

NEW LAND LAW OVERVIEW: KEY CHANGES

RE: PRINCIPAL LAND LAW;
CUSTOMARY LAND ACT;
REGISTERED LAND (AMENDMENT) ACT;
LAND ACQUISITION ACT.

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Preamble

- Malawi has reached a critical juncture in its land reform ambitions. A number of laws have recently been enacted which were first proposed in the National Land Policy of 2002

- Ten Land and Land Related Laws approved by Parliament and Assented to by the President are:
 - i. Land Act 2016
 - ii. Physical Planning Act 2016
 - iii. Land Survey Act 2016
 - iv. Customary Land Act 2016
 - v. The Registered Land (Amendment) Act 2016
 - vi. Public Roads (Amendment) Act 2016
 - vii. Forestry (Amendment) Act 2016
 - viii. Land Acquisition (Amendment) Act 2016
 - ix. Local Government (Amendment) Act 2016
 - x. Malawi Housing Corporation (Amendment) Act 2016

- Significantly, the Customary Land Act allows the creation of Customary Estates, so that smallholder farmers in Traditional Land Management Areas (TLMAs) can get legal title to their land and thus be protected from encroachment and other interests including those of Traditional Authorities.
- The Registered Land (Amendment) Act provides for title registration throughout the country for all land categories including customary estates. All land shall be subject to registration for purposes of determination of ownership.
- The ownership of family land has been done away with
- It also provides for decentralization of land management.

THE LAND ACT 2016

- The purpose of this Act is to replace the Land Act of 1965 (Cap. 57:01)
- **The rationale** of this Act is that it harmonises the existing legal framework with the aspirations of the Malawi National Land Policy (MNLP)

The New provisions in the Act include:

1. Definitions:
 - a. Sec. 1. of Land Act 2016 - “Land” means the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance, and includes the surface covered with water, all things growing on that surface, buildings, other things permanently affixed to land and free or occupied space for an indefinite distance upwards, as well as downwards subject to limitations upon the airspace imposed and rights in the use of airspace granted by international law.

- b. “Traditional Land management Area” (TLMA) means an area demarcated and registered as falling within the jurisdiction of a Traditional Authority.
- c. “Customary estate” means any customary land which is owned, held or occupied as private land within a Traditional Land Management Area (TLMA) and which is registered as private land under the Registered Land Act 2016.
- d. “Private Land” means all land that is owned, held or occupied under a freehold title, leasehold title, or as a customary estate non which is registered as private land under the Registered Land Act 2016.

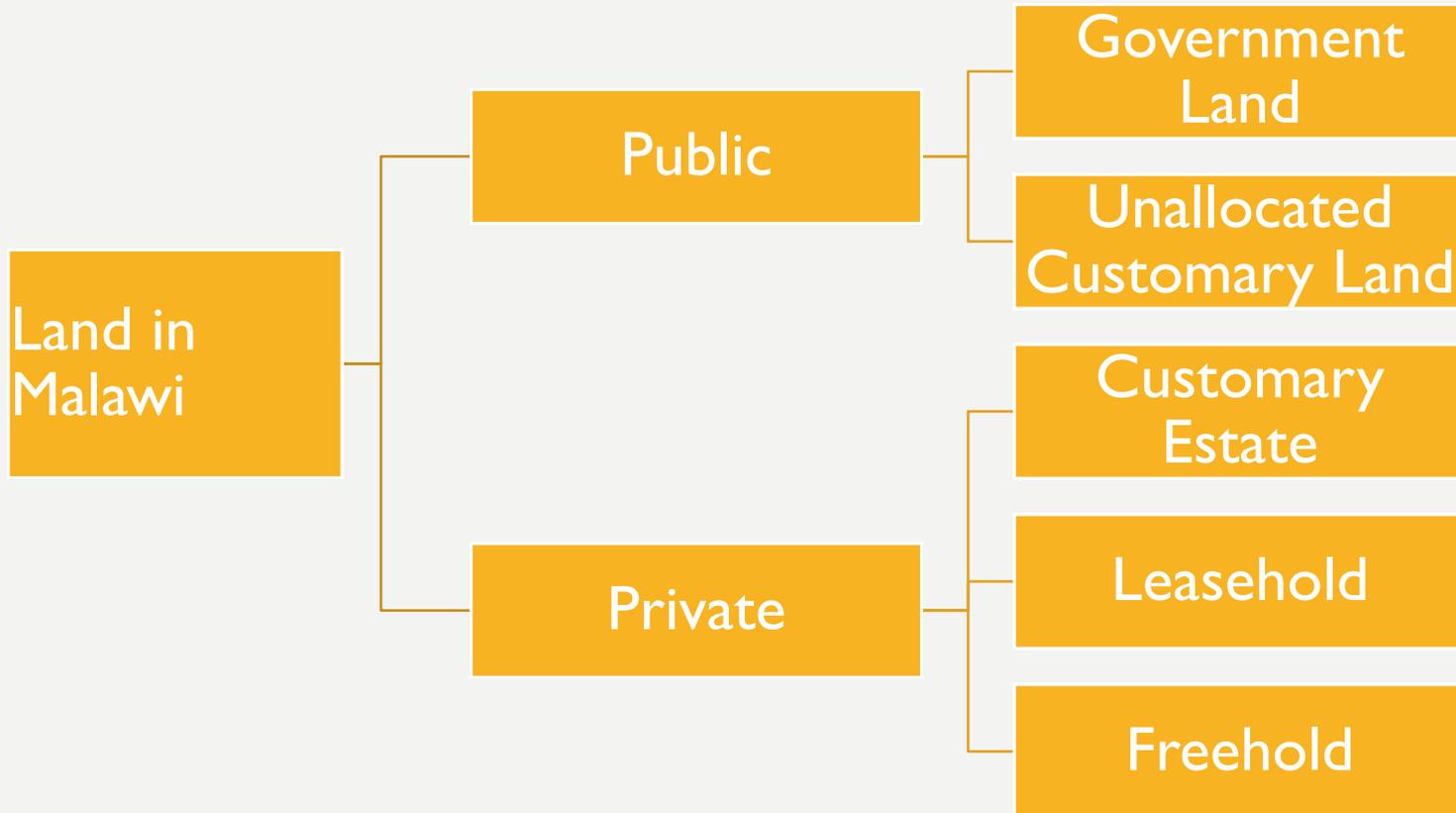
- e. “Customary Land” means all land used for the benefit of the community as a whole and includes unallocated land within the boundaries of a TLMA.
- f. “Public Land” means land held in trust for the people of Malawi and managed by government, a local government authority or a Traditional Authority – (e.g. government buildings, schools, hospitals, public infrastructure); national parks, forest reserves, recreation areas, historic and cultural sites; land vested in government as a result of uncertain ownership or abandonment; unallocated and communal land within a TLMA
- g. “Freehold” means an estate in land which is held in perpetuity.

The New provisions in the Act

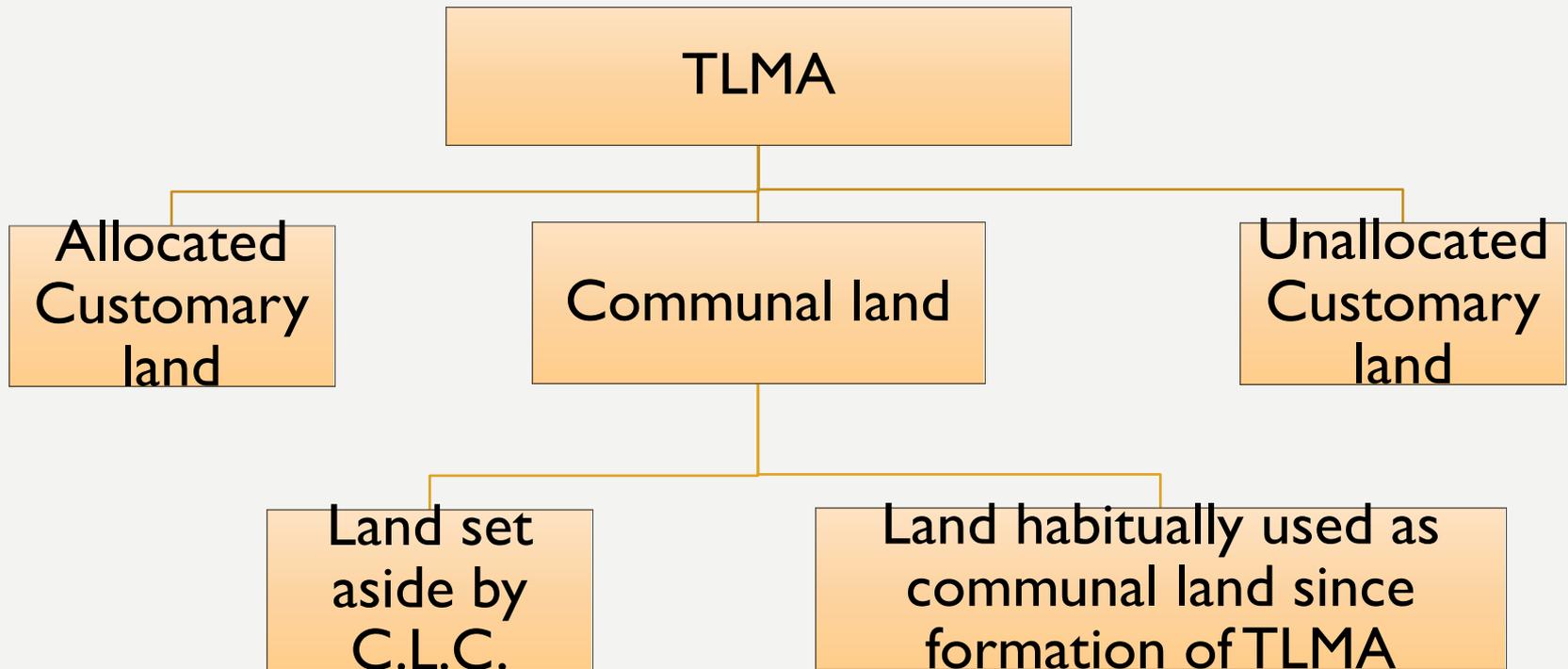
2. Classification of land tenure types;

- Land Act 2016 - Section 7 (1) – Land shall be categorised as either Public land or Private Land

SECTION 7: CATEGORIZATION OF LAND



TRADITIONAL LAND MANAGEMENT AREA – SECTION 13-14



VESTING OF LAND

Land Act 2016 - Section 8 - Vesting of land:
All land is vested in perpetuity in the Republic (to vest is to bestow, confer or devolve, consign or entrust) - Departure from the 1965 Land Act that vested Land in the President

4. Land for Investment: Land Act 2016 - Section 11(i). “Land designated for investment purposes shall be identified, published in the gazette and allocated to the Malawi Investment and Trade Centre Ltd which shall create derivative rights to investors in accordance with the Investment and Export Promotion Act, 2012”.
5. Planning. All land is subject to planning
6. LA 2016 Sec. 19. Conversion of Customary land into customary estates (private land). "Nothing in this Act shall be construed as preventing the registration of Customary land under the Registered Land Act as private land”.

CUSTOMARY LAND ACT 2016

- CLA - S 3 (3) – A certificate of customary land in a Traditional Land Management Area shall –
 - a. Be issued in the name of a Traditional Authority having jurisdiction in the area;
 - b. Confer upon land committee in the area, the function of management of customary land
 - c. Affirm the occupation and use of customary land by the person in the Traditional Land management Area.
 - d. **TLMA BOUNDARIES.** The Customary Land Act 2016 section 3(7) states that “Reference to the boundaries of Traditional Land Management Areas shall be to general boundaries”. TLMA boundaries will be general, not fixed

Administration and Management of customary land

- CL Act 2016; Sec. 4 – Land committees shall, subject to provisions of this Act, be responsible for the management of all customary land in a Traditional Land Management Area
- CL Act 2016; Sec. 5 – (1). There shall be established in each Traditional Land Management Area, customary land committees at Group Village Headman Level.

Administration and Management of customary land

- CL Act 2016; Sec. 5 – (2) – A Land Committee shall consist of:-
 - a. A Group Village Headman who shall be the chairperson;
 - b. Six other persons elected by and from within the community, at least three of whom shall be women

Administration and Management of customary land

- CL Act 2016; Sec. 5 – (3) A member of a customary land committee shall hold office for a term of three years, and shall be eligible for election for a further term of three years.
- CL Act 2016; Sec. 5 – (4) (Vacating office). A member of the committee shall vacate office if he/she (a) resigns; (b) is convicted of any offence involving dishonesty or moral turpitude; (c) is dismissed for failure to declare interest pursuant to Sec.16 or (d) becomes incapable to perform his/her duties as a result of any disability.
- CL Act Sec. 6 (1) – A land committee shall manage the customary land within its area of jurisdiction, on trust, as if the committee were a trustee of the residents in the area were beneficiaries under a trust of the customary land.

Administration and Management of customary land

- Sec. 6 (3) A land committee shall not allocate land or grant a customary estate without prior approval of the relevant Traditional Authority whose approval shall not be unnecessarily withheld.
- Sec. 6 (4) The role of the Commissioner is to give advice on management of customary land and **not allocation of land.**

Administration and Management of customary land

- CLA - Sec 8 (1) – (3).
 - Land clerks for each Traditional Land Management Area
 - Serve as secretary to any land committee
 - Shall be employee of local govt. authority
 - Qualifications- MSCE, trained in land tenure management, competent in basic map preparation and land use planning.

- Duties- survey work, basic map preparation for a TLMA, maintain a register of all land transactions with TLMA, prepare land use plans, provide technical advice on land matters and monitor compliance with relevant land related Acts.
- CLA - Sec 8 (3). Land Clerks will be responsible for “preparing land use plans in accordance with the Physical Planning Act, 2016

- Sec. 10 (1). Where a land committee is not managing customary land in accordance with this Act and other relevant Laws or with regard to the duties applicable to a trustee, any person in the relevant Traditional Land Management Area may lodge a complaint with a local government authority:
 - - inform commissioner of the matter
 - - advise to amicably settle the matter
 - - use dialogue to resolve the matter
 - Request the commissioner to issue a directive
 - Recommend a commission of inquiry

- CLA Sec. 11 (1). In the exercise of the powers of management, a land committee shall have powers to enter into an agreement with any other land committee within the TLMA concerning the use of land which is partly within the jurisdiction of one land committee and partly in another Land committee; provided that (c) they inform the TA responsible for the TLMA and submit to him/her the draft agreement for his/her approval.

- CLA Sec. 12 (1). In the exercise of the powers of management, a Traditional Authority (TA) shall have powers to enter into an agreement with another TA concerning the use of land which is partly within the jurisdiction of one TA and partly in another TA. The agreement may be amended, modified or varied from time to time.
- A local government authority must however be informed

- CLA Sec. 14 (1). A land committee shall determine a portion of the customary land to be set aside as communal customary land and the intended purpose of the portion.
- CLA Sec. 14 (3). A land committee shall maintain a register of communal customary land in accordance with any rules that may be prescribed

LEASES

- CLA Sec. 15 (1). Leases already granted by the commencement of this Act shall continue to be a lease for the remainder of its term.
- Upon expiry of the lease, Sec 11 of the Land Act (Land for Investment Purposes) shall apply, otherwise the Commissioner shall continue to be responsible for that land and the land committee shall recommend to the Commission for the grant or refusal of the lease.

- CLA Sec. 16 (1)- (3). Deals with issues of Conflict of interest.
- CLA Sec. 17 (1). Where the Minister intends to transfer any customary land in a TLMA to Government or reserve land for public interest (including investments of national interest), he may direct the Commissioner to proceed in accordance with the provisions of this Section. Such an intention shall be gazette with details of the location, extent of boundaries of the land to be transferred and the reason for the proposed transfer. The minister may exercise such power not less than ninety days from the date of gazetting.

- CLA Sec. 17 (8). The customary land shall be transferred subject to
 - a. Payment of appropriate compensation as assessed by a registered valuer and agreed upon by the land committee and the Commissioner
- CLA Sec. 17 (11). The minister may direct that compensation payable under this section shall be paid by the person to whom or an organization to which the customary land has been transferred to and is granted under lease.
- CLA Sec. 18. the minister may however direct the transfer of any area of government land or reserved land to customary land subject to the Land act 2016

- CLA Sec. 20 (1). A customary estate shall be allocated by a land committee to –
 - a. A citizen of Malawi, or a family of citizens of Malawi;
 - b. A group of two or more citizens of Malawi whether associated together under any law or not; or
 - c. A partnership or corporate body, the majority of whose members or shareholders are citizens of Malawi.

- CLA Sec. 20 (2) “A customary estate shall be:
 - a. of an indefinite period/duration,
 - b. Inheritable and transmissible by will.
 - c. Subject to any conditions set out in Sec 27 or as may be prescribed by the land committee
 - d. Liable, subject to adequate notification and prompt payment of full and appropriate compensation, to acquisition by government in the public interest, in accordance with the Land Acquisition Act.

- CLA Sec21 –
- (1) “A person, family unit, a group of persons recognised under customary law or who have formed themselves together as an association, a cooperative society or as any other body recognised by any written law, may apply to a land committee responsible for that land for the grant of a customary estate.
- (2) “An application for a customary estate shall be –
 - a. In a prescribed form
 - b. Signed by the applicant(s)
 - c. Accompanied by a fee if applicable or any other required information

- S 22 CLA- Security of tenure
- (1) A Land committee shall within 90 days of receipt of an application for a customary estate or within 90 days of the submission of further information determine the application
- (2) in determining whether or not to grant a customary estate, a land committee shall:
 - a. comply with decisions that have been reached by relevant authority on the adjudication of the boundaries to and rights in the land which is the subject of the application for a customary estate
 - b. Have regard to any guidance from the Commissioner concerning

- c. Have regard to equality of all persons such as
 - i. Treat an application from a woman or a group of women, a person with disability or a group of persons with disability no less favorably than an equivalent application from a man, a group of men or a mixed group of men and women
 - ii. Adopt or apply no adverse discriminatory practices or attitudes towards any person who has applied for a customary estate.

- Sections 23
 - i. Where a land committee grants a customary estate, it shall deliver a written offer
 - ii. The applicant shall, within 21 day, accept or decline the offer in writing
 - iii. If accepted, committee shall issue a certificate known as “Certificate of Customary Estate”
 - iv. The certificate not valid and occupation unlawful until a fee applicable under this section , **if any**, is paid in full.
 - v. Certificate shall be signed by CLC Chair, Land Clerk, signed or marked by the grantee, signed, sealed and registered by the District Land Registrar

PROCEDURE ON GRANT OF CUSTOMARY ESTATE

- Sec 24 (1). A land committee may require the payment of a fee on the grant of a customary estate to an organization or body.
- (2) A customary lease or sublease shall seek and take account of the advice of the Commissioner published to all land committees concerning fees applicable to such organizations or bodies.

- Sec.25 (i). A lease or sublease may be granted out of a customary estate and the lease shall be called “a customary estate lease” or “a customary estate sublease”, as the case may be.
- (ii) Any lease or sublease granted out of customary estate shall be governed by the Customary Land Act

- CLA - S 28 (2) Disposition of customary estate
- “A disposition of customary estate granted to a person or family unit shall not be permissible outside the immediate family during the first five years of titling of the estate”

- CLA – Sec 28 (3) The restriction under (1) may be waived in cases of emergency or all dependents or named members of the family are over 18 years old and have agreed to the disposal
- CLA - S 28 (4) “A sale of customary estate which was granted to a family unit without written consent of **all** persons named on the land certificate shall be invalid.

Surrender of a customary estate - Section 29-30

- A surrender of customary estate that is aimed at impeding women and dependents below the age of 18 from occupying or using land will be rendered invalid
- Surrender of customary estate should be accompanied with evidence that all dependents as well as those who have derivative rights are aware of surrender.

- A surrendered customary estate will be offered to the following in the order they are before it is publicized:
 1. Husband/wife/wives in order of seniority
 2. Children over the age of 18
 3. Other dependents

Abandonment of customary estates

- CLS -Sec 34 – abandonment
- (1) A customary estate shall be taken to be abandoned where
 - a. The occupier has not occupied or used the land for any purpose for which the land may lawfully be occupied and used including allowing land to lie **fallow for five years or more**
 - b. The occupier has left the country without making arrangements for any person to be responsible for the land and for ensuring that the conditions subject to which the customary estate was granted are complied with and has not given appropriate notification to a land committee

Abandonment of customary estates

- (2) In determining whether a customary estate has been abandoned in terms of sub-section (1)
 - (a) the land committee shall have regard to:
 - a. The means of the occupier of the land and where the occupier is an individual, the age and physical condition of the occupier
 - b. The weather conditions in the area during the preceding three years
 - c. Any advice on the matter sought by the land committee or given to it by the Commissioner

PAYMENT OF FEES

- Land Act 2016; Sec. 35:
 1. The minister or local government authority may prescribe fees payable in respect of any matters provided under this Act.
 2. The minister or local government authority may, in any special case, by notice published in the gazette, revise any such fees.

SALE TO OR LEASE BY NON-CITIZENS

- Land Act Sec. 37 (1). “Any grant of private land to any person who is not a citizen of Malawi, whether by sale, conveyance, assignment, lease, transfer or other transaction, shall not be for an estate greater than a lease of fifty years (unless explained in writing that greater estate is required for the realization of the investment)
- (ii) Except where the greater estate already existed at the time of transaction

- Land Act Sec. 38 (1) – Restriction of sale of private land to persons who are not citizens of Malawi. “Without prejudice to the requirement of Sec. 37, a person shall not sale, whether by private transaction or by tender, auction or other means, any private land to a person who is not a citizen of Malawi – (exceptions in a, b, and c)

- CLA – Sec. 44 (2): Dispute Settlement
- “A Customary Land Tribunal” shall consist of:
 - a. A presiding chairperson who shall be a Traditional Authority responsible for the area;
 - b. Six members of the community **nominated by the Traditional Authority and approved by the Commissioner**, at least three of whom shall be women
 - c. Section 48 provides for appeal procedures

Compensation Under Land Act 2016

- Read LA Sec 17 of Land act 2016.
- LA Sec 18: A person who by reason of :
 - a. Any acquisition made under section 17 (1) or
 - b. The temporary use and occupation of customary land under sec. 17 (2) or (3)suffers any disturbance of or loss or damage to any interest which he may have or immediately prior to the occurrence of any of the events referred to in this section may have had in such land shall be paid such compensation for such disturbance, loss or damage as is reasonable.
- Reasonable compensation for loss/damage to interest in land prior to occurrence of disturbance

Compensation Under Customary Land Act 2016

- CLA Sec. 17(8) The customary land shall be transferred subject to
 - a. Payment of appropriate compensation as assessed by a registered valuer and agreed upon between:
 - i. The land committee and the commissioner
 - ii. Where sub-sections (4) and (10) apply, the persons referred to in those sub-sections and the commissioner

- CLA Sec. 17 (11). The minister may direct that compensation payable under this section shall be paid by the person to whom or an organization to which the customary land has been transferred to and is granted under lease.
- CLA Sec. 18. the minister may however direct the transfer of any area of government land or reserved land to customary land subject to the Land act 2016

COMPENSATION

- b. If govt. or reserved land is to be exchanged with customary land which is the subject of the transfer, government will identify an alternative piece of land to be transferred to the traditional land management area or the affected persons as the case may be
 - (11) The minister may direct that any compensation payable under this section shall be paid by the person to whom or an organization to which the customary land has been transferred to and is granted under a lease.

COMPENSATION UNDER CLA

- CLA Sec. 20 (2) “A customary estate shall be:
(d). Liable, **subject to adequate notification and prompt payment of full and appropriate compensation**, to acquisition by government in the public interest, in accordance with the Land Acquisition Act.

COMPENSATION UNDER Land Acquisition Act

- Sec. 10.
- (1) Unless otherwise agreed between parties appropriate compensation shall be assessed by an independent valuer appointed by the minister.
- (2) an assessment of compensation shall be calculated based on any of the following grounds:-

- a. Loss of occupational rights
- b. Loss of land
- c. Loss of structure
- d. Loss of business
- e. Relocation costs
- f. Loss of goodwill
- g. Cost of professional advice
- h. Nuisance
- i. Loss of or reduction of tenure; or
- j. Disturbances, if it is not too remote and is a natural and reasonable consequence of the dispossession of the land

- The principal Act is amended by inserting, immediately after section 10, the following new section as section 10A:-
- Section 10 A (1). In assessing the amount of compensation under section 10, the following matters, and no other matters, shall be taken into consideration:-
 - a. The market value of the land, or interest therein of the claimant at the valuation date
 - b. The damage, if any, sustained by the person interested, at the date of valuation, by reason of the severance of such land from his/her land by reason of exercise of powers conferred by this Act

- c. If, in consequence of the matter giving rise to the claim, the claimant is compelled to change his/her residence or place of business, reasonable expenses if any, incidental to such change.
- d. Any increase in the value of land or other benefit likely to accrue at the valuation date from the proposed development to the person interested; and
- e. The relief obtained by the claimant as a result of the taking of the land against the necessity of carrying out any order or direction against the land made under any law for the time being in force relating to the use and protection of land when the work required by the order has not been commenced or completed at the valuation date.