

# **EDINBURGH AIRPORT RAIL LINK BILL**

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## **Draft**

### **EXPLANATORY NOTES**

#### **INTRODUCTION**

3. These Explanatory Notes have been prepared by John Kennedy & Co., Parliamentary Agents, on behalf of the promoter, **tie** limited (“**tie**”) in order to assist the reader of the Edinburgh Airport Rail Link Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

#### **THE BILL**

5. The Bill will grant powers to **tie** and its successors (for an explanation of successors to **tie** see the notes on **section 36** of the Bill). In the Bill the body exercising the powers is called “the authorised undertaker”. The Bill will enable the authorised undertaker to build new railways linking a new Edinburgh Airport station with the national railway network:

- connecting with the Edinburgh to Glasgow Main line via:
  - to the north west, an upgraded section of the existing railway between Winchburgh and Kirkliston and a new railway, connecting with the existing Dalmeny Chord Railway, between Kirkliston and the airport; and
  - to the south, connecting with the Main Line at Roddinglaw:
- connecting with the Edinburgh to Fife and North East Railway via:
  - to the north, a new railway from the airport to Dalmeny;
  - and to the south, via a new railway from the airport to Gogar.

All the other powers in the Bill, including the other works described below, are required in connection with the construction of the new railway. In particular, the Bill grants compulsory purchase powers. This will ensure that the authorised undertaker will be able to acquire the land or rights in land that are required for the works to be constructed and operated. Paragraphs 6 to 9 below outline the purpose of the Bill in greater detail.

6. The principal purpose of the Bill is to give statutory authority to **tie** and its successors (in the Bill called “the authorised undertaker”) for the construction of railways (in the Bill called “the scheduled works”). These railway works are fully described in schedule 1 to the Bill and in the Environmental Statement but shortly comprise the following:–

- Work No. 1 is a railway between Winchburgh Junction and Kirkliston to provide, with Work No. 1A, a new railway junction at Winchburgh as well as upgrading the existing railway over what is known as the Dalmeny Chord to Kirkliston;
- Work No. 2 is a continuation of Work No. 1 which will provide a new railway to Wheatlands where it will enter a new tunnel;
- Works Nos. 3A and 3B are two railways in tunnel continuing the new line from Work No. 2 to a point beneath Edinburgh Airport;
- Work No. 4 which incorporates a new airport station, continues the new line to Roddinglaw, where with Work No. 4A there is a new railway junction with the existing railway;
- Work No. 5 is a new railway from the Edinburgh to Fife and North East Railway to the north of Edinburgh Airport to the new railway Work No. 2, in tunnel;
- Work No. 6 is a new railway forming a connection between the new railway, Work No. 4, and the Edinburgh to Fife and North Railway to the south-east of the airport.

7. In connection with these works the Bill also provides for the stopping up<sup>1</sup> of lengths of some roads and other rights of way where they cross or are on the route. Diversions and substituted roads will be provided and are included as scheduled works. In addition, the Bill enables the authorised undertaker to construct miscellaneous works and do other things that are required in connection with or in consequence of the scheduled works. In the Bill, the works that will enable these miscellaneous things to be done are called “the ancillary works”.

8. The new railways will be able to operate as an integral part of the national rail network, to which they will connect. This will require adjustments, in particular to signalling equipment, within the existing network. In addition, the railway works necessitate the remodelling of two existing railway junctions, at Roddinglaw and Winchburgh. These are included in the powers in the Bill.

9. Provision is also included for the compulsory acquisition of land required for the scheme.

## **RECIPIENT OF THE POWERS**

10. The powers of the Bill will be conferred initially on **tie**. Provision is made for **tie** to transfer the railway undertaking and related powers in whole or in part. The intention is that

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<sup>1</sup> “Stopping up” a road is the technical expression for closing the road to traffic and terminating public rights of way over it.

the railway powers will eventually be transferred to another undertaker, expected to be Network Rail.

## **RELATIONSHIP WITH PLANNING AND RAILWAYS REGULATION**

11. As explained in **paragraph 14** of the Promoter's Memorandum, the development authorised by the Bill will be permitted development,<sup>2</sup> so that the Act will effectively grant planning permission. The Bill restricts this planning permission so that it applies only to works authorised by the Act where construction has been started within 10 years of the Act receiving Royal Assent. The position is described further in the explanation of **section 40** (see paragraphs 182 and 183 below).

12. The Bill does not state that the authorised undertaker may operate the railway and related facilities. This is because statutory authority to operate the railway will be conferred in another way. Under section 6 of the Railways Act 1993 (c.43) the operation (including maintenance) of a railway asset (which includes track and other infrastructure and stations) requires a licence under section 8 of that Act, and section 122 of the Act confers the benefits of statutory authority on a licensed operator. Statutory authority to operate the railway will also result from the incorporation of the Railways Clauses Consolidation (Scotland) Act 1845 (c.33). (The incorporation of this and other Acts is explained in paragraphs 18 to 21 and 73 and 219 below.)

## **THE BILL AND RELATED DOCUMENTS**

13. The Bill is the only document that is submitted for enactment by the Parliament. However, although it is free-standing from its accompanying documents, it must be read by reference to the documents referred to in it, namely the Parliamentary plans, the Parliamentary sections and the book of reference. The Parliamentary plans show the lands to be used, the works and facilities to be constructed and (in some cases) the uses to be made of certain areas. The Parliamentary sections show sections of all the scheduled works. The book of reference lists the owners, lessees and occupiers of all lands which may be compulsorily acquired or used or who have interests in any land or water in or over which rights would be acquired or extinguished, or interests in the rights that would be acquired or extinguished. Also included in the book of reference are the owners, lessees and occupiers of land on which any structures may be the subject of protective works ("safeguarding") under **section 15** of the Bill (see paragraphs 65 to 67 below).

14. European legislation on environmental assessment (EC Directive 85/337/EEC as amended by EC Directive 97/11/EC) applies to the Bill. The requirements are transposed into domestic law for development projects authorised under planning legislation through the Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1) as amended by the Environmental Impact Assessment (Scotland) Regulations 2002 (SSI 2002/324). The requirements of those Regulations are applied to the procedures for Scottish Private Bills authorising works by virtue of Rule 9A.2.3(c)(iii) of the Standing Orders of the Scottish

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<sup>2</sup> "Permitted development" means development which is permitted by article 3 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223) to be carried out without the need to apply for planning permission. The precise scope of the different classes of permitted development and the conditions subject to which it is permitted are set out in Schedule 1 to the 1992 Order. The relevant class in this case is Class 29 (development authorised by private Act, etc.).

Parliament and the Presiding Officer's determinations as set out in Annexes K and N to the Parliament's *Guidance on Private Bills*. The findings of the environmental assessment that has been carried out in relation to the Bill's proposals are set out in the Environmental Statement that has been lodged as one of the accompanying documents.

## **STRUCTURE OF THE BILL**

15. Before commenting on the individual sections it may be helpful to explain how the Bill operates.

16. Part 1 confers the powers relating to the works themselves. It distinguishes between—

- those works that are specifically described (the scheduled works described in schedule 1); and
- works carried out under general powers (the ancillary works as described in schedule 2).

17. Part 2 confers statutory authority for the compulsory purchase of the land required for the scheme. All the sections in this Part are concerned with the implementation of the compulsory purchase powers, so that the Bill will have the same effect as would a compulsory purchase order in other types of schemes e.g. for roads.

18. Fairness demands that compulsory purchase under the Bill must be on the same standardised basis as any other compulsory purchase in Scotland. Departure from what is generally applicable also has human rights implications. This means that in the Bill compulsory purchase must be subject to all the same procedural rules, safeguards and requirements regarding compensation as apply generally. All these provisions are in a large and complex body of law contained in several public Acts of Parliament and case law.<sup>3</sup> So that those affected by the Bill are on the same footing as those affected by compulsory purchase orders, this body of legislation must be applied to the Bill.

19. In theory this might be done either by writing the relevant provisions at length in the Bill or by applying the existing public Acts as if they had been included in the Bill. **Section 50** of the Bill proposes the latter. In this it adopts the format for legislation authorising railways and similar infrastructure works which has been in place throughout Great Britain since the mid 19<sup>th</sup> century and which continues to be utilised.<sup>4</sup>

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<sup>3</sup> The relevant law has been described as having “become an unwieldy and lumbering creature” – see ‘Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report’, Office of the Deputy Prime Minister, January 2003, para. 20.

<sup>4</sup> Recent Scottish examples of provisions similar to section 42 are the British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.3 (authorising an upgrading of the part of the present route between Cambus and Alloa) and the British Railways (No. 3) Order Confirmation Act 1994 (c.iii), s.3 (authorising an upgrading of the railway between Hamilton and Larkhall). More recent examples are in Orders made under the Transport and Works Act 1992, which are the means of authorising most infrastructure works in England and Wales and which apply the equivalent English Law. See for example article 4 of the Leeds Supertram (Extension) Order 2001 (SI 2001/1347), articles 3 and 10 of the Heathrow Express Railway Extension Order 2002 (SI 2002/1064) and article 4 of The Midland Metro (Wednesbury to Brierley Hill and Miscellaneous Amendments) Order 2005 (SI 2005/927).

20. The Bill follows this precedented format because writing the entire statutory code into the Bill is not a practical option. The scheme of the law in question is outlined below in paragraphs 68 to 157 and 219 explaining Part 2 of the Bill and **section 50**. The Acts applied by **section 50** contain a total of some 400 sections. Not all sections are relevant, but in much of this legislation it is not possible to say with absolute certainty that a particular provision is not going to be relevant. In addition, this legislation is written in 19<sup>th</sup> century legal English that would be unacceptable today. As a result, it could not be written into the Bill at length without being completely rewritten. The result of this would inevitably be that the meaning would be affected. Such an exercise in statute law revision, however desirable, is far outside the scope of any private Bill promoter.<sup>5</sup>

21. The Bill accordingly incorporates provisions of the Acts referred to in **section 50**. These Acts were passed for the purpose of being incorporated as standard “clauses”. They only have effect if they are referred to and implemented by some other piece of legislation such as the Bill. The effect of the incorporation is that the incorporated provisions become part of the Bill. The Acts in question are—

- the Lands Clauses Acts<sup>6</sup>;
- the Railways Clauses Consolidation (Scotland) Act 1845 (c.33);
- the Railways Clauses Act 1863 (c.92).

The Bill makes a number of adjustments to the incorporated Acts for the purpose of streamlining the 19<sup>th</sup> century procedures so as to bring them more nearly into line with the more modern legislative improvements that have been made in England and Wales, but not in Scotland<sup>7</sup> and also to allow for the greater flexibility provided for in the Bill. Details of the adjustments are explained in the notes below on **sections 17, 20, 25 and 29** of the Bill.

## COMMENTARY ON SECTIONS

### Part 1 – Works

22. The meaning of “the scheduled works” and “the ancillary works” is explained in paragraphs 23 to 32 below. They are collectively described as “the authorised works” (defined in **section 51**).

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<sup>5</sup> In fact, the law on compulsory purchase throughout the UK is recognised as being ripe for reform and there are current government proposals on the subject. See ‘Compulsory Purchase and Compensation – the Government Proposals for Change’ paras 1.1 and 3.1, Office of the Deputy Prime Minister, June 2002; and the Planning and Compulsory Purchase Act 2004 (c.5) which contains a number of reforms relating to compensation.

<sup>6</sup> i.e. The Lands Clauses Consolidation (Scotland) Act 1845 (c.19) and the Lands Clauses Consolidation Acts Amendment Act 1860 (c.106), and any Acts for the time being in force amending those Acts – see The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379), Schedule 1. Where a word or expression is defined in the 1999 Interpretation Order, that definition will apply unless a contrary intention appears in the enactment being interpreted. (Bennion, ‘Statutory Interpretation’ (4<sup>th</sup> edn. 2002) p. 497.) Where, as with this definition, an Interpretation Order definition is intended to apply, the definition is not repeated in the Bill. (“The purpose of an Interpretation Act is by the use of labelling definitions to shorten the language which needs to be used in legislation”. Bennion, p. 491.)

<sup>7</sup> “... it is unfortunate in view of ... the criticism which has been levelled at the [Lands Clauses Consolidation (Scotland) Act 1845] that Parliament has not found time to produce more up-to-date legislation as was done in England with the passing of the Compulsory Purchase Act 1965 (c.56).” Stair Memorial Encyclopaedia, Title ‘Compulsory Acquisition and Compensation’ para. 13.

*Section 1 – Power to construct works*

23. Subsection (1) gives the specific statutory authority which is required for the works.<sup>8</sup> In the absence of this section the activities permitted by the Bill 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.

24. Subsection (2) makes clear the extent of the works for which authority is given. **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**. Subsection (2) accordingly provides that the extent of the scheduled works is the works as constructed within the permitted deviation.

*Section 2 – The scheduled works*

25. **Section 2** introduces schedule 1, which contains the detailed descriptions of the works comprised in the railway and related physical structures (roads and river works).

26. The railways are the works comprising Works Nos. 1, 1A, 2, 3A, 3B, 4, 4A, 5 and 6. They are shown on the Parliamentary plans and the Parliamentary sections. Brief descriptions of the works are in paragraphs 5 and 6 above.

27. The scheduled works include the reconstruction of one bridge carrying the railway and the construction of several further railway bridges, a number of new road bridges, a new cycleway bridge and three diversions of burns, as well as three ventilation shafts. All these works are required as a result of the construction of the railways.

*Section 3 – The ancillary works*

28. **Section 3** introduces 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 Bill if they are necessary or expedient<sup>9</sup> in connection with the construction of the scheduled works, or are required as a consequence of those works being constructed.

29. Schedule 2 catalogues types of general incidental works and operations that are normally necessary for the operation of a railway. The “railway” itself is only the railway track as laid along the route.<sup>10</sup> The ancillary items accordingly range from the provision of stations and platforms to operations such as discharging water during construction<sup>11</sup> and moving utility apparatus.<sup>12</sup> The ancillary works will accordingly form an essential part of the authorised works.

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<sup>8</sup> The need for such authority is explained in paragraph 7 of the Promoter’s Memorandum.

<sup>9</sup> i.e. advantageous; suitable, appropriate (Concise Oxford English Dictionary).

<sup>10</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>11</sup> e.g. when pumping away water from a site so as to be able to lay track on dry ground.

<sup>12</sup> e.g. water mains and power supply cables.

30. The authorised works will necessitate some apparatus belonging to utility undertakers<sup>13</sup> being moved away from the works, or in the case of any sewers protected from the works.<sup>14</sup> Such accommodation works are usually conduits or other similar apparatus. **Section 3(2)** accordingly authorises the authorised undertaker to construct these works for the benefit of others e.g. utility undertakers whose apparatus is moved.

31. Unlike the specifically authorised scheduled works, which are a known quantity and the position of which is certain within a margin. The nature of ancillary works is such that they are not specifically identifiable at this stage. Accordingly, they do not appear on the Parliamentary plans. What is known at this stage is that (with two exceptions) they will only be required within the limits of deviation. The exceptions are ancillary works to carry out works referred to in schedule 5 within the limits of land to be acquired or used;<sup>15</sup> and landscaping, ecological or other mitigation works and protective works. All these may also be within the limits of land to be acquired or used. These restrictions are in section 3(3).

32. Examples of ancillary works that will be required are stations, platforms and landscaping.

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

33. 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 scheduled works are situated within the limits of deviation. The Bill will not accordingly permit the construction of those works outside these lateral limits.

34. The Parliamentary sections show the vertical dimensions and situation of the proposed works. The Bill authorises the works in accordance with those dimensions and levels, subject to the flexibility permitted by **section 4**.

35. **Section 4** allows for a degree of flexibility. It permits movement or variance from the precise lines and sections. In the Bill this is described as “deviation”. Every work as constructed or maintained may deviate laterally within the limits of deviation, and vertically by up to 7 metres upwards in the case of Works Nos. 1 and 1A (the railway works between Winchburgh and Kirkliston and at Winchburgh Junction), by up to 3 metres upwards in the case of any of the other scheduled works and in all cases to any extent downwards. This reflects the outline nature of the authorisation being given by the Bill. 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.

36. 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

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<sup>13</sup> Utilities are gas, electricity, water and telecommunications. Sewers are also treated as utilities. Utility undertakers are suppliers of these utilities, or in the case of sewers, the providers of sewerage services. Utility undertakers normally own their apparatus.

<sup>14</sup> Sewers are protected rather than moved because moving them would involve a change in their levels. Sewers usually rely on gravity and so their levels cannot readily be altered. The works to provide alternative apparatus for utility apparatus that is being moved, or to protect sewers, are called “accommodation works”.

<sup>15</sup> For an explanation of this expression see paragraph 71 below and footnote and paragraph 81 below.

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. If it came to light that at any point along the route the ability to deviate downwards created an impact that should be catered for, that could be dealt with by way of amendment to the Bill, if appropriate, or agreement with any person affected.

*Section 5 – Work No. 4: Station and southern tunnel portal*

37. Work No. 4 includes the new station and the southern portal of the tunnel. The description of these works in schedule 1 allows for these two elements of Work No. 4 to be constructed between certain points, rather than at precise locations. Schedule 1 also leaves open whether the station is to be designed as an underground station or in open cutting. Section 5 provides for the precise design and location of the station and portal to be agreed with BAA plc, the parent company of the owner and operator of Edinburgh Airport, with arbitration if the parties cannot agree.

38. In order to achieve proper integration with the development of the airport, the precise location of the new station must depend upon BAA's planned development of a new south-east pier. Similarly, the decision whether the station is to be designed as an underground station or in open cutting will be affected by BAA's proposed development of the airport at that point. The design of the station will in turn determine the precise location of the southern tunnel portal. All these are engineering issues for which parameters can be identified at this stage but which can only be settled when BAA has finalised its own plans.

39. The scheme as shown on the Parliamentary plans was engineered on the basis of assumptions made following discussions with BAA's engineers and caters for BAA's plans at the stage when the Bill was being prepared. At a later stage, shortly before completion of that work, however, it became apparent that BAA might alter its own designs and that a degree of flexibility was necessary. This has accordingly been built into the Bill by describing the station and tunnel portal in terms of permitted parameters and, in section 5, providing a mechanism for the final design and location to be determined.

40. The alternatives may give rise to different environmental impacts and the environmental statement accordingly assesses all the variables.

*Section 6 – Access to works*

41. It will be necessary for the authorised undertaker to provide access from existing roads to land to be used for the authorised works. **Section 6** 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 7 – Construction and maintenance of new or altered roads*

42. The roads associated with the railway works other than private accesses are all to become public roads. In accordance with standard arrangements when a new road is built, **section 7** provides for the relevant works 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.

43. Subsections (3) and (4) deal with the application to these roads of provisions in the New Roads and Street Works Act 1991 (c.22) (in the Bill called “the 1991 Act”).

#### *Section 8 – Vesting of private roads*

44. There is a number of authorised private access roads which will be constructed for the benefit of individual landowners to replace existing private accesses. These works will not therefore become public roads and **section 8** accordingly makes provision similar to **section 7**, but with the roads vesting in particular landowners.

#### *Section 9 – Permanent stopping up of roads*

45. Subsection (1) authorises the permanent stopping up<sup>16</sup> of 20 lengths of road, cycleway, track and other areas over which there are or may be public rights of way, all of which have the status of roads. They are detailed in Part 1 of schedule 3.

46. All of these stopped up roads, cycleways and tracks will be replaced by the substitutes specified in column (4) of Part 1 of schedule 3. Subsection (2) prevents any stopping up until the substitute has been completed to the reasonable satisfaction of the roads authority and is open for public use.

47. Where a road is closed, subsection (3) extinguishes all rights of way over it and allows the undertaker to use the site for the purposes of the authorised works. In the event that there are private rights of way over any length of stopped up road, subsection (4) provides for the payment of compensation to any person who suffers loss by the extinguishment or suspension of such rights. The effect of applying the Land Compensation (Scotland) Act 1963 (c.51) (in the Bill called “the 1963 Act”) is that the amount of compensation will be assessed on the same basis as compensation is assessed on compulsory acquisition. This is explained further in paragraphs 78 and 79 below.

48. Existing rights of statutory undertakers and others (who will be predominantly utilities) with apparatus in stopped up roads are protected by paragraph 2 of schedule 7, which is applied by subsection (5).

#### *Section 10 – Power to execute road works*

49. The carrying out of works authorised by the Bill at a junction with a road is likely to make it necessary or desirable for the authorised undertaker to go on that road for the purposes of the Bill works, and possibly also to do works in that road for the purpose of e.g. making good the junction, providing for drainage or doing other works necessitated by the road works authorised by the Bill. **Section 10** enables the authorised undertaker to do this, including in relation to roads within Edinburgh Airport.

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<sup>16</sup> For explanation see paragraph 7 above and footnote.

*Section 11 – Works to be major works for road purposes*

50. Section 11 provides that works to provide roads that are to become public roads (listed in section 7(1)) and works having a junction with a road are to be treated as major works for roads purposes within the meaning in Part IV of the 1991 Act. The practical effect of this is that the cost of what the 1991 Act calls “necessary measures” in relation to statutory undertakers’ apparatus in the road is shared between the authorised undertaker and the undertakers concerned in accordance with regulations made under section 144 of the Act.<sup>17</sup>

51. This provision is preceded in relation to comparable schemes.<sup>18</sup>

*Section 12 – Agreements with roads authorities, etc.*

52. Where the Bill authorises the alteration of, or provision of a new road in substitution for, an existing road, the roads authority or other persons responsible for the road may prefer to carry out the works themselves. Section 12 enables the authorised undertaker by agreement to delegate its relevant powers to them.

*Section 13 – Temporary stopping up, alteration or diversion of roads*

53. 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>19</sup> under subsection (5). By subsection (6) consent could not be unreasonably withheld but could be given subject to conditions. Under subsection (7) disputes as to the reasonableness of any condition would be determined by arbitration. (**Section 48** provides for the way in which any arbiter is appointed.)

54. In addition to any condition imposed by the road works authority, the authorised undertaker will be obliged by subsection (3) to provide continued pedestrian access to premises<sup>20</sup> abutting on the temporarily stopped up road.

55. Subsection (3) enables the authorised undertaker to make use of any temporarily stopped up road as a working site.

56. Six necessary temporary stoppings up have been identified at this stage as being required at the locations and for the purposes specified in Part 2 of schedule 3. For this reason subsection (2) authorises these temporary closures and, unlike the unspecified

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<sup>17</sup> Currently the Road Works (Sharing of Costs of Works)(Scotland) Regulations 2003 (SS1 2003/509).

<sup>18</sup> See e.g. Channel Tunnel Rail Link Act 1996, Schedule 3, paragraph 8 and the Crossrail Bill, Schedule 3, paragraph 8.

<sup>19</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)). The road works authorities for public roads potentially affected by this section will therefore be City of Edinburgh Council and West Lothian Council in their respective areas and the Scottish Ministers as regards trunk roads.

<sup>20</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.

closures, subsection (5)(a) requires consultation with the road works authority but not consent.

#### *Section 14– Discharge of water*

57. **Section 14** 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 stream or watercourse or any public sewer or drain for drainage purposes. It provides that within the limits of deviation, the limits of land to be acquired or used<sup>21</sup> and the limits of safeguarding<sup>22</sup> the authorised undertaker may lay down, take up or alter pipes or make openings into or connections with the stream, watercourse, public sewer or drain.

58. Under subsection (2) water may not be discharged into a public sewer or drain without the consent of the authority to which it belongs, but although consent may be given subject to reasonable terms and conditions, it cannot be unreasonably withheld or delayed.

59. Under subsection (3) an opening into a sewer or drain will have to be made in accordance with plans approved by the authority to which the sewer or drain belongs and subject to such supervision as the authority provides, but plan approval cannot be unreasonably withheld or delayed.

60. 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>23</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.)

61. Subsection (5) provides that any disagreement between the authorised undertaker and an authority owning a public drain or sewer shall be resolved by arbitration. (**Section 48** provides for the way in which any arbiter is appointed.)

62. Subsection (6) ensures that the normal pollution control regime will apply to discharges of water authorised by **section 14**. It does this by applying section 30F of the Control of Pollution Act 1974 (c.40) (“the 1974 Act”) to those discharges. Section 30F makes it an offence to pollute rivers and other waters but by virtue of section 30I(1)(f) of the 1974 Act no offence is committed where (as would be the case here) the discharge is

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<sup>21</sup> For explanation of this expression see paragraph 71 below and footnote and paragraph 81 below.

<sup>22</sup> For an explanation of this expression see paragraph 66 below.

<sup>23</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.

authorised by a local Act<sup>24</sup>. It is the promoter's intention that (as is the normal practice in legislation authorising the construction of works) the works should be subject to the same pollution control regime as the rest of the rail and road networks. Subsection (6) is required to achieve that aim.

63. Subsection (7) provides for the continued operation of Part IV of the 1991 Act in tandem with this section. Part IV contains a detailed code regulating the carrying out of works in roads by utilities and others. As a result of subsection (7), 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.

64. In the absence of **section 14** 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 will 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 15 – Safeguarding works to buildings*

65. 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. This will call for underpinning, strengthening or other works for the same purposes (all in the Bill called “safeguarding works”).

66. Subsection (1) accordingly enables the authorised undertaker at its own expense to carry out such safeguarding works to any building within the limits of deviation, the limits of land to be acquired or used or the limits of safeguarding shown on the Parliamentary plans as the authorised undertaker considers to be necessary or expedient. The lands included within the limits of safeguarding are set out in Part 1 of schedule 4 to the Bill. 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.

67. The detailed procedure that must be adopted is set out in Part 2 of 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. 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.

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<sup>24</sup> i.e. an Act that has effect in a particular locality, rather than generally throughout the country. Every private Act authorising specified works has effect only in the area affected by the works and so is a local Act.

## **Part 2 – Land**

### *Introduction*

68. Without provision in the Bill the authorised undertaker will not have any compulsory purchase powers to acquire land for construction of the railways and associated infrastructure, or to acquire rights in land e.g. for the purpose of re-routeing statutory undertakers' apparatus. Provisions are therefore required in the Bill to confer appropriate compulsory purchase powers.

69. 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 railways;
- land for signalling equipment;
- land for pedestrian and vehicular access to premises;
- land for relocation of apparatus;
- land for road improvements and landscaping;
- land for riverbank protection works;
- rights to undertake ground stabilisation work;
- rights to install and maintain drainage.

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 Bill temporary occupation is referred to as “temporary possession”.)

70. 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 Bill itself: there will not be a separate compulsory purchase order. The compulsory purchase powers are in Part 2 of the Bill, 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 Bill. The effect of the provisions is explained in greater detail below.

71. The land affected by the compulsory purchase powers in the Bill is the land described in the book of reference. On the Parliamentary plans it is all the land within the limits of deviation<sup>25</sup> and within the limits of land to be acquired or used.<sup>26</sup>

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<sup>25</sup> For an explanation of “limits of deviation” see notes on section 4 .

<sup>26</sup> i.e. land situated outside the limits of deviation which is required to be acquired or used for specific purposes - see **sections 16(1)(b), 17, 18 and 20** and schedules 5 and 6.

72. The compulsory purchase powers conferred by the Bill will enable the authorised undertaker to acquire the land necessary to construct the works authorised by the Bill. 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 to 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*

73. The provisions in the Bill 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 Bill, 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 Bill.<sup>27</sup> An outline of this applied legislation is given below.

#### *Compulsory purchase procedures*

74. After the Bill 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 Bill 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. A notice to treat will create a contract between the authorised undertaker and the landowner.

75. 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.

76. Where a landowner is unwilling or unable to sell the authorised undertaker may acquire the land by executing notarial instrument.<sup>28</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.

77. 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.

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<sup>27</sup> For an explanation of the reason for applying other Acts see paragraphs 19 to 21 above.

<sup>28</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.

### *Compensation*

78. 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, part in the Lands Clauses Acts and partly in Part I of the Land Compensation (Scotland) Act 1963 (c.51). This detailed body of law will apply to compulsory purchase under the Bill. Disputes about compensation will be referred to the Lands Tribunal for Scotland.<sup>29</sup>

79. The Bill applies the Railways Clauses Consolidation (Scotland) Act 1845 (c.33), in the Bill 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 16 – Power to acquire land*

80. **Section 16(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, it must be described in the book of reference and it must be land that may be required for the purposes of the authorised works.

81. **Section 16(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 Bill 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 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 Bill.<sup>30</sup>

82. The powers of **section 16** are subject to the time limit in **section 31** of the Bill (which may be extended under **section 33**).

### *Section 17 – Acquisition of subsoil or rights*

83. **Section 17** applies to any land that is authorised to be compulsorily acquired under **section 16**. **Section 16** authorises outright purchase of the land i.e. including the airspace

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<sup>29</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>30</sup> See **sections 17, 18 and 20**.

above the surface and the subsoil and bedrock beneath it. The purpose of **section 17** 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 or some right over the land.

84. Subsection (1) accordingly enables the authorised undertaker to acquire only the subsoil beneath land or servitudes<sup>31</sup> or other rights in relation to land.

85. By subsection (2), rights acquired under subsection (1) may be heritable or moveable<sup>32</sup> in nature. Subsection (2) also 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.

86. Subsection (3) provides that by exercising the powers of **section 17** 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 could be required to buy the land outright, even though all that is required for the authorised works is the subsoil (e.g. because the authorised undertaker will only need to dig a culvert under the land), or some right of access to the railway.

87. This anomaly is the result of the rules in the 1845 Lands Act, which reflect land ownership and compensation rules as existing at that time. The modern compensation code is well developed so as to provide proper compensation including where the property interest acquired is less than the whole of the land. As a result, it is now unnecessary for outright purchase automatically to be the norm where a less disruptive approach is possible. Subsection (4) accordingly provides that section 90 of the 1845 Lands Act (which states that landowners cannot be required to sell part of any house or building or manufactory) does not apply to the acquisition of subsoil or rights under this section. This modernises the 19<sup>th</sup> century compulsory purchase law in a way that is standard in legislation of this sort.<sup>33</sup>

88. Subsection (5) applies the other provisions of the Lands Clauses Acts to the compulsory acquisition of new rights under **section 17**. In subsection (7), the modifications in the 1845 Lands Act reflect similar provision in the Land Compensation (Scotland) Act 1973 (c.56).

#### *Section 18 – Purchase of specific new rights under land*

89. In addition to **section 17**, 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 18** enables the authorised undertaker to acquire new rights over that land for the

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<sup>31</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.

<sup>32</sup> Heritable rights are rights connected with land e.g. leases, or which will yield periodical profits e.g. annuities. All other rights are moveable.

<sup>33</sup> See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii) (the BR precursor to the present scheme), section 13, City of Edinburgh (Guided Busways) Order 1998 (c.iii), section 7.

specific purposes mentioned in column (4). This is mainly to allow access for construction and then maintenance of the railway. Rights that have been specifically identified also include ground stabilisation and installation of closed circuit television and lighting. The powers in **section 18** are subject to the time limit in **section 31** of the Bill (which may be extended under **section 33**).

*Section 19 – Rights in roads or public places*

90. **Section 19** applies to any road or public place that is included in the land that may be compulsorily acquired under **section 16**. In relation to such land, the section allows subsoil or airspace to be used for the works without the need for compulsory purchase.

91. 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.

92. 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.

93. The section enables the public works authorised by the Bill to occupy the public space under and over roads and public places 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 (3) 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).

94. Subsection (4) 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. Accordingly, subsection (4) obliges the authorised undertaker to acquire the relevant land, or an appropriate servitude or right, before using it for the authorised works.

95. Subsection (5) 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>34</sup> An overriding interest takes effect as against the registered owner of land even though it is not registered.<sup>35</sup> Thus the effect of subsection (5) is to ensure that the powers in subsection (1) will be binding on anyone who owns land to which this section applies.

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<sup>34</sup> See Land Registration (Scotland) Act 1979 (c.33) s.28(1), definition of “overriding interest” paragraph (h).

<sup>35</sup> Land Registration (Scotland) Act 1979 (c.33) s.3(1)(a).

*Section 20 – Temporary use of land for construction of works*

96. Where the authorised undertaker only needs to occupy land for a temporary period, purchase of the land cannot be justified (see paragraph 69 above). **Section 20** 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.

97. 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.

98. Subsection (2) requires the authorised undertaker to serve 28 days' prior notice of entry on the owners and occupiers of the land.

99. 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'.

100. 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>36</sup>

101. 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.

102. 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 this section 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)

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<sup>36</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.

*These documents relate to the Edinburgh Airport Rail Link Bill (SP Bill [ ]) as introduced in the Scottish Parliament on [ ] 2005*

provides that any compensation payable under this section is additional to any other compensation that may be payable in respect of the land.

103. 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, but may acquire new rights over it under **section 17** or **section 18**.

#### *Section 21 – Disregard of certain interests and improvements*

104. Under the rules applicable to the assessment of compensation land is valued at its market value. The purpose of **section 21** 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 will increase market value.

#### *Section 22 – Set-off of betterment against compensation*

105. Development may enhance the value of adjoining or nearby land. **Section 22** accordingly provides for compensation to be reduced by an amount equivalent to any enhanced value of other contiguous<sup>37</sup> or adjacent<sup>38</sup> land of the person seeking the compensation.

#### *Section 23 – Application of legislation relating to certificates of appropriate alternative development*

106. **Section 23** rectifies an anomaly arising from devolution. Section 25 of the Land Compensation (Scotland) Act 1963 (c.51) provides for a planning authority to certify, in relation to land subject to compulsory purchase, classes of development which it considers appropriate for the land. This then informs any compensation claim by enabling the market value of the land reflecting its planning potential to be established on an informed basis. This procedure is therefore a useful tool.

107. The 1963 Act defines the land to which it applies by specific reference to compulsory purchase under named Acts. These do not include any reference to compulsory purchase authorised by an Act of the Scottish Parliament. Neither the Scotland Act 1998 nor any of the Orders made under it has picked this up and amended the legislation so as to include Scottish Parliament Acts. This section does so in relation to the Bill.

#### *Section 24 – No double recovery*

108. **Section 24** ensures that those entitled to compensation under the Bill and any other enactment, contract or rule of law are not compensated twice in respect of the same item of compensation.

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<sup>37</sup> “contiguous”: touching or immediately next to, sharing a common boundary with (in this case) other land.

<sup>38</sup> “adjacent” includes land that is not contiguous, but which is close to or near other land.

*Section 25 – Acquisition of part of certain properties*

109. **Section 25** 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 the owner of a house, building or manufactory 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>39</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>40</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>41</sup>

110. Subsection (1) applies this section to any case where a notice to treat<sup>42</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.

111. 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.

112. 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.

113. Under subsection (4), if the authorised undertaker does not agree to acquire the whole of the land the issue is referred to the Lands Tribunal for Scotland. The Tribunal is required to determine whether or not part of the land can be taken without material detriment to the remainder or (in the case of a house with a park or garden) without seriously affecting the amenity or convenience of the house.

114. Under subsection (5) if the Tribunal decides that the part subject to the notice to treat can be taken without material detriment or, in the case of a house with a park or garden, without seriously affecting the amenity or convenience of the house, the owner is obliged to sell the land the authorised undertaker wishes to acquire.

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<sup>39</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>40</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>41</sup> See e.g. City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s.6.

<sup>42</sup> For an explanation of this expression see paragraph 74 above.

115. Under subsection (6) 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.

116. Subsection (7) 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.

117. Under subsection (8), where the authorised undertaker agrees to acquire the land subject to a counter-notice, or 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>43</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.

118. Under subsection (7) or (8) a notice to treat can be deemed to include other land whether or not that land is subject to compulsory acquisition under the Bill.

119. Subsection (9) covers 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. Where the Lands Tribunal determination can exclude land that is essential to the scheme, the authorised undertaker might re-start the process so as to acquire the whole of the property in question.

120. By subsection (10), 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>44</sup>

### *Section 26 – Extinction or suspension of private rights of way*

121. The Bill provides for necessary public and private means of access. The authorised works cannot accommodate further rights of way over the land that may be compulsorily

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<sup>43</sup> Where material detriment extends to only part of the land subject to the counter-notice subsection (7) applies.

<sup>44</sup> i.e. diminution in value of the remaining land due to the loss of the compulsorily acquired land.

acquired under the Bill. **Section 26** accordingly extinguishes<sup>45</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.

122. 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 28**, the extinguishment or suspension takes place instead as from the date on which possession is taken.

123. 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. This suspension is subject to the provisions of subsection (7) (see below).

124. Under subsection (3) 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).

125. Subsection (4) 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) Act 1997 (c.8) apply. (The position of statutory and utility undertakers is separately dealt with in **section 37** and schedule 7.)

126. Subsection (5) 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. For example, 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.

127. By subsection (6) the authorised undertaker may determine that particular rights of way can be exercised compatibly with the use of the land under the Act. In such cases the right will continue. A determination under this subsection must be made before the land is acquired or (if sooner) before entry on the land.

128. Subsection (7) is a similar provision relating to rights of way that may be suspended under subsection (2). Where the statutory undertaker determines that the right of way can be exercised compatibly with the temporary use of the land under the Act, the rights of way are not suspended. A determination under this subsection may be that the right of way may be used, but only to a limited extent. In that case the suspension will relate to the right of way only so far as the right is incompatible with the temporary use.

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<sup>45</sup> i.e. terminates the rights, so that they cease to exist.

129. Subsection (8) provides for notice of a determination under **section 26** to be posted on the land to which the determination relates.

130. The object of subsections (5) to (7) 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.

131. The purpose of **section 26** is to ensure there are no incompatible rights of way over land on which the authorised undertaker is to construct works. This protection is unnecessary on land where the authorised undertaker is only acquiring rights.<sup>46</sup> Accordingly, under subsection (9) the automatic extinguishment effected by subsection (1) or (2) will not apply on land where the authorised undertaker is only acquiring rights.

*Section 27 – Power to enter land for survey, etc.*

132. 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 27** of the Bill 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>47</sup>

133. Subsection (1) enables the authorised undertaker to enter any land within the limits of deviation, the limits of land to be acquired or used or the limits of safeguarding for the purposes of carrying out surveys and investigations (including archaeological investigations) and to protect or remove flora or fauna.

134. Subsection (2) requires the authorised undertaker to give, on the first occasion seven, and thereafter three days' notice to the owner and occupier.

135. 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.

136. By subsection (4) no trial holes may be made in a carriageway or footway without the consent of the road works authority.

137. Subsection (5) requires the authorised undertaker to pay compensation for damage caused to owners and occupiers.

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<sup>46</sup> See section 18 and Part 2 of schedule 5.

<sup>47</sup> See e.g. 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.

*Section 28 – Further powers of entry*

138. **Section 28** is also a standard provision.<sup>48</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>49</sup> The purpose of **section 28** of the Bill is to allow this modern procedure to apply.

139. 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.

140. Under subsection (2), at least three months' prior notice of entry must be given to the owner and the occupier of the land.

141. Subsection (3) enables the authorised undertaker to exercise these powers without complying with sections 83 to 89 of the 1845 Lands Act, which prevent taking entry in this way.

142. Where the authorised undertaker enters land under **section 28**, subsection (4) provides that the authorised undertaker must pay compensation as though sections 83 to 89 had been complied with. **Section 28** does not therefore alter a landowner's right to compensation.

143. The object of **section 28** 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 29– Persons under disability may grant servitudes, etc.*

144. **Section 29** 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 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 18** of the Bill.

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<sup>48</sup> See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.22, City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s. 14.

<sup>49</sup> See Compulsory Purchase Act 1965 (c.56), s.11.

*These documents relate to the Edinburgh Airport Rail Link Bill (SP Bill [ ]) as introduced in the Scottish Parliament on [ ] 2005*

145. Subsection (1) accordingly allows persons under a disability to grant to the authorised undertaker servitudes, rights or privileges<sup>50</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.

146. By subsection (2), rights cannot be granted in relation to water in which others have an interest.<sup>51</sup>

147. Subsection (3) ensures that all the associated provisions of the Lands Clauses Acts relating to the conveyancing treatment of land and feu duties or ground annuals<sup>52</sup> relating to land are also applied to the grant of new rights under this section.

### *Section 30 – Correction of errors in Parliamentary plans and book of reference*

148. **Section 30** provides a procedure to enable the correction of any inaccurate description of any land or its ownership or occupation in the Parliamentary plans or the book of reference. The authorised undertaker must apply to the sheriff under subsection (1); on being satisfied that there was a mistake, the sheriff certifies the nature of the mistake under subsection (2); under subsection (3) the certificate is deposited with the Clerk of the Parliament and the document requiring correction is deemed to be corrected according to the certificate; subsection (4) obliges the Clerk to keep the certificate with the plans and book of reference to which it relates.

149. The purpose of the section is to ensure that implementation of the Act (when passed) is not prevented by mistaken misdescriptions. The Bill 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.

150. This section, for which there are numerous precedents, is an extension of the procedure in **section 47** for certifying the book of reference and the Parliamentary plans and sections.

### *Section 31 – Period for compulsory acquisition of land*

151. 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 after the date on which it receives Royal Assent). Subsection (2) provides that for the purposes of this deadline the powers are deemed to have been exercised if notice to treat has been served before that date.

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<sup>50</sup> “Privileges”: rights that are of benefit to the person entitled to exercise them, for example fishing rights.

<sup>51</sup> 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.

<sup>52</sup> The references to land and feu duties and ground annuals are simply to describe which are the relevant sections of the 1845 Lands Act. They are feudal duties on land which have been superseded by the Land Tenure Reform (Scotland) Act 1974 (c.38).

152. 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 44** provides for the situation where a landowner needs to sell land that is affected in this way.

153. It is normal for legislation authorising the construction of works to impose time limits on the exercise of compulsory purchase powers.<sup>53</sup>

154. Subsection (3) makes clear that the expiry of the five year time limit does not result in the authorised undertaker having to give up temporary possession of any land under **section 20**, so long as such possession was taken before the time limit expired.

#### *Section 32 – Time limit on validity of notices to treat*

155. The Lands Clauses Acts do not provide a set period during which notices to treat are valid. As a result, where a notice to treat is served but not proceeded with, it is a matter of fact, ultimately for the court; whether notice has lapsed. There is a body of case law on this subject which lays down the relevant criteria, but it is clearly more satisfactory for the period during which a notice to treat is valid to be apparent from the outset. **Section 32** therefore applies section 78 of the Planning and Compensation Act 1991 (c.34), which applies a statutory time limit on the validity of notices to treat served under other compulsory purchase legislation. The time limit is generally three years from the date of service, reflecting case law.

#### *Section 33 – Extension of time*

156. There may be reasons why it is not possible to serve notices to treat within the five years allowed by **section 31**. In that event **section 33** enables the Scottish Ministers to make one or more orders extending the time limit. When applying for such an order it would be incumbent on the authorised undertaker to justify the extension.

157. It is not unusual for legislation authorising the construction of works to authorise the extension of time limits for compulsory purchase in this way.<sup>54</sup>

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

#### *Section 34 – General vesting declarations*

158. The compulsory purchase procedures under the Lands Clauses Acts as outlined in paragraphs 74 to 77 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 34** applies a further procedure that is available generally to vest land that has been compulsorily acquired.

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<sup>53</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.

<sup>54</sup> See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.16, City of Edinburgh (Guided Busways) Order 1998 (c.iii), s.59.

159. 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.

160. 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. The vesting declaration procedure can be speedier and more efficient than conveyances of individual properties.

161. Subsection (1) applies this procedure to compulsory acquisition under the Bill.

162. 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 Bill. 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 35 – Power to fell, etc. trees or shrubs*

163. 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 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.

164. Subsection (2) requires that the authorised undertaker is not to damage a tree or shrub unnecessarily.

165. Subsection (3) requires the authorised undertaker to pay compensation to any person who suffers loss or damage arising from the exercise of this section.

166. Subsection (4) disapplies any tree preservation order or prohibition on interfering with trees in conservation areas which might otherwise apply.

*Section 36 – Powers of disposal, agreements for operation, etc.*

167. **Section 36** is required because, although **tie** is the promoter of the Bill, it is not anticipated that **tie** will operate the railway. The expectation is that the powers conferred by the Bill or the completed railway will be transferred to Network Rail as the national rail infrastructure operator. **Section 36** therefore gives effect to the intention that **tie** will be no more than the procurer of the powers. In the absence of **section 36** the powers in the Bill would not be transferable.

168. Subsection (1) makes clear that each of the subsections gives a free-standing power which may be exercised with the others or separately.

169. Subsection (2) allows the authorised undertaker to make transfer agreements for the transfer of all or any of the authorised undertaker's functions under the Act. This subsection would, for example, allow for the transfer to Network Rail of the powers in the Bill to construct the authorised works or any part of them and the compulsory purchase powers relating to those works; or (again only an example) for powers to be transferred to a special purpose vehicle which would be responsible for acquiring the land, procuring the construction of the authorised works and, finally, transferring them once they are completed.

170. Subsection (3) authorises the authorised undertaker to enter into agreements relating to funding, construction, maintenance and operation. It also authorises disposals<sup>55</sup> relating to the authorised works once they have come into existence. Agreements authorised by subsection (3) can relate not simply to the physical works and the land held with the works but also to "the undertaking". This expression means the statutory 'package' consisting of the physical works and land and all the statutory powers that go with them by virtue of the Bill. Possible examples are agreements making future revenues security for loan capital or (as is contemplated) an agreement transferring the completed railway and the statutory powers ("the undertaking") to Network Rail.

171. Subsection (4) provides that the authorised undertaker will be bound by any restrictions, liabilities and obligations as regards which a commitment has been given by **tie** or any other authorised undertaker. It applies to any such commitment, whether given before or after the passing of the Act. In the absence of this subsection such commitments would not automatically bind successive authorised undertakers.

172. Subsection (5) allows for a transfer agreement to include any necessary related provisions that follow from the main provisions of the agreement.

173. The effect of a transfer agreement may be to transfer statutory functions in which there is a public interest. Subsection (6) accordingly ensures that the transfer is notified to the Scottish Ministers as custodians of the public interest in transport. Subsection (7) makes failure to notify a criminal offence attracting a maximum level 3 penalty (currently £1,000).

174. It is the expectation that the railways to be authorised by the Bill will ultimately vest in, and be operated by, Network Rail as an integral part of the national rail network.

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<sup>55</sup> This includes, in addition to transfer, sale, lease and similar disposals, a power to charge the undertaking as security for borrowings.

*These documents relate to the Edinburgh Airport Rail Link Bill (SP Bill [ ]) as introduced in the Scottish Parliament on [ ] 2005*

Accordingly, when any of the authorised works is transferred to Network Rail, subsection (8) provides that the works transferred may not be the subject of any further agreement under this section.

*Section 37 – Statutory undertakers, etc.*

175. **Section 37** introduces schedule 7 to the Bill. 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 Bill. 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 Bill 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.

176. It is known that there is undertakers’ apparatus in some of the land required for the authorised works. The Bill when enacted will therefore give rise to the situation for which sections 224 to 227 are designed. Paragraph 1 of schedule 7 accordingly applies the code in sections 224 to 227 to the authorised works. Paragraph 2 protects the position of statutory undertakers’ apparatus in roads that are stopped up under the Bill.

*Section 38 – Ancient monuments*

177. The Ancient Monuments and Archaeological Areas Act 1979 (c.46) imposes specific controls on works affecting scheduled ancient monuments and their surrounding sites. Part of the site of the scheduled ancient monument known as the Cat Stane (although not the Stane itself) is within the Bill limits and these controls are potentially attracted. The controls are the equivalent of the controls relating to listed buildings (see paragraphs 180 and 181 below) and they overlay the planning system.

178. As explained in paragraph 11 above, the Bill will grant planning permission for the authorised works. In authorising the works the Parliament will consider all issues relevant to their construction, including in particular the Environmental Statement and the impact of the works on ancient monuments. It is therefore appropriate that all such issues should be considered at the same time.

179. **Section 38** accordingly excludes the operation of the controls in the 1979 Act.

*Section 39– Listed buildings and conservation areas*

180. **Section 39** introduces schedule 8. The schedule makes special provisions as to the listed buildings which will be affected by the railway works.

181. As explained in paragraph 11 above, the Bill 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 39** and schedule 8, the authorised undertaker would have to obtain listed building consent and conservation area consent separately from the Bill. This section and schedule 8 accordingly disapply this separate statutory requirement so that the Bill will, effectively, also grant these

consents. The authorised works will not affect any currently listed buildings. These disapplications will apply if any buildings affected by the works are listed in future.

*Section 40 – Saving for Town and Country Planning*

182. Subsection (1) provides for general planning legislation to apply in relation to the works authorised by the Bill.

183. As explained in paragraph 11 above, development authorised by the Bill is permitted development. Subsection (2) lays down a 10-year limit in respect of these permitted development rights. By section (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 Bill therefore operates to grant planning permission for the works subject to a condition that development must be begun within 10 years.

*Section 41 – Interpretation of sections 42 and 43*

184. **Section 41** is the first of three sections dealing with the discrete topic of planning agreements, that is agreements between developers and local planning authorities entered into under section 75 of the Town and Country Planning (Scotland) Act 1997 (c.8) (in the Bill called “the 1997 Act”).

185. Subsection (1) contains specific definitions. A planning agreement relates to particular developments of specified land. For the purposes of **sections 42** and **43** subsection (1) has a definition of a “relevant planning agreement”. This is a planning agreement entered into in connection with land that is specifically benefited by the works authorised by the Bill. The test is that development on the land can be expected to benefit from or be enhanced by the authorised works. An example would be a proposed housing development where, if the railway were built, the houses would command a higher price because of good transport links.

186. **Sections 42** and **43** deal, among other things, with financial contributions towards the cost of providing the authorised works under a “financial support contract”. Subsection (1) of **section 41** has a detailed definition of this expression, which contemplates three different categories of binding contract, namely—

- a funding commitment or approval, whereby one of the parties is committed to procuring funding for the provisions of the authorised works or approves a relevant local planning authority<sup>56</sup> incurring expenditure or entering into a financial obligation for that purpose (intended to cover Scottish Executive approval of expenditure, which might be given together with a commitment for the Executive to procure funds for the works);
- a contract that obliges one party to provide money to pay for the provision of the authorised works and obliges the authorised undertaker to pay interest or give other monetary consideration (intended to catch the widest possible range of money provision agreements from interest bearing loans to capitalised payments); and

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<sup>56</sup> For an explanation of this expression see **section 41(2)** and paragraph 187 below.

- a contract that obliges one party to provide or procure the provision of all or part of the authorised works for a consideration all or part of which consists of the transfer or grant of assets or benefits, in either case other than money (intended to cover the full range of possible procurement contracts such as design and build; design, build, operate and maintain; franchised operations).

187. **Sections 42 and 43** apply to relevant planning authorities. Subsection (2) of **section 41** provides that the relevant planning authorities are City of Edinburgh Council and West Lothian Council.

#### *Section 42 – Planning agreements*

188. The legislation governing planning agreements is in section 75 of the 1997 Act. Section 75 provides that “a planning authority may enter into an agreement with any person interested in land in their area (in so far as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of that land”. Section 75(2) permits agreements made under section 75 to include incidental and consequential provisions, including financial provisions. A planning agreement may be recorded in the Register of Sasines or registered in the Land Register of Scotland, with the result that the agreement will bind persons whose title derives from the landowner who entered into the agreement.

189. Planning authorities may require planning agreements to be entered into as a condition of granting planning permission. Policy guidance on the reasonable exercise of this power is in Scottish Office Development Department Circular 12/1996 which requires that a planning agreement meets certain criteria. In particular—

- planning authorities should only require planning agreements to be entered into if, in land use planning terms, it would be wrong to grant planning permission without them;<sup>57</sup>
- an applicant’s need for planning permission should not be treated as an opportunity to obtain a benefit, financial or environmental, which is unrelated in nature, scale or kind to the development proposed;
- a planning agreement should serve a planning purpose,<sup>58</sup> relate to the development being proposed by overcoming some difficulty – such as a need for particular facilities – that the proposed development would create,<sup>59</sup> should be related in scale and kind to the proposed development<sup>60</sup> and should meet the test of reasonableness;<sup>61</sup>
- the provision of contributions towards public transport or community facilities may be acceptable provided the requirements are directly related to the development proposed and the need for them arises from its implementation.<sup>62</sup>

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<sup>57</sup> Circular 12/1996, paragraph 5.

<sup>58</sup> The same, paragraph 9.

<sup>59</sup> The same, paragraph 10.

<sup>60</sup> The same, paragraph 11.

<sup>61</sup> The same, paragraph 12.

<sup>62</sup> The same, paragraph 13.

190. The guidance in the Circular, and particularly the first and fourth bullet point items, restricts the ability of planning authorities to insist upon planning agreements to cases where the agreement is a direct necessity if planning permission is to be granted. The guidance concerning contributions to transport or community facilities also means that contributions can only be required in relation to facilities that follow the proposed development. In practice developers may sometimes be prepared voluntarily to go beyond the scope of the guidance, but the guidance does not allow planning authorities to require planning agreements by way of support for planned infrastructure that will benefit a development but which is not necessitated by the development alone. As a result of this guidance, planning agreements are of limited application as a means of supporting the provision of infrastructure that is of benefit to a wide development area.

191. In addition to the powers under the 1997 Act, section 69 of the Local Government (Scotland) Act 1973 (c.65) and Part 3 of the Local Government in Scotland Act 2003 (asp 1) give local authorities wide powers to do things, including entering into agreements, for the purpose of promoting or improving the well-being of its area. Unlike planning agreements, however, an agreement to advance well-being cannot be required to bind land to which it relates.

192. **Section 42** extends the scope of what may be dealt with by a relevant planning agreement<sup>63</sup> so as to allow for developers to be required to contribute towards or support the provision of the authorised works which will benefit their proposed developments.

193. **Section 42** is additional to the general law, not in substitution for it. Subsection (1) accordingly provides that the legislation explained in paragraphs 188 to 191 above is to have effect, but in accordance with the provisions of **section 42**. It automatically follows that Circular 12/1996 will also have effect subject to **section 42**.

194. Subsection (2) enables a relevant planning agreement to include provision relating to, or to development that supports or is otherwise connected with, the authorised works. This would cover provision directly connected with (“relating to”) the authorised works, such as the construction of works that are subsequently to be integrated into surrounding developments. Supporting or connected development would extend to, for example, a developer providing a link road from a proposed development to facilitate access to the railway infrastructure.

195. As explained above, a planning agreement must relate to the proposed development. The special nature of a linear work such as a railway is that its effect in one locality is referable to the whole length of the work. Subsection (3) therefore puts it beyond doubt that a planning agreement can validly relate to the authorised works notwithstanding that they are wholly or partly outwith the local government area of the relevant planning authority concerned. The subsection does not remove the need for the particular development to relate to the authorised works. It merely recognises the possibility of there being such a relationship notwithstanding geographical remoteness.

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<sup>63</sup> For an explanation of this expression see paragraph 185 above.

196. Subsection (4) provides that in a relevant planning agreement financial provisions relating to the authorised works may require the payment of developer contributions, that is contributions by the developer towards the cost of providing the authorised works or any development relating to, supporting or otherwise connected with the authorised works. For this purpose **section 41** defines “provision” as meaning design, construction or financing of any part of the railway works as defined in section 2. The definition includes maintenance and operation so far as provided in conjunction with design, construction or financing. This would mean that the relevant cost of providing the works could include the cost of a DBOM (design, build, operate, maintain) contract.

197. The reference to supporting or connected development reflects subsection (2).

198. The object of developer contributions pursuant to this section will be to assist in the provision of the authorised works only. Subsection (5) accordingly caps the aggregate developer contributions that can be secured. Aggregate contributions cannot exceed the total of the sums necessary for the purpose of providing the authorised works.

199. It is also important that there should be an end date for financial contributions. Subsection (6) provides that a developer contribution cannot be required more than 30 years after the opening of the railway for public use. The period reflects the likely length of financial support contracts.

200. The true cost of providing the authorised works is, in addition to the nominal capital cost, the cost of securing that capital, whether by interest payments, loan charges or any other sums payable under a financial support contract. Subsection (7) provides that all these sums are included in the cost for which contributions may be required.

201. It follows that developer contributions may be used while there is any outstanding loan agreement or financial support contract. Subsection (8) accordingly enables a relevant planning authority within the overall 30 year period, to require developer contributions at any time during the currency of such an agreement or contract.

202. Section 22(7) of the Local Government in Scotland Act 2003 (asp 1) prohibits a local authority from using the powers to advance well-being to impose a levy or imposition. Subsection (9) makes clear that developer contributions required under **section 42** do not infringe this rule.

#### *Section 43 – Application of developer contributions*

203. Subsection (1) makes the relevant local planning authority responsible for securing that any developer contributions it obtains towards the cost of providing the authorised works is paid to the authorised undertaker within 12 months of its receipt.

204. As a safeguard to paying developers, subsection (2) provides that if a developer contribution is not paid to the authorised undertaker within that period, the relevant planning authority must repay it.

205. The effect of these provisions is to extend the developments that could be requested to contribute towards the authorised works to any development that will benefit from the existence of the railway, whether the railway is built before or after the contributing development. The provisions also recognise that the generally beneficial effect of transport infrastructure on development values extend beyond the provision of infrastructure that is purely for or necessitated by any one development. **Sections 42** and **43** also reflect the fact that it can be reasonable for developers to contribute towards the cost of infrastructure that benefits particular developments even though the developments are acceptable for planning purposes without such infrastructure being provided.

206. These are extensions of existing policy as set out in Circular 12/1996. They reflect the increasingly wide effects of transport infrastructure schemes. The provisions therefore build on existing policy, without replacing it. As a result, all the current criteria, as extended in the Bill, will continue to apply.

#### *Section 44 – Blighted land*

207. **Section 44** 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 that 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 Bill.

208. The effect of **section 44** 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) £24,725;<sup>64</sup> or
- an owner-occupier of an agricultural unit,

whose land is subject to compulsory purchase under the Bill 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.

#### *Section 45 – Appropriate assessment*

209. **Section 45** disapplies section 60 of the Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716) (“the Habitats Regulations”) Council Directive 92/43/EEC on the conservation of natural habitats and of flora and fauna (“the Habitats Directive”), given general effect in the United Kingdom by the Habitats Regulations, requires<sup>65</sup> that where a project is likely to have a significant effect on what the Habitats Regulations call a “European site”<sup>66</sup> the authority responsible for authorising the project,<sup>67</sup> in this case the

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<sup>64</sup> Designed to catch small businesses.

<sup>65</sup> See regulation 48.

<sup>66</sup> Defined in regulation 10.

<sup>67</sup> Called the “competent authority” – see regulation 6.

Parliament, must make what the regulations call an “appropriate assessment” of the implications for the site of implementing the project. If the appropriate assessment leads to the conclusion that, after taking into account any proposed mitigation measures, the project will adversely affect the integrity of the European site, the competent authority cannot authorise the project unless the project satisfies stringent tests that it is in the overriding public interest. The requirement for appropriate assessment applies to the EARL scheme, which could potentially affect the Firth of Forth SPA Special Area of Conservation.

210. **Tie** intends to provide the Parliament with sufficient information to enable it to make an appropriate assessment in respect of the entire scheme. It will not therefore be necessary for any further requirement for appropriate assessment to apply to the scheme.

211. Regulation 60 of the Habitats Regulations applies a similar procedure which, through consultation with nature conservation bodies, can lead to a local planning authority being required to make an appropriate assessment of a scheme which is being carried out as permitted development.<sup>68</sup> The majority of such development will not directly follow the passage of authorising legislation, and so an appropriate assessment will not previously have been carried out. Where works are authorised following the carrying out of an appropriate assessment, as would be the case here, and assuming the Committee is able to make its appropriate assessment on a sufficiently detailed basis, the requirement for appropriate assessment under the Habitats Regulations duplicates the Parliament’s assessment. Regulation 60 is not intended to operate in this way and its disapplication in these circumstances is precedented.<sup>69</sup>

#### *Section 46 – Environmental mitigation*

212. **Section 46** deems the authorised undertaker to have an interest in any land within the limits of deviation or the limits of land to be acquired or used which is required for environmental mitigation measures in respect of its authorised works. The purpose of the provision is to enable Scottish Natural Heritage (“SNH”), if it wishes, to enter into any management agreement under section 49A of the Countryside (Scotland) Act 1967 (c.86). The section is required to overcome a legal technicality.

213. The Environmental Statement identifies certain environmental impacts of the authorised works. It assumes that stated mitigation measures will be taken to avoid such impacts. It is expected that the environmental regulators (SNH and Scottish Environmental Protection Agency (“SEPA”)) may wish to have an input into the environmental management of the authorised works, and in any event to be able to advise the Parliament that the authorised undertaker will be legally obliged to provide mitigation as envisaged.

214. For these reasons it is likely to be necessary, whether before the Bill is passed or at a later stage, for **tie** as Promoter (and subsequently the authorised undertaker) to enter into binding commitments to SNH and SEPA to provide the mitigation and to provide for environmental management of the project. SEPA’s statutory powers enable it to enter into formal agreements of this sort, but SNH’s do not.

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<sup>68</sup> See paragraph 11.

<sup>69</sup> See Felixstowe Dock and Railway Harbour Revision Order 2002 (SI 2002/2618), article 17; Associated British Ports (Immingham Outer Harbour) Harbour Revision Order 2004 (SI 2004/2190), article 18.

*These documents relate to the Edinburgh Airport Rail Link Bill (SP Bill [ ]) as introduced in the Scottish Parliament on [ ] 2005*

215. **Section 46** remedies this legal lacuna by bringing the proposed agreement within the scope of statutory management schemes. Normally such schemes have to be entered into with the landowner. By deeming the authorised undertaker to have an interest in land required for mitigation even before it has exercised its compulsory powers, SNH can enter into the necessary agreement as soon as the Act comes into force.

*Section 47 – Certification of plans, etc.*

216. **Section 47** 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. 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 48 – Arbitration*

217. **Section 48** lays down the procedures applicable in cases where the Act provides for disputes (other than those to which the Lands Clauses Acts apply<sup>70</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 (2) 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.

218. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 (c.53) requires that every building contract is subject to a dispute resolution procedure which satisfies certain requirements and in default applies a statutory procedure. The dispute resolution procedure required by the 1996 Act is designed for building contracts as commonly understood and is not appropriate for the approval of statutory undertakers' diversionary or protective works in circumstances such as envisaged by the Bill. However, the definition in the 1996 Act is so wide as to be of uncertain application. If it applied here the arbitration procedure provided in **section 48** could be overridden. So as to be sure that this could not happen subsection (3) expressly disapplies section 108.

*Section 49 – Service of notices, etc.*

219. **Section 49** 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.

## **Part 4 – Supplementary**

*Section 50 – Incorporation of enactments*

220. As explained earlier in these Explanatory Notes, the legal machinery for compulsory acquisition is in Acts that only apply if they are specifically incorporated. **Section 50** accordingly incorporates the relevant legislation.

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<sup>70</sup> Disputes under these Acts are referred to the Lands Tribunal for Scotland (see above).

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*Section 52 – Orders*

221. **Section 52** follows from **section 33**. **Section 52** provides that any order made under **section 33** shall be a statutory instrument, that it may contain incidental, consequential, supplementary or transitional provisions, may provide differently for different clauses and that it is subject to annulment (negative resolution procedure) by the Parliament.

*Section 53 – Crown rights*

222. Some of the land required for the scheme is vested in the Scottish Ministers and is, therefore, Crown land. Compulsory purchase powers cannot be exercised against the Crown. By convention, however, the Crown agrees to transfer land in these circumstances. **Section 53** gives effect to this convention. Similar provisions are standard in private legislation wherever Crown land is proposed to be affected.

*Section 54 – Short title*

223. **Section 54** does not make any special provision for the commencement of the Act once passed. It will come into force when the Bill receives Royal Assent.