointed to hear the case. While property arbitrators will for the most part set out deadlines and expectations of the parties in conducting proceedings, there is no uniform case management system adopted across the board.

[162] The function does not have a website where stakeholders can access information about the service, the steps involved in determining compensation, what to expect at an oral hearing or other guidance. Not having accessible information available, particularly for owners, means that they have little choice but to seek expert representation to make an application to determine compensation as they have little understanding about the process or what is required.

[163] Awards of compensation by property arbitrators must be reasoned. See Arbitration Act 2010. Before this, the finding in *Manning v Shackleton* that there is no duty on a property arbitrator to give a reasoned award stood. See *Manning v Shackleton* [1996] 3 IR 85 at page 97.

The lack of publications of determinations results in more unpredictability when it comes to awards and makes it difficult to establish how consistent the awards of different property arbitrators are with each other. Several submissions to the Commission stated that if determinations were published it would assist acquiring authorities in formulating offers and claimants in formulating claims, which would likely result in an increase in early settlement as both parties will make and accept realistic offers to avoid the costs of having a similar amount determined by an external party.

[164] Property arbitrators receive no administrative support which would commonly be provided in decision-making bodies carrying out public functions. They are solely responsible for scheduling hearings, liaising with parties, organising hearing rooms, and managing other practical arrangements.

(a) property arbitrators develop legal competencies and expertise by working in this area over many years and are well versed in the principles of compensation, relevant legislation and case law, and
(b) property arbitrators have the ability to state a case on a point or question of law to the High Court where a legal issue arises during proceedings.[165] The property arbitrator can be requested to state a case to the High Court by any party, and where they refuse, the High Court can direct the property arbitrator to state a case where there is a clear question of law to be resolved.[166]

[4.22] Many of the submissions to the Commission suggested that a legal professional should sit alongside either one or two chartered surveyors or valuers as a panel to determine compensation for land compulsorily acquired. A few submissions contended that this should only be the case for claims that raise legal issues or large complex cases. The Valuation Tribunal in this jurisdiction, the Lands Tribunal in Northern Ireland and the Upper Tribunal (Lands Chamber) in England and Wales were suggested as potential models for a panelled approach.

[4.23] As against this, some submissions contended that the chartered surveyor or valuer should be the sole decision-maker but that they should be able to avail of specialist legal expertise where required. Others asserted that there is no need for legal professionals to sit alongside chartered surveyors or valuers because property arbitrators have the relevant experience and expertise to navigate the law in this area and the ability to state a case on a point of law, where necessary.

[4.24] The Commission understands that in recent years there has been an increase in the number of legal arguments being made before property arbitrators, an increase in requests for property arbitrators to state a case on a point of law to the High Court, and more legal professionals representing parties during oral hearings.[167] All this suggests that there may be some merit to calls for an

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[165] Section 6(1) of the Acquisition of Land (Assessment of Compensation) Act 1919.

[166] This is done by one of the parties initiating judicial review proceedings. For example, see *Electricity Supply Board v Boyle, Electricity Supply Board v Good, Rossmore Property Ltd v Ffrench O'Carroll* [2018] IEHC 718.

[167] A few of the submissions to the Commission were critical of the heavy involvement of lawyers in property arbitrations because in their view, complex legal issues rarely arise, and matters can, for the most part, be resolved with the assistance of the respective parties' valuers. Some respondents contended that high involvement of legal professionals can result in disproportionate costs being awarded relative to the amount of compensation determined. One respondent argued that legal representation should only be allowed in circumstances where the arbitrator feels that there is an important point of law which requires such input.

increase in legal expertise in determining compensation for land compulsorily acquired.

## 6. Options for reform and recommendation

[4.25] The property arbitration function is the aspect of the law on compulsory acquisition of land that received the most calls for reform in submissions to the Issues Paper, with many of the issues identified above being raised by consultees. The Commission must emphasise that the difficulties with the property arbitration function have very little to do with the property arbitrators themselves, who are hardworking and possess the necessary valuation experience and expertise to determine compensation in this context. They have carried out this public function in a professional manner exercising a high degree of skill and judgement to achieve fair results for owners and acquiring authorities.[168] This is a neglected function that has failed to evolve over the years into a modern public law decision-making body and for that reason, the Commission takes the view that the infrastructure for determining compensation requires a complete overhaul.

[4.26] The Commission considered many different options for reform including:

(a) piecemeal reform of the current system, such as more training for property arbitrators, publication of determinations and establishing decision-making procedures;
(b) the establishment of a permanent Office of the Property Arbitrator or an equivalent body to determine compensation for land compulsorily acquired that would have proper governance and administrative support;
(c) giving the function of determining compensation to the courts;
(d) establishing a division or panel within An Bord Pleanála to determine compensation;
(e) merging the functions held by property arbitrators with an existing body with the relevant expertise.

[4.27] The Commission is satisfied that the problems associated with the property arbitration function are such that piecemeal amendments to the existing system are not appropriate. At present, no organisation or department has carriage of the function, despite the Courts Service being somewhat involved

[168] In *ESB v Good* [2023] IEHC 83 at para 169, the High Court (Heslin J), in deciding that the property arbitrator made an award outside of his jurisdiction, referred to the "vast experience" and the "professionalism" and "scrupulous fairness" with which the property arbitrator had approached the task of determining compensation. More generally, Heslin J referred throughout the judgment to the wealth of expertise, skill and professionalism of valuers who carry out this function.

by virtue of the fact that the property arbitrators are appointed by the Reference Committee. Proper governance and oversight is required, and decision-makers must be provided with established procedures and guidelines to ensure consistent and high-qualitiy decision-making.

[4.28] Assessing the cost-effectiveness of establishing a new compensation body for land compulsorily acquired is challenging given the limited data available on what its anticipated workload would be. However, the data that the Commission does have on the number of applications made to appoint a property arbitrator would suggest that there is insufficient demand for the service to justify establishing a permanent office to determine compensation for land compulsorily acquired, or to carry out any other functions currently assigned to property arbitrators. The data from 2009 to 2022 suggests that on average there are between 50 and 100 applications to appoint property arbitrators each year.[169] The Commission understands that even once a property arbitrator is appointed, many cases will settle. Therefore, the actual number of cases that fall to be determined by property arbitrators is likely significantly lower than the data above would suggest. For this reason, the Commission does not favour establishing a permanent office.

[4.29] As can be seen in Table 4, compensation for land compulsorily acquired is determined by courts in some comparative jurisdictions.[170] While a court has the necessary legal expertise to adjudicate on any legal issues arising, and experience in assessing damages and compensation, it does not have any land valuation expertise. The Commission does not see the benefit in removing the function from expert valuers to give it to a non-expert court.[171] If compensation claims were to be resolved through the courts this would likely make the determination of compensation more costly, slower and procedurally formal. It would also create a more litigious and oppositional dynamic between the parties. None of these things are in the public interest, especially considering that the main issue to be resolved is primarily a matter of quantum. For the most part, this can easily be determined outside the courts, where the principles of compensation and the law surrounding it are clearly established.

[4.30] Some might argue that for the sake of expediency, it would be beneficial if the confirmation of the compulsory purchase order and the determination of

[169] See figure 5 in para 4.14 of this report.

[170] It is usually one of a few options for determining compensation. See Table 4 above.

[171] In New South Wales, compensation is determined only by the Land and Environmental Court, which is a specialised court with no equivalent in this jurisdiction.

compensation were carried out by the same organisation.[172] This would be particularly helpful for owners, who generally have to engage with:

(a) An Bord Pleanála if they wish to make an objection to the confirmation of a compulsory purchase order, and
(b) Property arbitrators to determine compensation, if they cannot reach agreement with the acquiring authority.

[4.31] An Bord Pleanála is the body that confirms the majority of compulsory purchase orders in this jurisdiction, and therefore would be the likely candidate if the confirmation and the determination of compensation functions were to take place within an existing organisation.[173] This could be done by creating a separate division within An Bord Pleanála to determine compensation or it could have responsibility for overseeing a panel of chartered surveyors or valuers.[174] An Bord Pleanála does not have the necessary valuation expertise available on its Board to make determinations of this nature.[175] It is already responsible for a significant number of planning and environmental decisions and as a result it likely lacks the capacity to take on a function completely outside of its current jurisdiction and expertise. As with the Commission's observations on the suitability of the courts, it would not make sense to remove the function from the property arbitrators who possess the essential valuation expertise, and give the function to a non-expert body where the primary consideration for determination is the valuation of land. For all these reasons, the Commission does not consider that An Bord Pleanála is the optimal structure for determining compensation.

[4.32] There has been a move towards agency rationalisation in public services in recent years.[176] The agency rationalisation programme has resulted in some

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[172] This is the case in Denmark's Expropriation Commissions, see Table 4.

[173] It is the confirming authority, for example, under: Water Supplies Act 1942; Local Government (Sanitary Services) Act 1964; Housing Act 1966 (most local authorities use this Act to acquire land); Gas Act 1976; Derelict Sites Act 1990; Roads Act 1993 and 1998; Planning and Development Act 2000, and Transport (Railway Infrastructure) Act 2001. Some other confirmation processes, other than by An Bord Pleanála, remain in existence. See for example, section 33 of the Defence Act 1954 and section 44 of the Postal and Telecommunication Service Act 1984.

[174] The chartered surveyors or valuers could make the determinations, or alternatively hold hearings and write reports, with the ultimate decision being made by the Board.

[175] If An Bord Pleanála were given responsibility to oversee the panel, with the determinations being made by chartered surveyors or valuers, this would appear disjointed, as the premise of An Bord Pleanála is that the decisions are made by the Board.

[176] Department of Public Expenditure and Reform, *A Report on the Implementation of the Agency Rationalisation Programme* (DPER 2014). The aims of the programme are to deliver (a) a simplified administrative landscape, with greater democratic accountability and less duplication of effort and (b) administrative efficiencies and cost savings.

bodies being amalgamated into new entities, others being absorbed into existing entities, and some being terminated altogether. The Commission considers that in light of this policy, it would be preferable to subsume the property arbitration function within an existing body with the necessary expertise. The Commission considers that the only suitable existing body to take on the function is the Valuation Tribunal, as its members are chartered surveyors and legal professionals with the required expertise in valuing land. If it were assigned this jurisdiction, with additional resourcing, it could expand its members to include lawyers and chartered surveyors with specific expertise in compulsory acquisition and improve the knowledge of its existing members in this area through training, if required. The Commission understands that many members of the Tribunal already have expertise in determining compensation in a compulsory acquisition context.

[4.33] Assigning the function to the Tribunal would represent a move towards a structure with greater resemblance to a "Lands Tribunal"—common in other jurisdictions—where rating valuation appeals and compensation in respect of land compulsorily acquired are often determined by the same independent expert tribunal. Other functions could be assigned to it as appropriate. For the reasons outlined below, the Commission considers that the property arbitration function should be replaced with the Tribunal to determine compensation for land compulsorily acquired.

**R 4.3** **The Commission recommends that** the property arbitrator function should be replaced with the Valuation Tribunal to determine compensation for land compulsorily acquired.

## 7. Benefits of the Valuation Tribunal

[4.34] The Valuation Tribunal is an independent body that was initially set up under the Valuation Act 1988 and was continued in force by the Valuation Act 2001 (the "2001 Act"). It is an appeals body, and at present does not hear any first instance applications.

[4.35] The Tribunal hears appeals against decisions of Táilte Éireann on the valuation and revaluation of commercial properties for rating purposes.[177] The Tribunal also hears appeals from owners of derelict sites against a determination made

[177] Section 34 of the Valuation Act 2001. Táilte Éireann carries out valuations, revisions and revaluations of rates for commercial and industrial properties, which were previously done by the Commissioner of Valuation in the Valuation Office. The Táilte Éireann Act 2022 transferred the functions of the Commissioner of Valuation (though not those of the Valuation Tribunal) to Táilte Éireann.

by a local authority on the market value of urban land.[178] More recently it has been assigned appeals from decisions of the planning authority on the determination of the market value of vacant sites under the Urban Regeneration and Housing Act 2015.[179] If the Land Value Sharing and Urban Development Zones Bill scheme is enacted in its current form an owner will be able to appeal a determination by a planning authority as to the current use value of their parcel of land to the Tribunal.[180]

### (a) Modern appointment process

[4.36] The Tribunal currently consists of 34 members, including one chairperson, nine deputy chairpersons and 24 ordinary members.[181] Members are appointed by the Minister of Housing, Planning and Local Government after a competitive recruitment process by the Public Appointments Service.[182] Schedule 2 of the Valuation Act 2001 (the "2001 Act") provides for appointments, re-appointments, resignations, cessation of appointments and conflicts of interest. All of this promotes a high degree of transparency in the appointment process and the membership of the Tribunal.

[4.37] Members are not permanently employed by the Tribunal. They are paid fees for hearing appeals, attending divisional meetings, for writing and reviewing judgments, alongside an allowance for travel and subsistence.[183] Its chairperson is responsible for ensuring that the business of the Tribunal is disposed of expeditiously and for the overall governance of the Tribunal. Given that there is uncertainty on the number of cases actually heard on an

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[178] Section 22 of the Derelict Sites Act 1990. A local authority must determine the market value of urban land once it is entered on the register and at least once every five years thereafter.

[179] Section 13 of the Urban Regeneration and Housing Act 2015.

[180] See Department of Housing, Local Government and Heritage, General Scheme Land Value Sharing and Urban Development Zones Bill 2021 (22 December 2021) < https://www.gov.ie/en/publication/3cb33-general-scheme-land-value-sharing-and-urban-development-zones-bill-2021/> accessed 20 January 2023.

[181] Paragraph 2 of Schedule 2 of the Valuation Act 2001 provides that the Tribunal shall consist of "a chairperson and such number of deputy chairpersons (if any) and ordinary members as the Minister may determine from time to time, being such number as the Minister considers necessary for the performance by the Tribunal of its functions under this Act". See the list of members here <https://www.valuationtribunal.ie/about-us/members/> accessed on 10 January 2023.

[182] Members hold office on such terms and conditions as the Minister determines. A small number of members including the chairperson and some deputy chairpersons were appointed directly by the Minister. < https://membership.stateboards.ie/en/board/Valuation%20Tribunal/> accessed on 27 March 2023.

[183] It appears property arbitrators are not paid for writing judgments. This was something that the Tribunal lobbied the Minister to be introduced for its members.

annual basis, the Commission does not consider that this function needs to be carried out by two permanently employed personnel, as was the case before the panel of property arbitrators was established. The members of the Tribunal are drawn upon as required, where an application is made, as is the case with the current panel of property arbitrators.[184]

### (b) Legal and valuation expertise

[4.38] The Tribunal is mainly made up of legal and property valuation professionals. The availability of expertise in these two disciplines is one of the key benefits of the Tribunal as the infrastructure for determining compensation for land compulsorily acquired. The Commission considers that legal professionals should sit alongside chartered surveyors to determine compensation for land compulsorily acquired, as frequently legal issues are raised in the course of proceedings.[185] Even where complex legal issues do not arise, there is merit to having a legal professional on the decision-making panel to ensure that fair procedures are adhered to. Legal reasoning could be more readily provided in reasoned determinations by the Tribunal, in response to particular legal issues raised. This change would lessen the need for a convoluted consultative case stated procedure on a point of law, as legal issues could be dealt with as they arise subject to an appeal to court on a point of law.

[4.39] The Tribunal is permitted by legislation to meet in divisions of one or three when directed to do so by the chairperson.[186] Its determinations are reached by way of majority of the division or its total members.[187] The legislation is silent on the configuration of these divisions in terms of the balance of

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[184] As the members of the Tribunal are part-time, many still take on work in private practice.

[185] This approach is common in other jurisdictions where a tribunal-like structure has been adopted, see Table 4 above. The case of *ESB v Good* [2023] IEHC 83 demonstrates that complex legal issues can arise where a property arbitrator is determining compensation. Section 85 of the 1845 Act, which provides a right to compensation for lands that are injuriously affected by the execution of works is not incorporated in the Electricity Supply Act 1927. One of the legal issues that arose in this case was whether as a result, the property arbitrator had jurisdiction to award compensation for "injurious affection" to the remainder of the landholding in circumstances where no land was subject to a compulsory acquisition and the notice parties remained the full owner of all the lands.

The High Court (Heslin J) held that the property arbitrator had acted *ultra vires*, but emphasised that the error made was not a "conscious or obvious error". He stated that the issue was a "thorny" one that had to be "wrestled with" by eminent legal professionals over the course of two full days of hearing, and even after considering the relevant authorities and the submissions made by the parties, the answer to the question was not immediately apparent to the judge. See paras 167 and 216 of the judgment.

[186] Paragraph 3(4) of Schedule 2 of the Valuation Act 2001.

[187] Paragraph 7 of Schedule 2 of the Valuation Act 2001.

chartered surveyors to legal professionals so this question falls to the discretion of the chairperson. The same approach could be used for determining compensation for land compulsorily acquired, with the composition and number of members required for a division being left at the chairperson's discretion, allowing them to respond to the needs of a particular case and appoint decision-makers with particular expertise in the compulsory acquisition of land.[188]

**R 4.4** **The Commission recommends that** the composition (including the number of members) of any division of the Tribunal to determine compensation should be at the discretion of the chairperson.

### (c) Independence and permanent office

[4.40] As mentioned previously, property arbitrators do not benefit from separate administrative support, and must personally arrange all practical matters related to determinations made by them. The availability of a registrar and administrative support staff in the Tribunal would be a great improvement on the current situation, and more in keeping with public expectations of decision-making bodies.

[4.41] As the Tribunal is a permanent office it has administrative staff who oversee the day-to-day running of the Tribunal and who manage case listings, liaise with parties, and support the Tribunal in carrying out its functions. The Tribunal's administrative staff are civil servants, many of whom are seconded from the Department of Housing, Local Government and Heritage, or, previously, the Valuation Office (which was also staffed by civil servants).[189] It might be argued that this undermines the Tribunal's independence, but the Commission does not accept this view. Administrative staff are not involved in the decision-making. It is common practice in many public decision-making bodies for administrative or support staff to be civil servants taken from departments.[190] As mentioned above, the Tribunal is an independent statutory body, and its members, who make the determinations independently, are appointed by the Minister for Housing, Local Government and Heritage

[188] For example, if the claim at issue presented a complex legal issue, it may make more sense to have two lawyers sitting alongside a chartered surveyor.

[189] The Valuation Office now forms part of Táilte Éireann, the organisation formed as a result of the merger between the Valuation Office, the Property Registration Authority and Ordnance Survey Ireland.

[190] To name just a few examples that can be found by looking at the annual reports of the relevant organisations; the administrative staff in the International Protection Appeals Tribunal are civil servants assigned to the Tribunal from the Department of Justice and the administrative staff of the Workplace Relations Commission and the Labour Court are civil servants and part of the overall staffing of the Department of Enterprise, Trade and Employment.

following a competitive public appointment process. To underscore this independence point, the Commission expressly provides in its draft Bill that the Tribunal shall be independent in the performance of its functions in determining compensation for land compulsorily acquired.

[4.42] The Tribunal publishes an annual report that includes details of its activities, the remuneration paid to members and the amount collected in fees. Its annual reports provide a detailed account of its case load broken down into categories: the number of cases concluded, to be heard and pending a decision, and the number of decisions appealed to the courts. This provides the public with information about the activities and efficiency of the organisation and promotes transparency. This would be useful in the compulsory acquisition context, as there is currently no centralised information available on the workload or operation of the property arbitration function. The inclusion of similar data on compensation determinations in this context would be hugely beneficial as it would increase transparency about how the system operates.

### (d) Established procedural rules, user-friendly website and publication of determinations

[4.43] Consistency in decision-making and procedure and predictability for parties is aided by the rules of the Tribunal, which came into effect in 2019.[191] These rules detail many aspects of procedure and the conduct of hearings and could be adapted to apply, with any necessary modifications, to determinations of compensation for land compulsorily acquired. Alternatively, the Tribunal could be given the power to make separate rules specifically to be followed for determinations for compensation, borrowing from the rules related to appeals where appropriate.

[4.44] The Tribunal has a user-friendly website that provides information about its work, and instructions on how parties can make an appeal. It also includes information on preparing for a hearing, the procedure at hearing and a frequently asked questions tab. This enhances transparency and improves accessibility and predictability for parties. Information could easily be added to this website to assist parties in relation to having compensation determined in the compulsory acquisition context. This would be a huge improvement on the current situation where little information is available easily and accessibly on the property arbitration process.

[191] Valuation Tribunal (Appeals) Rules 2019. Paragraph 11 of Schedule 2 of the Valuation Act 2001 gives the power to the Tribunal to determine its own procedures in rules subject to the provisions of the Act and consent of the Minister.

[4.45] The Tribunal also publishes its determinations on its website, which allows for the development of precedent.[192] There is no reason why reasoned determinations in the compulsory acquisition context should not be published in a similar manner and this should be provided for in legislation. The Commission considers that legislation should provide that reasoned determinations of the Tribunal shall be published on the Tribunal's website.

[4.46] The Tribunal should have the power to publish its reasoned determinations with suitable redactions of certain matters (for example, where it would unduly fringe the owner's right to privacy).[193] Where the proceedings are held otherwise than in public, the Tribunal should have a more specific discretion to (1) not publish the determination, (2) publish the determination in part, or (3) publish the determination with appropriate redaction. The Commission considers that in exercising its discretion the Tribunal should endeavour to publish as much of the determination as possible, with due regard to the special circumstances that justified the hearing to be heard otherwise than in public.

**R 4.5** **The Commission recommends that** information should be made available on the Tribunal's website to assist parties in engaging with the Tribunal in order to have compensation determined for land compulsorily acquired.

**R 4.6** **The Commission recommends that** reasoned determinations of the Tribunal in respect of compensation for land compulsorily acquired should be published on the Tribunal's website. The Tribunal should have the power to redact part or all of the personal data contained in a reasoned determination.

**R 4.7** **The Commission recommends that** where proceedings are held otherwise than in public, the Tribunal may decide to decline to publish the reasoned determination, or publish it in partial or redacted form only.

### (e) Speedy, efficient, informal and low-cost service

[4.47] The 2001 Act provides that the Tribunal "…shall endeavour to make a decision on an appeal made to it…within 6 months from the date of its having received the appeal".[194] It is difficult for the Commission to recommend that a similar specific timeframe for determinations of compensation should be adopted, as

[192] See the Valuation Tribunal's website <https://www.valuationtribunal.ie/judgments/> accessed on 10 January 2023. Para 4(4) of the Second Schedule of the Valuation Act 2001 requires the Tribunal to publish its judgments "…by such means as it decides are appropriate (and the Internet may be the means of such publication)".

[193] Unredacted determinations of compensation in the compulsory acquisition may contain personal data such as the owner's name, the location of the land being acquired and possibly retained land, and the sum of compensation they received.

[194] Section 37(3) of the Valuation Act 2001.

it does not have any data on the duration of proceedings before a property arbitrator at present to assess what would be a realistic and reasonable timeframe to set. Nonetheless, the Commission considers that a statutory objective is important to provide certainty to parties and to ensure the speedy resolution of determinations. The Commission suggests that the statutory objective for making a decision should be a period of six months from the receipt of an application to determine compensation. This can be given further consideration by the relevant stakeholders in the legislative process in the event that the recommendation is taken up.

[4.48] The Tribunal has a strict timetable for different stages of the process of hearing appeals, as identified in the rules of the Tribunal.[195] This helps to speed up the process to ensure appeals are disposed of quickly. Currently, appeals before the Tribunal typically take about half a day to determine, unless it is a complex case.[196] It is difficult to say whether the Tribunal would be able to determine compensation cases as quickly as that, as there is no data on how many hearings on average are required to dispense with claims for compensation before the property arbitrator.[197] Nevertheless, these strict timelines and procedures would likely result in a huge improvement in terms of the speed and efficiency of the dispute resolution process.

[4.49] The Tribunal can make directions to parties on an array of different issues including producing documents and evidence as identified in the Rules.[198] The Tribunal can also determine an appeal on the basis of written documentation submitted to it without holding an oral hearing.[199] A few submissions to the Issues Paper also suggested that consideration should be given to permitting determinations based on written documentation. This approach would also be useful in determining simple compensation claims as it may reduce costs for the parties involved and result in a speedier resolution of claims. The Commission considers that the Tribunal should be empowered to decide whether a document-based determination for compensation should be

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195 Valuation Tribunal (Appeals) Rules 2019.

196 Valuation Tribunal, Valuation Tribunal Annual Report 2020 <https://www.valuationtribunal.ie/wp-content/uploads/2021/10/Valuation-Tribunal-2020-Annual-Report-2.pdf> accessed on 10 January 2023 at page 11.

197 There is more to determining compensation for land compulsorily acquired than just the market value, and full consideration of the relevant principles of compensation might require more time.

198 For example, see paragraph 93 of the Valuation Tribunal (Appeals) Rules 2019.

199 Paragraph 4(2) of Schedule 2 of the Valuation Act 2001. Document-based appeals are generally determined by a division of one. It should be noted that appeals that are determined by way of hearing are in private.

pursued in any given case, provided that submissions of both parties are sought and taken into account by the Tribunal before making a decision.

[4.50] The rules of the Tribunal expressly provide that it should seek to avoid undue formality in the conduct of appeal hearings. This may operate to reduce the need for excessive expert representation and should be provided for in the context of compensation determinations for land compulsorily acquired.[200] The Rules also provide that appeal hearings shall be held in private.[201] The Commission considers that hearings in relation to determinations for compensation for land compulsorily acquired should be in public, unless the Tribunal considers, upon its own motion, or the application of either the owner or the acquiring authority, that there are special circumstances for the proceedings or part of the proceedings to be conducted otherwise than in public.[202]

**R 4.8** **The Commission recommends that** the Tribunal should endeavour to make a determination of compensation within six months from the date of receipt of the application. This period can be given further consideration by the relevant stakeholders in the legislative process in the event that this recommendation is taken up.

**R 4.9** **The Commission recommends that** the Tribunal should be empowered to decide whether a document-based determination for compensation should be pursued in any given case, provided that submissions of both parties are sought and taken into account by the Tribunal before making a decision.

**R 4.10** **The Commission recommends that** proceedings to determine compensation for land compulsorily acquired should be conducted by the Tribunal without undue formality.

**R 4.11** **The Commission recommends that** proceedings to determine compensation should be conducted in public unless the Tribunal, upon its own motion or the application of either the owner or the acquiring authority, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public.

[200] Paragraph 89 of the Second Schedule of the Valuation Act 2001.

[201] Paragraph 90 of the Valuation Tribunal (Appeals) Rules 2019.

[202] Currently, determinations of property arbitrators are in public, but a person would only become aware that a hearing was taking place by being in contact with one of the parties involved.

## 8. Other aspects of procedure

[4.51] The Commission considers that, to a large extent, the existing rules of the Tribunal on procedure for appeals could be adapted to extend to first-instance determinations in relation to compensation for land compulsorily acquired. Alternatively, the Tribunal may prefer to create separate rules for determinations of compensation in the compulsory acquisition context, aligning the two sets of rules where appropriate. For that reason, there is no need to go into every aspect of procedure that should apply. The Commission has made some recommendations above on procedural matters. However, some procedural matters are more specific to compulsory acquisitions and warrant more detailed consideration.

**R 4.12** **The Commission recommends that** the procedures of the Tribunal in determining compensation should, subject to the provisions of any governing primary legislation, be determined by the Tribunal by rules made by it, with the consent of the Minister, and that the rules of the Tribunal in relation to appeals determined by it within its jurisdiction, may be adapted and applied with modifications to determinations of compensation for land compulsorily acquired.

### (a) Application to determine compensation

#### *(i) When should an application be made?*

[4.52] Currently, an application can be made to appoint a property arbitrator 14 days after service of the notice to treat,[203] to determine "any question of disputed compensation".[204] In most cases, the acquiring authority will not receive the relevant particulars of claim by that point.[205] The Commission considers that in the best case the acquiring authority should be in a position to attempt to

[203] Rule 7(1)(a) of the Property Values (Arbitration and Appeals) Rules 1961 (SI No 91 of 1961). Oddly, there does not appear to be any provision for when an owner or acquiring authority can apply to appoint an arbitrator where a vesting order procedure is used. For example, the Derelict Sites Act 1990 provides that in default of agreement, compensation is to be determined by a property arbitrator under the 1919 Act, but the 1961 rules were not updated to provide for when an application can be made to appoint an arbitrator where a vesting procedure is used.

[204] Section 1 of the Acquisition of Land (Assessment of Compensation) Act 1919.

[205] For example, section 79 of the Housing Act 1966 provides that when serving a notice to treat, the acquiring authority shall require each owner, lessee and occupier "to state within a specified period (not being less than one month from the date of service of the notice to treat) the exact nature of the interest in respect of which compensation is claimed by him and details of the compensation claimed…". In other words, the acquiring authority cannot require the owner to submit a claim until at least one month from the date of service of the notice to treat, meaning that an application to appoint an arbitrator can be made before the acquiring authority even receives the claim.

reach an agreement with the owner on compensation before an application can be made to the Tribunal to determine compensation. The submission of particulars of claim by the owner facilitates negotiation between the parties, as the particulars will set out the sum of compensation claimed and the exact nature of the owner's interest in the land. For that reason, the Commission considers that an application to the Tribunal should be capable of being made by either the owner or the acquiring authority after the expiration of one month from the date the acquiring authority receives the particulars of claim.

[4.53] However, the Commission recognises that circumstances might arise where the owner does not submit particulars of claim to the acquiring authority in response to the notice to treat or the copy of the vesting order.[206] The Commission explored whether failure to submit particulars of claim should mean that the owner is precluded from making an application to the Tribunal. While the Commission considers it important to incentivise engagement and settlement, it takes the view that the owner should not be prevented from making an application to the Tribunal in the event that they have not submitted particulars of claim. If this were the case, the owner would lose ownership of their land, and their only method of receiving compensation would be to agree a sum with the acquiring authority (unless the acquiring authority makes an application), as there would be no recourse to the Tribunal. The Commission therefore considers that where the owner has not submitted particulars of claim, the owner or the acquiring authority may apply to the Tribunal one month after the expiration of the period within which the particulars of claim should have been submitted. However, a failure to submit particulars of claim on time is a fact that should be taken into consideration by the Tribunal in awarding costs.

[206] Under the Commission's proposed vesting order scheme, a person may provide evidence of title that satisfies the acquiring authority that they have an interest in the land subject to the compulsory acquisition, without submitting details of compensation claimed. As a result, it is rare but possible that such an owner may avoid being deemed a "relevant person" and having the acquiring authority's estimate of the compensation paid into court. A route to the Tribunal needs to be provided for them. It is also possible that a person may not submit a notice of claim/particulars of claim in response to a notice to treat. Galligan and McGrath note that "…if it is correct that the owner cannot be compelled to submit the particulars required, it is not clear what significance, if any, attaches to the time limit [for submitting a notice of claim within a specific period in the notice to treat]. It is unlikely that a claim submitted out of time is invalid or otherwise prejudice…". See Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 25.44.

**R 4.13** **The Commission recommends that** an application to the Tribunal to determine compensation should be capable of being made, where the owner submitted particulars of claim, by either the owner or the acquiring authority, after the expiration of one month from the date the acquiring authority receives the particulars of claim, following service of a notice to treat or a copy of the vesting order.

**R 4.14** **The Commission recommends that** where the owner fails to provide the particulars of claim within the specified period in the notice to treat or copy of the vesting order, the owner or the acquiring authority may, one month after the expiration of that period, make an application to the Tribunal to determine a claim for compensation.

### *(ii) Time limit for claiming compensation*

[4.54] A small number of compulsory acquisition statutes in Ireland contain limitation periods preventing an owner from making a claim for compensation after the expiration of a set period.[207] Most compulsory acquisition schemes do not provide a time limit for making a claim for compensation. The Commission considers that a time limit should be introduced to provide certainty to acquiring authorities that they will not be liable indefinitely to pay compensation for land compulsorily acquired.[208] In the Commission's view, a period of six years is too short to properly protect the owner's constitutional right to property. Instead, the Commission considers that a claim for compensation should be brought by an owner within 20 years from either (1) the date the acquiring authority entered into possession of the land, where a notice to treat was served, or (2) the vesting date, where a vesting order was made. This would mean that an owner is not entitled to compensation if they fail to make a claim within that timeframe.

**R 4.15** **The Commission recommends that** a claim for compensation should be brought by the owner within 20 years from either (1) the date the acquiring authority entered into possession of the land, where a notice to treat was served or (2) the vesting date, where a vesting order was made.

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[207] See section 33(4)(b) of the Gas Act 1976, section 55(7)(b) of the Wildlife Act 1976 and section 65(6)(b) of the Inland Fisheries Act 2010, which contain express six-year limitation periods, not dissimilar to section 11(1)(e) of the Statute of Limitations, although this does not apply to compulsory purchase cases.

[208] There can be a real difficulty in assessing claims for compensation where a significant number of years have passed. At present the valuation date for the market value of the land is the date the notice to treat was served. If a property arbitrator has to determine a claim for compensation 50 years after service of the notice to treat, it would be difficult for them to assess the market value of the land or any other principles of compensation after so much time has passed.

### *(iii) Form and content of the application*

[4.55] It should be clear to the owner and the acquiring authority what is required to make an application to the Tribunal. At present, an application to appoint a property arbitrator must be in writing and specify:

(a) the parties to, or affected by, the acquisition,
(b) the land to be acquired,
(c) the question to which the application relates,
(d) the statutory provisions under which the question arises, and
(e) if compensation is claimed, the interest in respect of which it is claimed.[209]

[4.56] The explanatory note on the Courts Service website on how to apply to appoint a property arbitrator also asks applicants to provide other information alongside their application (that varies depending on the legislation at issue) such as:

(a) a copy of the compulsory purchase order,
(b) a copy of the confirmation order,
(c) a copy of the notice to treat, and
(d) a copy of the any statement of claim served by the owner on the acquiring authority.[210]

[4.57] The application form is on the Courts Service website and is nearly identical to the application form set out in the Schedule of the Acquisition of Land (Assessment of Compensation) Rules 1920.[211] Where an application is made to appoint an arbitrator, the applicant must send a copy of the application to "every other party to, or affected by, the acquisition".[212]

[4.58] The Commission considers that it is preferable for primary legislation to set out that an application to the Tribunal must be in writing and enclose a copy

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[209] Rule 7(2) of the Property Values (Arbitration and Appeals) Rules 1961 (SI No 91 of 1961).

[210] Courts Service, Reference Committee <https://www.courts.ie/reference-committee#:~:text=The%20Reference%20Committee%20is%20made,%2C%201920%20(S.R.%20%26%20O> accessed on 13 January 2023. These guidelines do not appear to have been updated following the enactment of the Planning and Development Act 2000 as it specifies further particulars for compensation being claimed under the Local Government (Planning and Development) Act 1963 and refers to decisions of the Minister for Local Government (at the time) in respect of confirmation of a compulsory purchase order. Where the application is being made under the Electricity Supply Act (as amended), the applicant should enclose the relevant wayleave notice with the application.

[211] *Ibid*.

[212] Rule 7(2) of the Property Values (Arbitration and Appeals) Rules 1961 (SI No 91 of 1961).

of any particulars of claim that were received by, or submitted to, the acquiring authority in response to a notice to treat or copy of a vesting order. Where particulars of claim were not submitted and the application is made by the owner, they should submit a statement containing their estimate of the compensation owed to them. Where particulars of claim were not submitted and the application is made by the acquiring authority, the acquiring authority should submit its estimate of the compensation owed to the owner. Legislation should also provide that the applicant must send a copy of the application and all related documents to every other affected party. However, the form and content of the application to determine compensation should be set out by the Tribunal in rules made by it, with the consent of the Minister.

**R 4.16** **The Commission recommends that** primary legislation should set out that an application to the Tribunal must be in writing and enclose either (1) where particulars of claim were submitted, a copy of any particulars of claim that were received by or submitted to the acquiring authority in response to a notice to treat or a vesting order, (2) where particulars of claim were not submitted, a statement of estimate from the acquiring authority or the owner depending on who is making the application. It should also provide that the applicant must send a copy of the application and all related documents to every other affected party.

**R 4.17** **The Commission recommends that** the form and content of the application to the Tribunal to determine compensation should be set out by the Tribunal in rules made by it, with the consent of the Minister.

### (b) Consolidation of claims

[4.59] Rule 7(1) of the Acquisition of Land (Assessment of Compensation) Rules 1920 allowed the acquiring authority to apply to the arbitrator, on notice to the owners, to consolidate claims relating to several interests in the same land. If one of the owners objected to having their claim heard together with other claims, they sent a notice of objection and this objection would be taken into consideration by the arbitrator.[213] The Commission considers that there is merit to hearing claims related to several interests in the same land together, as this could reduce the time, costs and inefficiencies of having parallel proceedings running in relation to the same piece of land, and ensure decisions are not inconsistent with one another.

[4.60] The Commission considers that the acquiring authority should be permitted to make an application to the Tribunal to consolidate claims related to several

[213] Rule 7(5) permitted the arbitrator to consolidate claims only in respect of some of the claims and make the order to consolidate subject to "…such special directions as to costs, witnesses, method of procedure and otherwise as the arbitrator thinks proper…".

interests in the same land where applications to determine compensation in respect of these interests have been made to the Tribunal. The Commission considers that it would also be useful to provide for the consolidation of claims in circumstances where land is held with other land, which makes it difficult to evaluate the claims separately. For example, two pieces of land may be owned by two different people, but farmed together, meaning that the disturbance costs would be related. The Commission considers that where land is held with other land, such that determining an award of compensation in respect of each claim would cause serious prejudice to the awards if considered separately, an application should be capable of being made to consolidate the claims.

[4.61] An application to consolidate claims should be made on notice to affected parties, who may be the acquiring authority or other owners, depending on the applicant. Any affected party may make submissions to the Tribunal in relation to the consolidation of claims, and the Tribunal should have regard to any submission made before determining whether it is expedient and appropriate for some or all of the claims in relation to several interests in the same land to be consolidated and determined together.

**R 4.18** **The Commission recommends that** an application may be made to the Tribunal to consolidate claims related to—

(a) more than one interest in or attaching to the same land, where applications to the Tribunal in respect of each interest in the land have been made, or

(b) land held with other land, in circumstances where determining an award of compensation in respect of each claim would cause serious and unfair prejudice to the awards if done in respect of each claim separately.

**R 4.19** **The Commission recommends that** an application to consolidate claims should be on notice to affected parties, who should be permitted to make submissions to the Tribunal in respect of the consolidation of claims. The Tribunal should have regard to any such submissions before determining whether it is expedient and appropriate to consolidate some or all of the claims in respect of which the application was made.

### (c) Power of the Valuation Tribunal to order a stay

[4.62] As discussed in Chapter 3, title issues can sometimes arise during proceedings before the property arbitrator.[214] The current position is that the property arbitrator has no jurisdiction to deal with matters of title and must proceed on

[214] *Jackson Way Properties v Dun Laoghaire-Rathdown County Council* [2015] IEHC 619.

the basis that the title claimed is correct.[215] Any issues related to title must be resolved in subsequent proceedings before the court.[216]

[4.63] The Commission considers that it is a waste of the Tribunal's time to proceed with determining a claim for compensation where a dispute about title is raised during proceedings before it. The introduction of an advance payment regime, as discussed in Chapter 2, should result in title issues arising at a much earlier stage in the process, as the acquiring authority will want to satisfy itself that title is in order before paying out a significant portion of compensation. In order to receive an advance payment, the owner must provide evidence of the exact nature of their interest in the land subject to the compulsory acquisition in their particulars of claim. Where the acquiring authority considers that a person (a "relevant person") has failed to provide evidence satisfactory to the acquiring authority of their title to the land being compulsorily acquired, it may estimate the compensation payable and pay the money into court. The payment into court procedure outlined in Chapter 3 would apply only to the Commission's proposed vesting order procedure, as under notice to treat the proper vehicle would be the execution of a deed poll.

[4.64] Despite attention being placed on proving title at an earlier stage, it is conceivable that title issues may not arise until after an application to the Tribunal has been made. In such circumstances, the Commission considers that it would be a waste of time and money for the determination to proceed on the basis of title claimed. In the event that it is proven that the person does not have any interest in the land, or has a lesser interest than claimed, the determination of the Tribunal would not be enforceable.

[4.65] For that reason, the Commission considers that where a dispute as to title arises between the parties before the Tribunal, it should order a stay of the determination upon the application of the acquiring authority. There is always the possibility that the acquiring authority might raise a superficial objection in relation to title in order to stay proceedings, which cannot be contested by the person making the claim or adjudicated by the Tribunal. However, the Commission considers that an automatic stay is the only way to properly limit the jurisdiction of the Tribunal in relation to title.[217] In any event, it is hard to see how raising artificial issues with title would be in the acquiring authority's

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[215] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.22.

[216] *Ibid*.

[217] If the Commission were to recommend that the Tribunal has discretion as to whether to stay proceedings where the acquiring authority contends there is a title issue, this would force the Tribunal to become involved in the title issue at least to the extent required to determine whether there is cause to stay the proceedings.

interest, as speedier resolution of compensation claims reduces its costs. The Commission takes the view that legislation should specify that where the Tribunal orders a stay of the determination, the person claiming compensation may make an application to the Court to determine the title issue. The fact that the person's claim for compensation cannot be determined by the Tribunal before they make an application to the Court to determine the title issue should motivate them to resolve the matter quickly, reducing the need for a limitation period within which to make an application to the Court.

**R 4.20** **The Commission recommends that** where a dispute as to title arises between the parties before the Tribunal, the Tribunal should, on application of the acquiring authority, order a stay of the determination process.

**R 4.21** **The Commission recommends that** where the Tribunal orders a stay of the determination, the person claiming compensation may make an application to the Court to determine title.

### (d) Interim determination

[4.66] The Commission acknowledges that it may not always be possible for the Tribunal to ascertain a full and final figure for compensation where the works for which the relevant land was compulsorily acquired have not been completed at the time of the hearing of the application. In such circumstances, the Commission considers that it would be appropriate to allow the Tribunal to make an interim determination of compensation. Where this occurs, either the owner or the acquiring authority should be able to make a subsequent application to the Tribunal to determine the remaining compensation once it is possible to assess the remaining amount. The Commission considers that the procedure for the making of an interim determination and a subsequent application to the Tribunal to determine the remaining compensation should be set out in rules by the Tribunal.

**R 4.22** **The Commission recommends that** where the Tribunal is not able to determine a final amount of compensation for reasons connected to the non-completion of the works related to the compulsory acquisition, the Tribunal should be permitted to make an interim determination of compensation.

**R 4.23** **The Commission recommends that** where the Tribunal has made an interim determination, either the owner or the acquiring authority may make a subsequent application to the Tribunal to determine the remaining compensation, once it is possible to assess the remaining amount.

**R 4.24** **The Commission recommends that** the procedure for making an interim determination and a subsequent application to the Tribunal should be set out in rules made by the Tribunal.

### (e) Unconditional offers and costs

[4.67] The rule in relation to unconditional offers and costs in section 5 of the 1919 Act is an exception to the general rule that the costs of the arbitration are at the discretion of the property arbitrator.[218] If no unconditional offer is made by the acquiring authority, or the unconditional offer is lower than the award ultimately determined by the arbitrator, it is up to the property arbitrator to determine costs as they see fit. Generally in these circumstances the property arbitrator will take the view that the costs incurred by the owner should be covered by the acquiring authority, as the owner should not have to bear the brunt of their land being compulsorily acquired.

[4.68] The Commission considers that legislation should stipulate a general rule that the reasonable costs and expenses properly incurred by the owner should be paid by the acquiring authority unless the Tribunal is satisfied that there are good reasons for not doing so. In determining whether there are good reasons not to award the owner their costs and expenses, the Tribunal should have regard to the conduct of the owner. The Commission considers that this should include any failure to submit, or delay in submitting, particulars of claim or revised particulars of claim to the acquiring authority,[219] or any other matter that the Tribunal considers relevant.

[4.69] Including this default rule in legislation highlights to affected parties that only costs that are reasonable and properly incurred will be paid, and that they should be cautious not to employ more than the number of legal or professional advisers than is necessary to assist with their claim. Costs and expenses should be defined as including legal and professional fees and the costs of executing or producing all necessary documents. The Commission considers that the Tribunal should have regard to the costs and expenses incurred by the owner in connection with the valuation process including but not limited to:

(1) providing particulars of claim to the acquiring authority,
(2) seeking an advance payment from the acquiring authority,
(3) preparing for, and the hearing of, the determination, and

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[218] Section 5(4) of the Acquisition of Land (Assessment of Compensation) Act 1919. It provides that "…the costs of an arbitration under this Act shall be in the discretion of the official arbitrator who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and the official arbitrator may in any case disallow the cost of counsel".

[219] Failing to submit or delay in submitting particulars of claim or revised particulars of claim inhibits the acquiring authority's ability to negotiate with the owner and make an offer to settle compensation. For this reason, the Commission considers these matters should be taken into account by the Tribunal in deciding whether there are good reasons not to direct the acquiring authority to pay the owner's costs and expenses.

(4) considering an offer made by the acquiring authority to settle the compensation.

[4.70] Unconditional offers play a central role in the determination of costs at present by virtue of section 5(2) of the 1919 Act.[220] It provides that:

> [w]here the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority, so far as such costs were incurred after the offer was made.[221]

[4.71] Effectively this means that where an unconditional offer is made and not accepted by the owner, they must "beat the offer" when the final award is determined by the property arbitrator. Otherwise, they will be liable for their costs and the costs of the acquiring authority from the date the offer was made. The rationale for this is that the owner could have avoided the expense of the hearing had they accepted the offer.

[4.72] Section 5(2) provides significant cost protection to acquiring authorities and promotes early negotiations between the parties. Aside from setting out the potential adverse cost consequences for the owner of not accepting an unconditional offer, the 1919 Act does not detail any other rules or criteria in relation to unconditional offers. It is hardly surprising therefore that this is one of the few areas of the compulsory acquisition process that has received judicial consideration in recent years, with applications being made to property arbitrators to have cases stated to the Court.[222] Most of the cases stated to the Court in relation to this section centered around the interpretation of the term "unconditional offer", and what parameters the word "unconditional" imposes on the offer.

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[220] Some compulsory acquisition statutes also provide that where an unconditional offer is (1) made by the acquiring authority, (2) not accepted by the owner, and (3) the sum awarded by the arbitrator does not exceed the unconditional offer, no interest shall be payable on compensation in respect of any period after the date of the making of the unconditional offer. See for example, section 65(2)(b) of the Inland Fisheries Act 2010 and Schedule 2 of the Gas Act 1976.

[221] Section 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919. See also section 4 of the Land Compensation Act 1961 (England and Wales), which re-enacts this section in a more straightforward format.

[222] *Manning v Shackleton* [1996] 3 IR 85, [1997] 2 ILRM 26; *Kelleher v The Electricity Supply Board* [2021] IEHC 497; *McCarthy v The Electricity Supply Board* [2021] IEHC 501.

[4.73] The Courts have provided clarity on a number of matters related to the validity and effect of unconditional offers in the case law including, for example:

(a) whether costs or a sum for the execution of works should be included in an unconditional offer,[223]
(b) whether the acquiring authority should make any mention of pre-reference costs (costs of preparation, submission of claim and considering unconditional offer) when making an unconditional offer,[224]
(c) whether more than one unconditional offer can be made,[225]
(d) whether an unconditional offer can be withdrawn,[226] and
(e) whether there is a time limit for acceptance of an unconditional offer.[227]

[4.74] One submission to the Issues Paper contended that the current unconditional offer rule in the 1919 Act creates a situation whereby the owner cannot afford to proceed and have their case heard before the property arbitrator due to the lack of transparency and consequent inability to assess their exposure to legal costs. The fact that reasoned awards made by property arbitrators are

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[223] In *Manning v Shackleton* [1996] 3 IR 85, [1997] 2 ILRM 26, the Supreme Court determined that an offer made was not an unconditional offer as an unconditional offer should not include costs or a promise to execute certain works.

[224] See *Kelleher v Electricity Supply Board* [2021] IEHC 497.

[225] In both *Kelleher* and *McCarthy*, it has held that more than one unconditional offer can be made. See *Kelleher v The Electricity Supply Board* [2021] IEHC 497 at para 20; *McCarthy* v *The Electricity Supply Board* [2021] IEHC 501 at para 30.

[226] This was raised in both *Kelleher* and *McCarthy* as both cases involved the consideration of two offers. While the facts of neither required the High Court (O'Moore J) to decide definitively whether an acquiring authority could withdraw an unconditional offer, he remarked that the "essential requirement" of an offer is that it is unconditional and that he did not think that requirement is consistent with the ability of the acquiring authority to "…limit the time of acceptance or by the same token, to withdraw the offer at the time of its choosing". See *Kelleher v The Electricity Supply Board* [2021] IEHC 497 at para 33. See also Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.17. Although in England and Wales, it seems that an unconditional offer can be withdrawn, see para 17.35 of the Valuation Office Agency, *Land Compensation Manual Section 17: References to the Upper Tribunal (Land Chamber)* <https://www.gov.uk/guidance/land-compensation-manual-section-17-references-to-the-upper-tribunal-land-chamber/section-17-references-to-the-upper-tribunal-lands-chamber> accessed 10 January 2023.

[227] In *Kelleher v The Electricity Supply Board* [2021] IEHC 497 at paras 33 and 37, the High Court (O'Moore J) held that an unconditional offer may be accepted at any time before the making of an award by the property arbitrator. However, where an unconditional offer is not taken up within a "reasonable time", there may be cost consequences for the delay. O'Moore J set out aspects that should be considered when it comes to what is a "reasonable time" for acceptance in the course of his judgment. See paras 37 to 38.

not publicly available online creates a situation where it is difficult for the owner to evaluate the reasonableness of an offer made by the acquiring authority, without incurring the cost of professional advice to advise on whether to accept an unconditional offer.[228] The owner's situation in this regard would be remedied substantially under the Commission's proposed reforms, as one of its recommendations is that reasoned determinations of the Tribunal in respect of compensation for land compulsorily acquired should be published on the Tribunal's website.

[4.75] Many consultees emphasised the importance of retaining the unconditional offer rule. It was submitted that if it were to be abolished, any incentive the owner has to settle will be removed. The Commission considers that there should be provision in modern compulsory acquisition legislation for a similar rule to that which exists currently in the 1919 Act, and that this should be restated in a simpler format. This would be an exception to the general rule under the Commission's proposals that the owner's costs and expenses should be payable by the acquiring authority.

[4.76] The Commission considers that there is value in maintaining the link between offers and liability for costs. This encourages the acquiring authority to make reasonable and realistic offers, as the aim is to offer a sum that is equal to or greater than the amount that would be determined by the Tribunal, to secure costs protection. It also encourages owners to accept reasonable and realistic offers, to avoid the possibility of incurring liability for potentially significant costs. Similar rules exist in other common law jurisdictions, except that the term "unconditional" is not used.[229] For example, in New Zealand, the legislation provides that:

> [w]here the respondent has made an offer of any amount for compensation and the compensation awarded is less than the amount so offered, the Tribunal may order the claimant to bear his own costs and to pay the costs of the respondent in so far

[228] Many settlements are made where the acquiring authority agrees to pay the reasonable costs of advising on an unconditional offer. In *McCarthy v ESB* [2021] IEHC 501, Owens J held that those costs arise out of the offer, and not out of anything within the 1919 Act, and so the appropriate dispute resolution forum for those costs is litigation rather than the property arbitrator. This means that there are two separate processes utilised to quantify the total costs.

[229] See for example section 91(1)(a) of the Land Acquisition and Compensation Act 1986 (Victoria), although this Act formalises the offer process in a way that does not exist here. See also section 39(2) of the Expropriation Act 1985 (Canada). Section 4 of the Land Compensation Act 1961 (England and Wales) does provide that the offer must be "unconditional".

> as the costs of either party are incurred after the making of the offer.[230]

[4.77] The Commission considers that a simpler approach to the rule in the 1919 Act would be achieved by avoiding the use of the term "unconditional", which has prompted uncertainty and cases stated to court as discussed above. Instead, the Commission recommends that the Tribunal should order the owner to bear their costs and to pay the costs of the acquiring authority where the acquiring authority has made an offer in writing of any sum as compensation to an owner and the sum awarded by the Tribunal to that owner does not exceed the sum offered.[231] The Tribunal should make such an order unless there are good reasons for not doing so. If such an order is made, the owner should be liable to pay the costs incurred after the offer was made.[232]

[4.78] This largely replicates the rule in section 5 of the 1919 Act, except that it removes the need for the offer to be an unconditional offer and broadens the discretion of the Tribunal to award costs to the owner in circumstances where the sum awarded by the Tribunal does not exceed the sum offered to the owner by the acquiring authority. Instead of providing that the Tribunal may do so if there are "special reasons", the Commission considers that the Tribunal should be permitted to do so if there are "good reasons".[233]

[4.79] Section 5(2) of the 1919 Act also provides for a situation where the acquiring authority had difficulty making an unconditional offer because the claimant failed to deliver their notice of claim containing sufficient particulars in sufficient time to enable the acquiring authority to make an offer. Where the property arbitrator is satisfied this has occurred, section 5(1) of the Act will apply "… as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the official arbitrator sufficient particulars should have been furnished and the claimant had been awarded a sum that does not exceed the amount of the offer". Effectively, this legislative provision assumes that had the owner provided particulars of claim in a timely

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[230] Section 90(2) of the Public Works Act 1981 (New Zealand).

[231] This follows closely the wording of section 4(1) of the Land Compensation Act 1961 (England and Wales), except it does not specify that the offer needs to be unconditional.

[232] Section 4(1) of the Land Compensation Act 1961 (England and Wales).

[233] A few submissions to the Issues Paper expressed dissatisfaction with the current rule in the 1919 Act, where owners revise their claims after an initial unconditional offer is made, forcing the acquiring authority to make another unconditional offer in order to have a chance of achieving cost protection. It was submitted that in such circumstances the date from which the acquiring authority's costs become payable (in the event that the offer is not beaten by the award) is only the date of the second unconditional offer. This is notwithstanding the fact that the only reason the second offer is made is because the owner revised their claim. The Commission's draft Bill addresses this point.

manner in sufficient detail, the acquiring authority would have made an offer and that offer would have exceeded the ultimate award. The Commission takes the view that it would be preferrable for failure and delay in submitting particulars of claim to be considered by the Tribunal as an aspect of the conduct of the owner in determining whether there are good reasons not to award the owner their costs and expenses. For that reason, the Commission decided not to reenact section 5(2) of the 1919 Act in its current format.

[4.80] The Commission has provided that the Tribunal may determine the amount of costs (including legal costs) and expenses payable to either the owner or the acquiring authority. In terms of legal costs, there is an existing entitlement under section 154 of the Legal Services Regulation Act 2015 to have disputed legal costs adjudicated by the Legal Cost Adjudicators, where a tribunal orders a person to pay "…in whole or in part, the legal costs of another person". For the avoidance of doubt, the Commission provides in its draft Bill, that where the Tribunal does not determine the amount of legal costs, the Tribunal shall make an order for the adjudication of legal costs pursuant to Chapter 4 of Part 10 of the Legal Services Regulation Act 2015.

[4.81] The Tribunal currently has detailed rules that contain cost provisions.[234] The Commission considers that, except where expressly provided for in its draft Bill, the procedure for determining costs in this context should be determined by the Tribunal in rules made by it, or the existing rules could be adapted and applied to determinations by the Tribunal in the compulsory acquisition context.

**R 4.25** **The Commission recommends that** legislation should provide that the Tribunal shall order that the reasonable costs and expenses properly incurred by the owner shall be paid by the acquiring authority, unless the Tribunal is satisfied that there are good reasons for not doing so.

**R 4.26** **The Commission recommends that** in determining whether there are good reasons not to award the owner their costs and expenses, the Tribunal should have regard to the conduct of the owner including any failure to submit, or delay in submitting, particulars of claim or revised particulars of claim to the acquiring authority, or any other matter that the Tribunal considers relevant.

**R 4.27** **The Commission recommends that** the Tribunal should have regard to the costs and expenses incurred by the owner in connection with the valuation process including but not limited to:

(a) providing particulars of claim to the acquiring authority,

(b) seeking an advance payment from the acquiring authority,

[234] Rules 158 to 167 of the Valuation Tribunal (Appeals) Rules 2019.

(c) preparing for, and the hearing of, the determination, and

(d) considering an offer made by the acquiring authority to settle the compensation.

**R 4.28** **The Commission recommends that** where the acquiring authority has made an offer in writing of any sum as compensation to an owner and the sum awarded by the Tribunal to that owner does not exceed the sum offered, the Tribunal should, unless it is satisfied that there are good reasons for not doing so, order the owner to bear their own costs and expenses and to pay the costs and expenses of the acquiring authority in so far as they were incurred after the offer was made.

**R 4.29** **The Commission recommends that** legislation should give the Tribunal the jurisdiction to determine the costs (including legal costs) and expenses payable to the owner or the acquiring authority.

**R 4.30** **The Commission recommends that** where the Tribunal does not determine the amount of legal costs, the Tribunal shall make an order for the adjudication of legal costs pursuant to Chapter 4 of Part 10 of the Legal Services Regulation Act 2015.

**R 4.31** **The Commission recommends that** the Tribunal may determine the procedure for determining costs in rules made by it, and that the Tribunal should also be permitted to apply its existing cost rules in relation to appeals, to determinations in the compulsory acquisition context.

### (f) Case stated and appeals

[4.82] Currently, a decision of a property arbitrator on any question of fact is "final and binding on the parties".[235] However, under the 1919 Act, the property arbitrator may state a case on a point or question of law, which arises in the course of the proceedings to the High Court.[236] This is often referred to as a consultative case stated. The property arbitrator may also state the award in whole or in part, in the form of a special case for the opinion of the High Court.[237] The procedure under section 6 of the 1919 Act remains in place despite the 2010 Act abolishing the case stated procedure for arbitrations in most instances.

[235] Section 6(1) of the Acquisition of Land (Assessment of Compensation) Act 1919.

[236] *Ibid*.

[237] *Ibid*.

[4.83] A property arbitrator may state a case on their own motion or following an application from either party to state a case.[238] A property arbitrator is not required to state a case when requested to do so by one of the parties to the proceedings.[239] However, where they refuse to do so, the Court may direct the property arbitrator to state a case following an application for judicial review of the decision not to state a case.[240] In recent years, there have been many applications for property arbitrators to state cases to the Court. Where the property arbitrator refused to do so, this often resulted in directions from the Court to do so.[241]

[4.84] The case stated procedure is beneficial where significant points of law may be raised before a decision-maker who does not have the necessary legal expertise to make a determination on the issue. Provision is not made in the existing legislation governing the Tribunal for a similar case stated procedure. Instead, an appeal on a point of law by way of case stated where a party contends there has been an error in law exists under the 2001 Act.[242] The Commission considers that it is preferable to align legislative approaches to any functions it may be given with regard to compulsory purchases following the Commission's recommendations with legislative approaches to the Tribunal's current functions.

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[238] An application for a case stated must be made by the parties during the course of the proceedings. In other words, at any point from the commencement of proceedings until the property arbitrator publishes the award. See Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 26.36.

[239] For factors to be taken into consideration by the property arbitrator in exercising their discretion to state a case, see *Halfdan Greig & Co v Sterling Coal Ltd* [1973] QB 843 (often referred to as the *Lysland* case). This case was applied with approval in this jurisdiction; see for example *Hogan & Ors v St Kevin's Co and Purcell* [1986] IR 80; *JJ Jenning Ltd v O'Leary and Midland Construction Engineering Ltd* (High Court, 27 May 2004) and more recently, *The Electricity Supply Board v Boyle* [2019] IEHC 475.

[240] Section 6 of the Acquisition of Land (Assessment of Compensation) Act 1919. Generally, where a property arbitrator refuses to state a case, the applicant can instigate judicial review proceedings seeking the Court to direct the arbitrator to state a case. Where the Court finds in favour of the application, the matter then returns to the arbitrator and they will state the case to the High Court (sometimes the same judge that heard the judicial review proceedings), and it is only then that the High Court will substantively consider the point of law raised. It is questionable whether these multiple steps in the case stated procedure required under the 1919 Act is an efficient use of the Court's time. If the case stated procedure is to be maintained, one way of remedying this would be to require the arbitrator to state a case on a point of law, where an application is made by either of the parties.

[241] *Electricity Supply Board v Boyle; Electricity Supply Board v Good ; Rossmore Property Ltd v O'Carroll* [2018] IEHC 718 and *Cork County Council v Lynch and Boyle* [2021] IECA 4.

[242] Section 39 of the Valuation Act 2001.

[4.85] The Tribunal's members have both legal and valuation expertise, which makes it a suitable body to determine compensation in the compulsory acquisition context. The Commission has recommended that the chairperson should have discretion on the composition of any division that will determine compensation, enabling them to respond to the particular needs of each case. In exercising that discretion, the Commission recommends that the Chairperson should have regard to—among other matters—the need for expertise in determining compensation for land compulsorily acquired and the complexity of the anticipated proceedings. Complex proceedings will likely benefit from a mixture of legal and valuation expertise, and so the division of the Tribunal in such cases will likely contain a lawyer. As a result, the Commission does not consider that there is a need to retain the case stated procedure, as the legal professional could make determinations on points of law that arise.[243] Regardless of whether there is a legal professional in the division to assist in making determinations on points of law, the Commission recommends as an additional measure that the Tribunal's decision should be subject to an appeal on a point of law. This is discussed further below.

[4.86] Any decision made by a division of the Tribunal would be subject to judicial review as it is carrying out a public law function. Legislation can also expressly provide for an appeal where either party considers there has been an error in law in a determination made by the Tribunal. Section 39 of the 2001 Act provides for an appeal to the High Court on a point of law where the party is "…dissatisfied with the determination as being erroneous in point of law…".[244] The Court determines any question(s) of law arising in the case and can "…reverse, affirm, or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit".[245] Any decision of the Court can subsequently be appealed to the Court of Appeal.[246] To avoid the undesirability of having multiple appeal

[243] This is not to say that in every case where there are legal professionals involved in the decision-making that this negates the value of consultative case stated procedures. For example, under the Adoption Act 2010, members of the Adoption Authority include legal professionals and a consultative case stated procedure is provided for in section 49 of the Act.

[244] First, the applicant must declare their dissatisfaction with the determination to the Tribunal within 21 days of the determination being made, and then the applicant can by notice, require the Tribunal to "…state a case and sign a case for the opinion of the High Court…" within 3 months from the date of the notice. The applicant will then transmit this case to the High Court, on notice to the other parties to the appeal.

[245] Section 39(5) of the Valuation Act 2001.

[246] Section 39(7) of the Valuation Act 2001. Prior to the Court of Appeal Act 2014, appeals were made to the Supreme Court. See section 8 of the Court of Appeal Act 2014, which

avenues in respect of different decisions by the same body, the Commission recommends that section 39 of the 2001 Act should be applied to determinations of the Tribunal in relation to compensation for land compulsorily acquired.

[4.87] On the question of whether a merits-based appeal of a determination on compensation should be introduced, most submissions to the Issues Paper stated that this should not be provided for as it would increase delay and add significantly to the costs incurred by parties.[247] Merit-based appeals are often conducted on a *de novo* basis, where the Court or another upper-level decision-maker (within the same body or a different body) conducts a full rehearing of the case and all questions of law and fact are considered afresh. If a determination of compensation for land compulsorily acquired was subject to a merits-based appeal, the second-instance decision-maker would consider all the evidence again (including any valuation reports submitted, expert evidence and any legal submissions) and determine the amount of compensation to be paid by the acquiring authority.

[4.88] Decisions of the property arbitrator are currently not subject to a merits-based appeal.[248] In many other common law jurisdictions, there is no merits-based appeal of determinations of compensation for land compulsorily acquired.[249] For example, in England and Wales, the Upper Tribunal (Lands Chamber) determines compensation for land compulsorily acquired at first

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inserted section 7A into the Courts (Supplemental Provisions) Act 1961 and provides that "…there shall be vested in the Court of Appeal all appellate jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Supreme Court".

247 As against this, one respondent contended that merits-based appeals should be permitted as it would require the arbitrator to justify the baseline that they based their decision on. It was argued that the original figure could be set aside, and the parameters for arriving at a figure set out by the Court, with the decision being remitted back to the arbitrator.

248 Section 6(1) of Acquisition of Land (Assessment of Compensation) Act 1919. It provides that the decision of the property arbitrator "…upon any question of fact, shall be final and binding on the parties…" and provides for the case stated procedure discussed above. In *Manning v Shackleton*, the Supreme Court (Keane J) commented that "…it must also be remembered that the clear policy of this legislation was to afford to the parties a machinery for determining the value of the compulsorily acquired land which would avoid the necessity of litigation and be final and binding…".

249 See also the Lands Tribunal of Scotland (Land Compensation (Scotland) Act 1963 and Land Compensation (Scotland) Act 1973), the Lands Tribunal for Northern Ireland (Lands Tribunal and Compensation Act (Northern Ireland) 1964), and the Land Valuation Tribunal in New Zealand (Public Works Act 1981), where compensation for land compulsorily acquired is determined by the respective Tribunals and not subject to a merits-based appeal. These Tribunals also have appellate functions including related to valuation decisions.

instance, despite the Tribunal having many appellate functions including decisions about rates made by the Valuation Tribunal in England and Wales.[250]

[4.89] The Commission takes the view that merit-based appeals to a Court or a higher level of decision-makers are not necessary considering the ability of either party to apply for judicial review of a determination by the Tribunal, and to appeal on a point of law. These avenues offer sufficient protection to both parties to challenge the decision-making processes of the Tribunal or a determination where they consider an error in law has been made. If merit-based appeals were permitted, it would likely take longer to resolve compensation claims, and the costs associated with doing so would increase.

[4.90] In addition, the Commission considers that the particular expertise contained within the Tribunal on land valuation cannot be replicated in a merits-based appeal to the courts.[251] The Commission takes the view that it is inadvisable to have a merits-based appeal from an expert body to a non-expert court, where the main factual question to be determined is the value of the land.[252] For all these reasons, the Commission considers that there should be no merit-based appeals from a determination by the Tribunal, as currently is the case for determinations made by property arbitrators.

**R 4.32** **The Commission recommends that** section 39 of the Valuation Act 2001 should be applied to determinations of the Tribunal in relation to compensation for land compulsorily acquired.

**R 4.33** **The Commission recommends that** there should not be a merits-based appeal of the determination of the Tribunal in respect of compensation.

[250] The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009.

[251] In addition, having an upper level of decision-making within the same body would not be worthwhile considering the relatively small number of compensation claims that fall to be determined.

[252] In *ESB v Good* [IEHC] 83, the High Court (Heslin J) referred repeatedly to the fact that the Court has no valuation role or expertise in how compensation should be determined under the 1919 Act. See for example paras 99, 141, 146, 166.

# CHAPTER 5
# PRINCIPLES OF COMPENSATION

**Chapter Contents**

## 1. Introduction

[5.1] Ireland, like many common law jurisdictions, derives its compulsory acquisition compensation rules from the 1845 Act and the 1919 Act. Both Acts are very old, and most jurisdictions that applied these rules have at some point in the past century updated or replaced them. Ireland is a significant outlier in keeping, with little modernisation or amendment, both the compensation rules and system of arbitration established under the 1919 Act.

[5.2] Much of the analysis in this chapter is focused on codifying well-established, existing legal principles, rather than a significant revision of the basis of compensation following compulsory acquisition. The main issue with the existing law on this subject is that it is only partly codified, and that partial code (parts of the 1845 and 1919 Acts) is very old and drafted in language that is often unfamiliar and difficult to understand.

[5.3] The Commission's discussions and recommendations in this Chapter correspond to the provisions of Chapter 2 of Part 4 of the draft Bill appended to this Report.

[5.4] As this is an expansive chapter touching on many different topics, the Commission sets out for convenience its main discussion and conclusions in overview form:

(1) The basis for compensation at present is value to landowner and the principle of equivalence. These principles cohere with general compensation norms (putting the plaintiff back in the position they would have been in had the loss-causing event not happened) as well as constitutional and ECHR case law on compensation following expropriation; they should therefore be retained as the default aims of compensation following a compulsory acquisition of land.
(2) The heads of compensation under the 1919 Act (market value, injurious affection, severance, disturbance and equivalent reinstatement) are well-established and should be retained.
(3) At the level of general land-use policy there have been proposals to capture "betterment value" or "unearned increment". This is the increase in land values that arises otherwise than by direct investment in the land, often by State regulation or planning decisions. As a land-use policy matter this is outside the scope of the current Report; however, if implemented, a betterment-capture policy would necessarily affect compensation for compulsory acquisition. While

there is some constitutional and ECHR case law that suggests this may be permissible if it is done in pursuit of the common good, it is not clear what threshold a common good initiative would have to meet to justify below-market compensation and the Commission does not express a view on this question.

(4) Changes in the uses for which land is zoned may significantly alter the market value of land and, thus, the compensation due to an owner. The existing rules 11 and 13, and the case law on those rules, address how this value should be accounted for. These rules are included in the Commission's proposed code in its draft Bill.

(5) The rules relating to injurious affection, including the *McCarthy* rules and the rule in *Edwards v Minister of Transport*, are not in need of significant change but would benefit from codification. The Commission proposes a codification of these rules in its draft Bill.

(6) The rules relating to disturbance (consequential loss) are among the most in need of codification as they do not currently have a statutory basis (they were taken as implied by the 1845 Act and subject to a saver in the 1919 Act). Consequently, the Commission proposes a codification of these rules in its draft Bill.

(7) The rules relating to equivalent reinstatement—which arises less frequently than other heads of compensation—are broadly satisfactory. The Commission proposes some additional provisions to address the issue that arose in *Dublin Corporation v The Building and Allied Trade Union* (the "Bricklayers' Hall" case); however, in the main, what is proposed is a codification of existing principles.

(8) Certain rules (rules 8, 9, 10 and 14) under the 1919 Act require a property arbitrator to specifically have regard to certain matters when considering the market value of land. These matters are now all well-established and would be taken as a factor in the valuation of land even in the event of an ordinary sale and so could likely be safely omitted from a new code.

(9) There are several rules under a mixture of the 1919 Act and case law (most notably the *Pointe Gourde* case) requiring disregard of aspects, or the entirety, of the scheme underlying a compulsory acquisition when determining the value of land compulsorily acquired. This "no-scheme" rule would benefit from codification and a more comprehensive restatement and the Commission proposes such a restatement in its draft Bill.

(10) In other jurisdictions it is common to offer an additional payment, over and above standard measures of compensation, to people displaced from their homes as a result of a compulsory acquisition. The Commission proposes that an additional payment of this kind should be introduced in this jurisdiction and should be payable in respect of both freehold and leasehold interests.

(11) Certain rules (the second clause of rule 3 and the entirety of rule 16) no longer have any application and should be omitted from a modern code. The Commission's draft Bill omits these rules.

## 2. Overlap in English and Irish law

[5.5] The Irish law on compensation for compulsory acquisition has its roots in legislation passed before the founding of the State. This legislation applied to the entire United Kingdom as it stood at that time. The rules have not been subject to significant revision in either Ireland or England and Wales. Because of this shared ancestry, and the enduring character of the rules, both English case law and the extensive review by the Law Commission of England and Wales of the rules of compensation for compulsory acquisition under that legal system are relevant.[253]

[5.6] This is not to say that there are not significant differences between English and Irish law, and the Commission has accounted for those in its careful consideration of Irish law. However, because of the shared architecture and overlapping concepts that apply in both jurisdictions, many of the points—both in respect of consolidation and reform—urged by the Law Commission of England and Wales apply with equal force in this jurisdiction.

## 3. Basic principles and rules

[5.7] Two basic principles govern compensation for compulsorily acquired land—the principle of value to landowner and the principle of equivalence. This section describes each of these principles and the basic rules, or "heads", of compensation that give effect to the principles. Under present Irish law these rules are contained in section 2 of the 1919 Act.

### (a) Value to landowner

[5.8] Before the enactment of the 1919 Act, compensation for owners proceeded on the assumption that "because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer".[254] This caused upward pressure on compensation awards, which were often determined by juries, and there was a separate "uplift" provision on allowance that the acquisition was compulsory.

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[253] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071).

[254] *Horn v Sunderland Corporation* [1941] 2 KB 26 at page 40.

[5.9] In 1918, anticipating an end to World War I and the reconstruction efforts that would follow, the British Government established a Committee (the Scott Committee) to review the law relating to compulsory purchase.[255] The Committee noted a shift from the 1845 Act context of compensation—one where the promoter of the compulsory purchase scheme was frequently a profit-motivated industrialist— towards one that focused more on recognition of communitarian interests being pursued through compulsory purchase:

> It ought to be recognised, and we believe is today recognised, that the exclusive right to the enjoyment of land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion, no landowner can, having regard to the fact that he holds his property subject to the right of the State to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value apart from compensation for injurious affection [et cetera].

[5.10] This communitarian concern is also found in the protection of property under the Irish constitution being subject to the exigencies of the common good.[256]

[5.11] On foot of the recommendations of the Scott Committee, the 1919 Act was enacted. The six original compensation rules in section 2 of that Act, most notably rule 1 (market value of willing seller to buyer) and rule 2 (no allowance on acquisition being compulsory) gave the value to owner principle its modern form.

[5.12] As the Commission proposes to retain these rules, subject to some modification,[257] in its statutory code it endorses the value to owner principle as it has developed from the 1919 Act.

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[255] *Second Report to the Ministry of Reconstruction of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes* (Cd 9229 1918).

[256] Article 43.3.2° of the Constitution of Ireland.

[257] The most significant of these modifications is the omission of the "special suitability" provision in rule 3. There is little case law on this provision and the case law that does exist is predominantly cases of the English courts placing restrictions on the rule. The Law Commission of England and Wales considered that the rule could effectively be subsumed by a more general, codified "no-scheme" rule. This is the approach endorsed by this Commission as well; see further below.

### (b) The principle of equivalence

[5.13] As with compensation in general, compensation for the expropriation of land is based on a restitutionary "principle of equivalence"; the person whose land is taken from them should be put, as far as money can achieve, back in the position they would have been in had the land not been taken. Lord Justice Scott summarised this principle as:

> …the right [of the owner] to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater.[258]

[5.14] The Commission considers that the principles of value to owner and equivalence are sound principles and reflect well-established legal norms of compensation. They should therefore be kept as the basis of a new compensation code.

**R 5.1** **The Commission recommends that** the basic principles of value to owner and equivalence—subject to certain well-established modifications—should remain the basis of compensation for compulsory acquisition.

### (c) Rules: heads of compensation

[5.15] Since the owner's loss must be given a monetary value, there need to be rules for how that monetary value is quantified and what types of loss are compensable. Following from the value to owner and equivalence principles described above, the basic rules of compensation under Irish law are as follows:

(a) the value of the acquired land, and any property on the land, is taken to be the market value of that land or property—this is the value that would be realised if an exchange were organised between a willing seller and a willing buyer in an open market,
(b) certain consequential losses (disturbance) that the owner incurred because of the acquisition are also recoverable,
(c) in cases where the acquired land is put to a use for which there is no general demand or market, the cost of reinstating the owner on an equivalent basis on alternative premises may be recoverable (equivalent reinstatement), and
(d) a reduction in value of land retained by the owner owing to either—

[258] *Horn v Sunderland Corporation* [1941] 2 KB 26 at page 42. This principle was endorsed in this jurisdiction in *Gunning v Dublin Corporation* [1983] ILRM 56.

(i) severance: the splitting of land that was once whole and contiguous into two or more smaller parcels, or
(ii) injurious affection: works done on the retained land during the construction and post-construction phases,

is recoverable.

[5.16] This is the fundamental architecture of the 1845 and 1919 Acts and most stakeholders engaged by the Commission were of the view that it is functional and not in need of significant reform. However, the rules are fragmented across different statutes—where they even have a statutory basis—and come with varying levels of guidance in terms of how they should be applied. The basis of the assessment of market value is the 1919 Act, the basis of severance and injurious affection is the 1845 Act, the basis of equivalent reinstatement is the 1919 Act, and there is no statutory basis *per se* for disturbance.[259]

[5.17] The Commission considers that these basic rules are not in need of fundamental "root and branch" reform, but they would benefit from consolidation and modern restatement.

**R 5.2** **The Commission recommends that** the basic rules of compensation—market value, severance, injurious affection and disturbance—are not in need of reform but should be set out clearly in one single code.

## 4. Market value

[5.18] The Commission acknowledges that this project is set against a background of considerable debate concerning the use of land in the State, particularly with a view to providing housing. The compulsory acquisition of land by the State is one of various measures that Government may employ in response to these issues.[260] Current compulsory purchase law permits the acquisition of land by authorities for purposes connected with housing.

[5.19] Historically, in Ireland and many other jurisdictions, the principal basis on which compensation for compulsory purchase has been determined has been

[259] Disturbance was taken to be implied by the pre-1919 Act position that compensation should be assessed on a value-to-seller basis. The 1919 Act displaced this with the market value basis just mentioned; however, it contains a saver for disturbance and compensation for other "matter[s] not directly based on the value of land" in rule 6.

[260] For example, policy objective 19.5 of the Government's *Housing for All* plan pledges to introduce a new programme for the compulsory purchase of vacant properties for resale on the open market. See Government of Ireland, *Housing for All: A new Housing Plan for Ireland* (September 2021).

the open market value of the land acquired.[261] Legislation has, from time to time, made some adjustments to that principle by requiring that certain matters either be, or not be, taken into account when calculating open market value for the purposes of determining compensation. However, many, if not all, of these measures have been designed to provide for what might have been considered to be a more accurate or reasonable determination of true open market value. For example, the requirement that any enhancement to the value of a property that derives from the statutory project for which the compulsory purchase order was made should not be taken into account can be seen to stem from a view that the true open market value for compulsory purchase compensation purposes is the value before the very project for which the compulsory purchase is done was put in place.[262]

[5.20] The traditional rationale that has been put forward to justify compensation on an open market basis stems from the fact that, ordinarily, the owner of property is entitled to sell that property on the open market and will be entitled to receive whatever sum a willing purchaser is prepared to pay. The principle is that of equal treatment between those who sell their land compulsorily and those who sell it voluntarily.

[5.21] Market value has been defined in the Commission's draft Bill as "the estimated amount for which that land or interest would exchange on the valuation date between a willing buyer and a willing seller". In wording this definition the Commission has used very similar language to that employed in the compulsory acquisition compensation codes of several other common law jurisdictions, all of which share the starting point of market value.

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[261] Section 2(2) of the Acquisition of Land (Assessment of Compensation) Act 1919. See further: section 5(2) of the Land Compensation Act 1961 (England and Wales) ("[t]he value of land shall … be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise"); section 56 of the Lands Acquisition Act 1989 (Australia) ("the market value of an interest in land at a particular time is the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer"); section 62(1)(b) of the Public Works Act 1981 (New Zealand) ("the value of land shall … be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise…"); section 26(2) of the Expropriation Act 1985 (Canada) ("the value of an expropriated interest or right is its market value, being the amount that would have been paid for the interest or right if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer").

[262] See further the discussion of the "no-scheme rule" in this chapter.

**R 5.3** **The Commission recommends that** a definition of market value of land or an interest in land as "the estimated amount for which that land or interest would exchange on the open market, as at the valuation date, between a willing buyer and a willing seller" should be included in a modern compulsory acquisition code.

[5.22] There have, from time to time, been suggestions that there should be a departure from open market value in a significant way in the context of assessing compensation for compulsorily purchased lands.[263] Certain public decisions or actions can and do have the potential to significantly enhance the value of lands. Zoning or development permission decisions can clearly materially increase the price that purchasers will be prepared to pay for any lands having the benefit of such decisions. Major publicly funded infrastructural works can have a similar enhancement effect. There are difficult issues of policy as to the extent, if any, to which all of the benefit of enhancement from public works (often called "betterment" or "unearned increment") should be distributed between the relevant landowner and the State in light of public investment in such enhancements.[264] Those issues involve not only important policy considerations but also difficult and complex socio-economic issues. Such issues stretch far beyond the question of compensation in respect of compulsorily acquired lands.

[5.23] Additional value generated by land has been captured by the State in other ways under Irish law. In some cases this has been done through planning law, for example, the 20% contribution required under section 96 of the Planning and Development Act 2000. Other interventions have been made through taxation, for example, the implementation of a residential land value tax under the Taxes Consolidation Act 1997. These legislative measures affect all owners of land and not just those whose land is compulsorily acquired.

[5.24] A more recent and general proposal has been made in the draft Scheme of the Land Value Sharing and Urban Development Zones Bill to capture value generated as a result of land being zoned for residential purposes. The Scheme proposes, if enacted, to require a planning contribution to be made in cases where the zoning of land is changed to residential use or mixed-use, including residential use. The contribution will be levied as a condition of planning permission and the Scheme projects that it is likely to be up to 30% of the difference between the current use value of the land and its market

[263] See, for example, the *Report of the Committee on the Price of Building Land* (1974) (often known as the "Kenny Report").

[264] For general discussion see Alterman, "Land-Use Regulations and Property Values: The 'Windfalls Capture' Idea Revisited" in Brooks, Donanghy and Knapp (eds), *The Oxford Handbook on Urban Economics and Planning* (OUP 2012) at page 762.

value (which includes the value of development potential facilitated by rezoning).

[5.25] The Commission's understanding of how the Government's land value sharing proposals would, if enacted, affect market value (in cases involving land being used for residential purposes) in the context of compulsory purchase is as follows:

(1) if land is rezoned for residential purposes before the passing of the Bill and it is purchased by compulsory purchase order, the compensation wouldreflect the full price of the land including, subject to rule 11 of the 1919 Act rules, development value it may hold as a result of the rezoning, or
(2) if land is rezoned for residential purposes after the passing of the Bill, and it is purchased by compulsory purchase order, the compensation reflects the full price of the value of the land, which would now include any reduction in that valuation caused by the attachment of a planning condition (rule 14 of the 1919 Act rules already requires a property arbitrator to have regard to "any contribution which a planning authority would have required as a condition precedent to the development of the land" when determining market value).

[5.26] The Commission considers that consideration of the distribution of "betterment" or "unearned increment" arising from public works projects goes far beyond the area of compensation in compulsory purchase cases. While there may be some constitutional and legal issues involved—and the Commission presents an overview of some of these below—many of the relevant policy considerations are outside the remit of the Commission and are more appropriately resolved by the Oireachtas. Furthermore, the Commission's Issues Paper did not address these issues and so the public consultation that followed did not consider whether such matters ought to be taken into account in the calculation of compensation for compulsory purchase

[5.27] Certain of the 1919 Act rules expressly refer to increased value due to zoning or proposed schemes not being taken into account when calculating the market value of land. The Commission discusses these rules in the following subsection.

## (a) Changes to land value from zoning decisions

### *(i) Rule 11: zoning objectives already set in development plan*

[5.28] Rule 11 of the 1919 Act rules requires a property arbitrator to disregard changes to the value of land caused by "the land, or any land in the vicinity thereof, being reserved for any particular purpose in a development plan".[265]

[5.29] The leading judgment on what it means for land to be "reserved for a particular purpose" under rule 11 is *Dublin City Council v Shortt*.[266] In *Shortt* the Supreme Court (O'Higgins CJ) quoted with approval a part of the judgment of the High Court (McMahon J) holding that, for the purposes of this rule, "the word 'reserved' means set apart and 'particular purpose' means a purpose distinct from the purpose for which the other land in the area is zoned. Rule 11 therefore refers to land which is set apart from the other land in the area and is zoned for a different purpose and in valuing such land the arbitrator is to disregard the setting apart and value the land at the value it would have had had it not been so reserved i.e. the value having regard to the purpose for which the land generally in the area is zoned".[267]

[5.30] In other words, rule 11, as interpreted in the *Shortt* case, confirms that the zoning of land will be taken into account in how it is valued. Where land is zoned for the same purpose as other land in the area no difficulty will arise. Where land is reserved for a particular purpose that other surrounding land is not zoned for, the particular reservation of the land should be ignored, and it should be valued on the basis that the particular reservation did not exist and the land is zoned for the same use as the other land.[268]

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[265] This rule is re-enacted in the Commission's proposed Bill by section 73.

[266] [1983] ILRM 377.

[267] *Ibid*.

[268] The wording in rule 11 has given rise to some confusion, though following clarification in the case law it is well understood. The words "particular purpose" also occurred in section 19 of the Local Government (Planning and Development) Act 1963 and were re-enacted in section 10 of the Planning and Development Act 2000. In the context of both the 1963 and 2000 Acts, the phrase "particular purpose" had to be given a separate meaning to the meaning it has in rule 11.

The reason for this is that sections 19 and 10 both speak in terms of zoning land "for the use solely or primarily of particular areas for particular purposes". If rule 11 excluded these purposes it would exclude all value owing to zoning, which would result in overcompensating landowners as their land would be valued (counterfactually) as if it were completely unbound by any zoning. It is for this reason that the Supreme Court found it necessary to endorse McMahon J's reading of the rule that requires "particular purposes" in that context to refer to purposes other than those purposes for which the land is zoned. On the issue of "spot zoning" and "general zoning", see further the judgment of the High Court (Simons J) in *Redmond v An Bord Pleanála* [2020] IEHC 151.

[5.31] This test is easy to state at the level of principle but its actual application will be heavily fact-dependent. In *Monastra Developments Ltd v Dublin County Council*[269] the land to be acquired (a 3.37-acre site in Foxrock, Co Dublin) straddled two different zoning designations: one part was zoned A (to protect and improve residential amenity) and the other—part of the old Leopardstown racecourse—was zoned F (to preserve and provide for open space and recreational amenity). So, which of these zonings, if either, should be considered as being "reserved for [a] particular purpose" for the purposes of exclusion under rule 11?

[5.32] The High Court (Carroll J) found that the central issue was the scale, or area, of the lands in question:

> It is all a matter of scale. There must be a point when an area is large enough in its own right not to be considered as set apart from other lands adjoining. In the case of the Leopardstown racecourse area it is, in my opinion, sufficiently large to comprise an area in its own right and accordingly cannot be considered as "land set apart from other land in the area".[270]

[5.33] The Court found that the land should be valued under the F zoning rather than the A zoning. Both zonings had certain permitted uses in common: open space, public services and cemeteries. However, in addition to these the F zoning included sports club, recreational buildings, cemeteries, and the A zoning included residential, private garage, education, church.

### *(ii) Rule 13: changes to zoning objectives implied by other State action*

[5.34] In most cases, the question of zoning will be addressed under rule 11. However, in some other cases the question of speculative or implied zoning changes has arisen. These would not be captured by rule 11. The Supreme Court in *In Re Murphy*[271] held that, in certain circumstances, rule 13 precludes a property arbitrator from taking into account the Minister's willingness (or unwillingness) to rezone land to pursue an objective of a compulsory

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It is notable that the Planning and Development Bill 2022 as currently drafted does not use similar language to the 1963 or 2000 Acts: see section 42 of the 2022 Bill, which is the equivalent section in that Bill to sections 19 and 10. This may address the linguistic confusion.

269 [1992] 1 IR 468.

270 [1992] 1 IR 468 at page 471.

271 [1977] IR 243.

purchase order. Rule 13[272] provides that a property arbitrator may not take account of:

> (a) the existence of proposals for development of the land or any other land by a local authority,[273] or
>
> (b) the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by a local authority.

[5.35] In *In Re Murphy*, the owner's land was zoned for agricultural purposes. However, it had a compulsory purchase order put on it for the purpose of housing under the 1966 Act. This implied that the Minister would have to rezone the land for non-agricultural purposes (even though no rezoning had yet been done) if housing were indeed to be developed on the land.[274] The owner therefore claimed that there was an implied decision to rezone the land for non-agricultural purposes and the property arbitrator should therefore take into account the development value of the land for private housing in determining the amount of compensation he should receive.

[5.36] The Supreme Court (Henchy J, with whom the other members of the court agreed) rejected this argument. First, it did not consider that the Minister changing the zoning of the land to facilitate a statutory housing objective under the 1966 Act necessarily implied that the land would be rezoned to facilitate private development for housing (which is what would be the main driver for an uplift in the land value). Second, it held that the compulsory purchase order was itself proof of "the existence of proposals for development of the land" and so it fell to be excluded by rule 13(a) of the 1919 Act (the existence of proposals for development of the land by a local authority) and not rule 13(b), which pertains to the possibility of a scheme of development.

[5.37] *In Re Murphy* does not, as *Shortt* did, squarely address the effect of a specific zoning decision on land, and whether it should be accounted for in compensation. The owner's argument was speculative. He suggested that, since the Minister was clearly going to zone the land for housing in some way, it should be assumed that—whatever the specifics of the zoning decision turned out to be—it would permit private housing development on the

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[272] This rule is re-enacted in the Commission's proposed Bill.

[273] This is effectively the statutory "no-scheme rule" under Irish law. The Commission discusses the "no-scheme" rule and makes recommendations on it generally below.

[274] The report of the judgment does not make it clear whether the compulsory purchase order was just for "housing" as a statutory objective in general or for a more specific project or development.

acquired land. This would, naturally, increase the value of that land. However, since the zoning decision had not yet been made, Henchy J considered it a *non sequitur* to argue that merely because the Minister was zoning the land to achieve a housing objective it followed that the land would have full development potential to sell to a developer for private housing. Since Henchy J decided the case on rule 13(a), which is premised on the land being subject to development by a local authority, this carries the implication that the local authority was in this case going to build the housing itself. The value of the land to a private developer was, thus, immaterial.

[5.38] In more precise terms, what *In Re Murphy* establishes is that any "implied" rezoning as a result of a compulsory purchase order should be read narrowly so as to capture rezoning only for the purposes of that compulsory purchase order rather than a more general purpose of, for instance, "housing" (which may, in fact, be stated on the face of the order). The Court repeatedly took the implied zoning decision and the terms of the compulsory purchase order as inextricably linked:[275] since the Minister had confirmed the compulsory purchase order for housing, a subsequent rezoning of the land by the Minister could only be assumed to be done having regard to the scheme of development contemplated by that compulsory purchase order. It thus could not be the case that the rezoning would increase the value of the land because the rezoning was itself done in contemplation of a specific local authority acquisition.

[275] "[T]he Minister's willingness to vary a development plan made under s. 19 of the Local Government (Planning and Development) Act, 1963, so as to effectuate a compulsory purchase order made for those purposes, could not be considered a pointer as to how the Minister might exercise his appellate powers if a development application were made in respect of the same lands by a private person" ([1977] IR 243 at pages 252-53).

"It would be impossible for the arbitrator to take into account, as an indicator of the potential development possibility of the land, the fact that the Minister was prepared to change the zoning of the land for agricultural purposes so as to enable the proposed housing development to be carried out, without at the same time taking into account the existence of the proposal for that development. The Minister's attitude to the zoning arises only in the context of that proposal. Without that proposal, the Minister does not come into the matter. It would be quite impossible to take into account the Minister's attitude, or the consequences of the Minister's attitude, without taking into account the proposal for development. It follows, therefore, that the arbitrator is debarred from considering whether the Minister's attitude to the zoning of the land gives the land a potential it would not otherwise have. Since the very existence of the proposed development is ruled out of consideration, the Minister's attitude to that development, whether established in the proceedings at the local public inquiry or otherwise, is also ruled out." ([1977] IR 243 at page 254).

## (b) Constitutional and ECHR law on the valuation of land below market value

[5.39] The case law addressing property rights protections under both the Irish Constitution and ECHR establishes the proposition that compensation should be, generally, whatever is required to make the owner whole. This will usually be a combination of the market value of the land and consequential losses resulting from the acquisition. This section describes both sets of relevant case law.

[5.40] The market value principle as it occurs in compulsory purchases is subject to some modifications to address distortions that would otherwise occur in that context.[276] The most significant of these is the "no-scheme" rule, which is a rule particular to the compulsory purchase context, discussed further in a separate section below. After the discussion of constitutional and ECHR law this section considers capturing betterment value by modifications to market value.

### *(i) Constitutional case law*

[5.41] Compensation plays an important role in offsetting the hardship that can result from the compulsory purchase of property.[277] However, as the authors of *Kelly: the Irish Constitution* observe, the jurisprudence on the role of compensation for this purpose has not always been a model of clarity and in some cases opens the possibility of compensation that is less than full market value:

> Judicial dicta admit of a range of possibilities, including uncompensated expropriation, compensation at less than market value, compensation at full market value, and possibly even compensation at more than market value. The most recent authority suggests that the compulsory acquisition of property should normally be accompanied by compensation that puts the owner in the position he or she was in prior to the

[276] Both rules 11 and rule 13 of the current 1919 Act rules are examples addressing such distortions. Rule 11 prevents an acquiring authority inflating land values by the mere contemplation of the scheme for which it acquires land. Rule 13 prevents a local authority from purposefully manipulating value (either to increase or decrease it) by reserving land for a particular purpose in its development plan (other than the purpose for which the local authority has zoned that land).

[277] For a detailed discussion of the constitutional jurisprudence on this issue, see generally the All-Party Oireachtas Committee on the Constitution, *Ninth Progress Report: Private Property* (2004).

> acquisition. This is, however, a principle to which exceptions may be made.[278]

[5.42] Importantly, it has been accepted by the Supreme Court that "compensation as such is no substitute for the property itself".[279] The Constitution permits State interference with property rights according to the principles of social justice and the common good. This means that there must be a rationale for acquisition grounded in social justice or the common good before an award of compensation can cure that compulsory acquisition. As the authors of Kelly have succinctly put it: "the Constitution guarantees a degree of secure possession of private property to owners, as distinct from security over the value of such property".[280] The question of compensation goes to the subsequent issue of whether the interference constitutes an unjust attack on property rights.

[5.43] There has been a suggestion in some authorities that, in principle, compensation is not an absolute entitlement following a compulsory acquisition;[281] however, the general tenor of more recent cases has been that it will only be in very exceptional cases that compensation will not be required for an expropriation to be constitutional.[282] Denham J affirmed this principle in very clear terms in her judgment in *Rafferty v Minister for Agriculture*:

> A person who has been compulsorily deprived of his or her property or property interests by the State is entitled, in principle, having regard to the constitutional protection of property rights from unjust attack, to compensation for the total loss caused or resulting as a consequence of compulsory deprivation of those interests.[283]

[5.44] Norms for the amount of compensation are less clear-cut. Again, in principle, just as it is possible that a dispossessed owner be paid *no* compensation, it is possible that just compensation in particular circumstances could be less than

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[278] Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.8.07.

[279] *Clinton v An Bord Pleanála* [2007] 4 IR 701.

[280] Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.8.167 (emphasis original).

[281] *Dreher v Irish Land Commission* [1984] ILRM 94.

[282] *ESB v Gormley* [1985] IR 129; *Dublin Corporation v Underwood* [1997] 1 IR 69; *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105 at page 201.

[283] *Rafferty v Minister for Agriculture* [2014] IESC 61, [2020] 2 IR 463, (Denham J) at para 45.

the market value of the acquired property.[284] This allowance is narrow, however, and generally compensation to full market value will be required, at least where market value means the value the property would attract at open market with its development rights accounted for,[285] but not necessarily the value of proposed developments to the land.[286] In the context of compulsory purchase this must be read in light of well-established modifications to the market value principle that may require disregard of, or specific regard to, certain development potential.

[5.45] More difficult is the question of whether consequential loss must be compensated. Consequential losses are those that are indirectly caused by the acquisition: for example, a farmer might lose the market value of their farm to compulsory acquisition, but their farming income may also suffer because of the compulsory acquisition. This latter type of loss is consequential loss. In a recent consideration of this issue, the Supreme Court indicated that the default position should be to put the expropriated owner in the position they would have occupied had their land not been compulsorily acquired.[287] This rule would include consequential loss by default, but such loss may not be compensated where it would be proportionate, rational and in furtherance of the common good not to regard certain losses as compensable.

### *(ii) European Convention on Human Rights case law*

[5.46] On the issue of whether compensation to full market value is required for expropriations, the case law under A1P1 of the European Convention on Human Rights (protecting the right to private property) endorses propositions similar to those seen in Irish constitutional law above: there is no absolute right to full market value compensation as there are circumstances where the public or general interest may call for a lesser measure. The Court has repeatedly affirmed that:

> the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under [A1P1]. That Article does not, however, guarantee a right to full

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[284] *Dreher v Irish Land Commission* [1984] ILRM 94; *In Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; *Rafferty v Minister for Agriculture* [2014] IESC 61, [2020] 2 IR 463.

[285] *In Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321 at page 349: the Court, in noting that the Bill did not provide for compensation at market value, assumed a definition of market value according to which: "market value is … the price which the property might be expected to fetch if sold on the open market enjoying the same right to develop as that enjoyed by the landowner".

[286] *In Re Murphy* [1977] IR 243.

[287] *Rafferty v Minister for Agriculture* [2014] IESC 61, [2020] IR 463 at para 45.

> compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value.[288]

[5.47] One of the few examples of the public interest allowing less than full market value that has been argued before the Court was in *The Former King of Greece v Greece*. This case involved King Constantine II of Greece, then living in exile following the transition of Greece from a monarchy to a republic, claiming compensation for property that had been compulsorily seized from him. The Court found in favour of the former king, holding that his property rights had indeed been breached by the actions of the Greek government. However, it did not award him the full market value of his properties.

[5.48] This was a very idiosyncratic case that involved extraordinarily high valuations of former royal palaces and other property. Valuations of the "market value" of these ranged widely between the parties, with two expert reports on behalf of the government of Greece claiming values of ~€550m and ~€346m and one expert report on behalf of the king claiming ~€473m. These wide valuations were, in part, a result of a highly artificial market valuation exercise to begin with. Market transfers assume transfers between willing buyers and willing sellers. The number of "willing buyers" for lavish royal palaces is few and so it is difficult to estimate what such a buyer would have paid to the Greek king.

[5.49] The Court, therefore, did not value the king's properties on the basis of market value, taking instead the view that:

> in many cases of lawful expropriation, such as a distinct taking of land for road construction or other public purposes, only full compensation may be regarded as reasonably related to the value of the property, this rule is not without exceptions … [L]egitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value ... The Court considers that less than full compensation may be equally, if not *a fortiori*, called for where the taking of property is resorted to with a view to completing

[288] *Lithgow v United Kingdom* Apps No 9006/80 9262/81 9263/81 9265/81 9266/81 9313/81 9405/81 (ECtHR 8 July 1986) at para 122; *Holy Monasteries v Greece* Apps No 13092/87; 13984/88 (ECtHR 9 December 1994) at para 71; *Papachelas v Greece* [GC] App No 31423/96 (ECtHR 25 March 1999) at para 48; *Bistrović v Croatia* App No 25774/05 (ECtHR 31 May 2007) at para 34; *JA Pye (Oxford) Ltd v United Kingdom* [GC] App No 44302/02 (ECtHR 30 August 2007) at para 54.

> "such fundamental changes of a country's constitutional system as the transition from monarchy to republic".[289]

[5.50] The net result of the Court's analysis was an award of €12m to the king and lesser awards to the king's co-applicants, his daughter Princess Irene and aunt Princess Ekaterini. This was very different from any estimate of "market value" produced by either party.

[5.51] The circumstances of the *Former King of Greece* case are very unusual and the public policy considerations, as they involved a very significant shift in the fundamental nature of government in Greece, were overwhelming and unlikely to arise in other cases. At the very least, the case shows in operation the ECtHR's acceptance of compensation at less than market value (in this case arguably far less) in extreme circumstances.

[5.52] In principle, the Contracting States enjoy a wide margin of appreciation in determining matters of public policy or interest that may justify less than full compensation. As the ECtHR held in *James v United Kingdom*:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken … Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.
>
> Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national

[289] *The Former King of Greece v Greece* App No 25701/94 (ECtHR 28 November 2002) at para 78.

> authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.

[5.53] The test is therefore whether the state's decision can be shown to be "manifestly without reasonable foundation".[290] In general, compensation will be reasonable if it bears some adequate relationship to the prevailing market value at the time of the compulsory acquisition.[291] In testing whether compensation is adequately related to market values, the Court will consider the amount that it "would itself have found acceptable under [A1P1] if the respondent … had duly compensated the applicant".[292] There is also support in the case law for compensating consequential loss adequately and construing a failure to do so as imposing a disproportionate burden on an expropriated owner.[293]

[5.54] A lack of compensation will be somewhat easier to justify where there is a restriction on property rights rather than a wholesale expropriation; in such cases the Court has accepted that a lack of compensation is a factor to be considered in the overall proportionality assessment[294] rather than a standalone issue giving rise to a *prima facie* breach of A1P1.

## 5. The "no-scheme" rule

[5.55] As shown above, rules that require that the value added by a scheme of development proposed under a compulsory acquisition order be disregarded already obtain under Irish law (for example, under rules 3 and 13 of the 1919 Act and by dint of judicial acceptance of the *Pointe Gourde* principle). However, there is no codification of this principle as there now is under English law.[295] The Law Commission's report on compensation for compulsory acquisition, which had a substantial appendix discussing only the "no-scheme"

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[290] *Lithgow v United Kingdom* Apps No 9006/80 9262/81 9263/81 9265/81 9266/81 9313/81 9405/81 (ECtHR 8 July 1986) at para 122.

[291] *Pincová and Pinc v The Czech Republic* App No 36548/97 (ECtHR 5 November 2002) at para 53; *Gashi v Croatia* App No 32457/05 (ECtHR 13 December 2007) at para 41.

[292] *Vistiņš and Perepjolkins v Latvia* App No 71243/01 (ECtHR 25 October 2012) at para 36.

[293] *Osmanyan and Amiraghyan v Armenia* App No 71306/11 (ECtHR 11 October 2018) at paras 70 and 71.

[294] *Depalle v France* [GC] App No 34044/02 (ECtHR 29 March 2010) at para 91.

[295] Sections 6A to 6E of the Land Compensation Act 1961 (England and Wales), inserted by the UK Neighbourhood Planning Act 2017.

rule, shows that unpacking this rule and giving it a comprehensive statutory restatement is difficult work.

[5.56] The judicial *Pointe Gourde* principle is relatively easily stated. The key principle as stated by Lord MacDermott is that "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition".[296] However, in both Ireland and England the principle has been further elaborated by statute.

### (a) Development of jurisprudence and statutory versions of the rule in England

[5.57] In England, the core statutory expression is what was originally section 9(2) of the Town and Country Planning Act 1959, substantially re-enacted in section 6(1) of the Land Compensation Act 1961. Judicial commentary in the English courts on these provisions assumed that they were a logical extension of the general *Pointe Gourde* principle that value owing to the acquiring authority's proposed development should be disregarded for compensation purposes. So, for instance, Lord Dilhorne in *Davy v Leeds Corporation* claimed that "[b]y section 9(2) of the 1959 Act [section 6 of the 1961 Act], Parliament, it seems to me, has given statutory expression to the principle which Lord MacDermott stated was well settled. Just as it would be wrong if the price to be paid for land compulsorily acquired was to be reduced if compulsory acquisition reduced its value, so, equally, would it be wrong if the price to be paid was increased as a result of what was proposed."[297]

[5.58] The interaction between the rules in English law became difficult to disentangle.[298] This was in part due to the complex drafting of section 6, which came in for some quite heavy judicial criticism.[299] In subsequent cases

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[296] *Pointe Gourde Quarrying and Transport Company Ltd v Sub-Intendent of Crown Lands* [1947] 1 AC 565 at page 572. Cited with approval in *Lambe v Secretary of State for War* [1955] 2 QB 612.

[297] [1965] 1 WLR 445 at page 453.

[298] See the discussion in the judgment of Lord Scott in *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 2 All ER 915.

[299] Several judges in the Court of Appeal hearing for *Davy v Leeds Corporation* [1964] 3 All ER 390 were critical of the drafting of the equivalent provision in the Town and Country Planning Act 1959 (England, Wales and Scotland). Diplock LJ noted that "This appeal from the Lands Tribunal raises a short point of construction under Section 9 of the Town & Country Planning Act, 1959, but the route by which alone it can be approached is through a labyrinth of statutory provisions".

Harman LJ opened his judgment saying:

> To reach a conclusion on this matter involved the Court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining

the import of the actual drafting of the section was diluted as it was treated as coextensive with the much more general judicial rule.[300]

### (b) The Irish context: fewer statutory interventions and less case law

[5.59] The earliest Irish authority on the *Pointe Gourde* principle is *In Re Dublin County Council Compulsory Purchase (Housing Act 1966) No 1, Order 1968*.[301] In that case, Pringle J cited English authorities—principally *Lambe* and *Camrose*—importing the judicial version of the rule in *Pointe Gourde* and making the observation that the Oireachtas had enacted its own version of the principle in rule 13 of the 1919 Act rules, which provides that for the purposes of compensation no account shall be taken of either:

(a) the existence of proposals for development of the land or any other land by a local authority, or
(b) the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by a local authority.[302]

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> the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the Court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side where I find myself, I am glad to say, at the same point as that arrived at with mere agility by my Lord.

Lord Denning MR also found difficulty navigating the provisions:

> In order to resolve this difference we have been taken through the provisions as to compensation in the Town & Country Planning Act, 1959. I must say that rarely have I come across such a mass of obscurity, even in a statute. I cannot conceive how any ordinary person can be expected to understand it. So deep is the thicket that, before the Lands Tribunal, both of the very experienced Counsel lost their way. Each of them missed the last 20 words of sub-section (8) of section 9. So did this expert Tribunal itself. I do not blame them for this. It might happen to anyone in this jungle. I am only too grateful to Counsel for guiding us through it.

[300] *Wilson v Liverpool City Corporation* [1971] 1 WLR 302; *Devotwill v Margate Corporation* [1969] 2 All ER 97; *Camrose v Basingstoke Corporation* [1966] 1 WLR 1100.

[301] (High Court, 16 July 1971).

[302] Henchy J distilled the rationale for this rule—and the principle of a no-scheme rule in general—in *In Re Murphy* [1977] IR 243 at page 254:

> The reason for [rule 13] is plain. It is to ensure that the acquiring authority will not have to pay more for the land than would an ordinary purchaser if a local authority development were not overshadowing this or other land. In other words, local authority interest—actually existing or even possibly impending—in land for development purpose is not allowed to trigger off increased land values in compulsory acquisitions. Local authorities are assured that they will not inflate land values against

[5.60] The drafting on this point is much simpler than the analogous provisions in English law. There is, therefore, less of a gulf between the judicial and statutory versions of the "no-scheme rule" in Ireland than there was in England and Wales prior to 2017.[303] In *In Re Deansrath Investments* Budd J took the view that rule 13 was, in effect, a statutory version of the *Pointe Gourde* principle. He considered that paragraph (a) of the rule was a modified version of *Pointe Gourde* and paragraph (b) was an innovation in Irish law that went further than the judicial rule, widening it to cover potential schemes.[304]

### (c) Ambiguity on the meaning of "scheme" or "proposal"

[5.61] Because of the lack of case law on this point in this jurisdiction, determining the meaning of "scheme" for the purposes of the *Pointe Gourde* principle, or "proposal" (paragraph a) or "scheme" (paragraph b) of development for the purposes of rule 13, does present some difficulty. To take two examples:

(a) in *In Re Deansrath Investments*[305] it was held that rule 13 precluded an arbitrator from taking into account value added by a development "in the full sense" (for example, a housing development) and did not preclude taking into account value added by "particular works of a subsidiary nature" (in that case, works related to the provision of services by the local authority);

(b) in *In Re Murphy*[306] it was held that rule 13 precluded an arbitrator from taking into account the Minister's willingness (or unwillingness) to rezone land in light of a particular scheme pursued by a compulsory purchase order.

[5.62] Galligan and McGrath also note that *Deansrath* and *Murphy* suggest opposite conclusions with respect to taking into account the potential for private

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> themselves if they are assiduous in carrying out, or even in considering carrying out, the development of land. This, if one may say so, is a common-sense rule for, if it did not apply, the compulsory acquisition of land for housing and other socially desirable purposes would be cramped by the fact that from the time a local authority showed an interest in developing a particular piece of land they would as a result have to pay not only a higher price for the land than it was worth before they cast their eye on it but a consequentially inflated price for any other land which could be said to be enhanced in value by the proposed development. Compulsory acquisition could be effected only on prohibitively high terms. This would not be in the public interest.

303 The rule was recast by the UK Neighbourhood Planning Act 2017, which amended the Land Compensation Act 1961 (England and Wales) to provide a more detailed framework for disregard of the scheme.

304 [1974] IR 228 at pages 243-44.

305 [1974] IR 228.

306 [1977] IR 243.

development of the land.[307] In *Deansrath* the Court assumed that if the land were suitable for development by a local authority then, all other things being equal, it was suitable for development by a private developer and this could be taken into account when determining compensation. By contrast, in *Murphy* the Court noted, in holding that the Minister's decision regarding the zoning of the lands must be disregarded, that the Minister's decision would not "cast[] any light on the development potential of the land if it remained in private hands".[308]

[5.63] The Commission considers that the principal issue under Irish law is that the "no-scheme" rule is under-specified. While the courts imported the *Pointe Gourde* principle, there is little case law in this jurisdiction elaborating on it and what case law there is tends to (as the English courts did with section 6 of the Land Compensation Act 1961) identify it as coextensive with the statutory provisions (rule 13 of the 1919 Act rules in the Irish case). Rule 13 itself is relatively thin and, as argued above with reference to the *Deansrath* and *Murphy* cases, it can generate ambiguity because of that thinness.

[5.64] The more developed statutory rules proposed by the Law Commission, and those in the Land Compensation Act 1961 (which partly implement the Commission's recommendations), would be an improvement at least in terms of certainty and precision on the current under-specified rules. These rules give effect to the same policy as has been embraced in both the Irish legislation and case law. The Commission therefore considers that they would be an appropriate basis on which to formulate a modern and codified statement of the "no-scheme rule" in Irish legislation.

[5.65] Rule 13 goes further than the *Pointe Gourde* and "no-scheme" rule as it encompasses potential schemes. This is an element of Irish law in respect of which the Commission does not recommend reform. It is intended to retain the rule and, as such, the Commission has included it in its more general codification of the no-scheme rule.

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[307] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 28.66.

[308] *In re Murphy* [1977] IR 243 at page 253. Henchy J also considered that "[t]he purposes of the [Housing Act 1966]—for which purposes alone land may be compulsorily acquired under the Act—are so socially orientated, so exclusively within the province of a housing authority, and so much under the surveillance of the Minister that the Minister's willingness to vary a development plan made under s. 19 of the Local Government (Planning and Development) Act, 1963, so as to effectuate a compulsory purchase order made for those purposes, could not be considered a pointer as to how the Minister might exercise his appellate powers if a development application were made in respect of the same lands by a private person. The determining considerations would be radically different".

**R 5.4** **The Commission recommends that** the "no-scheme" rule should be codified and set out in more detail than currently obtains under rule 13 of the 1919 Act.

### (d) The "disregard of special suitability" rule: rule 3

[5.66] Rule 3 of the 1919 Act requires that the "special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority".

[5.67] This rule is almost completely identical to its English counterpart in section 5 of the Land Compensation Act 1961,[309] which substantially re-enacted the basic 1919 Act rules. This makes the very considered analysis of that rule by the Law Commission of England and Wales potentially helpful to this Commission's consideration of the rule.

[5.68] The Law Commission was strongly critical of the rule, which it considered as a part of a suite of statutory "no-scheme" rules in Appendix D of its Report.[310] It took the view that the rule had "little remaining purpose" since it had been progressively narrowed by statute[311] and case law. It identified five key restrictions arising from the case law:

(a) the "adaptability" must be a quality of the subject land itself, not a quality of its products,[312] or of the nature of the interest;[313]
(b) "special" implies something "exceptional in character, quality or degree", rather than qualities shared with other possible sites;[314]
(c) the purpose requiring use of statutory powers must relate to the subject land, not to other land;[315]

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[309] The re-enactment of rule 3 in the 1961 Act substituted "the requirements of any authority possessing compulsory purchase powers" for the phrase originally in the 1919 Act "the requirements of any Government Department or any local or public authority".

[310] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071) at paras D.93 to D.97.

[311] In England and Wales the Planning and Compensation Act 1991 removed the "requirements of a special purchaser" aspect of the rule: see Part I of Schedule 15 and Part III of Schedule 19 of that Act.

[312] Citing *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565.

[313] Citing *Lambe v Secretary of State for War* [1955] 2 QB 612.

[314] Citing *Batchelor v Kent CC* [1989] 59 P&CR 357 at page 362.

[315] Citing *Hertfordshire County Council v Ozanne* [1991] 1 WLR 105 at page 111.

(d) the need for general forms of consent, such as planning permission or stopping-up orders, is not sufficient to bring the rule into play;[316]

(e) the "market" may include a mere speculator, with no direct interest in the use of the land.[317]

[5.69] There is little Irish case law on this rule, save a mention of it in *Deansrath* making clear that the rule has a relatively narrow field of application.[318] Galligan and McGrath note Lord Nicholls' pronouncement in *Waters v Welsh Development Agency*[319] that the rule was effectively redundant but they consider that this conclusion "may be an overstatement, at least in respect of this jurisdiction".[320]

[5.70] While it is true that the rule has not been subject to as restrictive interpretation as in the English cases, there is effectively no indigenous jurisprudence on its interpretation and it is unclear how frequently it is in fact used.

[5.71] The Law Commission of England and Wales recommended that the "disregard of special suitability" rule should be repealed and incorporated into a more general and modern statement of a general "no-scheme" rule. As this Commission has recommended a codified statement of the "no-scheme" rule, it also considers that the "disregard of special suitability" rule, to the extent that it has any ongoing relevance, would be provided for in that more general "no-scheme" rule and so it should not be specially provided for in its own, separate rule.

**R 5.5** **The Commission recommends that** clause 1 of rule 3 (disregard of special suitability) should be subsumed into a more general "no-scheme" rule.

316 Citing *Hertfordshire County Council v Ozanne* [1991] 1 WLR 105 at page 112.

317 Citing *Blandrent Investment Developments Ltd v British Gas Corporation* [1979] 2 EGLR 18 at page 22.

318 *In Re Deansrath Investments* [1974] IR 228 (Budd J) at page 248 it is stated that: "[R]ule 3 should be construed in such fashion that it does not impinge on the wording of the basic rule 2 unless the wording of rule 3 and its clear intendment indicate otherwise. In that light I must consider the true meaning of rule 3. It would seem to me that, on their true construction, the words "if that purpose is a purpose to which it could be applied only in pursuance of statutory powers" refer only to such purposes as actually require a particular statutory power to enable a particular purpose to be carried into effect—such as the making of a railway or the like."

319 [2004] 2 All ER 925.

320 Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 28.36.

# 6. Injurious affection and severance

## (a) General

[5.72] Injurious affection is damage or loss caused by the compulsory acquisition of the owner, lessee or occupier's land to land that is left to them after the compulsory acquisition.[321] Section 63 of the 1845 Act recognises, but does not define, injurious affection and severance. As a first step, a compensation code should expressly provide for these heads of compensation. The Law Commission's definitions of the concepts for this purpose are very helpful and could be used in this jurisdiction with only slight modification:

> [severance is] any decrease in the value of any interest of the claimant in any part of the retained land attributable to its severance from the subject land;
>
> [injurious affection is] any decrease in the value of any interest of the claimant in any part of the retained land attributable to the nature, carrying out, or expected use of the works for which the land is acquired.

[5.73] The definition of "injurious affection" given above incorporates a reversal of the *Edwards* rule (discussed further below). As the Commission does not recommend that this rule be reversed under Irish law, it adopts a modified definition of "injurious affection" in its proposed Bill, capturing "any decrease in the value of any interest of the claimant in any part of the retained land attributable to the construction of works on subject land acquired from the claimant and subsequent user of that land".[322]

[5.74] Since both injurious affection and severance pertain to land that is retained by the owner, another aspect of definition pertains to delineating the land to which these rules apply. While section 63 of the 1845 Act is not explicit on the test to be used, other sections of that Act describe other land being land "held with" the acquired land[323] and this requirement is what has been adopted in the case law for severance and injurious affection. What it means for land to be "held with" other land has been interpreted relatively loosely. In *Cowper Essex v Acton Local Board* Lord Macnaughten set out the test as being whether

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[321] For a recent consideration of injurious affection (in the specific context of acquisition of a wayleave by the ESB) see *ESB v Good* [2023] IEHC 83.

[322] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed (Bloomsbury Professional 2013) at para 30.04.

[323] For example, section 49 of the Lands Clauses Consolidation Act 1845 speaks in terms of the "value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith".

"the unity of ownership conduces to the advantage or protection of the property as one holding".[324]

[5.75] In its Issues Paper the Commission queried whether injurious affection should be retained as a head of compensation. There was clear support among consultees for its retention as a key aspect of compensation and so the Commission is of the view that it should be kept.

### (b) Does the "no-scheme" rule apply to retained land?

[5.76] Rule 13 of the 1919 Act rules requires that an arbitrator, in assessing compensation, shall disregard "the existence of proposals for the development of the land or any other land". The reference is to compensation in general, not compensation under a specific head. It is therefore somewhat unclear whether rule 13 should apply to injurious affection and severance.

[5.77] As far as the judicial rule goes, the Court of Appeal made the very logical point in *English Property Corporation v Kingston LBC* that the *Pointe Gourde* principle has no application to retained land on the basis that there is, by definition, no proposed scheme of development in respect of that land.[325] The Law Commission of England and Wales, also refusing to apply the no-scheme rule to retained land, observed that "[i]njury to retained land … does not require any hypothetical assumptions; it is a question of causation".[326] It follows that no-scheme rules premised on hypothetical (and counterfactual) cancellation of the scheme have no application to retained land.

[5.78] It is undesirable that the statutory rule and the judicial rule should pull in two separate directions. For the reasons given in *Kingston* and by the Law Commission of England and Wales, the Commission considers that the "no-scheme" rule should not apply to the assessment of compensation for injurious affection or severance of retained land.

**R 5.6** **The Commission recommends that** the "no-scheme" rule should apply only to the market value assessment of acquired land and not the assessment of loss to retained land under the "injurious affection" or "severance" heads of compensation.

[5.79] The Issues Paper queried whether, if injurious affection were retained, a provision to offset betterment should accompany it. This would reduce an owner's compensation if a part of their retained land increased in value

[324] (1889) 14 App Cas 153 at page 175.

[325] *English Property Corporation v Kingston LBC* (1999) 77 P&CR 1.

[326] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071) at para 7.46.

because of the scheme. Observations on this question were more mixed, with views both for and against betterment offset.

[5.80] The Commission proposes that only in cases where an owner is advancing a claim for a reduction in value of their land should a betterment offset apply. The logic of this is simple: if an owner invites review of the effect of the scheme on their retained land, then the Tribunal must take the full effect of the scheme into account. To allow an owner to recover for the loss to their land but to keep a separate uplift in value to that land, or other retained land, effectively allows a kind of double recovery. However, if an owner does not seek recovery for injurious affection or severance, then it should not be open to the Tribunal to deduct betterment value from other heads of compensation.

**R 5.7** **The Commission recommends that** offset for betterment should be retained in a modern compulsory acquisition code; however, the offset should only apply in cases where an owner seeks compensation for a reduction in value of their retained land.

### *(c)* Lands not held with the acquired land—the *McCarthy* Rules

[5.81] The courts have identified a limited right to compensation for injurious affection in respect of other land—that is, land not "held with" the acquired land—under section 68 of the 1845 Act. This right is governed by what have come to be known as the "*McCarthy* rules".[327] These rules are as follows:[328]

(a) the loss must result from an act made lawful by statute;[329]
(b) the loss must be such that in the absence of statutory powers it would have given rise to a cause of action;[330]
(c) the loss must arise from physical interference with the land or with a right enjoyed with it, and must result in depreciation of the value of the owner's land;

[327] Named for the leading case *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. See also the more modern statement of the rules by the House of Lords in *Wildtree Hotels v Harrow London Borough Council* [2001] 2 AC 1.

[328] Statements of the rules vary in cases and textbooks. The statement in the text here is taken from Honey, Pereira, Daly, Clutten, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at pages 557-563.

[329] If the act(s) done by the acquiring authority are unauthorised the claimant's remedy will lie in suing that authority for breach of statutory powers (see for example *Cloves v Staffordshire Potteries Waterworks Co* (1872) 8 Ch App 125) or negligence (see for example *Geddis v Bann Reservoir (Proprietors)* (1878) 3 App Cas 430).

[330] Thus, for example, if the works interfere with the claimant's view from their property the loss will, all other things held equal, not be recoverable because there is traditionally no right to a view as an easement (as a distinct to a right to light, which may be available).

(d) the loss must arise from the execution of the authorised works and not from their use.

[5.82] Condition (a) is a condition shared with a claim for injurious affection for land "held with" acquired land. The Law Commission observed that condition (b) is effectively the basis for why compensation is just in these cases—it would be unfair on the owner if statutory powers prevented them from otherwise succeeding in an action they would have been able to maintain.[331]

[5.83] Since the *McCarthy* rules govern this area the most straightforward approach to codification would be to consolidate these rules in appropriately modern statutory language.

**R 5.8** **The Commission recommends that** the *McCarthy* rules—which govern the availability of compensation for injurious affection of lands not held with acquired land—should be placed on modern statutory footing.

### (d) The *Edwards* principle

[5.84] In a line of English authorities, culminating in the leading case *Edwards v Minister of Transport*,[332] a rule was established that, with respect to compensation for injurious affection on retained land, such compensation may be claimed only in respect of work done on, or use made of, the land taken from the owner, lessee or occupier by the acquiring authority. The conditions of this rule are interpreted quite strictly so any reduction in value of the owner, lessee or occupier's retained land owing to either work done on, or use made of, other land (that is, land other than land acquired from the owner, lessee or occupier themselves) is non-recoverable, even if this work or use does in fact lessen the value of their land.

[5.85] Donovan LJ gave the following example in *Edwards* of the rule in action:

> If a public authority acting under statutory powers constructs a highway opposite my house and takes none of my land for the purpose, I cannot claim compensation for any diminution of value of my house caused by the noise and other inconveniences inflicted by the traffic. If, on the other hand, part of my frontage is compulsorily acquired and made part of the new highway, the position is different. Then I may claim not only the value of the land taken but also something in respect of any consequential diminution of value of my house. In

[331] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071) at para 11.6.

[332] [1964] 2 QB 134.

> assessing this latter claim, however, regard must be had only to things done on the land taken from me.

[5.86] The *Edwards* principle has proved contentious. It was overturned by statute in England and Wales: section 44 of the Land Compensation Act 1973 allows an owner to recover for loss in respect of the whole of the works or use, not just works on, or use of, their retained land. When the matter came before it, the High Court of Australia declined to follow the *Edwards* case.[333] It is inconsistently followed in Canadian law, with some Acts embracing it[334] and others rejecting the restriction it places on injurious affection claims.[335] It has also been subject to some academic criticism in that jurisdiction at the level of principle; Todd has claimed that it is:

> …inconsistent with the conceptual basis of compensation where a portion of land is expropriated. An owner is deemed to be a willing vendor of the portion and entitled to compensation for the market value of it and any economic loss (injurious affection) caused to the remaining land as a result of the construction or use of works on the expropriated portion. However, a prudent, informed and willing vendor would not sell a portion of land at a price that did not take into account the total decrease in value of the remaining land whether that decrease was caused by the construction or use of works wholly or only partially on the land which was originally his.[336]

[5.87] In this jurisdiction, the Supreme Court recently considered *Edwards* in *Chadwick v Fingal County Council*.[337] In that case the Supreme Court upheld the rule, saying that allowing recovery for injurious affection caused by work or acts done on other lands would require very clear statutory language and this type of recovery was not clearly contemplated under section 63 of the

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[333] *Marshall v Director General of Transport* [2001] HCA 37.

[334] The federal Act, Manitoba, New Brunswick, Nova Scotia and Ontario all have codified versions of the Edwards rule: Law Reform Commission of Manitoba, *Creating Efficiencies in the Law: The Expropriation Act of Manitoba* (2019) at page 6.

[335] British Columbia, Alberta, Prince Edward Island and Yukon all do not restrict injurious affection claims in the way prescribed by *Edwards*: Law Reform Commission of Manitoba, *Creating Efficiencies in the Law: The Expropriation Act of Manitoba* (2019) at page 6. The Alberta courts were critical of the rule in *Landex Investments Ltd v Red Deer (City)* [1991] 6 WWR 275 (ABCA) and *Sabo v AltaLink* 2022 ABQB 156.

[336] Todd, *The Law of Expropriation and Compensation in Canada* 2nd ed (Carswell 1992) at page 340.

[337] [2007] IESC 49, [2008] 3 IR 66.

1845 Act.[338] Thus, while the Court did not opine on the policy merits or demerits of the *Edwards* rule, it did make it clear that it was implied by the language of the 1845 Act and the Court was unwilling to impute other meaning to what it considered clear statutory language.

[5.88] Both Fennelly and Kearns JJ also made some remarks on the constitutionality of the section with regard to both property rights and equality. Since the law at present allows an owner to recover in circumstances where they would not otherwise be able to recover, both judges indicated that a constitutional challenge to section 63 would be unlikely to succeed.

[5.89] Section 63 does not breach property rights because the right of recovery under that section gives to a property owner more than they would otherwise be entitled to; it allows them to recover even where they would have no cause of action in tort.[339] Since the property owner is, from the point of view of property rights, better protected under the section, it follows that a successful challenge on this ground is unlikely.

[5.90] Regarding the right to equality, section 63 is not prejudicially unequal between owners and neighbours because, in fact, the *Edwards* rule puts the owner in the same situation as their neighbours: they can only claim for compensation in respect of work done on, or use of, land retained by them. If the owner could claim for compensation in respect of the devaluation of their land in respect of the full work, this would advantage them with respect to a neighbour whose land was not taken for the work, even though that neighbour's land is still devalued by the works. That neighbour would, instead, have to advance a nuisance or other tort claim in which they would be unlikely to succeed compared to the owner's statutory claim under a modified section 63.

[5.91] Although the remarks of both the High and Supreme Courts with respect to the equality argument are *obiter*, both Courts expressed the view that, in fact, a reversal of the *Edwards* rule might be unconstitutional for breaching the guarantee of equality in Article 40.1. In the Supreme Court Kearns J quoted with approval the judgment of O'Neill J in the High Court where the latter judge remarked:

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[338] The Supreme Court also clarified, in line with long-standing English authority, that there is no requirement that the damage caused by the acquiring authority would have been independently actionable. The only connection needed is that the acts done by the acquiring authority result from the exercise of the authority's statutory powers. If the act is not authorised, or arises from negligence, then the landowner's remedy is to sue in tort.

[339] *Chadwick v Fingal County Council* [2007] IESC 49 at para 36, [2008] 3 IR 66 at para 37 (Fennelly J).

> [W]ere s. 63 to be interpreted as permitting the recovery of the entire depreciation of the claimants' property because of the motorway scheme, that would be an infringement of the guarantee of equality before the law contained in that Article, in the sense that neighbours of the claimants who could be affected in exactly the same way by the motorway scheme or indeed perhaps even worse, would have no right to have any compensation if no land of theirs was taken and would have to suffer any diminution in the value of their properties without compensation. There would, in my view, be a manifest and unjustifiable inequality in the treatment of those persons vis-à-vis the claimants, if s. 63 were to be interpreted in the manner contended for by the claimants.

[5.92] Given these *dicta* casting doubt on the constitutionality of a reversal of the *Edwards* rule, the Commission considers that the rule should be retained as-is and codified in statutory form.

**R 5.9** **The Commission recommends that** the rule in *Edwards* (applied in this jurisdiction by *Chadwick*) should not be reformed but should be formulated in appropriate statutory language and codified as a part of the Commission's Bill.

### (e) Power to compel purchase of severed holdings

[5.93] Under section 93 of the 1845 Act, if lands, aside from those situated in a town or built upon, are divided by the acquisition in such a manner as to leave less than half a statute acre on either side, the owner may require the acquiring authority to acquire that land. There is an exception, however, where the land remaining can be conveniently combined with adjoining land and where the acquiring authority provides such accommodation works, such as the removal of fences and the levelling of sites, in order to combine the land. Section 94 provides that if it would cost more for the acquiring authority to conduct the accommodation works such as a bridge, culvert or any other communication between such lands, than purchase the land, the acquiring authority may require the owner to sell the land to the acquiring authority, the price to be determined by arbitration in the event of a dispute.

[5.94] In its Issues Paper the Commission queried whether the half a statute acre standard should be revised. Of the relatively few submissions that addressed this point directly, most recommended no change or converged expressly on the standard of 0.5 of an acre.

[5.95] As consultees did not highlight any specific issues, the Commission sees no reason to reform these provisions and accordingly makes no recommendation.

## 7. Disturbance

[5.96] Disturbance, or what might be termed "consequential loss" in more modern language, is intended to compensate the owner for the inconvenience of the acquisition such as the personal loss imposed on the owner by the forced sale or incidental loss in connection with a business or the cost of reinstatement. Compensation for disturbance should be assessed as part of the value to the owner and includes losses that are not directly based on the value of the land.

[5.97] In *Gunning v Dublin Corporation*,[340] Carroll J held that, although the 1845 Act did not make express provision for compensation for disturbance, this was provided for in Rule 6 and was consistent with the principle of equivalence. However, there are three conditions or limitations on recovery for disturbance:

(1) the owner should be able to recover personal loss imposed on them by the forced sale—otherwise they will not be fully compensated—but they should recover neither more nor less than their total loss,
(2) where other lands of the owner are not affected by the compulsory acquisition only one price is paid, but the fair price to which the owner is entitled will include the market value of the land together with personal loss sustained in respect of their ownership or possession of the lands, and
(3) where the value of the land is to be ascertained on the date of service of the notice to treat, the element of compensation for disturbance is not ascertained by reference to estimated losses on that date but is ascertained when the award is made by reference to actual losses already incurred, with estimated future losses, where relevant.

[5.98] Compensation on the basis of disturbance is based on the principle of equivalence. The principal elements of a valid disturbance claim were set out in *Dublin Corporation v Underwood* as follows:

(a) the loss must have been sustained or must reasonably be expected to be sustained in the future,
(b) the loss must flow from the compulsory acquisition,
(c) the loss must not be too remote and
(d) the loss must be the natural, direct, and reasonable consequence of the dispossession of the owner.[341]

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[340] [1983] ILRM 56.

[341] *Dublin Corporation v Underwood* [1997] 1 IR 69 at 87-91. These criteria are not dissimilar to those identified by the Privy Council in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111:

[5.99] At present under Irish law the general rule is that only losses incurred after a notice to treat are recoverable. However, losses incurred before a notice to treat may be recoverable if the following four criteria are satisfied:

(1) the steps taken in mitigation are clearly referable to an anticipated notice to treat,
(2) an inevitable loss consequent on the notice to treat has been avoided,
(3) the steps taken, while not obligatory, are reasonable and prudent and have not been taken for a collateral purpose (i.e. it must be possible for an arbitrator to say that but for the compulsory acquisition the owner would still be in their premises and would not have acquired the other premises); and
(4) the cost of the steps taken in mitigation or losses resulting from these steps do not exceed the amount which would be awarded if no steps had been taken until after service of the notice to treat.[342]

[5.100] There would be some merit to aligning the date from which disturbance costs may be recovered with the date from which the duty to mitigate commences. The Law Commission of England and Wales opted for "date of first notice" in respect of both, in line with a government policy paper in that jurisdiction. Irish law at present activates the duty to mitigate from the service of notice to treat, which is later in the process. While putting the duty to mitigate at an earlier point in the process would, in a sense, disadvantage owners by placing a burden on them at an earlier point, it would comparatively advantage them in that they could recover their disturbance and consequential costs from an earlier point in the process. This would open the possibility of recovering costs associated with the confirmation process, for example, and so it does potentially risk increasing the cost of the overall system.

[5.101] On a final note, the Commission stresses that if compensation has an element of loss arising from the value of the land, then it should be properly

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(a) there must be a causal connection between the compulsory acquisition and the loss claimed,

(b) the loss must not be too remote, and

(c) the claimant must behave reasonably to eliminate or reduce his loss.

See Honey, Pereira, Daly, Clutten, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at para 2024.

[342] *Gunning v Dublin Corporation* [1983] ILRM 56. Carroll J also noted that a landowner who does incur cost prior to the service of notice to treat bears two risks:

(1) that the notice to treat will never be served, in which case they can make no claim in respect of costs incurred, and

(2) that the cost of mitigation may exceed the amount which could have been awarded if no steps were taken, in which case they cannot recover more than the amount of the anticipated loss that has been avoided.

accounted for under the market value, severance or injurious affection heads. Disturbance or consequential loss should only be for non-land value. This is in fact clear on the face of rule 6 as it stands, but it would be even more clear built in as a clear condition for an award of disturbance.

**R 5.10** **The Commission recommends that** the rules relating to disturbance should be codified under the general heading of "consequential loss".

### (a) Disturbance of business premises: relocation and mitigation

[5.102] An issue that may arise, and that has arisen in England and Wales, relates to circumstances where an owner is unable—for reasons outside their control—to properly mitigate their losses. A case exemplifying this difficulty is *Bailey v Derby Corporation*.[343] In *Bailey*, the owner was a business owner whose premises were compulsorily acquired. He purchased alternative premises from which he could carry out his business; however, due to ill health he was unable to in fact carry out his business and he had to let the premises to another company. He claimed compensation on the basis that his business had been extinguished. The Lands Tribunal found that, had he been in good health, he would have been able to relocate the company to the new premises and so it refused to compensate him on an extinguishment basis.

[5.103] In its review of this area of the law, the Law Commission noted that this case had come under criticism for what seems like a harsh result. While there were some subsequent changes to English law that addressed the issue in *Bailey* quite directly[344] the Law Commission recommended that rather than solving *Bailey* by creating exceptions to the general rules of disturbance, the rules themselves should be formulated so as to prevent the result in *Bailey* occurring again.

[5.104] The Law Commission recommended that the presumption and preference should be that businesses are relocated rather than extinguished.[345] It endorsed a modified version of the principles articulated in *Shun Fung*, which were:

(1) can the business be relocated, or has it effectually been extinguished?
(2) does the owner intend to relocate?

[343] [1965] 1 All ER 443.

[344] Section 46 of the Land Compensation Act 1973 (England and Wales) makes provision for disturbance costs in respect of businesses carried on by persons over the age of 60.

[345] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071) at para 4.37.

(3) would a reasonable business owner relocate the business?[346]

[5.105] The Law Commission expressed some doubt about the reasonable business owner part of this test for the reason that it might not scale well to smaller or family-owned businesses. In those cases a strongly commercial standard might suggest extinguishment even where the business is the owner's sole means of earning a livelihood.[347] It therefore preferred a straightforward "reasonableness" standard: in effect, whether, all things considered, it is reasonable to relocate the business. Commercial factors would be a part, but not the entirety, of this enquiry.

[5.106] In its 2017 Issues Paper, the Commission asked whether compensation paid in respect of a business should be the lesser of the cost of moving or the cost of closing the business down. The Commission now considers that there should not be one absolute rule that a business owner should only ever get the lesser cost between extinguishment and relocation.

[5.107] The Law Commission's proposals strike a good balance between a presumption of relocating businesses to minimise economic disruption, as well as simple disruption to people's livelihoods, with an acknowledgement that in some cases extinguishment will be more appropriate. This will be a determination that should be made on a case-by-case basis having regard to the circumstances of each business and each owner.

**R 5.11** **The Commission recommends that** provision should be made for business owners whose land is compulsorily acquired to be compensated for the extinguishment or relocation costs for that business by reference to reasonableness and that this should be set out in statute.

### (b) Other aspects of disturbance

[5.108] Galligan and McGrath note that it would be "foolhardy" to attempt a definitive list of disturbance items; however, they do list the following main sources of disturbance claims:

(a) the cost of seeking and acquiring alternative premises,[348]
(b) the cost of adapting new premises

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[346] *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at page 128.

[347] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (2) Compensation* (2002, CP 165) at paras 4.29-4.33.

[348] In a residential context this can extend to the legal and surveyor's fees in purchasing a replacement dwelling, cost of moving furniture, having curtains or carpets altered or replaced, travelling expenses and even translator's fees where required: see Honey, Pereira, Daly, Clutten, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at para 2041.

(c) removal expenses
(d) double overheads[349]
(e) increased overheads (only where unavoidable in the circumstances)[350]
(f) time and trouble[351]
(g) loss of goodwill.

[5.109] An important constraint on disturbance compensation is what is termed the "value for money" constraint—if an owner ultimately has to pay more for replacement arrangements and property than they receive for the compulsory acquisition they cannot claim this extra amount in compensation as they are presumed to have obtained value for money in paying that extra amount:[352]

> there is a presumption in law, albeit a rebuttable presumption, that the purchase price paid for the new premises is something for which the claimant has received value for money ... If the claimant has made a bad bargain and has paid a great deal more for the new premises to which he is moving than they are really worth, that is not something for which the acquiring authority can properly be charged.[353]

[5.110] This presumption is reflected in the Law Commission's code on consequential loss where it provides that "the compensation [for consequential loss] may be reduced to such extent (if any) as the Tribunal may determine to reflect any improvement in the facilities so obtained over those replaced".

[5.111] This Commission is also of the view that the "value for money" constraint should be reflected in a statutory codification of disturbance principles and so it endorses the language chosen by the Law Commission of England and Wales in its draft code.

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[349] This reflects that in many cases—particularly in commercial contexts—the owner will have two premises simultaneously: the old premises subject to expropriation and the new premises to which they are relocating. They may be liable for rent, utilities, etc at both premises for a period of time. As these costs will generally satisfy the *Underwood* criteria, they will be recoverable.

[350] *J Bibby & Sons Ltd v Merseyside County Council* (1979) 39 P&CR 53. Notably, the claim in this case failed because the claimants were not able to show that they had not derived some benefit from the increased expenditure of taking out premises larger than was required (and in this case sub-letting part of those premises).

[351] *Minister of Transport v Pettit* (1968) 20 P&CR 344.

[352] Honey, Pereira, Daly, Clutten, *The Law of Compulsory Purchase* 4th ed (Bloomsbury Professional 2022) at para 2042, citing *Harvey v Crawley Development Corporation* [1957] 1 QB 485 at 494.

[353] *Service Welding Ltd v Tyne & Wear County Council* (1979) 38 P&CR 352.

**R 5.12** **The Commission recommends that** the "value for money" constraint on disturbance compensation should be reflected in a statutory code, providing that such compensation may be reduced to reflect improvement in facilities achieved by their replacement.

## 8. Equivalent reinstatement

[5.112] Under rule 5 of the 1919 Act rules (as modified by rule 7 in certain cases), an owner may apply to be compensated on the basis of equivalent reinstatement, rather than market value, where the land compulsorily acquired from them is:

(a) devoted to a particular purpose,
(b) there is no general demand or market for that purpose, and
(c) reinstatement in some other place is *bona fide* intended by the owner.

[5.113] Equivalent reinstatement arises less frequently than market value because of the relative strictness of the criteria above. It is applied most often in cases such as charities, churches or other not-for-profit enterprises that may have very specific requirements from their premises.

[5.114] One issue that has arisen in this jurisdiction—although only in a single reported case—is the refund of compensation where reinstatement is not in fact carried out. In *Dublin Corporation v The Building and Allied Trade Union* (the "Bricklayers' Hall" case)[354] the defendant union was awarded by an arbitrator in 1982 the cost of equivalent reinstatement of its premises, which was approximately 2.5 times the basic market value of the land. Almost 10 years later, in 1991, no attempt at reinstatement had been made by the defendant and the plaintiff corporation claimed that the defendant had unjustly enriched itself by claiming on the basis of equivalent reinstatement of its premises and then not in fact carrying out the reinstatement.

[5.115] While the High Court (Budd J) found in favour of the plaintiff, the Supreme Court reversed this on appeal. In the Supreme Court's view, the arbitrator's finding (to the effect that payment should be made on the basis of equivalent reinstatement) was *res judicata* and could not be disturbed by the Court.

[5.116] The Law Commission of England and Wales also considered the Bricklayers' Hall case in its review of compulsory acquisition law. It noted that its attention had not been drawn to any similar case under English law and so this

[354] [1996] 1 IR 468.

suggested it was not a common problem.[355] It observed that it may be the practice that where compensation is awarded for equivalent reinstatement it might be paid in stages as the reinstatement work proceeds or it may be made subject to an express condition that if the reinstatement work is not carried out then excess compensation must be repaid to the acquiring authority. It recommended that there should be express legislative provision to this effect.

[5.117] This Commission agrees with the proposal to make clear legislative provision for staged payments or conditions on compensation where equivalent reinstatement is the basis of compensation.

**R 5.13** **The Commission recommends** that there be express provision in statute that where compensation is granted to the owner on the basis of equivalent reinstatement, that payment may be—

(a) made in stages to the owner as the reinstatement work progresses,

(b) subject to a condition that excess compensation be repaid if the reinstatement work does not go ahead,

(c) both made in stages and subject to the condition in paragraph (b).

## 9. The "regard" rules: rules 8, 9, 10 and 14

[5.118] Rules 8, 9, 10 and 14 all require a property arbitrator to have regard to certain facts, if those facts obtain, when assessing market value. In all these cases, the prescribed facts would be relevant to any ordinary assessment of market value even were there no statutory "regard" provision and so it is arguable that none of these rules has any effect other than to operate as a salutary reminder of certain issues. The regard factors include:

(a) restrictive covenants (rule 8);
(b) restrictions on the development of land—
    (i) in respect of which compensation has been paid[356] (rule 9), and
    (ii) that could, without conferring a right to compensation, be imposed under any Act, or a regulation, order, rule or bye-law made under any Act (rule 10);

[355] Law Commission of England and Wales, *Towards a Compulsory Purchase Code: (1) Compensation* (2003, Cm 6071) at para 4.52.

[356] See Part XII of the Planning and Development Act 2000.

(c) contributions that a planning authority would have required as a condition precedent to developing the land[357] (rule 14).

[5.119] Each of these rules was inserted into the 1919 Act by the Local Government (Planning and Development) Act 1963. Several of them take account of what would have been, in the early 1960s, significant changes to property valuation arising from novel planning concepts. These concepts are no longer novel and the market some 60 years later has well learned how to account for them in property valuation. Thus, it is no surprise that in their commentary on each of these rules, Galligan and McGrath note that the rule in fact adds nothing to the concept of market value set out in rule 2.[358]

[5.120] Rules 8, 9, 10 and 14 all draw the arbitrator's attention to certain matters as an aspect of market value, but they are not constitutive of those matters being a part of market value. Each of them is a matter that any ordinary purchaser exercising reasonable prudence would investigate in relation to a property and they are matters that they would reasonably conclude affect the value of that property. As Galligan and McGrath conclude on the subject:

> When this legislation was drafted it may have been thought that the property market in Ireland was too unsophisticated to reflect in property values such unusual concepts as planning restrictions. Events since the passing of the Local Government (Planning and Development) Act 1963 do not support this view.[359]

**R 5.14** **The Commission recommends that** the matters referred to in the "regard" rules (rules 8, 9, 10 and 14) of the 1919 Act are now well-established aspects of the basic "market value" rule and so do not require re-enactment in a new code.

## 10. Additional payment for acquisition of a dwelling

[5.121] It is relatively common to have an additional payment to reflect elements of loss, in cases of expropriating dwellings, that would not otherwise be covered by disturbance. There is an element of intangible loss in displacement from one's dwelling. Under the law of England and Wales, sections 29 to 33 of the Land Compensation Act 1973 provide for home loss payments. The legislative

[357] See sections 48 and 49 of the Planning and Development Act 2000.

[358] Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* 2nd ed(Bloomsbury Professional 2013) chapter 28 *passim*.

[359] *Ibid* at para 28.74.

history of this provision was summarised in the judgment of Lindblom J in *R (on the application of Mahoney and Jones) v Department for Communities and Local Government*:

> The legislative history of home loss payments is described on behalf of the Secretary of State by Ms Susan Lovelock […]. Ms Lovelock says that home loss payments were introduced by the 1973 Act "because the Government considered that individuals should be entitled to payment for the personal grief or frustration of being forcibly displaced from their homes". She refers to the report of the Urban Motorways Committee to the Secretary of State for the Environment dated 11 July 1972, which recommended (in paragraph 12.19) that the legislation should include an additional payment for the occupiers of dwellings "in recognition of the real personal disturbance that is inflicted on them when they are required to move". The Government of the day accepted the committee's recommendation. Paragraph 36 of the White Paper of October 1972, "Development and Compensation – Putting People First", acknowledged that "[when] people's homes are acquired for public developments the occupiers who are obliged to uproot themselves suffer personal upset, discomfort and inconvenience", that "the loss of a home" was "something distinct from the value of the land and the bricks and mortar", and that "the principle of a lump sum payment …, quite independent of the payment for the interest acquired [was] right". It "therefore decided that where an authority wishes to acquire houses, whether for roads or for other public works, through compulsory purchase or with the backing of compulsory purchase powers, a home loss payment … should be paid to the occupier whether he happens to be the owner or a tenant …".[360]

[5.122] The main criteria for the making of a home loss payment are that the person occupies the dwelling as their main residence, has a right to occupy the dwelling, has been in occupation for a year ending with the date of displacement and is displaced from the dwelling as a consequence of the compulsory acquisition.

[5.123] The amount of a home loss payment under the Land Compensation 1973 is 10% of the market value of the acquired dwelling, subject to a maximum of £15,000 and a minimum of £1,500. These figures were inserted by an

[360] [2015] EWHC 589 (Admin) at para 8.

amendment to the 1973 Act in 1991[361] and have not been adjusted for inflation since. However, the Secretary of State may make regulations adjusting this figure.[362] This is similar to *solatium* (mental distress) damages under section 49 of the Civil Liability Act 1961 in Irish law. Since 1996 the maximum amount of *solatium* damages (given as £20,000 in the Act)[363] can be varied by the Minister for Justice by statutory order.[364] This was in fact done relatively recently—the Civil Liability Act 1961 (Section 49) Order 2014 designated the higher amount of €35,000 as the new cap.

[5.124] How much a home loss payment should be worth and which legal estates and interests it should attach raise questions of policy and economics that are outside the Commission's expertise. The Commission notes that such payments exist in other common law jurisdictions but it does not necessarily endorse that these payments should be a feature of Irish law. Given their commonness in other jurisidctions the Commission considers that they should be given further consideration by the Oireachtas.

**R 5.15** **The Commission recommends that** a home loss payment should be given further consideration in the context of compulsory acquisition law.

## 11. Certain rules of the 1919 Act spent

[5.125] Certain of the existing rules under the 1919 Act are spent. Two examples are the second clause of rule 3 and the entirety of rule 16. Rule 3 is set out below:

> The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: **Provided that any *bona fide* offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration**. [emphasis added]

[361] Section 68 of the Planning and Compensation Act 1991 (England, Wales and Scotland).

[362] Section 30(5) of the Land Compensation Act 1973 (England and Wales).

[363] Now €25,394.76.

[364] Section 2 of the Civil Liability (Amendment) Act 1996.

[5.126] It is safe to say that no *bona fide* offer for the purchase of land dated prior to 1919 would need to be brought to the attention of any living property arbitrator. This clause long ago lost its relevance.

[5.127] Rule 16 provides for compensation in cases where the purchase notice procedure under section 29 of the Local Government (Planning and Development) Act 1963 was used:

> In the case of land incapable of reasonably beneficial use which is purchased by a Planning Authority under section 29 of the Local Government (Planning & Development) Act 1963, the compensation shall be the value of the land exclusive of any allowance for disturbance or severance.

[5.128] Section 29 of the 1963 Act has been repealed and it has no analogue under the Planning and Development Act 2000. It therefore has no application.

**R 5.16** **The Commission recommends that** the second clause of rule 3 and the entirety of rule 16 of the 1919 Act, being spent, should be omitted from a codification of the rules of compensation for compulsory acquisition.

# APPENDIX A
# SUMMARY OF RECOMMENDATIONS

[A.1] This appendix contains a summary of all of the recommendations made by the Commission in this Report.

## Ch 1 Vesting Orders

**R 1.1** **The Commission recommends that** a new, standalone and simplified vesting order procedure replaces the existing notice to treat procedure.

**R 1.2** **The Commission recommends that** on the vesting date, as specified in the vesting order, the land is transferred to the acquiring authority in fee simple free from incumbrances.

**R 1.3** **The Commission recommends that** the vesting order model should include the following requirements:

(a) a vesting order shall be made within 12 months from the compulsory purchase order becoming operative,

(b) the vesting date cannot be earlier than 3 months from the service of a copy of the vesting order,

(c) the vesting date cannot be later than 6 months from the service of a copy of the vesting order, and

(d) the occupier loses possession on the vesting date.

## Ch 2 Advance Payment of Compensation

**R 2.1** **The Commission recommends that** the acquiring authority should be required to make an advance payment to an owner if:

(a) a vesting order has been made in respect of that owner's land or a notice of entry has been served on them, and

(b) the acquiring authority is satisfied that the owner holds the claimed title based on the information provided in the particulars of claim.

**R 2.2** **The Commission recommends that** the advance payment should be no less than 90% of the estimated full compensation as determined by the acquiring authority.

**R 2.3** **The Commission recommends that** any dispute on the amount of an advance payment should not affect the validity of the vesting order

**R 2.4** **The Commission recommends that** the acquiring authority shall, upon request, provide a reasoned statement providing a justification for reaching the compensation estimate.

**R 2.5** **The Commission recommends that** if the request for the advance payment has been made within 10 weeks from the service of the vesting order or notice to treat, then the advance payment must be made before the end of the date of taking possession, or, if later, within two months from the day on which the authority received the additional information, whichever is later.

**R 2.6** **The Commission recommends that** if the request for the advance payment has not been made within 10 weeks from the service of the copy of the vesting order or notice to treat, then the advance payment must be made within two months from the day on which the authority received the request or the additional information, whichever is later.

**R 2.7** **The Commission recommends that** the advance payment regime should apply to lands subject to a mortgage.

**R 2.8** **The Commission recommends that** if an owner of land subject to a mortgage requests an advance payment, the mortgagee must consent to it.

**R 2.9** **The Commission recommends that** the acquiring authority shall, in cases where the land is mortgaged, pay part (or all) of any advance payment directly to the mortgagee.

**R 2.10** **The Commission recommends that** if the total amount of the mortgages on the land does not exceed 90% of the estimated full compensation, the first portion of the advance payment is paid directly to the mortgagee(s) and the reduced portion is paid to the owner.

**R 2.11** **The Commission recommends that** if the total amount of the mortgages exceeds 90%, the full amount of the advance payment will be based on the market value of the land only and should be paid directly to the mortgagee(s).

## Ch 3 Owners who cannot be found or ascertained, and persons who fail to prove title

**R 3.1** **The Commission recommends that** the acquiring authority should be required to pay money into court where it is satisfied that a person (a "relevant person")—

(a) who holds title to the land or an interest in land subject to the vesting order who cannot be found or ascertained after reasonable inquiry by the acquiring authority, or

(b) served with a vesting order, who claims to hold title to the land or an interest, who fails to provide evidence to the satisfaction of the acquiring authority of such title.

**R 3.2** **The Commission recommends that** the sum paid into court should be the acquiring authority's estimate of the compensation payable in respect of the land compulsorily acquired.

**R 3.3** **The Commission recommends that** the acquiring authority should produce and preserve a reasoned statement of the estimate, to be given, where requested to the relevant person.

**R 3.4** **The Commission recommends that** the acquiring authority should pay the money into court within two months of the vesting date.

**R 3.5** **The Commission recommends that** a relevant person should make an application to the Court, on notice to the acquiring authority, to have the money released to them.

**R 3.6** **The Commission recommends that** when making an application to the Court, a relevant person should provide evidence to the court of their title to the land concerned.

**R 3.7** **The Commission recommends that** on the application of the relevant person, the Court may order the distribution of the money paid into court as compensation according to the respective estates, titles or interests of the relevant person, if satisfied as to title.

**R 3.8** **The Commission recommends that** where a relevant person considers that the money paid into court does not provide them with full compensation for their estate or interest in land, they may make an application, on notice to the acquiring authority, to the Tribunal within one month from the date the Court ordered the distribution of the money as compensation, to determine whether the money paid into court is sufficient or whether a further or lesser sum of compensation ought to be paid.

**R 3.9** **The Commission recommends that** where the Tribunal receives an application, it shall make a determination and:

(a) if it determines that a further sum of compensation ought to be paid to the relevant person, then the acquiring authority should pay the person the further sum no later than two months after the determination of the Tribunal, or

(b) if it determines that a lesser sum of compensation ought to be paid to the relevant person, then the relevant person should repay the excess amount to the acquiring authority no later than two months after the determination of the Tribunal.

**R 3.10** **The Commission recommends that** where money is paid into court, and an application is made by a relevant person to have money released, the costs and expenses payable to or by the acquiring authority or relevant person shall be at the discretion of the court.

**R 3.11** **The Commission recommends that** costs and expenses in respect of the determination by the Tribunal, shall be determined by the Tribunal and where the Tribunal determines that:

(a) the money paid into court is sufficient, the reasonable costs and expenses properly incurred shall be at the discretion of the Tribunal;

(b) a further sum ought to be paid by the acquiring authority, the reasonable costs and expenses properly incurred by the relevant person shall be paid by the acquiring authority;

(c) a relevant person is entitled to a sum lower than that which was paid into court, the reasonable costs and expenses properly incurred by the acquiring authority shall be paid by the relevant person.

**R 3.12** **The Commission recommends that** the acquiring authority should not be liable to pay interest on any money paid into court, or any further sum determined by the Tribunal, from the date it pays the money into court.

**R 3.13** **The Commission recommends that** in the case of a relevant person, the time limit for claiming compensation should be 25 years from the date the money is paid into court.

**R 3.14** **The Commission recommends that** where the money paid into court is not claimed within 25 years from the date the money is paid into court, the acquiring authority may make an application to the court, on notice to the relevant person where they are known to the acquiring authority, to have the money released to it.

## Ch 4 Determination of Compensation

**R 4.1** **The Commission recommends that** the following Acts should be repealed:

(a) The Acquisition of Land (Assessment of Compensation) Act 1919

(b) The Property Values (Arbitration and Appeals) Act 1960.

**R 4.2** **The Commission recommends that** the following statutory instruments should be revoked:

(a) The Acquisition of Land (Assessment of Compensation) Rules 1920 (SR&O No 600 of 1920)

(b) The Property Values (Arbitration and Appeals) Rules 1961 (SI No 91 of 1961)

(c) The Acquisition of Land (Assessment of Compensation) Fees Rules 1999 (SI No 115 of 1999).

**R 4.3** **The Commission recommends that** the property arbitrator function should be replaced with the Valuation Tribunal to determine compensation for land compulsorily acquired.

**R 4.4** **The Commission recommends that** the composition (including the number of members) of any division of the Tribunal to determine compensation should be at the discretion of the chairperson.

**R 4.5** **The Commission recommends that** information should be made available on the Tribunal's website to assist parties in engaging with the Tribunal in order to have compensation determined for land compulsorily acquired.

**R 4.6** **The Commission recommends that** reasoned determinations of the Tribunal in respect of compensation for land compulsorily acquired should be published on the Tribunal's website. The Tribunal should have the power to redact part or all of the personal data contained in a reasoned determination.

**R 4.7** **The Commission recommends that** where proceedings are held otherwise than in public, the Tribunal may decide to decline to publish the reasoned determination, or publish it in partial or redacted form only.

**R 4.8** **The Commission recommends that** the Tribunal should endeavour to make a determination of compensation within six months from the date of receipt of the application. This period can be given further consideration by the relevant stakeholders in the legislative process in the event that this recommendation is taken up.

**R 4.9** **The Commission recommends that** the Tribunal should be empowered to decide whether a document-based determination for compensation should be pursued in any given case, provided that submissions of both parties are sought and taken into account by the Tribunal before making a decision.

**R 4.10** **The Commission recommends that** proceedings to determine compensation for land compulsorily acquired should be conducted by the Tribunal without undue formality.

**R 4.11** **The Commission recommends that** proceedings to determine compensation should be conducted in public unless the Tribunal, upon its own motion or the application of either the owner or the acquiring authority, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public.

**R 4.12** **The Commission recommends that** the procedures of the Tribunal in determining compensation should, subject to the provisions of any governing primary legislation, be determined by the Tribunal by rules made by it, with the consent of the Minister, and that the rules of the Tribunal in relation to appeals determined by it within its jurisdiction, may be adapted and applied with modifications to determinations of compensation for land compulsorily acquired.

**R 4.13** **The Commission recommends that** an application to the Tribunal to determine compensation should be capable of being made, where the owner submitted particulars of claim, by either the owner or the acquiring authority, after the expiration of one month from the date the acquiring authority receives the particulars of claim, following service of a notice to treat or a copy of the vesting order.

**R 4.14** **The Commission recommends that** where the owner fails to provide the particulars of claim within the specified period in the notice to treat or copy of the vesting order, the owner or the acquiring authority may, one month after the expiration of that period, make an application to the Tribunal to determine a claim for compensation.

**R 4.15** **The Commission recommends that** a claim for compensation should be brought by the owner within 20 years from either (1) the date the acquiring authority entered into possession of the land, where a notice to treat was served or (2) the vesting date, where a vesting order was made.

**R 4.16** **The Commission recommends that** primary legislation should set out that an application to the Tribunal must be in writing and enclose either (1) where particulars of claim were submitted, a copy of any particulars of claim that were received by or submitted to the acquiring authority in response to a notice to treat or a vesting order, (2) where particulars of claim were not submitted, a statement of estimate from the acquiring authority or the owner depending on who is making the application. It should also provide that the applicant must send a copy of the application and all related documents to every other affected party.

**R 4.17** **The Commission recommends that** the form and content of the application to the Tribunal to determine compensation should be set out by the Tribunal in rules made by it, with the consent of the Minister.

**R 4.18** **The Commission recommends that** an application may be made to the Tribunal to consolidate claims related to—

(a) more than one interest in or attaching to the same land, where applications to the Tribunal in respect of each interest in the land have been made, or

(b) land held with other land, in circumstances where determining an award of compensation in respect of each claim would cause serious

and unfair prejudice to the awards if done in respect of each claim separately.

**R 4.19** **The Commission recommends that** an application to consolidate claims should be on notice to affected parties, who should be permitted to make submissions to the Tribunal in respect of the consolidation of claims. The Tribunal should have regard to any such submissions before determining whether it is expedient and appropriate to consolidate some or all of the claims in respect of which the application was made.

**R 4.20** **The Commission recommends that** where a dispute as to title arises between the parties before the Tribunal, the Tribunal should, on application of the acquiring authority, order a stay of the determination process.

**R 4.21** **The Commission recommends that** where the Tribunal orders a stay of the determination, the person claiming compensation may make an application to the Court to determine title.

**R 4.22** **The Commission recommends that** where the Tribunal is not able to determine a final amount of compensation for reasons connected to the non-completion of the works related to the compulsory acquisition, the Tribunal should be permitted to make an interim determination of compensation.

**R 4.23** **The Commission recommends that** where the Tribunal has made an interim determination, either the owner or the acquiring authority may make a subsequent application to the Tribunal to determine the remaining compensation, once it is possible to assess the remaining amount.

**R 4.24** **The Commission recommends that** the procedure for making an interim determination and a subsequent application to the Tribunal should be set out in rules made by the Tribunal.

**R 4.25** **The Commission recommends that** legislation should provide that the Tribunal shall order that the reasonable costs and expenses properly incurred by the owner shall be paid by the acquiring authority, unless the Tribunal is satisfied that there are good reasons for not doing so.

**R 4.26** **The Commission recommends that** in determining whether there are good reasons not to award the owner their costs and expenses, the Tribunal should have regard to the conduct of the owner including any failure to submit, or delay in submitting, particulars of claim or revised particulars of claim to the acquiring authority, or any other matter that the Tribunal considers relevant.

**R 4.27** **The Commission recommends that** the Tribunal should have regard to the costs and expenses incurred by the owner in connection with the valuation process including but not limited to:

(a) providing particulars of claim to the acquiring authority,

(b) seeking an advance payment from the acquiring authority,

(c) preparing for, and the hearing of, the determination, and

(d) considering an offer made by the acquiring authority to settle the compensation.

**R 4.28** **The Commission recommends that** where the acquiring authority has made an offer in writing of any sum as compensation to an owner and the sum awarded by the Tribunal to that owner does not exceed the sum offered, the Tribunal should, unless it is satisfied that there are good reasons for not doing so, order the owner to bear their own costs and expenses and to pay the costs and expenses of the acquiring authority in so far as they were incurred after the offer was made.

**R 4.29** **The Commission recommends that** legislation should give the Tribunal the jurisdiction to determine the costs (including legal costs) and expenses payable to the owner or the acquiring authority.

**R 4.30** **The Commission recommends that** where the Tribunal does not determine the amount of legal costs, the Tribunal shall make an order for the adjudication of legal costs pursuant to Chapter 4 of Part 10 of the Legal Services Regulation Act 2015.

**R 4.31** **The Commission recommends that** the Tribunal may determine the procedure for determining costs in rules made by it, and that the Tribunal should also be permitted to apply its existing cost rules in relation to appeals, to determinations in the compulsory acquisition context.

**R 4.32** **The Commission recommends that** section 39 of the Valuation Act 2001 should be applied to determinations of the Tribunal in relation to compensation for land compulsorily acquired.

**R 4.33** **The Commission recommends that** there should not be a merits-based appeal of the determination of the Tribunal in respect of compensation.

## Ch 5 Principles of Compensation

**R 5.1** **The Commission recommends that** the basic principles of value to owner and equivalence—subject to certain well-established modifications—should remain the basis of compensation for compulsory acquisition.

**R 5.2** **The Commission recommends that** the basic rules of compensation—market value, severance, injurious affection and disturbance—are not in need of reform but should be set out clearly in one single code.

**R 5.3** **The Commission recommends that** a definition of market value of land or an interest in land as "the estimated amount for which that land or interest would exchange on the open market, as at the valuation date, between a willing buyer and a willing seller" should be included in a modern compulsory acquisition code.

**R 5.4** **The Commission recommends that** the "no-scheme" rule should be codified and set out in more detail than currently obtains under rule 13 of the 1919 Act.

**R 5.5** **The Commission recommends that** clause 1 of rule 3 (disregard of special suitability) should be subsumed into a more general "no-scheme" rule.

**R 5.6** **The Commission recommends that** the "no-scheme" rule should apply only to the market value assessment of acquired land and not the assessment of loss to retained land under the "injurious affection" or "severance" heads of compensation.

**R 5.7** **The Commission recommends that** offset for betterment should be retained in a modern compulsory acquisition code; however, the offset should only apply in cases where an owner seeks compensation for a reduction in value of their retained land.

**R 5.8** **The Commission recommends that** the *McCarthy* rules—which govern the availability of compensation for injurious affection of lands not held with acquired land—should be placed on modern statutory footing.

**R 5.9** **The Commission recommends that** the rule in *Edwards* (applied in this jurisdiction by *Chadwick*) should not be reformed but should be formulated in appropriate statutory language and codified as a part of the Commission's Bill.

**R 5.10** **The Commission recommends that** the rules relating to disturbance should be codified under the general heading of "consequential loss".

**R 5.11** **The Commission recommends that** provision should be made for business owners whose land is compulsorily acquired to be compensated for the extinguishment or relocation costs for that business by reference to reasonableness and that this should be set out in statute.

**R 5.12** **The Commission recommends that** the "value for money" constraint on disturbance compensation should be reflected in a statutory code, providing that such compensation may be reduced to reflect improvement in facilities achieved by their replacement.

**R 5.13** **The Commission recommends** that there be express provision in statute that where compensation is granted to the owner on the basis of equivalent reinstatement, that payment may be—

(a) made in stages to the owner as the reinstatement work progresses,

(b) subject to a condition that excess compensation be repaid if the reinstatement work does not go ahead,

(c) both made in stages and subject to the condition in paragraph (b).

**R 5.14** **The Commission recommends that** the matters referred to in the "regard" rules (rules 8, 9, 10 and 14) of the 1919 Act are now well-established aspects of the basic "market value" rule and so do not require re-enactment in a new code.

**R 5.15** **The Commission recommends that** a home loss payment should be given further consideration in the context of compulsory acquisition law.

**R 5.16** **The Commission recommends that** the second clause of rule 3 and the entirety of rule 16 of the 1919 Act, being spent, should be omitted from a codification of the rules of compensation for compulsory acquisition.

# APPENDIX B
# DRAFT BILL

[B.1] The table below sets out how the provisions of the draft Bill correspond with the chapters of the Report.

| Part of Bill | Part of Report |
|---|---|
| Chapter 1 of Part 2 | Chapter 1: Vesting Orders |
| Chapter 2 of Part 2 | Chapter 3: Owners who cannot be found or ascertained, and persons who fail to provide title |
| Part 3 | Chapter 2: Advance Payment |
| Chapter 1 of Part 4 | Chapter 4: Determination of Compensation |
| Chapter 2 of Part 4 | Chapter 5: Principles of Compensation |

Table 5 Correspondence between provisions of Draft Bill and Chapters of Report

# ACQUISITION OF LAND BILL 2023

CONTENTS

Section

## ACTS REFERRED TO

Acquisition of Land (Assessment of Compensation) Act 1919 (9 & 10 Geo.) c. 5

Companies Act 2014 (No. 38)

Debtors (Ireland) Act 1840 (3 & 4 Vict.) c. 105

Lands Clauses Consolidation Act 1845 (8 & 9 Vict.) c. 18

Land and Conveyancing Law Reform Act 2009 (No. 27)

Legal Services Regulation Act 2015 (No. 65)

Planning and Development Act 2000 (No. 30)

Property Values (Arbitrations and Appeals) Act 1960 (No. 45)

State Property Act 1954 (No. 25)

Valuation Act 2001 (No. 13)

**ACQUISITION OF LAND BILL 2023**

# Bill

*entitled*

An Act to provide for the assessment of compensation payable on account of the compulsory acquisition of land; to provide for the acquisition of land by vesting order; to provide for the making of advance payments to owners, lessees and occupiers on account of compensation owed to them as a consequence of the compulsory acquisition of land; to provide for the transfer of functions relating to the assessment of compensation for compulsorily acquired land to the Valuation Tribunal; for those purposes to repeal the Acquisition of Land (Assessment of Compensation) Act 1919; and to provide for related matters.

**Be it enacted by the Oireachtas as follows:**

PART 1

PRELIMINARY AND GENERAL

**Short title and commencement**

**1.** (1) This Act may be cited as the Acquisition of Land Act 2023.

(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

**Definitions**

**2.** In this Act—

"acquiring authority" means any body corporate, unincorporated body of persons or individual that has granted to it by any enactment a power to compulsorily acquire relevant land or a relevant interest;

"advance payment" has the meaning given to it by *section 32*;

"award of compensation" is to be construed in accordance with *section 63*;

"Board" means An Bord Pleanála;

"compulsory purchase order" means any instrument, scheme or order made under or pursuant to a provision of any enactment that authorises an acquiring authority to acquire compulsorily relevant land or a relevant interest described in, or designated by, that instrument, scheme or order;

"consequential loss" has the meaning given to it by *section 68*;

"costs and expenses" includes—

(a) legal and professional fees, and

(b) costs incurred by the execution or production of necessary documents;

"Court" means the High Court;

"lessee" means the person, including a sublessee, in whom a tenancy created by a lease is vested;

"Minister" means the Minister for Housing, Local Government and Heritage;

"notice to treat" means—

(a) a notice described as a "notice to treat" under any other enactment, or

(b) a notice, other than a notice in *paragraph (a)*, issued by an acquiring authority pursuant to any enactment stating that authority's willingness to treat for the purchase of relevant land or a relevant interest that is subject to a compulsory purchase order;

"occupier", in relation to land, means—

(a) any person in or entitled to immediate use or enjoyment of the land,

(b) any person entitled to occupy the land, and

(c) any other person having, for the time being, control of the land;

"owner" means—

(a) a person, other than a mortgagee not in possession, who is, whether in his or her own right or as trustee or agent for any other person, for the time being entitled to dispose of—

(i) in the case of relevant land, the fee simple of the land, or

(ii) in the case of a relevant interest, the fee simple of the land to which the interest relates,

whether in possession or reversion, and

(b) a person who holds or is entitled to the rents and profits of—

(i) in the case of relevant land, the land, or

(ii) in the case of a relevant interest, the land to which the interest relates,

under a lease or agreement, the unexpired term of which exceeds 3 years;

"particulars of claim" has the meaning given to it by *section 5*;

"person" includes an individual, a company and any other body of persons;

"relevant interest" means, in relation to relevant land, an easement, profit a prendre, public or private right of way, wayleave or any other like right or interest, in, over or relating to the land;

"relevant land" includes—

(a) any estate or interest in or over land other than a relevant interest,

(b) any estate or interest, other than a relevant interest, in, over or relating to the substratum below the surface or any part thereof whether or not owned in horizontal, vertical or other layers apart from the surface of the land,

(c) mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land,

(d) land covered by water,

(e) buildings or structures of any kind affixed to land and any part of them, whether the division is made horizontally, vertically or in any other way,

(f) the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way,

(g) any part of land;

but does not include—

(i) "state land", within the meaning of section 2(1) of the State Property Act 1954,

(ii) land owned by a "state authority" within the meaning of section 2(1) of the State Property Act 1954,

(iii) any part of the maritime area;

"Tribunal" means the Valuation Tribunal;

"vesting date" means the date specified in a vesting order as the date on which the estates and interests in land specified in that order are to vest in the acquiring authority;

"vesting order" has the meaning given to it by *section 13*.

**Regulations**

**3.** (1) The Minister may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary, or expedient for the purposes of the regulations.

(3) Every regulation made under *subsection (1)* shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 3 weeks on which that House sits after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

**Time periods**

**4.** In relation to a time period referred to in this Act, the Minister may by regulation, where it appears to him or her to be necessary to do so for reasons of public importance in connection with the scale and complexity of a category of acquisition, vary or modify a time period in relation to such class of acquisitions as may be prescribed other than that provided for this Act, and the reference to such time periods shall be read in accordance with the time periods so prescribed.

**Particulars of claim**

**5.** (1) An owner, lessee or occupier shall, in making a claim under this Act for—

(a) compensation in respect of relevant land or a relevant interest,

(b) an advance payment of such compensation, or

(c) both compensation in respect of a relevant land or relevant interest and an advance payment of such compensation,

provide the acquiring authority, and the Tribunal where the matter is referred to the Tribunal, with particulars (in this Act referred to as "particulars of claim") in accordance with this section.

(2) The particulars of claim shall include:

(a) evidence of the exact nature of the owner, lessee or occupier's interest in land subject to the compulsory acquisition, and

(b) details of the compensation claimed.

(3) The Minister shall prescribe the form of particulars of claim to be submitted by the owner, lessee or occupier, where his or her land or interest is acquired using the vesting order procedure under this Act.

**Service of notices and vesting order**

**6.** (1) Where a notice or a vesting order is required to be served on a person under this Act, it shall be addressed to him or her and shall be served on him or her in one of the following ways:

(a) where it is addressed to him or her by name, by delivering it to him or her;

(b) by leaving it at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter addressed to him or her at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(d) where the address at which he or she ordinarily resides cannot be ascertained by reasonable inquiry by delivering it to some person over sixteen years of age resident or employed on such land or premises or by affixing it in a conspicuous position on or near such land or premises.

(2) Where a notice or vesting order is required to be served on an owner or occupier under this Act and the name of the owner or occupier cannot be ascertained by reasonable inquiry, it may be addressed to "the owner" or "the occupier", as the case may require, without naming him or her.

(3) For the purposes of this section, a company within the meaning of the Companies Act 2014, shall be deemed to be ordinarily resident at its registered office, and every other body corporate and every unincorporated body shall be deemed to be ordinarily resident at its principal office or place of business.

**Time limit for claiming compensation**

**7.** (1) Subject to *subsection (2)*, a claim for compensation under this Act shall be brought by a person within 20 years from:

(a) in case a notice to treat was served, or deemed to have been served, on him or her, the date on which the acquiring authority entered into possession of the land;

(b) in case a copy of a vesting order was served, or deemed to have been served, on him or her, the vesting date;

(c) in any other case, the date on which the acquiring authority entered into possession of the land.

(2) Where a claim for compensation relates to moneys paid into Court under *section 25*, that claim must be brought by a person within 25 years from the date on which those moneys are paid into Court.

**Withdrawal of notice to treat**

**8.** (1) Where under any enactment a notice to treat has, after the commencement of *section 10*, been served on a person the provisions of this section apply.

(2) An acquiring authority may, within six weeks from the receipt of particulars of claim from an owner, lessee or occupier, withdraw a notice to treat that was served on that owner, lessee or occupier.

(3) Where an acquiring authority withdraws a notice under *subsection (2)* it shall be liable to pay compensation to the owner, lessee or occupier for any loss or expenses reasonably incurred by him or her as a result of the notice to treat having been given to him or her and withdrawn.

(4) Compensation awarded under this section shall, in default of agreement, be determined by the Tribunal.

**Agreement between parties**

**9.** Nothing in this Act shall prevent the acquiring authority and the owner, lessee or occupier coming to an agreement on the acquisition of relevant land or a relevant interest or the compensation payable, and interest attaching to such compensation, for that land or interest by means of a process provided for other than in this Act.

**Repeals and revocations**

**10.** (1) The Acts referred to in *column (2)* of *Schedule 1* are repealed to the extent specified in *column (3)* of that Schedule.

(2) The instruments referred to in *column (2)* of *Schedule 2* are revoked to the extent specified in *column (3)* of that Schedule.

**References**

**11.** (1) A reference in any enactment or instrument made under any enactment, other than this Act, to:

(a) a property arbitrator or official arbitrator appointed by the Land Values Reference Committee, shall be construed as a reference to the Tribunal;

(b) the Acquisition of Land (Assessment of Compensation) Act 1919 shall be construed as a reference to this Act.

(2) A reference in the European Communities (Assessment and Management of Flood Risks) Regulations 2010 (S.I. No. 122 of 2010) to a Panel of Property Arbitrators shall be construed as a reference to the Tribunal.

**Transitional arrangements**

**12.** Notwithstanding the repeal of a provision by *section 10(1)* or the revocation of a provision by *section 10(2)*, where, prior to that repeal or revocation, an acquiring authority, the Board, a property arbitrator or other person as the case may be, has taken any step or exercised any power or function under any such enactment in respect of any relevant property, that Act and applicable regulations, shall continue to apply until the completion of any process for the compulsory acquisition of such relevant property set out in such enactment.

PART 2

VESTING ORDERS

*Chapter 1*

*Procedure*

**Making and effect of vesting order**

**13.** (1) Where a compulsory purchase order in respect of relevant land or a relevant interest becomes operative, the acquiring authority may by order (in this Act referred to as a "vesting order") acquire the relevant land or relevant interest.

(2) The effect of a vesting order shall be to vest any relevant land or relevant interest to which it relates in the acquiring authority in fee simple free from encumbrances and all estates, rights, titles and interests of whatsoever kind on the vesting date.

(3) An acquiring authority shall not, without the consent, expressed in writing, of each owner, lessee or occupier that would be affected by the order, make a vesting order in respect of relevant land or a relevant interest at any time after the period of 12 months has elapsed from the date on which the compulsory purchase order authorising acquisition of that land or interest becomes operative.

**Service of a vesting order**

**14.** Where the acquiring authority makes a vesting order under *section 13(1)*, it shall serve, no later than one week after the order was made, on any owner, lessee or occupier of land whose land or interest is included in the vesting order—

(a) a copy of the order, and

(b) a notice informing the owner, lessee or occupier of his or her—

(i) obligation under *section 17* to provide particulars of claim to the acquiring authority, and

(ii) entitlement to receive an advance payment under *section 32*.

**No service of vesting order where notice to treat served**

**15.** An acquiring authority shall not serve a copy of a vesting order on an owner, lessee or occupier if it has served a notice to treat on that owner, lessee or occupier and has not validly withdrawn that notice.

**Form of vesting order**

**16.** A vesting order shall be in a form to be prescribed, provided that such order shall—

(a) state the effect of the vesting order,

(b) state clearly the vesting date, and

(c) have attached to it a map showing the land to which it relates.

**Provision of particulars of claim to acquiring authority**

**17.** A person on whom a copy of a vesting order is served shall, within 10 weeks from the date of service, provide to the acquiring authority such particulars of claim as shall be prescribed.

**Vesting date**

**18.** (1) The vesting date shall be—

(a) a date that both the owner, lessee or occupier and acquiring authority agree in writing to designate as the vesting date, or

(b) a date—

(i) no earlier than 3 months, and

(ii) no later than 6 months

from the date on which the copy of the vesting order was served on the owner lessee or occupier.

(2) The acquiring authority shall be deemed to have taken possession on the vesting date and shall be liable to pay interest from that date in accordance with *section 79*.

**Compulsory purchase order of no effect where vesting date later than 6 months from vesting order**

**19.** Where the vesting date does not fall within the period specified in *section 18(1)(b)*, the compulsory purchase order in pursuance of which the vesting order was made shall cease to have effect unless the owner, lessee or occupier and acquiring authority agree another vesting date.

**Publication of service of vesting order**

**20.** Within one week from the date on which it makes the vesting order, an acquiring authority shall publish in one or more newspapers circulating within the State or the area to which the compulsory purchase order relates, and in *Iris Oifigiúil*, a notice stating that the order has been made, describing the land that shall be vested in the acquiring authority on the vesting date and naming a place where a copy of the order may be seen at all reasonable times.

**Registration of vesting order**

**21.** Where an acquiring authority makes a vesting order in relation to relevant land or a relevant interest, it shall send the order to the Property Registration Authority and the Property Registration Authority shall cause the acquiring authority to be registered as owner of the land or interest in accordance with the order.

**Amendment of vesting order**

**22.** (1) Where an acquiring authority is satisfied that the order contains a minor error, a misdescription or omission, whether occasioned by the acquiring authority by whom such vesting order was made or otherwise, the acquiring authority may, by order, amend such a vesting order, provided that the error or mistake may be rectified without injustice to any person.

(2) Where an acquiring authority makes an order under this subsection amending a vesting order, the Property Registration Authority shall, on the lodgement with them of a copy of such amending order, rectify the register in such manner as may be necessary to make the register conformable with such amending order.

*Chapter 2*

*Persons who cannot be found or ascertained, or who fail to provide evidence of title*

**Application of this Chapter**

**23.** This Chapter applies where an acquiring authority—

(a) has made a compulsory purchase order that has become operative, and

(b) intends to make a vesting order in accordance with *section 13.*

**Definitions (Chapter 2)**

**24.** In this Chapter—

"moneys" includes, where the moneys are invested, the sum of the principal moneys invested and any gain or loss arising from that investment;

"relevant person" means—

(a) an owner, lessee or occupier who holds title to relevant land or a relevant interest that is subject to a vesting order made by an acquiring authority and who cannot be found or ascertained after reasonable inquiry by that authority, and

(b) a person served with a copy of a vesting order who claims to hold title to relevant land or a relevant interest but who fails to provide evidence to the satisfaction of the acquiring authority of such title.

**Payment of moneys into court in respect of a relevant person**

**25.** Where the acquiring authority is satisfied that a person whose land or interest it seeks to compulsorily acquire is a relevant person, and an application has not been made to the Tribunal under *section 46(1)*, it shall estimate the compensation payable in respect of the land or interest compulsorily acquired and shall pay moneys equal to the amount of that estimate into Court within 2 months of the vesting date.

**Reasoned statement (moneys paid into court)**

**26.** The acquiring authority shall produce and preserve a reasoned statement of the estimate under *section 25* and shall, where requested to do so, give a copy of the statement to the relevant person to whom the estimation relates.

**Application to Court for release of moneys**

**27.** (1) A relevant person may, subject to this section, apply to the Court to have moneys paid into Court under *section 25* released to him or her where those moneys were paid in respect of land or an interest to which he or she claims to hold, or have held, title on—

(a) the date on which the application to Court is made, or

(b) the date immediately before the vesting date,

whichever is earlier.

(2) A relevant person shall, at the same time as making the application under *subsection (1)*, provide evidence to the Court of his or her title to the land or interest concerned, along with any other particulars as may be set out in rules of court.

(3) On the application of a relevant person or several relevant persons under *subsection (1)* claiming any part of the moneys paid into Court, the Court shall, where satisfied as to the title of the relevant person or persons, order the distribution of the moneys as compensation according to the estate, title or interest of the relevant person or the respective estates, titles or interests of the several relevant persons.

(4) Where moneys are paid into Court under *section 25* by the acquiring authority, any costs and expenses payable by or to the acquiring authority or the relevant person or persons shall be at the discretion of the Court.

**Application to Tribunal by relevant person**

**28.** (1) Where the Court has ordered the distribution to a relevant person of money paid into Court in accordance with *section 27(3)* and the relevant person considers that the moneys so distributed do not provide him or her with full compensation for the land or interest compulsorily acquired, he or she may make an application, on notice to the acquiring authority, to the Tribunal within one month of the date on which the Court ordered the distribution of the moneys as compensation under *section 27(3)*, to determine whether the moneys paid into Court are sufficient or whether a further or lesser sum of compensation ought to be paid.

(2) Where an application is made to the Tribunal under *subsection (1)*, the Tribunal shall:

(a) where it determines that a further sum of compensation ought to be paid to the relevant person, order the acquiring authority to pay the person the further sum no later than 2 months after the determination of the Tribunal;

(b) where it determines that a lesser sum of compensation ought to be paid to the relevant person, order the relevant person to repay the excess amount to the acquiring authority no later than 2 months after the determination of the Tribunal.

**Costs and expenses in respect of application by relevant person**

**29.** (1) Where a relevant person applies to the Tribunal for a determination under *section 28*, the reasonable costs and expenses, properly incurred by the relevant person or the acquiring authority, in respect of the determination by the Tribunal under this section shall be borne by—

(a) where the Tribunal determines that the moneys paid into Court are sufficient to compensate the relevant person, either or both of the relevant person and acquiring authority as the Tribunal may determine,

(b) where the Tribunal orders the acquiring authority to pay a further sum to the relevant person, the acquiring authority, or

(c) where the Tribunal determines that the relevant person is entitled to a sum lower than that which was paid into Court, the relevant person,

and the Tribunal may determine the amount of such costs and expenses.

(2) Where the Tribunal orders the relevant person to pay the costs and expenses, or any part of the costs and expenses, of the acquiring authority, the acquiring authority may deduct, where possible, the amount so payable by such person, from the amount of compensation payable to him or her by the acquiring authority.

**Release of moneys to acquiring authority**

**30.** Where moneys paid into Court under *section 25* are not claimed within the period specified in *section 7(c)*, the acquiring authority may make an application, on notice to the relevant person where he or she is known to the acquiring authority, to the Court to have the moneys released to him or her.

**No interest payable on moneys paid into Court**

**31.** The acquiring authority shall not be liable to pay interest on any moneys paid into Court, or any further sum as determined by the Tribunal, from the date it pays the moneys into Court.

PART 3

ADVANCE PAYMENT

**Right to advance payment of compensation**

**32.** (1) An acquiring authority shall make a payment (in this Act referred to as an "advance payment") to an owner, lessee or occupier on account of compensation payable by it for the compulsory acquisition of relevant land or a relevant interest if the owner, lessee or occupier has made a request to it under *section 35* and—

(a) the authority has made or intends to make a vesting order under *section 13* in respect of the land or interest, or

(b) the authority has served or intends to serve a notice of entry onto the relevant land or the land to which the interest relates following the service of a notice to treat under any other enactment.

(2) Subject to *section 42*, the amount of an advance payment shall be no less than 90 per cent of:

(a) where the acquiring authority and owner, lessee or occupier agree on—

(i) an award of compensation, or

(ii) an amount of one or more of the several amounts constituting an award of compensation,

the agreed award of compensation or the amount of that part of the award, as the case may be;

(b) where the acquiring authority and owner, lessee or occupier do not agree on—

(i) an award of compensation, or

(ii) the amount of one or more of the several amounts constituting that award,

the acquiring authority's estimate, based on the information available to it, of the award of compensation, or amount of that part of the award, likely to be awarded to the owner, lessee or occupier by the Tribunal.

**Advance payment conditional on satisfactory demonstration of title**

**33.** (1) Where the acquiring authority is satisfied as to the title of an owner, lessee or occupier, having regard to any evidence in support of the owner, lessee or occupier's claim to title that may be offered by him or her, including by submission of particulars of claim, the acquiring authority shall pay that owner, lessee or occupier an advance payment.

(2) Where the acquiring authority is not satisfied that the person upon whom the copy of the vesting order or the notice to treat is served has established title to its satisfaction, the acquiring authority shall not pay that person an advance payment and shall, where the person was served with a copy of a vesting order, treat him or her as a relevant person within the meaning of *section 24*.

**Offer of advance payment does not prejudice certain matters**

**34.** An offer by the acquiring authority, and receipt or rejection of that offer by the owner, lessee or occupier, of an advance payment is without prejudice to:

(a) the entitlement of either party to make an application to the Tribunal to determine a claim for compensation;

(b) the validity of the vesting order, a copy of which was served on the owner, lessee or occupier.

**Request for advance payment**

**35.** (1) Where—

(a) a copy of a vesting order, or

(b) a notice to treat,

has been served on an owner, lessee or occupier, he or she may request, by submitting to the acquiring authority such form as may be prescribed, that the acquiring authority make an advance payment to him or her.

(2) Subject to *subsection (3)*, an owner, lessee or occupier shall make a request for advance payment no later than 10 weeks from the date on which either—

(a) the copy of the vesting order, or

(b) the notice to treat,

was served on him or her.

(3) Where an owner, lessee or occupier has not made a request for advance payment within the time provided under *subsection (2)*, he or she may do so at any time up to the determination of compensation by the Tribunal pursuant to the provisions of this Act.

(4) Within one month of receiving a request for an advance payment, the acquiring authority shall determine whether it has enough information available to it to make an advance payment, and, if it determines that it requires more information, it shall require the owner, lessee or occupier to provide such further information as it requires.

**Reasoned statement (advance payment)**

**36.** In making an advance payment, an acquiring authority shall, upon the owner, lessee or occupier's request, provide to him or her a reasoned statement for the amount of the advance payment.

**Time within which advance payment to be made where request made within 10 weeks**

**37.** Provided an owner, lessee or occupier has made a request for advance payment not later than 10 weeks from the date on which either the copy of the vesting order or the notice to treat has been served, an advance payment requested under *section 32* to which the owner, lessee or occupier is entitled shall be made before the end of—

(a) the day on which the authority takes possession, or is deemed to have taken possession, of the land, or

(b) the period of 2 months beginning with the day on which the authority received any further information requested by it under *section 35(4)*,

whichever date is later.

**Time within which advance payment to be made where request made after 10 weeks**

**38.** Where an owner, lessee or occupier has not made a request for advance payment within the time provided under *section 35(2)*, an advance payment requested under *section 35* which the owner, lessee or occupier is entitled shall be made before the end of the period of 2 months beginning with the day on which the authority received—

(a) the request for the advance payment, or

(b) any further information requested by it under *section 35(4)*,

whichever date is later.

**Repayment of advance payment**

**39.** (1) Where the amount of any advance payment made on the basis of the acquiring authority's estimate of the compensation exceeds the compensation finally determined by the Tribunal or agreed between the parties, the owner, lessee or occupier shall repay the excess amount to the acquiring authority.

(2) If, after any advance payment has been made to a person, it becomes apparent to the acquiring authority that the person was not entitled to the advance payment, the person shall be required to repay a sum equivalent to the amount of the payment in full to the acquiring authority.

(3) Any repayment to which an acquiring authority is entitled under this section shall be recoverable as a simple contract debt in a court of competent jurisdiction.

**Conditions for advance payment in respect of mortgaged land**

**40.** (1) This section applies if—

(a) the acquiring authority is required to make an advance payment, and

(b) the owner, lessee or occupier's land is subject to a mortgage the principal of which does not exceed 90 per cent of the value of compensation agreed upon or estimated.

(2) The advance payment due to an owner, lessee or occupier shall be reduced by the amount the acquiring authority thinks will be required by it to secure the release of the interest of each mortgagee.

(3) The acquiring authority shall pay to the mortgagee the amount the acquiring authority thinks will be required by it to secure the release of the mortgagee's interest, if—

(a) the owner, lessee or occupier of the mortgaged land so requests, and

(b) the mortgagee consents to the making of the payment.

(4) If there is more than one mortgagee in respect of the land—

(a) *subsection 40(3)* applies to each mortgagee individually, but

(b) payment shall not be made to a mortgagee before the interest of each mortgagee whose interest has priority to his or her interest is released.

(5) The amount of the advance payment made to the owner, lessee or occupier and the amount of the payments made to mortgagees under this section shall not in aggregate exceed 90 per cent of the value of compensation.

**Land subject to more than one mortgage**

**41.** If relevant land is subject to more than one mortgage, the reference in *sections 40(1)(b)*, *42(1)(c)* and *42(4)(b)* to the principal is to the aggregate of all mortgagees' principals.

**Mortgage exceeding 90 per cent of estimated or agreed compensation**

**42.** (1) This section applies if—

(a) the acquiring authority would be required by *section 32* to make the advance payment if it were not for this section,

(b) the owner, lessee or occupier makes a request for an advance payment under *section 35* in respect of his or her land, and

(c) the land is subject to a mortgage the principal of which exceeds 90 per cent of the value of compensation agreed upon or estimated.

(2) Where this section applies, no advance payment is to be made to the owner, lessee or occupier in respect of relevant land or a relevant interest acquired.

(3) But the acquiring authority shall pay to the mortgagee the amount specified in *subsection (4)*, if—

(a) the owner, lessee or occupier so requests, and

(b) the mortgagee consents to the making of the payment.

(4) The amount is whichever is the lesser of—

(a) 90 per cent of the value of the land;

(b) the principal of the mortgagee's mortgage.

(5) The value of the land is the value—

(a) agreed by the owner, lessee or occupier and the acquiring authority, or

(b) in the absence of such agreement, estimated by the acquiring authority.

(6) For the purposes of *subsection (5)* the value of the land is to be calculated in accordance with provisions of *Chapter 2* of *Part 4* of this Act.

(7) If there is more than one mortgagee, payment shall not be made to a mortgagee until the interest of each mortgagee whose interest has priority to their interest is released.

(8) But the total payments shall not, in any event, exceed 90 per cent of the value of the land.

## PART 4

## COMPENSATION

### Application of this Part

**43.** This Part applies to any compulsory acquisition of relevant land or a relevant interest under any enactment, whether enacted before or (save where the application of this Act is expressly disapplied) after this Act.

### *Chapter 1*

### *Determination of compensation by Tribunal*

### Applicant

**44.** In this Chapter, "applicant" means the owner, lessee or occupier or the acquiring authority, as the case may be, who makes an application to the Tribunal under *section 46.*

### Compensation to be determined by the Tribunal

**45.** (1) Where, under any enactment, relevant land or a relevant interest is authorised to be compulsorily acquired the compensation payable for that acquisition shall, in default of agreement, be determined by the Tribunal in accordance with this Act.

(2) The Tribunal shall, subject to this Act, be independent in the performance of its functions under this Act.

### Application to Tribunal

**46.** (1) An application to the Tribunal to determine a claim for compensation shall be made in writing and may be made by the applicant—

(a) where the owner, lessee or occupier submitted particulars of claim to the acquiring authority, at any time after the expiration of one month from the date the acquiring authority receives the particulars of claim, or

(b) where the owner, lessee or occupier did not submit particulars of claim within the period within which the copy of the vesting order or notice to treat, as the case may be, required him or her to submit particulars of claim to the acquiring authority, one month after the expiry of that period.

(2) Where the applicant makes an application under *subsection (1)*, the applicant shall, as soon as may be after making the application, send a copy of the application alongside all other necessary documents to any relevant parties to the application.

(3) No application shall be made to the Tribunal to determine a claim for compensation under *subsection (1)* where money has been paid into Court by the acquiring authority pursuant to *section 25.*

(4) The Minister shall prescribe the fees payable to the Tribunal in relation to the making of an application under this section.

**Form and content of application**

**47.** (1) An application made under *section 46(1)* shall include—

(a) a statement of estimate as defined in *subsection (3)*, and

(b) any other information or documents as may be specified by the Tribunal under *section 52(1).*

(2) The Tribunal shall specify the form and content of an application in rules made by it under *section 52(1).*

(3) In this section, "statement of estimate" means—

(a) in case the owner, lessee or occupier submitted particulars of claim to the acquiring authority, those particulars of claim, or

(b) in case the owner, lessee or occupier did not submit particulars of claim to the acquiring authority—

(i) where the application is made by the owner, lessee or occupier, a statement containing the owner, lessee or occupier's estimate of the compensation owed to him or her, or

(ii) where the application is made by the acquiring authority, a statement containing the authority's estimate of the compensation owed to the owner, lessee or occupier.

**Power of the Tribunal to order a stay**

**48.** (1) Where a dispute as to title arises between the parties before the Tribunal, the Tribunal shall, upon the application of the acquiring authority, stay the determination process.

(2) Where the Tribunal orders a stay of the determination, in accordance with *subsection (1)*, the person claiming compensation may make an application to the Court to determine title.

(3) An application under *subsection (2)* shall be made in accordance with such rules of court as may be made.

**Consolidation of claims**

**49.** (1) An applicant may make an application to the Tribunal to consolidate claims related to—

(a) more than one interest in or attaching to the same land, where applications have been made to the Tribunal under *section 46(1)* in respect of each interest in the land, or

(b) land held with other land, in circumstances where determining an award of compensation in respect of each claim would cause serious and unfair prejudice to the awards if done in respect of each claim separately.

(2) An application under *subsection (1)*, shall be made on notice to—

(a) where the application is made by any owner, occupier or lessee, the acquiring authority, and

(b) all parties whose land or interest would be affected, for the purposes of determining an award of compensation, by the consolidation of claims.

(3) A person notified under *subsection (2)* may make submissions to the Tribunal in respect of an application to consolidate the claims and the Tribunal shall have regard to any such submission in making a determination under *subsection (3)*.

(4) Where an application is made to it under *subsection (1)*, the Tribunal shall determine whether it is expedient and appropriate for it to consolidate and determine together some or all of the claims in respect of which the application is made.

**Composition of Tribunal**

**50.** Notwithstanding paragraph 3(4) of Schedule 2 of the Valuation Act 2001, the composition (including the number of members) of any division of the Tribunal to determine a claim for compensation under this Act, shall be at the discretion of the chairperson of the Tribunal and in establishing a division, the chairperson shall have regard to—

(a) the need for expertise in determining compensation for land compulsorily acquired,

(b) the complexity of the anticipated proceedings,

(c) the potential for a balance of skills in the division, and

(d) the need for consistent decision-making.

**Basis of determination**

**51.** (1) The Tribunal may determine compensation under this Part by way of—

(a) an oral hearing, or

(b) subject to *subsection (2)*, a document-based determination.

(2) The Tribunal may, on its own motion or on an application by any party to proceedings before it, determine compensation based on written documentation submitted to it, provided that the Tribunal shall direct that submissions be made by the parties on the question of whether the determination should proceed on the basis of written documentation.

(3) The Tribunal shall take into consideration any submissions made by the parties pursuant to *subsection (2)*, before it decides to proceed with a document-based determination.

(4) An oral hearing before the Tribunal shall be held in public, unless the Tribunal, on its own motion or on application by either party, determines that due to the existence of special circumstances, the hearing or part of the hearing should be held otherwise than in public.

**Procedures of the Tribunal**

**52.** (1) The procedures of the Tribunal in determining compensation under this Part shall, subject to this Act, be determined by the Tribunal by rules made by it, with the consent of the Minister, provided such procedures provide for—

(a) the information and documents to be included with an application in accordance with *section 47(1)(b)*,

(b) the form and content of the application in accordance with *section 47(2)*,

(c) notifying the owner, lessee or occupier and the acquiring authority of the date, time and place for oral hearings, where required,

(d) appropriate case management procedures,

(e) amending statements of claim,

(f) enabling each party before the Tribunal to present its case in person or through a representative including, where the Tribunal is determining the claim on the basis of a document-based determination in accordance with *section 51(1)(b)* and *sections 51(2)* and *(3)*, the arrangements with respect to the submission of documents in writing,

(g) the number of expert witnesses that may be called by a party,

(h) the giving of notice in writing to every affected party to a determination of the Tribunal of the fact of the determination having been made and the effect of the determination on that party,

(i) procedure for the making of an interim determination in accordance with *section 55* and application to the Tribunal to determining the remaining compensation

(j) procedure for determining costs and expenses in accordance with *section 57*, and

(k) the making of sufficient record of the proceedings of the Tribunal.

(2) Without prejudice to the generality of *subsection (1)*, the rules of the Tribunal in relation to appeals determined by it made pursuant to the powers conferred on it by paragraph 11 of Schedule 2 of the Valuation Act 2001, may be adapted and applied, with appropriate modifications, to determinations made by it under this Act.

(3) The Tribunal may take evidence and receive submissions by or on behalf of either the owner, lessee or occupier or the acquiring authority or any other person appearing to the Tribunal to have an interest in or to be likely to be affected by the determination.

(4) The Tribunal may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice to give evidence in proceedings under this section and to produce to the Tribunal any documents in his or her possession, custody or control that relate to any matter to which those proceedings relate.

(5) A person to whom notice under *subsection (4)* is given shall be entitled to the same immunities and privileges as those to which he or she would be entitled if he or she were a witness in proceedings before the High Court.

(6) A person to whom a notice under *subsection (4)* has been given who—

(a) fails or refuses to comply with the notice, or

(b) refuses to give evidence in proceedings to which the notice relates or fails or refuses to produce any document to which the notice relates,

shall be guilty of an offence and shall be liable, on summary conviction, to a class E fine.

(7) The Tribunal may require a person giving evidence in proceedings before the Tribunal to give such evidence on oath or affirmation and, for that purpose, cause to be administered an oath or affirmation to such person.

(8) A person who, in or for the purpose of proceedings under this section, gives a statement material in the proceedings while lawfully sworn as a witness that is false and that he or she knows to be false shall be guilty of an offence and shall be liable—

(a) on summary conviction to a class B fine or to imprisonment for a term not exceeding 12 months, or both, or

(b) on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding ten years, or both.

**Determination should be made within 6 months**

**53.** The Tribunal shall endeavour to make a determination of compensation under *section 45(1)* within 6 months from the date of its having received an application to determine compensation.

**Publication of reasons for determination**

**54.** (1) A determination of compensation by the Tribunal shall contain the reasons for the determination and, subject to *subsections (2)* and *(3)*, the Tribunal shall publish on its website every determination made by it with any redactions the Tribunal considers necessary on grounds of the personal, confidential or commercially sensitive nature of any part of the determination.

(2) Where, by reason of a direction by the Tribunal under *section 51(4)* that a hearing be held otherwise than in public, the Tribunal considers that the determination made by the Tribunal pursuant to that hearing should—

(a) not be published,

(b) be published in part only, or

(c) be published with parts of the determination redacted,

it may decide to decline to publish, or publish in partial or redacted form only, that determination.

(3) In making a decision under *subsection (2)* or *subsection (3)* to decline to publish a determination or to publish it in partial or redacted form only, the Tribunal shall endeavour to publish as much of the determination as the circumstances allow, having regard, in the case of a decision under *subsection (3)*, to the special circumstances under *section 51(4)* grounding its determination to hold the hearing otherwise than in public.

**Interim determination by the Tribunal**

**55.** (1) Where for reasons connected to the non-completion of the works for which the relevant land was compulsorily acquired, the Tribunal is unable to determine a final amount of compensation, the Tribunal may make an interim determination of compensation.

(2) Where the Tribunal has made an interim determination of compensation in accordance with *subsection (2)*, either the owner, lessee or occupier or the acquiring authority may make a subsequent application to the Tribunal to determine the remaining compensation, once it is possible to assess the remaining amount.

(3) The procedure for the making of an interim determination and application to the Tribunal to determine the remaining compensation, may be set out in rules by the Tribunal, under *section 52(1)*.

**Appeal to Court**

**56.** (1) Subject to a right of appeal to the Court on a point of law under *subsection (2)*, the determination of the Tribunal under *section 45(1)* shall be final.

(2) Section 39 of the Valuation Act 2001 shall apply to a determination of compensation under *section 45(1)* as it applies to determinations of appeals under that Act, subject to the following modifications:

(a) a reference to an appeal made to the Tribunal under that Act shall be construed as a reference to an application to the Tribunal under this Act;

(b) a reference to a determination of an appeal made to the Tribunal under that Act shall be construed as a reference to a determination made by the Tribunal under this Act.

**Costs before the Tribunal**

**57.** (1) The Tribunal shall order that the reasonable costs and expenses properly incurred by an owner, lessee or occupier shall be paid by the acquiring authority, unless the Tribunal is satisfied that there are good reasons for not doing so.

(2) In determining whether there are good reasons for not making an order under *subsection (1)*, the Tribunal shall have regard to the conduct of the owner, lessee or occupier, including any failure to submit, or delay in submitting, particulars of claim or revised particulars of claim to the acquiring authority, and any other matter that the Tribunal considers relevant.

(3) Notwithstanding *subsection (1)*, where the acquiring authority has made an offer in writing of any sum as to compensation to any owner, lessee or occupier and the sum awarded by the Tribunal to that owner, lessee or occupier does not exceed the sum offered, the Tribunal shall, unless it is satisfied that there are good reasons for not doing so, order the owner, lessee or occupier to bear his or her own costs and expenses and to pay the costs and expenses of the acquiring authority so far as they were incurred after the offer was made.

(4) In making an order under *subsection (1)*, the Tribunal shall have regard to the costs and expenses incurred by the owner, lessee or occupier in connection with the valuation process including but not limited to—

(a) providing particulars of claim to the acquiring authority,

(b) seeking an advance payment from the acquiring authority,

(c) preparing for, and hearing of, the determination before the Tribunal,

(d) considering an offer made by the acquiring authority to settle compensation.

(5) The Tribunal may determine the amount of costs (including legal costs) and expenses under this section.

(6) Where the Tribunal does not determine the amount of legal costs, the Tribunal shall make an order for the adjudication of legal costs pursuant to Chapter 4 of Part 10 of the Legal Services Regulation Act 2015.

(7) Where the Tribunal orders the owner, lessee or occupier to pay the reasonable costs and expenses properly incurred, or any part of the costs and expenses, of the acquiring authority, the authority may, where possible, deduct the amount so payable by the owner, lessee or occupier from the amount of compensation payable to him or her.

(8) Save where otherwise provided in this Act, the Tribunal may determine the procedure for determining costs and expenses in rules made by it under *section 52(1)*.

(9) Without prejudice to the generality of *subsection (8)*, any rules on the procedure for determining costs and expenses made by the Tribunal by virtue of the powers conferred on it by paragraph 11 of Schedule 2 of the Valuation Act 2001 may be adapted and applied with any necessary modifications to costs and expenses determined by the Tribunal under this Act.

**Time limit for payment of compensation**

**58.** The compensation as determined by the Tribunal under *section 45(1)* shall be paid no later than 2 months after the determination is made unless—

(a) the Tribunal otherwise directs, or

(b) an appeal on a point of law of the Tribunal's determination is brought in accordance with *section 56(2)*, in which case the compensation shall be paid no later than 2 months after the determination of that appeal.

**Enforcement of compensation determination**

**59.** Compensation determined by the Tribunal under *section 45(1)* shall be recoverable as a simple contract debt in any court of competent jurisdiction.

*Chapter 2*

*Principles of compensation*

**Definitions and interpretation (Chapter 2)**

**60.** (1) In this Chapter—

"development" has the same meaning as it has in the Planning and Development Act 2000;

"development plan" has the same meaning as it has in the Planning and Development Act 2000;

"retained land" means relevant land that is—

(a) not subject to a compulsory purchase order, and

(b) held with land that is subject to a compulsory purchase order;

"special amenity area order" has the same meaning as it has in the Planning and Development Act 2000;

"subject land" means relevant land that is subject to a compulsory purchase order;

"unauthorised structure" has the same meaning as it has in the Planning and Development Act 2000;

"unauthorised use" has the same meaning as it has in the Planning and Development Act 2000;

"valuation date" means, in respect of a compulsory purchase order—

(a) where the compulsory acquisition is effected by a notice to treat or by a vesting order under this Act, the date on which the notice to treat or the copy of the vesting order is served on the owner, lessee or occupier, and

(b) where the compulsory purchase order is effected otherwise than by notice to treat or by vesting order under this Act and—

(i) there is a date designated by a provision of an enactment applying or attaching to the compulsory purchase order as the date on which relevant land or a relevant interest is to be valued for the purposes of compensation, that date,

(ii) there is no date to which *subparagraph (i)* applies and there is a statutory requirement applicable or attaching to the compulsory purchase order to notify the owner, lessee or occupier that the acquiring authority is proceeding with the compulsory acquisition authorised by or under that order, the date on which such notice was served on the owner, lessee or occupier, or

(iii) there is no date to which *subparagraph (i)* applies and no statutory requirement to notify the owner, lessee or occupier to which *subparagraph (ii)* applies, the date on which, according to the terms of the compulsory purchase order or a provision of any enactment applicable or attaching to the compulsory purchase order, the acquiring authority becomes legally bound to proceed with the acquisition;

"works" has the same meaning as it has in the Planning and Development Act 2000.

(2) A reference to "value" in this Chapter, except where otherwise provided, shall be construed as a reference to market value in accordance with *section 65*.

**Entitlement to compensation**

**61.** An owner, lessee or occupier from whom relevant land or a relevant interest is acquired pursuant to a compulsory purchase order is entitled to be paid compensation in accordance with this Chapter in respect of the acquisition.

**No allowance for acquisition being compulsory**

**62.** In assessing an award of compensation for relevant land or a relevant interest authorised to be compulsorily acquired, the Tribunal shall make no allowance on account of the acquisition being compulsory.

**Award of compensation**

**63.** An award of compensation made under this Act shall comprise the sum of such amounts of compensation as the Tribunal may award on account of—

(a) either—

(i) the market value of the owner, lessee or occupier's land, in accordance with *section 65*, or

(ii) the cost of equivalent reinstatement, in accordance with *section 69*,

(b) a reduction in the value of retained land owned by the owner, lessee or occupier, in accordance with *section 66*, and other land owned by him or her, in accordance with *section 67*, and

(c) certain consequential personal losses to the owner, lessee or occupier, in accordance with *section 68*.

**Relevant dates for assessment of compensation**

**64.** Save as otherwise provided in this Act, compensation shall be assessed by reference to the following dates and circumstances:

(a) relevant land or a relevant interest shall, under *section 65* and *section 66*, and in any other case where the amount of compensation depends on the value of land, be valued as they stand at the valuation date at values prevailing on that date and in the circumstances prevailing or reasonably anticipated on that date;

(b) compensation under *section 68* shall be assessed by reference to circumstances prevailing or reasonably anticipated at the date on which compensation is determined;

(c) compensation under *section 69* shall be assessed by reference to the costs, or estimated costs, at the date when commencement of reinstatement work became, or is expected to become, reasonably practicable.

**Market value**

**65.** Subject to—

(a) *section 72*,

(b) *section 73*,

(c) *section 74*, and

(d) *section 76*,

the market value of relevant land or a relevant interest for the purposes of this Act is the estimated amount for which that land or interest would exchange on the open market, as at the valuation date, between a willing buyer and a willing seller.

(2) The Tribunal shall have regard to the following when assessing the market value of relevant land or a relevant interest:

(a) any restrictive covenant entered into by the acquiring authority when the land is compulsorily acquired;

(b) any restriction on the development of the land—

(i) in respect of which compensation has been paid under the Planning and Development Act 2000, or

(ii) that could, without conferring a right to compensation, be imposed under any Act or under any order, regulation, rule or bye-law made under any Act;

(c) any contribution that a planning authority would have required as a condition precedent to the development of the land.

(3) The Tribunal shall not have regard to the following when assessing the market value of relevant land or a relevant interest:

(a) the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by a local authority;

(b) any increase or decrease in the value of the land attributable to—

(i) the land, or any land in the vicinity of the land, being reserved for a particular purpose in a development plan other than a purpose for which it is zoned in that development plan, or

(ii) the inclusion of the land in a special amenity area order.

**Reduction in value of retained land**

**66.** (1) Subject to—

(a) *subsections (2)* and *(3)*,

(b) *section 72*,

(c) *section 73*,

(d) *section 74*, and

(e) *section 76*,

compensation for loss or damage to retained land shall be assessed in accordance with this section.

(2) In assessing compensation for loss or damage to retained land the Tribunal shall have regard to—

(a) any decrease in the value of any interest of the owner, lessee or occupier in any part of the retained land attributable to its severance from the subject land ("severance"), and

(b) any decrease in the value of any interest of the owner, lessee or occupier in any part of the retained land attributable to works on subject land acquired from the owner, lessee or occupier and subsequent user of that land ("injurious affection"),

but shall off set against such assessment—

(c) any increase in the value of any part of the retained land attributable to the nature of, carrying out, or expected use of, those works ("betterment"),

so far as each is applicable to the retained land and as each stands at the valuation date.

(3) If the parties agree or the Tribunal determines, account shall be taken of changes of circumstances (other than changes in land values) known at the date on which compensation is determined.

**Reduction in value of land other than retained land**

**67.** (1) Where relevant land to which an owner, lessee or occupier has title is not retained land but is reduced in value by the compulsory acquisition, the owner, lessee or occupier may, subject to—

(a) *section 72*,

(b) *section 73*,

(c) *section 74*, and

(d) *section 76*,

claim compensation in respect of that reduction in value if—

(i) the loss results from the lawful exercise by the acquiring authority of its statutory powers,

(ii) the act that causes the loss would have given rise to an independent cause of action if the authority were not exercising its statutory powers,

(iii) the loss relates to a reduction in value of the owner, lessee or occupier's land and not personal inconvenience or damage to trade only, and

(iv) the loss arises from the execution of the works on the land compulsorily acquired and not from the authorised use of that land following completion of the works.

(2) In determining compensation under this section, the Tribunal shall apply *section 66(2)* as if the references to retained land were references to relevant land to which this section applies.

**Consequential losses**

**68.** (1) Disturbance (in this Act referred to as "consequential loss") means loss suffered or expense reasonably incurred as a result of the compulsory acquisition of relevant land or a relevant interest owned by the owner, lessee or occupier, so far as that loss or expense is—

(a) the natural and reasonable consequence of the compulsory acquisition,

(b) reasonably foreseeable,

(c) not included in compensation based on the value of relevant land or a relevant interest under *section 65* or *section 66*, and

(d) incurred after the valuation date, save that compensation for earlier losses may be granted—

(i) by agreement, or

(ii) if the Tribunal determines that, having regard to the special circumstances of the case, it would be unfair to refuse compensation for those earlier losses.

(2) Where compensation is claimed for the displacement of a business, trade or economic activity compensation shall be assessed by reference to either—

(a) the reasonable costs of relocating the business, trade or activity (wholly or partially), loss of profits and any loss or expense incidental to relocation (the "relocation" basis), or

(b) the value of the business, trade or activity (or part of the business or trade) as a going concern at the valuation date, and any loss or expense incidental to closure (the "total extinguishment" basis).

(3) The owner, lessee or occupier is entitled to claim on the relocation basis if—

(a) it is reasonably practicable to relocate the business, trade or activity (wholly or partially),

(b) it has been relocated, or the owner, lessee or occupier intends to relocate it (or complete its relocation), and

(c) it is not shown to be unreasonable in all the circumstances for compensation to be paid on that basis.

(4) The owner, lessee or occupier is not entitled to claim on the extinguishment basis unless he or she—

(a) has not relocated, and does not intend to relocate, the business, trade or activity, and

(b) shows that it is reasonable in all the circumstances for him or her not to relocate the business, trade or activity.

(5) In deciding what is reasonable under *subsections (3)* or *(4)* the Tribunal shall take into account—

(a) the personal circumstances of the owner, lessee or occupier (including age, illness, disability or financial circumstances), and

(b) the fact that higher compensation is payable on the relocation basis than on the extinguishment basis does not of itself make it unreasonable for compensation to be assessed on the relocation basis.

(6) Unless the contrary is shown, where premises acquired for relocation have a greater market value than the premises acquired from the owner, lessee or occupier, it shall be presumed that the difference in value reflects advantages for which compensation is not payable to the owner, lessee or occupier.

(7) Without prejudice to *subsections (1)* to *(6),* where land on which a business, trade or activity is carried on is severed by the acquisition, compensation shall include costs reasonably incurred in replacing buildings, plant or other installations (whether or not they were on the subject land) if or to the extent that—

(a) they are required to enable the business, trade or activity to be continued on the retained land, or other adjacent land acquired for the purpose,

(b) the need for replacement is caused by the acquisition,

(c) the cost is not adequately included in any other head of compensation, and

(d) it is not shown to be unreasonable in all the circumstances for compensation to include such costs,

provided that the compensation may be reduced to such extent (if any) as the Tribunal may determine to reflect any improvement in the facilities so obtained over those replaced.

**Equivalent reinstatement**

**69.** (1) An owner, lessee or occupier may claim compensation under this section for the cost of the reinstatement of an undertaking in some other place ("equivalent reinstatement") if—

(a) the subject land is, and but for the compulsory acquisition would continue to be, devoted to a particular purpose,

(b) there is no market or general demand for land for that purpose, and

(c) reinstatement in some other place is genuinely intended by the owner, lessee or occupier.

(2) Where an owner, lessee or occupier claims compensation under *subsection (1)* the Tribunal may refuse to award such compensation if it is shown that the cost of reinstatement is prohibitive relative to the value of the undertaking.

(3) Where reinstatement has not been carried out before the award of compensation has been determined, the Tribunal may make any compensation awarded under this section subject to conditions (including provision for staged payments) to ensure that the payment is used for the intended purpose or (if not) that any excess over the compensation otherwise due is repaid.

**Value owing to unlawful or unauthorised use or structure**

**70.** The Tribunal shall, in assessing compensation under this Act, disregard any increase in the value of land that is—

(a) attributable to—

(i) its use in a manner that could be restrained by any court, or

(ii) any unauthorised structure on the land or unauthorised use of the land,

or

(b) contrary to law, or detrimental to the health of the occupier of the land or to the public health.

**Duty to mitigate losses**

**71.** (1) If the Tribunal determines that the owner, lessee or occupier has, since the valuation date, unreasonably failed to take steps that were open to him or her to mitigate his or her loss, it may reduce the compensation otherwise payable by the amount of such loss as could have been avoided by taking such steps when it was reasonable to do so.

(2) In deciding what is reasonable under *subsection (1)* the personal circumstances of the owner, lessee or occupier (including age, illness, disability or financial circumstances) shall be taken into account.

**New interests or enhancements**

**72.** In valuing the owner, lessee or occupier's subject land or retained land, the Tribunal shall disregard:

(a) any new interests created over the subject land, or the retained land, between the valuation date and the date on which compensation is determined, in so far as they would increase the amount of compensation otherwise payable by the acquiring authority;

(b) any enhancements (by creation of interests or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was undertaken with a view to obtaining compensation or increased compensation.

**Disregard of change in value owing to reservation for particular purpose**

**73.** The Tribunal shall not have regard to any increase or decrease in the value of land attributable to—

(a) the land, or any land in the vicinity of the land, being reserved for a particular purpose in a development plan other than a purpose for which it is zoned in that development plan, or

(b) the inclusion of the land in a special amenity area order,

when assessing the market value of relevant land or a relevant interest.

**No-scheme rule**

**74.** (1) In valuing the subject land at the valuation date—

(a) it shall be assumed that the statutory project has been cancelled on that date, and

(b) the following matters shall be disregarded:

(i) the effects of any action previously taken (including acquisition of any land, and any development or works) by an acquiring authority, wholly or mainly for the purpose of the statutory project;

(ii) the prospect of the same, or any other, project to meet the same, or substantially the same, need being carried out in the exercise of a statutory function;

(iii) the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by an acquiring authority.

(2) In cases of dispute, the area of the statutory project shall be determined by the Tribunal as a question of fact, subject to the following:

(a) subject to *paragraph (b)*, the statutory project shall be taken to be the implementation of the specific or general purpose for which the acquiring authority intends to acquire the relevant property;

(b) either the owner, occupier or lessee or the acquiring authority may advance evidence of a larger project than would be indicated by the application of *paragraph (a)* and the Tribunal may, on the basis of such evidence, characterise the statutory project;

(c) for the purposes of *paragraph (b)*, the acquiring authority may not, unless—

(i) the owner, lessee or occupier agrees, or

(ii) the Tribunal allows,

advance any evidence of a larger project other than a larger project defined in the compulsory purchase order or the documents published with that order.

(3) *Subsection (1)* does not require or authorise, save to the extent specified in *paragraph (b)*, consideration of whether events or circumstances at any time (before or after the valuation date) would have been different in the absence of the statutory project.

(4) In this section, "statutory project" means a project for a purpose to be carried out in the exercise of a statutory function for which the acquiring authority has been authorised to acquire the subject land.

**Interference with other legal interests**

**75.** Where, in the carrying out of the purpose for which the subject land is acquired, any legal interest within the meaning of section 11 of the Land and Conveyancing Law Reform Act 2009 affecting the subject land is extinguished, interfered with or breached in a manner that would be unlawful in the absence of statutory authority, compensation shall be payable to the owner, lessee or occupier of the legal interest by reference to the reduction (if any) in the market value of any land to which the interest was attached, so far as attributable to the extinguishment, interference or breach of the interest, and any consequential loss (applying the provisions in *section 68* with appropriate modifications).

**Land below the surface**

**76.** The value of any land lying 10 metres or more below the surface of that land shall be taken to be nil, unless it is shown to be of a greater value by the owner, lessee or occupier.

*Chapter 3*

*Interest*

**Principal sum**

**77.** In this Chapter, "principal sum" means—

(a) where no advance payment was made to the owner, lessee or occupier, the amount of compensation agreed between the owner, occupier and lessee and the acquiring authority, or the award of compensation as determined by the Tribunal, or

(b) where an advance payment was made to the owner lessee or occupier, the amount of compensation agreed between the owner, occupier and lessee and the acquiring authority, or the award of compensation as determined by the Tribunal less the amount of the advance payment paid to him or her.

**Rate of interest**

**78.** Except where otherwise provided, the rate or rates of interest under this Chapter shall be prescribed.

**Interest after vesting order made**

**79.** (1) This section applies where an acquiring authority makes a vesting order under this Act.

(2) Interest shall be payable on the principal sum from the vesting date to the earlier of—

(a) the date on which the compensation is due to be paid under *section 58*, or

(b) the date on which compensation is paid to the owner, lessee or occupier.

**Interest on late payment of compensation as determined by the Tribunal**

**80.** (1) Where the acquiring authority does not pay in full the award of compensation as determined by the Tribunal in the period specified in *section 58,* it shall be liable to pay interest on the balance of the principal sum unpaid by it from the expiration of that period to the date the balance of the principal sum is paid.

(2) For the purposes of *subsection (1)* the rate of interest payable by the acquiring authority shall be the rate referred to in section 26 of the Debtors (Ireland) Act 1840.

**Interest on late advance payment**

**81.** (1) Where an acquiring authority makes, or undertakes to make, an advance payment and it does not pay in full that payment within the period specified in *section 37* or *section 38,* as the case may be, it shall be liable to pay interest on the balance of the advance payment unpaid by it from the expiration of that period to the date the outstanding advance payment is paid.

(2) Where the amount of an advance payment made by an acquiring authority exceeds the award of compensation determined by the Tribunal, the owner, lessee or occupier shall repay to the acquiring authority any interest paid to him or her by the acquiring authority on account of that advance payment.

## SCHEDULE 1

*Section 10.*

REPEALS

| Session and Chapter or Number and Year (1) | Short title (2) | Extent of Repeal (3) |
|---|---|---|
| 8 & 9 Vict. c. 18 | Lands Clauses Consolidation Act 1845 | Sections 63 and 68 |
| 9 & 10 Geo. 5 c. 57 | Acquisition of Land (Assessment of Compensation) Act 1919 | The whole Act |
| No. 45 of 1960 | Property Values (Arbitrations and Appeals) Act 1960 | The whole Act |

## SCHEDULE 2

*Section 10.*

### REVOCATIONS

| Series, Number and Year<br>(1) | Citation<br>(2) | Extent of Revocation<br>(3) |
|---|---|---|
| SR & O No. 600 of 1920 | Acquisition of Land (Assessment of Compensation) Rules 1920 | The whole instrument |
| S.I. No. 91 of 1961 | Property Values (Arbitrations and Appeals) Rules 1961 | The whole instrument |
| S.I. No. 115 of 1999 | Acquisition of Land (Assessment of Compensation) Fees Rules 1999 | The whole instrument |

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975