14th Pacific Rim Real Estate Society Conference
Kuala Lumpur, Malaysia
20 - 23 January, 2008

Topic: How Australia deals with land acquisition compensation for land subject to a leasehold title

Author: Nelson Chan

Affiliation: School of Economics & Finance, College of Business
University of Western Sydney

Contact: n.chan@uws.edu.au

Keywords: freehold, leasehold, land acquisition, compensation

Abstract:
In Australia, the majority of private urban land is under freehold title. However, all land in Australian Capital City (ACT) and a small portion of urban land in various States and Territory are under leasehold title. In addition, large tracts of rural land throughout Australia are held under Crown leases. The government at Commonwealth, State and Territory level has passed separate land acquisition laws to deal with compensation issues.

While the compensation principle for assessing the value of freehold land is relatively straightforward and consistent throughout the country, the compensation principle for assessing the value of leasehold land is different in different states and territories.

This paper aims at studying the different legal provisions for compensating the value of leasehold land in the country. It also looks at whether leasehold landowners are treated fairly. It is found that although there are different provisions in the various state and territory land acquisition compensation statutes, the spirit of compensation is on the whole the same throughout the country. Leasehold landowners are basically treated fairly when their land is acquired by the authority.

Introduction

Land tenure refers to" the manner in which a person held or owned real property" (MSN Encarta, 2007). The land tenure system in a country governs the traditional or legal rights that individuals or groups have in land and the resulting social relationships among the people (Kuhnen, 1982). Land tenure system exists in different forms. In countries where private land ownership is allowed and the rule of law is followed, private property rights are protected by law and cannot be violated by the government or individuals. The government, however, in relation to the carrying out developments for public purpose, may compulsorily take land from private owners by way of 'acquisition' or 'resumption' according to the provisions of the law.

Compulsory land acquisition is the right and action of the government to take property not owned by it for public use. In the United States, this right is known as 'eminent domain', the action is known as 'condemnation' (Eaton, 1995). In Canada, the United Kingdom, and Australia, the right and action are known as 'expropriation' (Boyce, 1984), 'compulsory purchase' (Denyer-Green, 1994), and compulsory acquisition or resumption' (Brown, 2004, Hyam, 2004, Jacobs, 1998), respectively. In each of these countries, compulsory acquisition of private property by the government is authorised by legislation.

In Australia, private land is owned under freehold or leasehold titles. There are 6 State and 2 Territory and 1 Federal governments in Australia. Each of them has passed law to govern the compensation principles for compulsory land acquisition. The compensation principles under these laws are not entirely the same. While leasehold land title is not as popular as freehold title, it is not unimportant given that the whole of Australian Capital Territory (ACT) is under a leasehold land tenure system.

The aim of this paper is to examine the different compensation principles for the compulsory acquisition of leasehold land in Australia to see if leasehold landowners are treated fairly. The compensation principles in Hong Kong are used to contrast the Australian ones. It is well known that Australia was a former British colony and has a common law legal system. Hong Kong was also a former British colony and has a common law legal system. What is important is that Hong Kong has a leasehold land tenure system. The compensation principles in Hong Kong, like Australia, are developed from the early compensation principles in Britain; they are thus good comparables for contrasting the Australian ones. A conclusion is provided at the end of the paper.

Overview of land tenure system in Australia

Being a former British colony, Australia has inherited common law and land tenure system from Britain. Private land in Australia may be held under freehold or leasehold titles. Land may also be held subject to native title, i.e. the traditional land rights of the Aboriginal people resurrected by the High Court's decision in the case of *Mabo and Others-v-The State of Queensland (No2) (1992) 107 ALR 1* (Sutton, 1996, Van Hattem, 1997). Table 1 below shows the category of private land in the country.

Table 1 Private Land Category in Australia

PRIVATE LAND CATEGORY (1993 data)	**(thousand square kilometres)**									
	QLD	**NSW**	**VIC**	**SA**	**WA**	**NT**	**TAS**	**ACT**	**TOTAL**	**% of Australia**
Freehold	627.2	405.5	155.2	158.4	205.1	6.4	27.2	-	1585.0	20.6
Crown leasehold	939.8	308.9	0.1	418.4	899.9	666.6	-	0.9	3234.6	42.1
Total	**1567.0**	**714.4**	**155.3**	**576.8**	**1105.0**	**673.0**	**27.2**	**0.9**	**4819.6**	**62.7**

Source: Geoscience Australia, 2007

Australian Capital Territory (ACT) is the only jurisdiction in the country that has an exclusive leasehold land tenure system (Forster, 2000, ACTPLA, 2005). Land is generally disposed of by the government on 99-year leases. Subject to the payment of a fee, lessees will be granted a new lease towards the end of the lease term if the land is not required by either the Territory or Commonwealth for public purposes (ACTPLA, 2005). Under ss. 171 & 172 of Land (Planning and Environment) Act 1991 (ACT), if the term of a further lease (residential and leases other than residential or rural) is not longer than the term of the existing lease, the fee payable must not be more than the cost of granting the lease.

While freehold land tenure system prevails in other jurisdictions, the States and Territory governments may also dispose of surplus Crown land by long leases or perpetual leases. In New South Wales, perpetual lease holders have a right under the Crown Lands (Continued Tenures) Act 1989 to convert perpetual leases into freehold titles subject to the payment of a purchase price.

Overview of Australian compensation principles

In Australia, compensation for compulsory land acquisition is not based on common law. This fact has been verified in various court decisions including *Kozaris v Roads Corporation* [1991] 1 VR 237 at 239, in which Gobbo J commented that "compensation for compulsory land acquisition is a matter of statutory entitlement and does not rest on common law". The compensation principles are written in the statutes and are continuously being fine-tuned by court rulings.

The principle of 'just terms' compensation is provided in s. 51(xxxi) of Australian Constitution which provides that the Commonwealth may only acquire property on 'just terms'). Just terms compensation is also enforced in NSW under the Land Acquisition (Just Terms Compensation) Act 1991 (Brown, 2004, Commonwealth of Australia, 1980, Hyam 2004, Jacobs, 1998). However, the meaning of 'just terms' is not defined in the Constitution or any other legislation. In general, 'just terms' compensation is assumed to be achieved if the assessment is made according to the 'value to the owner' principle.

The **'**value to the owner' compensation principle is widely applied in Australia. The High Court explained in the case of *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR at 571 that this compensation principle "prima facie means recompense for loss, and when owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property take from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it". The objective of this principle is to ensure that the dispossessed owners are fully indemnified for the loss of their land (Commonwealth of Australia, 1980, Rost & Collins, 1984).

The 'value to the owner' principle acknowledges that compensation is more than the market value of the land taken. In *Turner v Minister for Public Instruction* (1956) 95 CLR 245 at 264, Dixon CJ commented that "[c]ompensation should be the full monetary equivalent of the value to [the owner] of the land. All else is subsidiary to this end." Beaumont J in *Leppington Pastoral Co Pty Ltd v Commonwealth* (1997) 94 LGERA 68 at 88 pointed out that "[i]n this country, the land acquisition statutes have not only retained the English concept of the market value of land, but also have gone further: our legislation provides for other factors to be taken into account which an ordinary seller of land would not be able to obtain from an ordinary buyer; so that it is well understood here that the dispossessed owner may be entitled to a claim for 'disturbance' or a 'solatium' over and over the ordinary sale price of land."

The ‘value to the owner’ principle has been incorporated in the various compensation statutes in Australia. There are 9 compensation statutes in Australia and the relevant compensation principles are provided in:

1. Lands Acquisition Act 1989 (Commonwealth): ss. 55 -58;
2. Land Acquisition (Just Terms Compensation) Act 1991 (NSW): ss. 55 - 61;
3. Land Acquisition and Compensation Act 1986 (VIC): ss. 40 - 45;
4. Acquisition of Land Act 1976 (QLD): s. 20;
5. Lands Acquisition Act 1994 (ACT): ss. 45 -52.
6. Land Administration Act 1997 (WA): s. 241;
7. Land Acquisition Act 1969 (SA): s. 25;
8. Land Acquisition Act 1993 (TAS): ss. 27 - 33; and
9. Lands Acquisition Act 1978 (NT): Sch. 2.

In regard to which compensation statute is to be used for a particular land acquisition case, it depends on the background of the acquiring authority. If the authority is a Commonwealth government agency, then the Commonwealth compensation statute applies. If it is a State or Territory government agency, then the respective State or Territory compensation statute applies.

The heads of compensation under the principle of ‘value to the owner’ are known as ‘matters’ for consideration in these statutes. While the relevant ‘matters’ are described differently in the statutes, they generally include the following items:

1. Market value of the interest taken;
2. Special value due to ownership or use of the land taken;
3. Severance loss to retained land;
4. Disturbance loss or consequential loss;
5. Solatium; and
6. Disregard any increase or decrease of the property value due to the purpose of the acquisition.

Item 6 actually contains 2 ‘matters’ for consideration. Any ‘increase’ of the property value due to the purpose of the acquisition means ‘betterment’ or ‘value enhancement’ due to the authority’s scheme. If the acquired land enjoys betterment or value enhancement due to the authority’s scheme, it has to be deducted from the compensation. In contrast, any ‘decrease’ of the property value due to the purpose of the acquisition is otherwise known as ‘injurious affection’ by the courts and text books. It is a head of compensation claim arising from a partial land acquisition (Brown, 2004, Hyam 2004, Jacobs, 1998).

Similar to compensation statutes in other common law countries or jurisdictions, Australian statutes allow compensation for market value of the land taken, severance and injurious affection value losses to any retained land and consequential losses. In addition, there is compensation for special value loss and solatium as well. These 2 heads of compensation may not be available in other countries and jurisdictions.

The special value of land is the additional financial advantage above market value. Special value is described differently in the compensation statutes. It was explained by Callinan J in *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209 at 269 as “the value to the owner over and above [the land’s] market value. It arises in circumstances in which there is a conjunction of some special factor relating to the land and a capacity on the part of the owner exclusively or perhaps almost exclusively to exploit it. … There will in practice be few cases in which a property does have a special value for a particular owner. Obviously neither sentiment nor a long attachment to it will suffice. The special quality must be a quality that has an economic significance to the owner. A possible case would be one in which, for

example, a blacksmith operates a forge in the vicinity of a racetrack on land zoned for residential purposes as a protected non-conforming use, the right to which might be lost on a transfer of ownership or an interruption of the protected use. Such a property will have a special value for its blacksmith owner, and perhaps another blacksmith who might be able to comply with the relevant requirements to enable him to continue the use but no one else."

Solatium is not a compensation for sentiment or attachment to the land. It is a sum of money to make up for the disruption, nuisance and inconvenience suffered by the dispossessed owner who has to relocate due to the land acquisition. To a layman, the meaning of solatium can be found in the Shorter Oxford Dictionary as "a sum of money paid over and above the actual damages as solace for injured feelings". In s. 60(1) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), it is defined as "compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of the acquisition". In general, it is the compensation for residential owners who have to relocate from their principal place of residence due to the land acquisition. The amount of solatium payment differs under the various compensation statutes. For example, under s. 61 of Lands Acquisition Act 1989 (Commonwealth), the amount is $10,000 adjusted annually according to CPI. Under s. 60 of Land Acquisition (Just Terms Compensation) Act 1991 (NSW), the amount is a maximum of $15,000 or such higher amount notified by the Minister. In Victoria, s. 44(1) of Land Acquisition and Compensation Act 1986 provides that solatium payment could be up to 10% of the market value of the land taken.

Apart from the statutory compensation principles and court decisions, the attitude of the courts is also important in determining compensation for the dispossessed landowners. Australian courts generally adopt a liberal approach to assess compensation. In *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of SA Ltd* (1947) 74 CLR 358, it was held that compensation should be "resolved in favour of a more liberal estimate". This principle was reaffirmed in a number of court cases including *McBarron v Roads & Traffic Authority NSW* (1995) 87 LGERA 238 at 244 – 245. In this case, Talbot J expressed that "it is appropriate to seek to do justice by adopting a generous approach in favour of the resumee that just compensation is paid so far as the Act allows. Therefore any discretion should be exercised in favour of the claimant where practicable in order to achieve a just result."

Compensation principles in Australian Capital Territory (ACT)

As mentioned above, ACT is the only jurisdiction in Australia that has an exclusive leasehold land tenure system. Compensation for compulsory land acquisition follows the principle of 'value to the owner' and is governed by the Lands Acquisition Act 1994 (ACT). Although ACT has a leasehold land tenure system, compensation is also based on the principle of 'value to the owner'. The general compensation principles are provided in section 45 of the Act as follows:

Amount of compensation—general principles

(1) The amount of compensation to which a person is entitled under this part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.

(2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including—

  (a) except in a case to which paragraph (b) applies—

    (i) the market value of the interest on the day of the acquisition; and

    (ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest; and

(iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and

(iv) where the acquisition has the effect of severing the acquired interest from another interest—any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired; and

(b) if—

(i) the interest acquired from the person did not previously exist as such in relation to the land; and

(ii) the person's interest in the land was diminished, but not extinguished, by the acquisition; and

the loss suffered by the person because of the diminution of the person's interest in the land; and

(c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of—

(i) the acquisition of the interest; or

(ii) the making or giving of the pre-acquisition declaration or certificate under section 21 in relation to the acquisition of the interest;

other than any such loss, injury, damage or expense in respect of which compensation is payable under part 7; and

(d) subject to section 50, if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted; and

(e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of—

(i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and

(ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the chief executive or a person authorised under the *Government Solicitor Act 1989*, section 5 (4) requires.

In summary, under s. 45 of the Act, a dispossessed landowner is entitled to claim:

1. market value of the interest taken (s. 45(2)(a)(i))
2. special value (s.45(2)(a)(ii))
3. severance loss (s.45(2)(a)(iii))
4. injurious affection loss (s.45(2)(a)(iv))
5. consequential loss (s.45(c),(e))

Solatium is separately provided in s. 51 under which a person whose has to relocate because his principal place of residence has been compulsorily acquired is entitled to claim a payment of $15,000 indexed at CPI.

It is interesting to note that there are few major court decisions in land acquisition compensation from ACT. It may be due to that major decisions had already been made by courts in the more populous States over the years.

Compensation principles relating to the potential or future values of acquired land

Under Australian statues, both freehold and leasehold land are to be compensated according to the 'value to the owner' principle, i.e. the dispossessed landowners are allowed to claim compensation under the 6 'matters' for consideration. For acquisition of freehold land, Australian compensation statutes require the payment of market value for the land taken. The compensation is based on the market value of the acquired land. In assessing the market value, the full potential, present and future, of the land has to be considered. This principle has been upheld in a number of court decisions such as *Daandine Pastoral Co Pty Ltd v The Crown* (1950) 11 The Valuer 266 at 273. In this case, the court held that "[t]he property is to be considered with all its advantages, present and future, in the hands of the owner, and compensation is to be assessed in such a way to give the property its greatest value".

This principle also applies when assessing the value for land subject to a leasehold title or other lesser title. The full potential of the land is closely related to the likelihood of the grant, renewal or continuance of a lease, licence or permit etc. The Australian compensation statues have different provisions in respect of this matter, a summary is provided in Table 2:

Table 2 Compensation principles for assessing leasehold land value

Statute	**Provisions**
Lands Acquisition Act 1989 (Commonwealth)	"In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including: … (d) if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted" (s. 55(2)(d)) "In determining the amount of compensation to which the person is entitled in respect of the acquisition of the interest: …. (b) it shall be assumed that the land was subject only to such limitations and restrictions as would have been likely if there had been no proposal to limit or restrict the use of the land to use for the purpose permitted by the planning instrument" (s. 59(2)(b))
Land Acquisition (Just Terms Compensation) Act 1991 (NSW)	No specific provisions
Land Acquisition and Compensation Act 1986 (VIC)	"If the claimant's interest in the acquired land was liable to expire or to be determined, the assessment of compensation payable under this Part in respect of that interest must take account of any reasonable prospect of renewal or continuation of the interest." (s. 41(6)) "regard may be had to the actual zoning of the land in which the acquired interest subsists and, where relevant, to the actual zoning boundary" (s. 43(1A)(c))

Acquisition of Land Act 1976 (QLD)	No specific provisions
Lands Acquisition Act 1994 (ACT)	"In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including— … (d) subject to section 50, if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted" (s. 45(2)(d)) "it shall be assumed that the land was subject only to such limitations and restrictions as would have been likely if there had been no proposal to limit or restrict the use of the land to use for the purpose permitted by the planning instrument" (s. 49(2)(b)) "In assessing compensation, there shall be disregarded— … (e) in the case of an acquisition of land the subject of a rural lease that was granted for a term less than 21 years—the possibility of a further lease being granted in respect of the land under the *Land (Planning and Environment) Act 1991"* (s. 50(1)(e))
Land Administration Act 1997 (WA)	No specific provisions
Land Acquisition Act 1969 (SA)	"The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles: … (d) where the claimant's interest in the subject land was liable to expire or be determined, any reasonable prospect of renewal or continuation of the interest must be taken into account" (s. 25(1)(d))
Land Acquisition Act 1993 (TAS)	"it is to be assumed that the land was, on that day, zoned or reserved in such manner as would have been likely if there had been no proposal or requirement for public use." (s. 29(1)(b)) "Each of the following matters is to be disregarded in the determination of compensation in respect of subject land: … (d) any expectation by a claimant who was a lessee of the subject land that the claimant's lease would be renewed, other than an expectation which is based on an option of renewal in the lease contract" (s. 33(1)(d))
Lands Acquisition Act 1978 (NT)	"If, at the date of acquisition, the interest of the claimant in the land was –

	(a) due to expire; or (b) liable to be determined, the Tribunal shall take into account any reasonable prospect of renewal or continuation of the interest, and the likely terms and conditions of that renewal." (Sch. 2, rule 6)

Apart from statutes in NSW, Queensland and Western Australia, all other statutes have provisions in connection with the grant, renewal or continuance of the interest of the land acquired. In jurisdictions where there are no prescribed rules, the courts resort to rely on the general principle of 'value to the owner' to determine the appropriate compensation.

It can be seen that the tabled statutory rules cover 2 main areas– lease term and zoning in respect of the acquired land. Since the grant, renewal or continuance of lease term, and permission to put land to the next best use will greatly affect the potential or adaptability of the land and hence the amount of compensation, it is necessary to examine and estimate the probability of getting the necessary permissions.

The provisions under several compensation statutes, i.e. s. 55(2)(d) of Lands Acquisition Act 1989 (Commonwealth); s. 43(1A) of Land Acquisition and Compensation Act 1986 (VIC); s. 25(1)(d) of Land Acquisition Act 1969 (SA); and Sch. 2, rule 6 of Lands Acquisition Act 1978 (NT), mandate the courts to consider the likelihood of the continuation or renewal of the acquired interest and the likely terms and conditions on which any continuation or renewal would be granted.

In ACT where there is a leasehold land tenure system, the position is not much different. Section 45(2)(d) of Land Acquisition Act 1994 (ACT) requires compensation to be assessed with regard to "the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted". However, there is one exception to this rule. Where the acquired land is subject to a rural lease that was granted for a term less than 21 years, s. 50(1)(e) of the Act requires compensation to be assessed with no regard to "the possibility of a further lease being granted in respect of the land". A probable reason for this provision is that land in ACT is generally granted for a lease term of 99 years. Land subject to a rural lease for a term less than 21 years is land that will be required for a public use in the foreseeable future. Hence the lease term granted is less than 21 years and there is no intention for the lease term to be renewed or extended.

In the absence of statutory requirement for considering the expectancy or probability of the grant or renewal or continuance the interest, the courts will assume they have the authority to consider the likelihood of the continuation or renewal of the interest unless it is explicitly prohibited by law.

In *Robert Reid & Co v Minister for Public Works* (1902) 2 SR (NSW) 405, it was held that the court was entitled to consider the expectancy of leases being renewed. This decision was refined in *The Minister v New South Wales Aerated Water and Confectionery Co Ltd* (1916) 22 CLR 56 that the value of the claimant's unexpired lease term could not be increased by the expectation that the lease term would be extended unless it could be established that there was a right to an extension.

In considering the expectancy of continuation or renewal of a lease, the courts have to consider all relevant facts and evidence before them. It is necessary to identify the levels of probability. In *Beard v Director of Housing (Tas)* [1961] Tas SR 141 at 149, Burbury CJ used

the metaphor 'there is a difference between an anticipated and a realised potential, between the unhatched egg and the chicken' to illustrate the main points.

In general, lessees under fixed term tenancy are required to prove the right to extend or renew the lease. However, lessees under periodic tenancy or holding of indefinite duration have been held to sustain claims for compensation (Brown, 2004). In *Unimin Pty Ltd v Commonwealth* (1977) 18 ACTR 1, the claimant had partly written and partly oral agreements with the landowner to extract sand, topsoil and granite from the land prior to the compulsory land acquisition. It was agreed by the parties that the agreements could be terminated at any time by giving one month written notice to the other. The extraction activities carried on for almost 3 years before the land was acquired. In allowing the compensation claim, Connor J at 19 – 20 ruled that "[i]t is highly probable that the plaintiffs would have been permitted to carry on their operation … "and it was appropriate to value the claimant's rights on the basis that they would have subsisted during the commercial life of the deposits but to make some deduction for the risk that they have been terminated sooner."

In contrary to the mandate to consider the likelihood of the continuation or renewal of the acquired interest, the statute may restrict the courts from having such consideration. As mentioned earlier, under 50(1)(e) of Land Acquisition Act 1994 (ACT) requires that no regard shall be had for "the subject of a rural lease that was granted for a term less than 21 years—the possibility of a further lease being granted in respect of the land". Another restrictive provision can be found in s. 33(1)(d) of Land Acquisition Act 1993 (TAS). Under this provision, courts are required to disregard "any expectation by a claimant who was a lessee of the subject land that the claimant's lease would be renewed, other than an expectation which is based on an option of renewal in the lease contract".

In regard to zoning considerations, only the Commonwealth, Victoria, ACT, and Tasmania statutes have relevant provision. In general, these statutes require that in the course of assessing compensation, the land acquired shall be deemed to be subject to its existing zoning as if there had been no proposal or requirement for public use. In jurisdictions where there are no specific statutory provisions, courts may follow precedents. In *Housing Commission (NSW) v San Sebastian Pty Ltd* (1978) 140 CLR 196, it was held that if the zoning or rezoning of the required land was a step prior to acquisition, such zoning or rezoning could be ignored in compensation assessment. It other words, the existing zoning of the land is to be used to ascertain the land value.

Regarding zoning restrictions, it was held in *Pringle v The Minister* (1967) 14 LGRA 280 at 283 that land subject to zoning restrictions must not be valued on the basis that the compulsory land acquisition has nullified the restrictions. In general, land is to be valued with all its restrictions. Regarding the probability of getting planning permission to put the land to other more profitable use, Australian compensation statutes do not restrict the courts from taking this matter into consideration. It was held in *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1957) 97 CLR 379 that the prospect of a relaxation of the restrictions under a planning scheme may also be properly taken into consideration.

Under the liberal approach, courts will consider the remote probability that the restrictions on land use may be relaxed or removed. In *Nardone v SA Land Commission* (1978) 20 SASR 168, it was held that in cases where the likelihood of zoning restrictions being relaxed or removed is slender, it is appropriate to value the land in the first instance with all its restrictions and to make some allowance, however slight, in favour of the landowner for the remote possibility that they will be eased removed. In *Liverpool City Council v Commonwealth of Australia* (1993) 81 LGERA 405, 32 hectares of public roads owned by the Liverpool City Council were compulsorily acquired by the Commonwealth in connection with an airport proposal. Wilcox J ruled that there was a remote probability that some of the roads could be closed and rezoned for residential purpose in the distant future if there was no

compulsory acquisition and awarded a compensation based on a 'best guess' that 10% of the roads would be so converted.

Comparison with leasehold compensation principles in Hong Kong

Hong Kong has a leasehold land tenure system. Basically all land in Hong Kong, except the St. John's Cathedral Church which has a freehold title, is held under a lease, license or lesser title from the government (Cruden, 1986, Nissim, 1998). This former British colony also has a common law legal system inherited from Britain (Hong Kong Government, 2007). Given the leasehold land tenure system and the common law legal system, Hong Kong is a good candidate for contrasting the compensation principles in Australia.

In Hong Kong, compensation for compulsory land acquisition is governed by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990. This is the mini constitution of Hong Kong. Article 105 of this law provides that "compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay". Other compensation principles are mainly governed by the Lands Resumption Ordinance (LRO) (Chapter 124). Sections 6, 8, 10, 11, and 12 of which lay down the compensation principles and allow the following heads of claim:

1. value of the land resumed;
2. value of easement or other rights in the land resumed;
3. land value loss due to severance of the land resumed;
4. business loss; and
5. expenses relating to removal, acquisition of alternative property and professional fees for preparing the claim.

Injurious affection compensation is not provided in this compensation law (Cruden, 1986). In addition, payment for special value and solatium are not allowed. The omission of these heads of compensation shows that the 'value to the owner' compensation principle does not apply in Hong Kong.

In relation to the likelihood of the grant, renewal or continuance of a lease or other lesser titles, Hong Kong adopts a different attitude. Section 12(c) of the LRO states that "no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever: Provided that this paragraph shall not apply to any case in which the grant or renewal or continuance of any licence, permission, lease or permit could have been enforced as of right if the land in question had not been resumed." This provision effectively deprives the landowner of the opportunity to get higher land value compensation due to the probability of the lease being renewed or extended if it is not a right written in the lease document. This principle was applied and confirmed by the Court of Final Appeal when it heard two similar cases *Yin Shuen Enterprises Limited v. Director of Lands*, LDLR 5 of 2000 and *Nam Chun Investment Company Limited v. Director of Lands*, LDLR 3 of 2000.

In contrast, Australian provisions are generally less harsh, with the exception of s. 50(1)(e) of Land Acquisition Act 1994 (ACT) and s. 33(1)(d) of Land Acquisition Act 1993 (TAS). The former requires that no regard shall be had for "the subject of a rural lease that was granted for a term less than 21 years—the possibility of a further lease being granted in respect of the land". The latter requires compensation assessment to disregard "any expectation by a claimant who was a lessee of the subject land that the claimant's lease would be renewed, other than an expectation which is based on an option of renewal in the lease contract". These two provisions are the most restrictive written rules that are comparable to s. 12(c) of the LRO.

In regard to zoning issues, s. 12(aa) of the LRO requires that "no account shall be taken of the fact that the land lies within or is affected by any area, zone or district reserved or set apart for the purposes" in a draft plan under the Town Planning Ordinance (Cap 131). In other word, only the land value based on the current zoning will be considered. In this regard, the Hong Kong provision is basically in line with the provisions in the Commonwealth, Victoria, ACT and Tasmania laws.

The numerous court decisions, including the two mentioned above, show that Hong Kong law courts generally follow the law strictly. Since s. 12(a) of the LRO provides that "no allowance shall be made on account of the resumption being compulsory", the courts do not treat the dispossessed landowners with sympathy. In contrast, where there is no expressed statutory requirement to the contrary, Australian courts tend to adopt a liberal approach to consider the remote probability of changing future land use.

Conclusion

Like freehold interest, compensation for leasehold interest in Australia is based on the principle of 'value to the owner' which comprises the following 'matters' or heads of claim:

1. Market value of the interest taken;
2. Special value due to ownership or use of the land taken;
3. Severance loss to retained land;
4. Disturbance loss or consequential loss;
5. Solatium; and
6. Disregard any increase or decrease of the property value due the purpose of the acquisition.

In this regard, it can be said that leasehold landowners are treated the same way as their freehold counterparts. It can be said that they have been given a fair go.

Australia and Hong Kong have similar heads of compensation. However, the 'value to the owner' compensation principle does not apply in Hong Kong. The Australian compensation approach is more generous in that payment for special value, injurious affection and solatium is allowed.

In regard to the issue of the likelihood of the continuation or renewal of a terminable interest in land, there is no uniform approach among the Australian laws. Some are very restrictive and some are more generous.

Section 50(1)(e) of Land Acquisition Act 1994 (ACT) and s. 33(1)(d) of Land Acquisition Act 1993 (TAS) are restrictive to an extent that is comparable to the provision in Hong Kong statue. All these provisions are in favour of the government (acquiring authority) and the dispossessed owners are put in an inferior position.

In contrast, other Australian compensation laws are more generous. The courts are explicitly required to consider the likelihood of the continuation or renewal of the interest. In particular, the courts will look at the remote probability that the land may be put to alternative use in the future. What is more, Australian courts generally adopt a generous approach in favour of the claimant to ensure a just result. This is not a culture of the Hong Kong courts.

On the whole, the 'value to the owner' compensation principle in Australia treats owners of leasehold interest fairly. However, the restrictive provisions in the ACT and Tasmania statute can cause hardship to leasehold landowners. It will be good news to leasehold landowners if the generous and sympathetic compensation principles in other compensation statutes can be turned into a uniform approach across the whole country.

References

ACT Planning and Land Authority (ACTPLA), 2005, *The Leasehold System*, http://www.actpla.act.gov.au/plandev/land_leasing/info/index.htm

Baum A. & Sams G., 1997, *Statutory Valuation*, Routledge, London, 3rd edition, Part II.

Boyce B.N., 1984, *Real Estate Appraisal Terminology*, revised edition, Society of Real Estate Appraisers.

Brown D., 2004, *Land Acquisition*, 5th edition, Butterworths, Sydney.

Commonwealth of Australia, 1980, *The Law Reform Commission Report No. 14 – Lands Acquisition And Compensation*.

Cruden G.N., 1986, *Land Compensation and Valuation Law in Hong Kong*, Butterworths Singapore.

Denyer-Green B. 1994, *Compulsory Purchase and Compensation*, 4th edition, Estates Gazette.

Eaton J.D. 1995, *Real Estate Valuation in Litigation*, 2nd edition, Appraisal Institute.

Forster, G.A., 2000, Australia - land and property tax system - Statistical Data Included, *The American Journal of Economics and Sociology*, Vol 59, No 5, pp. 399-416

Geoscience Australia, 2007, Land Tenure, http://www.ga.gov.au/education/facts/tenure.htm

Hong Kong Government, 2007, *Hong Kong 2006*.

Hyam, A., 2004, *The Law Affecting Valuation of Land in Australia*, 3rd edition, The Federation Press.

Jacobs M.S., 1998, *The Law of Land Resumption*, LBC.

Kuhnen, F., 1982, *Man and Land – An Introduction into the Problems of Agrarian Structure and Agrarian Reform*, Verlag breitenbach Publishers.

MSN Encarta online encyclopaedia, 2007, http://encarta.msn.com/encyclopedia_761566465/Tenure.html#p1

Nissim, R., 1998, *Land administration and practice in Hong Kong*, Hong Kong: Hong Kong University Press.

Rost R.O. & Collins H.G., 1984, *Land Valuation and Compensation in Australia*, AIVLE, Chap. 23 – 26.

Sutton, P., 1996, The robustness of aboriginal land tenure systems: Underlying and proximate customary titles, *Oceania*, Vol 67, September.

Van Hattem, P., 1997, Demystifying Native Title *Murdoch University Electronic Journal of Law*, Vol. 4, No. 3.