

CONSERVATION OF PRIVATE LAND
BY MEANS OF COMPENSATORY MECHANISMS AND INCENTIVES

by

JAN GLAZEWSKI

A dissertation submitted to the Department of
Environmental and Geographical Sciences,
University of Cape Town,
as partial requirement for the degree of
Master of Arts

CAPE TOWN, 1986

The University of Cape Town has been given
the right to reproduce this thesis in whole
or in part. Copyright is held by the author.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ABSTRACT

This report reviews the potential of financial incentives and compensatory mechanisms for achieving conservation goals on privately owned land in South Africa. Legal concepts, such as the notion of absolute ownership of property, are examined in the context of South Africa's historical and political circumstances to highlight how they have contributed to a highly individualistic attitude to land ownership in South Africa. The achievement of environmental objectives has relied largely on outright control of, and prohibitions on, the use of land. Incentives and compensatory mechanisms offer complementary methods of encouraging the diminution of ownership rights in private land for the public interest.

A review of some foreign legal systems shows that compensation for the diminution of private rights in land is a grossly neglected area of South African law. It is found that attention should be given to the development of satisfactory principles of compensation as well as to the incorporation of incentives into South African legislation. It is concluded that the success of such recommendations is dependant on the fulfilment of certain administrative prerequisites, including the formulation of a national strategy for the conservation of private land in South Africa and the constitution of a formal body of experts to advise on compensation and incentive schemes.

TABLE OF CONTENTS

	<u>Page</u>
ABSTRACT	ii
ACKNOWLEDGEMENTS	viii
CHAPTER ONE : INTRODUCTION	1
1.1 Introduction to the topic	1
1.2 A clarification of terms	2
1.2.1 Compensatory Mechanisms ...	2
1.2.2 Incentives	3
1.2.3 Environmentally Desirable use of land	4
1.3 Aims and Objectives of the Report	5
1.4 Motivation	6
1.5 Research Methodology	9
1.5.1 Literature Search	9
1.5.2 Interviews	10
1.5.3 Analysis and Interpretation of Legal Materials	10
1.6 Limitations of the Report	11
1.7 Format and Approach to the Report	11
CHAPTER TWO : LAND OWNERSHIP LAW AND ENVIRONMENTAL CONCERNS	14
2.1 Introduction	14
2.2 An Historical Overview of Individualistic Attitudes to Land	15
2.3 The Legal Nature of Ownership (Dominium)	20
2.3.1 Introduction	20
2.3.2 The 'Absolute' Nature of Ownership	22

2.4	Legal Control of Private Land	29
2.4.1	Private and Public Law Controls	29
2.4.2	Private Law Provisions	31
2.4.3	Public Law Provisions	34
2.5	New Trends in Ownership Law	38
2.6	Conclusions	42
CHAPTER THREE : COMPENSATION FOR INROADS INTO RIGHTS IN LAND IN SOME FOREIGN JURISDICTIONS		43
3.1	Introduction	43
3.2	Economic Aspects of Compensation as applied to Land Use Planning ..	44
3.3	Jurisprudential Aspects of the Compensation Problem	47
3.4	The Taking - Regulation Dichotomy	49
3.4.1	The Problem	49
3.4.2	The United States of America	51
3.4.3	German Law	56
3.4.4	English Law	59
3.5	Conclusions	65
CHAPTER FOUR : COMPENSATION FOR INROADS INTO RIGHTS IN LAND IN SOUTH AFRICAN LAW ...		68
4.1	Introduction	68
4.2	Expropriation, Restrictions and Compensation	69
4.3	Compensation in Environmental Statutory Provisions	71
4.3.1	The Forest Act (No. 122 of 1984)	71
4.3.2	The Mountain Catchment Areas Act (No. 63 of 1970)	73
4.3.3	The Declaration of Nature Areas	74
4.3.4	The Meaning of 'Patrimonial' Loss'	77

4.4	Compensation in Town Planning Law	79
4.5	Conclusions and Recommendations ..	86
CHAPTER FIVE : INCENTIVES - DONATIONS AND TAX RELIEF		88
5.1	Introduction	88
5.2	Corporate Social Responsibility, the Environment and Tax Incentives	90
5.3	The Special Case of Environmental Needs and Tax Allowances	91
5.4	The Legality of Company Donations	95
5.5	The Present Status of Donations in the South African Tax System	97
	5.5.1 Introduction	97
	5.5.2 The Donor's Tax Position ...	98
	5.5.3 The Donee's Tax Position ...	104
5.6	The Tax Status of Voluntary Contributions in Other Jurisdictions	105
5.7	The Tax Status of Voluntary Contributions in the United States of America	105
	5.7.1 Introduction	105
	5.7.2 Gifts of Private Land	107
	5.7.3 Gifts of Cash	111
	5.7.4 Donations by Bequest	111
5.8	The Tax Consequences of Donations in the United Kingdom	112
	5.8.1 Introduction	112
	5.8.2 Income Tax	112
	5.8.3 Capital Gains Tax	112
	5.8.4 Capital Transfer Tax	113
5.9	The Tax Consequences of Donations in Australia	114
5.10	Conclusions and Recommendations ..	114

CHAPTER SIX : INCENTIVES - OTHER DEDUCTIONS SUBSIDIES AND GRANTS	117
6.1 Introduction	117
6.2 Other Deductions	118
6.3 Subsidies and Grants	119
6.3.1 Agricultural Subsidies	120
6.3.2 Incentives for Industrial Development	125
6.3.3 Conclusion on Subsidies and Grants	126
6.4 Conclusion and Recommendations ..	127
 CHAPTER SEVEN : THE APPLICATION OF COMPENSATORY MECHANISMS AND INCENTIVES	 124
7.1 Introduction	129
7.2 Trusts	130
7.2.1 Introduction	130
7.2.2 Types and Classifications of Trusts	131
7.2.3 The Juristic Nature of a Trust	133
7.2.4 Current Incentives in the Taxation of Trusts	133
7.2.5 The Estate Duty Position of Trusts	136
7.2.6 Innovative Incentives for Conservation Trusts ...	137
7.3 Management Agreements	138
7.3.1 Introduction	138
7.3.2 Existing Incentives and Compensatory Mechanisms ...	141
7.3.3 Conclusions and Recommenda tions on Management Agreements	147

CHAPTER EIGHT : CONCLUSIONS AND RECOMMENDATIONS	152
8.1 Introduction	152
8.2 General Conclusions	153
8.2.1 Ownership in South Africa ..	153
8.2.2 Compensatory Principles ...	154
8.2.3 Incentives	155
8.3 General Recommendations	157
8.3.1 A National Strategy for Environmental Conservation of Private Land in South Africa	157
8.3.2 A Conservation Incentive and Compensation Advisory Board	157
8.3.3 A Central Land Acquisition and Conservation Fund	162
8.4 Final Remarks	164

ACKNOWLEDGEMENTS

I acknowledge with thanks and appreciation the assistance of the following:

Professor R F Fuggle, my supervisor, for his encouragement and advice, despite pressures of time;

The various people interviewed who unhesitatingly gave up their time and offered valuable insights and perspectives;

The Council for Scientific and Industrial Research, for funding this research, particularly Mr A Ferrar;

Anne Babb, who typed this report, for her patience and accuracy;

And Liz for her constant support.

JAN GLAZEWSKI

May, 1986

CHAPTER ONE : INTRODUCTION

"Millions of people view the present theory of land as property sacrosanct and ... will fiercely oppose (attempts) to further limit what they can do with 'their' land. Thus any attempt to redefine man's relation to the land will perhaps be confronted with insurmountable political problems."

(Large, 1973, p. 1083)

1.1 Introduction to the Topic

Incentives and compensative mechanisms, both potential tools for achieving some environmental objectives, are not fully exploited in South African environmental legislation. This proposition is examined in the context of private land in South Africa.

Public realization that natural resources need to be managed on a sustainable basis is a relatively recent phenomenon, only having gained momentum in the latter half of this century. By contrast the legal rules which govern the use and exploitation of these resources are based on legal concepts and attitudes which Western society has developed over the course of the last twenty centuries. South African law of ownership, for instance, is based on the concept of absolute ownership of property, a concept which the present legal system inherited from Roman Law.

This report investigates incentives and compensatory mechanisms as a possible method of reconciling the public interest in the environmentally desirable use of private land with the

exploitative, individualistic and exclusive attitudes which landowners feel justified in adopting to 'their land'.

In general, legal provisions enacted for environmental protection in South Africa are restrictive. Insofar as the use of private land is concerned, curtailments on the ways in which an owner can use his land run against the liberal and individualistic notions on which private ownership is based. This report attempts to show that this restrictive approach can be effectively complemented by provisions which compensate or reward a landowner for dealing with his land in an environmentally desirable manner. Such provisions are more compatible with the individualistic attitudes which characterize land ownership than restrictions, and should therefore be more generally acceptable.

These proposals are examined in the context of the general framework created by the law governing ownership of land in South Africa as well as the deeply entrenched individualistic attitudes to land as a result of the historical and socio-political circumstances of South Africa.

1.2 A Clarification of Terms

1.2.1 Compensatory Mechanisms

Compensatory principles determine whether landowners should be granted compensation if they are deprived of rights in their land in the broader public interest. The concern here is specifically with compensatory mechanisms for the landowner who surrenders rights in his land in the interest of environmental conservation. This is not a simple matter.

Many landowners manage their land in an environmentally sensitive manner whether compensation is available or not. A situation where landowners could demand compensation for action which they would in any event have undertaken would be too liberal a system of compensation and would inhibit environmentally wise planning because it would generate too great a financial drain on state funds; on the other hand, a general unavailability of compensation would mean that environmentally desirable action could meet with resistance from landowners, a powerful lobby whose views have to be considered. In this analysis an attempt is made to find a balance between these conflicting pressures and to establish consistent, acceptable and practical principles of compensation to satisfy both landowners and environmentalists.

1.2.2 Incentives

Incentives include financial, contractual and other mechanisms which induce a landowner to use his land in a way which is in the general environmental interest and not necessarily his own. The implementation of incentives could remove some of the financial responsibility for environmental conservation from government and place it in the ambit of the private sector. Two broad categories of incentives can be distinguished: those within the tax system such as deductions and capital allowances and those outside the tax system, for example subsidies.

1.2.3 Environmentally desirable use of land

Scattered throughout this report are interchangeable terms such as the "environmentally wise" and "environmentally desirable" use of land. These terms reflect the aims of the World Conservation Strategy which was prepared by the International Union for the Conservation of Nature. Its aims are to achieve three main objectives:

- (i) to maintain essential ecological processes and life-support systems (such as soil regeneration and protection, the recycling of nutrients, and the cleansing of waters),
- (ii) to preserve genetic diversity (the range of genetic material found in the world's organisms on which many of the above processes and life-support systems depend) and
- (iii) to ensure the sustainable utilization of species and ecosystems (which support millions of rural communities as well as major industries),

(International Union for the Conservation
of Nature, 1980, p.1).

To achieve these ends private land should be utilized in a sustainable manner so that future generations are not negatively affected by present day land practices. These terms represent a facet of Aldo Leopold's land ethic which, he states "reflects the existence of an ecological conscience, and this in turn reflects a conviction of

individual responsibility for health of the land."
(Leopold, 1966, p. 285)

1.3 Aims and Objectives of the Report

The broad aim of this report is to analyse means of encouraging a positive land ethic while retaining the present system of privately held land in South Africa. Aldo Leopold who developed the notion of a land ethic emphasised that land is one organism comprising of interdependent constituents and that "harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left" (Leopold, 1966, p. 189). Ethics primarily governs individuals' relations with each other and with the community, and Leopold simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively, the land (Leopold, 1966, p. 239).

A primary objective of this report then is to provide insight into the feasibility and practicality of incorporating incentives and principles of compensation into our planning law and policy, to encourage a better land ethic. By laying down clear, precise and practical criteria for compensation, and by providing incentives for environmentally desirable use of land, a more positive land ethic can be encouraged.

A secondary aim of the report is to provide insight into the practical workings of the law, particularly the law of ownership of land, and the difficulties associated with incorporating principles of compensation for the diminution of ownership rights. A better understanding of the legal constraints which

inhibit the environmentally wise use of land will, hopefully, be gained.

1.4 Motivation

The motivation for selecting land as the subject of this report is two-fold.

Firstly, a broad study of economic and financial policy options available for application to a wide spectrum of environmental concerns has already been undertaken (Miltz, 1984). This study considered problems of pollution, resource destruction and land-use, and emphasized that different policies should be applied to different categories of problem. Land-use was considered a priority area as it underpins many other environmental problems.

Secondly, land use will come under increasing pressure in the forthcoming decades. A burgeoning population with increasing material and political aspirations forebodes an ever escalating pressure on land. In the view of the former leader of the opposition, Dr F Van Zyl Slabbert:

"land has been institutionalized as one of the major issues of racial competition in South Africa. The overcrowding of the homelands and the urban black communities has underscored the fact that the physical accommodation of racial groups is becoming one of the key issues of conflict in South Africa."

(Van Zyl Slabbert, 1985, p. 82)

It is imperative that environmental priorities be retained in any political dispensation which may be made affecting land allocation in South Africa, for the long-term benefit of the country.

The study was narrowed to the arena of private land as land use in general is a vast and complex field, involving many competing interests and concerns. Focussing on private land is a logical progression from Miltz's study as it emphasizes the need for greater reliance on market related mechanisms in the environmental field. It must immediately be acknowledged however that incentives and compensatory mechanisms are but one small way in which environmental considerations can be brought into the ambit of private land use. Some other mechanisms which could be considered are servitudes (conservation easements), transfer of development rights and planning tools such as 'use zoning'.

Another reason for focussing on privately owned land is the fact that such land constitutes 90% of the total area of all land in South Africa (President Council's Report, 1984 (b), p. 24). This fact, coupled with the fact that only 4.5% of all land in South Africa is set aside for nature conservation and outdoor recreation purposes (see Table 1) clearly points to the need to incorporate conservation priorities into private land use.

Table 1

Land-use in South Africa (use as a percentage of total land area)

	Percentage
Agriculture	85
Nature Conservation and Outdoor Recreation	4.5
Cities, towns and unproclaimed townships	3.5
Smallholdings	3
Roads, Railways and Airports	2
Mining and other	1
Forestry	1

(from Conservation Forum, 1982, p.10)

This table shows that the bulk of private land is utilized for agricultural purposes. While not decrying the importance of this sector, it must be emphasised that the primary motivation of this report is to achieve conservation goals, not to improve agricultural production. Obviously the two concerns overlap but agriculture is not the focus of this report.

Finally this report is motivated by the fact that recent policy statements made by Government officials indicate the adoption of a policy by Government to divest itself where practically possible, of responsibilities and activities which can be adequately managed by the private sector. In the 1985 Budget Speech the Minister of Finance stated:

"Privatisation will allow us to harness the skills and energies of the private sector in major areas of economic activity that are still within the ambit of the public sector."

(Hansard, 9 April 1985, col. 2984)

Incentives and compensatory principles can play a role in this regard as they place some of the initiative for conservation into the hands of the private sector.

1.5 Research Methodology

The research methodology used to pursue the aims and objectives outlined in 1.3 above included a detailed literature search, interviews with acknowledged authorities and the interpretation and analysis of pertinent South African and foreign legal texts and statute law. The nature of the subject matter was such that most of the research was desk bound.

1.5.1 Literature Search

As it was found that there is a dearth of relevant material in South African legal literature other appropriate local and foreign subject headings, for example, Economics and Planning, were consulted; great reliance was placed on the 'Index to Foreign Legal Periodicals' (ed. University of California Press) and on 'Index to Legal Periodicals' (ed. H W Wilson Company) for obtaining pertinent foreign legal literature on the subject. A further source of foreign literature were four inter-disciplinary database searches conducted by Miltz in 1984 which were obtained from him.

South African literature was obtained by personally conducting literature searches at five South African universities (in the Western Cape and Transvaal).

1.5.2 Interviews

Interviews were held with academics as well as with persons involved in the practical aspects of land-use, nature conservation and taxation. A list of interviewees is attached - See Annexure A to this report.

These interviews were conducted at a relatively early stage of the research period. Their aim was to identify and crystalize the potential, scope and practical problems which may be encountered if a diminution of ownership rights were to be encouraged by means of financial incentives and compensatory mechanisms. These interviews were conducted in an informal manner to gain general guidelines and ideas rather than specific information. Handwritten notes were made of the more important points made during the course of these interviews. Some of these points are referred to in the text of this report where they are referred to as 'pers. comm.'

1.5.3 Analysis and Interpretation of Legal Materials

Many legal principles and statutory provisions have important implications for environmental concerns, but have not been considered in this perspective. It was thus considered necessary to analyse and interpret some of these legal materials in the context of environmental concern.

This has been done by analysing and interpreting these provisions in the context of South African environmental problems.

1.6 Limitations of the Report

While it is recognized that South African society is sharply delineated between a first and a third world element, this report concentrates on first world aspects of land-use. Little cognisance is taken of black attitudes to, or systems of, land ownership or land-use. This report is thus inadequate insofar as it does not deal with the underdeveloped sector of the economy. The recommendations made are limited to the first world element of South African society. A comprehensive study would go far beyond the confines set for this report.

1.7 Format of and approach to the Report

The point of departure is that the possible implementation of incentives and better principles of compensation must be seen in the context of the rights and duties associated with the ownership of land in South Africa and the traditional methods of achieving environmental objectives in land. Any proposal affecting land must consider the nature and purpose of law affecting land-use, particularly the law affecting the rights and duties in ownership of land. Chapter two reviews how basic principles of ownership law inhibits the environmentally desirable use of land and analyses the concept of absolute ownership of property in this light. Chapter two also outlines the historical circumstances which contributed to incorporating individualistic attitudes to land in ownership law by briefly

comparing the southern African and North American frontier periods.

Chapter three examines how some foreign jurisdictions have attempted to implement the compensation principle into their law in order to facilitate the submission of private individual rights in land in favour of the public environmental interest. An attempt is made to glean some general principles to distinguish those restrictions on ownership rights which are compensated from those which should not be compensated.

Chapter four examines the extent to which the compensation principle is incorporated into South African law and its effectiveness in achieving environmental objectives. It is argued that South African jurists have grossly neglected developing a satisfactory system of public compensation and recommendations are made in this regard.

Chapter five turns to incentives within the tax system and examines the role of philanthropic activity and donations as an incentive for achieving environmental objectives.

Chapter six reviews the role of deductions as well as incentives outside the tax system, for example, subsidies, in achieving environmental objectives.

Chapter seven examines how some of the theoretical principles of compensation and/or incentives could be utilized in some traditional land conservation techniques. In particular Trusts, Heritage Sites, Nature Conservancies, Private Nature Reserves, Nature Areas and so called "Schedule 5 Parks" are reviewed.

Finally Chapter eight concludes this report by making some suggestions as to the administrative prerequisites which need to be implemented to ensure that principles of compensation and/or incentives will succeed.

CHAPTER TWO: LAND OWNERSHIP LAW AND ENVIRONMENTAL CONCERNS

"[property is] ... that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion to the right of any other individual in the universe."

(Blackstone, 1765, p. 1)

"[there is] a growing attitude that there exists an inherent public right in property that transcends the technicalities of title."

(Large, 1973, p. 1074)

2.1 Introduction

Ownership laws occupy the centre stage of any proposals promoting the environmentally desirable use of private land. This is because such proposals would have to modify existing ownership laws. The prevailing methods of controlling private rights in land in the context of public environmental interest also need to be appraised. It is postulated that the traditional methods of control, while having some success, can be profitably supplemented by incentives and compensatory mechanisms. However before outlining the way ownership law promotes environmental interests in private land, a broad historical background is sketched. This shows how individualistic attitudes to land in South Africa became entrenched and established in land ownership law.

2.2 An historical overview of individualistic attitudes to land

The intellectual and industrial revolutions of Europe in the eighteenth and nineteenth centuries left a marked effect on current land ownership concepts. The individualistic philosophy propounded by writers such as John Austin and Jeremy Bentham claimed that individuals had absolute and inalienable rights which could not be interfered with by the State. This included the notion that land was to be used for individual landowner's interests as opposed to the interests of society at large. This idea gave land ownership rights a new importance and the concept of land stewardship gave way to notions of individualistic economic gain.

This philosophy was compounded by the discovery of uncharted continents and the resultant burgeoning of the frontier mentality during the pioneering period. This frontier period had a profound effect on the development of attitudes to land which have, in the North American context, been described as follows:

"the white settler spread across the plains with his more exploitive ideology. His attitudes were shaped by an anthropocentric religion which demanded that men exercise dominion over the earth and all lesser creatures. Faced with a pristine and seemingly boundless wilderness, he quickly developed what has been called 'the cowboy mentality'. To one with this attitude land was a replaceable commodity that could and should be parcelled out to men for control and development, and if one man saw fit to destroy the environment of his valley in pursuit of profit, well

why not? There was always another valley over the next hill."

(Large, 1973, p. 1043)

The effect of the frontier period on the South African settler has been similarly described:

"Under these frontier conditions settlers became fully identified with their environment through their land ownership. Owners of farms in time developed a spirit of supreme command over their property which brooked no interference from authorities."

(Page and Rabie, 1983, p. 449)

In an interesting comparative study of the frontier periods of North America and southern Africa (Lamar and Thompson, 1981) the following similarities and differences between the two regions emerge:

Both regions are products of the same general process: the expansion of Europe and capitalism. Both had roughly the same chronologies: following the voyages of Columbus and Da Gama at the end of the fifteenth century and subsequent probings along the seaboards, Europeans established their first effective bridgeheads in both regions in the seventeenth century. Two common fundamental features were the seemingly endless availability of land for settlement and the confrontation with an indigenous population over possession of the land.

A little historic probing however uncovers some significant differences:

Geographically North America was much more accessible to Europe than southern Africa. The voyage from England to New York in sailing ships in the 1820's averaged about five weeks compared with about two months for the journey to Cape Town. The North American coastline was far more hospitable to the landing of ships because of numerous natural harbours; in contrast the southern African coastline was treacherous and not a single South African river was penetrable from the sea by ocean-going ships for any significant distance.

Inland expansion from the points of initial settlement in South Africa was impeded by formidable mountain ranges and the arid Karoo. By contrast there were less formidable barriers into North America - from the east coast to the Appalachians the terrain was hospitable and there were easy mountain passes to vast fertile areas beyond.

Climatically North America was similar to Europe. The North American rainfall, soil and pastures were suitable for crop production virtually all the way from the Atlantic Ocean to the Great Plains. South Africa on the other hand is a dry region - 65% of the country receives less than 500 mm of rain annually - the accepted minimum for dry land farming (Fuggle and Rabie, 1983, p. 18). De Kiewiet (1965, p. 187) comments: "the absence of abundant water was often the secret of incredible acreages which the Europeans claimed ... and boundaries were often stretched simply to include some essential water supply."

As a result the scale of European migration to North America was much larger than to southern Africa as is apparent from Table 2 below (from Lamar and Thompson, 1981, p. 16):

Table 2 Number of Settlers in Indicated Areas

<u>Year</u>	<u>North America</u>	<u>Southern Africa</u>
1700	200 000	1 200
1800	4 000 000	20 000
1900	67 000 000	1 000 000

In addition the relative number of indigenous peoples encountered by pioneers in the respective areas was much lower in North America than in southern Africa (Lamar and Thompson, 1981, p. 19 and 31). There was accordingly less competition for land between the North American Indians and the Europeans than was the case with their southern African counterparts.

As a result the North American Indians were much more quickly assimilated into the European way of life or set apart in reservations. This was not the case in South Africa where the blacks, even though allocated to designated reserves, became a significant and discrete political force.

Giliomee (pers. comm. 1985) is of the view that a further fundamental difference between the two frontiers was that the southern African settler was primarily a subsistence farmer, whereas his North American counterpart was rapidly integrated into secondary phase development.

A final difference between the two regions was the role governments played in the two regions. While in North America government provided constant moral and material support to the pioneering frontiersmen, in southern Africa the settlers were continuously at variance with the governing authorities.

Due to these various differences the southern African settler developed an independent spirit, a resistance to government interference and an individualistic attitude to land. It is postulated that these historical factors have permeated through to the present day and have been compounded by the growing aspirations of the majority black population (designated to less than a quarter of the land area) for a greater share of South African land. A combination of all these factors has led to the establishment of a private land tradition that has proved highly resistant to the imposition of public land use controls.

While these attitudes to ownership rights developed relatively late, they married easily with the legal institutions and principles inherited from Roman Law which were also inherently individualistic. The legal aspects of ownership rights is examined in 2.3 below.

It is submitted that incentives and compensatory mechanisms can help accommodate these individualistic notions while ameliorating some environmental concerns. However any such suggestions must be considered in the context of South Africa's land ownership law and its attempts to accomplish environmental goals.

2.3 The Legal Nature of Ownership (Dominum)

2.3.1 Introduction

The legal nature of ownership (Dominum) can be seen in the context of two diametrically opposing claims to private property. On the one hand the Roman Law regarded ownership as bestowing on the owner "plena in re potestas", that is, full power in the thing. This incorporates the dual characteristics of "totality" and "exclusiveness" in the subject matter of ownership. The "totality" of ownership refers to the owner's power to do in principle virtually what he likes with the thing owned, subject to the interests of his neighbours and the general public; the "exclusiveness" of ownership refers to the owner's power to prevent interference by others in the exercise of his ownership rights (Cowen, 1984, p. 67). This is but one example of how Roman Law concepts were tailor-made to accommodate the individualistic trends which prevailed in the eighteenth and nineteenth centuries.

On the other hand there is the state's power of eminent domain (dominium eminens) in private property which counteracts individual private rights in the object of ownership. Eminent Domain has been defined as:

"The superior right of property subsisting in a sovereignty by which private property may in certain cases be taken or its use controlled for

the public benefit without regard to the wishes of the owner."

(Blacks Law Dictionary, 1951)

Apart from this tension between public and private rights in the object of ownership, the actual concept of ownership is remarkably difficult to define. It has been remarked: "What however is the exact scope of dominium has been a controversy for centuries." (Johannesburg Municipal Council v Rand Townships Registrar 1910 TPD 1314 at 1319).

Perhaps for these reasons the Roman jurists did not attempt to formulate a precise definition of ownership (Nicholas, 1962, p. 154). Roman Dutch jurists and modern day authorities have, however, taken the plunge. Two commonly quoted definitions are that of Savigny:

"Dominium is the unrestricted and exclusive control which a person has over a thing."

(Savigny, in Lewis, 1985, p. 241)

and that of Grotius:

"Volle is den eigendom waer door iemand met de zake alles mag doen ane sijn geliefte ende t'sijnen bate dat by de wette onverboden is."

(Ownership confers on the owner of a thing the power to do with his thing as he deems fit, subject only to the limitations imposed by law.)

(Grotius, in Silberberg and Schoeman, 1983, p. 162)

Modern day authors have retained the restrictive element incorporated by Grotius. Thus Lee and Honoré define ownership as

"the most extensive private right in and to a corporeal thing. It entitles the owner to deal with the thing as he pleases within the limits allowed by law."

(Lee and Honoré, 1983, p. 260)

These definitions emphasise that ownership is not unfettered. The restrictions placed on ownership of private land in the environmental interests are outlined below (section 2.4). Before doing so however, the Roman Law concept of absolute ownership is outlined. No description of the nature of ownership would be complete without a mention of the nature of absolute ownership as this is a concept commonly misunderstood in analyses of environmental issues.

2.3.2 The 'Absolute' Nature of Ownership

The 'absolute' nature of ownership is examined from two perspectives: firstly, from the point of view of the concept of ownership and secondly from the point of view of the content of ownership.

Consternation is sometimes expressed that a landowner is "king of the castle" and that public concern with the environmental quality of that land cannot be adequately dealt with. This problem is often attributed to the

"absolute nature of ownership in South Africa". This section attempts to show that the concept of absolute ownership of property has very little to do with environmental concerns in private land. The discussion which follows outlines three different senses in which ownership is said to be absolute and concludes that none has a bearing on environmental concerns.

2.3.2.1 The Concept of Ownership

A traditional method of examining the concept of ownership is to consider ownership as consisting of a bundle of rights. The owner can deal with any one or more of these rights with a third party, for instance grant a mortgage over his property, without the loss of ownership of the object in question. In the context of the ownership of land this notion has been described as follows:

"A tract of land is looked upon as a bundle of rights or sticks, and each interest in the tract is one of the rights or sticks. Thus the leasehold interest (for example) ... is one of the rights in this whole bundle that makes up a piece of real estate ..."

(Matheny in Erasmus, 1984, p. 312)

Such a bundle of rights is the central theme in Honore's classical essay on ownership (Honore, 1961, p. 107). He outlines eleven standard incidents of ownership which are not individually necessary but are

"necessary ingredients in the sense that if the system did not admit them, and did not provide them to be united in a single person, we would conclude that we did not know the liberal concept of ownership." An example of such an incident is, for instance, the right to use and the right to fruit. From the point of view of environmental concern this theory is recommended as it stipulates the constituent element of ownership.

The bundle of rights theory results in the first sense in which the ownership of property is regarded as absolute. One of the various rights which constitute ownership is the so-called ultimate, or minimum residual right in the thing owned. It is absolute because it is possible to give up all the other standard incidents of ownership such as use, enjoyment and possession of the property and still retain the ultimate residual right of ownership. This is analogous to an air filled balloon, the air inside the balloon representing the different rights of ownership. Some, or even all the air in the balloon can be expelled but the holder still retains the balloon or the ultimate residual right of ownership. Cowen points out that this concept is linked to the idea of the "elasticity of ownership". He states that the idea that this phrase "is designed to express that no matter how many limitations are placed on ownership which is vested in a person - no matter how many subtractions there may be from the latter's ownership in the form of iura in re aliena (rights others hold in

the owner's thing) - the owners nevertheless retains the reversionary or residual right." (Cowen, 1984, p.76). In this sense ownership is absolute because there is one kind of right which no one, but the owner, can hold.

It is clear that in this sense, absolute ownership of property has no implication for environmental concern. Whether there are a dozen or three dozen rights which attach to ownership there will always be this ultimate absolute right.

Another sense in which the concept of ownership is said to be absolute is in the characteristic of exclusivity (Nicholas, 1962, p. 154 and Birks, 1985, p. 27). In Roman Law, and subsequently in South African Law, the assertion of ownership by an owner (or by a plurality of co-owners) was absolutely exclusive. It supposed that nobody else at all was the owner. In Roman Law the owner's rights were not relative, "not simply better than other competing rights, but the best, or rather the only, right, of its kind." (Nicholas, 1961, p. 154). This is in contrast to English Law where, in a dispute over title, the investigation would involve ascertaining who has the better right.

In this second sense in which ownership is said to be absolute, it is again clear that there are no implications for environmental concerns. We are dealing with a legal concept which does not have a bearing on ensuring the imposition of public interest

in private land. It is however in the third sense in which ownership is said to be absolute, namely that it is absolute from the point of view of enjoyment, that most misconceptions occur. This misconception is examined in context of the content of ownership.

2.3.2.2 The Content of Ownership

The content of ownership is concerned with the actual individual rights (and concomitant duties) which make up the bundle of rights referred to above. We can approach this negatively by asking to what extent are there restrictions on the owner's freedom to do as he pleases with his property (Birks, 1985, p.7). The definitions of ownership quoted above show that ownership is not unfettered. Even Roman Law from its inceptive stage recognized this fact. The social duty inherent in ownership was expressed in the maxim "sic utere tuo ut alienum non laedas" which literally means "use to the extent that you do not harm another".

Birks discusses the content of ownership by distinguishing four features of ownership and examining the restrictions on each:

- (1) The scope of ownership. Here Birks examines how much of the material world was susceptible to ownership under Roman Law. He concludes that while some objects were not capable of ownership, for example, the sea-shore, the general scope of ownership was very wide.

- (2) The sanctity of ownership. Here Birks examines how secure Roman owners were in their ownership rights. Insecurity in this sense can emanate from two sources: the legal system can be inefficient or the law itself may lay down that individuals enjoy their rights at the will of the community. The Roman legal system was certainly not inefficient and Birks shows that Roman owners enjoyed great security as regards interference by the state in the public interest.
- (3) The autonomy of ownership. Under this head Birks examines the extent to which Roman Law placed restrictions on an owner's freedom to do as he pleased with the thing owned. He points out that there were many restrictions, somewhat miscellaneous in character.

Most current day misconceptions about ownership, namely that it is absolute from the point of view of enjoyment occur under this head. No enjoyment of ownership can be, or ever has been, absolute in the sense that it is free from any restrictions whatever. Birks points out:

"In relation to the content, the word 'absolute' suggests that the Roman owner was free from restrictions in relation to the things which he owned, that he could do as he pleased. It implies not

only that observably his use was unrestricted but also that it was in some sense incapable of restriction. It should, however, be immediately obvious that no community could tolerate ownership literally unrestricted in its content. To take an extreme example, even a society which did not go to the length of forbidding citizens to own firearms could not allow owners to use their guns as they please."

(Birks, 1985, p. 1)

It is clear, therefore, that when ownership is described as being absolute in this sense, that of enjoyment, an error is being made.

- (4) The demands of society. Under the final head Birks considers the general character of the restrictions on Roman owners and the extent collective action is required to accumulate wealth. He concludes that the restrictions were generally for the benefit of the individual rather than the community as a whole.

As regards the content of ownership, Birks' general conclusion is that 'absolute' is not an appropriate word because Roman ownership was restricted, albeit minimally. While most of the material world could be owned, and the owner's freedom to use and alienate his

property was broadly unhampered, these were not absolute freedoms.

In the sphere of land-use contemporary common law imposes much more stringent requirements on landowners. In King v Dykes (1971(3) SA 540 RA at 545) it was said:

"The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generations."

In conclusion, one can state that as far as the concept of ownership is concerned, ownership can be described as absolute. However this does not have a bearing on areas of environmental concern. Insofar as ownership is said to be absolute as regards its content, specifically as regards the right of enjoyment, an error is being made.

2.4 Legal Control of Private Land

2.4.1 Private and Public Law Controls

Two broad areas of the law govern privately owned land: private law and public law. Private law grants individuals, particularly adjoining landowners, the right to

ensure that a landowner does not use his land in a way which harms their normal use of their land. The chief branch of private law of concern here is the Law of Neighbours. Public law on the other hand grants government the power to regulate and restrict land-use to further the general public interest. Here we are mainly concerned with Planning Law although Administrative and Criminal Law are also relevant here. This classification is merely one of convenience because as Milton points out:

"Emerging from chaos of the urban environments wrought by the Industrial Revolution, planning law explicitly confronted the consequences of the laissez-faire concept of the nature of ownership. Building on nuisance [neighbour] law's elementary concept of the obligations owed by landowners to their neighbours, planning law extrapolated the principle so as to 'comprehend all the obligations which according to the social standards of the day are regarded as due to neighbours and fellow citizens'".

(Milton, 1985, p. 275)

Public law principles, insofar as they regulate private land use, developed relatively late in western legal history as it was only the growth of the modern urbanized administrative state which saw the need for planning law and administrative law. By contrast private law controls date back to Roman Law. The needs of Roman society were such that private law, in this context, the law governing individual rights in land, predominates the writings of

early jurists (Wiechers, 1976, p. 34). This contrast reflects society's historical emphasis on individual's rights in land rather than public rights. Milton referring for instance to early South Africa points out that there was little judicial development of the law relating to limitations on the rights of owners because "vast areas of the country were not developed large sections of the population were nomadic ... [and] such large tracts [of land] were held by individuals that violations of property rights went largely unnoticed" (Milton, 1969, p. 127). It is only with the advent of the demands brought about by modern day technology and population pressure that consideration has had to be paid to public law as a means of controlling use of private land.

As a result landowners tend to resist the imposition of public law controls on their private law rights. It is submitted that compensatory principles and incentives can play a role in ameliorating this resistance. Private law and public law means of regulating private land emphasising areas of environmental concern are outlined below.

2.4.2 Private Law Provisions

There are two fundamental but contrary legal principles governing private land. On the one hand a landowner enjoys the privilege of full and unrestricted use of his land, on the other hand every owner is obliged to use his property in a way which does not injure his neighbour. The law of neighbours emanates from the Roman Law principle sic utere tuo ut alienum non Laedas which literally means use to the

extent that you do not harm another. The potential of this branch of private law for improving areas of environmental concern is considered here.

Although early Roman law recognized the need to restrict owners use of land in order not to infringe on neighbours rights, no coherent theory emerged (Milton, 1969, p. 131). Later Roman Dutch jurists contributed little to this area of the law and by comparison with English law of the time this area has been described as "fragmented, unsystematic and vague" (Joubert, 1981, p. 118). As a result South African law borrowed heavily from the English law of delict and its specific tort of nuisance to develop its law of neighbours. This would have been encouraging from an environmental perspective because the English law of nuisance in general applies to the principle of strict liability whereas in South Africa fault needs to be proved (Milton, 1969, p. 183).

A general move to "purify" the South African law from the influence of English law however culminated insofar as the English tort of nuisance is concerned, in the Appellate Division case of Regal v African Superslate (Pty) Ltd (1963 (1) SA 102 AD). The court specifically rejected the idea of a separate delict of nuisance in South African law and attempted to classify the law of neighbours under the general head of South African delictual liability, the aquilian action. This development is a set-back for environmental conservation because the aquilian action requires fault, i.e. intention or negligence, to be shown on the part of the perpetrator. Van der Merwe adopts a

sensible approach in suggesting that it ought to be recognized that the law of neighbours contains elements of both the law of delict and the law of property (1979 p. 122). In the latter case fault would not be an element of liability.

Whatever the outcome of the controversy resulting from this court decision, the major drawback from the point of view of environmental concern is that the law of neighbours and the English tort of nuisance is, in general, only available to adjoining landowners. There is no room for incorporating the public's at large interest in environmental conservation of private land. Furthermore, abuse or maltreatment by the perpetrating landowner of his own land does not per se grant any other landowner the right to interfere. Secondly, the fact that an action is only available to an adjoining or nearby landowner excludes the general public who may have a genuine interest in conserving the land in question. The basis of the law of neighbours is to only provide a remedy where there is an interference with a proprietary interest with the result that it is generally inadequate to deal with environmental concerns. Alternatives incorporating the public interest, need to be investigated.

A remedy which could potentially regulate the use of private land at common law is the abuse of rights doctrine which originated in nineteenth century France. The doctrine has potentially a wider application than neighbour law in that it attempts to stop the spiteful or unreasonable exercise of rights which causes damage to another without

any benefit to the person exercising the rights. In France the doctrine enjoys wide scope and has been rationalised as follows:

"private rights are only a privilege granted by law to permit fulfilment of the social functions of private persons. Hence ... private rights are exercised only for social purposes and not to further the personal interests of individuals."

(Devine, 1969, p. 155)

The social functions of private individuals would undoubtedly include the environmentally wise use of land in the public interest. The result is that in France objective criteria determine whether an abuse of right has occurred and the question of the state of mind of the perpetrator need not be considered.

By contrast in South African law it must be shown that the perpetrator acted with malice in that he used his property to harm his neighbour rather than for his own benefit; secondly it is probably restricted to the law of neighbours and not applicable to other branches of the law; finally it is in any event, not altogether clear whether the doctrine is part of South African law (Milton, 1969, p. 267). He suggests that there is at present only an atmosphere conducive to the acceptance of the doctrine into South African law. While the doctrine has accordingly some potential for ameliorating land use concerns, its present vague status in South African law renders it inadequate to do so.

In summary the law of neighbours cannot ameliorate public concern in private land and alternatives have to be looked to.

2.4.3 Public Law Provisions

The chief area of public law which has a bearing on private land use is planning law. In the South African context it has been said:

"While all manifestations of planning may well impinge upon the interests of owners of property none does so quite as explicitly and pervasively as the planning of the physical environment through the control and regulation of the use of land."

(Milton, 1985, p. 267)

Planning law is perceived to be a combination of neighbour law and public welfare legislation and, as such, a form of legitimate regulation of rights of ownership in land. As such planning provisions have traditionally not been conceived as involving the taking or expropriation of property rights so that in principle no compensation has been available. The role of compensation in planning law is elaborated on in Chapter Four.

With the burgeoning restrictions on the traditional rights of ownership in land these traditional attitudes will have to be re-examined. In a comprehensive review Rabie

(1985(b), p. 289) has outlined no less than thirteen types of non voluntary restrictions imposed on private land. These are: expropriation of land, suspension of rights in land, performance of actions on land by administrative authorities, recovery of rates in respect of work done on land, different types of legislative and administrative directives, directions binding successors in title, imposition of conditions binding the land, licensing and other authorization of land use covering a wide range of activities from national monuments to mining, restricting purposes for which land may be used, control of certain declared areas such as water, air pollution, fire and mountain catchment control areas, control of land subdivision and the imposition of compulsory agreements in respect of land use.

It is submitted that with this increasing assault on private rights in land, principles of compensation have to be examined afresh.

Another area of public law which has a bearing on environmental concerns is administrative law. It has been described as:

"that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organizations, or with other public authorities."

(Baxter, 1984, p. 2)

Administrative law is concerned with controlling and regulating the decisions of government bodies. Although potentially this area can play a role in regulating the environment, its chief weapon, judicial review, is severely hampered in South African law by the requirements of locus standi and the inability of the court to examine the merits of the administrative decision, only its procedural regularity. The requirement of locus standi has been considerably relaxed in other jurisdictions, particularly the United States of America (Rabie, 1976, p. 3). Similarly the rule that the court may not enquire into the merits of an administrative decision is not applicable in many jurisdictions. For instance in France the judge may "penetrate beyond the outward semblance of legality to examine the motive of the administrator" (Garner and Brown, 1973, p. 155). While these fundamental constraints remain in South African administrative law alternative methods of ameliorating environmental problems have to be looked to.

A final branch of public law which has a bearing on environmental concern is criminal law. Apart from the common law crime of malicious damage to property, the regulation of crimes against the environment is achieved largely by statute.

Criminal regulation of environmental concerns has its problems. Enforcement particularly, is difficult because crimes affecting the environment often occur in remote areas and on private land. The case of De Lange, an unreported magistrate's court case, illustrates the difficulties of proof, lack of expertise on the part of the prosecution and

inadequacy of sentences for environmental protection. The accused was charged with theft of over 25 000 protected *Protea Mblosericea* blooms and illegal harvesting of over 500 000 other protected protea species. In the end result he was convicted only of the former charge, fined R300 and given a suspended sentence (African Wildlife, 1984, p. 135). Other aspects of the difficulties which are associated with criminal law as a means of maintaining the public environmental interest are dealt with by Fuggle and Rabie (1983, pp. 43 to 47)

In conclusion it is apparent that there are inadequacies in the traditional legal tools used to control private land insofar as the protection of environmental interests is concerned. This is partially because environmental problems are a relatively new phenomenon and the legal system has only relatively recently had to confront these issues. It is submitted that incentives on compensatory mechanisms can contribute to the amelioration of this gap. However they must be examined against the background of the changing trends in ownership rights to which attention is now turned.

2.5 New Trends in Ownership Law

The concept of ownership generally has in modern times been undergoing a fundamental transformation. In some areas it has been expanding so that individuals today enjoy enhanced rights of personality, intellectual property, status and so forth. Land ownership rights have been, by contrast, diminishing largely to accommodate modern socio-economic needs and attitudes. Such

curtailments while apparently mere restrictions, are fundamental and go to the root of the concept of ownership itself (Cowen, 1984, p. 8). A policy decision has to accordingly be made to decide whether such fundamental intrusions into traditional ownership rights should in certain circumstances be compensated. Intrusions less than outright expropriation are envisaged here. If it is found that compensation should in certain circumstances be payable, satisfactory principles need to be developed to determine the circumstances in which such compensation is payable. These issues are taken up in Chapter Three and Four.

The transformation of ownership is well illustrated by the changes which have taken place to the Roman Law principle cuus est solum eius est usque ad coelum meaning he who owns the land surface is also the owner of the air above and the earth below. This was always a fundamental attribute of ownership and the basis of the traditional Roman technique of establishing boundaries vertically and not horizontally. However, both economic needs - particularly in the mining industry, and social requirements - the urgent need to provide secure and high density housing to an escalating population, have led to fundamental changes to this principle.

The transformation of the traditional concept of ownership to accommodate mining needs is reflected, firstly, by the fact that mining rights in land can be severed from ownership rights of the land. This was recognized by the courts long before it was given statutory recognition by the Deeds Registry Act, No. 47 of 1937 (Franklin and Kaplan, 1982, p. 6). Secondly, mining requirements led to the abrogation of the cuus est solum principle in that the right to mine and prospect for minerals in

private land vests in the state (Mining Rights Act, 20 of 1967 and Precious Stones Act, 73 of 1964). Thirdly the landowners common law surface rights and right of lateral support have been dramatically restricted to accommodate mining needs (Lewis, 1985, p. 246).

Socio-economic needs in the form of an urgent need for housing have also led to the abrogation of the cuius est solum principle. The Sectional Titles Act (66 of 1971) provides for the horizontal, as opposed to the traditional vertical, method of demarcating boundaries. This allows for ownership of demarcated areas which are not contiguous to the earth surface (Cowen, 1984, p. 54-57 and Cowen, 1985, p. 333).

Environmental requirements have also to a certain extent contributed to the transformation of ownership. The most far reaching South African statutory provision in this regard is the Physical Planning Act (88 of 1967) which gives the Minister concerned the power to declare Nature Areas. Such a declaration results in the use to which land is put being frozen while remaining in private ownership. Nature Areas and compensation are elaborated on in Chapter Four.

In general one can conclude that the traditional concept of ownership is obsolete and undergoing radical transformation. Cowen puts forward three cogent submissions why this is so: firstly, different attributes of ownership should be recognized in different objects of ownership to accommodate modern needs. Thus while the owner of a piece of firewood has a right to destroy it, the owner of land should not necessarily enjoy this right. Secondly, the traditional form of ownership is

incompatible with the fragmentation of ownership which is a necessity of modern times. This is illustrated by Sectional Title legislation and the need to recognize the multiple use concept in land. Thirdly, the ownership concept is unsatisfactory from a jurisprudential point of view because it has as its basis the idea that ownership is the most extensive power of control and use which an owner can enjoy in a thing and then attempts to qualify that power (Cowen, 1984, pp. 70-80). It has been shown in 2.3 above that this is a misconception.

The transformation of ownership is not a peculiarly South African phenomenon. For example, American writers such as Caldwell have argued that the underlying philosophic and conceptual basis of the traditional form of ownership in America is similarly inadequate to meet the demands of that modern society. He states that the conventional concept of ownership in land is:

"detrimental to rational land use, obstructive to the development of related environmental policies, and deceptive to those innocent individuals who would trust it for protection."

(Caldwell, 1975, p. 408)

He argues that a redefinition of the rights flowing to an individual from land is needed and that attention should be paid to rights of use and not the traditional rights of ownership. Although these comments are made in an American context they are equally relevant in South Africa.

It is submitted that the question of compensation and incentives is intrinsically linked to the current conception of ownership

and must be viewed against its dynamic nature. The process of diminishing the traditional rights of ownership is resulting in a corresponding increasing need to develop satisfactory principles of compensation. Compensation for inroads into private rights in land in the environmental interest is examined in the next two chapters.

2.6 Conclusion

This chapter has shown how historical and physical circumstances in South Africa have contributed to a highly individualistic attitude to land. It has been shown that the absolute ownership of property has not per se militated against the accomplishment of a land ethic in South Africa. However the traditional legal methods of controlling private land do not incorporate satisfactory legal means to ensure the incorporation of environmental interests in private land.

It is submitted that incentives and compensatory mechanisms can play a role in alleviating this limitation in the legal system. This is especially so in the light of modern trends in ownership law. Chapters Four and Five deal with compensation as a means of achieving environmental objectives in private land and Chapters Five and Six deal with incentives.

CHAPTER THREE: COMPENSATION FOR INROADS INTO
RIGHTS IN LAND IN SOME FOREIGN JURISDICTIONS

"A stage is reached at which ... a restriction on landowner's use of his land amount[s] to a taking away from him of a proprietary interest in the land. When this point has been reached the landowner will claim to be fairly entitled to compensation."

(The Expert Committee on Compensation
and Betterment, 1942, para 35)

3.1 Introduction

Chapter Two referred to the ever escalating trend of limiting the traditional uses of private property for environmental conservation. With increasing sophistication of these restrictions and mounting pressure on land use, satisfactory principles are needed for laying down when a landowner, who is legally denied the unfettered use of his property, would qualify for compensation. Such principles would counter some of the traditionally held individualistic rights which accompany ownership of land. They would also pave the way for the political acceptability of environmental (or other) legislation. Foreign legal systems have devoted much effort towards developing such principles. However they have not enjoyed much attention from the South African legislature. This is an omission because some statutory provisions do exist in South Africa which entitle a landowner to compensation when he is not deprived of his property but only of some lesser right (see Chapter 4).

While the formulation of satisfactory principles of compensation is of interest to environmental conservation, their possible application is much wider. Planning law, in particular, faces the complexity of regulation and compensation and this is touched on in this and the following chapter. The wide ranging character of the compensation principle means that it can be applied to both the urban and rural environments, but this report is primarily concerned with the rural environment.

In the White Paper preceding the enactment of the Environmental Conservation Act (No 100 Of 1982) - a document which despite many omissions, is regarded as the closest the Government has come to laying down a national environmental policy (Fuggle and Rabie 1983, p. 37) - reference was made to the need to strive towards a golden mean between conservation and development (WPO. 1980). The compensation principle could play a central role in achieving this.

3.2 Economic Aspects of Compensation as Applied to Land Use Planning

Economic theory has a straightforward justification for the compensation principle: if the costs and benefits resulting from a particular policy are unequal and if the benefits exceed the cost, then it should be possible for those who benefit to compensate fully those who bear the cost and still have an overall net gain (Savage et al 1974, p.73). Compensation is thus theoretically justifiable because the benefits of environmental improvement are widely distributed in society but the costs are invariably concentrated on individuals or small groups. This is a classical example of what economists call

Pareto improvement, described as a change in economic organization that makes one or more members of society better off without making anyone worse off (Mishan, 1972, p. 14).

In reality two fundamental problems arise: firstly as authorities have limited budgets, satisfactory planning may be inhibited if restrictions carry with them too liberal rights of compensation; secondly, once the idea of buying off political opposition with the public purse becomes implanted in peoples' minds, it is difficult to limit actual payments.

As regards the first problem, Rabie has pointed out that in the conservation sphere:

"The general principle that compensation is not payable to landowners on account of the fact that their land use has been restricted ... can operate for the benefit of conservation, since it may bring about the restriction of land use in favour of conservation, without the state in principle being subject to a claim for compensation on the part of the landowner."

(Fuggle and Rabie 1983, p. 477)

However this approach may be double edged. American land-use controls in the 1960's were similarly not compensatable and a British expert commented:

"Such a situation cuts both ways: it may facilitate control since its exercise is not a charge on public funds, but it may also stultify control by imposing too heavy a penalty on private property. There comes a

point in the exercise of control where the community is reluctant to require that the cost of public benefit should be borne entirely by private loss...".

(Delafons 1969, p. 110)

It is pertinent to compare the views of two comprehensive British reports on planning law on this point. The Report of the Expert Committee on Compensation and Betterment 1942 (the 'Uthwatt Report') stated that: "the ideal is that the best plans should be prepared unhampered by financial considerations." While many of the recommendations of this report still apply in Britain today, some of its aspects were subject to another investigation in 1972 (Development and Compensation, 1972). Here the contrary view was expressed. This Commission thought that by imposing greater financial burdens on public authorities in respect of intrusive development, better planned developments would result (Farrier and McAuslan, 1975, p. 48).

It has been pointed out that if Government has the power to declare a person's land a conservation area without any obligation to pay compensation, it should by the same token be able to build a highway through a conservation area without similarly paying anything (Large, 1973, p. 1051). A pertinent question is whether environmentalists would be happier with a property law where the latter-type action is sanctioned. If not, perhaps the real problem of land-use control lies not in antiquated property concepts but in the Government's willingness to spend money on highways rather than on preserving the environment.

This chapter attempts to show that circumstances do exist where the compensation principle is preferable to restrictive control in achieving environmental ends. While the importance of the latter is not denied it is felt that the compensation principle should not be disregarded on the grounds that it may inhibit planning.

3.3 Jurisprudential Aspects of the Compensation Problem

The problem of deciding the circumstances in which compensation is payable is a matter of public policy. We are dealing with a question of choice which goes beyond an analysis of legal principles and rules. Most legal writing in this field has been concerned with finding a set of rational principles as a basis for paying compensation. However the compensation question evokes much wider issues. It has been pointed out that:

"[it] involves the redistribution of wealth and economic opportunity, it is an important part of the management of social change and has an inherent potential for influencing the course of future social change."

(Samuels, 1974, p. 113)

Chapter Two illustrates how emphasis has traditionally been placed on the protection of individual rights in land. Public concern in private land, particularly environmental consideration, is a relatively new phenomenon. The compensation principle is a potential tool for imposing modern values on traditional legal rules which no longer reflect all the needs of modern society.

However the success of the compensation principle is dependant on the political will to effect social change. While the law can provide a certain amount of coercion as well as the mechanics for implementing it, its ultimate success depends on a departure from traditonal invidualistic attitudes to land.

Society is confronted with the choice of which rights to protect. Rights which are protected are in reality rights only because they are given legal status as such. As a result society must choose who will have what rights and who will be subjected to the rights of others. Viewed in this light the compensation principle could be ubiquitous because ultimately every exercise of a right by X will in some way affect Y. This general problem of choice has been referred to as the problem of "selective perception" by Samuels. He points out that:

"the general phenomenon pervading the entire compensation problem is the differential perception of analytically equivalent situations capable of different contradictory identifications depending upon perspective."

(Samuels and Mercurio 1975, p. 216)

The relative nature of rights and resultant choices offered to decisionmakers has prompted Michelman to point out that it is necessary "to form a clear understanding of just what purposes society might be pursuing when it decrees that compensation payments shall sometimes be made" (Michelman 1967, p. 1171).

One reason for ever-increasing environmental degradation is that traditional legal rights in land cannot sustain the requirements and pressures of a modern industrial and populated age. The compensation principle could be used for the purpose of redressing some of the public needs in the use of private land.

3.4 The Taking versus Regulation Dichotomy

3.4.1 The Problem

The problem of choice referred to above is reflected in the legal systems of different countries in what may be termed the "taking-regulation dichotomy". Although this terminology is strictly applicable to the law of the United States of America, where this problem has been subject to much judicial scrutiny and debate, it is used here in a wider sense as applying to other legal systems as well.

Generally two broad categories of land-use control measures are at the disposal of governments: on the one hand there is a the so-called 'police power' which recognizes the government's right to enact control measures 'to promote health, safety, morals and the general welfare' of the populace (Greenewald, 1971, p. 12); on the other hand there is the power of eminent domain (dominium eminens) which recognizes that the state, as ultimate guardian of its territory and subjects, has the power to deprive its subjects of their property where this is in the public interest. The importance of the distinction lies in the fact that generally the former being a regulation does not carry a right of compensation; however the latter amounts

to a taking or expropriation and usually enjoys a guarantee to compensation.

Other legal systems, including South Africa's, have similar conceptual divisions even though they are not based on a constitution. Thus South Africa's expropriation law (eminent domain) has traditionally provided a statutory guarantee to compensation where a person is deprived of the ownership of his property. Restrictions on land do not as a rule carry with them a right to compensation.

With the increasing socio-economic sophistication of modern society and resultant plethora of legal deviations from the traditional norm, the line between the police power and eminent domain has become increasingly difficult to identify. This is evident even in South African environmental legislation where provisions provide for compensation where there has been the exercise of the so called police power. For example, the Environment Conservation Act (No 100 of 1982) provides for compensation where land has been declared a Nature Area if certain conditions are met. These are elaborated on in 4.3.3 below.

The law in the United States of America, Germany and England is reviewed here to establish whether a satisfactory and practicable line can indeed be drawn between the power of taking and that of regulation.

3.4.2 The United States of America

The fifth amendment of the constitution of the United States of America states:

"No person shall ... be deprived of ... property without due process of law nor shall private property be taken for public use without just compensation ..."

Despite this specific provision for compensation, American law has not generally incorporated compensatory provisions in its planning law to achieve environmental objectives but has rather relied on the police power in this field (Delafons, 1969, p. 111). As a result of the above taking provision however, landowners have been able to bring so called "inverse condemnation proceedings" alleging that a regulation is so restrictive that it amounts to a taking. Here the landowner and not the alleged expropriator (the governmental authority) initiates proceedings, hence the term inverse condemnation proceedings. This procedure can have an important bearing on environmental legislation and is referred to again below.

It has been left to the courts to determine what constitutes a taking and judicial grappling with this question goes back to the early part of the century. In 1915, in the celebrated case of Hadacheck v Sebastian (239 US 394 1915) the Supreme Court upheld a zoning ordinance as a valid exercise of police power and no compensation was accordingly payable. Hadacheck had bought certain land with a high

clay content and had been running a lucrative brick-making operation for some time. Because of the clay deposits, it was worth \$800 000 if used for this purpose but only \$60 000 if used for other purposes. The city expanded and the local authority legislated against brick manufacture in the area. Hadacheck appealed but the court upheld the ordinance as a valid exercise of the police power despite his pre-existing use of the land and the drastic reduction in its value. The court upheld the local authorities' assertion that the ordinance served a valid public health purpose as the area had become residential.

The decision was shortlived because a completely opposite view was taken a short while later in Pennsylvania Coal Co v Mahon (260 US 393 (1922)). A coal company had bought the mineral rights in certain land and had the surface owner's agreement that he would assume all risk of damage to the surface. Subsequently the state authority forbade the mining of coal in a way which could cause subsidence of any dwelling structure. As the coal company was effectively precluded from mining, it asserted that this amounted to a taking of property without just compensation. The Supreme Court agreed. Justice Holmes held:

"Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have limits ..." (p. 413).

He then implied that the test to determine whether a given law is a valid regulation or an unconstitutional taking hinges to a great extent on the degree of diminution of value of the affected land. Emphasis was also placed on the pre-existing use of the land and this was an important consideration in deciding in favour of the coal company.

While the early cases dealing with the extent of the state's police power were decided in the context of use zoning, the environmental decade of the 1960's saw the same problem in the context of environmental related legislation. Thus for example the issue in Morris County Land Improvement Company v Township of Parsipany Troy Hills (193 A2d 232 (1963)) was the preservation of a wetland. The plaintiff wanted to fill in his wetland for intensive commercial development. The local authority had however declared the area 'a meadowlands' which gave it a preservation status.

The New Jersey Supreme Court held that the regulation had the practical effect of appropriating private property and that compensation was accordingly payable.

A similar decision was made in State v Johnson (265 A2d 711 (1970)) which concerned environmental preservation more directly. The State of Maine, concerned about the destruction of its coastal salt marshes by oil companies and holiday home development, passed a wetland act which prohibited the filling in or dredging of a wetland without a permit. The defendant applied for but was refused a permit. It was again held that this amounted to a taking

and should be compensated even though the court recognized that marsh preservation was a laudable purpose.

Environmentalists regard these two decisions as being detrimental to the environmental interest because situations should be recognized where environmental considerations prevail and no compensation should be payable. However here the environmental cause was not promoted because in determining whether a taking had occurred the court looked solely at the economic harm caused to the defendant's land (Large 1973, p. 1063). No cognisance was taken of the interests of the public or even of the effect the court's decision would have on adjoining owner's lands. The obvious difficulty facing the court then was that no easy method exists for quantifying the environmental benefit which would have resulted from a contrary decision. However environmental evaluation techniques have developed apace and today methods do exist whereby environmental impacts can be quantified (for example see Fuggle & Rabie, 1983, p. 483).

Environmental considerations were however taken into account by the court in Just v Marinette County (56 Wis 2d7 (1970)). Just, a landowner, was similarly prevented from filling in a swampland and thus establishing a township. In this case, however, the court rejected the landowner's claim that the refusal amounted to a taking. The court held that the value of the land in its natural state ought to be considered. The traditional notion that value based on changing the land's character should be taken into account

was rejected. The real significance of the decision lies in the statement:

"no longer is an alleged greater economic value for human demand going to be allowed always to prevail in the law over the inherent worth of naturally existing renewing systems within the environment."

(Murphy 1977, p. 271)

While the American cases do not provide a clearcut formula distinguishing regulation from taking - in one it was said "There is no set formula to determine where regulation ends and taking begins," (Goldblatt v Town of Hamstead 369 US 590, 1962) - they do show how the application of the compensation principle has led to a marked shift from an emphasis on individual economic interests to a recognition of the intrinsic value of an ecological system.

More specifically, the American courts have shifted from the narrow focus on individual economic harm, for example the degree of diminution in the land's value, to the broader public interest of conserving unique ecosystems. They have done this by recognizing that in the case of conserving certain ecosystems no compensation should be payable.

The compensation principle is accordingly used to achieve public ends at private expense.

3.4.3 German Law

The taking-regulation dichotomy in Germany flows directly from the "social obligation" inherent in German property law and is incorporated in its constitution. The right to compensation has been entrenched in the so-called principle of sacrifice which goes back to the eighteenth century. The Allgemeines Landrecht (The Prussian Code) of 1794 stated: "The government is obliged to pay compensation to those who have been forced to sacrifice their rights and privileges for the benefit of the community." This principle has been retained in article 14 of the present day German constitution with some modification. Article 14(2) in juxtaposition to Article 14(3) of the constitution is the source of the taking-regulation dichotomy in German Law.

Article 14(2) reads: "Property implies duties. Its use shall at the same time serve the benefit of the community." and Article 14(3) reads: "Expropriation is admissible only for the benefit of the community ... compensation is to be assessed with due consideration to the interests of the community and the persons affected ... " Expropriation is not read literally as the acquisition of title rather "whenever a public act infringes upon property rights, it is necessary to decide whether such act is a consequence of the general source obligation or whether it constitutes an act of expropriation" (Kimminich, 1975, p. 191).

As has been the case in the United States of America, it has been left to the courts to determine whether or not government action constitutes an expropriation or regulation

in each particular case. The German courts have developed two tests in this regard. Firstly, there is the "individual sacrifice" test. According to this test a government action constitutes an expropriation if it is an encroachment upon property rights of individuals or groups who are burdened with a special sacrifice for the benefit of the community. When a regulation affects all owners uniformly, there is little justification for compensation. In contrast expropriation pre-supposes an individual act directed against individuals or a clearly defined group of individuals. This test has had to be refined to take into consideration the notion of the "situational commitment" of property, for example it may be situated in a uniquely sensitive ecological area. In such a case there may be no entitlement to compensation even though the individual may have to make a sacrifice for the benefit of the whole community. Here the notion of "potential social obligation" applies. This states that "if, upon a comprehensive examination of all factors, it is shown that the owner must have been aware, even before the existence of the regulation, that there would be a conflict with the public interest if he exercised unfettered his usual property rights" there is no obligation to pay compensation. In such a case it is argued that the true cause of the sacrifice results from the situation of the property and not due to a newly arisen public need (Dolzer 1976, p.22).

The application of this doctrine in the environmental sphere is illustrated in the renowned "dome of beech trees", case (BGHDVBI, 1957, 861). A landowner was prevented from felling a grove of beech trees as the trees had been

proclaimed a natural protection area. He claimed that this prohibition amounted to a taking and brought an application for compensation. The court applied the doctrine of "situational commitment" and held that this was not a case where an individual had to bear an individual sacrifice for the community. It was found that the natural location of this particular land in the context of the general landscape imposed a social obligation on the landowner. No compensation was accordingly payable.

This case resembles the court's attitude in the American case Just v Marinette County (seen above) where the court paid attention to the inherent ecological worth of the property in determining whether compensation ought to be payable.

The second test developed by the German courts is that of "the intensity of the regulation". The courts have developed a theory of "tolerable sacrifice" whereby the weight and intensity of a government encroachment is considered (Kimminich, 1975, p. 193). It may be questioned as to how much further this test goes towards solving the taking-regulation dichotomy and not merely re-stating it. It seems that ultimately the courts have to make a policy decision in this regard. Recently, for example, the political climate in Germany has been such that there has been a leaning towards socialism with the result that the courts have resisted compensation for restrictions on land-use in order to diminish the value of private property (Kimminich, 1975, p. 193). This is an example of the selective perception referred to in 3.3 above.

The features which emerge from German law and which have relevance for South Africa are:

- while great reliance is placed on the police power to achieve environmental objectives, there are circumstances laid down by the constitution and courts which entitle the landowner to compensation.
- the principle of individual sacrifice read with the notion of the "situational commitment" of property are two criteria used in Germany which could be borrowed and incorporated into local legislation. They have been used to exclude the payment of compensation in certain special cases.

3.4.4 English Law

English law is in one sense similar to South African law in that there is no constitutional or common law right to compensation as there is in Germany or the United States of America. In O D Cars Ltd v Belfast Corporation 1960 (1) All ER 65, the House of Lords rejected the argument that there existed a fundamental common law right to compensation, when the question was raised in the context of the Northern Ireland constitution and its planning legislation. The court specifically rejected the contention that a local authority's refusal to grant a landowner approval to undertake a development constituted a taking. It was held that this amounted to a valid

regulation and no compensation was payable. English law is accordingly similar to South African law in the sense that no right to compensation exists unless specifically provided for by statute. As a result the taking-regulation dichotomy is not a central problem in either of these legal systems.

In another sense English law is very different from South African law in that it has had a series of national planning acts since the turn of the century. These reflect national planning policy but are administered at local authority level. Although they deal with general planning issues they also contain specific environmental provisions, for example 'the conservation and enhancement of both the natural and built environment' (Halsbury's Laws of England, 1984, Vol. 46 para 1).

The chief act under consideration here is the Town and Country Planning Act of 1971 which replaced, but contains many of the ideals and provisions of the well-known 1947 act of the same name. Also relevant is the Land Compensation Act of 1973.

The question of compensation is not approached by examining the extent of restrictions imposed on a landowner but from a much wider perspective of both increases and decreases in land values as a result of government planning action. The nub of the system is that the state recovers "betterment" from the landowner and pays compensation for "worsenment" of the landowner's position.

"Betterment" occurs whenever there is "any increase in the value of land ... arising from central or local government action, whether positive, for example the execution of public works or negative, for example the imposition of restrictions on other land." (The Expert Committee on Compensation and Betterment, 1942, para. 260).

"Worsenment" is the other side of the coin. Here the state pays compensation to those persons whose land has not been acquired but whose land value has been depreciated as the result of some development undertaken by a planning agency, for example the construction of an airport (Garner, 1975, p. 7).

The current position is that betterment is recovered when a landowner is, say, granted development permission but no compensation is paid if such development right is refused. This was not always the case. Prior to 1947 the idea was that compensation should also be paid where development permission was refused. This system did not work well in practice and the whole issue was subjected to an extensive commission of enquiry - The Expert Committee on Compensation and Betterment, 1942 (the "Uthwatt Commission"). The Commission summarised its findings on compensation in five propositions:

- "1. Ownership of land does not carry with it an unqualified right of user.
2. Therefore restrictions based on the duties of neighbourliness may be imposed without involving

the conception that the landowner is being deprived of any property or interest.

3. Therefore such restriction can be imposed without liability to pay compensation.
4. But the point may be reached when the restrictions imposed extend beyond the obligations of neighbourliness.
5. At this stage the restrictions become equivalent to an expropriation of a proprietary right or interest and therefore should carry a right to compensation as such."

(The Report of the Expert Committee on
Compensation and Betterment, 1942, para. 29)

Unfortunately the report did not offer any guidance to determine when the circumstances outlined in 4 are reached.

The Report then went on to make the far reaching recommendation that planning should be comprehensively dealt with by the nationalisation of all development rights in land. This recommendation was implemented in the 1947 Town and Country Planning act which set up a central fund of 300 million pounds sterling to pay compensation to landowners who had to forfeit their development rights. While some modifications have been made the basic philosophy of this act still prevails in England today. Betterment is recovered in the form of a Development Land Tax and no

compensation is, in general, paid for the refusal of development permission.

However the 1971 Town and Country Planning Act ("the Act") does provide compensation and other relief in certain limited circumstances:

- where land has "become incapable of reasonably beneficial use" as a result of a planning decision or regulation proceedings can be instituted for the compulsory acquisition of such land by the local authority (Section 181). This is akin to the inverse condemnation procedure in the United States of America outlined in 3.4.2 above.

- where development is proposed in respect of "listed buildings" and is refused or conditions are imposed with regard to their preservation, rehabilitation or restoration in terms of the Act, compensation may be payable (Section 171). A "listed building" refers to lists of buildings compiled by the Secretary of State which are of special historic or architectural interest.

- compensation may also be payable in respect of Tree Preservation Orders which may be made by a local planning authority. Such an authority, may, in terms of Section 60, prevent the felling and mutilation of trees and woodland and secure replanting where appropriate. Section 124

provides for compensation in respect of the damage or expenditure caused or incurred as a result of such order.

- regulations made under the Act provide for the prohibition of, or imposition of conditions in respect of, outdoor advertising. In such a case compensation may be payable if damage is suffered which is directly attributable to the revocation or modification of consent to advertise. (Town and Country Planning Act, Control of Advertising Regulations, 1969, reg. 2.5).

Finally English law contains two further broad statutory circumstances where compensation may be payable to a landowner although no land has been acquired from him:

- where statutorily authorized works are carried out on an adjoining land (Compulsory Purchase Act, 1965, Section 10) and,
- where land depreciates in value as a result of the use of public works on adjoining land (Land Compensation Act, 1973, Section 1). Such depreciation must be the result of physical factors such as noise, vibration, smell, smoke, artificial lighting or discharge of waste. This is essentially an extension of the common law right to prevent a nuisance being carried on on adjoining land. In such a case compensation

is limited to cases of direct damage caused by the use of works and to cases where damage has been suffered as a result of rights attached to the ownership of an interest in land (Widdicombe and Moore, 1975, p. 37). These authors point out that the "mere imposition of a regulation or a police power by public authorities does not of itself give rise to compensation."

In conclusion one can summarise the English position regarding compensation as follows: Attempts have been made historically to have a general right to compensation when a landowner was adversely affected by a planning decision. The idea was that such compensation would be financed by charges on benefits accruing to a landowner as a result of planning decisions but this did not succeed in practice. No compensation is now paid to landowners adversely affected by a planning decision but compensation is payable in certain specific and narrowly defined areas of environmental concern.

Overall however, English law on the compensation principle tends to be complex and confusing. It seems to have evolved in an ad hoc fashion to meet the socio-political needs of that country and does not have much to offer South African law.

3.5 Conclusions

3.5.1 All three legal systems reviewed recognize that circumstances do exist where landowners whose rights are

curtailed for purposes of achieving environmental objectives ought to be compensated. This follows from the generally recognized fact that while individuals may have to render sacrifices for the benefit of the community at large, a point is reached where the sacrifice is too great and compensation is payable.

3.5.2 Situations have however been recognized by all three legal systems which acknowledge that compensation should not in certain special environmental circumstances be payable.

3.5.3 No clearly evident principle emerges demarcating the line between a compensatable taking and a non-compensatable regulation. However certain guidelines in this regard can be extrapolated:

3.5.3.1 The economic harm suffered by the landowner must not be viewed in isolation but in the context of the general public need for the protection of the environment.

3.5.3.2 The German, individual sacrifice test coupled with their doctrine of "potential social obligation" is useful and could conceivably be grafted into a South African environmental statute.

3.5.4 The inverse condemnation procedure as used in the United States of America is a useful safety valve to appease those landowners not satisfied with an administrative decision.

3.5.5 It would be preferable to incorporate such guidelines in a statute rather than leave the courts to formulate distinctions between compensatable and non-compensatable curtailments on individual's property rights. Baxter has said:

" ... the development of an efficient and equitable system of public compensation for the harmful effects of administrative action is not a role to which the courts are easily suited ... "

(1984, p. 641)

3.5.6 All the legal systems reviewed have shown a historical tendency towards recognizing the inherent worth of natural systems and have developed their compensation law accordingly.

CHAPTER FOUR: COMPENSATION FOR INROADS INTO
RIGHTS IN LAND IN SOUTH AFRICAN LAW

"Additional methods of compensation are necessary [in South Africa], not only in respect of faultless unlawful administrative action, but also insofar as lawful action is concerned."

(Baxter, 1984, p. 641)

4.1 Introduction

This chapter sets out how the compensation principle is utilized, and how it could be improved on, in South African environmental and related legislation to achieve environmental goals.

With the increasing plethora of restrictions on privately owned land, it is imperative that attention be paid to the development of the compensation principle. For example, recently published draft regulations propose to regulate all activity (as defined) in the 500 m wide strip which adjoins and runs parallel to, the high water mark (Government Gazette, No. 10041, 20 Dec 1985). Its purpose is to grant the Department of Environment Affairs power to ensure that development and other activity in the coastal zone is carried out in accordance with certain stipulated guidelines. These guidelines aim to ensure that development is undertaken with due consideration to its environmental affects and that it is carried out in accordance with an overall planning framework for the coastal zone. Parts of the coastal zone are ecologically sensitive and South Africans generally feel a certain public entitlement to the coastal zone although it may be privately owned.

The proposed imposition of these legitimate public interests on privately owned land has predictably been met with vociferous opposition by developers and private landowners (Financial Mail, 17 January 1986). It is submitted that without facilities for compensation in certain defined and limited circumstances, regulations such as these will not be fully effective. Environmental interests will only be fully served once there is provision for compensation to supplement the traditional mechanisms of outright expropriation and regulation.

4.2 Expropriation, Restrictions and Compensation

In contrast to the countries reviewed in Chapter Three, South African common law does not grant a landowner an inherent right to compensation for the denial of, or restrictions on, the use to which he puts his property. Even outright expropriation of land does not at common law necessarily result in an automatic right to compensation. In practice, however, the statutory instrument authorizing expropriation will invariably include a compensatory provision. But there is nothing to prevent parliament, either directly, or via delegated provincial legislation, from granting a government agency the power to expropriate without paying any compensation whatsoever (Gildenhuis, 1976, p. 6).

The courts have however tended to interpret this rule as restrictively as possible in favour of the landowner. In Belinco (Pty) Ltd v Bellville Municipality (1970 (4) SA 589 AD) the Appellate Division pointed out that "it is a settled rule of interpretation that a legislative intention to authorize

expropriation without compensation will not be imputed in the absence of express words or plain implication." (at page 597).

Interestingly the Roman Dutch writers suggested that there is a common law rule to the effect that the State is entitled to expropriate property only if reasonable compensation is paid (Gildenhuis, 1976, p. 41). This line was not followed in South African law, these suggestions having been dispelled by the Appellate Division. In Joyce v McGregor (1946 AD 658) Justice Schreiner held:

"... the passages in the Roman Dutch writers which say that expropriation can only take place against reasonable compensation ... appear to me to be irrelevant to the construction of our modern statutes."

(at page 671)

On the other side of the coin the State may not expropriate without being specifically authorized to do so by statute (Gildenhuis, 1976, p. 7). Schreiner has also pointed out: "... in South Africa today all rights of expropriation must rest upon a legislative foundation" (Joyce v McGregor, 1946 AD 658 at page 671).

As a result of these two general rules the argument is sometimes raised that no expropriation could have been intended by the legislature if compensation is not provided for (Belinco (Pty) Ltd v Bellville Municipality 1970 (4) SA 589, and Belletuin (Pty) Ltd v Cape Town Municipality 1978 (1) SA 346.

The point is that expropriation law states that compensation is not payable without specific statutory authority: lesser inroads into ownership rights, such as the imposition of restrictions, will certainly not entitle the landowner to any compensation at common law. Such compensation must be specifically provided for by statute.

Common sense dictates that there should be a facility which falls somewhere between the two traditional methods of achieving environmental land-use objectives, namely, its outright acquisition and the imposition of restrictions on it. Although, as seen in Chapter 3, it is not possible to lay down clear-cut criteria stipulating which inroads should be compensated and which should be borne by the landowner. Ultimately the decision as to which inroads into property rights to compensate is a question of policy and could be incorporated into a national strategy for the conservation of private land in South Africa. Such a strategy could identify the whole spectrum of conservation needs in land: that which should be acquired, restricted and compensated, and that land which should be simply restricted in use. Thereafter it could be given statutory recognition.

4.3 Compensation in Environmental Statutory Provisions

4.3.1 The Forest Act (No 122 of 1984)

Section 13 of the Forest Act is a typical example of an environmentally motivated restriction in that it prohibits a landowner from damaging or destroying declared protected trees on his land unless he obtains written consent to do so. Provision is made for conditions to be laid down by

the authorities in this regard. Section 14(1) entitles a landowner to claim compensation in respect of the "patrimonial loss" suffered as a result of the refusal of such consent on the imposition of conditions in this regard. The meaning of "patrimonial loss" is taken up in 4.3.4 below.

Section 14(1) is pertinent because it is probably the first environmentally oriented statutory provision which provides for something akin to the "inverse condemnation" procedure used in the United States of America (referred to in Chapter Three). The section provides that if a landowner can satisfy the Director-General of Environment Affairs that the imposition of conditions in terms of section 13 will result in "substantial interference with the beneficial occupation of his land" or "the rendering of a substantial part thereof unavailable for the purpose for which it was being used beforehand", he shall cause the land to be expropriated, thereby paying out the landowner. This provision implicitly recognizes that statutory restrictions may go so far as to effectively deny a landowner the reasonable use of his property and be tantamount to expropriation. More use of this procedure could be made in other environmental provisions as it acts as a release valve whereby a landowner can give vent to his frustration where he feels he has been over-restricted.

Part VII of this act deals with the National Hiking Way System which often runs across private land. To this extent it can also be regarded as an intrusion into private landowners' rights of ownership. Interestingly however no

provision is made for compensation, although patrimonial loss (described below) could conceivably be suffered. Hiking Way Systems are established with the voluntary agreement of the landowners concerned. They tend to be proud to be associated with it and do not expect any compensation (Van Rensburg, 1985, pers. comm.). Provision is however made for indemnification of the landowner where he suffers damage as a result of a hiker's action, for example, a fire caused by a hiker (section 39 (2)(c)).

This illustrates the delicate line between compensatory and non-compensatory provisions and that environmental objectives do not necessarily depend on the existence of financial inducement for their implementation.

4.3.2 The Mountain Catchment Areas Act (No 63 of 1970)

Specific statutory provision for compensation for restrictions imposed on a land-owner is also statutorily provided for in the Mountain Catchment Areas Act. In terms of section 2 the Minister of Agriculture and Water Affairs may declare a specific area of private land to be a Mountain Catchment Area and may in terms of section 4 issue specific directions in this regard.

Section 4(1) provides that:

"If in terms of a direction limitations are placed on the purposes for which land may be used, the owner or occupier of such land shall be paid such compensation in respect of actual patrimonial loss

suffered by him as may be determined by him in an agreement with the Ministers concerned."

Two criteria to qualify for a compensation emerge:

- (1) the restriction imposed must be such that it limits the purpose for which the area may be used.
- (2) the compensation is only payable in respect of the actual patrimonial loss suffered.

These two criteria are discussed in 4.3.3 and 4.3.4 below.

4.3.3 The Declaration of Nature Areas

Nature areas are declared in terms of the Physical Planning Act (No 88 of 1967) but administered in terms of the Environment Conservation Act (No 100 of 1982). The power to declare nature areas is the most far-reaching inroad into private ownership rights which can at present be made in South Africa for purposes of achieving environmental objectives.

The enabling provision is section 4(2) of the Physical Planning Act which provides that once the Minister has declared an area to be a nature area, the purpose for which it is being used at the time cannot be changed unless the landowner obtains a permit. The declaration of a nature area or the refusal of such a permit does not entitle the landowner to any compensation.

Compensation is however provided for in terms of the Environment Conservation Act in certain limited circumstances: once a nature area is declared the Minister may, but is not obliged to, appoint a management committee to advise him on the management and development of the area. Such advice may result in him issuing directives to the landowner (sections 9 and 10(1)). Compensation is only payable in two stipulated circumstances which flow directly as a result of such directives: firstly, where the landowner suffers actual patrimonial loss where limitations are imposed on the purposes for which he may use the land as a result of advice from the management committee (section 10(5)); secondly, where the landowner incurs expenses in complying with these directions he may be re-imbursed (section 10(6)).

It is anomalous that compensation is payable where limitations on the purpose for which land is used are imposed as a result of a management committee's recommendations but not where such limitations result from the declaration of a nature area under section 4(2) of the Physical Planning Act. It is conceivable that limitations flowing from the latter could be just as, or even more onerous, than the ones flowing from a management committee's advice. This anomaly appears to result from the fact that nature areas are declared in terms of the Physical Planning Act but administered by the Environment Conservation Act. When the latter act was being debated in Parliament an opposition spokesman said in this regard:

"When such an area is proclaimed, an automatic freezing of rights takes place. I thought that the power to compensate should possibly be extended so that it will be possible to compensate people who are affected by such a declaration."

(Hansard 11 June 1982, Col. 9323)

Despite this, the anomaly prevails and should be rectified by amending legislation.

Another problem is the ambiguity of the stipulation that compensation is payable whenever the "purpose" for which land may be used is limited. It is not clear whether the word "purpose" is used in a wide sense in that it refers only to a fundamental change in land use, for example, from agricultural use to commercial use or whether it also includes changes within agricultural use, say from crop to cattle farming. It is desirable that some changes also be included in this narrower sense of "purpose" for example where a landowner constructs a dam in the course of his farming activities as this would invariably result in secondary environmental impacts (Fuggle and Rabie, 1983, p. 488). The act should be amended to make it clear that such actions fall within its ambit.

A final problem concerns the meaning of "actual patrimonial loss". This is dealt with in 4.3.4 as it pertains not only to nature areas but also to the Forest Act and Mountain Catchment Areas Act as seen above.

4.3.4 The Meaning of "Patrimonial Loss"

The Environment Conservation Act and the Mountain Catchment Areas Act refer to "actual patrimonial loss" while the Forest Act refers only to "patrimonial loss". The Expropriation Act (No 63 of 1975) provides for compensation for "actual financial loss" in both legs of its two-legged formula for compensation: section 12(1)(a) providing compensation where property is expropriated and section 12(1)(b) where a right is expropriated. The corresponding Afrikaans provisions similarly distinguish between "vermoenskade" (patrimonial loss) and "geldelike verlies" (financial loss). The meaning of "patrimonial loss" should be seen in the context of these subtle distinctions to the basic compensatory formula. What did the legislature intend by these variations?

Gildenhuis is of the view that there is no difference between financial loss and patrimonial loss (1985, pers. comm.). It may be however that because "financial loss" has been subject to judicial interpretation and comment and thereby acquired an accepted meaning the legislature intended something different when it used the phrase "patrimonial loss" in later legislation. The relevant parliamentary debates do not however refer to any distinction but it is a basic rule of interpretation of statutes that one cannot rely on these when interpreting legislation.

"Financial loss" as used in the Expropriation Act means that loss which is part of the natural and reasonable consequence

of the expropriation and which is capable of measurement in money. There must be a direct causal link between the loss and the expropriation but it is not necessary for it to be capable of exact measurement (Gildenhuis 1976, p. 205 b). Potential future loss is also included under financial loss so that the loss need not have been incurred at the time the expropriation takes place (Jacobs, 1982 p.83).

In contrast to compensation for the market value of expropriated property which is objectively determined, compensation for actual financial loss is subjectively determined (Gildenhuis 1976, p. 222). It may be that by departing from the words "financial loss" in the environmental statutes, the legislature intended to impose an objective interpretation to "patrimonial loss". That is, in determining the amount of compensation, the individual circumstances of the particular landowner whose rights are restricted are not considered; rather he is compensated an amount which would be paid to a reasonable average landowner in those circumstances.

These are general speculations however, and in the absence of legislature definition, reliance must be placed on the judicial interpretation of financial loss in ascribing a meaning to "patrimonial loss". It is accordingly taken to mean that loss which is part of the natural and reasonable consequence of the restriction and which is capable of measurement in money. It would include potential future loss to the landowner which should ideally be determined by an objective body and not coloured by the landowner's subjective and perhaps exaggerated views as to what use he

could put his land. Sentimental damage, inconvenience or mental anguish are however not included in such a claim.

The legislature seems to have recognized the difficulty in interpreting patrimonial loss by providing that ultimately the amount paid shall be "determined in an agreement" between the landowners and Ministers concerned (section 10(8)), failing which appeal lies to the Supreme Court.

It is submitted that it would be more satisfactory to provide for a compensation board, say within the Department of Environment Affairs, which could apply uniform principles of compensation across the board. By providing for agreements in ad hoc situations anomalies can easily result. For example allegations of anomalies have been made in the case of compensation payments for land expropriated in the De Hoop Nature Reserve area (Cape Times, 15 Feb 1984). The idea of a Conservation Incentive and Compensation Advisory Board is pursued in 8.3.2 of Chapter eight.

4.4 Compensation in Town Planning Law

Areas of South African town planning law which provide for compensation are examined to see whether any analogies or extrapolations can be made from the urban to the rural environment, the primary focus of this report. South African town planning law has to a certain degree borrowed from the English Law of compensation and betterment, referred to in 3.4.4 above. But the local position is complicated by the fact that there is no comprehensive national planning statute as in England and town planning is by and large governed by different townships

ordinances in each of the four provinces. Furthermore the long-surviving Cape Townships Ordinance (No 15 of 1934) has recently been repealed and replaced by the Land Use Ordinance (No 5 of 1985) which was promulgated on 22 November 1985. However the former is referred to in this section.

Compensatory provisions are centered around the town planning schemes which are provided for in each of the ordinances. The typical purpose of a town planning scheme is to provide "a co-ordinated and harmonious development of the area of the local authority ... in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare..." (Cape Townships Ordinance, section 35 and Transvaal Town Planning and Townships Ordinance, No 25 of 1965, section 32). The various town planning schemes drawn up by the local authorities provide for different use zones, for example, residential, industrial and commercial use, and are subject to the administrator's approval. Compensation is payable where an amendment is made to the scheme and a landowner is adversely affected thereby. Once a scheme has been drawn up a landowner can only develop his land within the strictures laid down. The use to which he can put his land is thereby effectively controlled.

A comparison can be made here with a feature of the environmental legislation reviewed above, namely nature areas. While practically the declaration of a nature area is very different to a specific use zone in the urban environment, conceptually there is a similarity in that both tools are used to control the use to which land is put. In terms of the Physical Planning Act, once a nature area has been declared no person whose land falls within

the area may use his land "for any purpose other than the particular purpose for which it was lawfully being used immediately prior to that date" unless he has a permit (section 4(2)). The circumstances resulting in compensation payment in such circumstances have been set out above.

In the town planning arena, compensation is in theory available when property is down-zoned by a local authority as this constitutes a denial of a vested proprietary right. This means that all zoning changes which are detrimental to the landowner are in principle subject to a possible claim for compensation. In practice however, compensation is not paid (at least in the Cape and Natal) because of a technicality in the ordinances. They provide that certain of the compensatory provisions only come into operation when a Town Planning Scheme is finally approved by the Administrator and not while it is in the course of preparation. These provinces have not had their schemes finally approved by the Administrator so that they have remained in the course of preparation for decades. The resultant hardship suffered by the landowner is illustrated in the case of McCulloch v Munster (unreported) where Mrs McCulloch's property was down-zoned. She claimed compensation but after a long legal wrangle, the court held that she was not entitled to compensation for these technical reasons. Morally and ethically however it appeared that she should have been paid compensation. It is imperative that if environmental regulation is to enjoy general acceptance, compensation payments should not be denied for technical legal reasons.

If compensation payments are granted in the urban environment for changes in the zoning status of land, it is arguable that compensation payments should be made for the denial of the use to which rural land is put. Zoned areas enjoy their status from artificial and sometimes arbitrary decisions of local authorities whereas the right to put ones rural land to whatever use the owner feels expedient is deeply entrenched in historical attitudes which go back centuries.

On the other side of the compensation coin is betterment. Its very presence in the ordinances has proved unpopular and contentious (Natal Town and Regional Planning Commission, 1984). The idea is that the landowner should pay some sort of levy (also referred to as an endowment) whenever the value of land is enhanced as a result of a planning decision. A typical example would be where high density (flat) rights are approved for a single dwelling residential area. The anti-betterment lobby argues that betterment amounts to "just one more tax to be placed on the bowed and bent shoulders of an already overburdened, overtaxed society." (Natal Town and Regional Planning Commission, 1984, p. 51).

On the other hand, its protagonists, chiefly local authorities, argue that if private property owners are entitled to compensation for the down-grading of their property, they should by the same token pay some form of tax when their properties are upgraded, improving their value.

While compensation and betterment may be conceptually linked, in practise there is no need for them to be coupled as one can satisfactorily operate without the existence of the other.

Betterment is a source of revenue for local authorities but such revenue can be recovered from other sources, for example, increased rates on such improvements. The financing of compensation is therefore not dependent on the existence of betterment. The concept of betterment will not be pursued here because, apart from being a useful revenue raising device, it has limited application in the environmental field. Here the concern is invariably to conserve rather than to develop and betterment is dependent on the latter.

Certain technical legal aspects of the compensation principle as it is applied in town planning practice are worth considering however, to see what lessons can be gleaned for areas of environmental concern. Emphasis is placed on the Cape Townships Ordinance ("the Ordinance") as it is the most familiar ordinance to the writer.

Section 35 ter (1) of the recently repealed Ordinance provides that:

"In respect of every provision which is or has been prescribed by the Administrator ... in terms of section 35 bis for a local authority's scheme in the course of preparation or awaiting approval, there shall ... be compensation due by such local authority to the owner of any land of which the value is or has decreased in consequence of such provision being or having been so prescribed."

Section 35 bis in turn provides that the Administrator may "prescribe provisions for a scheme" but does not elaborate on the type of provisions which may be so prescribed. The problems and legal disputes which can arise from giving the Administrator such a vague power are illustrated in the case of Belinco (Pty) Ltd v Bellville Municipality 1970 (4) 589. The Administrator prescribed a clause in the town planning scheme which required Belinco to forfeit a strip of land to the Municipality as a pre-condition for having its development plans passed. The court held that the provision was ultra vires because no expropriation of land without compensation could be assumed unless such expropriation was clearly and unambiguously provided for in the enabling statute. An analogy in the environmental field would be that the relevant authority will only grant a landowner permission to fill in his wetland if he hands over other land to the local authority for purposes of a reserve. The lesson to be learnt for areas of environmental concern is that the courts will tend to interpret legislation depriving a landowner of his property interests, in favour of the traditional proprietary right of individual landowners.

The enabling statute should clearly and unambiguously stipulate whether compensation is payable in such cases.

The amount of compensation payable under section 35 ter is stipulated to be an amount equal to the "estimated difference" (section 35 ter (1)(b)). This formula is not defined but provision is made that the "estimated difference" shall be determined by agreement between the local authority and the landowner and shall be subject to the approval of the

Administrator. Provision is made for the matter to be submitted to a valuation court if agreement cannot be reached.

The difficulty in determining the exact amount of compensation due is similarly illustrated by section 48 of the ordinance which provides for compensation for land injuriously affected by the coming into operation of a town planning scheme. Here again provision is made for the amount of compensation to be determined by agreement, in the absence of which appeal can be made to an arbitrator.

The difficulty in determining how much compensation to pay in any given case is further illustrated by the new Cape Land Use Planning Ordinance. Section 19 provides for compensation where land sustains a "fall in value" as a result of its rezoning and section 19(2) provides for the amount of compensation to be ascertained by agreement. If agreement cannot be reached then provision is made for the dispute to be settled by an appeal committee on arbitration (section 19(4)).

This review of South African town planning law illustrates the difficulty it has in laying down clear-cut compensatory formula for inroads into land-ownership rights. It appears that ultimately the amount of compensation is determined by agreement but provision is made for appeal to an administrative tribunal where such agreement cannot be reached. Similar reliance on an administrative body to determine the need and amount of compensation is suggested in the environmental field. This is elaborated on in 8.3.2 below.

4.5 Conclusions and Recommendations

4.5.1 No inherent right to compensation exists in common law for expropriation of land, let alone for the imposition of restrictions on its use. A review of existing statutory compensatory provisions in both environmental legislation and town planning ordinances shows that compensation is available in certain defined circumstances but that there is no overall principle providing for compensation for inroads into land-ownership rights. Some problems with these provisions have been highlighted. Confusion exists for instance as to the meaning of actual patrimonial loss and limitations being imposed on the "purpose" for which land may be used. Some of these compensatory provisions seem to have been inserted as an afterthought rather than the legislature having considered all the legal ramifications of such compensatory provisions (Fuggle and Rabie, 1983, p. 486).

4.5.2 It is recommended that a general statutory provision, linked to an overall national strategy for the conservation of private land in South Africa, be enacted laying down that in principle:

4.5.2.1 compensation should be available for landowners in certain circumstances where they suffer restrictions on their land in favour of the general environmental interest,

4.5.2.2 certain special circumstances exist where the environmental interest is so great that no compensation at all should be payable.

The former is based on the German principle of sacrifice and the latter on the German principle of potential social obligation outlined in Chapter Three.

4.5.3 It is further recommended that an expert body, comprising of individuals from both the private and public sector, be appointed to determine into which category a particular situation falls. This body would view the situation from an overall national perspective, taking into account overall South African conservation needs. This body is elaborated on in Chapter Eight.

4.5.5 In those circumstances where no compensation is payable but restrictions are imposed the inverse condemnation procedure (referred to in 3.4.2) should be made available to act as a safety-valve for aggrieved landowners.

4.5.6 The Central Land Acquisition Fund, referred to in 8.3.3 below could be used to fund such compensation payments. In this way planning for the acquisition of environmentally sensitive land would be integrated with land which enjoys a conservation status but remains in private ownership.

CHAPTER FIVE: INCENTIVES - DONATIONS AND TAX RELIEF

"...there is at present no financial incentive for a landowner to set aside land for the conservation of nature or an aesthetically pleasing landscape, nor are donations or bequests to conservation, of money or land, deductible for tax purposes."

(President's Council Report, 1984(a), p. 106)

"We shall always have a need for private voluntary activity ..."

(Relly, 1982 p.3)

5.1 Introduction

In South Africa philanthropic activity can play a role in solving the most pressing problems of the country: the need for a generally accepted political dispensation and the creation of a self sustaining environment capable of supporting all its peoples. These two problems are inter-related. Old fashioned notions that conservation's business is to provide a privileged class with a haven to commune with nature must be dispelled. A new political dispensation will only be successful in the long term if it is framed within the context of a self-sustaining environment. The first objective of the world conservation strategy is: "to maintain essential ecological processes and life support systems" (International Union for the Conservation of Nature, 1980, p.1). We are concerned here with not only political but human survival.

In the United States of America making donations is big business. Its level of corporate giving has adhered closely to 1% of total net pre-tax income since the early 1950's (Koch, 1979, p. 7; Morrison, 1983, p. 101). In quantitative terms, as long ago as 1964, United States corporations reported gifts and contributions of \$729 million which represented 1/1000 of Gross National Product at the time. This proportion has not changed significantly since, and means that for every \$1000 spent by United States corporations, \$1 goes towards a public cause (Nelson, 1970, p. 1 and 18). As regards conservation, donations were a major contributor to the formation of one of the most extensive and well managed federal and state park systems in the world (Meyerson, 1984, p. 389). In addition, private conservation organizations, such as the Nature Conservancy, are funded primarily by charitable contributions and has acquired ownership of at least 60% of the 2 million acres of land it is involved in preserving (Nature Conservancy News, 1983, p. 1).

No comparable figures are available for South Africa. However, a survey of a cross-section of listed South African companies reveals that they, like their American counterparts, donate about 1% of their pre-tax income (Galombik, 1980, p. 189; Morrison, 1983, p. 22). Some of these funds are channelled specifically to private conservation organizations. An example is the South African Nature Foundation which is funded primarily by corporate membership fees and donations. It in turn makes funds available for various conservation activities and the acquisition of private land for the establishment of parks. Recently it contributed over R500 000 for the acquisition of land to establish the Karroo National Park.

No figures are available for individual as opposed to corporate giving because of the difficulty in collecting such information. However, Nelson is of the view that total individual giving is even more extensive than corporate giving because of the large amounts given to religious organizations (1970, p. 13). Whatever this figure may be, it is clear that very substantial amounts of money are made available in the United States by way of philanthropy and there is reason to believe that the position is similar in South Africa. Corporate donations are emphasised in this chapter because it is in this area that tax incentives can play the most significant role.

5.2 Corporate Social Responsibility, the Environment and Tax Incentives

In South Africa business is increasingly being asked not merely to consider but to actually budget for the social costs associated with economic progress. Demands are being made for these costs to be transferred from the public sector to the business firms which generate them (Feldberg, 1972, p. 10). The response has been positive. Research has shown that South African companies like their American counterparts, have rejected Milton Friedmann's view that "Corporations have no money to give to anyone. It belongs to their workers, their employees or their shareholders" (Smith, 1981, p. 123).

Examples of such corporate social responsibility in South Africa is the Urban Foundation, financed largely by corporate donations and the Anglo American and De Beers Chairman's Fund which makes substantial contributions to causes offering their parent companies no direct benefit, but which are seen as socially

beneficial. Corporate donations are manifestation of such broader corporate social responsibility shown by South African companies and can make a significant contribution towards achieving both political and social objectives.

A good example of a corporate financed non-profit organization which marries this corporate social responsibility with the political and environmental needs of South Africa is the Institute of Natural Resources in Natal. Its primary objective is the improvement of "the present unsatisfactory system of rural land usage in Kwa Zulu [which] is resulting in gross degradation of natural resources [although] over 40% of this region has high agricultural potential (Institute of Natural Resources, Annual Report, 1983, p. 13).

Two broad questions are accordingly considered: firstly, why should the fiscal system be used to encourage and channel donations specifically into the area of environmental concern and secondly what are the fiscal mechanisms for doing so. This is a particularly opportune time for considering these questions because the whole tax structure of South Africa is at present being reviewed by the Commission of Enquiry into the Tax Structure of the Republic of South Africa (referred to hereafter as the "Margo Commission"). A submission made to this Commission is attached to this report and marked annexure B.

5.3 The Special Case of Environmental Needs and Tax Allowances

Given the substantial amount made available by donations for the improvement of the general social welfare, why should environmental considerations particularly enjoy favourable tax

treatment? In 1977 the Urban Foundation made well motivated and forceful submissions to the Department of Inland Revenue (hereafter referred to as "the Department") for allowing donations to the Foundation to become tax deductible. The State would thereby make an indirect contribution to the much needed supply of housing on the urban fringes of major South African cities. Although commending the Foundation's activities, the application was dismissed largely on the ground that if the Department were to uphold it, a precedent for a host of other worthy applications would be set. Environmentalists need to counter such an argument in respect of their own cause.

A rationale for tax incentives in the environmental field can be extrapolated from basic economic principles justifying Government's role in the private market economy. A generally accepted reason why the Government enters the private market place is because the private market cannot supply all the goods needed by society (Wonnacott, 1982, p. 83). This is partly because not all property rights are non-attenuated (see Miltz, 1984, p. 14).

The nature of some goods is such that they are required by society at large and not individual members of it. Economists call these 'public goods' and cite as an example the provision of a defence force. Although it provides security for the whole country, an individual enterprise will not be inclined to supply such a commodity because the benefits flowing from the costs incurred by the enterprise would flow not to it, but to society at large (Wonnacott, 1982, pp. 82-86). In the environmental sphere, an acceptable level of environmental quality is similarly a public good.

Public goods can also be described in terms of externalities and have been defined as "the limiting, or extreme case of externalities" (Seneca and Taussig, 1974, p. 90). An externality occurs when some costs (or benefits) of an activity do not accrue to the enterprise producing the goods, but are imposed on society at large or a cross-section thereof. The members of society affected will not have participated in the decision making process which results in the externality. The distinction therefore between the production of a private good (like a television set) and a public good (like a defence force) is that the consumption of private goods involves the minimum level of externality while consumption of public goods involves maximum externalities, as flow, for instance, from the production of a defence force.

An externality can be negative, for example, pollution by a manufacturer, where the costs of an action are not incorporated into the total cost borne by the enterprise conducting the activity but are passed on to society at large. Conversely a positive externality occurs when a benefit is involuntarily passed on to society by the enterprise's activity. For example, beautifying one's garden may result in the overall enhancement of the neighbourhood. Many environmental problems can be explained in terms of externalities because the nature of environmental quality is such that the benefits or costs of an acceptable quality environment are enjoyed by the public at large. For this reason an acceptable level of environmental quality is a public good.

One method which Government can use to provide this public good is by use of the fiscal system which can be manipulated to

indirectly encourage different types of activity. A specific way for Government to generate positive externalities or to reduce negative ones, is to allow as a deduction from income tax the donations made to private conservation organizations. The funds generated would be allocated by such an organization towards providing the public good in question, namely an acceptable level of environmental quality.

The only type of donations currently allowed as a deduction by the Income Tax Act, No 58 of 1962 are those to institutions of higher learning. This complies with the criteria referred to, namely it is for a public good - a better educated population - and is supplied by Government indirectly thereby generating a positive externality.

By contrast, the application by the Urban Foundation failed because the State would thereby be providing a private good. The direct benefits of the Foundation's activities do not flow to society at large but to a specific sector thereof.

It is submitted that the above not only justifies the deductibility of donations from an economics point of view but also provides the Department with a policy guideline to determine which applications it should be sympathetic towards. From personal acquaintance with the Department, the writer gained the impression that no distinct policy exists in this regard. Similarly the Franssen Commission when it made its recommendations that donations to higher educational institutions should be deductible did not offer any policy guideline in this regard. The Commission simply emphasised the importance of higher

education to South Africa (The Commission of Enquiry into Fiscal and Monetary Policy in South Africa, 1970, Chapter 2).

5.4 The Legality of Company Donations

A primary consideration is the legal capacity of a company to make donations and secondly the directors' fiduciary duty in this regard. At common law a company's capacity to act is limited by its object clause. This is statutorily reinforced by section 33 of the Companies Act, No 61 of 1973 (referred to in 5.4 as "the Act") which grants a company full power to enable it to realize its main and ancillary objects. A company has the option, but is not obliged, to adopt the powers enumerated in schedule 2 of the Act which includes the power to make donations. It is clear throughout that in the absence of express exclusion, South African companies enjoy the capacity to make donations.

But even if the power to make donations was expressly excluded and a company ignorant or in disregard thereof made donations, these would be valid as regards outside parties in terms of section 36 of the Act. This section varies the common law rule that an act beyond the company's capacity is invalid by providing that a transaction entered into by the company will not be invalid as far as outside parties are concerned merely on the ground that the company lacked the capacity so to act. Internally, insiders of the company such as members or directors can still rely on such lack of capacity in proceeding against other insiders.

From the point of view of the officers of the company, particularly the directors, the common law rule that the

directors occupy a fiduciary position in relation to their company applies. This duty requires them to act in good faith for the benefit of the company as a whole. In making donations the danger arises that the directors mis-allocate the company's funds by supporting outside interests without considering the interests of the company or its shareholders.

The traditional approach at company law has been to disallow donations unless a direct benefit accrues to the company therefrom. This rule originates in the nineteenth century English case of Hutton v West Cork Railway Company, 1883 23 Ch 654, where it was said: "Charity has no business to sit at the board of directors qua charity." This approach has been adopted by South African law. See for example "Amalgamated Society of Woodworkers v Die 1963 Ambagsvereniging 1967 (1) SA 586, where this rule was confirmed as applying in South Africa.

However company practise has shown that these legal principles are no longer representative of current business policy. The Chairman of Anglo American Corporation, Gavin Relly has said:

"the case for doing something that brings no immediate financial return ... is that an investment in the future wellbeing of your society and of your country must in the long term be of benefit to your business."

(Optima, 1983, p. 2)

It remains to be seen whether the court will be prepared to depart from the conventional approach and adjust to modern corporate thinking. In the United States of America such a departure has been made. This is illustrated by the New Jersey

case of A P Smith Manufacturing Company v Barlow", 26 New Jersey Super, 106 1953. A P Smith was a small manufacturer and made an unrestricted donation to Princeton University which did not result in any direct benefit to the company. Some of the shareholders objected but the directors obtained a declaratory order to the effect that the donation was valid. The court ruled that such gifts are "essential to public welfare, and therefore, of necessity to corporate welfare."

Hopefully a South African court would adopt a similar approach should such a donation ever be challenged.

5.5 The Present Status of Donations in the South African Tax System

5.5.1 Introduction

The tax consequences of donations in South Africa are governed by the Income Tax Act No 58 of 1962. These consequences must be examined from different perspectives: firstly, in the context of the two types of taxes affected by donations namely income tax and donations tax, secondly, from the viewpoint of both donor and donee and finally from the viewpoint of companies and individual donors who are differently treated in some respects. These various perspectives are considered under two separate sub-headings: from the standpoints of the donor (5.5.2) and donee (5.5.3) respectively.

5.5.2 The Donor's Tax Position

5.5.2.1 Income Tax

It has been suggested that:

"If donations on bequests to conservation projects were tax deductible, there would be appreciably greater support from the private sector."

(President's Council Report, 1984(a), p. 106)

While this study does not attempt to quantify how much more funds would be generated for conservation purposes if such donations were tax deductible, the cost to taxpayers of making donations deductible is readily apparent. As regards companies the current company tax rate is 50% of taxable income. This means that 50c of every rand of taxable income is collected by the fiscus. If taxable income is permitted to be reduced by the amount of any donation made, tax is calculated on this lesser amount. This effectively means that the cost to a company of a donation is 50c for every rand donated.

The principle of calculating tax deductible donations for individuals is identical. The only difference is that individuals are subjected to an escalating tax rate. The marginal rates at present range from 5% to a maximum of 50%.

At present there are only two specific provisions in the Act which allow donations to be deducted: section 18A which provides for a deduction in respect of donations made to

higher educational institutions and section 11(t) where donations are made for the provision of employee housing. In practise companies rather than individuals will be inclined to make use of these deductions.

Apart from these specific deductions the possible application of the general deduction formula contained in section 11(a) must be considered. This section provides:

"For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be allowed as deductions from the income of such person so derived expenditure and losses actually incurred in the Republic in the production of the income, provided such expenditure and losses are not of a capital nature."

Donations generally, including those made to conservation organizations do not qualify for a deduction because they are not made "in the production of the income" of the taxpayer. It is not always easy to determine whether expenditure is in the production of income and conservation activities have sometimes been prejudiced as a result. For example, the writer is aware of a case where the taxpayer, a subsidiary of a large public manufacturing company, lodged objection and appeal against the disallowance of certain conservation related expenditure. The company as part of its public relations activity involved itself in the restoration of historic buildings and argued that the publicity it received therefrom was a form of advertising

and accordingly deductible. The Department disagreed with this view and disallowed the expenditure. The case did not proceed to the Special Income Tax Court, but was settled on the basis that some expenditure was allowed and others not.

The unsympathetic tax treatment of taxpayers who undertake charitable activities is further illustrated in the Rhodesian (as it then was) Special Court case ITC 1129, 31 SATC 144. The taxpayer, a company, as part of its public relations exercise had launched a bursary scheme in terms of which any member of the Rhodesian public could apply for assistance to undertake higher education. There was no equivalent of the South African Section 18A and the company sought to deduct the amount under the general deduction formula on the ground that it constituted advertising. The court acknowledged that such expenditure may have been in the production of the company's income but dismissed the company's appeal on the ground that the expenditure was of a capital nature.

What may be a watershed case for the tax status of corporate donations in South Africa has recently been heard by the Special Tax Court. A nationwide supermarket chain appealed against the disallowance of donations it made to the Urban Foundation. The case has not yet been reported so that apart from the generalization that it concerned the general deduction formula, no details are known. Should the appeal succeed however, it may change the whole position regarding the deductibility of corporate donations.

This case illustrates businessmen's tax frustration when making donations. It is questionable whether judges should interfere with businessmen's perceptions of what is good for business in deciding what expenditure is in the production of income.

Ultimately the legislature should step in and allow a specific deduction in respect of donations to conservation organizations for the reasons mentioned in 5.3 above. Safeguards to guard against abuse can be easily incorporated into such a subsection: only donations to certain designated conservation organizations would qualify for deduction, a percentage (of taxable income) or quantitative limitation could be incorporated as is the case with donations to universities at present, receipts could be issued by the organizations vouching such payments, as is the case at present with both universities and expenditure in respect of scientific research where the CSIR issues receipts.

5.5.2.2 Donations Tax

Sections 54 to 64 of the Income Tax Act deal with donations tax although this is a completely separate form of taxation to income tax.

A donation is defined as "any gratuitous disposal of property including any gratuitous waiver or renunciation of a right" (Section 55(1)(ii) of the Act). In terms of section 54 donations tax is payable by the donor on the cumulative taxable value of all property disposed of by way

of a donation. The rate of donations tax starts off low, being 3% on items whose value is R8000 or less and gradually increases to a maximum of 25% on items valued R90000 or more. Numerous exemptions and exclusions provide for relief in a wide variety of cases (see Section 56).

As far as environmental priorities are concerned, the donor is exempted from donations tax where a donation is made to an organization engaged in or promoting "nature conservation or animal protection activities." (Section 56(1)(h) read with section 10(1)(cB)(cc). It is submitted that "nature conservation" can be widely interpreted and would include activities such as rural development. Furthermore donations made by public companies (as defined in Section 38) enjoy a blanket exemption from donations tax.

The avowed purpose of donations tax is to prevent tax avoidance, not specifically to raise Government revenue. Estate duty and donations tax account for a minor proportion of State revenue. For the 1984 financial year they accounted for R85 million of a total of over R17 000 million of State revenue (Statistical/Economic Review, 1984/5 p. 28). On its introduction in 1955 the then Minister of Finance said the following concerning the practise of making gifts:

"It serves a double purpose. In the first place the 'donor' reduces the assets on which estate duty would be payable on his death. But also, while he is still in the land of the living, he thereby reduces his income tax, because by means

of these donations the assets, and hence also the income derived therefrom are spread over a greater number of taxpayers."

(Hansard, 1955 paras. 3233 and 3234)

Donations tax is accordingly regarded as estate duty paid in advance (Huxham and Haupt, 1983, p. 247) because it prevents the avoidance of estate duty which is based on the value of the deceased's assets on date of death.

In the 1985 budget speech the Minister of Finance stated that the Government had informed the Commission of Enquiry into the Tax Structure of the Republic of South Africa ('the Margo Commission') that in its opinion "estate duty, at least in its present form can no longer be regarded as appropriate to the needs of our time." This has resulted in speculation that estate duty and donations may be abolished and replaced with one tax. This is the case in the United Kingdom (see 5.8 below) where Capital Transfer Tax incorporates both estate duty and donations tax.

In view of the fact that donations tax and estate duty are intractably linked it is anomalous that the Estate Duty Act, No 45 of 1955, does not exclude bequests for conservation purposes while these are excluded for purposes of calculating donations tax. The Estate Duty Act does provide for a broad range of related deductions such as: bequests of a charitable, educational or ecclesiastical nature (Section 4(h)(i)); bequests to a public institution for the advancement of science or art (Section 4(h)(ii)); and bequests of books, pictures or statutory objects of art

(Section 4(o)). Although some conservation organizations may be regarded as charities, this will not always necessarily be the case. The omission of bequests to conservation organisations can potentially be a big disincentive for a testator who wishes to leave ecologically sensitive land to a conservation organization for the benefit of the general public.

5.5.3 The Donee's Tax Position

In terms of Section 10(1)(cB)(cc) of the Act, the receipts of accruals of any company, society or other association of persons is exempt from taxation if its sole or principal object is: "to engage in or promote nature conservation or animal protection activities."

The position is therefore satisfactory in that the receipts of a conservation organization, for example the Wild Life Society, whether in the form of membership fees, donations, bequests, income from investments or of any other nature will not be subjected to taxation. Section 10(3) contains the reasonable provision that the exemption will not extend to any payments made out of revenues, for example salaries paid to employees of the organization.

This exemption is in line with the general policy manifested in the act to exempt organizations involved in promoting the general social welfare. For example Section 10(1)(f) similarly exempts the receipts and accruals of ecclesiastical, charitable and educational institutions of a public character. The status of trusts in this regard is

discussed in 7.2.4 below. This policy is in line with other jurisdictions, for example section 501(a) of the United States Inland Revenue Code which similarly exempts from taxation specified organizations involved in promoting the general public welfare, as seen below.

5.6 The Tax Status of Voluntary Contributions in Other Jurisdictions

Tax law in South Africa is based on the Income Tax Act as interpreted by the Special Income Tax Court and ordinary courts of the country. Very little, if any reliance is placed on Roman Dutch law principles in the formation of tax law, apart from the rules of statutory interpretation. As a result, because the law is largely a creature of statute, much can be learnt by the comparative approach as little common law constrictions stand in the way of borrowing from other jurisdictions.

A brief review of certain other jurisdictions accordingly follows. In general the donor's viewpoint is emphasized as it is in this area that most potential for incentives exist.

5.7 The Tax Status of Voluntary Contributions in the United States of America

5.7.1 Introduction

Donations in the United States of America affect three types of tax: income tax, estate tax and gift tax. An immediate resemblance to the South African structural division into income tax, estate duty and donations tax is apparent.

However as will be seen, certain fundamental differences exist because the United States also includes in income, profits made on the sale of immovable property which in South Africa could be regarded as being of a capital nature.

The United States federal income tax laws are contained in the Internal Revenue Code and accompanying Income Tax Regulations (hereafter referred to as "the Code" and "the Regulations", respectively). The Code encourages the making of charitable contributions by allowing as a deduction against income, an amount equal in value to the donation. This is qualified by many exceptions, rules and conditions. This has permitted both individuals and corporations to express the maximum possible generosity at the lowest possible cost (United States Department of the Interior, 1979, p. 1).

The deductibility of charitable contributions and gifts is specifically governed by section 170 of the Code. The general rule is contained in section 170(a) which allows as a deduction from income any "charitable contribution" defined in turn, as a contribution or gift to, or for use by, certain organizations designated in section 170(c). Included in the latter are scientific and educational organizations which have in practice been recognized by the Internal Revenue Service as including conservation organizations. For this reason the constitution of the Nature Conservancy describes it as "a non-profit membership organization ... incorporated for scientific and educational purposes" (Nature Conservancy News, 1983, p.1).

5.7.2 Gifts of Private Land

Private land in the United States would normally fall into the category of capital gain property. This is property such as land or stock that will result in a long term capital gain if it is sold for a profit. As such it is taxed. In this regard the United States system is fundamentally different from the South African because the latter does not tax capital gains. The incentive in the United States to donate land is built around the fact that if sold, the land would be taxed. While not applicable to South Africa under the present system, it is described here because of the likelihood of a capital gains tax being introduced in South Africa in the future. Such a tax has been hinted at on occasion and was recommended by The Commission of Enquiry into Fiscal and Monetary Policy in South Africa (1969, para 235).

An important feature of the United States system is that the capital gain is not taxed as a separate type of tax as it is in the United Kingdom, but is included with the income of the taxpayer from other sources. Thus relief granted on capital gain property which is donated rather than sold results in a tax shelter effect for the taxpayer.

This can be illustrated by describing the different consequences resulting from a sale and a donation. If the taxpayer sells his land (capital gain property) and adds the proceeds to his income, he will invariably move into a higher tax bracket and his aggregate income will be taxed at a higher rate. Conversely, a deduction for the donation of

capital gain property results in the taxpayer moving into a lower tax bracket, and thus tax rate, than would otherwise have applied. The net cost of the donation is accordingly the difference after taxes of a sale as opposed to a gift of property. The real difference arises not only because of the different aggregate incomes in the two cases but because of the different tax rates applicable in each case.

This tax shelter effect is shown in an example adapted from Hoose (1981, p. 101) which illustrates the different consequences to a taxpayer owning land who can follow any one of the following three alternatives:

- (i) he earns a personal income of \$37000 per annum comprising of salary of \$35000 and interest of \$2000;
- (ii) he enjoys allowable deductions of \$4000.
- (iii) he owns land acquired for \$1500 which currently enjoys a value of \$10000 on the open market.

	Land Kept	Land Donated	Land Sold
INCOME			
Salary and Interest	37 000	37 000	37 000
ADD Capital gain	-	-	8 500
GROSS INCOME	37 000	37 000	45 500
LESS 60% Capital Gains Tax deduction¹			
	-	-	(5 100)
LESS Allowable Deductions² Charitable Contribution			
	(2 700)	(2 700)	(2 700)
	-	(10 000)	-
TAXABLE INCOME	34 300	24 300	37 700
TAXES³			
Federal	9 864	5 679	11 530
State	1 222	931	1 309
	11 086	6 610	12 839
CASH RETURNS			
Gross Income	37 000	37 000	45 500
ADD Basis ⁴	-	-	500
LESS Taxes	(11 086)	(6 610)	(12 839)
	25 914	30 390	32 161

1. - Different rates of deduction apply to different types of capital gain property.
2. - Allowable deductions of \$4000 must be reduced in terms of a specific formula.
3. - Federal taxes are obtained from tables while State taxes vary. Here they have been calculated as 5% of taxable income after deducting federal tax.
4. - 'Basis' is the amount a seller can deduct from the proceeds of capital gain property, normally its cost.

The example illustrates that although the land realizes \$10000 on the open market, from the point of view of a cash return the taxpayer is only better off by an amount of \$2771 by selling it, as opposed to donating it. This amount is the difference between the cash return on a sale (\$33161) and the return on a donation (\$30390).

While the above illustrates the position from the individual's point of view, the position would be substantially the same for a company. The major difference is that the maximum charitable deduction for a company is limited to 5% of its taxable income. Any balance may be carried over into future tax years.

In practise the maximum tax advantages of such a gift will accrue to the donor who gives highly appreciated property, is in a high income tax bracket, and is able to deduct the full fair market value of the property within a stipulated period (certain limitations apply concerning the maximum amount deductible in any one year.)

The Code also provides for similar relief for "bargain sales" where a land-owner will not consider making a full donation of his property but is willing to dispose of it to a charitable organization for less than full market value. This results in a part-sale and part-charitable contribution. The amount deductible is the difference between the fair market value of the property and the actual sale price.

For South African conservation goals the relevant point to emerge is that relief does lie in the United States for gifts of land but this is based on the fact that capital gains are taxed in

that country. By contrast no relief from income tax is offered on donations or bargain sales of land to conservation organizations in South Africa.

5.7.3 Gifts of Cash

In the United States gifts of cash to designated charitable organizations are fully deductible provided the amount does not exceed 50% of the donor's adjusted gross income. If the amount exceeds this 50% limitation, the excess may be carried over and deducted for a period of up to 5 years.

By contrast, as seen, such gifts are not deductible in South Africa unless made to an institution of higher education or for the provision of employee housing.

5.7.4 Donations by Bequest

Bequests whether cash or land, to a charitable organization including a conservation organization are allowed as deductions in computing the net value of an estate on which federal estate tax is imposed (Arthur Anderson, 1982, p. 80).

In South Africa such bequests do qualify for relief from estate duty where they are made to a charitable organization but not necessarily when made to a conservation organization (seen in 5.5.2.2 above).

5.8 The Tax Consequences of Donations in the United Kingdom

5.8.1 Introduction

The tax consequences of donations to conservation organizations in the United Kingdom are reviewed from the point of view of three different taxes: income tax, capital gains tax and capital transfer tax. It will be recalled that capital gains in the United Kingdom are taxed separately whereas in the United States area gains are included in income.

5.8.2 Income Tax

No relief is offered to individuals or corporations in respect of donations to any charitable organization. Section 54 of the Finance Act, 1980, expressly excludes the deduction by businesses of charitable deductions unless made "wholly for business purposes".

5.8.3 Capital Gains Tax

The Capital Gains Tax Act, 1979, imposes a tax on all "chargeable gains" that accrue on disposal of assets during the tax year (Section 1(1)). However in terms of section 145 of the Act, a gain will not be a chargeable gain if it accrues to a charity and is applicable to or applied for charitable purposes.

While charitable purposes is not specifically defined by the Act it has been held that:

"promoting the preservation for the benefit of the nation of lands and tenements of beauty or historic interest is a charitable purpose."

(Simon's Taxes, E6, 509)

5.8.4 Capital Transfer Tax

Capital transfer tax is a combined gift and estate tax that applies to transfers of assets by an individual, both during his lifetime and after his death. It is a graduated tax.

However gifts to conservation organizations would qualify for exemption under any one of three sections:

5.8.4.1 Gifts to charities are exempt without limitation (previously there was a maximum). A charity will presumably include a conservation organization as has been held in the case of capital gains tax.

5.8.4.2 Gifts for national purposes such as to universities or the National Trust are specifically exempted.

5.8.4.3 Gifts, for the public benefit, of outstanding scientific, scenic or historic interest, will be exempt.

5.9 The Tax Consequences of Donations in Australia

Australia does not impose a capital gains tax nor a gifts tax. As far as income tax is concerned it does provide an incentive for individual but not corporate donations.

In terms of section 78(i) of the Australian Income Tax Assessment Act, donations by individuals to certain specified organizations are tax deductible. These include donations to the World Wildlife Fund, Australia, various state parks boards, nature conservation societies and conservation trusts.

5.10 Conclusions and Recommendations

The conclusion and recommendations to emerge from the above are:

5.10.1 Donations are a valuable source of finance for achieving conservation aims and their magnitude should not be underestimated.

5.10.2 Social economic reasons exist why donations to conservation organizations, as opposed to other socially worthy causes, should qualify for tax relief (see 5.3).

5.10.3 The most effective form of incentive as far as donations are concerned is a deduction from income. Such a provision can incorporate certain safeguards to guard against its abuse (see 5.5.2.1).

5.10.4 There are specific tax related advantages of having a few consolidated conservation organizations as opposed to many diffuse ones. These are:

5.10.4.1 Without generally acceptable conservation organizations (from the point of view of both the public and the Revenue) there is no focal point towards which public philanthropy can be channelled, which can simultaneously qualify for tax relief.

5.10.4.2 The Commissioner for Inland Revenue would be much more amenable to allowing deductions of donations to certain designated conservation organizations, rather than stipulating a formula for conservation organizations generally.

5.10.4.3 Such conservation organizations would be more likely to gain the credibility of the Commissioner for Inland Revenue who needs to be satisfied with the bona fides of the conservation organization's activities.

5.10.5 As far as donations tax is concerned the present treatment of donations to conservation organizations is satisfactory. However, an anomaly exists in that bequests to such organizations do not enjoy relief from estate duty. Representations should be made to the Commissioner for Inland Revenue in this regard and have been made to the Margo Commission (Annexure B page ii).

5.10.6 Should speculation that donations tax and estate duty will be abolished and replaced with one form of capital

transfer tax be correct, representations should be made for relief for transfers to conservation organizations. It is easier to motivate for relief at the inception stages of a tax than to try and get such relief incorporated once the tax is on the statute books.

5.10.7 There is a possibility that a capital gains tax will be introduced at some stage. Valuable examples of relief for gifts of land to conservation organizations can be had from the American system. As mentioned in 5.10.6 motivation for relief should be made at the inceptive stages of such a tax.

5.10.8 Company law needs to be adapted to acknowledge the responsibility of a company to society at large, not only to shareholders and creditors (See 5.4).

CHAPTER SIX: INCENTIVES - OTHER DEDUCTIONS, SUBSIDIES
AND GRANTS

"In most jurisdictions, a range of direct and indirect public actions is used to encourage or restrain certain changes. These actions include tax subsidies and disincentives ... and the direct public provision of goods and services."

(Knetch, 1963, p. 95)

6.1 Introduction

This chapter focuses firstly on deductions other than for donations (reviewed in Chapter Five) which could be granted to encourage environmentally desirable action in private land. Secondly some incentives outside the tax system which could be used to achieve environmental objectives, particularly subsidies and grants, are reviewed. James and Nobes (1978, p. 41) point out that deductions, which they term 'tax expenditure', and cash subsidies have much in common. They both allow the government to favour certain groups or activities at the expense of other taxpayers. However they are of the view that deductions ('tax expenditure') is less efficient than an equivalent system of cash payments for the following reasons: firstly, deductions are relatively hidden whereas subsidies are open to public scrutiny, thus debate and regular review. Secondly, deductions are not worth the same amount to different people because of different marginal tax rates of individual taxpayers. This also complicates the calculation of the cost to revenue of a particular incentive programme. Finally, deductions complicate

the tax system by increasing administrative and compliance costs. Both deductions and subsidies are however, reviewed in this report.

6.2 Other Deductions

The general deduction formula contained in section 11(a) of the Income Tax Act (the Act) and quoted in 5.4.2.1 above, stipulates that expenditure is only deductible if it is incurred in the production of income. The rule is based on the underlying philosophy that since only income (as defined) is taxable, only expenditure incurred in producing that income is deductible from taxable income. Expenditure of a capital nature, that is expenditure incurred in enhancing the taxpayers' income earning structure rather than running the structure, is similarly, as a rule not allowable as a deduction from income.

This has grave consequences for the taxpayer who is considering an outlay which promotes environmental conservation as such expenditure will invariably be of a capital nature or, if not, will not be in the production of income.

Apart from the general deduction formula, however, the legislature has also provided for certain specified deductions. These invariably reflect some activity or sector which the financial authorities wish to promote. For example a specific deduction is allowed in respect of the provision of employee housing (section 11(t)) which is a capital expense and not in the production of income. Certain activities, for example exporting, enjoy double deductions provided certain conditions are met (section 11 bis). Farming activities are favourably

treated in that certain capital expenditure is permitted as a deduction from income, for example, expenditure incurred on dipping tanks, dams, irrigation schemes, boreholes, pumping plants and fences is deductible (Schedule 1 para 12 of the Act).

It is clear however that environmental factors do not come into consideration for such specific deductions. Admittedly Schedule 1 (para 12(a) and (b)) does allow expenditure incurred in respect of the eradication of noxious plants or prevention of soil erosion to be deducted but this is motivated by farming interest.

It is suggested that general environmentally desirable activity could be encouraged by granting specific deductions for expenditure incurred on:

- (i) the eradication of alien vegetation - a double deduction could be implemented here,
- (ii) environmental education programmes,
- (iii) veld management - as this would normally be a legitimate farming expense, a double deduction can again be implemented here,
- (iv) research in to the sustainable utilization of natural systems.

(Cooper, 1985, pers. comm.)

6.3 Subsidies and Grants

Whereas compensation (seen in Chapters Three and Four) is usually concerned with a public authority reimbursing a landowner for agreeing not to exercise a right which attaches to his land, subsidies render financial aid to a landowner who undertakes

action which he would not necessarily carry out. Subsidies usually entail the landowner and the public authority undertaking an action which both are desirous of carrying out whereas compensation implies that the landowner is acting against his will in not exercising a vested right. Subsidies entail the partial financing of a specific project by a public authority with payment being made to the contractor and not the landowner concerned. Grants on the other hand involve cash payments being made directly to the landowner concerned to be utilized in accordance with a specific budget.

Subsidies have been extensively utilized in foreign jurisdictions for conservation purposes where agricultural pressure threatens endangered habitats. For example, in 1985 the British Ministry of Agriculture, Fisheries and Food approved grants to farmers in the Norfolk Broads to prevent them from draining an ecologically important wetland which they wish to utilize for agriculture (New Scientist, 18 March 1985, p. 8). Similarly in the Netherlands farmers are paid not to farm designated environmentally sensitive land.

Subsidies and grants are not unknown in South African law. Two areas, in particular, where these incentives have been extensively utilized are in the agricultural sector and in the decentralization of industry.

6.3.1 Agricultural Subsidies

Agricultural subsidies are authorised by the Conservation of Agricultural Resources Act (43 of 1983). This Act is gone into in some detail here as it is felt that it serves

as a model for subsidies in the broader conservation sphere. Section 3 sets out its objectives:

"The objects of this Act are to provide for the conservation of natural agricultural resources of the Republic by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of water sources, and by the protection of vegetation and the combating of weeds and invader plants."

It is clear that these objectives overlap to a large degree with environmental conservation objectives although formulated for narrower agricultural purposes. This points to the need for similarly laying down the objectives of the conservation of private land in South Africa. Ideally this should be done by formulating a national strategy for the conservation of private land in South Africa (see 8.3.1 below). Such a strategy should integrate the objectives of the agricultural sector with the aims of environmental conservation of private land in South Africa.

Subsidies are authorized under section 8 of the Act. It provides for the establishment of various schemes by the Minister of Agriculture in terms of which subsidies may be granted to land users in respect of:

- (i) the construction of soil conservation works,
- (ii) the reparation of damage to the natural agricultural resources or soil conservation works

which has been caused by a flood or any other disaster caused by natural forces,

- (iii) the reduction of the number of animals being kept on land in order to restrict the detrimental effect of a drought on that land,
- (iv) the restoration or reclamation of eroded, disturbed, denuded or damaged land,
- (v) the planting and cultivation of particular crops which improve soil fertility or counteract the vulnerability of soil to erosion,
- (vi) the combating of weeds or invader plants,
- (vii) other action which the Minister may deem necessary or expedient in order to achieve the objects of the Act.

Various schemes have been provided for by the Minister. For example, regulations establish:

- (i) a soil conservation scheme,
- (ii) a flood relief scheme,
- (iii) a bush control scheme, and
- (iv) a weed control scheme.

(Government Gazette, No. 9238, 27 May 1984,)

Payment of subsidies subject to certain conditions and requirements is provided for in respect of the first three of the abovementioned schemes. Their application is tightly controlled. For example, as regards the soil conservation scheme, subsidies may be paid in respect of soil conservation works which have been classified as:

- (i) protection works,
- (ii) drainage works,
- (iii) veld utilization works and
- (iv) drought relief works (regulation 5).

Each of these latter four categories have in turn been extensively described ensuring that subsidies are only paid for certain narrowly defined categories of works (regulation 6). For example, a "protection work" can only be classified as such if the executive officer is satisfied that it is, "a weir that has as its object to stabilise a water course", (regulation 6(1)(a)).

The actual amount of the subsidy is determined according to a tariff which sets out different rates in respect of each of the above broad categories (regulation 7). In addition a land user only qualifies for a subsidy if certain stipulated conditions are met (regulation 8). For example, the land is situated in a demarcated area and the proposed soil conservation work has been classified as such. Provision is made for details of the specifications and dimensions to be furnished to the Department.

In an interview, the Chief Director, Regulatory Services, Department of Agriculture, Economics and Marketing was of the view that much success had been achieved, especially as regards the stemming of soil erosion. Faults in the previous system which had encouraged overstocking because the amount of subsidy had been determined according to the number of stock units held, had also been overcome. This was done by making the payment of subsidy conditional on

reduction of the number of stock held. The Act can still be improved by taking into consideration certain practical problems, for example, the subsidising of fencing encourages subdivision of paddocks, which then requires additional stock watering points, which in turn concentrates stock into specific areas (Baard, 1985, pers. comm.).

An important factor in the success of the system is the establishment of conservation committees in terms of section 15 of the Act. These are established by the Minister for demarcated areas to "promote the conservation of the natural agricultural resources in the area concerned in order to achieve the objects of this Act" (Section 15(2)(a)). These committees are also encouraged to advise the department on any matter regarding the application of the Act and according to the Chief Director, Regulatory Services, are the "eyes and ears" of the department.

It is submitted that similar types of schemes can be extended into the broader conservation arena. These could be based on scientifically compiled reports, for example in Conservation Priorities in Lowland Regions of the Fynbos Biome (Jarman, 1984), a scientific numeric rating system has been used to identify sites for conservation. An example of a critically threatened species which warrants protection by means of subsidies is the Renosterbos (Acocks, 1953, veld type No. 46). It has been estimated that over 95% of the biomass of this species which existed at the time of white settlement of the Western Cape, has been displaced by cultivation and other human activities (McDowell, 1985, pers. comm.). In addition the South African National

Committee for Nature Conservation (NAKOR) is compiling a National Atlas of Critical Environmental Components which identifies priority areas for nature conservation in South Africa. It is submitted that where outright acquisition of such land is not possible nor feasible, subsidies can play an important role in conserving such areas. Their allocation could be determined and administered by the Conservation, Incentives and Compensation Advisory Board recommended in 8.3.2 below.

6.3.2 Incentives for Industrial Development

Incentives in the form of subsidies, rebates, allowances and grants-in-aid are available to industrialists who establish industries in designated economic or industrial development areas. These are available only to secondary industry, that is manufacturing, assembly and processing and not to the agricultural, mining or commercial sectors. They reflect a two-fold purpose on the part of government: firstly its commitment to promote industries in certain geographic areas in accordance with its political ideology and, secondly, to alleviate the bottleneck on skilled labour in South Africa, while simultaneously providing much needed employment.

In contrast to agricultural subsidies, a peculiar feature of these incentives is that there is no statutory provision detailing the circumstances in which they are available. Rather they are granted administratively by a statutory body - The Board for the Decentralization of Industry (The Decentralisation Board). An exception is those incentives

which pertain to the training of employees. The Manpower Training Act (No. 56 of 1981) provides for the establishment and registration of employer group and private training schemes with the Registrar of Manpower Training (sections 31, 32 and 37). The Minister of Manpower Training is authorized to allocate grants-in-aid and allowances out of moneys specially appropriated by parliament to such registered schemes. In addition, the Income Tax Act (No. 58 of 1962) specifically provides for a deduction in calculating taxable income of a training allowance over and above that which would be normally deductible under the general deduction formula (Section 11 Sept).

A host of other incentives are available but these are not laid down in any statute but rather in notices issued by the Decentralization Board. There are two broad categories of incentives: firstly those aimed at compensating industrialists for certain longer term disadvantages for operating in the areas concerned. Examples are rebates on rail transport, harbour services, road transport, electricity and so on. Secondly, there are those incentives which are aimed at alleviating certain short term financing problems, especially during the initial years of establishing the industries concerned. Examples here include cash payments to supplement the wage bill of the employer, interest subsidies on capital equipment and rental subsidies on premises.

6.3.3 Conclusion on Subsidies and Grants

This outline of agricultural and industrial development incentives illustrates the point that legal and administrative machinery for the implementation of incentives is not particularly difficult to structure. The legal question which ought to be considered is the degree of administrative discretion granted to the statutory body charged with their implementation. While agricultural subsidies are tightly controlled by statutory and regulatory formulae, virtually complete control of industrial development incentives appears to be vested in the statutory body concerned. It is submitted that such a wide degree of discretion is undesirable as it could lead to irregularities. Incentives for environmental conservation on private land should be structured to fit in somewhere between these two models. In this way the statutory body entrusted with the granting of financial incentives will enjoy a certain degree of flexibility, but at the same time be open to public scrutiny and possible judicial review.

6.4 Conclusions and Recommendations

6.4.1 Scope exists for extending the ambit of deductions from taxable income in terms of the Income Tax Act to include deductions for expenditure incurred in environmental improvement. These are outlined in 6.2 above.

6.4.2 Precedent exists in South African law and administration for the granting of incentives in the form of subsidies, grants-in-aid, rebates and capital allowances. Incentives

for environmental conservation of private land could be modelled on those at present granted to the agricultural sector and for industrial development.

6.4.3 A prerequisite for such incentives is the formulation of a national strategy for the conservation of private land in South Africa. Such a strategy should accommodate both agricultural needs and broader, longer term environmental needs as these two areas potentially conflict.

6.4.4 The granting and administration of incentives should be carried out by a statutory body as described in 8.3.2 below. Such a body could also advise the Minister of Finance on the implementation of deductions in terms of the Income Tax Act.

6.4.5 The underlying problem appears not to be the means of implementing incentives but the realization on the part of decision-makers of their need and importance for the conservation of private land. Conservationists should channel their efforts into lobbying for such incentives.

CHAPTER SEVEN: THE APPLICATION OF COMPENSATORY
MECHANISMS AND INCENTIVES

" ... no provision is made [in South African law] for any financial incentive such as subsidies or tax concessions to stimulate landowners to cooperate [in the establishment of conservation areas] ..."

(Rabie, 1985 (a), p. 83)

7.1 Introduction

This chapter examines how some of the theoretical principles of compensation (seen in Chapters 3 and 4) and incentives (reviewed in Chapters 5 and 6) could be applied to some generally recognized conservation tools. The more popular mechanisms used to impose public environmental interests on to privately owned land are reviewed, namely Trusts, Heritage Sites, Nature Conservancies, Private Nature Reserves, Nature Areas and so called "Schedule 5 Parks".

It is concluded that without a rational strategy setting out the purposes and priorities behind the conservation of private land and the roles of the above tools in relation to each other, incentives and compensatory mechanisms will be difficult to implement.

7.2 Trusts

7.2.1 Introduction

This section reviews trusts and the role of fiscal incentives in the achievement of environmental objectives. Compensatory provisions are not relevant to this discussion. The South African law of trusts has its origins in English law, the Roman and Roman Dutch systems not having developed such a concept. This area of the law is today however not bound by the English system and the South African courts have developed their own law of trusts.

As there is no statutory definition of a trust, the courts and writers have obliged. A generally quoted judicial definition of a trust is that from Thorne and Molenaar NNO v Receiver of Revenue, Cape Town (1976 (2) SA 50 C):

"in general a trust is created by contract ... it is created in respect of defined property transferred to a trustee, who is burdened with the obligation to administer the property for the benefit of a third person, the latter being accorded a right against the trustee to enforce the trustee's compliance with his obligations towards the beneficiary concerned ... "

The leading author on the law of trusts in South Africa distinguishes between the wide and narrow sense in which the term "trust" is used (Honore, 1985, p.3). For these

purposes the narrow sense of trust, which is a species of the genus "trust" in its wide sense, will suffice:

"a trust exists when the creator of the trust, whom I shall call the founder, hands over or is bound to hand over the control of an asset which, or the proceeds of which, is to be administered by another (the trustee or administrator) in his capacity as such for the benefit of some person (beneficiary) other than the trustee or for some impersonal object."

(Honore, 1985, p.3)

7.2.2 Types and Classification of Trusts

A broad distinction can be made between what one may term a "personal trust", that is, where a founder wishes to arrange his personal affairs in such a way that some of his assets are made over to a trust, and a "public trust" where an association of persons or organization chooses the trust as the legal medium under which, it will conduct its activities. In the latter case alternative legal structures are available such as an incorporated association not for gain (for example the Wildlife Society of Southern Africa) or simply an unincorporated association (for example the South African Nature Foundation). "Public trusts" are popular in England where they are often the legal vehicle from which many philanthropic activities are conducted.

Either of the above can be legally classified as a "charitable trust" in which case certain favourable fiscal

benefits result (seen below). Indeed most of the English "public trusts" referred to above are charitable trusts for the purpose of English revenue law. Such public trusts are found in South Africa (for example the Mauerberger Foundation) but other methods of association or incorporation have proved more popular. As a result the majority of trusts in South Africa are of the personal type referred to above.

With regard to personal trusts a distinction can be made between testamentary trusts - those which are created by will and which come into operation on the death of the founder - and inter vivos trusts - those which are created by contract and come into operation during the founder's lifetime. The distinction is significant because as seen below, estate duty incentives exist, and can be developed in respect of testamentary trusts.

Finally, the conservation trust must be highlighted. This is simply an ordinary trust where the founder stipulates that the asset made over to the trust, usually land, is to be used for a designated conservation purpose, so that the public benefits directly or indirectly (Rabie, 1985 (a) p.78). An advantage of a conservation trust over a servitude is that only negative conditions can be imposed in respect of the latter whereas the administrators of a trust can manage the land in question (Fuggle and Rabie, 1983, p. 42).

7.2.3 The Juristic Nature of a Trust

In South African law a trust does not enjoy juristic personality except in certain statutorily defined contexts (Honore, 1985, p. 54). Thus for purposes of income tax a trustee is included in the definition of a "representative taxpayer", (section 1 of the Income Tax Act, 58 of 1962). and certain complex rules have been laid down determining the circumstances in which a trust is taxable (Silke, 1982, Chapter 12). If so, it is taxed at the same rate and enjoys the same rebates as an unmarried taxpayer (Income Tax Act, Section 6(1)).

Despite this lack of legal personality, the administrators are free to manage the trust property in whatever way they wish provided they remain within the confines of the founding trust deed.

7.2.4 Current Incentives in the Taxation of Trusts

Where income accrues to a trust it may be taxed in the hands of the trust itself, or in the hands of a donor, or in the hands of the beneficiaries. Most of the fiscal statutory provisions, case law and commentaries on trusts are concerned with this question of determining in whose hands income is taxable (Silke, 1982, Chapter 12).

Of concern here however are the circumstances around which trusts enjoy favourable treatment as far as tax is concerned. As seen in 5.4.3 above, section 10(1)(f) of the Act exempts "the receipts and accruals of ecclesiastical,

charitable and educational institutions." It must be immediately stressed that no matter how charitable the motivation of a trust may be, it will not qualify for the exemption unless it constitutes an "institution". To do so it must actually be carrying out ecclesiastical, charitable or educational functions. Thus many of the "personal" trusts described above will not qualify because such a trust may be charitable without constituting a charitable institution.

The only exception exists where the trust deed is framed in such a way that the trustees act as a mere conduit pipe and the income, while accruing to the trust, in law vests in the beneficiary institution (Fiscus, 1972, p. 207 and Silke, 1982, p. 283). While this reflects strict law, the Revenue Department has in practice adopted a more lenient approach and tends to treat the trust itself as an institution for purposes of the section 10(1)(f) exemption. However there is no obligation on the Department to do so and with the current trend towards tightening various revenue collecting mechanisms this practice could well be phased out.

Another question is whether conservation activities are regarded as "charitable" for the purposes of the section. Despite some uncertainty in the law, it is submitted that they would be. Originally charitable activities were associated with religion and underprivileged sectors of the community. The former are now included under the separate "ecclesiastical" heading and the latter is not a sine qua non for the exemption to apply. A primary test is whether the cause is for the public benefit but not all

trusts constituted for the public benefit are necessarily charitable (Honore, 1985, p. 129). In Marks v Est. Gluckman (1946 AD 289) it was held that legacies for public ornaments or to bestow prizes for excellence in art or science are not charitable but this decision does not find favour with Honore (1985, p. 129). It is submitted that as the public as a whole benefits from an improved environment, conservation trusts should be regarded as charitable where the founder's motives are clearly philanthropic.

To summarise, a charitable trust per se does not enjoy favoured tax treatment. Furthermore, the exemption provided by Section 10(1) cB(i) in respect of the receipts and accruals of "any company, society or other association of persons" which is engaged in, or promotes nature conservation or animal protection activities is unlikely to apply to conservation trusts because these will not be regarded as an "association of persons" for purposes of the exemption. It appears that this exemption is also aimed at the public-type trust rather than the personal one.

It is recommended that conservation trusts be elevated to the exempt status because while not "institutions" they fulfil a similar public interest as do such "institutions". These trusts can be designated as such by the granting of a "Conservation Trust Certificate" by the Conservation Incentive and Compensation Advisory Board recommended in 8.3.2 below.

7.2.5 Estate Duty and Trusts

As far as estate duty is concerned, the Estate Duty Act (45 of 1955, "the Act") provides five different deductions which have a bearing on the law of trusts (Sections 4 (g), (h), (j), (m) and (n). Section 4(h) has a familiar ring to it as it provides for a deduction for bequests made to charitable ecclesiastical or educational institutions. Here interestingly, specific provision is made for providing a deduction both where such a bequest is made directly to an institution (4(h)(ii) and where it is made to "any person under conditions requiring such amount or value to be devoted" to such causes. Thus the problem of "personal trusts" not being institutions referred to in 7.2.4 above in the context of income tax would not arise with respect to estate duty.

Section 4(n) is pertinent as it provides that so much of any amount which, as a result of the grant to any person of a right to the use or occupation of property for no consideration, or inadequate consideration, which is deemed to be property of the deceased, is also deductible. Suppose X agrees that a conservation organisation may occupy and manage his land for no or inadequate consideration. The value of this disposition is deemed to be property of the deceased but may be deducted in ascertaining the dutiable value of the estate.

The remaining deductions which affect trusts are not directly relevant to conservation issues.

7.2.6 Innovative Incentives for Conservation Trusts

The real potential for incentives in the area of trust law lies however, not in tax status of the trust but in the consequences to the founder of the trust. A primary motivation for the formation of trusts is the substantial income tax and estate duty savings which can be made if the trust is correctly structured. Any incentive should, therefore, exploit this tendency by providing relief to the donor where he forms a personal conservation trust or donates to a 'public trust' which qualifies as a conservation trust. A necessary prerequisite would be the provision of a safeguard by having the bona fides of such a trust scrutinized and established. This could be done by the Conservation Incentive and Compensation Advisory Board referred to in 8.3.2 below.

Such an incentive would take the following forms:

7.2.5.1 In the case of a testamentary trust, a double deduction from the dutiable value of the estate in respect of the value of the asset bequeathed. Certain rules already exist regarding the valuation of assets for estate duty purposes and these could be adapted in the necessary way.

7.2.5.2 In the case of an inter vivos conservation trust the founder could, provided the trust is not revocable, enjoy tax free the income therefrom for the remainder of his lifetime, in addition to exemption from donations tax and estate duty. It is not practicable

to recommend a deduction of a percentage of the asset donated in the form of a capital allowance as current fiscal policy is against capital allowances (Standing Commission of Inquiry with regard to the Taxation Policy of the Republic, 1983, p. 10). It remains to be seen what the Commission of Enquiry into the tax structure of the Republic of South Africa (the 'Margo Commission') recommends in this regard.

Finally, the present anomaly under which a donation made to a conservation organization qualifies for relief (Section 56(1)(h)) but a bequest does not qualify for similar relief under the Estate Duty Act, ought to be rectified. As donations tax is essentially estate duty paid in advance (Huxham and Haupt, 1983, p. 247) there is no reason for this distinction to exist in the fiscal statute books. If the conservation organization is regarded to be a charitable institution, then there is no problem. However this may not necessarily be the case.

7.3 Management Agreements

7.3.1 Introduction

Management Agreements have been defined as

"a formal written agreement between a public authority and an owner of an interest in land who thereby undertakes to manage the land in a specified manner in order to satisfy a particular

public need, usually in return for some form of consideration."

(Feist, 1978 p.1)

This definition, adopted from a report to the English Countryside Commission (Feist, 1978), implies the voluntary assumption of an obligation on the part of a landowner. Such agreements have only relatively recently come into vogue in South Africa under the auspices of the South African Nature Foundation and the Department of Environment Affairs (through its National Plan for Nature Conservation, or Nakor) by the launching of the South African Natural Heritage Programme in 1984 (Cohen and Marrao, 1984).

This report however adopts a wider definition because it regards management agreements as including those situations where the state unilaterally imposes conditions on a landowner to comply with stipulated conditions. For example a Nature Area where cooperation of the landowner is required. Here ownership of land remains with the private landowner but he is obliged to comply with certain conditions. The adoption of such a wider definition is not unrealistic as an authority quoted in the above-mentioned report states:

"What is required is the statutory power to make a form of management agreement for any area of rural land or inland water."

(Hookway, in Feist, 1978 p.1)

The scope of management agreements is not only broad from the point of view of the degree of voluntary participation obtained from the landowner but also as regards the use to which they can be put. In a given situation any one or more of the following arrangements can be agreed upon: to refrain altogether from an existing or proposed activity, to modify an existing or proposed activity, to maintain an existing activity or situation, to undertake a proposed activity, to allow agencies other than the land occupier to carry out certain activities on the land (Feist, 1978, p. 35).

The immediate attraction of management agreements is the broad scope they offer of environmental conservation. Ironically this positive aspect of management agreements makes the application of both incentives and compensatory mechanisms problematic. Statutory concessions, particularly financial ones, need to be narrow and precise to ensure that such concessions are not abused.

An added consideration is that the introduction of financial inducements to encourage a better land ethic is superfluous in those situations where a landowner is in any event incorporating environmentally desirable practices into the use of his land. The introduction of financial inducements could result in the eroding of the land ethic and replacing it by purely financially induced action. This is obviously undesirable.

The application of incentives and/or compensatory incentives to five kinds of management agreements namely: Heritage

sites, Nature Conservancies, Nature Areas, "Schedule 5 Parks" and Private Nature Reserves are now reviewed.

7.3.2 Existing Incentives and Compensatory Mechanisms

7.3.2.1 Heritage Sites

Heritage sites represent the lower end of the incentive spectrum in that as seen there is no quid pro quo for the landowner who agrees to participate in the scheme (he may however qualify for a prize and does receive a plaque in recognition of his participation.) As the voluntary participation of landowners in environmentally enhancing activities is desirable and important no incentive or compensation is recommended. Such voluntary participation on the part of landowners holds an important position in the total spectrum of incentive induced behaviour. The important role of an inherent pride in their land and the prestige gained by landowners who participate in the heritage scheme has been emphasised by the Director of the South African Nature Foundation (Stroebel, 1985, pers. comm.).

Indirectly however incentives can be incorporated into the income tax system by providing relief to those taxpayers who contribute to SANF/NAKOR which funds the project. The whole programme has been made possible largely by the generous donation of one corporate donor which did not gain any tax relief for doing so. The need for corporate relief for donations towards

conservation orientated projects has been outlined in 5.3 above.

7.3.2.2 Nature Conservancies

Another form of management agreement, peculiar to Natal, is the Nature Conservancy. Nature Conservancies comprise groups of farmers who combine financial resources to provide integrated conservation facilities for their area of geographic concern. Primary effort goes into providing suitably trained game guards to police poaching. Although organized on regional levels an ultimate umbrella body, the Natal Wildlife Conservancies Association, exists and coordinates general policy matters. While not directly involving any State Authorities, indirectly the Natal Parks Board (a statutory body) is involved in that it trains the game guards used for patrols.

Scope exists for broadening the sphere of the Conservancies activities. It has been pointed out by the Chairman of the Natal Wildlife Conservancies Association that a need exists for integrated veld management programmes in Natal, and that Conservancies could play a role in this regard (Henderson, 1984, pers. comm.).

The contribution made by individual farmers to their local Conservancy body is at present deductible as a legitimate expense incurred in the course of carrying on farming activities. It is accordingly submitted

that tax incentives per se do not have a crucial role in developing and improving the Conservancies' activities. More effective financial relief could probably be achieved by a grant-in-aid to the umbrella body to be utilized for the furtherance of environmental as opposed to purely agricultural ends.

7.3.2.3 "Schedule 5 Parks"

So-called "Schedule 5" Parks are in fact established under section 2 of the National Parks Act (57 of 1976). This provides that the State President may declare land, which the owner has made available by agreement with the Minister of Environmental Affairs and Tourism, to be a National Park. The wording of the section makes it clear that the landowner, not the State, has ultimate say in whether he will participate in having his land declared such a "contractual" park.

The legal adviser of the National Parks Board has admitted that uncooperative landowners are a stumbling block to the formation of such parks (H Botha, pers. comm. 1985). He states that the incentive for a private landowner to participate in such a park is that the landowner will be protected from outside interference, will receive expert scientific advice on the management of his land and will be guaranteed favourable treatment to ensure that his specific needs are met, for example the right to borehole water. He acknowledges that an inherent defect in these parks is that the agreement vests with the owner and not with

the land so that subsequent owners can turn their back on the agreement.

It is submitted that "contractual parks" have exciting potential but that greater room for incentives should be built into the act to induce un-cooperative landowners to participate. This could be achieved by granting a statutory body, for example, the Conservation Incentive and Compensation Advisory Board referred to in 8.3.2 below, the power to make financial inducements in ad hoc situations to otherwise unwilling landowners. See also recommendation 7.3.3.5 below.

7.3.2.4 Nature Areas

As seen in 4.2.3 above Nature Areas are declared and administered by the Physical Planning Act and Environment Conservation Act respectively. They constitute a type of management agreement in that the purpose for which land can be used becomes limited. In addition the Minister of Environment Affairs, acting on the advice of the management committee, can issue directives limiting the use to which the land is put. (Environment Conservation Act, No 100 of 1982, Section 9 and 10).

Compensation for actual patrimonial loss suffered as a result of a management committee's directive is provided for and has been extensively dealt with in 4.2.4 above. This particular compensatory mechanism has been problematic in practise both from a

landowner's point of view and from the Department of Environment's point of view (S Brownlee, 1985, pers. comm.) From a landowner's point of view it provides insufficient compensation from, and no incentive for, participating in the goals and objectives of a Nature Area. From the Department of Environment's point of view it is an inadequate incentive to win over landowners' cooperation and support.

Greater effectiveness and political acceptability of the Nature Areas philosophy will only be gained by widening the scope and ambit of the available compensatory and incentive mechanisms. It is submitted that this cannot be done by statutory formulae but should be entrusted to a body with the necessary statutory authority to decide appropriate forms of compensation and incentive in specific ad hoc situations. The funding, composition and source of finance for such a body is taken up in 8.3.2 below.

7.3.2.5 Private Nature Reserves

Private Nature Reserves may be established under each of the Provincial Nature Conservation Ordinances. While the Transvaal Nature Conservation Ordinance (12 of 1983) does not specifically refer to private nature reserves, it is clear that these are envisaged in the general provision granting the Administrator power to establish nature reserves (Section 14). Private nature reserves are an important phenomenon in the Transvaal where the sum total of their area exceeds the

total area of the Kruger National Park (Mr P Milstein, 1985, pers. comm.)

The pertinent question is what incentive currently exists to establish a private nature reserve and what environmental objectives are achieved thereby?

It is submitted that at present no effective incentive exists for the establishment of private nature reserves and that in any event environmental objectives are not attained thereby. Their establishment may even be deleterious to the achievement of a more positive land ethic. The Cape Ordinance (19 of 1974) states:

"Subject to any conditions imposed by the Administrator ... any person who has established a private nature reserve shall manage, control and develop such reserve with a view to the propagation, protection and preservation of fauna and flora ... "

(Section 13(1))

It is clear that the landowner could do this anyway and there is no apparent reason why he should do so through the medium of a private nature reserve. It has been stated (Milstein, 1985, pers. comm.) that the incentive to establish such reserves is the higher status gained by the landowner as well as the higher penalties which may be imposed against poachers by so doing. The latter grants the owner more authority over his land

but does not ensure that he himself is acting in an environmentally desirable manner.

The above section goes on to provide that the owner of such a reserve may "hunt any wild animal or pick any flora found in such reserve" (Section 13(a)) thereby exempting him from any conservation laws which would otherwise apply. The Transvaal Ordinance has an equivalent provision exempting owners from hunting restrictions (Sections 19 and 88) and, it has been remarked,

"this may be the reason for many of the requests for proclamation in this province."

(President's Council Report, 1984(a), p. 32)

It is accordingly doubted whether environmental objectives are truly being achieved by the proclamation of private nature reserves. Their whole philosophy and purpose ought to be reviewed before suggestions for incentives and/or compensation are implemented. If environmental objectives were being met then the recommendations outlined in the conclusions to this chapter (7.3.3.6 below) could be implemented.

7.3.3 Conclusions and Recommendations on Management Agreements

7.3.3.1 General

It is evident from the above that a wide diversity of types of management agreements exist in South Africa today. These are governed by different national or provincial statutes and accordingly involve different administrative agencies. For example, one may legitimately suspect that the possibility of declaring land to be either a nature area or a "Schedule 5 Park" arose, not as a result of a carefully thought out masterplan, but because two different administrative agencies are pursuing broadly similar objectives. In addition varying degrees of private sector involvement are manifested in some but not all, of these. Moreover a wide range of ecosystems and administrative goals are brought under their ambit.

It is submitted that before effective compensatory or incentive mechanisms are adopted, the overall purpose and philosophy behind these tools ought to be reviewed. In short, without a national strategy setting out the aims and priorities behind the conservation of private land, it will be difficult to implement consistent and effective compensatory mechanisms and incentives for the achievement of environmental objectives. In addition the role of each of the tools reviewed needs to be appraised in relation to each other, thereby

ensuring that the overall spectrum of needs and variables is met.

This again points to the need for one overall national body to review and control the financial aspects of achieving environmental objectives.

7.3.3.2 Heritage Sites

No direct form of compensation is recommended as these fulfil the need to encourage the voluntary adoption of a more positive land ethic. Indirect forms of inducement to participate in the scheme ought to be encouraged by granting a deduction from taxable income to those taxpayers who donate to the organizing body.

7.3.3.3 Nature Conservancies

Insofar as these "conservation activities" are closely related to farming activities, participants enjoy tax relief by virtue of the favoured treatment given to farmers by the Income Tax Act. Such relief ought to be extended to those situations where the landowner is not necessarily carrying on farming activities but is undertaking activities which are environmentally desirable.

7.3.3.4 Nature Areas

Relief should take the form of grants to those landowners who suffer financial hardship as a result of

having their land incorporated in a Nature Area. Power to make such grants should be vested in a national board empowered to allocate funds towards the achievement of environmental objectives.

7.3.3.5 "Schedule 5 Parks"

The implementation of incentives and for compensatory mechanisms is desirable under this head to encourage recalcitrant landowners to participate in these agreements. However these will only be effective if the relationship between these Parks and Nature Areas is laid down. Financial inducement under both these heads should be considered by one umbrella body for the sake of uniformity and consistency. Grant aid could be made available once an overall strategy and priorities for the conservation of privately owned land has been determined.

7.3.3.6 Private Nature Reserves

It ought to be recognized that such reserves are not necessarily "farms" for purposes of the favourable treatment granted to farmers in the Income Tax Act. "Private Nature Reserve Owners" should therefore be recognized as a separate category for purposes of the Income Tax Act and losses incurred under this head could be allowed to be offset against income from other sources.

Specific deductions could be granted for fencing costs, amounts paid for scientific management advice and capital allowances for capital works undertaken to improve and maintain natural ecosystems. In addition such landowners could come into consideration for grants where they refrain from undertaking commercial activities which would otherwise be deleterious to the natural environment. This would be subject to the purview of the Conservation Compensation and Incentive Advisory Board referred to in 8.3.2 below.

Ultimately, however, conservation needs would best be served if the roles of each of the above five tools were viewed from one broad conservation perspective. In this way each would play a defined role in relation to the others. At present this does not appear to be the case.

CHAPTER EIGHT: CONCLUSIONS AND RECOMMENDATIONS

"With the rapid rate of development and the tremendous backlog of conservation projects, it (has become) obvious that while acquisition of certain tracts of land would have to continue, more ways of protecting our natural diversity (are) needed."

(Cohen and Marrao, 1984, p. 8)

8.1 Introduction

This concluding chapter is divided into three parts: firstly the General Conclusions (in 8.2) summarise the findings as regards Ownership (8.2.1), Compensation (8.2.2) and Incentives (8.2.3). These were examined in the light of their capacity to contribute towards the achievement of environmental objectives in South Africa. The reader is also referred to the more detailed conclusions and recommendations made at the end of each respective chapter on these topics.

Secondly some general recommendations are made in 8.3. These relate to the formulation of a national strategy for environmental conservation of private land in South Africa (8.3.1), the creation of a Conservation Incentive and Compensation Advisory Board (8.3.2) and the establishment of a Central Land Acquisition and Conservation Fund (8.3.3). It is argued that without these underlying structures and facilities, the implementation of incentives and/or compensatory mechanisms will not succeed.

Section 8.4 concludes with some final remarks.

8.2 General Conclusions

8.2.1 Ownership in South Africa

Any proposals for compensation and/or incentive for inroads into private land for purposes of conservation must be seen in the context of the South African attitude to land ownership. This tends to be highly individualistic for three broad reasons: firstly, as a result of its legal history, South Africa has inherited a system of property ownership law which is based on the so called absolute concept of ownership. The implications of this have been outlined in 2.4 above. Secondly, for cultural-historical reasons the attitude of the current ruling group in South Africa, the white Afrikaner, is steeped in the pioneer mentality which grew and flourished during the Voortrekker and Boer Republic eras. Thirdly, the current socio-political climate in South Africa is such that the group in control of the vast majority of land feels threatened and insecure. As a result individualistic attitudes in land are reinforced.

The combination of these factors resulted in a general reluctance by landowners to sacrifice their individual rights in land in favour of the general public interest. As a result land-use control has relied on restricting the traditional attributes which flow with ownership. Little attention has been paid to more subtle and persuasive means namely, incentives and compensatory mechanisms, to achieve

environmental objectives. Greater reliance should be placed on these as pressure on land and political resistance against interference in traditional ownership rights increases.

8.2.2 Compensatory Principles

Although there are numerous decisions in South African law to the effect that where a statute removes existing rights compensation is presumed to be payable (see 4.1 above), this only applies where there has been actual expropriation. In general South African law makes no provision for compensation when a landowner remains owner of a right but is obliged to make some sacrifice in the public interest in respect of this right. Some foreign jurisdictions have developed principles of compensation in such cases, but South Africa is not doing so. This is an omission to which attention should be paid.

An environmental statute is recommended which recognise that in principle compensation is payable in certain stipulated circumstances where a governmental control does not legally amount to expropriation but, in reality, has the effect of expropriation. For example recently published draft regulations (Government Gazette No. 10041, dated 20 December 1985) propose to regulate any "activity" (as defined) by landowners in the coastal zone. The effect of such a regulation in a particular case may be to stop a landowner from developing his land. Such a decision could have the effect of expropriation as far as the landowner is concerned, although legally not amounting to expropriation.

In such circumstances it is reasonable to compensate the landowner concerned. On the other hand special circumstances should be recognized, for example unique ecosystems, which should be controlled without any liability for compensation on the part of the state arising.

Nonetheless compensation for inroads into land ownership rights to achieve environmental objectives is a delicate and potentially controversial area. The traditional reliance on outright land-use controls is fundamental and should at no time be lost sight of. It is submitted that there are at least two prerequisites which need to be accomplished before success with principles of compensation can be hoped for: a national strategy for environmental conservation of private land in South Africa, and the establishment of a Conservation Incentive and Compensation Advisory Board. The role of these two prerequisites is discussed in 8.3.1 and 8.3.2 below.

The strength of compensation lies in its flexibility. Compensation can be channeled to priority areas where it is most needed. But this can only be achieved by the Compensation Board referred to above.

8.2.3 Incentives

The important role of tax deductions, particularly those which encourage philanthropic activity, was discussed in Chapter Five and Six. However, as regards incentives within the tax system it must be immediately pointed out that the philosophy and policy behind the whole South

African tax system is at present being reviewed by the Commission of Enquiry into the Tax Structure of the Republic of South Africa ("The Margo Commission"). The wide ranging brief of this Commission was emphasised by the Minister of Finance in his 1986 Budget Speech in which he stated:

" ... in the light of the present socio-economic circumstances in South Africa it is manifest that the appointment of this commission was both needful and timely. It is imperative that South African have a tax structure that, with due regard to the universal norms for a good tax system, is capable of contributing significantly to the long-term socio-economic development of the South African community."

(Hansard, 7 April 1986, Cols. 2679/80)

From the point of view of this report the current study undertaken by the Commission has both a positive and negative aspect. On the one hand it has enabled the relevant findings of this report to be incorporated into a submission for consideration by the Commission. Such a submission has been made on behalf of the Wildlife Society of Southern Africa and is incorporated as Annexure B to this report. Interviews with two members of the Commission, Dr J Graaf and Mrs K Jowell were held in an attempt to ensure that the submission (and this report) was in accordance with the current thinking of fiscal policy-makers. Only very broad guidelines could however be obtained due to the confidential nature of the Commission's work.

This highlights the negative aspect, namely that it is difficult to ensure that recommendations on incentives, are in line with the general direction of the Commission's recommendations. For instance it may well be that the Commission comes out strongly against using the tax system as an instrument of social policy in which case some of the proposals made in this report will not find favour with the fiscal authorities. However for the reasons outlined in Part 1 of Annexure B, it is felt that environmental issues do stand apart from other interests when it comes to favoured and sympathetic tax treatment.

As far as fiscal incentives outside the tax system are concerned there is a precedent in South African law for such measures. The Conservation of Agricultural Resources Act (no 43 of 1983) provides for subsidies for soil conservation works, veld utilization works, drainage works and stock reduction schemes. Such schemes could be extended from the agricultural sector to incorporate broader environmental considerations. This act as well as the favoured tax allowances granted to farmers in terms of the Income Tax Act points to a conclusion that the mechanics of incorporating fiscal incentives into our environmental legislation is not a problem. What is required is the political will and desire to do so.

8.3 General Recommendations

8.3.1 A National Strategy for Environmental Conservation of Private Land in South Africa

It is submitted that the implementation of compensatory mechanisms, more so than incentives, will not succeed unless formulated in the context of a national strategy for conserving private land in South Africa. Chapter Seven reviewed different tools for this purpose: Heritage Sites, Nature Conservancies, Nature Areas, Private Nature Reserves and so called "Schedule 5 Parks". These have not been implemented in the context of an overall masterplan but have been developed by different public agencies, some at different tiers of government, as well as by private organizations, without consulting each other. They appear to have been implemented without any reference to the overall need to cater for a variety of inroads into private rights. These range from situations where a landowner acts in a manner which is in the environmental interest without requiring any financial incentive to do so, to those situations where a landowner will not budge, in the public environmental interest, without financial inducement.

In addition a national strategy should lay down national priorities within the broad diversity of ecosystems which are encompassed by private land holdings. These range from highveld savanna systems (for example the Magaliesberg Nature Area) to lowland Cape Wetlands (for example the proposed Langebaan "Schedule 5 Park"). A classification of priorities within a national strategy will allow for the

more efficient allocation of scarce funds between different conservation needs.

Furthermore it is submitted that at present an inordinate gap exists between the body of scientific knowledge, regarding the critical state of some of South Africa's ecosystems, veld types, habitats and species, and the awareness of environmental needs amongst decision-makers. For example the Council for Scientific and Industrial Research through its Co-operative Scientific Programmes Division has produced over one hundred National Scientific Programme Reports, many of which highlight the critical state of aspects of the South African environment. But little seems to have been done to solve these problems.

A national environmental strategy would go a long way towards alleviating some of these problems. In addition, it would lay down the priorities and purposes behind the conservation of private land. Such a strategy would of necessity take cognisance of national requirements and priorities in granting compensation and incentives.

From an administrative viewpoint the most suitable body to implement the guidelines of such a national strategy would be the Conservation Incentive and Advisory Board referred to in 8.3.2. below.

8.3.2 A Conservation Incentive and Compensation Advisory Board

8.3.2.1 Introduction

A recurrent recommendation in this report is the formation of a Conservation Incentive and Compensation Advisory Board ("CICAB"). Such a Board would formulate policy, manage funds, control and monitor the granting of compensation and liaise with the Minister of Finance regarding the implementation of incentives. All this would be done within the framework of the national strategy for the conservation of private land referred to in 8.3.1. Such a Board could be run under the auspices of The National Committee for Environmental Conservation (NAKOR) or the Council of the Environment but would comprise of members from both the public and private sectors.

8.3.2.2 Legal Rationale

Lawyers traditionally resist the granting of an administrative discretion to a state (or semi-state) agency particularly where it involves the allocation of financial preferences, as the possibility of abuse of such discretion always exists. They would prefer to have the qualifications for financial privilege laid down in tightly defined statutory formula to ensure that arbitrary allocation of funds are not made.

However, in the granting of compensation or other forms of incentives outside the tax system, such

administrative discretion is recommended. Environmental objectives are concerned with a wide diversity of ecosystems, a broad range of priorities and a multiplicity of uses to which critical ecosystems are being put. These diffuse factors make it well nigh impossible to lay down concise and all-embracing statutory formulae for compensation when inroads into private ownership rights are made. It is accordingly recommended that the power to compensate landowners adversely affected by state decisions be vested in such an administrative body.

The granting of such a discretion to an administrative body is not unprecedented in South African law. For example the Board for the Decentralization of Industry established under the Manpower Training Act (No 56 of 1981) has within its terms of reference fairly wide discretionary power in the granting of decentralization incentives. Similarly, provision is made in this Act for allowances to be paid to an employer whose activity is "designated (to be in) an industrial development area" by the Minister of Finance in concurrence with the Minister of Industries and Commerce (Section 37A).

In the sphere of land affairs, the Expropriation Act (No 63 of 1975) provides for a compensation court "with jurisdiction to determine compensation in terms of this Act ..." (Section 16). This court has clearly a wide discretion to determine the amount of compensation payments within the confines of the Act.

There is accordingly undisputed legal precedent for such a Board.

8.3.2.2 The Composition, Control and Functioning of CICAB

CICAB could function under the auspices of a government or semi-government agency such as NAKOR or the Council for the Environment. It would comprise of members from both private and public sector bodies as well as individuals appointed in their own rights. Private sector bodies which could be represented are the Habitat Council, the Wildlife Society of Southern Africa, the Botanical Society, the South African Nature Foundation and the Institute of Natural Resources. Public sector membership would come from state and semi-state bodies involved in environmental protection, for example the Department of Environment Affairs, the Provincial Nature Conservation Department, the National Parks Board, as well as the Departments of Finance, and Commerce and Industry.

CICAB's functions would be laid down in its constitution and would include: involvement in the formulation of a national strategy for the environmental conservation of private land, the formulation of priorities for conservation within the national framework, the granting and monitoring of compensation in particular cases, advising and making recommendations to the Minister of Finance on the granting of incentives within the tax system and controlling the funds generated by the Central Land

Acquisition and Conservation Fund which would be CICAB's chief source of finance. The role and financing of this fund is taken up in 8.3.3 below.

Finally, care should be taken to ensure that CICAB is not regarded as just another "Board" to enlarge an already overburdened civil service. CICAB should be seen as a dynamic, efficient and bona fide agency committed to the conservation of private land in South Africa.

8.3.3 The Central Land Acquisition and Conservation Fund

A final general recommendation is the establishment of one central fund to finance the acquisition of land identified as having a high conservation priority, as well as to finance the compensation of landowners whose rights in land are curtailed for purposes of achieving environmental objectives. The logical body to administer such a fund would be CICAB, referred to in 8.3.2, as it would be in a position to view national priorities and requirements in a holistic perspective.

At present some funds do exist for financing the acquisition of land for conservation purposes and for other conservation goals. For example Section 12A of the National Parks Act (No 57 of 1976) establishes a Land Acquisition Fund. It administers funds generated by the NPB as well as receiving a parliamentary grant. Similarly the South African Nature Foundation administers a trust fund which is financed largely by corporate donations. It is submitted that

greater efficiency and achievements within the national framework of environmental objectives can be accomplished by centralizing such funds. The establishment of such a fund was recommended in the Report of the Planning Committee of the President's Council on Nature Conservation in South Africa (President's Council Report, 1984(a), p. 154). No steps appear to have been taken in this regard.

A further criticism which has been levelled at the funding of state conservation agencies is that funds generated from these accrue to a central state revenue account and not to the agency which generated them (President's Council Report, 1984(a), p. 154). These criticisms overlook the fact that, in the case of the one important exception to this principle - the National Parks Board, which is allowed to generate its own funds, much dissatisfaction has been expressed about the "commercialization" of this body. Such "commercialization" could well be the result of the National Parks Board's capacity to generate its own revenue.

The establishment of one central land acquisition and conservation fund would alleviate this criticism while at the same time ensuring that such funds are retained for conservation purposes.

In a similar vein the revenue generated at present by Transfer Duty on land transactions accrues to the central state revenue account. It is recommended that such revenue should be earmarked for land conservation by allocating it to the land acquisition and conservation fund. Some states in the United States of America adopt something akin to this

in the form of a Conservation Board Levy. Here the sale of properties in environmentally sensitive areas is subjected to a percentage levy and the funds generated thereby are used for acquiring as yet undeveloped land (Heydorn, 1985, p. F7). Such a fund could be generated and earmarked for conservation of private land in a similar manner in South Africa.

8.4 Final Remarks

Incentives and compensatory mechanisms are powerful tools which could go a long way towards promoting the achievement of some environmental objectives in South Africa. It has been shown that the legal system can and should accommodate these proposals. What is required is an understanding by decision-makers of their urgent necessity and the political will to implement them.

REFERENCES

1. Acocks, J P, 1953: Veld Types of South Africa, Memoir of the Botanical Survey of South Africa, p. 28.
2. Arthur Andersen and Company, 1982: Tax Economics of Charitable Giving, Arthur Andersen, Chicago.
3. African Wildlife, 1984: The Law of the Jungle: Protea holosericea of Saw-Edge Peak, Vol 38, No. 4, pp. 135-138.
4. Baxter, L, 1984: Administrative Law, Juta and Co., Cape Town.
5. Birks, P, 1985: The Roman Law Concept of Dominion and the Idea of Absolute Ownership, Acta Juridica, pp. 1-37.
6. Blacks Law Dictionary, 1951: H C Black, West Publishing Co, St Paul.
7. Blackstone, W, 1765: In: Milton, J, 1985: Planning and Property, Acta Juridica, pp. 267-288.
8. Caldwell, L, 1975: Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy, Land Use and Environmental Law Review (formerly Environment Law Review), pp. 409-425.
9. Cohen, M, and Marao, E, 1984: The Nakor National Plan for Programmes, In: Conservation : The Broad View, The Wildlife Society of Southern Africa, pp. 1-9.
10. Conservation Forum, 1982: Grondgebruik en Grondaanwending in die RSA, Division of Soil Protection, Department of Agriculture and Fisheries, Republic of South Africa.
11. Cowen, D V, 1984: New Patterns of Landownership : The Transformation of the Concept of Ownership as Plena in re Potestas, The Trust Bank Series of Continuing Legal Education Lectures, Law Students Council, University of Witwatersrand, Johannesburg.
12. Cowen, D V, 1985: From Sectional to Airspace Title, Acta Juridica, pp. 333-347.
13. De Kiewiet, C W, 1965: The Imperial Factor in South Africa: a Study in Politics and Economics, Frank Cass and Co Ltd, London.
14. Delafons, J, 1969: Land Use Controls in the United States, Cambridge, England.
15. Development and Compensation, Putting People First, 1972: Cmd 5124, Her Majesty's Stationary Office, London.

16. Devine, D, 1964: Abuse of Rights, Acta Juridica, pp. 148-186.
17. Dolzer, R, 1976: Property and Environment : The Social Obligation Inherent in Ownership, International Union for Conservation of Nature, IUCN Environmental Policy and Law Paper No. 12, Morges, Switzerland.
18. Erasmus, G M, 1984: Expropriation and the Social Contract with reference to the Relation between Citizens and their Property, unpublished LLM thesis, University of Natal, Pietermaritzburg.
19. Farrier, D, and McAuslan, P, 1975: Compensation, Participation and the Compulsory Acquisition of Homes, In: Garner, J F (ed), Compensation for Compulsory Purchase: A Comparative Study, United Kingdom Comparative Law Series, Vol. 2, London.
20. Feist, M J, 1978: A Study of Management Agreements, Countryside Commission, Cheltenham, England.
21. Feldberg, M, 1972: Business Profits and Social Responsibility, Inaugural Lecture, No. 10 (New Series), University of Cape Town.
22. Financial Mail, 1986: Clampdown on the Coast, Financial Mail, 17 January 1986, p. 65.
23. Fiscus, 1972: Charitable Trusts, Income Tax Reporter, Vol xi, No. 86, pp. 207-211.
24. Franklin, B L S, and Kaplan, M, 1982: The Mining and Mineral Laws of South Africa, Butterworths, Durban.
25. Fuggle, R F, and Rabie, M A, (eds) 1983: Environmental Concerns in South Africa: Technical and Legal Perspectives, Juta and Co, Cape Town.
26. Galombik, J, 1980: Corporate Social Responsibility Policies and Practices in South Africa, unpublished Technical Report, Graduate School of Business, University of Cape Town, Cape Town.
27. Garner, J F, 1975, Compensation for Compulsory Purchase - A Comparative Study, United Kingdom Comparative Law Series, Vol. 2, London.
28. Garner, J F, and Neville Brown, L, 1973: French Administrative Law, Butterworths, London.
29. Gildenhuys, A, 1976: Onteieingsreg, Butterworths, Durban.

30. Greenewald, R H, 1971: In: Lowenfeld, A P (ed), Expropriation in the Americas, Cambridge University Press, New York.
31. Halsbury, 1973: Halsbury's Laws of England, (fourth ed), Lord Hailsham of St Marylebone, Butterworths, London.
32. Hansard, House of Assembly Debates, Government Printer, Cape Town.
33. Heydorn, H, 1985: Coastal Zone 85, Fourth Symposium on Coastal and Ocean Management, NR10 Memorandum 8517, National Research Institute for Oceanology, Stellenbosch.
34. Honore, T, 1961, Ownership, in: Guest, A G (ed.), Oxford Essays in Jurisprudence, Oxford University Press, London.
35. Honore, T, 1985: The South African Law of Trusts, Juta and Co, Cape Town.
36. Hoose, P M, 1981: Building an Ark, Tools for the Preservation of Natural Diversity Through Land Protection, Island Press, California.
37. Huxham, K, and Haupt, P, 1983: Notes on South African Income Tax, H and H Publications, Cape Town.
38. International Union for the Conservation of Nature, 1980: World Conservation Strategy, Morges, Switzerland.
39. Index to Foreign Legal Periodicals, The American Association of Law Libraries, University of California Press, California.
40. Index to Legal Periodicals, H W Wilson and Co (eds), New York.
41. Institute of Natural Resources, 1983: Annual Report, Pietermaritzburg.
42. Jacobs, M, 1982: The Law of Expropriation in South Africa, Juta & Co, Cape Town.
43. James, S, and Nobes, C, 1978: The Economics of Taxation, Philip Allan Publishers, Oxford, England.
44. Jarman, M L, 1984: Conservation Priorities in Lowland Fynbos, Report No. 99, South African National Scientific Programmes, CSIR, Pretoria.
45. Joubert, W A (ed), 1981: The Law of South Africa, Vol. 19, Butterworths, Durban and Pretoria.

46. Kimminich, O, 1975: Compensation for Expropriation of Land and for "Worsenment" in the Federal Republic of Germany, In: Garner, J F (ed), Compensation for Compulsory Purchase: A Comparative Study, United Kingdom Comparative Law Series, Vol. 2, London.
47. Knetch, J L, 1983: Property Rights and Compensation: Compulsory Acquisition and other Losses, Butterworths and Co, Canada.
48. Koch, F, 1974: The New Corporate Philanthropy, Plenum Press, New York and London.
49. Lamar, H, and Thompson, R (eds), 1981: The Frontier in History : North America and Southern Africa Compared, Yale University Press, New Haven and London.
50. Large, D W, 1973: This Land is Whose Land? Changing Concepts of Land as Property, Wisconsin Law Review, Vol. 4, pp. 1039-1083.
51. Leopold, A, 1966: A Sand County Almanac, Ballantine Books, New York.
52. Lee, J, and Honore, T, 1983: Family, Things and Succession, Erasmus, H J, van der Merwe, C G and van Wyk, A H (eds), Butterworths, Durban.
53. Lewis, C, 1985: The Modern Concept of Ownership of Land, Acta Juridica, pp. 241-266.
54. Meyerson, F A, 1984: A Comparative Analysis of Land Preservation Incentives: Brazil and the United States, Columbia Journal of Transnational Law, Vol. 22, pp. 389-411.
55. Michelman, F I, 1967: Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law", Harvard Law Review, Vol. 80, pp. 1165-1258.
56. Milton, J R L, 1969: The Law of Neighbours in South Africa, Acta Juridica, pp. 123-269.
57. Milton, J R L, 1985: Planning and Property, Acta Juridica, pp. 267-288.
58. Miltz, D, 1984: Financial Considerations of South Africa's Environmental Problems, unpublished thesis, Research Report No. 54, School of Environmental Studies, University of Cape Town.
59. Mishan, E J, 1972: Elements of Cost-Benefit Analysis, George Allen and Unwin, London.

60. Morrison, E D, 1983: Corporate Support of South African Universities, unpublished Technical Report, Graduate School of Business, University of Cape Town.
61. Murphy, E F, 1977: Nature, Bureaucracy and the Rules of Property, North Holland Publishing Co, Amsterdam and New York.
62. Natal Town and Regional Planning Commission, 1984: Compensation and Betterment, Proceedings of a Symposium, Vol. 13, Natal Town and Regional Planning Commission, Pietermaritzburg.
63. Nature Conservancy News, 1983: editorial, The Nature Conservancy News, Vol. 33, No. 6, p. 1.
64. Nelson, R, 1970: Economic Factors in the Growth of Corporate Giving, National Bureau of Economic Research and Russel Sage Foundation, New York.
65. New Scientist, 1985: Broads Breakthrough in Conservation Funding, 28 March 1985.
66. Nicholas, B, 1962: An Introduction to Roman Law, Clarendon Law Series, Oxford.
67. Optima, 1983: Social Responsibility in South Africa: The Work of The Anglo American and De Beers Chairman's Fund, Supplement to Optima, Vol. 31, October 1982, Johannesburg.
68. Page, D, and Rabie, M A, 1983: Land-use Planning and Control, In: Fuggle and Rabie, 1983, Environmental Concerns in South Africa, Juta & Co, Cape Town.
69. President's Council Report, 1984(a): Report of the Planning Committee of the President's Council on Nature Conservation in South Africa, No. 2/1984, Government Printer, Cape Town.
70. President's Council Report 1984(b): Report of the Planning Committee of the President's Council on Priorities between Conservation and Development, No. 5/1984, Government Printer, Cape Town.
71. Rabie, M A, 1976: South African Environmental Legislation, The Institute of Foreign and Comparative Law, Pretoria.
72. Rabie, M A, 1985(a): South African Law relating to Conservation Areas, The Comparative and International Law Journal of Southern Africa, Vol. xviii, No. 1, March 1985, pp. 51-89.

73. Rabie, M A, 1985(b): The Impact of Environmental Conservation on Landownership, Acta Juridica, pp. 289-313.
74. Relly, G, 1982: Editorial, Social Responsibility in South Africa, Optima, (supplement) Vol 31, October 1982, Johannesburg.
75. Samuels, W J, 1976: An Economic Perspective on the Compensation Problem, Wayne Law Review, Vol. 21, pp. 113-134.
76. Samuels, W J, and Mercurio, N, 1975: The Role of the Compensation Principle in Society, In: Economic Foundations of Property Law, [Ackerman, B A (ed)], Little, Brown and Co, Boston and Toronto.
77. Savage, D T, Burbe, M, Coupe, J D, Duchesneau, T D, Whiry, D F, and Wilson, J A, 1974: The Economics of Environmental Improvement, Houghton Mifflin Co, Boston.
78. Seneca, J J and Taussig, M K, 1974: Environmental Economics, Prentice Hall Inc, Englewood Cliffs, New Jersey.
79. Silberberg, H S, and Schoeman, J, 1983: The Law of Property, (2nd ed), Butterworth and Co, Pretoria and Durban.
80. Silke, A S, Divaris, C and Stein M L, 1982: Silke on South African Income Tax, (10th ed), Juta and Co, Cape Town.
81. Smith, L, 1981: The unsentimental Corporate Giver, Fortune, 21 September 1981, pp. 123-125.
82. Simon, J A, 1976: Simon's Taxes, John Foster (ed.), third revised edition, Butterworths, London.
83. Statistical/Economic Review, 1984/5: Budget 1984/5, The Government Printer, Pretoria.
84. The Commission of Enquiry into Fiscal and Monetary Policy in South Africa, 1969: First Report: Taxation in South Africa, R P 24/1969, Government Printer, Pretoria.
85. The Report of the Expert Committee on Compensation and Betterment, (the "Uthwatt Report"), 1942: Command 6386, Her Majesty's Stationary's Office, London.
86. The Standing Commission of Enquiry with regard to the Taxation Policy of the Republic, 1983: Report on the System of Initial and Investment Allowances Presented to the Honourable Minister of Finance, Government Printer, Pretoria.

87. United States Department of the Interior, 1979: Land Conservation and Preservation Techniques, Heritage and Recreation Service, U S Department of the Interior, Washington, D C.
88. Van der Merwe, C G, 1979: Sakereq, Butterworths, Durban.
89. Van Zyl Slabbert, F, 1985: The Last White Parliament, Jonathan Ball and Hans Strydom Publishers, Johannesburg.
90. Widdicome, D, and Moore, V, 1975: A General Survey of English Law, In: Garner, J F (ed), Compensation for Compulsory Purchase: A Comparative Study, United Kingdom Comparative Law Series, Vol. 2, London.
91. Wiechers, M, 1976: Administratiefreg, Butterworths, Durban.
92. Wonnacot, P and R, 1982: Economics, McGrawHill Interantional Book Company, New York.

ANNEXURE A: LIST OF PERSONS INTERVIEWED

- 1 Baard, C R, Chief Director, Regulatory Services, Department of Agricultural Economics and Marketing, Pretoria.
- 2 Botha, H, Legal Advisor, National Parks Board, Pretoria.
- 3 Brownlee, S, Administrative Officer, Chief Directorate of Environmental Conservation, Department Environment Affairs, Pretoria.
- 4 Cohen, M, Assistant Director, Chief Directorate of Environmental Conservation, Department of Environment Affairs, Pretoria.
- 5 Davis, D, Associate Professor, Department of Commercial Law, University of Cape Town.
- 6 Fuggle, R F F, Professor and Head, Department of Environmental and Geographical Science, University of Cape Town.
- 7 Gamble, F, Senior Lecturer, Department of Geography, University of Witwatersrand.
- 8 Gasson, B, Senior Lecturer, Department of Town and Regional Planning, University of Cape Town.
- 9 Gildenhuis, A, Attorney, Gildenhuis, Taylor and Vos, Pretoria.
- 10 Giliomee, H, Professor, Department of Political Studies, University of Cape Town.
- 11 Gill, K, Attorney, Bell, Dewar and Hall, Johannesburg.
- 12 Graaf, J, Member of Commission of Enquiry into the Tax Structure of the Republic of South Africa and Director of Companies.
- 13 Grindley, J, Associate Professor, Department of Environmental and Geographical Sciences, University of Cape Town.
- 14 Grossman, D, Administrative Officer, Department of Agriculture, Pretoria.
- 15 Henderson, D M, Chairman, Natal Wildlife Conservation Association, Natal.
- 16 Jowell, K, Member of Commission of Enquiry into the Tax Structure of the Republic of South Africa and Assistant Director of the Graduate School of Business, University of Cape Town.

- 17 Mark, M, Lecturer, School of Economics, University of Cape Town.
- 18 Milstein, D, Administrative Officer, Transvaal Provincial Department of Nature Conservation, Pretoria.
- 19 Rabie, M A, Professor, Department of Public Law, University of Stellenbosch.
- 20 Schoembee, J, Senior Lecturer, Department of Public Law, University of Cape Town.
- 21 Stroebel, F H, Director, South African Nature Foundation, Stellenbosch.
- 22 Theron, C H B, Assistant Director, Directorate of Soil Protection, Department of Agriculture, Pretoria.
- 23 Whitaker, W, Professor, Dean of the Faculty of Law, University of Cape Town.
- 24 Wiechers, M, Professor, Head of Department of Public Law, University of South Africa.
- 25 Wimble, D, Attorney, Moodie and Robertson, Johannesburg.

SUBMISSION TO : COMMISSION OF ENQUIRY INTO
THE TAX STRUCTURE OF THE REPUBLIC OF SOUTH AFRICA

(THE MARGO COMMISSION)

SUBMISSION MADE BY: J GLAZEWSKI, on behalf of

THE WILDLIFE SOCIETY OF SOUTHERN AFRICA

BACKGROUND:

The Society has over 22 000 members from all sectors of South African society and is the largest private sector society in the country. It was established in 1926 by a group of individuals concerned with inroads into the wildlife heritage of South Africa. Today it concerns itself with the conservation of the whole South African environment.

Apart from normal conservation club activities it is involved in a broad spectrum of projects including environmental education (embracing environmental education in the Black community), the publication of an award winning magazine, monitoring environmental legislation, funding research into conservation issues and the acquisition of land for conservation purposes.

It enjoys international recognition being a member of the IUCN (International Union for the Conservation of Nature).

PURPOSE AND NATURE OF THIS SUBMISSION

This submission motivates for tax relief in the area of environmental concern. It is divided into four parts:

Part 1 gives reasons why environmental concerns specifically need to be considered for tax relief. While not wishing to anticipate any of the Commission's recommendations the general impression is that it will not favour granting incentives to particular sectors or activities in the economy. Part 1 accordingly offers some generally accepted economic arguments as well as some environmental considerations as to why this should not be the case in the sphere of environmental concern.

Part 2 considers existing forms of taxation and potential forms of tax relief in the environmental sphere. Income Tax, Donations Tax and Estate Duty are considered.

Part 3 highlights specific environmental problems which could be ameliorated by tax relief. It also reviews some different forms of tax which could be implemented to achieve specific environmental objectives. Potential taxes such as a capital gains tax which may be recommended by the Commission are reviewed.

Part 4 lists the recommendations to emerge from Parts 1 to 3.

PART 1 REASONS WHY ENVIRONMENTAL CONCERNS PARTICULARLY
SHOULD ENJOY FAVOURABLE TAX TREATMENT

1.1 ECONOMIC CONSIDERATIONS

1.1.1 The Free Market and Public Goods

Environmental quality is a public good like a defence force or education system. The essence of a public good is that it is required by society at large rather than by individual members. Public goods are enjoyed collectively as opposed to individually. An individual enterprise would not be inclined to supply such a good because the major benefits flowing from the costs incurred in producing such a good flow not to it but to society at large.

Environmental problems occur as a result of certain failures in the free market system. The free market economy does not include in the price of goods and services the costs to society at large which result from the production and use of these goods and services. Government is accordingly required to compensate for the inadequacies inherent in the free market system.

The traditional government method of dealing with environmental concerns has been prohibition and regulation. These have not always been successful and alternative innovative methods ought to be considered (Miltz 1984, pp. 10-34). The tax system is one alternative tool available to government.

By viewing environmental quality as a public good, tax relief for environmentally desirable activity can be justified and distinguished from other forms of relief which the Commission

will undoubtedly be requested to consider. The need for a clear policy guideline on which public causes qualify for tax relief was not filled by the previous major Commission of Inquiry into taxation matters, the Fransen Commission (The Commission of Enquiry into Fiscal and Monetary Policy in South Africa, 1970). This was apparent in its recommendation that a deduction should be allowed for donations to higher educational institutions. The public goods perspective can therefore act as a policy guideline to determine which activities should qualify for relief.

Finally, the granting of tax relief will encourage environmentally desirable activity in the private sector and thus be in conformity with the distinct government policy to encourage privatisation. For instance in the 1985 Budget Speech the Minister of Finance stated that the government is seeking ways and means to give effect to privatisation. It is submitted that incentives encourage the private sector to become involved in areas traditionally reserved for government.

1.2 ENVIRONMENTAL CONSIDERATIONS

1.2.1 General

It has been repeatedly stated that ours is the last generation which has any real chance of conserving in some measure the diversity of ecosystems in the Republic of South Africa. It is estimated that 20% of the world's currently surviving fauna and flora species will be extinct by the end of this century. Undeniably the preservation of the greatest number of plants and animals, habitats and ecosystems has longterm benefits for man. For example:

- 1 There is the prospect of discovering further products useful to man and it would be unwise to assume that we can dispense with species simply because there is no proven use to man at present.
- 2 Animals more adapted to local conditions and which will be more compatible with the local environment could possibly be utilized as a source of protein for our growing population.
- 3 Plants bred from indigenous varieties and more adapted to local conditions as a food source will be required.
- 4 The aesthetic and recreational value of the natural environment will come under increasing pressure as population increases.

Sight is often lost of the fact that, while it may be tragic that various flora and fauna species disappear, that is not the aspect of greatest importance. The crucial point is that the factors operating to cause their extinction are also operating on mankind as man is a life form and subject to the same forces. Man's future security is totally dependent upon the proper functioning of natural ecosystems. Because of man's destruction of natural vegetation and his over-utilization of the land in South Africa, both droughts and floods have increased in intensity and severity. These have tremendous economic, social, political and ecological impacts on the country and must be considered as our highest priority problem for action.

Of major importance is the formulation of a policy and a strategy for the implementation of that policy by the state. The machinery for this exists in the Environment Conservation Act No. 100 of 1982 and the Council for the Environment has established a standing committee for policy and strategy which is dealing with this aspect. In addition, the President's Council has considered and reported on nature conservation in South Africa (P.C. 2/84) and priorities between conservation and development (P.C. 5/84). There exists at present an urgent need for funding for the following purposes:

1. The rehabilitation and restoration of habitat.
2. The prevention of soil erosion.
3. Proper land management.
4. Pollution control.
5. Implementation of environmental education programmes.
6. Research.
7. Family planning programmes.
8. Land acquisition and management.

1.2.2 A Central Land Acquisition Fund

Item 8 above is elaborated on as it is of an urgent and high priority nature. Certain essential areas of land for conservation in South Africa are in private ownership and have been identified by NAKOR (The South African National Committee for Nature Conservation). Most of these areas have limited agricultural potential and have degenerated as a result of inappropriate or inadequate management practices. Examples are Seekoeivlei in the OFS and Kransberg in the Transvaal. In other

cases it is desirable that land adjoining existing game or nature reserves be acquired.

It is accordingly essential that a central State fund be established which could finance the acquisition of high priority conservation areas. It could be administered by a central government agency such as NAKOR.

Such a fund has also been recommended in a "Report of the Planning Committee of the President's Council on Nature Conservation in South Africa" (P.C. 2/1984 recommendation No. 40.)

Potential incentives for this and some of the other areas referred to above are considered in Parts 2 and 3 below.

PART 2 INCENTIVES WITHIN THE EXISTING TAX SYSTEM

2.1 INCOME TAX

2.1.1 Introduction

An effective incentive would be to allow as a deduction from income the amount of any donation made by a taxpayer to a designated conservation organization. Such funds would be used to acquire land for conservation purposes or for undertaking other conservation projects. While no attempt is made here to quantify the amount of funds which would be generated by the private sector if such deductions were allowable, it has been stated that:

"If donations or bequests to conservation projects were tax deductible, there would be appreciably greater support from the private sector."

(Report of the Planning Committee of the President's Council on Nature Conservation in South Africa, 1984 p. 106).

Other areas of environmental concern where a deduction from income ought to be considered are:

- expenditure incurred in the rehabilitation and restoration of habitat. As regards the mining industry, Franklin and Kaplan (1982, p. 710) are of the view that expenditure on maintenance and preservation of the environment are deductible.

Situations can be envisaged however, where such expenditure is regarded as capital.

- expenditure incurred in respect of implementing in-house educational programmes by companies. This would encourage the sustained use of the rural environment which is at present suffering from severe degradation particularly in the homelands and independant states.

- expenditure incurred in respect of research conducted into ameliorating areas of environment concern.

At the current corporate tax rate of 50% the burden of every R1 donated to these areas would be borne equally by both the private and public sectors.

2.1.2 The General Deduction Formula (Section II(a) of the Income Tax Act No 56 of 1962, referred to as 'the Act')

At present the general deduction formula does not permit the deduction of donations to conservation organizations on the grounds that this is not "in the production of income". Consideration should be given to broadening the ambit of this requirement and allowing "expenditure reasonably incurred in the course of trade." This will encourage enterprises to participate more fully in the social costs associated with economic progress, including the various types of expenditure outlined above. However, in certain cases such expenditure may not be allowable on the grounds that it is of a capital nature (see ITC 1129, 31 SATC 144).

2.1.3 Specific Deductions

An alternative to the above would be to allow a specific deduction for donations to designated conservation organizations as well as the other expenditure items listed in 2.1.1 above.

At present the Act contains only two provisions which allow a deduction in respect of donations:

Section 18A with respect to donations to institutions of higher learning and section 11(t) with regard to donations made for the provision of employee housing. Section 18A complies with the recommendation made in Part 1 in that it provides for the provision of a public good. Section 18A(2)(a) ensures that the donor has no control over the selection of the beneficiary of the donation thereby ensuring the donation is used for public purposes.

The following safeguards could be built into such a specific provision: only donations to designated conservation organizations would qualify; stipulating a minimum percentage of funds which can go towards administration, applying a percentage of taxable income limitation on the extent of the allowable donation and providing for the issue and production of receipts.

The donee's position is satisfactory as section 10(1)(cB)(cc) exempts from income tax the receipts and accruals of any body engaged in "promoting nature conservation or animal protection activities." It is submitted that nature conservation is wide enough to cover rural development schemes as these are concerned with resource destruction.

2.2 DONATIONS TAX AND ESTATE DUTY

2.2.1 Comment: These two types of tax are dealt with under one head because donations tax can be viewed as estate duty payable in advance. There is also speculation that the Commission may replace these with one type of tax as in the United Kingdom where there is a capital transfer tax.

The existing donations tax provisions appear to be satisfactory and ought to be retained if any changes are made. From the donor's point of view section 56(1)(h) read with section 10(1)(cB)(cc) exempts from donations tax any donation made to an organization engaged in or promoting "nature conservation or animal protection activities."

As regards estate duty however an anomaly is apparent because the Estate Duty Act (No 45 of 1955) does not exempt from estate duty bequests to conservation organizations. This appears to be an omission because this act does provide for a broad range of deductions for example in respect of bequests for charitable, ecclesiastical or educational purposes. These are similar to the donations tax exemptions and there is no apparent reason why conservation gifts should be exempted from donations tax but not estate duty. While conservation organizations can apply for individual exemption on the ground of being a charity, it would be preferable to grant statutory exemption to all conservation organizations.

PART 3 INNOVATIVE FORMS OF TAXATION, RELIEF AND INCENTIVES
IN THE ENVIRONMENTAL SPHERE

3.1 INCENTIVES WITHIN THE TAX SYSTEM

3.1.1 A Residuals or Emissions Tax

South African pollution control legislation deals with the regulation of both the source of pollution and the emission itself. However greater reliance is placed on the former because of the difficulty in proving violations of emission standards.

The residuals tax which imposes a tax on each unit of pollutant emitted can potentially complement the administrative control of emissions. While proof would still be a requirement it would be less onerous because the consequences of non-compliance would not be criminal. Further advantages of a residuals tax are:

- it substitutes the flexible incentive of the pricing mechanism for the cumbersome administrative machinery of the coercion implied by regulation and enforcement. However difficulties of ascribing a particular emission to a particular enterprise as well as the measurement of level of emissions would still present problems.

- it is economically efficient in that the rational decisionmaker would reduce pollution levels to the point where marginal social benefit derived from pollution reductions equals the marginal social cost of reducing emissions.

- it can be easily varied so as to regulate the nature and level of emission abatement in accordance with the firm's production function and assimilative capacity of the environment.

3.1.2 Capital Gains Tax

In the event of the Commission recommending the implementation of a capital gains tax, relief should be granted for transactions made for purposes of environmental conservation.

In the USA relief is granted to the donor for capital gain property donated or sold under a "bargain sale" to scientific or educational institutions which include private conservation organizations such as the Nature Conservancy (Section 170 of the US Internal Revenue Code). Relief is effective because under the US system the taxable proceeds on the disposition of such property is included with receipts of an income nature, and tax due is calculated on this total amount. This is in contrast to the United Kingdom where capital gains are taxed separately.

In the United Kingdom the Capital Gains Tax Act of 1979 imposes a tax on all "chargeable gains" that accrue on the disposal of defined assets in the tax year. However, an exemption is made where the asset accrues to a charity or is applied for a "charitable purpose". Although "charitable purpose" is not defined, it has been held that the promotion of the preservation of lands of beauty or historic interest is a charitable purpose (Simon's Taxes, E6 p. 509). There is no capital gains tax in Australia.

3.2 INCENTIVES OUTSIDE THE TAX SYSTEM

3.2.1 Subsidies and Grants

Fiscal measures outside the tax system that can be implemented to encourage the achievement of environmental objectives are subsidies and cash grants. They have to a certain degree been incorporated in South African legislation, for example by the Conservation of Agricultural Resources Act (No 43 of 1983) which incorporates the previous Soil Erosion Act. These incentives have been used with a certain amount of success by providing subsidies for soil conservation works, veld utilization works, drainage works and the stock-reduction scheme (Fuggle and Rabie, 1983 p. 153). It is submitted that such schemes ought to be extended from the agricultural sector to incorporate the broader conservation sphere as well.

The advantages of subsidies and cash grants are:

- a great deal of control and exclusivity can be built into subsidy and cash grant payment policies. The qualification criteria can be very broad or quite specific.
- they are open to review, debate and possible alteration at regular intervals.
- they are readily quantifiable, may be undertaken directly through the process of legislative appropriation and can be applied directly to areas of high priority.

Grants and subsidies have been extensively utilized in other jurisdictions. For example, the British Ministry of Agriculture, Fisheries and Food approved grants this year for farmers in the Norfolk Broads to prevent them from draining this wetland to carry on their farming activities. Similarly in the Netherlands farmers are paid not to farm designated environmentally sensitive land.

In the South African environmental sphere they could be effectively utilized for the protection or prevention of the destruction of threatened habitats or endangered species. Much of this degradation is occurring on private land and means other than the outright acquisition thereof are needed to prevent such destruction.

Priority areas for nature conservation have been identified. For example, in Conservation Priorities in Lowland Regions of the Fynbos Brome (M L Jarman, 1984) a scientific numeric rating system has been used to identify sites for conservation. In addition the South African National Committee for Nature Conservation (NAKOR) has identified certain areas as being essential for nature conservation in South Africa.

Where the outright acquisition of such land is not possible, subsidies and grants can play a role in conserving such areas.

3.2.2 Property Transfer Tax

The high priority accorded to the establishment of a central State fund to finance the acquisition of land which should be conserved has been referred to in 1.2.2 above.

One of many ways of financing such a fund is by a property transfer tax. Here a tax is imposed on all land transactions (sale or lease) and the funds generated placed in the central fund. Such a tax (transfer duty) is already in existence but the funds generated accrue to the State Revenue Fund and are not designated for a particular purpose.

In some states in the United States, e.g. Maryland, such a tax has been successfully imposed to finance the acquisition of open space specifically for the purpose of acquiring land for conservation or recreational use.

Such a tax could be imposed at the local or national level.

PART 4 RECOMMENDATIONS

The recommendations to emerge from the above are:

- 4.1 Environmental quality and conservation is to be recognized as a public good and thus qualifying for favourable tax treatment.
- 4.2 The escalating demands on the environment and resultant stress on natural ecosystems which will be evident in the forthcoming future emphasises the need for the implementation of such alternative mechanisms. Particular consideration should be given to methods of funding a central State fund for land acquisition.
- 4.3 The "in the production of income" prerequisite in the general deduction formula (Section 11(a)) should be widened to include "expenditure reasonably incurred in the course of trade."
- 4.4 Alternatively, specific deductions should be allowed to alleviate specific areas of environmental concern outlined in 2.1.1.
- 4.5 In particular, a deduction should be allowed for donations to designated conservation organizations. This would qualify with the criterion that the State will contribute to the production of public good referred to in Part 1.

- 4.6 The anomaly in the Estate Duty Act that bequests to conservation organisations do not qualify for a deduction ought to be rectified.
- 4.7 A residuals tax should be implemented to combat the pollution problem.
- 4.8 In the event of a capital gains tax being introduced, relief should be granted where dispositions are made for conservation purposes.
- 4.9 Consideration should be given to widening the application of subsidies and grants in the conservation sphere. Areas demarcated as being of high sensitivity or threatened habitats have been identified and should enjoy priority.
- 4.10 The feasibility of imposing and allocating a transfer tax on property for the purpose of partially funding a central state land acquisition fund ought to be considered.