

Solatium Payments for Public Works - An International Comparison

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Abstract

Public works are essential to support modern society but often necessitate the requirement to compulsorily acquire land. In these circumstances the right to full compensation is usually enshrined in legislation, but what constitutes full compensation? Should full compensation include some consideration over and above market value for the lack of a willing seller usually inherent in definitions of market value? Such a solatium is payable in New Zealand, but concern has been expressed that the level of payment is inappropriate. This research examined the historic background and current situation applying to public works compensation in New Zealand, as well as in a variety of other countries with a common legal tradition. The findings revealed a variety of approaches applying to compensation legislation and practice. In many cases some form of solatium or additional compensation for compulsory acquisition was seen as appropriate, particularly if residential dwellings were involved. Most commonly this payment has been in the order of five to ten percent of market value overseas. In light of these findings the current level of solatium payment in New Zealand appears to be unusually low. An increase to a more typical level may smooth the progress of public works delivery in New Zealand by reducing costly and time consuming legal battles over compensation.

Key Words: compensation, public works, solatium, market value, international, comparison.

Introduction

The development and renewal of public infrastructure is essential in modern society, and the ability to compulsorily acquire land is an essential element in the provision of many of these public works.

When land is acquired compulsorily in New Zealand the Public Works Act 1981 applies and compensation is awarded on the principle of equivalence - that is the landowner should be in a position no better or worse than before the land was acquired. In practice this means compensation is based on the assessed market value of the land or interest acquired. However, there is a widespread belief that compulsory acquisition should be a last resort (Almond and Plimmer 1997) and, if used, some additional element of compensation should also be payable on account of the fact that the acquisition is compulsory and the willing buyer/willing seller paradigm inherent in the definition of market value does not apply (Mangioni 2008, 2010, Alias and Daud 2009, Chan 2008).

This is recognised in many jurisdictions by the payment of a small premium over and above the market value, or some other form of compensation. The New Zealand legislation contains provision for such payments, referred to as a solatium. However, this is only payable on the compulsory acquisition of a residence from an owner and has been fixed for many years at \$2,000. With an average house value of \$409,000 in New Zealand in 2010 this would now appear to be inconsequential in compensation terms.

The aim of this research was to investigate international practice relating to payments in the nature of a solatium as a component of public works compensation.

Methodology

A solatium is defined in the Collins Concise English Dictionary as “compensation awarded for injury to the feelings as distinct from physical suffering and pecuniary loss”. It is derived from the concept of “solace” - defined as something that gives comfort or consolation in misery, disappointment or distress. In a property context it is generally seen as an additional payment over and above the market or fair value of a property or loss of value to a property – paid to the party that is suffering some form of damage by a party that is causing some form of damage to that party.

In the context of this research a solatium is used to describe any form of payment (irrespective of what it is termed in the legislation) in excess of the market or fair value of property rights that have been acquired by an authority exercising rights to compulsorily acquire real estate interests for public works.

The principles underpinning public works legislation in many countries were originally developed in English law, imported during the period of colonisation by Great Britain and subsequently further developed and adapted to local circumstances. The first step in this research was a review of the history of compensation legislation dating back to the Magna Carta of 1215. This revealed that the concept of a solatium is not new or unique and it can be seen as an important component in ensuring “fairness” in the outcomes of compulsory acquisition.

Compulsory acquisition has become more important over time with increased levels of development, population density, and the consequent need for greater public infrastructure. Prior to the industrial revolution there was seldom any requirement for compulsory acquisition as pre-industrial Britain had remained unchanged for centuries with the roading and communications system’s being little better than those developed in Roman times (Perkin, H.(1970) cited in Marr (1997). However, the roll out of new technology and associated social change raised the need for more substantial public works and as a result a greater focus fell on compensation legislation. This pattern of increasing need for compulsory acquisition over time, as development expands, appears to apply world wide (Chan 2006, Alias and Daud 2009, Maitra 2009) and has been further brought further into focus by acquisition for economic development and public/private partnership purposes (Mangioni 2008, 2010).

The fundamental principles of compensation were confirmed in 1765 by Sir William Blackstone in his commentaries on the Laws of England where he described the need for ‘full indemnification and equivalent’ (i.e. full compensation) for the land taken (Blackstone Commentaries, Book 1 – Rights of Persons, Page 139). The term full compensation is taken to mean putting the owner in a financial position as close as possible to what he or she would have enjoyed had acquisition not occurred (Davies, 2000, Mangioni 2010, Chan 2006). This is the principle of equivalence which underpins almost all compensation legislation around the world – however, there are significant differences in the details of how this principle is applied (Maitra 2009) and in some jurisdictions, for example China, it is not applied at all (Chan 2006).

While early legislation preserved the entitlement to compensation for compulsory acquisition, it was virtually silent on the methodology to be used to establish the quantum of compensation to be paid (Turner, 2004). This situation changed in 1919 with the passing of the Acquisition of Land (Assessment of Compensation Act) in England. This Act set out the ‘rules’ for the assessment of compensation derived from case law and has been substantially reproduced in the legislation of other countries.

The main part of this research reviewed current international public works compensation legislation particularly as it relates to payments in the nature of a solatium – that is over and above the payment of market value compensation as some “solace” for the acquisition being compulsory. This was carried out via both content analysis of public works compensation legislation and a review of published literature relating to public works compensation in a variety of countries with a legal tradition similar to that of New Zealand. Another part of the research detailed public works legislation in New Zealand, both from a historic perspective and that currently applying. The research concludes with a comparison of international practice in relation to payments in the nature of a solatium to that currently applying in New Zealand.

International Public Works Legislation

The focus of this research was to compare overseas public works legislation, especially as it relates to payments in the nature of a solatium, to that applying in New Zealand. New Zealand practices have evolved from English law and this is a common scenario in most English speaking countries. Overall the principles used in Australia, Canada, United Kingdom and the United States are very similar to those used in New Zealand. However, there are important differences in what is compensated and who can claim. The following sections provide an overview of the legislation for each country (or state) as it pertains to the payment of additional compensation over and above market value, (i.e. solatium payments, although the actual term used does vary between jurisdictions).

Australia

The law relating to public works compulsory acquisition in Australia is split with each state and the federal government having particular legislation regarding the resumption of land (this being the term used to describe compulsory acquisition in Australia).

Federal (Commonwealth):

The federal government legislation is the Lands Acquisition Act 1989. Sections 52 – 65 of the Act specify who can claim compensation, what can be compensated and how compensation should be assessed. In general the provisions are similar to New Zealand in that only a person with an interest in land acquired can claim and the compensation is based on the market value of the interest acquired.

However, Section 61 entitles the owner to additional compensation where a dwelling is acquired and essentially this provides for an extra payment of \$10,000 indexed against the Australian All Groups Consumer Price Index from 1 April 1989.

Northern Territory:

The Northern Territory legislation is the Lands Acquisition Act 1978. The Act does not provide for the payment of any compensation except to those whose land has been acquired. The rules for the assessment of compensation are set out in Schedule 2 of the Act.

Rule 9 of Schedule 2 provides for the possibility of a payment of additional compensation for “intangible disadvantages” resulting from the acquisition where a dwelling of an owner is acquired. The wording includes “the amount of compensation otherwise payable under this Schedule maybe increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition” but the legislation does not prescribe any limit on the level of this payment.

However, sub rule 2 does outline factors to be considered in the assessment of this amount.
Lands Acquisition Act 1978, Schedule 2, Rule 9 sub rule 2.

- (a) the interest of the claimant in the land;
- (b) the length of time during which the claimant resided on the land;
- (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;
- (d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;
- (e) the period during which the claimant would have been likely to continue to reside on the land; and
- (f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant.

Clearly this provision is intending to provide the same type of compensation as the solatium payment in the New Zealand Public Works Act.

Western Australia:

The Western Australian legislation is the Land Administration Act 1997. Part 10 of the Act limits compensation to those who have had an interest in land acquired or those whose land has been entered or occupied but not acquired.

Section 241 of the Act sets out how compensation should be assessed with subsections 8 and 9 providing for an additional payment not exceeding 10% (except in exceptional circumstances) when the land has been taken without agreement;

This provision differs from the New Zealand solatium provisions in that it applies to any land acquired compulsorily and not just a residence occupied by the owner.

South Australia:

In South Australia the legislation is the Land Acquisition Act 1969. Compared to most of the other legislation reviewed this is a fairly basic Act containing only 33 clauses. There is no provision for payment of compensation for anyone other than a claimant who has their land acquired. Section 25 outlines the principles to be used in the assessment of compensation as follows;

Land Acquisition Act 1969 Section 25.

- (1) The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles:
 - (a) the compensation payable to a claimant shall be such as adequately to compensate him for any loss that he has suffered by reason of the acquisition of the land; and
 - (b) in assessing the amount referred to in paragraph (a) of this section consideration may be given to (i) the actual value of the subject land; and (ii) the loss occasioned by reason of severance, disturbance or injurious affection; and ...
 - (g) no allowance shall be made on account of the fact that the acquisition is effected without the consent, or against the will, of any person; ...

As indicated by section 25(1)(g) the Act does not contain any allowance for additional compensation in the form of a solatium payment or the like.

Tasmania:

In Tasmania the relevant legislation is the Land Acquisition Act 1993. Entitlement to compensation is covered in Part 3 of the Act, with Section 24 dealing with the right to compensation and Section 27 outlining the basis for the assessment of compensation. Part 3 of the Act was reviewed and there is no provision for payment of compensation other than to claimants from whom land has been acquired. There is also no provision for additional compensation in the form of a solatium or similar.

Victoria:

In Victoria the relevant legislation is the Land Acquisition and Compensation Act 1986. Section 30 of the Act provides that any person from whom land or an interest in land has been acquired can claim compensation. Section 41 sets out the basis of the assessment of compensation. As is the norm this is based on the market value of the property and any special value to the claimant, disturbance costs and depreciation to the balance of the land.

The Victorian legislation also provides (at Section 44) for the payment of a solatium;

Land Acquisition and Compensation Act 1986 Section 44**Solatium**

(1) The amount of compensation may be increased by such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition.

(2) In assessing the amount payable under subsection (1), there must be taken into account all relevant circumstances applicable to the claimant including, without limiting the generality of the foregoing-

- (a) the interest of the claimant in the acquired land; and
- (b) the length of time during which the claimant had occupied the land; and
- (c) the inconvenience likely to be suffered by the claimant by reason of removal from the land; and
- (d) the period of time after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land; and
- (e) the period of time during which, but for the acquisition of the land, the claimant would have been likely to continue to occupy the land; and
- (f) the age of the claimant; and
- (g) where the claimant at the date of acquisition is occupying the land as the claimant's principal place of residence, the number, age and circumstances of other people (if any) living with the claimant.

It is interesting that the payment of a solatium under this act is not necessarily restricted to the circumstances where a principal place of residence is acquired, though purchase of a residence appears to be a significant factor in calculation of the quantum of the payment.

Australian Capital Territory:

In the Australian Capital Territory the relevant legislation is the Lands Acquisition Act 1994. The provisions contained in the Act as to who can claim compensation and how that compensation is assessed appear to be more or less identical to the rules contained in the Federal legislation outlined earlier with the exception of the solatium payment in Section 51 which is set at \$15,000 and indexed to the All Goods Consumer Price Index for Australia.

In practice there would be little if any difference between the solatium payments payable under the Federal and the ACT Acts as the indexing of the payment under the earlier Federal Act is likely to have brought the payment up to a comparable level to the \$15,000 provided for in the 1994 ACT Act when it was introduced.

NSW:

In New South Wales the relevant legislation is the Land Acquisition (Just Terms Compensation) Act 1994. The entitlement to compensation is set out in Section 54 of the Act as 'just compensation' to the person from whom the land is acquired. The term 'just compensation' is not defined. However section 55 of the Act stipulates the matters to be considered in determining the amount of compensation as the market value of the land, special value to the owner of the land, loss attributable to severance, loss attributable to disturbance, solatium and any increase or decrease in the value of any balance land owned.

The criterion for payment of the solatium is outlined in Section 60 of the Act;

Land Acquisition (Just Terms Compensation) Act 1994 Section 60

Solatium

(1) In this Act: "solatium" means compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of the acquisition.

(2) The maximum amount of compensation in respect of solatium is:

(a) except as provided by paragraph (b)-\$15,000, or

(b) such higher amount as may be notified by the Minister by notice published in the Gazette.

(3) In assessing the amount of compensation in respect of solatium, all relevant circumstances are to be taken into account, including:

(a) the interest in the land of the person entitled to compensation, and

(b) the length of time the person has resided on the land (and in particular whether the person is residing on the land temporarily or indefinitely), and

(c) the inconvenience likely to be suffered by the person because of his or her removal from the land, and

(d) the period after the acquisition of the land during which the person has been (or will be) allowed to remain in possession of the land.

(4) Compensation is payable in respect of solatium if the whole of the land is acquired or if any part of the land on which the residence is situated is acquired.

The solatium is payable on all purchases initiated by the acquiring authority except for purchases that are open market transactions or forced by the owner on the grounds of hardship. The Act provides for the maximum amount of the solatium to be altered from time-to-time by the Minister by notice published in the gazette. According to the NSW Roads and Traffic Authority (RTA) Lands Acquisitions Policy Statement this amount was increased to \$16,821 effective from 1 July 1998 and it seems almost certain that there will have been further increases since that time but it was not possible to ascertain the current level of the maximum payment.

Queensland:

In Queensland the relevant legislation is the Acquisition of Land Act 1967. This legislation was extensively reviewed and amended in February 2009. The amendments included updates clarifying who could make a claim and what could be claimed. The amended legislation does not provide for

compensation to be paid to anyone other than a person with an interest in the land acquired, nor does it provide for any additional compensation in the form of a solatium or the like.

The failure to incorporate a solatium payment has been criticised in some quarters. Missingham (2009) says that resumption is usually devastating for those that experience it with the “emotional trauma caused by an acquisition of residential property particularly horrific and very real”. He argues that a failure to provide for a solatium or some other form of premium when land is resumed by the state is a failure to properly compensate the claimant (i.e. to ensure that they are no worse off after the acquisition). Mangioni (2010) raises similar issues in that a compulsory seller could be entitled to some of the additional value attributable to the buyer. He argues compensation legislation has not kept up with the increasing range of developments claimed to be for a public purpose.

It is noted that in a review of the Australian process for compulsory acquisition Campbell, et al (2009) mentions that the Queensland government transport authority had tried to get a solatium incorporated into this amendment but was unsuccessful. This may be seen as an indication that the practitioners who have to work with the Act see some benefit in payment of a solatium to help them achieve an outcome when acquiring a property, or it may be simply have been a desire to bring Queensland into line with their neighbouring states.

Canada

Canada, like Australia and the United States, has a system of federal and state legislation covering the compulsory acquisition of real property (expropriation is the term used in Canada). Also like Australia these acts are considered to be generally complimentary, all of them deriving originally from the English common law basics previously discussed (Kirk, 2000). However, a review of these statutes shows that there are significant differences between jurisdictions on who can make a claim and what can be claimed.

Federal

In the Canadian federal Expropriation Act the rights to compensation and rules for determination of compensation are laid out in sections 25 and 26 of the Act;

Expropriation Act Section 26

Rules for determining value

- (1) The rules set out in this section shall be applied in determining the value of an expropriated interest.
- (2) Subject to this section, the value of an expropriated interest is the market value thereof, that is to say, the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.
- (3) Where the owner of an expropriated interest was in occupation of any land at the time the notice of confirmation was registered and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the expropriated interest is the greater of
 - (a) the market value thereof determined as set out in subsection (2), and
 - (b) the aggregate of
 - (i) the market value thereof determined on the basis that the use to which the expropriated interest was being put at the time of its taking was its highest and best use, and
 - (ii) the costs, expenses and losses arising out of or incidental to the owner’s disturbance, including moving to other premises, but if those costs, expenses and losses cannot practically

be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set out in subparagraph (i)...

There is no allowance made in the Act to compensate any person except those from whom an interest has been acquired. There is also no specific provision to pay a premium for the interest acquired except that 26(3)(b) provides for the payment of costs expenses and allowances to the claimant or a sum of 15% in lieu if these cannot be estimated.

No information relating to the actual payment of this allowance was found. However, as it is clearly intended to cover the actual costs incurred by the claimant it is not considered to be a premium or additional compensation in the manner of a solatium payment.

Northwest Territories

The Expropriation Act for the Northwest Territories contains essentially the same provisions as the federal Act in terms of who is entitled to claim and the manner of determining the compensation to be paid.

Yukon Territory

The Yukon Expropriation Act compensation provisions are similar to the federal Act with the important exception that the Yukon Act in Sections 7 and 10 provides for claims for injurious affection where no land has been taken;

Ontario

The Ontario Expropriation Act (sections 13 – 18) is also very similar to the federal Act. The only significant difference being the payment of an allowance of 5% for residential owners contained in Section 18;

Ontario Expropriation Act Section 18

Allowance for disturbance Owner other than tenant

(1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,

(a) where the premises taken include the owner's residence,

(i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation.

This payment differs from the payment in the federal Act in that it is paid in addition to actual costs rather than as an in lieu payment. Therefore this payment does represent a premium in the compensation paid to an owner, the same as a solatium payment.

Nova Scotia

The Expropriation Act for Nova Scotia (Sections 26 and 27) contains the exact wording of the federal Act in terms of who is entitled to claim and the manner of determining the compensation to be paid.

Newfoundland

The entitlement and rules for assessing compensation are found in sections 17 and 27 of the Newfoundland Expropriation Act. This appears to be an older Act and provides for compensation based on fair market value but does not authorise compensation for any costs incurred. In this regard it is out of step with most of the other Canadian legislation reviewed and more closely aligned with the approach used in the United States. Certainly there is no allowance within the legislation for a premium or solatium payment, nor is there any consideration of injurious affection for parties who have had no land acquired.

Prince Edward Island

The Expropriation Act for Prince Edward Island is a comparatively brief piece of legislation of only a few pages. The entitlement to compensation is set out in Section 11 of the Act and like the Yukon legislation includes provision for payment of injurious affection to owners where no land has been taken. The Act does not outline the rules for the determination of compensation. It provides for compensation to be agreed between the claimant and the acquiring authority or, if no agreement reached, to be determined by a judge of the Supreme Court.

British Columbia

The entitlement and rules for assessing compensation are found in sections 30 – 34, 38 and 41 – 42 of the British Columbia Expropriation Act. The basic rights are the same as the federal Act, however, like the Ontario Act an allowance is made at Section 38 for the payment of a 5% premium (over and above disturbance costs) where a residence is acquired. However, it is noted that the legislation provides that this payment will only be payable where the owner would qualify for a grant under the Home Owner Grant Act. This Act was not investigated but it is assumed that this restriction would have the effect of limiting payments to those whose assets and/or income fall below a predetermined threshold.

Like the Yukon and Prince Edward Island Acts provision is also made in section 41 of the Act for the payment of compensation for injurious affection where no land is taken.

Manitoba

The entitlement and rules for assessing compensation are found in sections 25 – 28 of the Manitoba Expropriation Act. The provisions are nearly identical to those contained in the British Columbia Act with the exception that the 5% premium provided for when a residence is purchased is available in all cases (i.e. the same as the Ontario Act).

Alberta

The provisions in the Alberta Expropriation Act (sections 41 – 42, 44, 47 and 50) are the same as the federal Act with the exception of the payment of costs in Section 50. This section represents a hybrid between the federal Act (which provides for payment of costs or a payment in lieu if they cannot be determined) and the Ontario Act (which provides for a payment of 5% in addition to actual costs). The actual wording is as follows;

Alberta Expropriation Act Section 50

Disturbance compensation to owner

(1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,

(a) when the premises taken include the owner's residence,

(i) an allowance of

(A) 5% of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or

(B) the actual amount proved with respect to those items, whichever is the greater, to compensate for inconvenience and the costs of finding another residence, if the part of the land so used was not being offered for sale on the date of the expropriation..

Saskatchewan

The Expropriation Act for Saskatchewan is like that of Prince Edward Island, a brief and basic Act. The entitlement to compensation is set out in Section 10 of the Act but the rules for the determination of compensation are not outlined. The Act provides for compensation to be agreed between the claimant and the acquiring authority or, if no agreement reached, for compensation to be determined by a judge of the supreme court acting as arbitrator and to be ascertained by him "in such way as he deems best." The Act does not provide for the payment of any premium nor does it make any provision for the payment of compensation where no land is taken.

New Brunswick

The entitlement and rules for assessing compensation are found in Part II of the New Brunswick Expropriation Act. The provisions are nearly identical to those contained in the Manitoba Act (payment for injurious affection where no land acquired and payment of 5% premium where a residence is acquired), but the New Brunswick Act contains a further provision at Section 37(4) for the payment of a further 5% of market value when any property is acquired and the owner is required to surrender physical possession of the land.

Quebec

The entitlement and rules for assessing compensation are found in Chapter II of the Quebec Expropriation Act. This Act is fairly disjointed and difficult to follow however as far as could be ascertained, the provisions contained within the Act apply a basic right to compensation only, with no allowance for a premium or injurious affection where no land is taken.

United Kingdom

Unlike New Zealand, the UK law regarding compulsory purchase is not codified and is spread across a number of statutes as well as case law. It is estimated that in excess of 500 statutes in the UK contain reference to compulsory purchase powers and procedures (Kirk, *ibid*). However the compensation provisions appear to be consolidated within the following core statutes;

- Acquisition of Land Act 1981
- Land Compensation Act 1961
- Compulsory Purchase Act 1965
- Land Compensation Act 1973

The Land Compensation Act 1973 is the most relevant to the matters reviewed in this paper as it provides for the payment of a premium in some land acquisitions. In addition to more usual compensation arrangements the Act provides additional compensation to some claimants for land purchase in the form of 'home loss payments' and 'farm loss payments'.

The home loss payment is "an additional sum to reflect and recognise the distress and discomfort of being compelled to move out of your home" (Department for Communities and Local Government, 2004), and as such it is clearly the equivalent of the New Zealand solatium payment.

The home loss payments are provided for in Section 29 and 30 of the Act and apply to anyone who legally occupies a property as their main place of residence. For owners the home loss payment is 10% of the assessed market value of the property (or that part of the property containing the dwelling used as the residence) subject to regulated minimum and maximum payments. For tenants the home loss payment is the regulated minimum payment.

The initial payments were subject to a maximum of £15,000 and a minimum of £1,500 but these amounts contained have been regularly reviewed - current amounts provided for being;

- a maximum of £47,000 and a minimum of £4,700 in England
- a maximum of £44,000 and a minimum of £4,400 in Wales
- a maximum of £15,000 and a minimum of £1,500 in Scotland

Sections 34 and 35 of the Act also provide for a farm loss payment in circumstances where a farm (or a substantial portion of a farm) has been acquired. The payment equates to one year's profit from the farm purchased and is payable when the owner of the farm commences farming at a new location. This payment would appear to be designed to encourage farmers displaced from their properties to re-establish and continue farming rather than applying the capital released on the sale of the original property to other ventures.

United States of America

The law relating to compulsory acquisition (referred to as land condemnation in the USA) is, like both Australia and Canada, covered by both federal and state jurisdictions and legislature. As such there is a huge amount of legislation (and case law) related to land condemnation in the USA and these laws can be quite diverse (Kirk, *ibid*).

All of the various legislative provisions governing the condemnation of land in the United States are based around the observance of Constitutional Rights. The fifth amendment to the US constitution requires that no person shall "...be deprived of ...property, without due process of law; nor shall private property be taken for public use, without just compensation..."

The fourteenth amendment reiterates these sentiments "...nor shall any state deprive any person of ... property, without the due process of law" The term 'just compensation' is not defined but most jurisdictions in the United States appear to interpret it as market value of the interest acquired based on the willing buyer, willing seller test, a position generally upheld by the Courts (US Supreme Court Centre, n.d.)

As the constitution requires the payment of compensation for the taking of "property" there is assumed to be no constitutional requirement to pay consequential damages (i.e. legal, valuation, moving costs etc) to an owner when taking their property. This position though harsh has been confirmed in case law many times (US Supreme Court Centre, *ibid*).

Notwithstanding the constitutional loophole, federal and many state laws (but by no means all) do provide for reimbursement of at least some costs incurred.

The federal law on land condemnation is contained in US Code – Title 42, Sections 4651 and 4653;

US Code Section 4653;

The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

- (1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;
- (2) penalty costs for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering such real property; and
- (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.

In this example the additional costs that are covered are minimal and amount to mortgage break fees, a rates apportionment and normal conveyancing costs.

As noted previously, many states pay only the compensation for the interest in the land acquired itself, with no allowance for costs of any kind all though this does appear to be changing with some states even covering relocation costs (Leroy, n.d.). Certainly there was no suggestion in any of the material reviewed of any form of premium or solatium paid when land condemnation occurs.

It is clear that land condemnation is actively pursued on a large scale in the United States with federal, state and city bureaucracies across the country taking thousands of properties every year. In past it has been common for private property to be acquired by condemnation and then transferred to private interests for development on the basis that it is 'in the public interest', even if the only obvious public good achieved is an increase in the property taxes collected by the city. In these circumstances it is not surprising that an industry of lawyers and land valuation experts have sprung up around land condemnation, as in a litigious society like the US compensation is invariably decided by the courts.

Other Countries

Research into land acquisition practices used in other countries is more difficult due to the language problem. Public infrastructure is in place in virtually every country of the world and private ownership and/or occupation of land is also the norm so it follows that most if not all countries will have legislative provisions for the state to acquire land for public works.

The rules for expropriation and the payment of compensation in Scandinavia (Viitanen, 2002, Kalbro, 2008), Malaysia (Alias & Daud, 2006) and Hong Kong (Chan, 2008) appear to be very similar to those of the United States. The right to compensation is clearly very much weaker in China (Chan, 2006). Other countries reviewed were India and Pakistan where the compulsory purchase of land is covered by the Land Acquisition Act 1894 (same name different [although nearly identical] legislation).

The Indian legislation provides for compensation to include the market value of the land acquired, the value of any crops or trees on that land, business loss and injurious affection, costs of moving to a new residence or place of business and at section 23(2) a premium in recognition of the compulsory nature of the acquisition.

Land Acquisition Act Section 23 (2) (India)

In addition to the market value of the land as above provided, the Court shall in every case award a sum of [thirty per centum] on such market value, in consideration of the compulsory nature of the acquisition.

There is anecdotal evidence (Wikipedia) that the Act has been criticised by groups that view the act as weak and ineffective, and by groups that view the Act as draconian. People who feel the act is weak argue that the procedure followed is cumbersome and costly, often resulting in a delay in land acquisition. There is also opposition to the additional payment of solatium to land owners, over and above the property value. Those that feel the Act is draconian claim that it has been used to acquire land which has no public purpose attached and that the actual compensation assessed and paid is well below market value for the land. This has in some instances lead to violent outbreaks (as in the Nandigram incident where several people were killed resisting compulsory purchase of property).

Maitra (2009) records that there has been serious dilution of the original rights to compensation in Indian legislation by successive amendments that have had the effect of overruling the courts and transferring compensation payments into the political arena. This may help explain the situation outlined in the paragraph above.

The Pakistani legislation is almost identical with regard to section 23 but substitutes a new section 23(2);

Land Acquisition Act Section 23 (2) (Pakistan)

In addition to the market-value of the land as above provided, the Court shall award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition, if the acquisition has been made for a public purpose and a sum of twenty-five per centum on such market-value if the acquisition has been made for a Company.

The Hong Kong legislation provides for market value compensation for the lease hold interest acquired (virtually all land in Hong Kong is leasehold), but none for loss due to injurious affection or payment of a solatium. However, the government does provide ex-gratia payments in the nature of a solatium to claimants outside of the compensation legislation – a confusing situation (Chan 2008).

Table 1 below summaries the findings of the above research regarding payments in the nature of a solatium amongst the jurisdictions reviewed.

Jurisdiction	Premium or solatium payment
New Zealand	Yes, \$2,000 for acquisition of a residence
Australia (federal)	Yes, \$10,000 (indexed to inflation since 1989) for acquisition of a residence
Northern Territory	Yes, for acquisition of a residence – quantum not stipulated
Western Australia	Yes, up to 10% of market value
South Australia	No
Victoria	Yes, Up to 10% of market value
Tasmania	No
ACT	Yes, \$15,000 (indexed to inflation since 1994) for acquisition of a residence
NSW	Yes, up to \$15,000 for acquisition of a residence with provision for adjustment
Queensland	No
Canada (federal)	No
Northwest Territory	No
Yukon	No
Ontario	Yes, 5% of market value for acquisition of a residence
Nova Scotia	No
Newfoundland	No
Prince Edward Island	No
British Columbia	Yes, 5% of market value for acquisition of a residence where claimant meets income threshold
Manitoba	Yes, 5% of market value for acquisition of a residence
Alberta	Partial, 5% of market value to cover disturbance costs or actual costs if greater than 5%
Saskatchewan	No
New Brunswick	Yes, 5% of market value for acquisition of a residence plus another 5% if owner is required to surrender physical possession
Quebec	No
United Kingdom	Yes, 10% for acquisition of a residence and one years farm profit for acquisition of farm if the recipient continues farming elsewhere
USA	No
India	Yes, 30% of market value
Pakistan	Yes, 15 – 25% depending on who is acquiring
Hong Kong	No – in legislation – but ex gratia payments made
China	No very different non-market basis of compensation

New Zealand Public Works Legislative History

The early to mid 19th century was a period of massive expansion of public works in England. However, in New Zealand this was the period of colonisation. Initially little land was privately owned with most either owned by Maori or the Crown. Crown policy at this time was to make provision for public purposes well in advance of settlement and therefore there was little need for purchase of land for public works (Marr, *ibid*). On the few occasions when land was required to be taken compulsorily English law was relied upon (Marr, *ibid*).

In 1870 the Immigration and Public Works Act was introduced to facilitate a programme of public works devised to improve infrastructure, attract immigration and encourage economic development. Like earlier English legislation it preserved the established processes for the taking of land and

preserved the entitlement to compensation. In 1876 provincial governments were abolished in favour of local authority bodies and the Public Works Act 1876 was introduced to consolidate legislation, but no significant changes were made to the general principles of compensation.

The next major update of legislation occurred with the Public Works Act 1928. Once again the principles relating to entitlement to compensation were not significantly changed. However this Act brought on board in large part the 'rules' for the assessment of the compensation entitlement from the English legislation - Acquisition of Land (Assessment of Compensation Act) 1919 (Turner, *ibid*).

By the mid 20th century ownership of land amongst the middle and working classes was widespread and the assessment of compensation began to be challenged through the court system. One judgement of 1941 is particularly interesting as the court outlined the principle of compensation applied in the judgement. This was that the court should '...make an award which shall be just to both parties. On the one hand the respondent must not be required to pay more than the land is worth on a fair consideration of all the evidence before the Court, while, on the other, the Court must see that the claimant receives the fair value of the property taken...' (Napier Harbour Board v Minister of Public Works (1941) NZLR 186).

This approach confirms that nothing much had changed since Blackstone's summary of the law in 1765 and also endorses the doctrine of the principle of equivalence as the basis for assessing compensation.

By the 1960's the compensation provisions contained in the Public Works Act 1928 were the subject of strong criticism (Marr, *ibid*) as more and more people were affected by public works projects, (particularly urban motorway projects proposed for the main centres). A government review of the compensation provisions was undertaken in the late 1960's which resulted in more liberal compensation provisions being inserted in the 1970 amendment of the Public Works Act 1928, including for the first time a solatium payment.

This first solatium payment was set at \$500 and was paid to anyone from whom a principle place of residence was acquired and where there was a 'shadow of compulsion' in the purchase (that is, where the Crown approached the owner to purchase the land). The \$500 solatium was increased to \$1,500 in the 1973 amendment of the Act and again to \$2,000 in 1975. A review of the parliamentary records in Hansard for this time shows that there was support for these provisions from both sides of the house. There is no clear statement as to how the amount of \$500 was arrived at or why the amounts were increased so much over such a short period of time, but the early 1970's were a period which saw a dramatic boom in house prices around the country. In 1970 the average house price in Auckland was around \$12,000 and by mid 1974 had increased to around \$25,000 (Hickey, 2008).

Auckland prices would have been a little higher than the national average of the time, but it is clear that the solatium as originally created and subsequently modified represented a payment of approximately 5 – 10% of the price of the average house at the time.

However, by 1981 when the current Public Works Act was passed the solatium provisions had been undermined by inflation and represented approximately 4% of the average house price in Auckland. This was notwithstanding a very slow housing market in the latter half of the 1970's. Hansard shows that there was no discussion in parliament regarding the level of the solatium payment at that time and \$2,000 probably still represented 5% of the national median house price. It may have been that the existing level was seen as adequate for the time.

Contemporary Public Works Legislation in New Zealand

When the Public Works Act 1981 was introduced this saw a significant expansion of the statute law on compensation, codifying most of the extensive body of case law that had been developed (Turner, *ibid*). The provisions of this Act relating to compensation are largely intact to the present day.

Part V of the Act outlines the compensation provisions with Sections 60 – 71 setting out a claimants entitlement, Sections 72 – 76 setting out rights to additional compensation and Part VI of the Act setting out the provisions for alternative compensation.

As this paper is concerned with the application of solatium payments the focus will be on those parts of the statute. It is however useful to look at the basic entitlement set out in Section 60 of the Act;

Public Works Act 1981 Section 60.

- (1) Where under this Act any land
 - (a) Is acquired or taken for any public work; or
 - (b) Suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or the owner of that land shall be entitled to full compensation from the Crown (acting through the Minister) or local authority, as the case may be, for such acquisition, taking, injurious affection, or damage.

This clause then sets out clearly the expectation that has existed from the time of Blackstone that full compensation is payable where land is taken for a public work.

The term ‘injurious affection’ was first used in the Land Clauses Consolidation Act 1845 (i.e. the English version). The term is a valuation concept rather than a legal one and refers to a nuisance which causes the value of a property to depreciate (Turner, *ibid*). Importantly Section 60 of the Act provides for compensation for injurious affection only where the owner has had land taken. It therefore applies only where a part title is acquired with the injurious affection assessed against the balance of the owner’s property.

Section 63 of the Public Works Act 1981 does provide for injurious affection to be compensated where no land is taken in some circumstances, but in order for any claim to be successful the depreciation must be substantial, the owner must have acquired the land prior to the commencement of the work, the claim must be one that would succeed under common law and claims can only be made for injurious affection resulting from the construction of the work – not its operation or maintenance.

Combined with the other restrictions in section 63 this means that in practice any claim for injurious affection would be very difficult to sustain. A virtually identical rule applies in Scotland but it also is accepted as having limited application because of the stringent limitations applying (Dundas & Evans, 2001). The current New Zealand Act therefore does not provide any effective compensation for a third party when the construction, use and/or maintenance of a public work cause injurious affection to their property.

This could be seen as unfair and this issue of injurious affection is an area where there are substantial differences in the application of compensation between different jurisdictions. In some ways there are parallels with the perceived “unfairness” of current level of solatium payments in New Zealand. However, detailed consideration of injurious affection is beyond the scope of this paper.

Turning to the payment of solatium, this is covered by Section 72 of the Act as follows;

Public Works Act 1981 Section 72 Additional compensation for acquisition of notified dwelling.

(1) Subject to the provisions of this section, where any land that has been notified and that contains a dwelling used as a private residence is taken or acquired for the public work for which it was notified there shall be paid to the owner of the land the sum of \$2,000 by way of solatium ...

(3) Compensation shall not be payable under subsection (1) of this section unless the person giving vacant possession (a) Was the owner, or the spouse, civil union partner, or de facto partner of the owner, of the land on the date on which it was notified, or, where the owner has died since that date, was the person beneficially interested in the land; and (b) Was the owner of the land on the date on which vacant possession of the land and all buildings and structures on the land was given to the notifying authority; and (c) The dwelling on the land was the principal place of residence of that person for a substantial part of the period between the date of notification and the date of so giving vacant possession; and (d) Was not a willing party to the taking or acquisition of the land, or was a willing party to the taking or acquisition principally because the land had been notified.

In essence this section provides for the payment of a solatium of \$2,000 provided the property acquired was the principle place of residence of the owner, was owned at the time of notification and there was an element of compulsion in the acquisition.

Conclusions

The solatium payment fixed at \$2000 by current New Zealand legislation and only payable on the acquisition of a residence is now such a small percentage of the average house price that it is inconsequential in terms of compensation.

It is common (but by no means universal) for overseas jurisdictions to make an allowance in legislation for the payment of small premiums over the market value when land is acquired using an element of compulsion. This premium is commonly in the range of 5% to 10% of market value of the land acquired and often (but not always) reserved for the purchase of residential property occupied by the vendor as a residence. Sometimes the payment of a premium is discretionary up to the maximum, particularly in cases where the premium is allowed for all classes of land.

Examination of the variety of “solatium” provisions in overseas legislation shows that these can be constructed to manipulate the payment in almost any manner desired so it is clearly possible to engineer a clause which would enable meaningful premiums to be paid but still place a reasonable limit on owner’s expectations. A potential extension of this study would be to examine actual cases to see how the various legislation was applied in practice.

It is accepted that payment of a solatium would theoretically add to the cost of public works projects but in most of the cases examined this would probably not constitute more than 10% of the total property purchase cost, and property acquisition costs in many projects are not a significant component of the overall project cost.

The research also indicated there were circumstances where acquiring authorities were quite prepared to pay a premium over assessed market value to acquire land via negotiation, rather than

relying on the compulsory acquisition and associated compensation legislation (Almond and Plimmer 1997). The rationale was that it was more cost effective to expedite the public work in this way than get “bogged down” by compensation legislation with limited flexibility. This aspect will be examined in more detail in a separate paper.

Other areas for more research include the compensation situation applying to properties injuriously affected by nearby public works, but not subject to the actual resumption of any land. The situation applying here appears to vary markedly around the world, with the affected parties often receiving no compensation. Another area is the concept of “like for like” compensation. Because major public works can often lead to greatly increased property prices in the vicinity, even seemingly generous monetary compensation can displace populations no longer able to afford to buy a replacement property in the same locality (Chan 2006, Maitra 2009). Like for like replacement compensation as a component of the public work itself is one possible approach.

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