

FORTH CROSSING ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 – Compensation

155. This Part sets out the framework for compensation ([section 47](#)), matters that must be taken into account when considering compensation ([sections 48 and 49](#)), entitlement to compensation and the process for addressing any dispute as to that entitlement or the level of compensation ([sections 50 to 56](#)).
156. The Act applies the same procedural rules, safeguards and requirements regarding compensation as generally apply for land and rights purchased compulsorily. The rules for calculating the basis and amount of compensation are contained in the Land Clauses Acts (see paragraph 75) and the [Land Compensation \(Scotland\) Act 1963 \(c.51\)](#) and the [Land Compensation \(Scotland\) Act 1973 \(c.56\)](#).
157. The 1963 Act, which deals with assessing compensation and resolving disputed compensation claims, applies to the compulsory acquisition of land. The 1973 Act covers compensation for a decrease in value of land caused by use of public works and defines the physical factors that will give rise to a claim for compensation. The general principles with regards to compensation that these Acts embody are collectively known as the “compensation code”.
158. The 1845 Lands Act provides that in estimating the compensation to be paid, regard is to be had first of all to the value of the land to be taken and secondly to the depreciation in the value of any remaining land caused by severance or injurious affection (section 61 of the 1845 Lands Act). This is the basic principle by which compensation is assessed. [Section 21\(1\)](#) of the Act incorporates section 61 of the 1845 Lands Act.
159. In addition to this basic principle it is generally accepted that any increase in value to land caused by the scheme underlying the acquisition is to be ignored. This principle is embodied within the 1963 Act which provides that:
- any depreciation in the value of land due to the prospect of the land being compulsorily acquired is to be ignored (section 16 of that Act);
 - any increase or decrease in the value of the land due to the scheme underlying the acquisition is to be ignored (section 13, schedule 1); and
 - any increase in the value of adjoining land in the same ownership as a result of the scheme is to be set off against the compensation for the land compulsorily acquired (section 14 and 15 and schedule 1).
160. Accordingly, compensation is generally available for:
- the value of land;
 - disturbance, being losses such as, for example, removal expenses or loss of profits, arising as result of displacement from the land acquired;

*These notes relate to the Forth Crossing Act 2011 (asp
2) which received Royal Assent on 20 January 2011*

- injurious affection being depreciation, for example, caused by the construction or use of works, in the value of land retained by a land owner; and
 - severance being a specific type of injurious affection arising when part of an area of land held by the same owner is taken.
161. The 1963 Act contains provisions on the assessment of compensation in respect of interest in land. In particular it sets out in section 12 the rules on assessing compensation and provides that the Lands Tribunal for Scotland is responsible for dealing with any disputes as to compensation for compulsory purchase.
162. **Part 6** of the Act makes particular reference to the aforementioned Acts and where appropriate explanations are provided as to the application or disapplication of various provisions within those Acts as they relate to provisions within the Act.

Section 47 – Land Compensation (Scotland) Act 1963

163. **Section 47** expressly adapts the application of the provisions of the Land Compensation (Scotland) Act 1963 in respect of land compulsorily acquired under **section 22**. Paragraph (a) ensures that the Act falls within the terms of a “special enactment” and therefore enables the provisions to be applied appropriately. Paragraph (b) disapplies section 14 of the 1963 Act, which makes provision for set-off. Since **section 48** of the Act addresses set-off of betterment against compensation, section 14 is accordingly disapplied.
164. Paragraphs (c) and (e) are technical provisions which ensure that the Act can attract appropriate provisions of the 1963 Act. Similarly, paragraph (f) ensures that the 1963 Act attracts the provisions of the Act in its construction.
165. Paragraph (d) ensures that references in sections 22 and 23 of the 1963 Act to the date of service of the notice to treat include references to the date the general vesting declaration is made where title to land is taken by general vesting declaration as both the procedure of notice to treat and general vesting declaration are available to take title under the Act.

Section 48 – Matters to be considered when assessing compensation

166. This section ensures that the value of land for compensation is unaffected by any increase in value arising as a consequence of the Forth Crossing works. Land close to the roads, their junctions and the bridge approaches may become attractive to developers and, as a result, increase in value. **Section 48** makes provisions for set-off, which is where the value of compensation to a land owner is set-off against any increase in value in any contiguous land that the land owner may have. This approach is consistent with that which applies under section 110 of the **Roads (Scotland) Act 1984 (c.54)** and in this way a land owner affected by the Forth Crossing works is treated in the same way as a land owner affected by a roads scheme made under the 1984 Act.
167. Paragraphs (a) to (c) set out what the Lands Tribunal for Scotland must do or have regard to when assessing compensation.

Section 49 – Matters to be ignored when assessing compensation

168. This section addresses the situation where a land owner does something with the deliberate purpose of seeking to obtain compensation or increased compensation. This principle has been put in statutory form by paragraph 7 of Schedule 2 to the Acquisition of **Land (Authorisation Procedure) (Scotland) Act 1947 (c.42)** and applies to the compulsory acquisition of roads under the **Roads (Scotland) Act 1984**. A provision is required under the Act so that this principle is consistently applied. Accordingly, under subsection (1) the Lands Tribunal for Scotland, when making any determination on compensation, must not take into account either the creation of an interest in land or any land value enhancement if they are satisfied that the purpose of that interest or

enhancement was to obtain compensation or increased compensation. These provisions are precedented.¹

169. Subsection (2) provides a definition of “land value enhancement”.

Section 50 – Compensation: partial acquisition etc.

170. **Section 50(1)** ensures that the Scottish Ministers must in addition to paying compensation for the value of any interest (which includes servitudes and rights) in the land acquired pay compensation for any loss resulting from the severance of the land.
171. Subsection (2) provides that when the Scottish Ministers withdraw a notice to treat under **section 32(4)** they must pay the land owner compensation for any expense caused by the giving and withdrawal of the notice to treat. This provision is required so that the land owner is appropriately compensated for any disturbance that may be caused. If there is any dispute about entitlement to compensation or the amount of any compensation the matter will be determined by the Lands Tribunal for Scotland. Either the land owner or the Scottish Ministers can approach the Lands Tribunal for a determination.

Section 51 – Compensation: servitudes and other rights

172. There are at least four situations where compensation may be payable for the acquisition or extinguishment or disapplication of servitudes or other rights. Those situations are:
- (i) where a right is directly purchased permanently or temporarily (see **section 24**);
 - (ii) where land is purchased, rights in land are extinguished or disappplied and the owner’s other land (benefited property) suffers (see **section 25**);
 - (iii) where land is purchased, rights in land are extinguished under **section 25** and the holder of a personal real burden suffers loss; and
 - (iv) where a right is extinguished on land that the Scottish Ministers currently own.
173. Compensation for acquisition or extinguishment of a servitude or right under **section 22** (see categories (i) and (iv) above) is provided for by **section 51**.
174. Compensation for category (ii) above is provided by virtue of section 6 of the 1845 Railways Act which makes provision whereby a benefited proprietor is entitled to compensation where their interest in land has been injuriously affected when a servitude or other right is extinguished. Section 6 applies by incorporation under **section 21(2)** of the Act.
175. Compensation for category (iii) above is provided by **section 51(2)** which ensures that any person who loses the right to enforce a personal real burden is entitled to compensation.
176. **Section 51** ensures compensation is payable in respect of the circumstances set out above and provides that as part of the determination of the compensation payable that account is taken of any new servitude or real burden created by the Scottish Ministers. For illustration, this means that a person could be compensated for the loss of a right to do something on their land and further compensated because the Scottish Ministers have taken a right to do something such as to provide access to Forth Crossing works over that person’s land thus further affecting the land owner’s enjoyment of his or her land.
177. Subsection (3) sets out the process for resolving any dispute as to entitlement to compensation or the amount of any compensation.

¹ See section 22 of the [Edinburgh Airport Rail Link Act 2007 \(asp 16\)](#) and section 17 of the [Glasgow Airport Rail Link 2007 \(asp 1\)](#).

Section 52 – Compensation: cutting down, lopping, or cutting back roots of, trees or shrubs

178. **Section 52** provides for the Scottish Ministers to pay compensation to any person who suffers loss arising from the exercise of the powers conferred by **section 10**.
179. Under subsection (2) any dispute as to entitlement to compensation or the amount of compensation will be determined by the Lands Tribunal for Scotland in accordance with the Land Compensation (Scotland) Act 1963.

Section 53 – Compensation: stopping up

180. **Section 53(1)** provides for compensation in respect of interests affected by the stopping up of a road or access by ensuring that any person with an interest in land who suffers loss or disturbance as a result of action taken by the Scottish Ministers in stopping up a road (see **section 14**) or an access (see **section 15**) is entitled to compensation.
181. Subsection (2) provides that any dispute as to entitlement to, or amount of, compensation is determined by the Lands Tribunal for Scotland under the Land Compensation (Scotland) Act 1963 although account must be taken, in terms of subsection (3) of any new road or means of access provided.

Section 54 – Compensation: entering and using land temporarily

182. This section also reaffirms the general principle of compensation for interests being affected in circumstances where a person with an interest in land suffers loss or disturbance as a consequence of the Scottish Ministers entering or using land temporarily. Subsection (1) provides for compensation to be payable where entry is taken to land under **sections 37 or 38**; where, having taken such entry, Ministers use the land in terms of **section 41**; or where leases are extinguished (**section 37(3)**) or rights or burdens are suspended during such entry (**section 46**).
183. Subsections (2) and (3) make provision as to how a dispute regarding compensation is to be determined and subsection (4) sets out what factors are to be taken into account in assessing compensation.
184. Subsection (5) ensures that compensation payable under **section 54** does not preclude compensation being paid for loss or damage arising as a result of the Forth Crossing works under section 6 of the 1845 Railways Act or any other enactment as long as a person is not compensated for the same thing twice.

Section 55 – Compensation: advance entry

185. **Section 55** provides that where the Scottish Ministers take advance entry to land under **section 39**, compensation is payable from the point that entry is taken as if the provisions in the 1845 Lands Act on entry on lands had been complied with or the land had vested in the Scottish Ministers (depending on whether the notice to treat or general vesting declaration procedure is used).
186. Where an acquiring authority, which in the case of the Forth Crossing works will be the Scottish Ministers, have taken possession of any land they are obliged under the terms of section 48 of the Land Compensation (Scotland) Act 1973 to make an advance payment on account of any compensation payable by them for the compulsory acquisition of any interest in that land. The process and the calculation of the amount of the advance payment are set out in section 48 of the 1973 Act. Subsection (2) ensures that the operation of the provision in the 1973 Act is not precluded by **sections 37 or 55** of the Act.

Section 56 – Compensation where notice to treat becomes invalid

187. **Section 56** provides that a person is entitled to compensation from the Scottish Ministers for any loss arising as a result of a notice to treat subsequently being invalidated under the terms of **section 34**. This would cover, for example, the situation where a person may have taken actions in the expectation that the notice to treat would have progressed and resulted in their land being taken.
188. Subsection (2) ensures that the Lands Tribunal will determine any dispute and subsection (3) provides that interest is payable at the rate prescribed under section 40 of the Land Compensation (Scotland) Act 1963 from the date of the notice becoming invalid until the date of payment.