20th ANNUAL PACIFIC RIM REAL ESTATE SOCIETY CONFERENCE
CHRISTCHURCH, NEW ZEALAND, 19-22 JANUARY 2014

REFINING PRINCIPLES OF COMPENSATION IN LAND ACQUISITION FOR URBAN RENEWAL

Refereed Paper

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ABSTRACT

This paper examines the expanding purposes for which land is compulsorily acquired in Australia, and the evolving complexities in providing parity of value to the dispossessed party. Surveys are used and cases are examined in exploring the various purposes for land is acquired as well as the types of acquisitions which encompass partial versus total acquisitions. This provides a basis for establishing a framework which better supports the option for reinstatement and asks whether expanding items of disturbance and solatium paves the way for improving options for reinstatement.

The paper makes it primary contribution through the development of a framework which expands options for reinstatement and articulates factors to be included under the heads of disturbance and solatium as distinct from market value. It further builds a case for a share in the uplift in value resulting from the acquisition of land in the case of economic development being the rationale for the acquisition.

Keywords: Reinstatement, Solatium, Disturbance, Traditional / Non-Traditional Purposes

INTRODUCTION

The compulsory acquisition of land is undertaken by all three tiers of government in Australia, with the States responsible for over 80 per cent of all acquisition by volume, in which the acquisition of land for transportation is the dominant purpose, (Russell 2013:21). Each State and has its own enabling acquisition legislation which establishes the relevant heads of compensation and overarches the operation of the various agencies undertaking acquisitions.

It is highlighted by Brown (2010:3) that across Australia 'none of the nine statutes governing land acquisition are a model of excellence,' and that while the legislation was generally adequate, it is the 'factual complexities surrounding the tasks for claimants, administrators, valuers and the courts' is where the challenge arises. This is further compounded by the fact that the acquisition of land includes takings on either a partial or total acquisition basis.

Across the capital cities of Australia, the current legislation has been suited to the acquisition of and land in an evolving city environment, where traditional public purposes precipitated the need for land to be acquired for infrastructure, health, education and other traditional public purposes. Since the early 1990s, Melbourne, Sydney and parts of Brisbane have moved from the initial phase of land urbanisation, to a more complex rationale encompassing the regeneration and re-urbanisation of some land uses (Property Council of Australia 2010).

As traditional public purposes now coexist with more complex rationales for acquisition, a more detailed and comprehensive response to the needs of dispossessed parties as stakeholders in the acquisition process is needed. Drafting for such evolution is not simple and requires expansion of the principles that have governed traditional acquisition purposes, when assessing compensation for more complex and evolving public purposes which include housing and economic development.

As set out in Table 1, the complexity surrounding the acquisition and the emerging purposes for which land is acquired is resulting in the need for principles which clearly define and adequately compensate dispossessed parties. This further amplifies the need for compensation to address the fact that market value is the only head of compensation in which the dispossessed party can be assumed to be a willing but not over anxious seller. Beyond this, compensation principles must be modernised in addressing the overarching principle of equivalence in one form or another through reforms to the other heads of compensation.

Table 1: Acquisition types purposes and principles

Acquisition Type	Acquisition Purpose	Basis of compensation
Total – Piecemeal Method	Traditional - Infrastructure	Market Value + Solatium + Items of Disturbance
Partial – Before and After Method	Non-traditional – economic development / alternate development.	
Existing and Alternate Application of the Principles of Compensation		Reinstatement

The following sections of this paper examine the types of acquisition, methods of assessing compensation in which the principles of compensation are examined. This examination is undertaken within the context of traditional and non-traditional purposes of acquisition, which encompass economic development. This examination lays the platform for expanding existing principles of compensation in providing equivalence to dispossessed parties which extends beyond market value and conciliatory compensation in the form of disturbance and solatium.

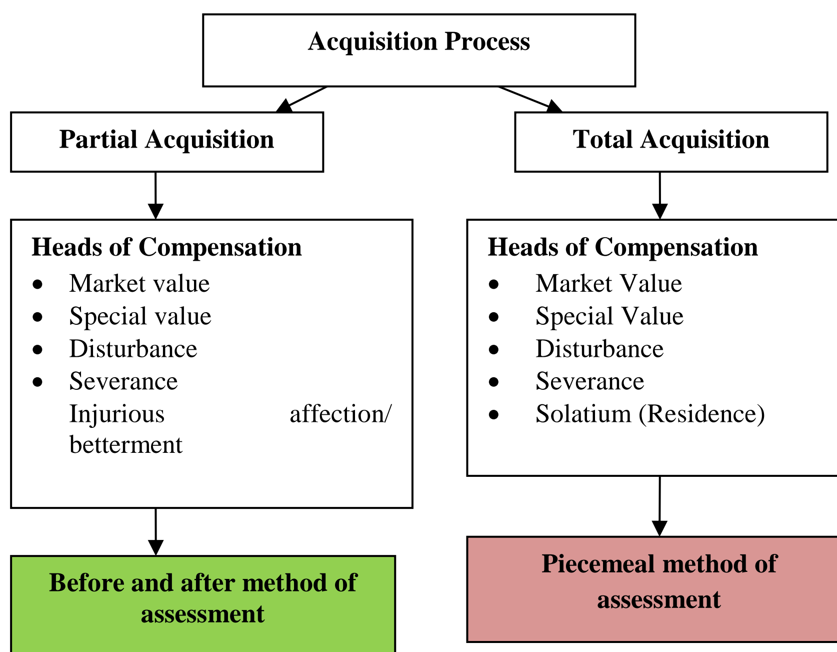
TYPES OF ACQUISITION: PARTIAL VERSUS TOTAL ACQUISITIONS

The compulsory acquisition of land entails two broad types of acquisition, partial and total acquisition of land. Within each type of acquisition, different principles and legislative provisions have evolved in assessing compensation across the various jurisdictions. Common to both types of acquisition is the overriding principle of compensation for the market value of land taken, being a contestable measure on which part of the compensation is assessed (Hyam 2009). It is at this point that these two forms of acquisition diverge in practice, but are assumed to be one resulting from the notion that value is determined on the basis of the parties being

willing to but not anxious to trade on a given day. This factor solely relates to value in exchange, as defined under the Spencer Principle of market value, which features in both partial and total acquisition cases.

Beyond the market value of the land taken, the basis of a claim for compensation will depend on the type of acquisition and the impact of the acquisition on the dispossessed party. The form of acquisition will impact on the Heads of Compensation claimable and most importantly will drive the methodology used in the assessment of compensation. Figure 1 distinguishes the difference in a claim, the heads of compensation and the methods of assessment.

Figure 1: Total v Partial Acquisition Approach



In assessing compensation in partial and total acquisition cases, Hornby (1996:307) sets out the formula in assessing each type of acquisition in accounting for the various heads of compensation as follows:

Partial Acquisition – Before and After Method:
(Before value **less** After value) **plus** Disturbance = Sum of Compensation

Total Acquisition - Piecemeal Method:
Market Value **plus** Special Value **plus** Severance **plus** Solatium **plus** Disturbance = Sum of Compensation

In the case of a partial acquisition, the use to which the acquired land is put and the impact of that use on the land retained by the dispossessed is to be accounted for in the after value and hence the compensation paid for head of market value. This includes any uplift in value where the retained land benefits from the use to which the acquired land is put or conversely, any loss resulting from an adverse use of the acquired land and its use. The method of capturing either a positive or adverse impact is defined by Hyam (2009) as the 'Before and After Method' of assessment. This method measures the value of the property before the acquisition and again after the acquisition where a portion of the land is retained by the dispossessed party. The difference in the before and after value captures each of the heads of compensation as set out in Figure 1, with the exception of items of disturbance.

In contrast to a partial acquisition, in cases of total acquisition of land, compensation is assessed by adding the sum of each applicable head of compensation as shown in Figure 1 to determine the dispossessed parties total compensation. It is noted that Solatium only appears in total acquisition, however, where a partial acquisition results in the loss of a residence on a large parcel of land, in which the residence cannot be relocated on the retained land, Solatium may also apply. This now leads to the important question of how a total versus partial acquisition is determined.

The acquisition of land and the type of acquisition is primarily determined by the requirements of an acquiring authority which is dictated by the purpose and extent of the acquisition. An acquiring authority is not compelled to acquire any more land than is required for the public purpose for which it is acquired as set out in Minister for Public Works (NSW) v Duggan (1951) 83 CLR 824 and Thompson v Randwick Corporation (1950) 81 CLR 87. Whilst case law prohibits the taking of any additional land that is required for the public purpose, the State of Tasmania has the statutory power to enter into agreement under section 10 Land Acquisition Act 1993 to acquire more land than is required by agreement.

In NSW, it is not uncommon for an acquiring authority to negotiate the acquisition of the total property, particularly in the case of residential property where a partial acquisition has been proposed and is not in the best interest of the dispossessed party to remain in occupation (Prentice 2002). Similarly, in cases of partial acquisition where the use of the acquired land so detrimentally impacts the retailed land, for example where the retained land is land-locked and looses all access, the difference between the before and after value may be close to the total value prior to the acquisition.

To this end, in addressing the full impact of the taking, the principles of compensation extend beyond market value to encompass items such as disturbance and solatium and are safety net in recognition that the willing buyer willing seller hypothesis is only relevant to the assessment of the market value head of compensation. By virtue of the fact that market value is treated as a separate head of compensation, across all State acquisition legislation is recognition that the parties, particularly the dispossessed party is not willing and has no intention of selling when the acquisition notice is issued, unless the property is on the market for sale at that time.

Of particular note in Figure 1 in distinguishing between partial and total acquisition, is the option for reinstatement where a party continues to reside or occupy the retained portion of the land not acquired. This is in contrast to a dispossessed party whose land is totally acquired and hence are forced to purchase an alternate property particularly in the case of a principle place of residence. In the case of partial acquisition for road widening, the principle of disturbance may extend to include items of capital expenditure such as double glazing, air-conditioning and other noise minimisation remedies. In other cases, this may extend to include the relocation of the existing house on the retained portion of the land where practical.

The above point marks the primary difference between partial and total acquisition, and in particular where a dispossessed party is able to reinstate themselves in a partial acquisition. This is in contrast to a party the subject of a total acquisition of which the total compensation is insufficient to reinstate their home or business where such interest is located in a marginal value location. This point is the subject of the next section of this paper and is elaborated on in the cases which follow.

ACQUISITION PURPOSES AND RATIONALE

As highlighted in the introduction the purposes for which land is acquired have expanded to non-traditional purposes which include such provisions as economic development. This is defined as a purpose of which the contribution to the public is the regeneration of locations which stimulate employment and economic activity and is not viewed as a traditional public purpose (Miceli 2004). In examining traditional and non-traditional public purposes a survey and court cases are used to distinguish the perceived differences and outcomes aligned with each traditional and non-traditional purposes.

Within the constructs of acquisition legislation there are wide ranging differences in articulating what a specific public purpose constitutes. Table 2 shows that public purposes are not specifically stated within acquisition statutes, with Queensland and to some degree Western Australia being the exception. While it is not possible to consider examples or cases covering the range of public purposes, the acquisition of land for road widening purposes has been selected as a traditional public purpose and two cases examining acquisition for economic development are used to examine non-traditional public purposes.

Table 2: Legislative comparison of acquisition provisions

State	Legislation	Provisions
Western Australia	Local Government Act 1995 refers to Public Works Act 1902 s2 - Terms	Specific purposes stated
Queensland	Land Acquisition Act 1967 ss45 & 47	Specific purposes stated
New South Wales	Local Government Act 1993 s186	Non-specific purposes stated s188 prohibits acquisition and resale of land acquired
Victoria	Local Government Act 1989 s187	Non-specific purposes stated
South Australia	Local Government Act 1999 s191	Non-specific purposes stated

Source: Austlii.edu.au

Traditional public purposes – Road works

Traditional public purposes for which land is acquired include public infrastructure which encompass sewerage treatments and desalination plants, health and educational facilities and road widening works. As was highlighted in the introduction, the dominant purpose for which land is acquired in Australia is for widening purposes.

Research undertaken by Prentice (2002) measures the dispossessed's satisfaction of the process and compensation paid in achieving the objectives of acquisition for road works. In undertaking this research a survey of 23 dispossessed property owners was undertaken on a number of key points which encompassed the acquisition process and principles used in assessing compensation. The 23 property owners surveyed were randomly selected from a pool of dispossessed residential property owners in which the acquiring authority provided details and access to parties from which land was acquired.

In this survey, it is acknowledged that the sample of three percent of dispossessed owners in NSW gives an indicative opinion of the success of the acquisition process and compensation principles. A summary of the key survey questions and results are set out in Tables 3 and 4 with discussion following:

Table 3: Survey summary with results expressed as a percentage

Question	Satisfied	Dissatisfied	Neutral
1) How satisfied were you with the amount of compensation paid?	74	22	4
2) Do you think the timeframe for the acquisition process was suitable	83	17	nil

Table 4: Survey summary to questions expressed as a Yes or No as a percentage

Question	Yes	No	Unsure
3) If the underground of your land were acquired for a tunnel or easement would you expect compensation?	100	nil	nil
4) Did you object to the amount of compensation that was initially offered by the acquiring authority?	61	39	n/a
5) Question to the 61 percent who objected in Q 4) above: Did your compensation amount increase?	36	64	n/a
6) In your opinion, do you think that the Commonwealth or State Government should have the power to acquire land?	22	78	nil

Source: Prentice 2002

In this survey, of the 23 parties dispossessed, 19 parties or 83 percent negotiated a settlement with the acquiring authority and 4 owners or 17 percent had their property compulsorily acquired of which 2 cases proceeded to court. In conclusion to this survey, participants were asked to give suggestions as to ways in which the acquisition process and compensation could be improved in the future. The key issues and feedback provided are:

1. **In the case of partial acquisition**: a majority of the parties who objected to the amount of compensation initially offered, were the subject of partial acquisitions and excluding the amount of compensation amount, were most dissatisfied with noise and access to their property during the works being carried out and time taken to carry out the works. The primary issue with partial acquisition was the non-claimable provision for the inconvenience factor experienced during the works. In these cases, the affected parties remained in their residences while road works were undertaken.
2. **In the case of total acquisition**: the key issue apart from the amount of compensation paid was the time frame for completion of the process. Of the parties who objected to the amount of compensation in these cases, the primary concern was the sufficiency of compensation to rehouse. Further, in each case the additional items of disturbance and solatium were generally considered sufficient in addressing the needs of the dispossessed for rehousing. It is further suggested that a compelling reason to settle by negotiation was to avoid living on a main road after road widening was complete.

Of the 23 respondents to the survey, 40% did not have any complaints or suggestions for improvement to the process.

The compelling feedback and observations from this survey shows that in general terms the acquisition legislation was achieving its objectives in the case of residential property. In the cases observed, the primary area of disputation occurred in cases of partial acquisition of land. A further interesting point of note was the agreement of property owners not to fight the acquisition process, once they were aware of the works to be carried out and the impact those works would have on their property.

In compulsory acquisition cases for road works generally across NSW, Bourke (Cited in Prentice 2002:62), provides the acquisition statistics at 95 per cent of all acquisitions are by agreement, 5 per cent by compulsory process with less than one per cent proceeding to court. In the case of the Sydney M2 Motorway, being the largest road works undertaken during the 1990s, 240 properties were acquired by agreement, 6 by compulsory acquisition, with 2 cases proceeding to court.

Non-Traditional Public Purposes - Economic Development

Economic development as a public purpose has evolved in the United States since its post WWII rapid economic expansion. The first noted case involving "economic development" occurred in 1954, Berman v. Parker 348 U.S. 26 (1954) where Turnbull & Salvino (2006) note eminent domain being used in a slum clearing program in Washington D.C., in which land acquired was sold onto private developers for redevelopment. Again in 1981, Poletown Neighbourhood Council v. City of Detroit 304 N.W. 2d 455 (Mich 1981) the city paid for land using eminent domain which was on-sold to General Motors for a new factory. The court ruling in favour of the compulsory taking on the grounds that is would "alleviate unemployment and revitalize the economic base of the community." The following and most recent case solidifies the expansion of the public purpose rule in the United States, which has ramifications for property owners in Australia.

Whilst an evolving purpose in the United States, economic development has not gained the same level of support in Australia. Despite attempts to acquire land for economic development, this purpose has been tested in the courts, which ruled against this as a purpose where local Government itself is not the developer. In examining land acquisition cases for non-traditional purposes, two cases one in the United States and the second in Australia have been used to show the disparity in the courts ruling as well as the legislative constraints that apply in Australia to economic development as a public purpose. A summary and outcome of each case follows next.

United *States* - Kelo v City of New London 125 S. Ct. 2655 (2005)

Summary of facts
Kelo and others resided in a rundown part of the City of New London, Connecticut in which the Local Government elected to acquire the subject and surrounding land and provide this land to a developer for the purposes of urban renewal and redevelopment of that quarter of the City. Kelo choose not to move and resided in her property for four years after the order declaring the acquisition was issued following her loss in the Superior Court. The City of New London agreed to move Kelo's house to an alternate parcel of land and further pay compensation to settle the matter. The initial objective of the dispossessed in Kelo was the principle of

equivalence and not a matter of monetary compensation, which was insufficient to rehouse her in the surrounding location under the initial offer made for compensation.

Justification and dissention for compulsory purchase & ruling

In the Kelo case the court was faced with an absence of specific legislation defining a public purpose in acquisition statutes. The case resulted in a broadening of the uses being established for eminent domain or compulsory acquisition through the result, which in essence supported eminent domain for the transfer of acquired land to private parties for urban renewal and job stimulation. The public purpose doctrine in this case is aptly described by Miceli (2004:218-219) as;

> "a narrow economic rationale for eminent domain as a way of forestalling costly holdout problems that plague land assembly for large scale urban redevelopment projects, whether private or governmental. In this view, efficiency is served by any process that gets the land into the hands of parties who value it most highly."

In deliberating on the Kelo case, the court decided in favour 5-4 for eminent domain for redevelopment purposes. An important précis of the decision follows which highlights the difficulty confronting the court in deliberating on economic development as a public purpose:

> The majority opinion, by Justice Stevens, found that it was appropriate to defer to the city's decision that the development plan had a public purpose, saying that "the city has carefully formulated a development plan that it believes will provide appreciable benefits to the community including, but not limited to, new jobs and increased tax revenue." Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to . . . the developer" and that if that was the case the plan might have been impermissible. In the dissent, Justice Sandra Day O'Connor argued that this decision would allow the rich to benefit at the expense of the poor, asserting that "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property—and thereby effectively delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment".

In contrast to the Kelo case, within Australia the same rationale of economic development met with the opposite outcome. This outcome resulted from statutory safeguards in the Local Government Act, which prohibits the acquisition of land and subsequent on-sale of that land to a developer without consent of the land owner. Despite these provisions within the Act, Parramatta City Council proceeded to acquire land in which the matter was appealed twice, first by Parramatta Council and then by the dispossessed party to the High Court of Australia, which found in favour of the dispossessed. In opposing acquisition for economic development, a précis of the case follows:

Australia – R&R Fazzolari Pty Ltd v Parramatta City Council; & Mac's Pty Limited v Parramatta City Council [2009] HCA 12

Summary of facts

In 2007 the Council sent proposed acquisition notices to the owners of the land located in the town centre of Parramatta, of which the dispossessed owned a number of retail shops. The land was required as part of a redevelopment referred to as 'Civic Place.' The redevelopment was to be carried out under a Private Public Partnership (PPP). "Under that agreement the council would transfer certain of the acquired land to Grocon and receive substantial financial payments and other consideration from Grocon." In the first instance the Land and Environment Court ruled that the proposed acquisition was unlawful on the grounds that the purpose of the acquisition was the re-sale by council to the developer. Council appealed the matter to the New South Wales Court of Appeal, which unanimously set aside the declarations made the lower court. In conclusion, the High Court of Australia found that the primary purpose of the acquisition was for re-sale and reinstated the decision of the Land & Environment Court NSW finding that the proposed acquisition was unlawful.

Justification and dissention for compulsory purchase and ruling

The High Court have considered in detail the agreement between Council and the developer and found that the primary purpose of the taking was for the on-sale of the land to a developer.

Local Government Act Section 188

> *"A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purposes of re-sale."*

(a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale,

In response to this sub-section of the Local Government Act, the High Court confirmed the position of the primary judge that this sub-section did not apply, as the adjoining land acquired by council was itself acquired for the purposes of re-sale, which was acquired in November 2004 and December 2006. The High Court ordered that each appeal to the court should be allowed with costs. Further, cost should also be awarded in favour of the appellants for the courts below the High Court, NSW Court of Appeal and NSW Land & Environment Court.

In contrasting the traditional and non-traditional public purposes for which land may be acquired, it is probable that the acquisition for traditional public purposes are less likely to be met with the same level of resistance as non-traditional purposes. Overriding the potential outcomes resulting from both traditional and non-traditional public purposes is the principle of equivalence, which goes well beyond the monetary equivalence of the value property of the dispossessed.

REFORMS FOR A PARITY COMPENSATION FRAMEWORK

In addition to the market value of land compulsorily acquired, heads of compensation exist which attempt to account for non-financial loss resulting from the taking of land (Solatium) and for relocation expenses reasonably incurred in placing the dispossessed party in the same position they were in prior to the acquisition (Disturbance). These heads of compensation demonstrate that compensation beyond market value of the acquired land taken must be made and is founded on the premise that the willing buyer willing seller principle solely relates to the market value component in acquisition cases.

In drafting for reform, consideration is made on two bases, the first being the review of existing and emerging reforms in Australia, and secondly through the lens of a more radical approach which challenges some of the conventions which underpin the current principles of compensation. Of importance in the acquisition process is the option for the dispossessed to be reinstated where feasibly possible. While not possible in each circumstance, equivalence must also extend to rehousing the dispossessed with an interest in fee simple. In the case of investment property, this may also extend to include similar premises within the proposed development, where the acquisition is undertaken for economic development.

In building a framework to achieve such reform, both evolving provisions for solatium and disturbance are considered, as well as more radical reforms which address sharing in the uplift in value for non-traditional public purposes in which land is more intensely developed for economic development.

Reforms to heads of compensation other than market value

Current provisions for parity of compensation in addition to market value generally operate under two heads of compensation in Australia, these are Disturbance and Solatium. As set out in Table 5, these heads of compensation vary across State jurisdictions. In addition to their operation in Australia, they exist in various forms internationally. Table 5 highlights the breadth of application of these two heads of compensation across Australia. It is noted the main divide in the provision for solatium, being a fixed amount versus a percentage of the total compensation, of which 10 per cent is used in Queensland and Western Australia.

Table 5: Solatium & Disturbance summary across Australia

Jurisdiction	Solatium	Disturbance	Reinstatement
VIC Land Acquisition & Compensation Act 1986	Up to 10% of total compensation	Section 41 Professional costs	Section 42 Purchase or intended purchase
Qld Acquisition of Land Act 1967	No Provision	Section 20 Reasonable professional & financial costs	No provision
NSW Land Acquisition (Just Terms Compensation) Act 1991	Up to $25,500	Section 59 Items reasonably incurred for relocation, finance and acquisition costs.	No provision
South Australia Land Acquisition Act 1969	No Provision	Section 25 Not detailed	Section25 Similar to disturbance
Western Australia Land Administration Act 1997	Up to 10% of total compensation	Section 241 Removal & professional	No specific provision
TAS Land Acquisition Act 1993	Limited circumstances	Section 27 Reasonable costs	Section 31 Where no market
ACT / Commonwealth Lands Acquisition Act 1989	Yes, as decided by the authority or court	Section 55 Reasonable expenses	Section 58 No general market

In Hong Kong an alternate safety net exists, referred to as the Home Purchase Allowance (HPA). The Home Purchase Appeals Committee (2007) sets out provisions for domestic property being an ex gratia HPA based on the replacement cost of a notional 7 year old property in the same location as the acquired property. This provides some recognition of the issues facing dispossessed parties and a measure of restoring dispossessed parties with an alternate property within the same location. The Hong Kong model is a tangible step towards reinstatement compensation.

In New Zealand, solatium for the purchase of a dwelling has recently increased from NZ$2,000 to up to NZ$50,000. The $2,000 figure had not been updated since 1975 and it was decided that an increase was required to modernise the amount. Rather a set amount, the solatium is now on a sliding scale and provisions are currently being drafted within the legislation to set out the criteria to determine how much is paid in each case. One option is whether a component of this solatium could be paid on early agreement i.e. within 6 months of negotiations commencing, (Pers Com, Land Information New Zealand 2013).

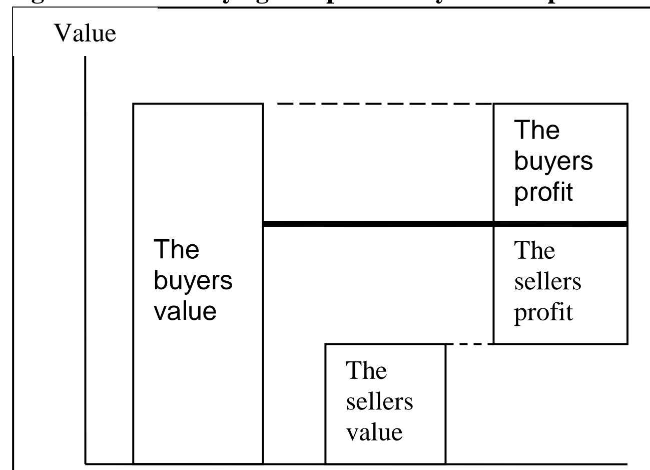
In addition, a new land-loss payment will be introduced, at 10% of the land value acquired to a maximum of NZ$25,000 for any one property (and minimum of $250). This reflects the view that an owner suffers disruption not just from losing a home but also if land is taken. This mirrors the UK practice. If there is more than one owner, or more than one interest (e.g. freehold, lease) then the land loss payment is to be divided between those qualifying owners, (Ibid 2013).

Mid-point for reform and profit share framework

In contrast to solatium and disturbance, Epstein (1985) proposes a sharing model in which any uplift in value is shared between the dispossessed and acquiring authority/developer. This model adopts the proposal of a low public interest project would results in a higher profit share and higher public interest results in a low or no profit share. The primary question is how would the degree of public interest be determined and what percentage would be provided to a dispossessed along the variant scale of such determinations

In questioning the principle of the Epstein Model, Mills cited in Hollander (2000) discusses the defensible argument of utilitarianism being an action which supports the greatest good for the greatest number of people. Kalbro and Sjodin (1993) expand on the Epstein Model by defining the split in the uplift in value which is shared between the stakeholders to the acquisition as shown in Figure 2. This challenges the Raja Principle which contains the value of the property to the dispossessed and not the acquiring authority. This principle predominantly worked well in acquisitions for traditional public purposes.

Figure: 2 Voluntary agreed price - buyer/seller profit



Source: Kalbro and Sjodin 1993

In expanding the Epstein's model in support of the basic needs of a dispossessed party, an alternative model would commence with a reinstatement safety net, particularly in the case of a residence. An option to disturbance and solatium would be an alternate property reinstating the dispossessed. If this cannot be achieved, the dispossessed would be relocated in a property as close in value to the property acquired. This task and duty would be a responsibility of an acquiring authority in which there resources would be used rather than the dispossessed if that were the choice of the dispossessed. In the case of a business, an option for reinstatement would need to be considered, however as highlighted by Jacobs (1998) there are additional issues which include location goodwill, in which it may not be prudent for such a business to be reinstated elsewhere where it is likely to fail.

In these cases where a livelihood is extinguished, the profit sharing arrangements of Epstein could be adopted to form part of the compensation. Adopting a broad brush approach to providing a dispossessed party with a profit share from a low public interest project could be fraught with inconsistency without considering the circumstances on a case by case basis.

The option in Table 6 provides a generic safety net to any party being dispossessed, with some exception in the case of location goodwill of a business which cannot be replicated. In many cases, these small businesses provide a basic stable income and have little value in extinguishment. Therefore a livelihood is extinguished through involuntary sale. In these cases, the Epstein Model would be replaced with provisions for relocating the business elsewhere under the principles of reinstatement, of which one option would be relocation within the proposed project in the case of economic development.

Table 6: Compensation framework for total acquisitions

<table>
<tr><th>Party</th><th colspan="2">Traditional
Infrastructure Projects</th><th colspan="2">Non-Traditional
Economic Development</th></tr>
<tr><th></th><th>Current</th><th>Proposed</th><th>Current</th><th>Proposed</th></tr>
<tr><td>Residential / Business Owner Occupier</td><td>Market value, *Solatium & Disturbance</td><td>Market Value *Solatium #Disturbance or Reinstatement Option</td><td>Market value, *Solatium & Disturbance</td><td rowspan="2">Market value or Reinstatement or Percentage share of land value as a redevelopment</td></tr>
<tr><td>Residential / Business Investor Owner</td><td>Market value & Disturbance</td><td>Market value & #Disturbance</td><td>Market value & Disturbance</td></tr>
<tr><td>Residential / Business Tenant</td><td>Disturbance to lessee and lessor</td><td>#Disturbance to lessee or lessor or Reinstatement Option</td><td>Disturbance up to the cost of extinguishment.</td><td>Market Value or Reinstatement / relocation to alternate premises or market value extinguishment option.</td></tr>
</table>

*Applies to residential property only, #Disturbance includes cost of finding an alternate property / buyers agent.

In applying the Epstein model or mid-points options of profit sharing to the cases of Fazzolarri and Kelo reviewed earlier, both may have been resolved avoiding protracted litigation and unnecessary legal costs. In the case of Kelo, the Plaintiff was reinstated with their residence relocated on alternate land and hence an eventual but protracted mid-point was reached. However for many of the surrounding residents to Kelo the same benefits were not received. In applying either the Epstein or mid-point framework, each owner could have been either relocated for provided with sufficient compensation to be re-housed within or close to the location their land was acquired from.

In the case of Fazzollari, simpler options may have been available by offering alternate retail premises within the proposed Civic development complex, which also accommodated retail premises. Alternatively a profit share of the unutilised floor space (FRS) could have been offered as part of the compensation in recognition of the potential similar use to which the land may be put. Rather than each side incurring legal costs of many hundreds of thousands of dollars, these funds are better directed through profit sharing with the dispossessed party. This case demonstrates that lack of commercial acumen where an acquiring authority is unable to move beyond the market value head of compensation and divert cost incurred attributed to items of disturbance in in the form of legal costs to either reinstate or compensate the party for solatium.

CONCLUSION

The purposes for which land is acquired have expanded in the re-urbanisation phase of highly developed cities to encompass both traditional and non-traditional public purposes. The necessity to be able to acquire land for both of these broad purposes is important and necessary in regenerating underdeveloped and obsolete land uses. In undertaking the acquisition process, it is important that all stakeholder needs are addressed and options are available for reinstatement of a dispossessed party, particularly in the case of economic development where a dispossessed party may be rehoused or their business relocated within the new development. This will still necessitate the need for disturbance while such development is being built, alternatively the Epstein model of a profit share model may be an option.

It was further shown that in partial acquisition cases, a form of reinstatement does exist, in which items of disturbance form part of the compensation in allowing the dispossessed party to relocate on the retained potion of their land where practical. This option needs to be expanded to provide similar protection for owners who are the subject of total acquisitions, in which costs of relocating under items of disturbance must also include such professional services as buyer agents and location specialists. This is particularly the case where the acquiring authority does not participate in the relocation process.

It was demonstrated that a difference exists in attitudes towards the options in the case of road widening purposes versus economic development, however in each purpose, particularly in marginal value locations reinstatement is an important safety net for a dispossessed owner. To this end, it was further shown that solatium and items of disturbance are within existing legislation in Australia and are being strengthened as is the case internationally. This supports the fact that beyond the determination of market value, that the parties to an acquisition in particular the dispossessed, are not willing and the requite heads of compensation must reflect that fact.

The equivalence principle must go beyond that of the equivalence of market value and encompass physical or economic equivalences in acquisition cases. This will place greater pressure and resourcing the acquisition process, however in the case of economic development, where more intense uses of land underlie the acquisition of land, the Epstein Model is an option in which the developer in concert with the acquiring authority may minimise lengthy hold-outs by accommodating the needs of the dispossessed through either a profit share or reinstatement options.

The role of valuers in compulsory acquisition cases has predominantly been involved in the assessment of market value. The assessment of items of compensation other than market value, such as disturbance and solatium has traditionally been the domain of the dispossessed parties legal advisors. In establishing parity of

value which includes the amalgam of market value, disturbance and solatium, the role of valuers should be expanded to include the assessment of these later two heads of compensation.

At present the heads of compensation are segregated independent of one another, in which the valuer input is market value. In order for valuers to expand their role in acquisition cases, additional training and education involving the assessment of factors which comprise reinstatement and encompass items of disturbance and solatium will be necessary. In achieving the outcomes advocated in the Epstein model, valuer in concert with developers and acquiring authorities need to expand their role in both expediting acquisition cases and resolving differences resulting in costly holdout and forestalling in acquisition cases. The quantum shift however is with the courts in determining that a claim for compensation does not stop at parity of value, but the parity of status of the dispossessed party in placing them in the same position as they were in prior to the acquisition.

REFERENCES

Brown, D. (2010). Land Acquisition. Chatswood, Lexis Nexis Butterworths.

Curtin, D. J., & Witten, J.D., (2005). "Windfalls, wipeouts, givings and takings in dramatic redevelopment projects: Bargaining for better zoning on density, views and public access." Boston College Environmental Affairs Law Review **Boston College, School of Law**.

Epstein, R. A. (1985). Takings: Private Property and the Power of Eminent Domain. Cambridge MA, Harvard University Press.

Epstein, R. A. (2008). Supreme Neglect. Oxford, Oxford University Press.

Hollander, S. (2000). John Stuart Mill on economic theory and method, London. Routledge

Home Purchase Appeals Committee (2007), Secretariat of the Home Purchase Appeals Committee, Hong Kong.

Hornby, D. (1996). Appraisal 1, Introductory Valuation. Wooden ACT. Double D Products.

Hyam, A. (2004). The Law Affecting Valuation of Land in Australia, 3rd Ed, The Federation Press, Annandale, Sydney.

Jacobs, M. (1998). The Law of Compulsory Land Acquisition. Thomson Reuters Australia.

Kalbro, T., & Sjodin, E., (1993). "Ersattning vid fastighetsreglering (Compensation for Reallotment)." Stockholm.

Land and Property Information New Zealand, (2013) Personal Communication, Crown Property Management 9 & 12 Sept 2013.

Miceli, T. J. (2004). The economics approach to law. Stanford, CA, Stanford University Press.

Moore, M. (2009). Councils win bonus in forced land sales. Sydney Morning Herald. M. Peatman. Sydney. **18 May 2009**.

Prentice, P. (2002). Are the obligations of the (Just Terms Compensation) Act 1991 being achieved? Thesis, University of Technology, Sydney.

Property Council of Australia, 2009. Strata Title Renewal – Accommodating Growth Giving People Choice Renewing Our Cities, Sydney.

Russell, D.J. (2013). Just Terms Compensation Legislation Review – Consultation Paper. NSW Attorney Generals Department, Sydney June 2013.

Turnbull, G. K., & Salvino, R., (2006). Kelo v. Leviathan: The Public Purpose Doctrine and Government Size. Working Paper No. 06-02. Georgia State University.