

Modernising compensation principles for regeneration of land uses in urbanised cities

FIG Congress 2014
Kuala Lumpur Malaysia
Engaging the Challenges,
Enhancing the Relevance
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Complexities in land acquisition

- Australia is a federated structure of government comprising **national**, **state** and **local** government.
- Land acquisition is undertaken by all three levels of government with the **States** responsible for over 80 percent of all acquisitions (Russell 2013).
- None of the nine statutes governing land acquisition are a model of excellence (Brown 2010).
- It is the factual complexities of cases that confront claimants, administrators, valuer's and the courts that compound the acquisition process.

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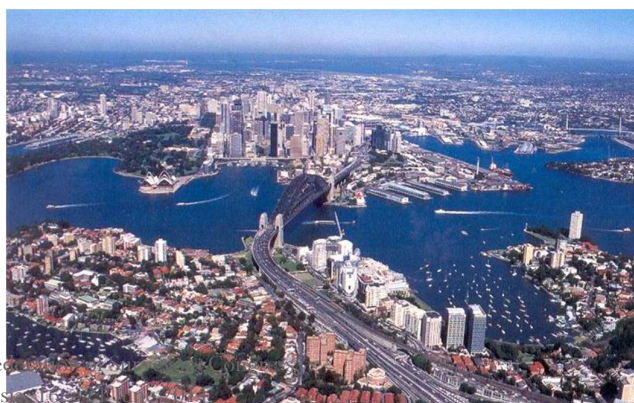
Challenging Tradition

- As Australia's capital cities move from initial urbanisation to re-urbanisation and regeneration of existing land uses, the challenges of dealing with single owner and greenfield sites to multiple owners of existing land uses, has greater impact in questioning existing compensation principles and the rationale for equivalence.

| 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 |

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Sydney & Melbourne – Re-urbanising phase



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Evolving economic rationale for acquisition purposes.

| 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 |

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Clunes-Ross v Commonwealth (1984) 155 CLR 193

- Owner on the Cocos Islands sold a large portion of their land to the Commonwealth but retained land around their residence
- Following the sale, the Commonwealth attempted to acquire the balance of the land for ‘political, social and economic advancement’

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Clunes-Ross v Commonwealth (1984) 155 CLR 193

- Court ruled that removing the owner from the island did not serve a public purpose and that the underlying rationale for the subsequent acquisition was abusive.



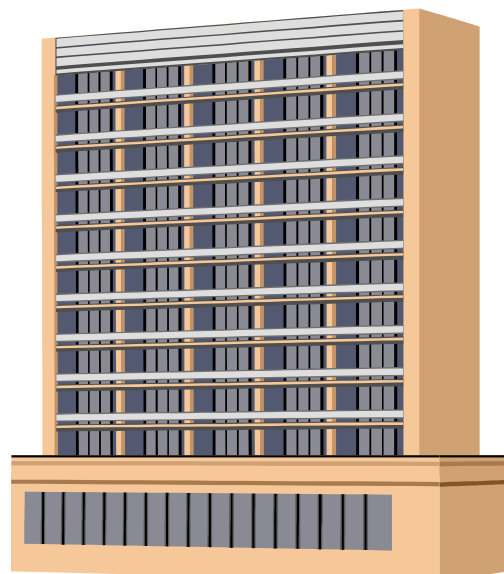
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Traditional v. Non-traditional Public Purposes

Traditional



Non-traditional



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Survey of dispossessed parties traditional / road widening purpose

Survey of 28 dispossessed parties by Prentice 2002/03 Responses expressed as a percentage. Property type houses

| 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 |

| 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 |

NSW Roads & Traffic Authority gave parties the option of total v partial acquisition where possible

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United States - Kelo v City of New London 125 S. Ct. 2655 (2005) Federal Court split 5 : 4 decision

- Court adopted a tortured definition of public purpose: To increase tax revenue via expanding property tax revenue to be generated by new development.
- Stands as one of the worst in recent years, handing local governments carte blanche to seize private property in the name of economic development. Now, four years after that decision gave Susette Kelo's land to private developers for a project including a hotel and offices intended to enhance Pfizer Inc.'s nearby corporate facility, the pharmaceutical giant has announced it will close its research and development headquarters in New London, Connecticut.
- While Ms. Kelo and her neighbors lost their homes, the city and the state spent some \$78 million to bulldoze private property for high-end condos and other "desirable" elements. Instead, the wrecked and condemned neighborhood still stands vacant, without any of the touted tax benefits or job creation.

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

The lesson from Connecticut's misfortune, it is that economic development that relies on the strong arm of government will never be the kind to create sustainable growth.

The public good



"I am Susette Kilo and the government stole my home" (Cato Institute Jan 27, 2009)



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R & R Fazzolari Pty Limited v Parramatta City Council (2009) 237 CLR 603

- Parramatta City Council, on 1 June 2007, gave notices to the owners of land in a block in the Parramatta city centre, regarding the council's intent to acquire their land. The council's plan was to redevelop the block. The redevelopment was to be partaken under a Public Private Partnership between the Council and two companies, Grocon (Civic Place) Pty Ltd and Grocon Constructors Pty Ltd. The agreement between the Council and the companies was that the Council would transfer some of the land they intended to acquire to the companies for large financial payments, as well as other considerations. Two owners of the land the Council proposed to acquire, R & R Fazzolari Pty Ltd and Mac's Pty Ltd, challenged the proposed acquisitions, citing the purpose of acquisition as for re-sale.
- The final decision of the high court was in favour of Fazzolari and Mac. The High Court judges decided to restore the declarations that were made by Biscoe J. in the original hearing and that costs follow in the High Court as well as the courts below. Other orders included setting aside the orders of the Court of Appeal of the Supreme Court of New South Wales and removing paragraph 2 of the orders of the Land and Environment Court of New South Wales.¹⁶ . The On-sale of land to a developer is not a public purpose and hence precluded from acquisition.

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Parramatta Civic Centre 2013

SIX years after signing a \$1.6 billion agreement to rebuild the heart of the city, Parramatta City Council and the developer Grocon have abandoned plans for one of Sydney's biggest urban-redevelopment projects.

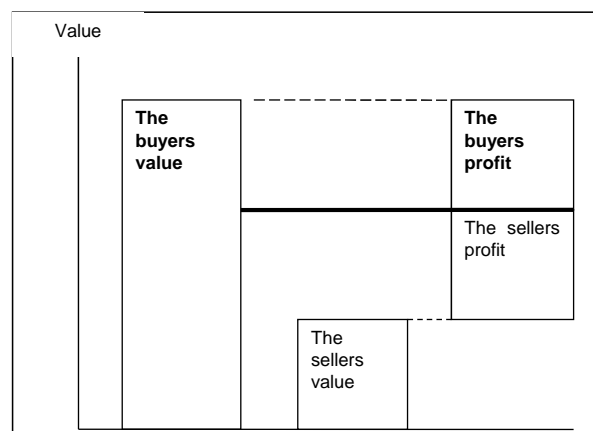
Valuation issues

1. Could not fully utilize the FSR 8:1 land size / foot print
2. Woollams Principle – Blighted approach adopt rents and rates of return from other parts of the CBD that were not blighted.



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Voluntary Agreed Price Buyer/seller Profit Model



Source: Kalbro and Sjodin 1993

Contrary to the Raja Principle: Value is to the owner not the acquiring authority

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Traditional v. Non-traditional Options

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

Table 6: Compensation framework for total acquisitions

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

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Solatium / Disturbance – Australia quasi reinstatement opportunities

| 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 | Section 25 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 |

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Conclusion

- Valuers have traditionally been charged with the role determining the market value of the acquired property or interest.
- The determination of other heads of compensation such as solatium have been the domain of the legal profession for both the acquiring authority and dispossessed party.
- In either achieving the objectives of the buyer/seller model through profit sharing in the uplift in value or with the introduction of reinstatement, valuers need to expand their role beyond assessment of market value.

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Conclusion

- Uniformity / harmonization of compensation principles are needed across Australia (Market value, Solatium, Disturbance) – API (NSW).
- Opportunity exists to expand existing principles of compensation for acquisition of non-traditional purposes – *“It is the factual complexities of cases that confront claimants, administrators, valuer’s and the courts that compound the acquisition process.”*
- Acquisitions are undertaken by numerous government agencies across the three tiers of government. Simple and transparent guidelines for dispossessed parties and regular status reports are needed on the progress of their matters by acquiring authorities.

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