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Injurious Affection: The position in Queensland after *Marshall* and under the *Integrated Planning Act 1997* (Qld)

In Queensland, 'injurious affection' is a long-established statutory concept relevant to compensation-

- *for the compulsory acquisition of part of a person's land under the* Acquisition of Land Act 1967 *(Qld); and*
- *under the* Integrated Planning Act 1997 *(Qld), for the adverse effects to a person's development rights from changes to a planning scheme or planning scheme policy.*

The 2001 decision of the High Court in Marshall *noticeably widened the grounds upon which compensation is payable for injurious affection arising from land acquisitions. The right to compensation in this instance has been criticised, particularly in relation to neighbouring landowners who are generally similarly affected by the public works giving rise to a resumption but whose right to compensation depends on whether part of their property has been acquired.*

Compensation for injurious affection for planning scheme changes is unique to Queensland. Criticism of these provisions generally relates to their impact on local government decision-making.

Renee Giskes

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Ms Karen Sampford, Director (07) 3406 7116
Ms Renee Giskes, Acting Senior Parliamentary Research Officer (07) 3406 7241

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Inquiries should be addressed to:
Director, Research Publications & Resources
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Ms Karen Sampford. (Tel: 07 3406 7116)
Email: Karen.Sampford@parliament.qld.gov.au

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In Queensland, 'injurious affection' is a long-established statutory concept relevant to compensation-

- for the compulsory acquisition of part of a person's land under the *Acquisition of Land Act 1967* (Qld) ('*ALA*'); and
- under the *Integrated Planning Act 1997* (Qld) ('*IPA*'), for the adverse effects to a person's development rights from changes to a planning scheme or planning scheme policy (**page 1**).

The *ALA* sets out the procedure for the compulsory acquisition of land in Queensland (**pages 2-4**). In assessing the compensation to be paid to a landowner who has had part of their property acquired, regard must be had to any damage caused by the exercise of the statutory powers by the constructing authority which 'injuriously affect' the landowner's remaining land (**pages 3-4**).

'Injurious affection' provides compensation for the "adverse effects of the activities of a resuming authority upon a dispossessed owner's land". Essentially, injurious affection involves damage to, or a decrease in the value of, any land retained by a claimant caused by the scheme or purpose of the acquisition (**page 4**).

Historically, there was some uncertainty in the case law whether a claim for injurious affection was assessed by restricting the claim to the use of, or the works done on, the resumed land. This was the principle enunciated in the United Kingdom in *Edwards v Minister of Transport* (the 'Edwards Principle') (**pages 4-6**). In 2001, the High Court in *Marshall v The Director-General of Transport* unanimously dismissed the application of the Edwards Principle in Australia. It held that, in relation to the resumption of part of a person's land under the *ALA* for a particular purpose, compensation for injurious affection should take into account the impact of that purpose on the person's remaining land *generally*, and not only the impact arising from that *part* of the purpose carried out on the land which is *acquired* from the claimant (**pages 6-13**).

The ability to claim compensation for injurious affection for a land resumption, particularly between neighbouring landowners who are generally similarly affected by the public works giving rise to the resumption, has been criticised (**pages 13-14**).

IPA sets out the circumstances which may result in a liability on local governments to pay compensation for injurious affection arising from changes to planning schemes or planning scheme policies which affect development rights (**pages 16-23**). From the perspective of allowing compensation for the effects of 'down zoning', these provisions are unique to Australian planning legislation and have been a feature of Queensland legislation since 1934, including under the now repealed *Local Government (Planning and Environment Act) 1990* (Qld) (**pages 23-25**).

The injurious affection provisions in *IPA* have been recognised as providing some protection to the development rights and property values of landowners; however they have also been strongly criticised for their impact on local government decision-making (**page 25**).

1 INTRODUCTION

In Queensland, 'injurious affection' is a long-established statutory concept relevant to compensation-

- for the compulsory acquisition of part of a person's land under the *Acquisition of Land Act 1967* (Qld); and
- under the *Integrated Planning Act 1997* (Qld), for the adverse effects to a person's development rights from changes to a planning scheme or planning scheme policy.

In the compulsory acquisition context, it has been said that "no other subject … has attracted as much interest and attention as injurious affection".[1] A considerable part of the controversy relates to the 'unfairness' which results from the concept being restricted to those who have had part of their property acquired. Other neighbouring landowners, who are generally also impacted by the public works giving rise to the resumption (e.g. construction of a new road, or the widening of an existing road), and from whom no land is acquired, do not have a right to similar claims for the impact of those works (e.g. noise, dust, vibration, fumes, lighting) on their land. Further, a 2001 decision of the High Court noticeably widened the grounds upon which compensation is payable for injurious affection arising from land acquisitions. It is considered that this decision will have a significant effect on Queensland infrastructure[2] and increase the amount of damages for injurious affection.

Compensation for injurious affection arising from planning scheme changes is unique to Queensland. While offering some protection to the development rights and property values of landowners, the Queensland position has been described as "pro-development" and is criticised on a number of fronts. In particular, local governments encounter difficulty when seeking to act in the greater community interest or in ecologically sustainable ways, or in effectively controlling development where 'down zoning' is needed to rectify inappropriately zoned land.

2 ACQUISITION BY COMPULSORY PROCESS

The *Acquisition of Land Act 1967* (Qld) ('*ALA*') sets out the procedure for the compulsory acquisition of land in Queensland.

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1 Douglas Brown, *Land Acquisition*, 5th edn, Butterworths, Sydney, 2004, p 168.

2 Comment by Mr Pat Dwyer, Deputy Crown Solicitor, Litigation made at Queensland Government Crown Law Forum: Marshall decision examined.

2.1 PURPOSES FOR WHICH LAND MAY BE TAKEN

The purposes for which land[3] may be taken under and subject to the *ALA* are-

- where the constructing authority is the Crown, any purpose set out in the schedule to the *ALA*;
- where the constructing authority is a local government-
  - any purpose in the schedule which the local government may lawfully carry out; or
  - any purpose, including any function of local government, which the local government is authorised or required under another Act to carry out; or
- where the constructing authority is other than the Crown or a local government-
  - any purpose in the schedule which the constructing authority may lawfully carry out; or
  - any purpose which the constructing authority is authorised or required under another Act to carry out (s 5(1)).

The power to take land under the *ALA* includes power to take land, from time to time as required, either for the primary purpose or for any incidental purpose (s 5(2)). In circumstances, however, where it is not necessary that the whole estate in any land be taken, an easement must instead be taken (s 6).

2.2 COMPULSORY ACQUISITION PROCEDURE

The main steps in the acquisition process involve-

- issuing a notice proposing that land be resumed (a 'notice of intention to resume');
- allowing the decision to compulsorily acquire the land to be challenged ('pre-acquisition review'); and
- acquiring the interest by issuing an acquisition notice.

2.2.1 Pre-Acquisition

A constructing authority which proposes to take land under the *ALA* must serve a notice of intention to resume (s 7(1)) on every party that will be entitled to

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[3] 'Land' means land, or any estate or interest in land, that is held in fee simple, but does not include a freeholding lease (*ALA*, s 2).

compensation under the *ALA* in respect of the taking of the land, and on any mortgagee of the land (s 7(2)). The notice must-

- specify the particular purpose for which the land is required; and
- state the description of the land to be taken (ss 7(3)(a) and (b)).

The notice must also state that the person to whom it is directed has a right to object to the acquisition within a specified timeframe, which must be not less than 30 days after the date of the notice (s 7(3)(d)).

2.2.2 Acquisition

An acquisition is effected by publication of a notice in the Gazette (ss 9(7), 10(2), 10(5)), at which time the land vests in the Crown or the constructing authority which requires the land (s 12).

2.3 COMPENSATION

2.3.1 Right to Compensation

Upon publication of a resumption notice in the Gazette, the estate and interest of every person entitled to the whole or any part of the resumed land is converted into a right to claim compensation under the *ALA* (s 12(5)).

A claim for compensation must include both an itemised statement of the claim, showing the nature and particulars of each item and the amount claimed in respect thereof, and the total amount claimed (s 19(1)).

The amount of compensation may be agreed upon, or referred to the Land Court for independent determination (s 24).

2.3.2 Assessment of Compensation

In assessing the compensation to be paid, regard must be had not only to the value of the land that is taken but also to the damage (if any) caused by-

- severing that land from other land of the claimant; and/or
- the exercise of any statutory powers by the constructing authority otherwise 'injuriously affecting' such other land (s 20(1)).

Compensation is assessed according to the value of the claimant's estate or interest in the acquired land on the date that it was taken (s 20(2)). Account is also taken of

any enhancement to the value of the claimant's interest in any adjoining land due to the carrying out of the works or purpose for the resumption (s 20(3)).

2.4 MEANING OF 'INJURIOUS AFFECTION'

'Injurious affection' provides compensation for the "adverse effect of the activities of a resuming authority upon a dispossessed owner's land".[4]

Essentially, injurious affection involves damage to, or a decrease in the value of, any land retained by the claimant that is caused by the scheme or the purpose of the acquisition.[5] This may include, but is not limited to-[6]

- physical damage to the retained land;
- limitations on the activities on, or the use of, the retained land;
- interferences with the amenity or character of the retained land;
- things that may deter purchasers from buying the retained land; or
- things that increase the expense of using the retained land.

2.5 CASE LAW ON INJURIOUS AFFECTION

Historically, there was some uncertainty in the case law whether a claim for injurious affection was assessed by restricting the claim to the use of, or the works done on, the resumed land. This was the principle enunciated in the United Kingdom in *Edwards v Minister of Transport*[7] (the 'Edwards Principle').

In 2001, the High Court in *Marshall v The Director-General of Transport*[8] unanimously dismissed the application of the Edwards Principle in Australia. It held that, in relation to the resumption of part of a person's land under the *ALA* for a particular purpose (e.g. a road), compensation for injurious affection should take into account the impact of that purpose on the person's remaining land *generally*,

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4 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 363.

5 Kelly McDonald, 'High Court expands compensation for compulsory acquisition', *Environmental & Planning Issues*, Clayton Utz, November 2001; http://www.claytonutz.com/downloads/Env_National_Nov01.pdf.

6 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 367.

7 [1964] 2 QB 134.

8 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351.

and not only the impact arising from that *part* of the purpose carried out on the land which is *acquired* from the claimant.

2.5.1 The Edwards Principle

Facts

Mr Edwards owned a house on about two acres of land, and an adjacent paddock of approximately two and a half acres. Under powers conferred by particular highway legislation, the Minister of Transport constructed a large trunk road on an embankment which passed above Edwards' land. To construct the road, the Minister compulsorily acquired two small pieces of triangular land from Edwards comprising 38 and 302 square yards. Although for the greater part of its length the trunk road did not impact on Edwards' property, the evidence indicated that, because the road rose somewhat steeply where it passed his house, Edwards would be considerably disturbed by dust, noise and the flashing lights of traffic.

Edwards sought compensation under section 63 of the *Land Clauses Consolidation Act 1845* (UK). This provision entitled a landowner not only to compensation for the resumed land but also for the damage sustained by the severing of the acquired land from the remaining land, or otherwise injuriously affecting such other lands by the exercise of the powers of the Act.

Land Tribunal Decision

The Land Tribunal held that Edwards was entitled to £4,000 compensation for the acquisition and use of the acquired land, and for the injurious affection to the remainder of his property which resulted from the construction of the trunk road *both on and beyond* the boundary of the acquired land.

This award was the sum the parties agreed Edwards was entitled to if compensation was to be assessed on this basis. However, if compensation was to be restricted to the damage caused by acts done *upon the acquired land*, it was agreed that the compensation would have been limited to £1,600.

A factor taken into account by the Land Tribunal in reaching its decision was the 'veto principle'; namely that if the Minister had no compulsory acquisition powers, Edwards could have refused to sell, unless he were compensated for all the damage his entire holding would suffer by the construction of the road.

Decision on Appeal

The Minister appealed the award of compensation on this basis to the English Court of Appeal.

The Court accepted the view that, in referring to damage "injuriously affecting such other lands by the exercise of the powers of this or the special Act", the compensation provision restricted to damage arising from things that happened on the acquired land. Accordingly, Edwards was entitled to only £1,600 compensation.

It was decided that, in injurious affection claims, if the damage to the claimant's land arose *partly from* the use of the land acquired from the claimant and *partly from* the use of other land never owned by the claimant, the whole damage could not be claimed; only *that part* of the damage *attributable to the activities on the acquired land* could be claimed.

2.5.2 The *Marshall* Case

The High Court in *Marshall* dismissed the Edwards Principle, thereby widening the basis of compensation for injurious affection.

Facts

Marshall owned a large area of land near Nambour, immediately west of the Bruce Highway. In 1985, 5,555 square metres of Marshall's land were acquired for road purposes under the *ALA* for a project involving the widening of a large part of the Bruce Highway from two lanes to four lanes. The existing highway, where it passed Marshall's land, formed the new southbound lanes. The new northbound lanes gave rise to the resumption.

Marshall claimed that the project altered the drainage system making his remaining land (which was located in a flood plain) more susceptible to periodic flooding. No part of the widened highway or the altered drainage system was on the resumed land, nor was the resumed land used to carry out work to widen or drain the highway.

Compensation of approximately $1,250,000 was claimed under the *ALA*, including damages for injurious affection to the remainder of Marshall's land. The components to the claim were as follows-

- raw land value $ 6,630
- damage due to severance $590,000
- damages due to injurious affection $651,352
- disturbance $ 8,850

The claim for injurious affection related to the cost of installing improved flood mitigation measures ($650,000) on Marshall's remaining land, so that the risk of flooding remained at pre-acquisition levels.

Based on the Edwards Principle, the Director-General argued that this component of the claim should be refused because the acquired land was not used for the widened road or drainage works. Instead, it was only used for rock spill from the batters supporting the highway.

The Land Court, Land Appeal Court and Court of Appeal agreed with the Director-General. This was later overturned on appeal to the High Court.

Land Court and Land Appeal Court Decisions

In February 1998, the Land Court assessed compensation at $348,446. Relying on the Edwards Principle, Marshall's claim for compensation for injurious affection was entirely rejected.

The evidence failed to establish that any part of the works was performed on the resumed land. Neither was it established that any of the works on the resumed land caused or contributed to the flooding problem. The flooding problem was entirely attributable to works beyond the boundary of the resumed land. The rock spill on the resumed land formed no part of the road embankment and it had no discernable purpose, the best explanation being that it was surplus material with no structural or engineering purpose.

An appeal by Marshall to the Land Appeal Court was refused in July 1998.

Decision of the Queensland Court of Appeal

Marshall appealed to the Queensland Court of Appeal. A ground of appeal included that the Edwards Principle was wrong and should not be followed. In October 1999, the appeal was unanimously dismissed.[9]

Although noting that the Edwards Principle had been criticised in some journals and Law Reform Commission reports,[10] the Court of Appeal said that it did not find-

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[9] *Marshall v Director-General, Department of Transport* [1999] QCA 440; http://www.courts.qld.gov.au/qjudgment/QCA%201999/QCA99-440.pdf. De Jersey CJ and Davies and Thomas JJA delivered judgment.

[10] The judgment refers to Knetsch, *Property Rights and Compensation – Compulsory Acquisition and Other Losses*, Butterworth & Co (Canada) Ltd, 1983, pp 150-152; Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14, Canberra AGPS, 1980, p

> *[S]uch criticisms to be founded upon the suggestion that the decision is legally unsound. Indeed the criticisms have proceeded upon the basis of inequality of result according to artificial criteria. The principles are principally of legislative unfairness, and their subject matter goes beyond the consequences of Edwards, adverting particularly to persons affected by a public project without having any of their land taken, and who accordingly are not eligible for compensation. Other points of criticism involve the types of nuisance for which Australian law has not provided compensation for land owners affected by public projects. Such matters involve wide-ranging aspects of public policy with complex social and economic consequences. It is significant that despite the existence of such criticisms over many years, and despite various amendments in some jurisdictions, no ideal solution seems to have emerged to satisfy the community's desire for both progress and compensation. The criteria settled in Edwards may not be ideal, but they have the virtue of relative certainty, and have been well understood for many years. If they are to be replaced by some other criteria this should be done by the legislature. It is interesting to note that this was done in the United Kingdom in 1973 by s 44 of the Land Compensation Act which requires compensation for injurious affection now to be assessed by reference to the effect of the whole of the works of the acquiring authority and not only those performed on land acquired from the claimant.*[11] …
>
> *Edwards has been consistently followed in this State for many years*[12] *… and indeed the same construction had already been reached by the Land Court … before Edwards was decided. Edwards has also been applied in other jurisdictions within and beyond Australia, but it is unnecessary to pursue its application further. For the purpose of s 20 of the Acquisition of Land Act 1967 it may be taken as settled law.*[13]

Marshall appealed to the High Court.

Application of the Edwards Principle in Australia dismissed by the High Court

In June 2001, the High Court, in a unanimous decision,[14] allowed the appeal and disapproved of the Marshall Principle.

The issue for determination was whether compensation for injurious affection payable to a dispossessed landowner under the *ALA* was restricted to compensation

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152, http://www.austlii.edu.au/au/other/alrc/publications/reports/14/14.pdf; South Australian Land Acquisition (Legislative Review) Committee, *Report*, 1969, pp 3-4; Jacobs, *The Law of Resumption and Compensation in Australia*, LBC Information Services, 1998, para 13.3, pp 206-208.

11 *Marshall v Director-General, Department of Transport* [1999] QCA 440, para 34.

12 The High Court later disagreed with this finding. *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 361.

13 *Marshall v Director-General, Department of Transport* [1999] QCA 440, para 35.

14 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351. Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ delivered judgement.

for the impact of the work done on the actual land taken, and the precise use to which that land was put.

The High Court held that Marshall was entitled to compensation for the injurious affection to his remaining land which resulted from the exercise of the respondent's power in duplicating the highway. To this extent, the use of the acquired land was taken *in combination with* the use of other land for the duplication of the highway. The High Court said that the acquisition of Marshall's land, the work done on it, and the use, passive or active, to which it was put in pursuance of the statutory purpose formed part of the exercise of the relevant statutory power so as to give rise to a right to compensation for such injurious affection caused to Marshall's remaining land by reason of the exercise of that power.

In their joint judgment, Gleeson CJ, Gummow, Kirby and Callinan JJ[15] held that the language of section 20(1)(b) of the *AIA*[16] is plain and provides that, when assessing compensation, regard must be had not only to the value of the land taken but also to the damage caused by the exercise of *any statutory powers* by the constructing authority otherwise injuriously affecting *such other* [the remaining, severed] *land*.[17] Their Honours said-

> *The section does not say "the exercise of any statutory powers by the constructing authority on and only on the land taken …". The section clearly distinguishes between the land taken and the severed land. It does not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers: for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. In truth, all of these can relevantly and properly be characterised as part and parcel of the construction, and subsequently the use of the road. Once the constructing authority acquires land for a statutory purpose and carries out the statutory purpose, it must, pursuant to s 20(1)(b) of the Act, compensate the dispossessed owner for the injurious effect upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective.*
>
> *In this case, the respondent gave notice of intention to the appellant to resume the land for "road purposes" … . That notice was given following the making of a proclamation … . A constructing authority does not have an unfettered right to*

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[15] Gleeson CJ, Gummow, Kirby and Callinan JJ delivered the leading judgment. Gaudron, McHugh and Hayne JJ substantially agreed with their Honours' reasoning.

[16] Section 20(1)(b) of the *AIA* provides that, in assessing the compensation to be paid, regard shall be had to the damage caused by "the exercise of any statutory powers by the constructing authority otherwise injuriously affecting" any land retained by the claimant from which the acquired land was severed.

[17] *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 359.

> *resume land. Unless the authority has a bona fide purpose of exercising a statutory power in respect of the land, a purported resumption of it would be unlawful. There is no suggestion of unlawfulness here. What is extraordinary here is the respondent's submission that having acquired the land for "road purposes" its use of the land thereafter was, and is not, for any of those purposes.*[18]

In their Honours' opinion, the correct view is that land is land used for 'road purposes', whether it is a site for-[19]

- the deposition of residue from the roadworks;
- the support of a batter;
- drainage associated with roadworks;
- future road widenings; or
- use as a passive buffer.

In terms of the apparent unfairness between neighbouring landowners of compensation for injurious affection being restricted to those who had had part of their property resumed, their Honours said-[20]

> *It is no answer to say … that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation. That is irrelevant. The fact that the enjoyment or utilisation by them of their property may have been adversely affected, and indeed, perhaps unfairly so by reason of the unavailability to them of compensation, provides no reason to distort the language of the Act, and to deprive others, who have lost land, of compensation for injurious affection.*

Other "practical difficulties" which were raised by the constructing authority against giving the *AIA* its "ordinary meaning" were dismissed by their Honours as "illusory only".[21] These included-

- that the resuming authority might have a long-term purpose which is not to be carried into effect within an identifiable period (their Honours said that this will raise a merely factual question of the quantification of postponed damage or loss, an exercise which is regularly undertaken by courts); and
- difficulties associated with measuring the effects of implementation of the statutory purpose, the degree of vibration and the extent of the escape of noise, dust or fumes (their Honours said that this, again, raises questions of

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18 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, pp 359-360.

19 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 360.

20 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 362.

21 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, pp 362-363.

> fact capable of resolution on evidence of the kind regularly given in planning courts and tribunals, as well as those in which compensation must be determined).

In considering the authority to be accorded to the Edwards Principle, and the extent of its application, their Honours concluded that the reasoning in *Edwards* was "unconvincing".[22] Contrary to the findings of the Court of Appeal, it was held that *Edwards* had "not been consistently applied, or at least certainly not in an unqualified way in Queensland".[23] *Treston v Brisbane City Council*[24] and *South East Queensland Electricity Board v Beaver Dredging Pty Ltd*,[25] both decisions of the Queensland Land Court, were referred to in support of this statement and provide examples of cases which demonstrate the unrealistic nature, and unfairness, of an unqualified application of the Edwards Principle.

Example 1 – Treston v Brisbane City Council

This case involved a claim for compensation following the resumption of an elongated strip of land (together with other adjoining land) for the construction of a connecting road. The claimants owned and resided upon a parcel of land in a quiet suburban area, with frontage to a typical suburban 'back' road. When constructed, the new connecting road contained four traffic lanes. On the land acquired from the claimants, a narrow footpath was constructed. Traffic counts on the new road showed volumes of 10,400 vehicles a day in 1984, increasing to 11,800 in 1985. The claimant's property changed from an inside residential property in a quiet attractive residential setting to a corner position on a busy four lane connection road affected by noise, vibration, fumes, smell, artificial lighting and lack of privacy. The Council argued that the claimant was not, or was hardly, injuriously affected by the relatively innocuous use, as a footpath, to which the acquired land was put.

The Land Court held that the land acquired from the claimant formed an integral and inseparable part of the resumptions necessary for the construction of the road. Therefore, compensation for injurious affection to the retained land was assessed according to the damage which flowed from the construction of the whole of the new road.

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22 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 363.

23 *Marshall v Director-General, Department of Transport* (2001) 180 ALR 351, p 361.

24 (1985) 10 QLCR 247.

25 (1985) 10 QLCR 166.

Example 2 - South East Queensland Electricity Board v Beaver Dredging Pty Ltd

In this case, the Board acquired an easement for electric line purposes containing, among other things, the right to convey electricity over and across the resumed land by means of electric wires. The easement was over a strip of land nine metres wide along the full length of the north-western boundary of the claimant's land, and was contiguous with an easement acquired from the adjacent Headlands Golf Course. At the time the easement was taken, the land over which it was taken had been considered ripe for residential subdivision.

The Board appealed against a determination of the Queensland Land Court for compensation of $96,000 consequent upon the resumption of the easement, instead arguing that only $4,100 should have been awarded due to the powerline structures predominantly not being on the easement. The Land Appeal Court said-[26]

> *In this case there was a novel attack in that, as the power line structures are mainly not on the subject easement, but on the golf course easement, then compensation should be only minimal (… Edwards v Minister for Transport …). With this suggestion we do not agree. In Re: Commonwealth v. Morrison …, the High Court, in distinguishing Edwards v. Minister for Transport, held that where the Commonwealth acquired land used as a sheep station adjacent to an airport, for the extension of the airport, after which the airport was suitable for use by jet aircraft, the assessment of compensation for the resumption should be made on the footing that allowance should be made for the depreciation in the value of the adjacent land by the use of the whole of the extended aerodrome. Further, compensation under this heading was not limited to allowance for depreciatory effects exclusively traceable to the construction and use of works constructed on the acquired land. We have no doubt that the resumption of the subject easement is an integral and inseparable part of the resumptions necessary for the construction of the power lines and we cannot appreciate in a practical sense and in having regard to the rights and obligations conferred and imposed by the easement how a separation of damage flowing from the resumptions could be made in view of the uses to which such lands have been put or are capable of being put.*
>
> *We find that in this matter that it is an unrealistic proposition to suggest that the very existence of the power lines would not be off-putting for potential purchasers of adjacent subdivided residential lots … for a variety of reasons, many of which are obvious, but the principal one being the unsightly nature of the towers, and to a lesser degree the transmission lines.*

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[26] *South East Queensland Electricity Board v Beaver Dredging Pty Ltd* (1985) 10 QLCR 166, p 182.

2.6 ISSUES REGARDING COMPENSATION FOR INJURIOUS AFFECTION FOR LAND RESUMPTIONS

The Australian Law Reform Commission ('ALRC') noted the "gap" giving rise to injurious affection claims under statute-[27]

> *Australia is predominantly an urban society. Noise, vibration, smell, smoke, fumes and the like have become familiar to urban dwellers. To some extent they are accepted as the price of enjoying urban facilities. However, in extreme cases, they so affect the enjoyment of property as to devalue it. If the owner feels forced to move from a property, or for other reasons needs to sell, he must sell at a loss. Where private development causes or threatens such a loss, a remedy, the common law action for nuisance, is available. An injunction may be obtained to restrain the nuisance. Damages for financial loss are recoverable. However, an action for nuisance is not normally available against a statutory authority acting within its powers. In such a case the private citizen must suffer the loss, imposed upon him by the community for the community's end.*

In recognising the 'unfairness' between neighbouring landowners who may be similarly affected by the purpose of a resumption, but where compensation for injurious affection is limited to those from whom part of their land has been acquired, the ALRC further discussed this "exceptional" circumstance as follows-[28]

> *The only exception to this rule is where part of the claimant's land is taken for the work which causes the adverse, or injurious, effect. In such a case the compensation payable to the claimant for the loss of the part taken may include an allowance for injurious affects on the remainder. … The present law distinguishes between landowners who have suffered a loss of value by reason of a public work not on the basis of the extent of the damage but on the basis of which of them happened to lose land for the work. There is, of course, no necessary correlation between the loss suffered and the history of ownership of the land upon which the work is located.*

The apparent inequity between neighbouring landowners regarding the restriction of compensation for injurious affection to those from whom part of their property has been compulsorily acquired is the key criticism of the concept.

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[27] ALRC, *Lands Acquisition and Compensation,* Report No 14, para 47.

[28] ARLC, *Lands Acquisition and Compensation,* Report No 14, para 48.

2.7 POSITION IN OTHER JURISDICTIONS

2.7.1 Other Australian Jurisdictions

Similarly to the *ALA*, the land acquisition provisions in South Australian and Tasmanian legislation adopt the 'injurious affection' terminology. However, also similar to the *ALA*, these jurisdictions do not define 'injurious affection'.

Section 25(1)(b)(ii) of the *Land Acquisition Act 1969* (SA) provides that in assessing the amount of compensation, consideration may be given to the loss occasioned by reason of injurious affection.

Section 27(1)(e) *Land Acquisition Act 1993* (Tas) provides that in determining compensation, regard must be had to "whether other land belonging to the claimant is injuriously affected by the carrying out of, or the proposal to carry out, the authorized purpose". Further, section 7H provides that where the Crown acquires land from a person for the purposes of infrastructure to be constructed or operated by the private sector, compensation is available for the injurious affection to the land and other land owned by the person.

The remaining jurisdictions, although not expressly referring to 'injurious affection', provide a similar element of compensation.[29]

It has been questioned whether *Marshall* applies in those jurisdictions where the compulsory acquisition provisions do not specifically refer to 'injurious affection' but which do indicate an ability to be compensated for loss or damage which could be regarded as injurious affection.

It has been said that it is strongly arguable that this question would be answered in the affirmative,[30] although it is a matter yet to be argued and authoritatively determined.[31]

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[29] *Lands Acquisition Act 1989* (Cth), s 55(a)(iv); *Lands Acquisition Act 1994* (ACT), s 45(2)(a)(iv); *Lands Acquisition Act 1979* (NT), schedule 2 rule 2 (c) (severance); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 55(f); *Land Acquisition and Compensation Act 1986* (Vic), s 41(1)(e); *Land Administration Act 1997* (WA), s 241(7).

[30] Kelly McDonald, 'High Court expands compensation for compulsory acquisition'.

[31] Douglas Brown, *Land Acquisition*, 5th edition, Butterworths, Sydney, 2004, p 172.

2.7.2 Overseas Jurisdictions

The United Kingdom

In the United Kingdom, *Edwards* was greeted with criticism. The ALRC noted-[32]

> *The case illustrates the artificiality of the distinction between acts done on the land taken from the claimant and acts done on land acquired from someone else. If the two triangles acquired from Edwards had merely constituted, for example, part of the embankment or shoulder to the road, he would have received no compensation for injurious affection caused by traffic passing over the roadway even though the road could not have been constructed without provision for a shoulder or an embankment. However, as he was 'fortunate' enough to have land taken from him upon which part of the roadway itself was constructed he received some compensation. Such compensation was, however, limited to the damage attributable to the traffic passing over the acquired land, even though the injury to his property resulted from construction and use of the road as a whole.*

A report in the United Kingdom which followed the Edwards Principle recommended that it be reversed "so that an owner who has had part of his land taken from him will receive full compensation for the injurious affection to the land he retains, regardless of whether or not the damage is caused by the use of land taken from him".[33] The legislation was subsequently amended, with section 44(1) of the *Land Compensation Act 1973* (UK) adopting the recommendation and providing that-[34]

> *Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.*

California

In California, the 1960 case of *People v Symons*[35] had held (similarly to *Edwards*) that the part of the project or works causing damage to retained land must be located on the part acquired in order to be compensable. In 1974, the California

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[32] ARLC, *Lands Acquisition and Compensation,* Report No 14, para 290.

[33] *Justice Report: Compensation for Compulsory Acquisition and Remedies for Planning Restrictions together with a Supplemental Report,* Stevens, London, 1973, para 54, in ALRC, *Lands Acquisition and Compensation,* Report No 14, para 290.

[34] *Lands Acquisition and Compensation,* Report No 14, para 291.

[35] 54 Cal 2d 855.

Law Revision Commission recommended that in cases where only part of a landowner's land is taken, that the principle in *People v Symons* should be overriden by legislation. This was effected in 1975.[36]

3 COMPENSATION UNDER THE *INTEGRATED PLANNING ACT 1997* (QLD)

Chapter 5, Part 4 of the *Integrated Planning Act 1997* (Qld) ('*IPA*') sets out the circumstances which may result in a liability on local governments to pay compensation for injurious affection arising from changes to planning schemes or planning scheme policies which affect development rights.

From the perspective of allowing compensation for the effects of 'down zoning', the provisions in *IPA* are unique to Australian planning legislation and have been a feature of Queensland legislation since 1934.[37]

3.1 DEVELOPMENT OF INJURIOUS AFFECTION UNDER QUEENSLAND PLANNING LEGISLATION

The compensation provisions in *IPA* replaced, but take a different approach to, the injurious affection provisions which were contained in the now repealed *Local Government (Planning and Environment) Act 1990* (Qld) ('*LGPEA*').

Local governments had "sought a new approach because of a perception that, under the *LGPEA* provisions, persons were receiving substantial compensation payments based upon theoretical and academic losses in development rights, rather than the real loss of a right to proceed with a development which the owner genuinely intended to pursue".[38] The following examples demonstrated this problem-[39]

- claims in relation to the 'down zoning' of land which had been historically subdivided and was therefore, at least theoretically, capable of residential development. Despite natural characteristics of such lands making it unlikely that such development would occur, valuation exercises could be

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[36] Under Chapter 1275 of the Statutes of 1975. See ALRC, *Lands Acquisition and Compensation*, Report No 14, para 295 and ff 49 & 50.

[37] David Margan, 'Problems facing a state of change', *Courier Mail*, 20 November 1996, p 17.

[38] Local Government Association of Queensland Inc., *Integrated Planning Act and Commentary*, commentary by Stephen Fynes-Clinton, p 257.

[39] These examples are taken from LGAQ, *Integrated Planning Act and Commentary*, pp 257-258.

undertaken which purported to take the characteristics of the land into account and still arrive at a figure representing loss in value due to the imposition of a legal prohibition on the development. This reflected a focus in the *LGPEA* on the loss of development rights at a theoretical rather than practical level; and

- the down zoning of a commercial site due to an oversight in the preparation of a new planning scheme. The oversight did not result in the loss of substantive development rights, and was corrected as quickly as possible. The owner of the land still received $500,000 compensation at first instance. An appeal by the local government was substantially successful, with the Court of Appeal noting that the likelihood of the error being corrected, and this subsequently occurring, should have been considered as indications that the actual loss in value was minimal, or nil. The fact that the claim could still be brought demonstrated the inappropriateness of the provisions.[40]

IPA "did not take the politically charged route of extinguishing the right to compensation for changes to a planning scheme".[41] However, the *IPA* provisions are considered a "significant improvement" on the *LGPEA* which-[42]

> *[L]ocked local governments into undesirable zoning patterns for fear of massive compensation claims if they made changes to their planning schemes restricting development opportunities.*

It has been said that "[o]verall, … *IPA* gives local governments more flexibility to proceed with changes to their planning schemes and to deal afterwards with compensation issues on a case by case basis. … [L]ocal governments need no longer shy away from making changes to their planning schemes for fear of exposing themselves to large compensation claims".[43]

IPA "allows local governments to make changes to their planning schemes and then to deal with compensation claims on [an individual] basis over the next two years. After two years, compensation is no longer an issue and the existing planning scheme will govern all new development".[44]

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[40] This example is based on the facts in *CMB No. 1 Pty Ltd v Mulgrave Shire Council* [1997] QPELR 51. The appeal is reported at (1997) 96 LGERA 306.

[41] Philippa England, *Integrated Planning in Queensland*, 2nd edn, Federation Press, Sydney, 2004, p 90.

[42] Philippa England, p 90.

[43] Philippa England, p 89.

[44] Philippa England, p 90.

Further, the compensation provisions in *IPA* target the loss of development rights which were *actually capable* of being exercised and *actually intended* to be exercised.[45] The procedure also provides local governments with an option, in the assessment of development applications under superseded planning schemes, whether or not to expose themselves to a possible compensation claim.

3.2 *INTEGRATED PLANNING ACT 1997* (QLD)

3.2.1 Compensation for Reduced Value of Interest in Land

The owner[46] of an interest in land is entitled to reasonable compensation from a local government if-

- a change to a planning scheme or planning scheme policy reduces the value of the interest;
- a 'development application (superseded planning scheme)' for a development permit relating to the land has been made;[47]
- the application is assessed having regard to the planning scheme and planning scheme policies in effect when the application was made;[48] and
- the local government (or, on appeal, the court) either refuses the application or approves the application in part and/or subject to conditions (ss 5.4.1 and 5.4.2).[49]

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45 LGAQ, *Integrated Planning Act and Commentary*, p 258.

46 The "owner" of an interest in land must be an owner of the interest at the time a change to the planning scheme is made (*IPA*, s 5.4.1).

47 Essentially, the application must request that it be made under the superseded planning scheme and must be for a development permit and not simply a preliminary approval. 'Development application (superseded planning scheme)' is defined in the schedule 10 dictionary to *IPA*.

48 That is, under the 'new' planning scheme.

49 On a separate basis, the owner of an interest in land is also entitled to reasonable compensation from a local government if because of a change, the only purpose for which the land could be used (other than the purpose for which it was lawfully being used when the change was made) is a public purpose (*IPA*, s 5.4.3).

3.2.2 Application must be made within Two Years of the Change

A 'development application (superseded planning scheme)' is a development application made within two years after the day the planning scheme or planning scheme policy creating the superseded planning scheme was adopted or the amendment creating the superseded planning scheme was adopted (schedule 10 dictionary).

For example, if a local government implements a new planning scheme on 30 June 2004, the two year timeframe commences on 1 July 2004 and ends on 1 July 2006.

3.2.3 Choice how Local Governments Deal with Applications

Local governments have a choice how to deal with a development application (superseded planning scheme).

Option 1

A local government may decide to assess the application under the superseded planning scheme (s 3.2.5(3)(a)), in which case an obligation to pay compensation will not be incurred, even if conditions are imposed or the application is refused under the superseded planning scheme.

As part of the 'use it or lose it' ideology of *IPA*, the currency period of a development permit in this instance will be between two and five years, depending on the type of development (ss 3.5.21(4)-(5)).

The basis of this approach is that the applicant is in exactly the same position that it would have been in had the scheme change not occurred. The consideration for local governments however is whether this approach may "undermine the objectives of their new planning scheme if the changes made in it were significant".[50]

Option 2

The alternate option is for a local government to assess the development application (superseded planning scheme) as an application under the new planning scheme (s 3.2.5(3)(b)). In this circumstance, if the application is refused, only partly granted and/or granted subject to conditions, the applicant is entitled to reasonable compensation.

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[50] Philippa England, p 89.

The consideration for local governments with this approach is a balance between the advantages that result from upholding the integrity of the scheme changes and the disadvantages of possible compensation claims.

3.2.4 Compensation

Reasonable compensation is the difference between market values of an interest immediately before and after a change, taking the following into account to the extent they are relevant-

- any limitations or conditions that may reasonably have applied to the development of the land under the superseded planning scheme;
- any benefit accruing to the land from the change, including but not limited to the likelihood of improved amenity in the locality of the land;
- if the owner owns land adjacent to the interest in land, any benefit accruing to that land because of-
  - the coming into effect of the change or any other change made before the claim for compensation was made; or
  - the construction of, or improvement to, infrastructure on the adjacent land under the planning scheme or planning scheme policy (other than infrastructure funded by the owner) before the claim for compensation was made);
- the effect of any other subsequent changes made to the planning scheme or planning scheme policy since the change, but before the development application (superseded planning scheme) was made; and
- if the application is approved in part or subject to conditions – the effect of the approval on the value of the land (s 5.4.9).

3.2.5 Circumstances in which Compensation is not Payable

Compensation is not payable if a change-

- has the same effect as another statutory instrument, in respect of which compensation is not payable;[51]

[51] This has the effect of providing that compensation under *IPA* is not payable if the development rights would have been lost in any event, without the scheme change, under other legislation which does not allow for compensation. Examples include an environmental protection policy which imposes restrictive standards in relation to particular development ro where premises are entered into the register under the *Queensland Heritage Act 1992* (Qld).

- concerns a type of development that, before *IPA*, would normally have been dealt with under a local law, including, for example, the filling or drainage of land;
- is about the relationships between, the location of, or the physical characteristics of buildings, works or lots, but the yield achievable is substantially the same as it would have been before the change;[52]

- concerns a designation of land for community infrastructure,[53] the timing of development in a benchmark development sequence or matters identified for an infrastructure charges plan;
- removes or changes an item of infrastructure shown in the scheme;
- affects development that, had it happened under the superseded planning scheme-
  - would have led to significant risk to persons or property from natural processes (including flooding, land slippage or erosion) and the risk could not have been significantly reduced by conditions attached to a development permit;[54] or
  - would have caused 'serious environmental harm',[55] which could not have been significantly reduced by conditions attached to a development approval; or
- compensation has already been paid; or
- if infrastructure in a planning scheme is not supplied, or supplied to a different standard, or supplied at a different time than the time stated in the planning scheme (s 5.4.4).

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[52] The concept of "yield" and "gross floor area" are discussed in *IPA*, ss 5.4.4(2) and (5).

[53] Designation involves the identification of certain land as being suitable for particular community infrastructure. It does not prevent an application being made for approval of development on the land which is otherwise consistent with the planning scheme, though it may make it less likely that approval will be given. Refer to *IPA*, s 3.3.18(5). In this instance, the relevant procedure is set out in *IPA*, s 2.6.19, and the following provisions. The owner of designated land may request the designating authority to acquire the land on specific 'hardship' grounds, including that a development approval the owner genuinely intended to seek has been, or is, likely to be refused because of the designation.

[54] In this case, the public interest in preventing such development overrides private financial issues which might otherwise act as a disincentive for local governments in introducing such changes (LGAQ, *Integrated Planning Act and Commentary*, p 263).

[55] 'Serious environmental harm' is defined the *Environmental Protection Act 1994* (Qld), s 17.

3.2.6 Time Limit for Claiming Compensation

A claim for compensation must be given to a local government within six months after the day the application is refused or approved in part and/or subject to conditions (s 5.4.6(a)).

A local government must decide a claim for compensation within 60 business days after the day the claim is made (s 5.4.7). The decision may grant all or part of the claim, or refuse all of the claim (s 5.4.8(1)).

If the claimant is dissatisfied with the compensation decision, an appeal to the Planning and Environment Court must be commenced within 20 business days after the day notice of the decision is given to the claimant (s 4.1.34).

The payment of compensation is recorded on the title to the land (s 5.4.11).

3.3 REPEALED *LOCAL GOVERNMENT (PLANNING & ENVIRONMENT) ACT 1990* (QLD)

By way of summary and comparison with the current compensation provisions in *IPA*, section 3.5 of the now repealed *LGPEA* provided as follows-

- where a person's interest in premises was injuriously affected by the coming into force of any planning scheme provision, or any prohibition or restriction under the planning scheme, the person was entitled to compensation from the local government in respect of the injurious affection (s 3.5.(1));
- where land is included in a zone wherein its only permitted use (other than the continuance of the use to which it was lawfully being put at the time of the coming into force of the planning scheme and other than a permissible use of the land) is for a public purpose, or is affected by a proposed road (including a road widening), the land is taken to be injuriously affected (s 3.5(2)), in which case a claim for compensation could be satisfied by the local government, with the approval of the Governor in Council, amending the planning scheme to remove the limitations on use rights (s 3.5(2A));
- compensation is not payable-
  - in respect of any building or other structure erected or work done upon, or contract made, or other act or thing done in respect of land, unless, where required by law, it was approved by the local government;
  - where an interest in premises is injuriously affected by any planning scheme provision, if and to the extent that the same provision or a provision of the same effect was, at the date the planning scheme provision came into operation, already in force under the *LGPEA* or some other Act or local law of the local government;

- where an interest in premises is affected by a planning scheme which by its operation prescribes the space about buildings or other structures, or limits the size of allotments or the number of buildings or other structures to be erected, or prescribes the height, floor space, density, design, external appearance or character of buildings or other structures, but nothing in this paragraph is to limit the liability of the local government to pay compensation in respect of the acquisition by it of land under the *ALA*;
- where an interest in premises is affected by a planning scheme which prohibits or restricts the use of land or the erection or use of a building or other structure thereon for a particular purpose, unless the applicant establishes that he or she had a legal right immediately before the particular planning scheme provision came into force to use the land or erect or use a building or other structure thereon for a particular purpose which is so prohibited or restricted;
- in respect of anything done in contravention of a planning scheme;
- in respect of anything done in contravention of any interim development control provisions or approval given under those interim development control provisions, or in contravention of any building approval granted by the local government, or, in contravention of any decision in an appeal under such an interim development control provision or under part 5 of the *LGPEA*; or
- in respect of any affection of an interest in premises by or under a planning scheme or a local law made by a local government under which the subdivision of the land is prohibited or restricted (s 3.5 (4));

- a claim for compensation had to be made within three years after the date on which the claim arose (s 3.5(7));
- in assessing compensation, the following factors were relevant-
  - the difference between the market value of the interest immediately before and after the relevant planning scheme provision came into operation;
  - any modification of the injurious affection that may be effected in consonance with the planning scheme;
  - any benefit which may accrue to any of the claimant's land adjacent to the land the subject of the claim by reason of the change or the construction or improvement by the local government after the change of any work or service in pursuance of the change;
  - if the land in respect of which the claim is made, after the change came into operation, became or ceased to be separate from other land, the amount of compensation was not to be increased by reason of it having become or ceased to be separate from other land (s 3.5(8));

- where compensation for injurious affection was claimed, the local government could, at its option and with the prior approval of the Governor in Council, acquire the land under the *ALA* instead of paying compensation for injurious affection (s 3.5(9));
- a local government had to make a decision on a claim for compensation within 40 days after the receipt of the claim (s 3.5(10));
- in deciding a claim, a local government could grant or reject the claim (in whole or in part), acquire the land under *ALA* or, in certain circumstances, propose to amend the planning scheme. It could also do any combination of these (s 3.5(11)); and
- a claimant could appeal a local government's decision on compensation to the Planning and Environment Court (s 3.5(13)) within 40 days after the day the compensation decision was made (s 7.1).

3.4 ISSUES REGARDING COMPENSATION FOR INJURIOUS AFFECTION FOR PLANNING SCHEME CHANGES

The compensation provisions in *IPA* have been labelled as "pro-development".[56]

The key criticisms directed towards the provision of compensation for injurious affection under *IPA* include-

- an inability of local governments to control development if they have "no effective way of down zoning", particularly to rectify the inappropriate zoning of land. An example of such an impediment is where a local government seeks to "remove some of the excess stock of approved canal estates in the middle of unserviceable cow paddocks".[57]
- that the provisions interfere with the ability of local governments to act in the greater community interest or in ecologically sustainable ways;[58]
- the provisions are of greatest benefit to land speculators; and
- compensation for injurious affection to a landowner's development rights as a result of 'down zoning' is not balanced by recognition (e.g. through a 'betterment' tax) of the benefits to landowners and increased property values that may result from local government 'up zoning' of property.

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[56] Su Wild River, 'Protecting Noosa North Shore from development'; http://cres.anu.edu.au/lgcases/q4%20noosa.pdf.

[57] Phil Dickie, 'Let's get planning under control', *Sunday Mail*, 24 March 1996, p 71.

[58] Su Wild River, 'Protecting Noosa North Shore from development'.

The argument generally supporting injurious affection claims for planning scheme changes is that such provisions ensure the protection of development rights and property values and that a "move to an 'ecological' or 'liveable' community need not be at the expense of" landowners.[59]

[59] Chris Robertson, 'Compensation lost, compensation found: injurious affection and the Integrated Planning Act labyrinth', *Proctor*, April 2002, pp 20-21, p 20.

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