

# GLASGOW AIRPORT RAIL LINK ACT 2007

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Works

19. The meaning of “the scheduled works” and “the ancillary works” is explained in **paragraphs 22 to 25** below. They are collectively described as “the authorised works” (defined in **section 51**).

#### *Section 1 – Authority to construct works*

20. **Section 1** gives the specific statutory authority for the works which are required<sup>1</sup>. In the absence of this section the activities permitted by the Act would potentially be liable to challenge in the courts e.g. on the ground that the railway constituted a legal nuisance. Such an action could potentially result in an order preventing the nuisance by stopping the works (called an interdict). The protection of statutory authority is therefore important to the viability of the scheme because it allows the works to be constructed without the threat of legal challenge.
21. **Section 2** refers to the scheduled works as being within the limits of deviation shown on the Parliamentary plans. However, the precise position of the works may move (“deviate”) within those limits, in accordance with **section 4**.

#### *Section 2 – The scheduled works*

22. **Section 2** gives effect to **schedule 1**, which contains the detailed descriptions of the works authorised by the Act described in **paragraph 4** above.

#### *Section 3 – The ancillary works*

23. **Section 3** gives effect to **schedule 2**, which describes the types of works which may be provided in connection with the scheduled works. Works of this nature will only be authorised by the Act if they are necessary or expedient<sup>2</sup> in connection with the construction of the scheduled works, or are required as a consequence of those works being constructed.
24. **Schedule 2** catalogues types of works and operations that are normally necessary for the operation of a railway and also mitigation works and works for the protection of neighbouring landowners. The “railway” itself is only the railway track as laid along the route<sup>3</sup>. The ancillary items accordingly range from the provision of stations and platforms to operations such as discharging water during construction<sup>4</sup> and moving utility apparatus<sup>5</sup>. They also cover the provision of recreational facilities at St James’

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<sup>1</sup> *The need for such authority is explained in paragraph 12 of the Promoter’s Memorandum.*

<sup>2</sup> *i.e. advantageous; suitable, appropriate (Concise Oxford English Dictionary).*

<sup>3</sup> *See, by virtue of section 81(3) of the Railways Act 1993 (c.43), the definition of “railway” in section 67(1) of the Transport and Works Act 1992 (c.42).*

<sup>4</sup> *e.g. when pumping away water from a site so as to be able to lay track on dry ground.*

<sup>5</sup> *e.g. water mains and power supply cables.*

Park and replacement fuel farm facilities at Glasgow Airport. The ancillary works will form an essential part of the authorised works (the term “authorised works” is explained in [paragraph 19](#)).

25. At this stage the nature of the ancillary works is known but not the precise ancillary works or, in some cases, their positions. However by virtue of [sections 3\(2\) and 3\(3\)](#) they can only be constructed within “the Act limits” i.e. the limits shown on the plans in which the powers of the Act can be exercised. This term is defined in [section 51](#) of the Act.

#### ***Section 4 – Permitted deviation within limits***

26. [Section 4](#) allows for a degree of flexibility within the defined limits. It permits movement or variance from the precise lines and sections shown on the Parliamentary plans and sections. In the Act this is described as “deviation”.
27. The Parliamentary plans show the centre lines of the works and also show limits of deviation around those centre lines. [Section 2](#) specifically states that the authorised works are situated within the limits of deviation. The Act will not accordingly permit the construction of those works outside these lateral limits.
28. The Parliamentary sections show the vertical dimensions and situation of the proposed works. The Act authorises the works in accordance with those dimensions and levels, subject to the flexibility permitted by [section 4](#).
29. [Section 4](#) provides that every work as constructed or maintained may deviate laterally within the limits of deviation, and vertically by up to 3 metres upwards and to any extent downwards. This reflects the outline nature of the authorisation being given by the Act. The works are not being authorised in the fine detail which will be formulated at a later stage when the railway is finally designed. The permission to deviate therefore allows for the normal design process.
30. The ability to deviate vertically to any extent downwards that may be necessary or expedient enables the authorised undertaker to construct the works at whatever depth is needed to achieve stability. It also allows for e.g. the undertaking of ground stabilisation works in the event of mine workings or other geological conditions.

#### ***Section 5 – Access to works***

31. It will be necessary for the authorised undertaker to provide access from existing roads to land to be used for the authorised works. [Section 5](#) will enable the authorised undertaker to facilitate such access by constructing drop kerbs and similar works both at the points shown on the Parliamentary plans and at other points approved by the roads authority. In the absence of this section such works, amounting to an interference with the road, could not be carried out by the authorised undertaker without first obtaining the consent of the roads authority under section 56 of the [Roads \(Scotland\) Act 1984](#) (c.54).

#### ***Section 6 – Construction and maintenance of altered roads***

32. In accordance with standard arrangements when a new road is built, [section 6](#) provides for alterations of roads authorised by the Act to be completed to the reasonable satisfaction of the roads authority, and to become maintainable by the roads authority after an initial 12 month maintenance period during which the authorised undertaker remains liable for any maintenance. This is normal practice to allow any defects that emerge once the roads are first commissioned after construction to be remedied at the expense of the authorised undertaker.

### **Section 7 – Works treated as major works for road purposes**

33. **Section 7** is intended to ensure that the regime under Part IV of the **New Roads and Street Works Act 1991 (c.22)** (in the Act referred to as the 1991 Act) for dealing with apparatus of utilities affected by road works will apply to the authorised works. Part IV of the 1991 Act together with the Road Works (Sharing of Costs of Works) (Scotland) Regulations 2003 and the Codes of Practice issued under the 1991 Act provide a regime dealing with the measures (and the costs of these measures) in relation to utilities' apparatus in streets as a result of types of road works described in the 1991 Act as "major works for road purposes". This regime includes a process for identifying and agreeing work required, including any necessary diversions of apparatus, and also deals with the costs of these works. It provides for a contribution to be payable by the utilities in respect of work carried out in relation to their apparatus.
34. "Major works for road purposes" under the 1991 Act cover various categories of road works such as reconstruction or widening of roads, or substantial alterations in the level of roads but only if those works are carried out by the roads authority. Since the authorised undertaker will not be the roads authority, the regime under the 1991 Act would not apply to road works carried out under the powers of the Act. **Section 7** accordingly provides for such works carried out by the authorised undertaker to be treated as "major works for road purposes" for the purpose of the 1991 Act. It puts the authorised undertaker in the same position as the roads authority would be if it was carrying out these works and ensures that the same regime will apply.
35. Similar provision relating to the equivalent provisions of the 1991 Act in England was included in the Channel Tunnel Rail Link Act 1996 and is commonly included in Orders under the Transport and Works Act 1992.

### **Section 8 – Agreements with roads authorities**

36. **Section 8** permits the authorised undertaker to enter into agreements with the roads authorities to carry out any works to existing roads authorised by the Act. The authorised undertaker is also authorised to delegate by agreement its powers to alter or maintain such altered roads. It is necessary to refer to maintenance because under section 6 the authorised undertaker is required to maintain a road which has been altered under the powers of the Act for a period of 12 months, before the roads authority resumes its maintenance responsibilities.

### **Section 9 – Temporary stopping up, alteration or diversion of roads**

37. It will be necessary for the authorised undertaker during construction temporarily to stop up, alter, or divert roads. Precise details of the roads, timing and duration of closures will be developed as the scheme is designed. Subsection (1) will enable such temporary stoppings up by the authorised undertaker provided consent is obtained from the road works authority<sup>6</sup> under subsection (4). By subsection (5) consent could not be unreasonably withheld but could be given subject to conditions. Under subsection (6) disputes as to the reasonableness of any condition would be determined by arbitration unless the parties agree on an alternative form of disputes procedure. (**Section 35** provides for the way in which any arbiter is appointed.)
38. In addition to any condition imposed by the road works authority, the authorised undertaker will be obliged by subsection (2) to provide continued pedestrian access to premises<sup>7</sup> abutting on the temporarily stopped up road.

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<sup>6</sup> *i.e. in the case of a public road, the roads authority for the road, and in the case of any other road the road managers (New Roads and Street Works Act 1991 (c.22), s.108(i)).*

<sup>7</sup> *"Premises" is used in its ordinary meaning i.e. places, landholdings (including buildings). Except where it is especially defined, as in some legislation, it is not a technical term. "Premises" is an ordinary word of the English language which takes colour and content from the context in which it is raised ... it has, in my opinion, no recognised and established primary meaning." Maunsell v Olins [1975] 1 All ER 16 at 19, HL, per Viscount Dilhorne.*

39. Five necessary temporary stoppings up have been identified at this stage as being required at the locations and for the purposes specified in [schedule 3](#). For this reason subsection (3) authorises these temporary closures and, unlike the unspecified closures, subsection (4)(a) requires consultation with the road works authority but not consent.
40. If there is any suspension of a private right of way under this section compensation would be payable under the compensation code applied by the Act (see [paragraph 62](#)).

### ***Section 10 – Discharge of water***

41. **Section 10** ensures that the authorised undertaker can effectively drain its works, both during construction and thereafter. Subsection (1) enables the authorised undertaker to use any available watercourse or any public sewer or drain for drainage purposes. It provides that within the limits of deviation or the limits of land to be acquired or used<sup>8</sup> the authorised undertaker may lay down, take up or alter pipes or make openings into or connections with the watercourse, public sewer or drain.
42. Under subsection (2) water may not be discharged into an artificial watercourse or a public sewer or drain without the consent of the person to whom it belongs (who in the case of a public sewer or drain will be Scottish Water, a private provider who has made an agreement with Scottish Water under section 1(2)(b) of the [Sewerage \(Scotland\) Act 1968 \(c.47\)](#) (duty of Scottish Water to provide sewerage for their area) or the roads authority), but although consent may be given subject to reasonable terms and conditions, it cannot be unreasonably withheld.
43. Under subsection (3) an opening into a sewer or drain will have to be made in accordance with plans approved by the person to whom the sewer or drain belongs and subject to such supervision as he provides, but plan approval cannot be unreasonably withheld
44. Subsection (4) requires the authorised undertaker to take such steps as are reasonably practicable to secure that water is free from gravel, soil or other solid substances or from oil or matter in suspension. This might include installation of gullies, filter drains or settlement ponds<sup>9</sup> to separate out such matter from clean water before the water is discharged into a stream, watercourse or public sewer or drain. The precise means of separating such matter from clean water will be determined during the design process in consultation with all appropriate people and bodies, including the roads authority and the Scottish Environment Protection Agency, “SEPA”.
45. Subsection (5) provides that any disagreement between the authorised undertaker and a person owning an artificial watercourse or a public drain or sewer shall be resolved by arbitration. ([Section 35](#) provides for the way in which any arbiter is appointed.)
46. Subsection (6) provides for the continued operation of both Part IV of the [New Roads and Street Works Act 1991 \(c.22\)](#) and the [Water Environment \(Controlled Activities\) \(Scotland\) Regulations 2005 \(S.S.I.2005/348\)](#) in tandem with this section. Part IV of the New Roads and Street Works Act 1991 contains a detailed code regulating the carrying out of works in roads by utilities and others. As a result of subsection (6), the authorised undertaker will have to comply with all the requirements of Part IV as to the giving of notice of the works, the compliance with directions given by the road works authority, the duty to co-operate with the road works authority and other undertakers, safety measures, and the provisions for the avoidance of danger, delay or obstruction. The Water Environment (Controlled Activities) (Scotland) Regulations 2005 provide the regulatory framework whereby the authorised undertaker’s activities which impact on the water environment will be controlled and under which compliance

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<sup>8</sup> For explanation of this expression see paragraph 65 below.

<sup>9</sup> A “gully” is a concrete box with a pipe and a metal grid on top: solid materials settle on the bottom of the box and water to be discharged continues along the pipe. A “filter drain” (also known as a “French drain”) is a ditch filled with stones which act to remove large solid particles from the water before the water is discharged into the ground or a drainage system. A “settlement pond” is a large pond that allows water to sit while slow settlement of particles takes place.

with the regulatory requirements will be enforced. SEPA is responsible for authorising 'controlled activities' under these Regulations.

47. In the absence of **section 10** effective drainage of the works would be subject to the risk of legal action for nuisance in respect of discharges, and subject also to successful private negotiation as regards the use of public sewers or drains. The section is intended to ensure that works authorised by the Parliament can be drained without the risk of legal action or failed private negotiations and will also ensure that drainage from these works is subject to the same pollution controls as other railway and road works.

### **Section 11 – Safeguarding works to buildings**

48. The ground conditions along the route may give rise to a need to prevent or remedy damage to buildings caused by the construction, operation or maintenance of the authorised works or conversely to carry out remedial works to a building which might otherwise affect the safe construction or operation of the authorised works. This will call for underpinning, strengthening or other works for the same purposes (all in the Act called "safeguarding works"). The area where there is a possibility of such works being required is the land within the limits of the Act which are shown on the Parliamentary plans.
49. Subsection (1) accordingly enables the authorised undertaker at its own expense to carry out such safeguarding works to any building within the Act limits as the authorised undertaker considers to be necessary or expedient. Safeguarding works may be carried out during construction or at any time during the five years after any part of the authorised works is first opened for public use.
50. The detailed procedure that must be adopted is set out in **schedule 4**. This allows for the carrying out of preliminary surveys and (except in an emergency) the service of 14 days' notice prior to entry and carrying out the safeguarding works. A landowner may question the necessity for safeguarding works and require the issue to be referred to arbitration. However there is no right to question the initial entry to carry out preliminary surveys. Without such preliminary survey it would be very difficult to identify whether and to what extent safeguarding works are required, or to determine the extent of any damage which is caused and for which compensation would be payable. A compulsory power of entry is required in order to make the operation of this provision effective.
51. Where damage is caused by safeguarding works, or where safeguarding works prove to be inadequate within five years after the opening of the relevant authorised works, the authorised undertaker must pay compensation.

## **Part 2 – Land**

### **Introduction**

52. Without provision in the Act the authorised undertaker will not have any compulsory purchase powers to acquire land for construction of the railway and associated infrastructure, or to acquire rights in land e.g. for the purpose of re-routing statutory undertakers' apparatus. Provisions are therefore required in the Act to confer appropriate compulsory purchase powers.
53. The principal purposes for which compulsory purchase powers are needed are for the acquisition of:
- land and rights to access land to construct and then maintain the railway;
  - land for pedestrian and vehicular access to premises;
  - land for replacement of fuel farm at Glasgow Airport;

land for road alterations; and

land for provision of recreational facilities, associated mitigation and landscaping.

The promoters have also identified land which the authorised undertaker will not need to acquire permanently but which will need to be used to allow temporary access or to be occupied temporarily during the construction period e.g. as construction sites. (In the Act temporary occupation is referred to as “temporary possession”.)

54. In many cases (roads and housing are examples) powers are given by compulsory purchase order made by the authority that is to have the powers, or by the relevant Minister. In the present case compulsory purchase is authorised by the Act itself: there will not be a separate compulsory purchase order. The compulsory purchase powers are in Part 2 of the Act, either set out in full or applying the compulsory purchase and compensation law that applies to compulsory purchase orders. This suite of provisions gives the authorised undertaker powers for the compulsory purchase of land and rights over land, access and temporary possession, all of which are needed in connection with the authorised works. It also deals with issues concerning compulsory purchase procedures, entry on land, the assessment of compensation and procedures relating to compensation, as well as the particular issues dealt with in specific sections of the Act. The effect of the provisions is explained in greater detail below.
55. The land affected by the compulsory purchase powers in the Act is the land described – that is, given a description and not merely referred to as an unused plot number – in the book of reference. On the Parliamentary plans it is all the land within the limits of deviation<sup>10</sup> and within the limits of land to be acquired or used<sup>11</sup>.
56. The compulsory purchase powers conferred by the Act will enable the authorised undertaker to acquire the land necessary to construct the works authorised by the Act. In the absence of compulsory purchase powers this would not be possible if landowners refused to make their land available. The acquisition of land under compulsory powers (including purchase by agreement but where compulsory purchase powers have been conferred) also operates to extinguish all rights and claims which are inconsistent with the scheme and thus might inhibit the construction of the works. These include private rights of way as well as rights to maintain plant and equipment in the land.

### **Other compulsory purchase legislation**

57. The provisions in the Act simply grant compulsory purchase powers. They do not include the detailed procedures required for implementation. Implementation is governed by an existing body of law relating to the detailed procedure for any compulsory purchase (whether authorised by Act, compulsory purchase order or some other means) and the way in which compensation is determined. This law is all applied to the compulsory purchase powers conferred by the Act<sup>12</sup>. An outline of this applied legislation is given below.

### **Compulsory purchase procedures**

58. After the Act has been enacted, the first stage of the procedures will be the service on each landowner whose land is required of a notice (called a notice to treat) under section 17 of the [Lands Clauses Consolidation \(Scotland\) Act 1845 \(c.19\)](#) (in the Act called “the 1845 Lands Act”). This notice will inform those with an interest in land of the intention of the authorised undertaker to acquire the land or the rights described in the notice. Service of a notice to treat results in the authorised undertaker being in the same position as if a binding contract for the purchase of the land had been completed.

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<sup>10</sup> For an explanation of “limits of deviation” see notes on section 4.

<sup>11</sup> i.e. land situated outside the limits of deviation which is required to be acquired or used for specific purposes - see sections 12(b), 13, 14 and 16 and schedules 5 and 6.

<sup>12</sup> For an explanation of the reason for applying other Acts see paragraphs 15 to 17 above.

As an alternative to serving a notice to treat, the authorised undertaker may acquire land by a general vesting declaration (on this see [paragraphs 192 to 196](#)).

59. The authorised undertaker may need to enter land to start the works in advance of completing its purchase. Before it can do so it must serve a notice (called a notice of entry) on the landowner.
60. Where a landowner is unwilling or unable to sell the authorised undertaker may acquire the land by executing a notarial instrument<sup>13</sup>. The same procedure applies where the authorised undertaker has made diligent efforts to find the landowner but has been unable to do so. These provisions are intended to ensure that a landowner cannot hold up the scheme unreasonably by refusing to sell and that the scheme can go ahead even if the landowner cannot be traced.
61. In practice an authority having compulsory purchase powers will often be able to buy land by agreement without having to resort to the formal statutory procedures. When this happens the Lands Clauses Acts give powers of sale to landowners (such as trustees) who otherwise might not be at liberty to sell. Although land may be purchased by agreement, the compensation rules will be the same as if the land had been purchased compulsorily.

## **Compensation**

62. The money paid for lands and rights purchased compulsorily is known as compensation. The body of law governing rights to compensation where there are compulsory purchase powers and the rules for calculating the basis and amount of compensation are in part in the common law, in part in the Lands Clauses Acts and in part in Part I of the [Land Compensation \(Scotland\) Act 1963 \(c.51\)](#). This detailed body of law will apply to compulsory purchase under the Act. Disputes about compensation will be referred to the Lands Tribunal for Scotland<sup>14</sup>.
63. The Act applies the [Railways Clauses Consolidation \(Scotland\) Act 1845 \(c.33\)](#), (in the Act called “the 1845 Act”). This Act includes a detailed code relating to minerals under the railway. These provisions (as amended by the [Mines \(Working Facilities and Support\) Act 1923 \(c.20\)](#)) restrict mineral extraction where this risks damaging the railway. If these restrictions apply the authorised undertaker may be required to pay compensation to the person with the right to work the mine.

## **Section 12 – Authority to acquire land**

64. **Section 12(1)(a)** is the power for the authorised undertaker to acquire land within the limits of deviation. The land that may be acquired must be within those limits must be described<sup>15</sup> in the book of reference and it must be land that may be required for the purposes of the authorised works.
65. **Section 12(1)(b)** relates to the permanent outright acquisition of land within the limits of land to be acquired or used. The authorised undertaker is authorised to acquire the land within those limits if (a) it is specified in columns (1), (2) and (3) of Part 1 of [schedule 5](#) to the Act and (b) it may be required for the purposes specified in relation to that land in column (4). Part 1 of [Schedule 5](#) lists specific plots of land within the

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<sup>13</sup> “Notarial instrument”: the term used in sections 74 to 76 of the 1845 Lands Act when referring to the formal document that in these circumstances will vest land in the authorised undertaker. The expression is only a description. There is no special style laid down for this type of deed.

<sup>14</sup> The Lands Tribunal for Scotland was set up under the [Lands Tribunal Act 1949 \(c.42\)](#). Section 8 of the [Land Compensation \(Scotland\) Act 1963 \(c.51\)](#) makes the tribunal responsible for determining disputes about compensation for compulsory purchase. The tribunal’s composition is governed by section 2(1) and (9)(b) of the 1949 Act (substituted by section 50(1) of the [Conveyancing and Feudal Reform \(Scotland\) Act 1970 \(c.35\)](#)). It comprises a President (who must be a suitably qualified lawyer) and such number of other members as is determined by the Lord President of the Court of Session. The other members must be either suitably qualified lawyers or persons with experience in the valuation of land. The President and other members are all appointed by the Lord President (in the case of valuer members after consultation with the Royal Institution of Chartered Surveyors).

<sup>15</sup> See paragraph 55 above.

limits of land to be acquired or used and specifies against each entry the purpose for which the land may be acquired. This is only some of the land within the limits of land to be acquired or used. The rest of the land within those limits is not to be acquired permanently and is dealt with in separate sections of the Act<sup>16</sup>.

66. **Section 12 (2)** provides specific protection to CGM (Oswald) Limited (company no. SC 190896) which occupies part of the land numbered 45 on sheet 19 of the Parliamentary plans. This provision prevents the authorised undertaker from compulsorily acquiring CGM (Oswald) Limited's leasehold interest in part of plot number 45, except in relation to airspace occupied by any protective or strengthening works constructed under the powers conferred by the Act. This provision will enable the company to resume occupation of their property following completion of construction of the authorised works, whilst allowing the authorised undertaker to acquire ownership of any permanent protective or strengthening works constructed within the property. If the authorised undertaker did not have authority to acquire the airspace occupied by any of the protective or strengthening works, there would be nothing to prevent the tenant from removing them, which would affect the safe construction and operation of the railway.

### ***Section 13 – Acquisition of subsoil, airspace or rights***

67. **Section 13** applies to any land that is authorised to be compulsorily acquired under **section 12**. **Section 12** authorises outright purchase of the land i.e. including the airspace above the surface and the subsoil and bedrock beneath it. The purpose of **section 13** is to ensure that when exercising those powers the authorised undertaker is able to acquire less than that total interest in cases where all that is required is the subsoil under the land, the airspace above it or some right over the land.
68. Subsection (1) accordingly enables the authorised undertaker to acquire only the subsoil beneath or airspace over land or servitudes<sup>17</sup> or other rights in relation to land.
69. Subsection (2) covers the case where the rights required by the authorised undertaker do not already exist. The subsection expressly allows for the creation of new rights, which will then be compulsorily acquired by the authorised undertaker.
70. Subsection (3) is intended to ensure that by exercising the powers of **section 13** the authorised undertaker will not be required to acquire the land itself or any interest in the land greater than the rights acquired under the section. In the absence of this provision the authorised undertaker will or may be required to buy land outright, even though all that is required for the authorised works is the airspace (e.g. because the authorised undertaker will only need to construct a viaduct over the land), or some right of access to the railway.
71. Subsection (3) accordingly provides that section 90 of the 1845 Lands Act and paragraph 20 of Schedule 15 to the Town and Country Planning (Scotland) Act 1997 do not apply to the acquisition of subsoil, airspace or rights under this section. Section 90 of the 1845 Act (which is discussed further in **paragraph 96**) states that landowners cannot be required to sell part of any house, building or factory. Paragraph 20 of Schedule 15 to the 1997 Act, which would apply if land is acquired under a general vesting declaration (see **paragraphs 192 to 196**), entitles a landowner to object to the purchase of part only of property consisting of a house, building or factory, or of a part of garden belonging to a house.
72. Subsection (4) applies the other provisions of the Lands Clauses Acts to the compulsory acquisition of new rights under **section 13** (on the Lands Clauses Acts, see **paragraph**

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<sup>16</sup> See sections 14, 15 and 16.

<sup>17</sup> "Servitudes" are rights created for the benefit of one plot of land (known as the dominant tenement) over another plot of land (known as the servient tenement). A servitude binds the servient tenement itself and so has to be observed by every owner of the servient tenement, not just the owner who agreed to the servitude at the outset. Only certain types of rights are servitudes e.g. the right to have a building supported, a right of way, a right to lay water pipes.

18). In subsection (6), the modifications in the 1845 Lands Act reflect similar provision in the [Land Compensation \(Scotland\) Act 1973 \(c.56\)](#).

### ***Section 14 – Purchase of specific new rights under land***

73. In addition to [section 13](#), in relation to the land within the limits of land to be acquired or used which is specified in columns (1), (2) and (3) of Part 2 of [schedule 5, section 14](#) enables the authorised undertaker to acquire new rights over that land for the specific purposes mentioned in column (4). This is mainly to allow access for construction and then maintenance of the railway.
74. [Section 14\(2\)](#) relates to the specific protection from compulsory acquisition of land afforded to CGM (Oswald) Ltd under section 12(2), explained in paragraph 66 above. It makes specific provision for the authorised undertaker to acquire permanent rights of access to the land as required for the purpose of maintaining the authorised works within plot 45.

### ***Section 15 – Rights in roads***

75. [Section 15](#) applies to any road that is included in the land that may be compulsorily acquired under [section 12](#). In relation to such land, the section allows subsoil or airspace to be used for the works without the need for compulsory purchase.
76. Subsection (1) enables the authorised undertaker to enter and use the subsoil of or airspace over such land for the purposes of the authorised works. The subsection permits the authorised undertaker to do this without serving notice on the roads authority or other owner of the land involved.
77. By subsection (2), the authorised undertaker may exercise these powers without being obliged to acquire the road or place or any servitude or right in relation to it.
78. Subsection (3) is a technical provision to safeguard the authorised undertaker's exercise of the powers in this section. The subsection provides that the powers in subsection (1) are taken to create a real right, even though it is not a right that is registered. An unregistered real right is an overriding interest<sup>18</sup>. An overriding interest takes effect as against the registered owner of land even though it is not registered<sup>19</sup>. Thus the effect of subsection (3) is to ensure that the powers in subsection (1) will be binding on anyone who owns land to which this section applies. The ability to create such rights is unaffected by the Title Conditions (Scotland) Act 2003.
79. The section enables the public works authorised by the Act to occupy the public space under and over roads on the same basis as the usual public use of those places, that is without the authorised undertaker having any owning interest. The section recognises that there may also be private interests in this land (for example, the subsoil under roads is often owned by the owners of land adjoining the road). Subsection (4) accordingly provides for the payment of compensation to any private owner of land to which the section applies who suffers loss as the result of the use of his or her land under subsection (1). Under subsection (5) any dispute as to compensation will be determined by the Lands Tribunal for Scotland in accordance with the Land Compensation (Scotland) Act 1963.
80. Subsection (6) provides that subsection (2) shall not apply where subsoil to which the section applies is occupied by an underground subway or building or by an underground part of an adjoining building. This recognises that in these cases the authorised undertaker will be occupying an integral part of a larger structure. Where what is occupied is a part of a structure the authorised undertaker ought not to be able to avoid the obligation to acquire the relevant land or obtain appropriate rights. There may well need to be obligations included in the legal transfer or grant of rights

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18 See [Land Registration \(Scotland\) Act 1979 \(c.33\) s.28\(1\)](#), definition of "overriding interest" paragraph (h).

19 [Land Registration \(Scotland\) Act 1979 \(c.33\) s.3\(1\)\(a\)](#).

concerning the use by the authorised undertaker of part of the structure. Accordingly, subsection (6) obliges the authorised undertaker to acquire the relevant land, or an appropriate servitude or right, before using it for the authorised works.

### ***Section 16 – Temporary use of land for construction of works***

81. Where the authorised undertaker only needs to occupy land for a temporary period, purchase of the land cannot be justified (see [paragraph 52](#) above). [Section 16](#) allows for the authorised undertaker to take temporary possession of specified land for the period required for specific authorised works. Provision of this sort is standard in legislation authorising works.
82. By subsection (1) the authorised undertaker may take temporary possession of the land specified in columns (1), (2) and (3) of [schedule 6](#) for the various purposes mentioned in column (4) of that schedule. (These are purposes such as the provision of construction compounds, working spaces and access.) On exercising these powers the authorised undertaker may remove buildings and vegetation and construct temporary works (including means of access) and temporary buildings on the land and carry out as necessary permanent works to mitigate the effects of the authorised works.
83. Subsection (2) requires the authorised undertaker to serve 28 days' prior notice of entry on the owners and occupiers of the land.
84. Subsection (3) provides that, except with the landowner's agreement, the authorised undertaker may not remain in temporary possession for more than one year after the date of completion of the works for the purposes of which entry was made. The relevant work is specified, in relation to each plot, in column (5) of [schedule 6](#). The authorised undertaker is allowed to remain in possession for this further year so that it can do all the work required during the 12 month maintenance period immediately after construction has been completed. It is normal in construction contracts for contractors to be liable to maintain works for a given period (usually 12 months) after the works have been completed. This makes the contractor responsible to rectify any defects that come to light while the works are 'bedding in'.
85. Subsection (4) provides that before giving up possession the authorised undertaker must remove temporary buildings and restore the land to the reasonable satisfaction of its owners. The authorised undertaker is not required to replace buildings that have been removed on the basis that the character of the land has fundamentally changed as the result of its temporary use<sup>20</sup>.
86. Subsection (5) requires the authorised undertaker to pay the owners and occupiers of land of which temporary possession has been taken compensation for any loss they suffer as the result of the temporary possession.
87. By subsection (6) the amount of any compensation is to be determined in case of dispute under the [Land Compensation \(Scotland\) Act 1963 \(c.51\)](#). The compensation payable under [section 16](#) is in respect of loss or damage arising from the temporary possession. The same landowner might be entitled to compensation in respect of the same land arising from the construction of the authorised works. Accordingly, subsection (7) provides that any compensation payable under this section is additional to any other compensation that may be payable in respect of the land. Compensation will continue to be payable under any other enactment except in so far as this duplicates compensation payable under [section 16](#).
88. Subsection (8) provides that the authorised undertaker is not required to acquire the land which is used temporarily under this section, or any interest in it.

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<sup>20</sup> *This is standard in provisions of this sort – see e.g. City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s.8(4)(b). It reflects the legal rule that where land that has been compulsorily acquired outright for a particular authorised purpose is no longer needed for that purpose and is to be sold, the original owner has no right to be given first refusal if the character of the land has fundamentally changed as the result of its use for the authorised purpose.*

### ***Section 17 – Disregard of certain interests and improvements***

89. Under the rules applicable to the assessment of compensation land is valued at its market value. The purpose of **section 17** is to ensure that landowners do not act to enhance the value of their land solely for the purpose of obtaining compensation or increased compensation. Subsection (1) accordingly provides that when assessing compensation payable on the acquisition of the land the Lands Tribunal for Scotland shall not take into account the creation of any interest in land, the erection of buildings or the carrying out of works, improvements or alterations which was undertaken for this purpose.
90. Subsection (2) makes clear that this section applies to works or improvements undertaken both on the land to be acquired and any other land in which the claimant has an interest (a claim for compensation will take into account the impact on land which has been retained by the claimant as well as on the land which is being acquired).

### ***Section 18 – Set-off of betterment against compensation***

91. Development may enhance the value of adjoining or nearby land. **Section 18** accordingly provides for compensation to be reduced by an amount equivalent to any enhanced value of other contiguous<sup>21</sup> or adjacent<sup>22</sup> land of the person seeking the compensation.

### ***Section 19 – Application of legislation relating to certificates of appropriate alternative Development***

92. The provisions relating to a certificate of appropriate alternative development under section 25 and 26 of the Land Compensation (Scotland) Act 1963 apply (as provided by section 30(2)(a) of the 1963 Act) to an interest in land subject to compulsory purchase where a notice to landowners has been served as part of the requirements of UK Parliament's standing orders for a Act when it is first introduced.
93. The effect of the certificate is that where an interest in land is subject to compulsory acquisition under an Act, the person in whom that interest is vested or the authorised undertaker may apply to the planning authority for a certificate of appropriate alternative development in respect of that land. If the planning authority issues such a certificate stating that, in the absence of the promoter's proposal, planning permission would have been granted for specified development, then it is assumed for compensation valuation purposes that such planning permission would have been granted.
94. Section 30(2)(a) of the 1963 Act was not extended on devolution to refer also to the standing Orders of the Scottish Parliament. The purpose of **section 19** is to amend section 30(2)(a) so that when (in accordance with the Scottish Parliament's standing orders) a notification is given of the proposal to acquire land compulsorily the provisions relating to a certificate of appropriate alternative development (sections 25 and 26) will apply.

### ***Section 20 – No double recovery***

95. **Section 20** ensures that those entitled to compensation under the Act and any other enactment, contract or rule of law are not compensated twice in respect of the same item of compensation.

### ***Section 21 – Acquisition of part of certain properties***

96. **Section 21** lays down special procedures in place of section 90 of the 1845 Lands Act, which would otherwise be applicable where an acquiring authority wishes to acquire part only of certain types of property required for the works. Section 90 provides that

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<sup>21</sup> "contiguous": touching or immediately next to, sharing a common boundary with [other land].

<sup>22</sup> "adjacent" includes land that is not contiguous, but which is close to or near other land.

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the owner of a house, building or factory cannot be compelled to sell only part of his or her property if he or she is willing to sell the whole. This would enable a landowner to insist on the acquisition of the whole of his or her property, however large, even where the purchase of the part proposed for compulsory acquisition is insignificant in relation to the whole. The replacement procedures allow the authorised undertaker to acquire only part of a property where this can be done without material detriment<sup>23</sup> to the rest of the property and, in the case of a house with a park or garden, without also seriously affecting the amenity or convenience of the house<sup>24</sup>. These replacement provisions reflect the modernised state of the law in England and Wales (under section 8 of the [Compulsory Purchase Act 1965 \(c.56\)](#)). Their application in legislation of this sort is standard<sup>25</sup>.

97. Subsection (1) applies this section to any case where a notice to treat<sup>26</sup> relates to land forming part of a house, building or factory or to land consisting of a house with a park or garden. For the section to apply a copy of the section must also be served with the notice to treat.
98. Subsection (2) provides that where a notice to treat is served under subsection (1), the owner may serve a counter-notice on the authorised undertaker within 21 days, objecting to the sale of part of the land and stating that the owner is willing to sell the whole of the land.
99. Subsection (3) provides that if the owner does not serve a counter-notice within 21 days, he or she is obliged to sell the land the authorised undertaker wishes to acquire.
100. Subsection (4) provides that where the authorised undertaker agrees to take the land the subject of the counter notice, the notice to treat is deemed to apply to that land, in addition to the land it originally applied to.
101. Subsection (5) provides that where the authorised undertaker does not agree to take the land the subject of the counter notice, the question as to what land the owner shall be required to sell is referred to the Lands Tribunal for Scotland.
102. Subsection (6) provides that if the Tribunal decides that the part subject to the notice to treat can be taken without material detriment to the land specified in the counter notice, or in the case of a house with a park or a garden, without seriously affecting the amenity of the house, the owner is obliged to sell the land that the authorised undertaker wishes to acquire.
103. Under subsection (7) the Tribunal may make a similar decision in relation to part of the land subject to the notice to treat. In that case the notice is deemed to apply only to that part, which can then be acquired.
104. Subsection (8) provides for the case where the Tribunal finds that there is material detriment or serious effect on amenity or convenience, but limited to part of the land subject to the counter-notice. The notice to treat is then deemed to apply to both the land referred to in that original notice and, in addition, the land affected by the material detriment.
105. Under subsection (9), where the Tribunal determines that there will be material detriment or an adverse effect on amenity or convenience, and also determines that any material detriment extends to all<sup>27</sup> the land subject to the counter-notice, the notice to treat is deemed to apply to all the land included in the counter-notice.

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<sup>23</sup> “Material detriment” to the remainder of the property: the test is whether the remainder, after the part is compulsorily acquired, is less useful or less valuable in some significant degree compared with the property as existing before the acquisition took place (*McMillan v Strathclyde Regional Council* 1984 S.L.T. Lands Tr. (Scot)) 25.

<sup>24</sup> “Seriously affecting the amenity and convenience of the house”: the test is whether after the part has been compulsorily acquired the house has less amenity and less convenience in some significant degree compared with the property as existing before the acquisition took place (see *McMillan v Strathclyde Regional Council*).

<sup>25</sup> See e.g. *City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii)*, s.6.

<sup>26</sup> For an explanation of this expression see paragraph 58 above.

<sup>27</sup> Where material detriment extends to only part of the land subject to the counter-notice subsection (7) applies.

106. Under subsection (4), (8) or (9) a notice to treat can be deemed to include other land whether or not that land is subject to compulsory acquisition under the Act.
107. Subsections (11) and (12) cover the situation where the Tribunal determines that the authorised undertaker should acquire either more or less land than was included in the original notice. Either of these circumstances could have serious implications for the design or operation of the authorised works. The authorised undertaker is allowed 6 weeks within which to withdraw the notice to treat rather than proceed with the acquisition of the land determined by the Lands Tribunal. If the authorised undertaker withdraws the notice to treat it is obliged to pay the owner compensation for any expense caused by the giving and withdrawal of the notice to treat. This enables the authorised undertaker to take any available alternative options. This might for example involve re-designing works or methods of construction so that none of the land is required.
108. By subsection (13), where this section results in an owner being required to sell only part of—
- a house, building or factory; or
  - land with a house and a park or garden,
- the authorised undertaker is not required to buy the whole property. However, the authorised undertaker must in addition to paying compensation for the value of the interest acquired, pay compensation for any loss resulting from severance of the land<sup>28</sup>.

### ***Section 22 – Extinction or suspension of private rights of way***

109. The Act provides for necessary public and private means of access<sup>29</sup>. The authorised works cannot accommodate further rights of way over the land that may be compulsorily acquired under the Act. **Section 22** accordingly extinguishes<sup>30</sup> private rights of way over this land or, where the land is subject only to temporary possession, suspends the rights of way while the authorised undertaker remains on the land. In relation to compulsory purchase orders, servitudes over the land are extinguished automatically by virtue of section 106 of the **Title Conditions (Scotland) Act 2003 (asp 9)** but that provision may not apply to land acquired under the powers of the Act. **Section 22** is consistent with the general law in this regard.
110. Subsection (1) provides for the extinguishment of private rights of way over land which may be compulsorily acquired under the Act. It applies where the land is actually acquired by the authorised undertaker, both where the purchase has been by using the compulsory purchase procedures and where the authorised undertaker and the landowner have instead agreed terms without recourse to the formal procedures. The private rights of way will be extinguished as from the date when the land is acquired. Where the authorised undertaker enters the land and takes possession before completion under **section 24**, the extinguishment or suspension takes place instead as from the date on which possession is taken.
111. Subsection (2) provides for the suspension of private rights of way over land of which the authorised undertaker takes temporary possession. The suspension continues while the authorised undertaker is in temporary possession of the land.
112. Under subsections (3) and (4) a person who suffers loss as a result of the extinguishment or suspension is entitled to compensation. Any dispute as to the amount is determined by the Lands Tribunal for Scotland under the **Land Compensation (Scotland) Act 1963 (c.51)**.
113. Subsection (5) provides that the section does not apply to rights of way of statutory undertakers to which section 224 or 225 of the Town and Country Planning (Scotland)

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<sup>28</sup> *i.e. diminution in value of the remaining land due to the loss of the compulsorily acquired land.*

<sup>29</sup> *See e.g. Work No.1B.*

<sup>30</sup> *i.e. terminates the rights, so that they cease to exist.*

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Act 1997 (c.8) apply. (The position of statutory and utility undertakers is separately dealt with in [section 34](#) and [schedule 7](#).)

114. Subsection (6) allows for the extinction or suspension of private rights of way under the section to be subject to agreement between the authorised undertaker and the person entitled to the right of way or to a unilateral determination by the authorised undertaker. The authorised undertaker might be able to agree to a right of way continuing between the date of acquisition and the commencement of construction works, or to a diversion of the route used. Alternatively the authorised undertaker may conclude, following detailed design of the scheme, that the construction and maintenance of the scheme is not incompatible with the continuation of a right of way over the land and need not therefore be extinguished or suspended
115. Subsections (7) and (8) spell out that any determination that a right of way is not to be extinguished must be made before the extinguishment would have taken place, while a determination that a suspension is not required can take place at any time. This reflects the fact that an extinction of a right of way is a single event while a suspension is an ongoing process which can be terminated.
116. Subsection (9) provides for notice of a determination not to extinguish or suspend a right to be given to the person entitled to the right.
117. The object of subsection (6) is to ensure that the interference with private rights which results from their extinction or suspension under this section is kept to the minimum necessary to accommodate the construction and maintenance of the authorised works.
118. The purpose of [section 22](#) is to ensure there are no incompatible rights of way over land on which the authorised undertaker is to construct works. It is unnecessary to extinguish other rights in relation to land where the authorised undertaker is only acquiring rights<sup>31</sup>. Accordingly, under subsection (10) the automatic extinguishment effected by subsection (1) will not apply on land where the authorised undertaker is only acquiring rights. Subsection (10) refers only to subsection (1) and not to subsection (2) (which authorises the suspension of rights during compulsory possession of land). There are areas where powers are sought both to occupy the land temporarily as a working site and to acquire permanent rights of access. During the temporary occupation it may be necessary to have exclusive occupation of land and therefore suspend other rights.

***Section 23 – Power to enter land for survey, etc.***

119. The Lands Clauses Acts do not allow adequately for the carrying out of survey and similar work before acquiring land. Surveys and the other activities described in subsection (1) are a necessary part of the detailed design and preparatory work that is required in advance of starting construction. It is impracticable for survey work to await completion of formal purchase procedures, which can include Lands Tribunal hearings. This is recognised in section 83 of the 1845 Lands Act which allows entry before purchase for survey and a limited number of other purposes (drilling and soil samples). [Section 23](#) of the Act extends these purposes to include what is necessary for a modern construction project. It is a standard provision in modern legislation of this sort<sup>32</sup>.
120. Subsection (1) enables the authorised undertaker to enter any land within the limits of deviation or the limits of land to be acquired or used for the purposes of carrying out surveys and investigations (including archaeological investigations) and to protect or remove flora or fauna.

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<sup>31</sup> See [section 14](#) and [Part 2 of schedule 5](#).

<sup>32</sup> See e.g. [The Stirling-Alloa- Kincardine Railway and Linked Improvements Act 2004, section 23](#), [British Railways \(No. 2\) Order Confirmation Act 1994 \(c.ii\)](#), s.21, [City of Edinburgh \(Guided Busways\) Order Confirmation Act 1998 \(c.iii\)](#), ss. 12 and 13.

121. Subsection (2) requires the authorised undertaker to give, on the first occasion seven, and thereafter three, days' notice to the owner and occupier.
122. Subsection (3) requires a person entering under these powers to produce written evidence of authority, and authorises such a person to enter with vehicles and equipment. The subsection does not specify the form of written authority required, but this might take the form of a letter of authority from the authorised undertaker.
123. By subsection (4) no trial holes may be made in a carriageway or footway without the consent of the road works authority.
124. Subsection (6) requires the authorised undertaker to pay compensation for damage caused to owners and occupiers.

### **Section 24 – Further powers of entry**

125. **Section 24** is also a standard provision<sup>33</sup>. The 1845 Lands Act permits entry on land under compulsory purchase powers only after full payment has been made (1845 Lands Act, section 83) or after the body with the compulsory purchase powers has deposited in a bank as security either the compensation claimed by the landowner or a sum representing the value of the land as valued by a valuer appointed by the sheriff (section 84). Sections 85 and 86 require the money to remain in the bank as a security to be distributed as directed by the sheriff. Section 87 imposes financial penalties on entering land without complying with the procedures, and in the event of a landowner refusing entry even after full payment has been made, the only recourse is to apply to the sheriff for a possession order. The procedures are cumbersome and time consuming. In England and Wales they have been simplified and modernised so as to allow entry after the landowner has been given notice<sup>34</sup>. The purpose of **section 24** of the Act is to allow this modern procedure to apply.
126. Where a notice to treat has been served in respect of any land subject to compulsory purchase subsection (1) enables the authorised undertaker to enter the land and take possession of it.
127. Under subsection (2), at least three months' prior notice of entry must be given to the owner and the occupier of the land.
128. Subsection (3) enables the authorised undertaker to exercise these powers without complying with sections 83 to 89 of the 1845 Lands Act.
129. Where the authorised undertaker enters land under **section 24**, subsection (4) provides that the authorised undertaker must pay compensation as though sections 83 to 89 had been complied with. **Section 24** does not therefore alter a landowner's right to compensation, including the right to receive an advance payment of 90% of the compensation, as required by section 48 of the **Land Compensation (Scotland) Act 1973 (c.56)**. Subsection (5) makes it clear that the obligation to make an advance payment is not affected by **section 24**.
130. The object of this section is to ensure that the works are not delayed by negotiations with landowners about the compensation to which they are entitled. As landowners are to be obliged to give up their land in any event, the amount of compensation is a completely separate issue from possession of the land.

### **Section 25 – Persons under disability may grant servitudes, etc.**

131. **Section 25** applies to persons such as trustees who are only able to convey the land because they are empowered to do so by the 1845 Lands Act. People who are legally

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<sup>33</sup> See e.g. *The Stirling-Alloa- Kincardine and Linked Improvements Act 2004 section 24*, *British Railways (No.2) Order Confirmation Act 1994 (c.ii)*, s.22, *City of Edinburgh (Guided Buses) Order Confirmation Act 1998 (c.iii)*, s.14.

<sup>34</sup> See *Compulsory Purchase Act 1965 (c.56)*, s.11.

disabled from doing something (in this case selling land) are described as being under a disability.

Section 7 of the 1845 Lands Act enables such people to convey existing rights, but not to create new rights. Provision is accordingly required to ensure that it will always be possible for the authorised undertaker to acquire new rights under [section 14](#) of the Act.

132. Subsection (1) accordingly allows persons under a disability to grant to the authorised undertaker servitudes, rights or privileges<sup>35</sup> over their land. If they remained unable to do this such people in this position could only sell the whole of the land. The authorised undertaker could be left with land it did not need and an increased compensation liability.
133. By subsection (2), rights cannot be granted in relation to water in which others have an interest. Where several landowners have interests in the same water, the law treats them as sharing a common interest: one of them cannot therefore do something that affects the others. Subsection (2) is needed to prevent [section 25](#) being used to override these general property rights.

### ***Section 26 – Period for compulsory acquisition of land***

134. Subsection (1) provides that the compulsory purchase powers of the Act will expire five years from the date on which the Act comes into force (i.e. five years following the day after it receives Royal Assent). Subsection (2) provides that for the purposes of this deadline the powers are deemed to have been exercised before that date if either notice to treat has already been served or if the authorised undertaker has executed a general vesting declaration under paragraph 1 of Schedule 15 to the Town and Country Planning (Scotland) Act 1997, the effect of which is to vest that land in the authorised undertaker. (See [paragraphs 192 to 196](#)).
135. A time limit on exercising the compulsory purchase powers is needed so that landowners are not prejudiced. Without a time limit landowners would be likely to find that for so long as land was at risk of compulsory purchase it would be difficult if not impossible to sell, or its value would be reduced. [Section 39](#) provides for the situation where a landowner needs to sell land that is affected in this way.
136. It is normal for legislation authorising the construction of works to impose time limits on the exercise of compulsory purchase powers<sup>36</sup>.

### ***Section 27 – Extension of time***

137. Subsection (1) provides for the time limit on the exercise of compulsory powers referred to in [Section 26\(1\)](#) to be extended on the application of the authorised undertaker. Subsection (1)(a) provides that the application must be made before the original five year period has expired. More than one extension may be ordered but subsection (1)(b) provides that the total period for compulsory acquisition shall not exceed 10 years. Subsection (3) requires extensions to be made by statutory instrument, thereby subjecting any such application to the scrutiny of Parliament. Subsection (4) provides that any statutory order containing an extension of time can be annulled by resolution of the Parliament.

### ***Section 28 – Time limit on validity of notice to treat***

138. Section 17 of the Lands Clauses Consolidation (Scotland) Act 1845 which requires an acquiring authority to give notice of its intention to take land (that is, to serve a notice to treat), is incorporated with this Act by virtue of [Section 47](#). In relation to compulsory purchase orders section 78 of the [Planning and Compensation Act 1991 \(c.34\)](#) limits

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<sup>35</sup> “Privileges”: rights that are of benefit to the person entitled to exercise them, for example fishing rights.

<sup>36</sup> See e.g. *British Railways (No.2) Order Confirmation Act 1994 (c.ii), s.15*; *City of Edinburgh (Guided Busways) Order 1998 (c.iii), s.20*.

the life of a notice to treat served under section 17 of the 1845 Act to three years from the date on which it is served. The effect of **Section 28** is to apply the three-year limit under section 78 of the 1991 Act to a notice to treat served under this Act. Without this provision there would be a degree of uncertainty as to whether or when a notice to treat should be treated as having been abandoned.

***Section 29 – Parliamentary plans and book of reference: adjustments agreed with landowners and correction of errors***

139. **Section 29** provides a procedure whereby owners of land as well as the authorised undertaker will be able to have binding agreements not to acquire land reflected in the plans and book of reference. It also provides for the authorised undertaker to correct an inaccurate description of any land or its ownership or occupation in the Parliamentary plans or the book of reference. Subsection (2), for which there are numerous precedents, is an extension of the procedure in **section 41** for certifying the book of reference and the Parliamentary plans and sections.
140. Where a binding obligation has been entered into not to acquire land within the limits of deviation or limits of land to be acquired or used, subsection (1) allows the owner of the land and the authorised undertaker to have the plans and book of reference altered to reflect the agreement. The owner or authorised undertaker must give 10 days notice as required by subsection (3) and may then apply to the sheriff. Subsection (3) provides that an authorised undertaker must give notice to the owner, lessee and occupier of the land in question and the owner must give notice to the authorised undertaker and any lessee or occupier.
141. For corrections to errors, the authorised undertaker must apply to the sheriff under subsection (2) giving notice of the application as required by subsection (3).
142. Subsection (4) enables a recipient of a notice to give a counter-notice in writing to dispute, in the case of an application under subsection (1), that the proposed amendment or addendum accurately reflects the obligation or, in the case of a notice under subsection (2), that there is an inaccuracy which may be amended under section 29. If a counter-notice is received, subsection (7) requires the sheriff to have a hearing before making a decision on the application.
143. Where no counter-notice is received, and the Sheriff is satisfied that the proposed amendment or addendum accurately reflects the obligation, or that the inaccuracy arose by mistake, the sheriff will certify that this is the case (subsection (5)). Where an application was for correction of an inaccuracy, the certificate shall state in what respect the matter was misstated or wrongly described. The certificate will then be deposited in the office of the Clerk to Parliament (subsection (8)) and the plans and book of reference shall be deemed to be corrected or amended according to the certificate (subsection (9)). Subsection (10) obliges the Clerk to keep the certificate with the plans and book of reference to which it relates.
144. Subsection (12) defines sheriff as the sheriff for the area in which the land is situated.
145. The purpose of the section is to ensure that binding obligations not to acquire land may be recorded by either party and that implementation of the Act (when passed) is not prevented by mistaken misdescriptions. The Act authorises the compulsory acquisition of land as shown on the Parliamentary plans and described in the book of reference. A minor mistake in a description in one document might result in it being inconsistent with the other, which might in turn prevent proper identification of land to be compulsorily acquired. In the absence of this procedure to correct the position, the compulsory purchase powers in the Act could not be used in relation to that land. Subsection (11) ensures that this provision cannot be used to bring in further land which was not identified on either the original plans or the book of reference.

***Section 30 – Restrictions on compulsory purchase in respect of operational airport land***

146. The Act will authorise works on land within Glasgow Airport. It is recognised that the exercise of unrestricted compulsory powers over such land could compromise the operation or safety of this key transport undertaking. The object of these provisions is to restrict the exercise of compulsory powers in order to safeguard the statutory responsibilities of the body which owns and operates the relevant infrastructure while at the same time establishing that this body must act reasonably in imposing requirements in relation to the construction of the railway.
147. Subsection (1) refers by reference to the parcel numbers on the Parliamentary plans to the land within Glasgow Airport, and provides that compulsory acquisition of this land or the exercise of powers to occupy land temporarily is subject to such requirements as Glasgow Airport Limited, the owner and operator of the airport, may reasonably make to ensure there is no material adverse impact on the operation or safety of its airport undertaking. The requirements imposed could cover the extent of land being acquired, the nature of the interest (in so far as this could have an impact on airport operations) and the terms on which the acquisition is made. However they relate only to operational requirements (rather than for example issues relating to retail facilities at the airport).
148. Subsection (2) and (3) provide for disputes to be determined by arbitration, unless the parties agree on some other alternative form of dispute resolution, and that the authorised undertaker will not take possession of any of the land stipulated until the dispute has been resolved. Arbitration is governed by **section 35** of the Act.
149. Subsection (4) amends in relation to operational airport land, the restriction on the length of leases imposed by section 67(1) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 which sets the maximum as 175 years and provides the authorised undertaker with powers to take leases of up to 250 years at Glasgow Airport.

***Section 31 – Protection of Access at St James' Park***

150. The purpose of **section 31** is to protect pedestrian and vehicular access at St James' Park. By subsection (1) when the authorised undertaker acquires title to all or any part of the land under the viaduct, it must immediately grant and register rights for pedestrian and vehicular access over that land in favour of the proprietor or proprietors for the time being of plots 75 and 78. Subsection (2) provides that the rights conferred by this section are to operate for as long as there are football pitches available for use on either side of the viaduct.
151. These access rights are subject to reasonable restrictions for the protection of the authorised works or their operation (subsection (3)) which may include the right to obstruct access temporarily across plots 76 and 83 for the purpose of maintaining the authorised works and restrictions on the nature of vehicles permitted to pass under the authorised works. However, where restrictions occur, the authorised undertaker must provide suitable alternative means of access and egress (subsection (4)).
152. Subsection (5) requires the authorised undertaker not to exercise its powers over the private access road adjoining the playing fields in a manner that would prevent access to and from plots 75 and 78 at any time during which there is a football pitch available for use on either or both of those plots.

***Part 3 – Miscellaneous and general***

***Section 32 – Power to fell, etc. trees or shrubs***

153. Subsection (1) enables the authorised undertaker to fell, lop or cut back the roots of any tree or shrub that is near either any part of the authorised work or any land proposed to

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be used for the authorised works. The power is exercisable if the authorised undertaker reasonably believes it to be necessary in order to prevent the tree or shrub–

from obstructing or interfering with the maintenance or operation of the authorised works or associated apparatus; or

from constituting a danger to those using the authorised works.

The powers are exercisable in relation to any tree or shrub that comes within the tests in subsection (1), whether inside or outside the limits of deviation and the limits of land to be acquired or used.

154. Subsection (2) requires that the authorised undertaker is not to damage a tree or shrub unnecessarily.
155. Subsection (3) requires the authorised undertaker to pay compensation to any person who suffers loss or damage arising from the exercise of this section.
156. Under subsection (4) any dispute as to compensation will be determined by the Lands Tribunal for Scotland in accordance with the Land Compensation (Scotland) Act 1963.
157. Subsection (5) disapplies any tree preservation order or prohibition on interfering with trees in conservation areas which might otherwise apply.

***Section 33 – Powers of disposal, agreements for operation, etc.***

158. **Section 33** is required because, although SPT is the promoter of the Act, it will not necessarily own or operate the railway. For instance the expectation is that ownership of the alterations to the existing rail network will be transferred to Network Rail as the national rail infrastructure operator. **Section 33** therefore gives effect to the intention that SPT may be no more than the procurer of the powers. In the absence of **section 33** the powers in the Act would not be transferable.
159. Subsection (1) provides that the authorised undertaker is competent to (i.e. lawfully can) make and implement agreements connected with the authorised works that provide for the things described in subsection (2). The matters listed in subsection (2) are:
  - the transfer to and vesting in another person of all or any of the authorised undertaker’s functions under the Act, including the powers conferred by this section,
  - the disposal of the whole or any part of the railway undertaking that the authorised works make up, and
  - the creation of any heritable security, charge or other encumbrance secured on that statutory undertaking.

The authorised undertaker does not need powers to transfer or dispose of non-statutory assets, but the matters described in subsection (2) all relate to interference with the statutory powers of the Act and so require legislation to authorise them.

160. Subsection (3) relates to any restrictions, liabilities or obligations that bind the authorised undertaker, either under this Act or under an undertaking or commitment (given before or after the Act passes) by SPT or any other authorised undertaker. Any such thing will be equally binding on any subsequent authorised undertaker.
161. Subsection (4) requires that where there is an agreement under subsection (1) to transfer functions, the authorised undertaker making the transfer must serve a notice on the Scottish Ministers stating the name and address of the transferee and the date when the transfer is to take effect. The notice must be served within 21 days after such an agreement has been completed. The purpose is to ensure that the Scottish Ministers have a record of who is entitled to exercise statutory functions and, reflecting the importance

of the notice requirement, subsection (5) makes it a criminal offence to fail without reasonable excuse to comply with the requirement.

162. Subsection (6) makes clear that an agreement under subsection (1) made in connection with the authorised works can include any agreement relating to funding, construction, maintenance and operation of the authorised works or any supplementary or ancillary matters
163. Subsection (7) contains definitions. “Functions” includes powers, duties and obligations: in short, in relation to the statutory functions under the Act, anything arising under the Act.

### **Section 34 – Statutory undertakers, etc.**

164. Subsection (1) introduces **schedule 7** to the Act. This schedule is concerned with the rights of the providers of water, gas, electricity, sewerage and telecommunications services to maintain their supplies through apparatus that will or may be affected by the Act. These providers (frequently described in legislation as “undertakers”) have historically been legislated for as “statutory undertakers”. In particular, “statutory undertakers” is the expression used in sections 224 to 227 of the [Town and Country Planning \(Scotland\) Act 1997 \(c.8\)](#) (in the Act called “the 1997 Act”). Sections 224 to 227 provide a statutory code that applies in certain cases where the use of land for planning purposes makes it necessary to extinguish undertakers’ rights to maintain apparatus.
165. This code provides for the acquiring authority to be able to serve notice to require the relocation of apparatus of the undertaker, and for the statutory undertaker to object to the proposal (disputes being determined by Scottish Ministers). Alternatively the statutory undertaker can serve notice on the acquiring authority if it considers that a relocation will be necessary. In either case the compensation is payable by the acquiring authority.
166. **Schedule 7** is well preceded. Legislation authorising infrastructure provides protection for undertakers’ apparatus in one of two ways. Either it applies the statutory code in the 1997 Act or it sets out at length the arrangements between the promoter and each of the affected undertakers. The latter course would call for the Act to include detailed provisions concerning the approval or agreement of detailed works, the methods of carrying them out and the provision of alternative undertakers’ apparatus. These are all matters that can be agreed privately between the parties and recorded in formal agreements. **Schedule 7** seeks to put in place a baseline framework that will ensure that the authorised undertaker is obliged to make the necessary arrangements, and which will operate in the absence of any separate private agreement.
167. It is known that there is undertakers’ apparatus in some of the land required for the authorised works. The Act when enacted will therefore give rise to the situation for which sections 224 to 227 are designed. **Schedule 7** accordingly applies the code in sections 224 to 227 to the authorised works.
168. **Paragraph 1** of **schedule 7** provides for those sections to apply. **Paragraph 2** applies all other provisions of the 1997 Act that are needed for the operation of sections 224 to 227, including the provisions regarding compensation.
169. **Paragraphs 3** and **4** provide for compensation to be payable to owners and occupiers of premises who have to make alternative connection arrangements because of the removal of apparatus in accordance with the code. **Paragraph 3** deals with connections in order to retain a supply of water, electricity, gas or electronic communications services and **paragraph 4** deals with connections with sewers.
170. Part IV of the New Roads and Street Works Act 1991 is a separate code governing works in roads. It covers works involving the removal or laying of undertakers’ apparatus in roads, and it applies automatically. Accordingly, **paragraph 5** of **schedule 7** provides that this schedule will not apply to cases that are governed by Part IV.

### **Section 35 – Arbitration**

171. **Section 35** lays down the procedures applicable in cases where the Act provides for disputes (other than those to which the Lands Clauses Acts apply<sup>37</sup>) to be settled by arbitration. The arbiter is to be agreed by the parties to the dispute or, failing agreement, by the President of the Institution of Civil Engineers. By subsection (3) the arbiter is entitled to obtain a ruling on points of law from the Court of Session. This is standard practice for resolving such disputes. It will cover disputes arising under sections 5, 9, 10, 11 and 29. These are all potentially matters of a technical nature for which arbitration is considered a more appropriate procedure than recourse to the courts.
172. Subsection (4) disapplies section 108 of the **Housing Grants, Construction and Regeneration Act 1996 (c.53)** and any regulations made thereunder so that the dispute resolution mechanisms contained therein do not apply in respect of a dispute arising under this Act (for which a mechanism is provided under section 35). There is an exception for any contract where a party other than the authorised undertaker is to construct or fund the works authorised by the Act (subsection (5)).

### **Section 36 – Service of notices, etc.**

173. **Section 36** lays down detailed procedures for the services of notices under the Act. The section allows notices to be served in person, by hand to someone's address or by post. It also specifies how notices and letters may be properly addressed.

### **Section 37 – Listed buildings**

174. **Section 37** introduces **schedule 8**. The schedule makes special provisions as to the listed building (Glasgow Central Station) which will be affected by the railway works.
175. As explained in **paragraph 8** above, the Act will grant planning permission for the authorised works. It is appropriate that all planning issues should be considered at the same time, but the way in which the legislation is framed means that, but for **section 37** and **schedule 8**, the authorised undertaker would have to obtain listed building consent separately from the Act. This section and schedule 8 accordingly disapply this separate statutory requirement so that the Act will, effectively, also grant these consents.
176. **Paragraph 1** of **schedule 8** refers to the **Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9)** (in the schedule called "the Listed Buildings Act"). This is the Act that requires special consent (called listed building consent) for works and operations affecting buildings that are listed under the Act as being of special architectural or historic importance and conservation area consent for the demolition or alteration of the external appearance of buildings in areas that are listed under the Act as being of special architectural or historic importance.
177. **Paragraph 1(1)** of the schedule specifies the provisions in the Listed Buildings Act and the actions that may be taken under the Act which are not to apply. They are–
- section 6 (the requirement for listed building consent);
  - any notice under section 34(1) (in the Listed Buildings Act called an enforcement notice) by which the local planning authority may require actions in relation to any of the buildings specified in the table which would render ineffective, or substantially ineffective, the works authorised by the Act;
  - in relation to an enforcement notice to which paragraph 1(1)(b) above applies, the power under section 38(1) of the Listed Buildings Act for the local planning authority to do the things required by an enforcement notice if the recipient of the notice fails to comply; and

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<sup>37</sup> Disputes under these Acts are referred to the Lands Tribunal for Scotland (see paragraph 62).

*These notes relate to the Glasgow Airport Rail Link Act 2007  
(asp 1) which received Royal Assent on 15 January 2007*

the ability under section 49 for the local planning authority to carry out urgent preservation works if those works would render ineffective, or substantially ineffective, the works authorised by the Act.

178. The purpose of disapplying these statutory controls in relation to the building specified in the table is only to allow the construction of the authorised works. Accordingly, paragraph 1(2) of **schedule 8** makes clear that the only works that are not affected by the controls mentioned in paragraph 1(1) are the works described in column (4) of the table at the end of paragraph 1.
179. The purpose of **schedule 8** is to give listed building consent in all cases where it is needed. The building mentioned in the table is the only building that was listed as at 1<sup>st</sup> September 2004. Paragraph 1(3) ensures that if any further buildings are listed the schedule will apply to them, as well.
180. Paragraph 1(4) of **schedule 8** makes clear that objects or structures fixed to or within the curtilage of a building (for example, lamp brackets or door furniture) are to be treated as a part of the building for the purpose of this schedule<sup>38</sup>.
181. The listed buildings and the works to which the schedule will apply are described in the table at the end of paragraph 1.

**These Notes relate to the Glasgow Airport Rail Link Act (asp [no]) which received Royal Assent on [date]**

182. **Paragraph 2** of **schedule 8** disapplies section 53 of the Listed Buildings Act in relation to the works authorised by Part 1 of the Act. Section 53(1) of the Listed Buildings Act makes it a criminal offence to do or permit anything which causes or is likely to result in damage to a listed building. The works described in the table would amount to damage giving rise to an offence. Section 53(3) provides that subsection (1) does not apply (which means that the offence is not committed) to the execution of works authorised by a planning permission or for which listed building consent has been given. As the Act amounts to an effective grant of planning permission, and the effect of **section 37** of and **schedule 8** to the Act is effectively to grant listed building consent for the specified works, section 53 ought not to apply to the works.
183. **Paragraph 3** of the schedule applies the definitions of “building”<sup>39</sup> and “listed building”<sup>40</sup> in the Listed Buildings Act.
184. In the absence of this section it would be necessary to obtain separate listed building consent and conservation area consent in respect of works affecting the specific listed buildings or certain works in the conservation areas in which they are situated. This section enables the principle of the listed building issues to be dealt with at the same time as the rest of the scheme. However the details of any modifications to listed buildings will require prior approval by the local planning authority in accordance with the conditions attaching to the permitted development rights which apply to development authorised by the Act (see **paragraph 8** for an explanation of these permitted development rights).

**Section 38 – Saving for Town and Country Planning**

185. Subsection (1) provides for planning legislation to apply in relation to the works authorised by the Act.

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<sup>38</sup> *The Listed Buildings Act provides that these things are deemed to be part of a listed building, but only for the purposes of that Act (Listed Buildings Act, s.1(4)).*

<sup>39</sup> *“Building” includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building (Town and Country Planning (Scotland) Act 1997 (c.8), s.277(1), applied by Listed Buildings Act s.81).*

<sup>40</sup> *“Listed building”:* A building which is for the time being included in a list compiled by the Secretary of State under section 1 of the Listed Buildings Act (Listed Buildings Act, ss.1 and 81).

186. As explained in **paragraph 8** above, development authorised by the Act is permitted development i.e. under class 29 of Schedule 1 to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (in the Act referred to as “the 1992 Order”). Subsection (2) imposes three restrictions on the planning permission conferred by the 1992 Order.
187. First, subsection (2) lays down a 10-year limit in respect of these permitted development rights. By subsection (3) the time limit does not apply to the alteration, maintenance or repair of the authorised works, or the substitution for those works of new works. The Act therefore operates to grant planning permission for the works subject to a condition that development must be begun within 10 years.
188. Subsection (2)(b) imposes a restriction on the extent of the permission given for new fuel farm facilities at Glasgow Airport (the ancillary works identified in paragraph 2 of **schedule 2** to the Act). The intention is that the Act should authorise a replacement which is equivalent to the existing fuel farm facilities which will be displaced by the railway works, and that is all that has been assessed in the Environmental Statement accompanying the Act. The purpose of this provision is to ensure that the permitted development conferred by the 1992 Order is consistent with what has been considered in the Environmental Statement. If the operators of the fuel farm decide that expanded facilities are in due course required an application would need to be made for planning permission in the normal way.
189. The purpose of subsection (2)(c) is to ensure that Renfrewshire Council will have the right to approve the detailed plans and specifications of the viaduct to be constructed over St James’ Park. Under paragraph (2) of Class 29 of Schedule 1 to the 1992 Order the planning permission conferred by that Order for certain types of development is subject to the prior approval by the local planning authority of detailed plans and specifications. This provision adds “viaduct” to this list of types of development and thus removes any doubt as to whether construction of a viaduct would otherwise have been treated as being included within the types of development for which prior approval is required.

### **Section 39 – Blighted land**

190. **Section 39** applies the planning blight provisions of sections 100 to 122 of the **Town and Country Planning (Scotland) Act 1997 (c.8)** (which applies in cases mentioned in Schedule 14 to the Act). These provisions ordinarily apply where compulsory purchase is authorised by a variety of legislative instruments, including a private Act of the UK Parliament, but on devolution this was not extended to apply automatically where the authorisation is by a private Act of the Scottish Parliament. This section is therefore needed to ensure that these provisions apply to the works authorised by the Act.
191. The effect of **section 39** is that–
- a resident owner-occupier of a residential dwelling;
  - an owner-occupier of land with an annual (i.e. in most cases rateable) value of (currently) £28,000<sup>41</sup>; or
  - an owner-occupier of an agricultural unit,
- whose land is subject to compulsory purchase under the Act may require the authorised undertaker to purchase the land at market value if, having tried to sell the property, the landowner has been unable to sell except at a substantially lower price than might reasonably have been expected had the land not been subject to compulsory purchase.

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<sup>41</sup> *Town and Country Planning (Limit of Annual Value) (Scotland) Order 2005/(SSI 2005/594) designed to catch small businesses.*

### ***Section 40 – Method of vesting land***

192. The compulsory purchase procedures under the Lands Clauses Acts as outlined in **paragraphs 58 to 61** above provide for land to be vested in the acquiring authorised undertaker by means of a conveyance or in certain circumstances a notarial instrument executed by the authorised undertaker. **Section 40** applies a further procedure that is available generally to vest land that has been compulsorily acquired.
193. Section 195 of and Schedule 15 to the **Town and Country Planning (Scotland) Act 1997 (c.8)** apply to any Minister or any local or other public authority that is authorised to acquire land by means of a compulsory purchase order (called an acquiring authority). Where a compulsory purchase order has come into operation, the acquiring authority may execute a general vesting declaration (for which there is a prescribed form) vesting in themselves any of the land which they are authorised to acquire. A single declaration may relate to all or any of the land subject to compulsory purchase. Schedule 15 includes requirements as to the giving of prior notice and the date on which any declaration takes effect.
194. The effect of a general vesting declaration is to vest the land to which it relates in the acquiring authority. The making of the declaration has the same effect as service of a notice to treat in triggering the landowner's right to claim compensation.
195. Subsection (1) applies this procedure to compulsory acquisition under the Act.
196. Paragraph 2 of Schedule 15 makes detailed provision for the giving of notice to trigger the vesting declaration procedure. Subsection (2) adopts this for the Act. The vesting declaration provisions will apply on publication of a notice that the Act has received Royal Assent, giving details about the general vesting declaration procedure and stating that compensation may be payable. Subsection (2) provides that such a notice may be given at any time after the Act comes into force. The requirements for publication and service referred to in subsection (2)(c) are for newspaper publication and service on landowners who previously received notice of the proposals.

### ***Section 41 – Certification of plans, etc.***

197. **Section 41** requires that the authorised undertaker shall as soon as practicable after the Act comes into force submit copies of the book of reference, Parliamentary plans and Parliamentary sections to the Clerk of the Parliament for certification. Subsection (2) provides that the Clerk of the Parliament must be satisfied as to the accuracy of the documents before certifying them. The certificate is that they are the documents referred to in the Act. Such certified copies will be admissible in proceedings as evidence of the contents of these documents. In the absence of this provision the authorised undertaker could be required to prove the authenticity of copy documents.

### ***Section 42 – Registration of new rights***

198. **Section 42** addresses two issues in relation to positive servitudes that is, rights relating to the doing of some positive thing in relation to property ("burdened property") for the benefit of other property ("benefited property"). Subsection (1) provides that a servitude or other right acquired compulsorily under the powers to be conferred by the Act benefits all the land held by the authorised undertaker for the purposes of the authorised works. In the case of a linear work such as a railway, the benefit of a positive servitude (such as a right of access to the railway) may be capable of benefiting significant parts of the railway system, considerably more than the land immediately adjoining the burdened property. It is a principal of Scottish land law that a servitude is construed restrictively. This means that the servitude must be clear and precise. If the deed creating a servitude does not define land as being benefited by the servitude then the servitude cannot be used to benefit that land. In the context of the Act, an access servitude that defines the benefited property as being only some of the land comprised within the railway could not be used to access other land belonging to the authorised undertaker

further down the route. Subsection (1) ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect and are not reduced in scope by this principle of general Scots property law.

199. Subsection (2) provides that such a servitude is effective whether or not the deed creating it is registered against both the benefited property and the burdened property. Section 75 of the [Title Conditions \(Scotland\) Act 2003 \(asp 9\)](#) requires that a deed creating a positive servitude must be registered against both the burdened and the benefited property. An ordinary reading of section 75 leads to the conclusion that if registration is against only some of the benefited property, the deed will not be enforceable for the benefit of the remainder of the benefited property, against which it has not been registered. This subsection therefore ensures that statutory servitudes acquired under the powers in the Act for the benefit of the railway will have that effect in relation to all the land occupied by the authorised works, whether or not they are registered against all that land. Servitudes must still be registered against the burdened property.

### ***Section 43 – Mitigation of environmental impacts***

200. **Section 43** imposes a positive duty on the authorised undertaker regarding the environmental impacts of the authorised works. The environmental statement lodged with the Act on introduction proposes that certain mitigation measures will be taken. The effect of these measures will be to prevent or reduce environmental impacts being caused by the authorised works. Subsection (1)(a) obliges the authorised undertaker to ensure that the environmental impacts of the construction or operation of the authorised works are no worse than the residual impacts identified in the environmental statement. Subsection (1)(b) obliges the authorised undertaker either to carry out any additional mitigation measures identified in the undertakings given by SPT as promoter of the Act or to ensure that the environmental impacts are no worse than they would have been if those additional mitigation measures had been carried out. The test for the authorised undertaker to apply is that of using all reasonably practicable means.
201. Subsection (2) contains definitions of environmental statement, the promoter’s undertakings and residual impacts. For the purposes of this section, the environmental statement is identified as the accompanying document lodged with the Act and residual impacts means the environmental impacts of the construction or operation of the authorised works after the mitigation measures proposed in the environmental statement have been carried out.

### ***Section 44 – Application of Crichton Down Rules***

202. **Section 44** requires the authorised undertaker to implement the rules (known as the “Crichton Down Rules”)<sup>42</sup>. The rules provide that in certain circumstances former owners will, as a general rule, be given the first opportunity to repurchase, at the current market value, land previously in their ownership which was acquired by or under threat of compulsion and which is no longer required for the purpose of providing the authorised works. The Circular applies to public authorities and makes clear that the rules (so called) are to be regarded as guidance rather than imposing an absolute requirement. By providing that this obligation to offer back surplus land will automatically apply, the Act overcomes any uncertainty concerning the identity (and hence public status) of the authorised undertaker and commits the authorised undertaker to implementing rules that would not otherwise be mandatory.

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<sup>42</sup> Set out in Scottish Development Department Circular 38 of 1992 in relation to the disposal of surplus land.

***Section 45 – Compliance with code of construction practice and noise and vibration policy***

203. The purpose of **Section 45** is to ensure that the authorised undertaker complies with the code of construction practice and noise and vibration policy for the authorised works which may, from time to time, be amended or replaced. The test for the authorised undertaker to apply in complying is that of using all reasonably practicable means.
204. Subsection (3) refers to **schedule 9** which sets out the detailed procedure for approval, amendment and replacement of the code of construction practice. The schedule provides that the authorised undertaker must not commence construction of the authorised works in the area of a local planning authority until it has submitted to that local planning authority the code of construction practice for their approval. Paragraph 2 of the schedule requires a local planning authority to send a copy of the code, including any amendment or replacement to both Scottish National Heritage and the Scottish Environment Protection Agency. Those bodies are not obliged to respond but, if they do so, the local planning authority must take account of their representations.
205. Subsection (2) provides that the code of construction practice and the noise and vibration policy may not be amended or replaced so as to reduce the standards of mitigation or protection provided for in the earlier version. If they are not amended or replaced they are the documents dated 7<sup>th</sup> November 2006 and lodged with the Clerk of the Parliament.

***Section 46 – Regulation of mitigation measures***

206. The purpose of this section is to provide a mechanism for the provision of mitigation measures to be regulated. Subsections (1) and (2) provide for the requirements imposed by sections 43 and 45 and schedule 9 of the Act to be enforced by the local planning authority as though they were planning conditions imposed on a normal grant of planning permission. They also apply the normal provisions for appeal against the refusal of a local planning authority to grant an approval which is required under a planning condition. By subsection (3) each of the local planning authorities is obliged to appoint an Environmental Clerk of Works to monitor the authorised undertaker's compliance with the mitigation measures.

**Part 4 – Supplementary**

***Section 47 – Incorporation of enactments***

207. As explained in paragraphs 15 to 18, the legal machinery for compulsory acquisition is in Acts that only apply if they are specifically incorporated. **Section 47** accordingly incorporates the relevant legislation.

***Section 48 – Application of original railway enactments***

208. The purpose of this section is to discharge BRB (Residuary) Limited from any statutory liabilities that remain with them relating to a former railway in respect of land acquired by the authorised undertaker. A former railway for the purpose of this section is a railway which did not pass to Railtrack PLC (now known as Network Rail Infrastructure Limited) with the operational railway infrastructure of the British Railways Board on the privatisation of the national rail network. The British Railways Board was left on privatisation with land held in connection with abandoned railways and any historic statutory liabilities which attached to those railways and BRB (Residuary) Limited has inherited that land and those liabilities. On acquisition of the land by the authorised undertaker these statutory liabilities will be superseded by the statutory liabilities applying to the new railway works but since they are statutory liabilities BRB(Residuary) Limited will remain bound by them unless the Act contains express statutory authority for it to be discharged. That is what this section achieves.

***Section 49 – Disapplication of statutory and other restrictions on acquisition and use of certain land***

209. Section 63 of the Paisley Improvement Act 1877 required the local Council to lay out the land of the former race-course as a public park for all time. The land to which this section refers is St James' Park. Some of the land will be permanently acquired for a viaduct to carry the new railway across the park and rights for access for maintenance will be required. During construction of the railway an area of the park will be occupied or used as a worksite. **Section 49** therefore disapplies section 63 of the 1877 Act in respect of the land which is permanently acquired for the railway, and the land which is temporarily occupied or used for maintenance during the time when it is so used.
210. This land is land which is held by local Council for the common good. Under section 75 of the **Local Government (Scotland) Act 1975 (c.65)** if there is any question as to the right of a local authority to dispose of such land the authority may apply to the Court of Session to authorise the disposal. For the avoidance of doubt and in order to remove any need for a subsequent reference to the sheriff of the Court to authorise its acquisition, **Section 49** also makes clear that any restriction arising from the status of the land as land held for the common good is not to prevent the authorised undertaker acquiring the land or rights over it.

***Section 50 – Rights of Crown and Scottish Ministers***

211. The purpose of this section is to ensure that the powers of the Act cannot be used against land of the Crown or Scottish Ministers without their consent. The land to which this section relates includes the M8 motorway, over which the railway will pass on a new bridge and the bed of the river Clyde over which the works will be constructed on an existing bridge. Similar provisions are normally included in private legislation whenever Crown land is proposed to be affected.

***Section 52 – Short title***

212. **Section 52** does not make any special provision for the commencement of the Act once passed. It will come into force the day after the Act receives Royal Assent.