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The evolution of the 'Public Purpose Rule' in compulsory acquisition

Referred paper

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ABSTRACT

The compulsory acquisition of land has been a necessary but contentious domain of government at sub-national and national levels and in recent years has intensified in a number of developed and developing countries. Traditionally the domain of government for the provision of public infrastructure in serving the needs of the community, 'public purpose' provisions are provided for in both State and Commonwealth legislation around Australia and internationally.

Not clearly defined within the various legislation, are the purposes to which acquired land may be put in complying with its use as a public purpose or more specifically, what a public purpose constitutes. This paper is a critique of the application of the public purpose rule and examines the boundaries and recent attempts to qualify and solidify the potential extent of this rule within legislation in parts of Australia and internationally. Local and international examples are used to highlight the extent to which this rule has evolved without requisite legislation and questions the limitless expansionary potential of what may constitute a public purpose. A framework has been developed to provide for an alternate assessment of compensation in view of the current limitations and restrictions of the Pointe Gourde Principle in the formulation of compensation.

Keywords: Pointe Gourde, Public Purpose Rule, Marginal Value, Parity Value, Compulsory Acquisition (Aust) / Eminent Domain (U.S.)

Introduction

As world population continues to climb and a greater concentration of the worlds population continue to centralize, Rosenberg (2005) highlights the density dilemma facing government as 90 percent of the earths population live on approximately 10 percent of the land. This concentration in the provision and renewal of public infrastructure and new industry has greatly increased the need for land in the provision of these services, which are often defined as public purposes. In Australia, Sydney and Melbourne are identified as two of the worlds one hundred most populated cities with correspondingly higher urban agglomeration rates. As at 2007, the United Nations (2007) ranked Sydney 65th and Melbourne 76th most populated cities in the world as shown in Table 1.

The capital cities of Australia require ongoing provision of infrastructure in which some of these works are not suited to Private Public Partnerships (PPP's). Uren (2008) highlights the need to meet the increasing demand for infrastructure in Australia through an Infrastructure Fund in which the Federal Government has responded too, through the setting up of a new statutory authority 'Infrastructure Australia'. The projects to be dealt with under this fund include ports and major rail links.

Table 1: World city populations

Rank	City	Population	Country	Statistic concept	Area (km2)
1	Tokyo	35,676,000	Japan	Major Metro Area	13,500
2	New York	19,040,000	United States	Urban agglomeration	8,683
3	Mexico City	19,028,000	Mexico	Metro area	7,815
4	Mumbai	18,978,000	India	Urban agglomeration	1,097
5	Sao Paulo	18,845,000	Brazil	Metro Area	8,050
6	Delhi	15,926,000	India	Urban agglomeration	920
7	Shanghai	14,987,000	China	Metro Area	3,920
8	Calcutta	14,787,000	India	Urban agglomeration	1,026
9	Dhaka	13,485,000	Bangladesh	Metro Area	1,600
10	Buenos Aires	12,795,000	Argentina	Urban agglomeration	3,680
26	London	8,567,000	United Kgdom	Urban agglomeration	1,620
65	Sydney	4,327,000	Australia	Urban agglomeration	12,140
76	Melbourne	3,728,000	Australia	Urban agglomeration	7,690
84	Brasilia	3,599,000	Brazil	Metro area	14,400

Source: United Nations 2007

On an international scale, the impact of land acquisition is impacting on the poor at a significantly greater rate compared to those countries which have more traditional forms of land tenure. The United Nations (2005) highlight as at 2007, the number of slum dwellers in the world reached one billion, of which 90 per cent are located in cities of the developing world. Urbanization impacts on society in many ways in which Westman (2007:87) states “Urbanisation is one of the most powerful irreversible forces of the world.” “cities make countries rich. Countries that are highly urbanized have higher incomes, more stable economies, stronger institutions.”

Land title and tenure

In understanding the perception of land tenure and its relationship with compulsory acquisition among other matters which may impact on it, freehold title to land may constitute the most absolute interest in land and maybe viewed as a bundle of rights and entitlements. It is at this point that the perception of freehold tenure may depart from the understanding of many of those who hold an interest in it. “The legal concept of property does not denote the tangible or intangible objects that are termed property in common speech. Rather, property as a legal concept which refers to rights and interests in such objects” (Youngman 1993:76). This perspective by Youngman begins to dissect and distinguish what is actually held as opposed to what freehold title entitles the holder of land to use or do with their land, hence further defining their interest.

More than just an entitlement and right, property is a diverse bundle of rights and also responsibilities, upon which focus on those responsibilities and caveats may broadly define the understanding and meaning of freehold title. Allen (2000) discusses the importance of the State to be able to compulsorily acquire property, tax land and regulate its use. To this end, coexisting with the perception of absolutism in fee simple is the statutory right of government to regulate, acquire and regulate the use of land.

Figures 1 and 2 are conceptual models of traditional and non-traditional perceptions of fee simple tenure and what these interests may be perceived to mean. In Figure 1 the traditional perception of fee simple ranks fee simple above those of the interests of

government who tax, regulate the use of and acquire land. In this model, the acquisition of land is viewed as a government impost. In juxtaposition, Figure 2 highlights government's right to tax, regulate the use of and acquire land in which these rights are implicit and reserved by government in the alienation process.

Figure 1: Traditional

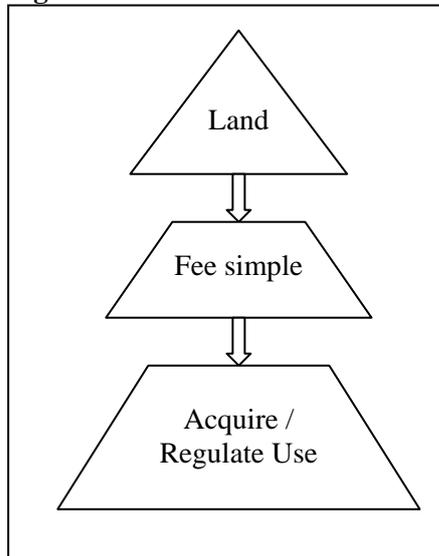
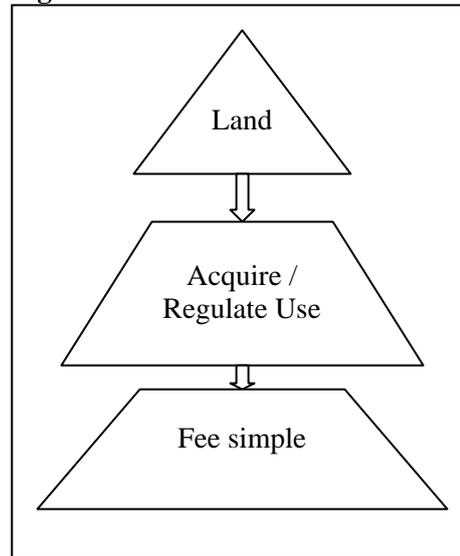


Figure 2: Non-traditional



Source: Author

In comparing the distinction that exists between these two models of fee simple and governments reservations within them, a disconnect in modern day understanding of fee simple ownership has evolved through the view that fee simple means absolute ownership free of any imposition, charge or tax over land by some property owners. In many circumstances what appears to be an assault on property rights in Australia and other developed nations from time to time, is little more than government exercising its statutory right to acquire or regulate the use of land. This is a right that many freeholders and holders of lesser interests in land had either not acquainted themselves with, or fully understood when purchasing the bundle or rights and responsibilities in their property.

Public purpose and Private Public Partnerships

The literature and discussion on property tenure and the perceptions of what tenure means, leads to the fundamental question of the justification of the acquisition and more specifically the purpose to which the acquired land is intended. The 'public purpose' provisions in the various State and Commonwealth legislation of Australia

are non-descript in providing for the variety of purposes which may fit the intended application of a public purpose. Whilst providing latitude, the interpretation and application of what constitutes a public purpose has not gone unchallenged.

In the case *Clunes-Ross v Commonwealth* (1984) 155 CLR 193, the owner of a major portion of land on the Cocos Islands, sold their land with exception of land around their residence to the Commonwealth of Australia. Following the sale, the Commonwealth attempted to acquire the land of the retained residence in which the owner challenged the public purpose of the acquisition. The defined public purpose in the attempted acquisition was stated to be “political, social and economic advancement”. Brown (1996) highlights the purpose of the acquisition was to remove the owner from the island altogether, in which the court ruled was not a public purpose. In an earlier case *Caldwell v Rural Bank of New South Wales* (1925) 53 SR (NSW) 415, offices to be acquired and used by a government organization for a public service only was determined not to be a public purpose purely by virtue of the property being held and used by State Government.

As State and Commonwealth legislation across Australia provide a broader non-descript definition of a public purpose or works, the NSW Government have attempted to solidify the boundaries of the meaning of a public purpose through amendments to the Environmental Planning and Assessment Act 1979. In the United States a landmark case has recently been tested in determining the extent to which a public purpose in the compulsory purchase of land. These issues will be examined next.

The evolution of the “Economic Development Purpose”

The economic development purpose in the acquisition of land 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) notes 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 it 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.

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

Case Summary

Kelo and others resided in a rundown part of the City of New London 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. In settling the matter, 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. Whilst it may appear that Kelo’s plight was compensation, which whilst undisclosed was not a matter of monetary compensation, but a matter of being placed in the same position (in her home) in an alternate location, which may be more or less than the value of the location she was dispossessed of.

Justification and dissention for compulsory purchase

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 is 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 the of eminent domain for redevelopment purposes. An important précis of the decision follows;

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".

This case is highly relevant to many dispossessed parties, particularly in marginal value locations where an alternate property cannot be replaced with the compensation paid for by the property taken. As highlighted under the discussion on title and tenure to land, the comments of Justice O'Connor, in the *Kelo* decision mirror the loss of distinction between private and public land. In opposition to this judgement, *Turnbull et al* (2006) states that following the decision several States in the U.S., in response to *Kelo*, have passed laws which make it more difficult for state governments to seize private land.

Australia (NSW) – 2008 attempts to privatize the Public Purpose Rule

In April 2008, the NSW Government released the Draft Environmental Planning and Assessment Amendment Bill 2008 in which under section 9A (3) **Acquisition of land in connection with urban renewal proposal or urban land releases**, which states:

“The corporation or a designated authority authorized by the Minister may acquire land that forms part of, or adjoins or lies in the vicinity of, land subject to an urban renewal proposal or urban land release by agreement or by compulsory process in accordance with the Land Acquisition (Just Terms Compensation) Act 1991.”

In summary, this provision attempts to privatizes the acquisition process. There is no definition of what urban renewal constitutes in this Bill and in effect the provision seeks to solidify the unqualified extent of the public purpose rule to be determined at

the discretion of a corporation under the auspices of government. This provision has been best qualified as follows;

“A mans home may no longer be his castle, but it could well end up being someone else’s castle,” (Whealy cited in Grennan 2008:1)

In contrast to dealing with property owners holding out where their property is designated as part of a major redevelopment or infrastructure project, this provision would bring the land consolidation process into the uniform timelines provided for under the Land Acquisition (Just Terms Compensation) Act 1991. What it does not provide for, is the competing needs for individual property and business owners, who in New South Wales are as best compensated on the basis of extinguishment of their interest.

As highlighted in the introduction to this paper, the need for infrastructure across Australia is significant, with Swan cited in (Carbonell 2008) highlighting that a \$20bn infrastructure fund dedicated for key public infrastructure projects Australia wide was an important initiative. What is not clear is what portion of this fund is anticipated to be designated for the purchase of the land and compensating dispossessed parties in the first place in order for such infrastructure to be constructed.

Sweden – The evolution of data transfer and telecommunications

In 2000 Kalbro & Lind (2007) highlight the National Post and Telecom Agency awarded licenses for 99 per cent of the population of Sweden to have data and mobile phone reception by end of 2003. This project required the erection of a large number of masts throughout the country. To this end the government embarked on the acquisition of land for these masts on behalf of the relevant telecommunication companies. Of particular issue in this project is the location of the masts, which Sverige (2002) highlights provides an interconnecting transmission across the country.

In the first instance, is the question of whether the purpose of the taking of land is a public purpose, which is followed by how much compensation should be paid. These two questions merge and are inseparable according to Epstein (1985), who argues that

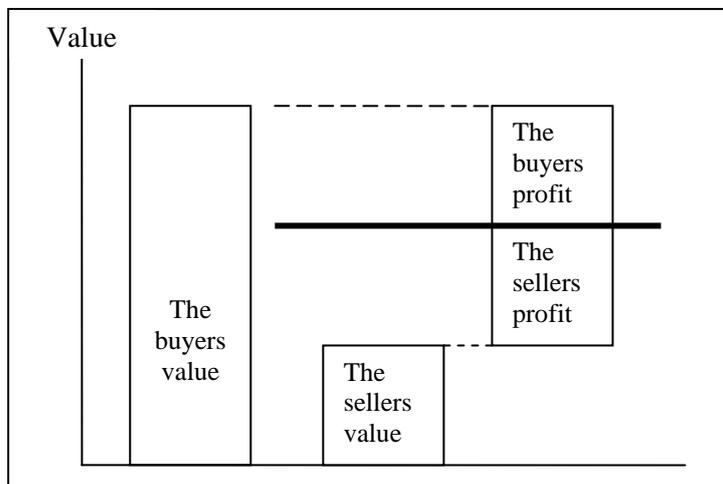
the degree of public interest should dictate the level or amount of compensation payable. In cases where there is a low degree of public interest, Epstein argues that the compensation should be higher.

Despite the theoretical arguments of Epstein, the concept of compensation tied to public benefit opens a challenge to the long standing principle of ‘Pointe Gourde’ and also seeks to expand the ‘Raja Principle’. Brown (2004) summarizes Pointe Gourde as the principle of not allowing any added value to the acquired property resulting from the scheme underlying the acquisition, being paid as compensation. The Raja Principle is applied where there are limited buyers due to the nature of the land i.e. swamp land. Emanating out of Raja, Brown (1996) highlights the emerging principle that in the formulation of value the value of the land to the purchaser cannot be entirely disregarded;

“The value of land is not to be estimated at its value to the purchaser. The fact that a particular purchaser might desire the land more than others is not to be disregarded.” (p. 109)

In this regard Kalbro and Sjodin (1993) highlight the differences between a voluntary versus involuntary sale of the subject property and how compensation may be assessed to the dispossessed. In Figure 3 it is shown through voluntary bargaining how part of the value of the property to the purchaser may be established and split between the buyer and seller. It is suggested by these authors that this concept should be included as part of negotiating the price in compulsory acquisition cases.

Figure: 3 Voluntary agreed price with buyer / seller profit



Source: Kalbro and Sjodin 1993

The contradiction of the use ‘Just Terms’ in land acquisition legislation

In a number of circumstances, the taking of land through the compulsory acquisition process is inevitable. The sum of compensation is primarily determined in the context of the meaning of value of a property to a dispossessed party under the traditional definition of value as defined in *Spencer v Commonwealth* 1907. For some home and business owners, the acquisition of their property means the extinguishment of their tenement in land or livelihood, of which the assessment of market value under traditional terms by reference to similar property transaction is not parity of compensation. This is primarily due to the amount of compensation offered being insufficient to re-establish the dispossessed parties freehold tenement or business. From a residential perspective, this results in the extinguishment of a home.

This is of greatest concern for those with marginal value property or property at the lower end of the market in low socio economic locations and who are not in a financial position to increase levels of debt to accommodate the purchase and finance of alternate higher value premises. To these dispossessed parties, the value of their dispossession is the security of their environment in which they live and bears no relevance to the Spencer principle as the option of being a willing seller would not realistically become an option of choice. In these circumstances, it must be asked whether the objectives of Just Terms Compensation have been applied. To this end, it is questioned as to whether the traditional definition of market value as defined in the Spencer case is the primary consideration for the assessment of Just Terms Compensation.

To date the Courts have avoided this issue by reference to the absence of provisions for reinstatement in acquisition legislation. This issue is further defined by Brown (2004) who states, “Any question of compensation for resumed land being based on the cost of purchasing alternative, similar land must depend on the compensation provisions contained in the relevant resumption statutes” (p.157). The provision for reinstatement is absent in the NSW legislation.

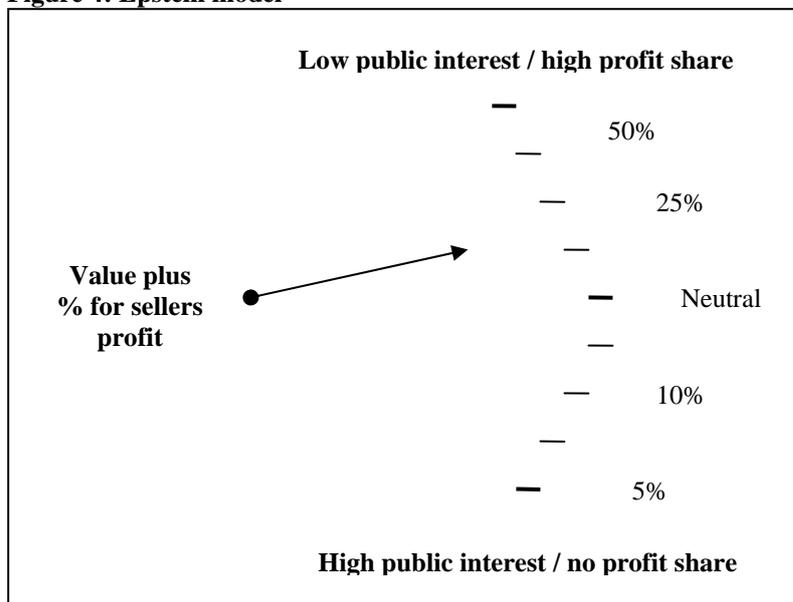
As highlighted in the case’s above, a variety of circumstances exist under which land may be compulsorily acquired for an expanding number of public purposes. Despite

the expansion of these public purposes and ‘economic development purposes’, there is very little corresponding development in compensation theory or rationale.

Just terms parity value framework

The model of Epstein is highlighted below Figure 4 in which a low public interest would result 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.

Figure 4: Epstein model

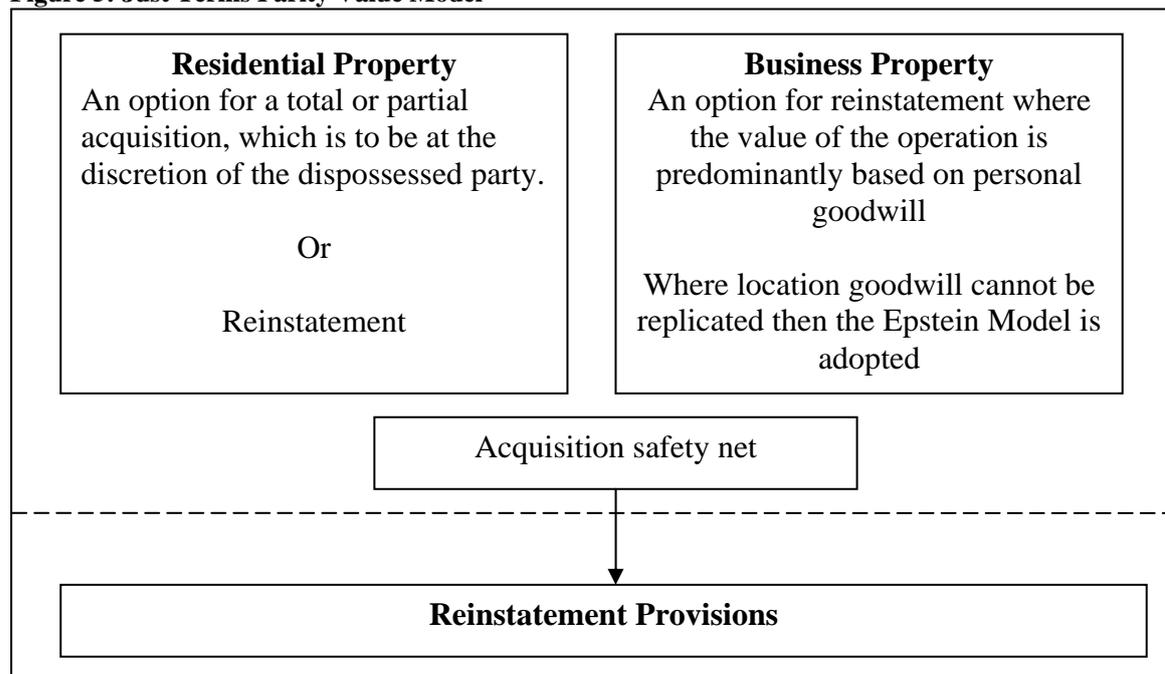


In contrast to Epstein’s model, and in support of the basic needs of a dispossessed party, an alternative model would commence with a reinstatement safety net, particularly in the case of a residence. Rather than items of disturbance, in connection with an alternate property, reinstatement would result in an alternate property being provided of a similar nature to the property acquired. 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. As highlighted in the United States and Australian cases, where property is acquired for urban renewal, it would be incumbent on the acquiring authority or corporation as part of their obligation, for reinstatement to be offered to 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 including 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 model in Figure 5, is a framework in which a minimum safety net of reinstatement is provided as an option for the dispossessed.

Figure 5: Just Terms Parity Value Model



Source: Author

The author's model 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 adopted to provide for

the business. The profit share would need to be assessed on a case by case basis and on the merits of the business and the proposed project.

The Epstein Model provides a way of replicating a voluntary bargaining environment as part of an acquisition process. This is in opposition to Government acting as intermediary in securing property at a price based on sales of property and businesses on existing use. What the Pointe Gourde Principle seeks to do, is to ensure an entrepreneurs profit is fully retained by the developer in the carrying out of their business, rather than any part of that margin that may be attributable to a location being partly provided to a dispossessed party. To this end, a median for 'Economic Development Purposes' needs to be encouraged in the acquisition process, with provisions for unreasonable holdouts.

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.

Conclusion

The ownership of land and the use to which it is put has intensified significantly in response to greater urbanization of society. In cities the need to renew services, infrastructure and residential suburbs is an evolving process. Whilst systems and laws are put in place to facilitate these outcomes, corresponding provisions need to be developed to protect those who are affected and dispossessed by these changes. The need to provide environments for negotiation over the compulsory purchase is crucial to insure that the interests of existing property and business owners are catered for. At present the legislation governing the acquisition process is fragmented into heads of compensation in which an affected party must navigate in order to prove their compensation.

Void in the legislation and at the reluctance of the courts to award reinstatement, the potential expansion of the 'Public Purpose Rule' to include 'Economic Development' leaves a dispossessed party more vulnerable to the redevelopment plans of corporations embarking on government sanctioned urban renewal projects. The non-descript and nebulous evolution of this rule, with no corresponding development in compensation principle for dispossessed parties is of concern for all property owners. As the need to provide infrastructure and other community services, increases with greater urbanization, a minimum safety net is needed for the protection of existing property owners. At this point it is contended that that minimum standard is reinstatement in accordance with the use of the word 'Just Terms' in land acquisition legislation across Australia.

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