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9th December 2022

Re SCSI Submission – Law Reform draft Recommendations for Compulsory Purchase Orders

Dear Mr Noonan,

I refer to the invitation of the Law Reform Commission on the 19th July 2022 and subsequent engagements between SCSI and your office regarding the consolidation and overarching review of the legislation governing the CPO process and assessment of compensation.

The SCSI welcomes the early engagement on the draft recommendations and the recognition for the expertise of chartered valuation surveyors within our organisation, many of whom provide consultancy advice to claimants and acquiring authorities regarding CPO matters. SCSI's submission (enclosed) is prepared in the context of the information supplied within the 'Summary of Recommendations Report' dated 19th July 2022, covering eight Model Clauses across 9 chapters. We are aware however that supplementary information is yet to be published on recommendations pertaining to other matters such as 'Notice to Treat', however SCSI's submission is therefore limited to the scope and proposed recommendations contained only in the 19th July Report.

Our submission issued to your office in 2018 regarding the review of the CPO process and legislation, sets out in detail our position regarding CPO matters and how the process could be refined and adjusted to increase transparency, fairness and equity to a current robust and tested legislative framework. We believe that with further improvements to the legislation and arbitration process, the CPO rules could be well capable of serving the public interest for the next generation.

The meeting between the SCSI and the Law Reform Commission in October provided a great opportunity for both organisations to exchange views regarding the challenges and possibilities for reform. We welcome further dialogue on this matter as progress is made in the finalisation of your report regarding the review of CPO.

I hope you will find the contents of our submission helpful, and we remain available for another meeting if you consider it to be beneficial.

Regards

A handwritten signature in blue ink, appearing to read "Edward McAuley", is placed over a white rectangular background.

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SUBMISSION TO THE LAW REFORM COMMISSION

**COMPULSORY PURCHASE ORDER
LEGISLATION**

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Summary of SCSI recommendations

- Reduce the time period between CPO order and Notice to Treat.
- Establish an Advanced Payment Scheme whereby landowners are given the right to request 90% of the value as assessed by the Acquiring Authority once the obligations to buy and sell the property becomes operative.
- Amend the legislation allowing a Purchase/Blight Notice to the Acquiring Authority in cases where the proposed scheme renders the property incapable of reasonably beneficial use in the short term.
- Amend the inequities posed by Capital Gains Tax (CGT) by reintroducing roll-over tax relief to foster increased equity.
- Retain the Notice to Treat but have automatic vesting 18 months afterwards, which will allow the Acquiring Authority to grant legal rights of way.
- Modify the panel for Arbitration to maintain two full time arbitrators with legal backup from a panel of two barristers.
- Introduction of a statutory duty to provide ownership information by occupiers, owners or those in receipt of rent for the land when requested, and that such parameters should be included in a revised CPO code.
- Inclusion of all landowner types to be included within the CPO process should be considered.
- Acquiring Authority should be required to produce substantive information regarding the funding sources for land acquisition and scheme implementation.

1. Introduction

The Law Reform Commission, herein after referred to as the Commission, published a Compulsory Purchase Order (CPO) 'Issues Paper' in December 2017. The Paper outlined the Commission's review of the current law on compulsory acquisition of land with a view to the clarification, reform and consolidation of the principles and rules that underlie the process.

The Society of Chartered Surveyors Ireland (SCSI) welcomed the proposed review of the legislation and acknowledged the benefits of its consolidation. The SCSI acts in the public interest and is an advocate for a more cohesive and holistic legislative framework that is equitable for all property owners and relevant occupiers that are affected by CPO's.

The SCSI is pleased to provide written submission on the Commission's 'Appendix A – Summary of Recommendations' (as appended), however, noting that the SCSI response is principally focused on the draft recommendations outlined within this paper. The scope of this paper does not extend to any future recommendations that may be due in future CPO reports by the Commission. The overarching objective of this position paper is to outline how the Commission's draft recommendations can be more comprehensive by outlining certain matters for the Commission's consideration and how they can potentially be improved upon to make CPO proceedings more equitable and seamless.

2. The legislative Framework

SCSI has concerns that the current CPO process is far too elongated. From the date that a statutory body decides to issue a CPO as a single route or a section process, to the issuance of the Notice to Treat and Award Stage, is far too long and is thus imposing a severe detriment on property owners and their rights. With the ambitious plans set out in the 2040 National Development Plan, it is important that the consolidation and modernisation of CPO laws and rules are as streamlined as possible to reduce stress and any financial burdens on affected parties. The process can take many years and, in some cases, can span over the course of a decade or longer. The current proceedings for CPO are unacceptable as the knock-on impact of intention can negatively impact many decisions of the affected parties.

The SCSI recommends that in any revision of CPO legislation, that consideration is provided to reduce the time between CPO order and Notice to Treat. The current process also places a severe detriment on the valuers that represent the property owners/occupiers due to the caps that are placed on professional fees.

3. Compulsory Purchase Timeframes

The SCSI outlines a few considerations for the Commission on how this process can potentially be expedited at all stages.

(a) There should be funding in place prior to progressing a scheme of development which will ultimately lead to a CPO. The SCSI is aware of some projects that are brought to a certain stage and then they are stalled subject to funding.

(b) The design phase should be expediated through allocated funding in the initial stages, which will quickly progress the scheme so that the land required, and the preliminary design are made available.

(c) When the preliminary design and the lands needed are known, the scheme should quickly progress to a compulsory purchase application.

(d) Prior to the 2000 Planning and Development Act, it was possible for owners to serve purchase notices on Acquiring Authorities, but this ability was removed in the 2000 Act. The conditions that applied to this legislation prior to the year 2000 could be usefully brought back in relation to properties that have become blighted by a scheme and that cannot be usefully progressed or used.

(e) Blight Notices should be introduced for Principle Private Residences. This measure is a necessary requirement as there is a serious flaw in the current CPO process in that someone's home could be blighted potentially for ten years without compensation being payable.

4. Interests in Land

The SCSi proposes an inclusion of all land types in the CPO process, which would mean that no land would be excluded from being compulsorily acquired. Currently, the interpretation of constitutional protection remains somewhat undefined for state lands, and thus this gap in jurisdiction could be addressed in an updated code.

5. Agreement Between Landowner and Acquiring Authority

The Commission's 'Issues Paper' outlined its stance regarding the agreement between landowners and Acquiring Authorities and stated that there should not be a statutory obligation introduced requiring an authority to enter negotiations prior to exercising its compulsory acquisition powers. Currently, there is no obligation on either the authority or the property owner to enter negotiations until the relevant time, which is typically after the service of a Notice to Treat. The SCSi agrees with the Commission in that implementing such a legislative provision would not be feasible for several reasons, which are listed as follows:

- The CPO may not subsequently be confirmed partially or as a whole.
- Depending on when the land is required, it may often be necessary given the amount of time needed to complete the compulsory purchase process, for the Acquiring Authority to plan a compulsory purchase timetable and initiate formal procedures.
- Acquiring Authority may not have access to funds prior to confirmation of a CPO.
- Under current legislation, referral to Arbitration is only available once the CPO is confirmed.
- Right of entry to all affected lands is a legal imperative to provide access for the appointed contractor; accordingly, the ability to serve Notices to Treat/Entry are essential to enable works to proceed on all parts of the scheme.

It is already common practice for Acquiring Authorities to attempt negotiating with landowners prior to the advancement of a CPO. Authorities will assume based on financial capability that there is a high or even guaranteed certainty of the CPO being approved, which is not always the case. In circumstances whereby a CPO order is taking ample time to be actioned, SCSI believes landowners would benefit from having the option of issuing a Purchase/Blight Notice to the Acquiring Authority in cases where the proposed scheme renders the property incapable of reasonably beneficial use in the short term.

6. Advertising, Notifying & Hearings

In the very early stages of a CPO the Acquiring Authority is obliged to advertise and notify the impacted parties. This phase will typically entail sending notices to the landowners, lessees and occupiers; and publishing a notice in a local newspaper outlining the Authority's intention to compulsorily acquire the land. The SCSI holds the position that while the current system of informing the impacted parties and any potential complainants, there is potential for improvement.

The prevailing scheme could benefit from an alteration of timelines and subsequently broaden the service of notices to adjacent landowners due to potential disturbance. The Commission contemplates whether the ability to object should widen to include third party objectors. This notion raises the question as to what consideration should be allocated to any costs accumulated by these third-party objectors because of pursuing independent expert opinions, that ultimately determine the possibility of disturbance arising.

Such party objections could also be limited in instances where parties have a geographical proximity to the proposed CPO scheme or if there is a proven vested interest. Objections arising from vexation should be identified and not permitted to add further delays, in an already lengthy process.

Regarding oral hearings, they could only be held when there is a significant number of objections or if the specific nature of the scheme may be particularly detrimental to the applicable landowners. Typically, a written representation procedure is quicker and less costly than an oral hearing. Such submissions that are submitted in writing can thus be reviewed by an appointed inspector who can conduct a site visit. The report formulated by the inspector will then be issues to the Board for decision.

7. Blight Notice

A parameter that needs consideration is the serious issue that has surfaced with the length of time that it takes from route options to the subsequent payment on a compulsory purchase scheme. There are two potential avenues that could be adopted to amend this issue and they are listed as follows:

1. Implementing strict and relatively short time frames between the various stages of the process such as the route option stage, preferred route stage, initial design, issuing of the CPO order, confirmation, the speed of any Judicial Review procedure, length of time in which to serve a Notice to Treat and an obligation to pay compensation within a certain period.
2. Serving a Notice of Blight which is a similar provision to those that were implemented prior to the 2000 Act, and thus can be established once more so that the owner can serve a blight notice as is the case in the UK

In general landowners could have the option to issue a Blight Notice to the Acquiring Authority where the proposed scheme implicates that the property will be incapable of reasonable beneficial use in the short term. The impacted landowner should have the right to serve a Blight Notice at any stage from the time a scheme is published up until the Notice to Treat. They should also have the option to have compensation determined in accordance with the rules of compensation or have the property purchased in its entirety.

8. Initial Procedure

Apart from the parameters imbedded into the actual CPO legislation there could also be modifications based on the recommended pre-acquisition powers of the Authorities. The Commission recommends there being a statutory duty to provide ownership information on occupiers, owners or those in receipt of rent for the land when requested, and that such parameter should be included in the revised CPO code. If this new measure is going to be implemented the owner should be entitled to the costs involved in acquiring such information such as hiring a solicitor to prove title. However, it is imperative that there is an obligation for the owner to prove title at an early stage of the proceedings and at the very latest, which would be on serving the Notice of Treat. There should also be a time limit in which title must be proven to the Authority. The SCSI also agrees with the recommendations made by the Commission stating that all costs incurred by the owner or occupier should be reimbursed by the Authority.

9. Pre-acquisition procedures of acquiring authorities

The Housing Act 1966 and the Planning and Development Act 2000 include provisions requiring an occupier to divulge information regarding the landowner to the Acquiring Authority. An alternative approach may be to reassign the culpability to the Acquiring Authority so that it's required to execute its own investigation of title, rather than the responsibility falling on the occupant.

It is already a common practice for the Acquiring Authority to perform its own title research. However, complications in such proceedings will arise if title has never been registered if leasehold interests have not been entered on the Commercial Lease Register or the property is held under Registry of Deeds title. The SCSI believes the Commission should consider the potential benefits of requiring owners and occupiers to divulge evidence of their interest in the property/land being

acquired. Establishing such a measure would save a considerable amount of time and delay, and ultimately minimize the lengthy CPO process. This measure is a necessary component to CPO proceedings and should thus be funded through public funds.

Due compensation is assessed based on the legal interest and therefore verifying interest and title in the early stages of proceedings will ultimately assist the parties in effectively assessing the claim and negotiating a settlement accordingly based on the relevant facts. The first step in the process of boundary clarification is the creation of a Ground Truth Survey. Without this essential base there is no means of verifying the spatial accuracy or the spatial integrity of any other documents or maps. These facts should also include appropriate measurement procedures such as International Property Measurement (IPMS) and International Land Measurement Standards (ILMS). This global initiative sets out an agreed code of measurement to ensure consistency of measurement reporting. More information is available at www.ipmsc.org.

Presently, parties are not legally required to provide evidence proving their legal interest in advance, which fosters a highly flawed process, where Arbitrations proceed based on the title claimed by the landowner despite a lack of proof regarding title. Arbitrators thus decide upon an award, but compensation can only be received to the claimant upon confirmation of title.

There would be ample benefits in implementing an obligation on landowners to prove title at an early stage and at the very latest, on serving of the Notice to Treat. Imbedding the responsibility in earlier phases of proceedings would countervail this issue however, the owner should be entitled to the costs involved in a solicitor having to prove title.

In some instances, an Acquiring Authority will enter the land or dwelling to assess whether its suitable for the proposed project. In these cases, a representative of the Acquiring Authority will enter the premises of the land in question to execute a variety of tasks such as performing surveys; formulate plans for once the land is acquired assess mineral levels; and excavate/examine the subsoil. The SCSI believes that this parameter should remain intact to minimize the potential disproportionate interference that could arise if an Acquiring Authority acquired land without ensuring that it was suitable for the proposed purpose prior to the acquisition. However, the establishment of this parameter raises the question of whether there should be statutory guidance that is implemented to assist judges of the District Court in determining whether there are any circumstances under which access to the proposed premises should be prohibited. Any costs incurred by an owner in relation to a claim, such as a Valuation Surveyor cost, should be reimbursed.

10 Purchase Notice

The SCSI advocated that landowners should have the option to disseminate a Purchase Notice to the Acquiring Authority where the proposed CPO results in the property being incapable of reasonably beneficial use in the short term. There is already an established precedent such practices in existing legislation. Within Section 29 of the 1963 Act, a landowner has the right to issue a "Purchase Notice" requiring the authority to purchase his property in an instance where a

decision to refuse planning permission or grant a conditional permission renders his land "incapable of reasonably beneficial use in its existing state, etc."

Therefore, it would be equitable that landowner should also have the right to serve a Purchase Notice at any time throughout the publication of the scheme and the service of Notice to Treat. The claimant should also have compensation determined in accordance with the rules of compensation or have the property purchased in its entirety. Currently, in the UK in an instance when a landowner is unable to sell his property due to the existence of proposals for an infrastructure project, they have the right to serve a Purchase Notice after publication of the scheme requiring the authority to purchase the affected land.

11. Equity of Compensation

Compensation rules

The Rules of Compensation are found in the 1919 Act (Section 2) – the first six Rules being original and the remaining 10 Rules inserted by the 1963 Act. The primary and most fundamental Rules are Rules 2 and 6:

Rule 2 – The market value rule

“The value of the land shall, subject as is hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant.”

The basic concept is market value, and much precedent exists as to definition in terms generally understood. It is not the value to the purchaser and the underlying scheme is to be ignored.

Rule 2 is qualified by Rules 3, 4, 5, 7, 11, 12 and 13, and by the Third Schedule to the 1966 Act, where Article (I) contains an important safeguard in providing that any interest created, building erected or improvement made after the publication of notification of the intention to submit a CPO is not to be considered by the arbitrator.

The best evidence of market value is normally comparative and contemporary open market sales. Thus, settlements with other claimants or awards made will not normally be acceptable as evidence to the property arbitrators.

Rule 6 – The disturbance rule

“The provisions of Rule 2 shall not affect the assessment of compensation for disturbance, or any other matter not directly based on the value of land.”

This Rule maintains the provisions of Section 63 of the 1845 Act that the owner is entitled to compensation for any loss to land severed and for injurious affection to other land not taken and for ‘disturbance’ as a matter not directly based on land value. The Law has consistently served its purpose for many decades and even centuries. However, there should be increased harmonisation and simplification to consolidate the existing regulations into one place. Currently, the complex

nature is not only prolonging the extensive CPO process but it's also deterring Valuers from entering the unique and necessary profession.

13. Advance Payment Scheme

An advance payments system should be put in place where 90% of the compensation that the Acquiring Authority consider to be payable after a claim has been submitted should be paid to the property owner. Alongside this, there should be an interest rate that puts an Acquiring Authority under some pressure to progress and complete payments. The current Local Loans Fund rate is near zero. As many property owners have either a mortgage or other loans, this low interest rate is not equitable. A feasible potential adjustment would be a Euribor Rate plus 2%. This would become payable by the Acquiring Authority from the date of possession to the date that the owner receives their compensation. Most property owners are incapable of searching for another plot of land/property until the allocation of CPO funding, and in some cases, it could be months or even years before obligations become operative. Therefore, a potential solution to this could be instilling an advanced payment scheme whereby property owners are given the right to request 90% of the value as assessed by the acquiring authority once the obligations to buy and sell the property become operative, which is currently after the service of Notice to Treat.

Implementing this parameter is imperative given the ongoing housing crisis and the associated difficulties and lengthy time periods that are currently associated with purchasing a house. Another component to ensure the economic wellbeing of the property owner would be to instil a 10% payment above market value payable in the case of a home being a Principal Private Residence (PPR). The loss of a PPR implicates that these particular private owners will have to re-enter the housing market in search of another dwelling which typically has additional associated costs apart from the acquisition of the new home. Implementing an Advanced Payment Scheme to decrease the burden on vulnerable communities is an imperative measure to ensure that they are not disproportionately hindered by the onset of a CPO.

14. Notice to Treat & Vesting

Vesting orders are used rarely and typically when the owner cannot be identified. The Acquiring Authority should stand ready to pay compensation or to make a lodgement of to an escrow account without prejudice to a final settlement. Merit to retain the Notice to Treat but have automatic vesting 18 months afterwards, which will allow the Acquiring Authority to grant legal rights of way over access roads. This resolution could subsequently solve an issue that can become very detrimental for owners who settle a claim based on a right of way. However, this concept has not progressed as the Acquiring Authority does not gain ownership of the land over which the access passes in an efficient manner. If a landowner cannot be located or identified the compensation could be arbitrated by the allocated Property Arbitrator.

The Arbitrator should subsequently assign a valuer to submit a case for the unidentified landowner. There should also be a suitable panel of qualified valuers that specialise in CPO, which can be made

available by the SCSi to the Land Reference Committee. Compensation should be assessed and paid into Court, or a nominated escrow account. A process should be developed whereby the Acquiring Authority can claim the title and after a period, if the title is not claimed by a “lost owner”, it vests in the Authority with the compensation funding being disseminated back to the State. There is existing precedence in the UK where if it is not possible (following a reasonable enquiry) to ascertain the name or address of an owner, lessee or occupier of the land the Authority can thus issue a CPO Vesting Declaration.

15. Arbitration

One of the primary points of contention within the current CPO code is the inefficient arbitration process. Currently a part time panel of six arbitrators determines CPO compensation. The Commission's recommendations outline whether this component could be reformed to mirror the system in the Minerals Development Act 2017, which involves a 3-person panel comprising 2 property arbitrators and a legal professional. There are several parameters that can be adopted for the current Arbitration process to become more efficient and adequately executed.

Firstly, two full time arbitrators should be established and properly resourced and remunerated so there can be the utmost logic and consistency regarding awards decisions.

There needs to be an emphasis on minimising costs particularly in small cases and possibility of a ‘documents only’ procedure if a consensus is reached by the parties. The SCSi also advocates that once an award is reached it should be publicised, so as there is an established precedent for future cases and increased consistency. There should also be a review of the adversarial approach as to whether it is appropriate as it typically results in a lot of time wasted and adds very little in most cases. Competent arbitrators should be capable of determining through dubious evidence without the need for lengthy cross examination, which extends the already lengthy process.

There is no legislative provision under the Acquisition of Land (Assessment of Compensation) Act, 1919 to prescribe rules to govern the conduct of arbitrations. The development of such rules would provide consistency to arbitrations and certainty to users of the service.

Such rules would draw on the approaches taken by other public bodies with an adjudicative role and would be based on best practice. Their purpose would be to explain to those unfamiliar with the property arbitration process how it will work and what standards the arbitration process will adhere to.

16. Model Clauses

It is critical that there are no anomalies arising from the model clauses whereby a property owner currently has rights in relation to compensation and those rights are removed. The proposal that a lessee with a term unexpired less than three years would not have the right to compensation is a case in point. There could be rights of renewal. There could be very serious losses arising in a three-year unexpired lease being terminated.

17. CGT & Rollover Relief

An anomaly that should be addressed in the new scheme of rules was Capital Gains Tax (CGT) and the current rate of rollover relief. There is currently a lack of clarification as to whether section 1002 of the Taxes Consolidation Act 1997 where taxes owing may be deducted from CPO reward will be retained. The acquisition of land through CPO represents the disposal of an asset by the landowner for the purposes of a CGT, and any chargeable gain arising on such disposal is currently subject to CGT at a rate of 33%. Rollover relief has not been addressed since 2002 when the precedent was that a landowner receiving compensation for a compulsory purchase had the right to repurchase lands with the proceeds and utilize the CPO rollover relief. After the replacement lands had been acquired the owner would effectively have reverted to the pre-CPO acquisition status.

The compensation would again be invested in land, meaning the tax could have been avoided in its entirety or alternatively the tax could have been paid but refunded by the Revenue when the acquisition of the replacement land was concluded. Therefore, an individual landowner who loses a substantial portion of land to CPO and then must pay a relatively high rate of CGT out of the compensation is in a significantly disadvantaged position when attempting to acquire land to replace the dwelling which was lost to the CPO. One of the main principles that governs CPO law is that the landowner or occupier will be in the same economic state as they were prior to the acquisition of their land. This ends up not being the case due to the current proceedings associated with CGT. The SCSI believes this is an inequitable circumstance that the Commission should be made aware of and subsequently take into consideration when formulating the new scheme.

18. Attracting Expertise to the Profession

Acquiring Authorities habitually place caps on valuer fees, the SCSI views this as limiting the options of representation from affected property owners. The SCSI believes that no caps should be in place in relation to payment of affected parties professional fees and should be based solely on 'reasonable professional fee costs incurred'. The Commission should consequently consider an appeals mechanism in the Act to adjudicate reasonable fees if needed. There should be payable interest on claimant's professional fees in the same context as they are a component of the compensation and set at the Euribor rate plus c. 2%.

Professional fee caps are one of the main reasons why there are a very low concentration of Valuers interested in the field of CPO law. The low intake of Valuers in this profession is a product of the lengthy amount of time needed for an Arbitration hearing, and the complex nature of CPO with low fees. Without an adequate amount of CPO surveyors, the public and system is likely to be disadvantaged.

19. Confirmation Process

The Commission has recommended that all compulsory purchase notifications should be subject to a confirmation process conducted by a single independent confirming authority. However, taking

this route may cause problems in that there may be an extreme urgency with certain CPOs and the An Bord Pleanála may be delayed in this process. An alternative body well-resourced with specialist knowledge might be a more effective approach. There should also be a measure capable of expediting the Judicial Review process in relation to CPOs as there can be severe hardship associated with lengthy Judicial Reviews for owners on a scheme, particularly those losing their primary dwellings.

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