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INTRODUCTION

Sometimes developers are likened to the big bad wolf that blows down the first little pig’s house in the fairytale ‘The Three Little Pigs’. In painting developers in that light, arguably due consideration has not been given to the benefits, economic and otherwise, that development brings. Housing provided by local, State and the Commonwealth governments accounts for only 4.03% of total housing (Australian Bureau of Statistics 2006), meaning that developers play a primary role in the construction of housing for families. However, has the contribution developers make in overcoming or easing broader issues associated with accommodating Australia’s growing population, the provision of affordable housing and urban renewal been discounted or altogether forgotten?

Population growth (Australian Bureau of Statistics 2006), land scarcity (Queensland Department of Infrastructure and Planning, 2008), housing shortages (Housing Industry Association 2011) and community problems, such as long commutes to employment centres, traffic problems, a lack of affordability and urban sprawl suggest that redevelopment of existing areas (or ‘infill development’) is desirable (‘Sydney housing “unaffordable”’ 2010, Property Council of Australia 2009 and City Futures Research Centre 2010). One of the main difficulties of developing an infill site is amalgamating the site itself. Site amalgamations are made more difficult by owners’ arguably “unreasonable” (Lehavi and Licht 2007) ability to veto a project by refusing to sell or ‘holding out’ to achieve an above market price (Singer 2006).

The extension of compulsory acquisition powers, as a form of legislative intervention to facilitate site amalgamations, has not been considered in the Australian context. In fact, using compulsory acquisitions to benefit a private third party has been criticised, both in Australia (Brennan 2008a) and the United States (Cohen 2005-2006, Castle Coalition 2006a and Castle Coalition 2006b), where sites may be amalgamated using the compulsory acquisition process. Both the Australian and United States systems are considered to identify whether Australia might learn from the United States system and its shortcomings. Two recent Australian cases are discussed highlighting the need for legislative change. The United States urban renewal programs and their significant shortcomings are considered, some of the fundamental flaws facing the United States compulsory acquisition system today are considered (Stelle Garnett 2003 and Bell and Parchimovsky 2006) and the controversial 2005 United States Supreme Court case, *Kelo v City of New London* 545 U.S. 469 (2005) (“*Kelo*”), is discussed.

This paper argues that government intervention to aid site amalgamations is warranted and may be achieved by extending compulsory acquisition powers. Two proposals and associated considerations are also suggested that implement an approval process to delegate or authorise use of compulsory acquisition powers for a site amalgamation.

AMALGAMATING SITES – THE DEVELOPER’S ROLE AND THE HOLD OUT PROBLEM

The private sector provides approximately 96 per cent of Australian housing (Australian Bureau of Statistics 2006), much of which is developed by developers. To undertake a project, a developer will identify and acquire a site, develop it and, where necessary, reconfigure titles into either parcels of land upon which freestanding homes are constructed (i.e. allotments), or duplexes, townhouses or apartments (i.e. community titles scheme lots). Each developer adopts a different approach when selecting sites for an infill development (Dredge 2009). One may identify contiguous lots and/or allotments available for sale with redevelopment potential. Alternatively a developer may act speculatively by targeting a potential redevelopment area and negotiating to acquire adjoining properties. While the contractual form adopted differs, each of these processes is a ‘site amalgamation’.

When a developer undertakes a site amalgamation, it will bear significant risk by committing to invest potentially large sums of money and time in contract negotiations to compose the site (Read, Schwartz and Zillante 2010). Difficulties arise when a developer cannot reach agreement with all targeted owners, particularly after contracts for, or ownership of, a large component of the site has been secured. Negotiations are often protracted because of ‘hold outs’. The “holdout problem” (Munch 1976) arises when an owner anticipates securing a better price for their land, profiting from a developer’s interest in a site (Read, Schwartz and Zillante 2010). The holding out by a very small number of owners may prevent the entire site from being secured.

If an allotment cannot be secured, planners may exclude that unsecured allotment from the development. However, where the unsecured property is a community titles scheme lot, the entire scheme must be omitted from the redesigned project, as it generally cannot be terminated unless all lots have identical ownership. Any lots in the scheme the developer already owns cannot form part of the redevelopment parcel, hampering the replacement of older buildings nearing, or exceeding, their economic life (Dredge 2009 and Bugden 2005). This occurs largely because there are limited mechanisms in the *Body Corporate and Community Management Act 1997* (Qld) (“*BCCM Act*”) to terminate a scheme. Termination may only occur in two circumstances:

1. a resolution without dissent is passed (s78(1)(a) of the *BCCM Act*). A resolution without dissent is defined in s105(3) of the *BCCM Act* as a resolution in which no vote is counted against the motion. It is notoriously difficult to achieve when differing ownership of lots exists; and
2. the District Court may order termination of the scheme where it is just and equitable (s78(2) of the *BCCM Act*). However, as the common law protects vested private property rights (*Clissold v Perry* (1904) 1 CLR 363), the District Court is unlikely to make the order where owners oppose the termination.

Consequently, unless one party owns all the lots in a scheme, it is extremely difficult to redevelop it. Legislative intervention, particularly in relation to the termination of community titles schemes, would facilitate site amalgamations.

Developers employ differing approaches when difficulties are experienced in amalgamating sites, particularly where community titles scheme lots are involved (Read, Schwartz and Zillante 2010). These strategies, including the appointment of real estate agents and solicitors to push negotiations, paint developers as the big bad wolf, responsible for blowing down neighbourhoods and eating up the naïve and vulnerable landowners. In fact, this reputation prompted the introduction of extensive consumer protection legislation in Queensland to ensure buyers understand their decision to buy property before titles are issued (s2(b) of the *Land Sales Act 1984* (Qld) (“*LS Act*”), s10 of the *Property Agents and Motor Dealers Act 2000* (Qld) (“*PAMD Act*”) and s4(g) of the *BCCM Act*). For example, the *BCCM Act*, *PAMD Act* and *LS Act* all place quite onerous obligations on developers, such as the disclosure of the scheme budgets and scheme composition and layout (potentially before development approvals to construct the building are obtained), compliance with technical requirements for contract composition and delivery and precise identification of proposed lots. Conversely, despite the important role that developers play in providing housing and ‘hold out’ difficulties, no legislative assistance exists to aid site amalgamations.

Government intervention in site amalgamations is also desirable because of a scarcity of land available for new housing, causing a need to foster infill developments. Land scarcity is experienced in many areas throughout Australia, including the Gold Coast, Australia's sixth largest city. Only 3.72 per cent of the 131,200 ha in the city is available for developing new housing. Based on Council's 2008 population projections there are, at best, 10 years of land supply into which the growing population can fit (Queensland Department of Infrastructure and Planning, 2008). Projections that Queensland's population will more than double its 2007 population by 2056, when it is expected to grow to 8.7 million people (Australian Bureau of Statistics 2006) compounds the problem.

Capital cities, particularly Sydney, are experiencing even greater land scarcity issues. Residents have excessively long commutes to work because of urban sprawl, there are serious traffic problems and housing is amongst the most expensive in the developed world. If development of the fringe suburbs continues, these problems will only worsen ('Sydney housing "unaffordable"' 2010, Property Council of Australia 2009 and City Futures Research Centre 2010).

Infill developments, particularly mixed use schemes combining housing, recreation and employment opportunities into one scheme, assists to achieve more sustainable land use by renewing urban areas at a higher density than developing rural areas does. Infill developments may be promoted by easing site amalgamation difficulties through legislative intervention. However, compulsory acquisition laws do not currently permit site amalgamation assistance.

CURRENT AUSTRALIAN LAW

One way to resolve the holdout problem in site amalgamations is to extend compulsory acquisition powers. A government's use of compulsory acquisition powers for a private entity for private purposes, such as a developer for an infill development, is a 'private-to-private transfer'.

Compulsorily acquiring land subject to 'hold outs' may overcome site amalgamation difficulties for infill developments. Both academics and interest groups (Brennan 2008a, Cohen 2005-2006, Castle Coalition 2006a, Castle Coalition 2006b and Becker as cited in Bell and Parchomovsky 2006) argued that:

- a) private-to-private transfers are an objectionable and unnecessary incursion on private property rights; and
- b) market forces more appropriately dictate whether a development can proceed.

However, a free market scenario produces a "sub-optimal amount of assembly" (Munch 1976) because the traditional concept of a 'willing buyer and a willing seller who act in their own self-interest without duress or compulsion' does not apply to a site amalgamation scenario without difficulty. Owners seek to maximise their return on a sale or may be unwilling to negotiate at all. Inefficiencies and market failure occur where a significant financial investment and expending of substantial time has occurred, particularly if the site is vital to the development. Market failure is another factor warranting government intervention in site amalgamations. Compulsory acquisition may be the appropriate means to achieve this intervention.

Use of compulsory acquisition in Australia to avoid 'hold outs'

There is currently no legislation either federally or in Queensland permitting private-to-private transfers. Acquisitions must be for a 'public purpose'. Before private-to-private transfers are permissible in Queensland or at Commonwealth level, legislative amendment extending the public purpose requirement to economic development of a region is necessary. Whilst cases dealing with private-to-private transfers have arisen in both the Northern Territory and New South Wales, the High Court interpreted the relevant legislation differently, allowing a Northern Territory government acquisition, but preventing an acquisition by Parramatta City Council.

Griffiths

Griffiths v Minister for Lands, Planning and Environment (2008) 235 CLR 232 (“*Griffiths*”) centred on the Northern Territory government’s acquisition of native title land to enable the grant of title to a cattle farmer. It was the first case in Australia permitting a private-to-private transfer where the economic development of a town was the only public benefit accruing from the acquisition.

The parcels subject to compulsory acquisition in *Griffiths* were Crown land in Timber Creek, Northern Territory. Between 1981 and 1997, Fogarty’s company held a pastoral lease over the land. After the lease expired, Fogarty and the other applicants applied for the grant of the fee simple title to the land from the Minister for Lands, Planning and Environment. The appellants, the Ngaliwurru and Nungali peoples, sought recognition of their native title interests. They objected to Fogarty’s application under the *Lands Acquisition Act* 1978 (NT) (“*NT Acquisition Act*”) based on their pre-existing native title rights to the land. While the Ngaliwurru and Nungali peoples’ native title rights were recognised, the Minister nonetheless compulsorily acquired them. The Minister’s decision was appealed and ultimately considered by the High Court.

Five of the High Court justices allowed the acquisition, with two judges dissenting. Gummow, Hayne and Heydon JJ, with whom Gleeson CJ and Crennan J agreed, allowed the compulsory acquisition of the native title interests. Their Honours concluded that s43 of the *NT Acquisition Act*, which permitted acquisitions “for any purposes whatsoever” authorised the compulsory acquisition. It was irrelevant that the beneficiaries of the compulsory acquisition were non-government entities.

The dissenting judges in *Griffiths*, Kirby and Kiefel JJ, held that the other judges’ reasoning in the case contradicted the common law. The curtailment of private property rights is permitted only where legislation is clear and unambiguous. Kirby and Kiefel JJ disagreed with the majority of the Court that the language in s43 of the *NT Acquisition Act* was sufficiently clear and unambiguous to enable destruction of the native title rights.

Fazzolari and Mac’s

Approximately 11 months after *Griffiths* was decided, the High Court handed down its decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 (“*Fazzolari and Mac’s*”). In *Fazzolari and Mac’s*, the High Court determined that local government powers do not extend to private-to-private transfers. The case concerned Parramatta City Council’s attempted compulsory acquisition of two small allotments (the land owned by Mac’s Pty Ltd was only 260m² and R & R Fazzolari Pty Ltd’s land was between 631m² and 648m²) in Parramatta’s central business district, for redevelopment into ‘Civic Place’. Civic Place is a \$1.4 billion integrated development, which includes residential and office towers, Council chambers and offices, a public library and art gallery, community facilities, meeting rooms, a childcare centre, shopping centre, public car park, pedestrian walkways for access to public transport and 13,000m² of public open space. It is also estimated to create 8,800 jobs (Tobias JA in *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac’s Pty Ltd* [2008] NSWCA 132 (11 June 2008), ¶ 23 and 73 (“*Parramatta Court of Appeal Decision*”)).

Section 188 of the *Local Government Act* 1993 (NSW) provides, subject to certain exceptions, owners’ consent to an acquisition must be obtained where property is compulsorily acquired for resale. The Local Government Minister must also consent to the acquisition. Consent may be forthcoming if the public benefit arising from an acquisition is demonstrated. Council submitted that the extent of public facilities forming part of the development warranted Ministerial approval. Ministerial consent was obtained and the acquisition process commenced. In the meantime, Council and Grocon Pty Ltd, the developer, signed a development agreement. Payment to Grocon Pty Ltd was to include cash instalments and ownership of specified allotments, including those owned by R & R Fazzolari Pty Ltd and Mac’s Pty Ltd (*Parramatta Court of Appeal Decision*, ¶ 69). The applicants contested the acquisitions on this basis.

Two judgements were handed down by the High Court. French CJ disagreed with Council's argument that it could acquire the land without owners' consent, holding that the development agreement effected a re-sale. As a result, the land was not to be used for public purposes, despite the significant community facilities being developed. His Honour determined that the acquisition was occurring purely to allow Grocon Pty Ltd to profit from the development.

The other judgement handed down by the Court in *Fazzolari and Mac's* was the joint judgement by Gummow, Hayne, Heydon and Kiefel JJ. Their Honours reached the same conclusion as French CJ, holding that the use of each acquired parcel must be investigated. As the development agreement transferred the land owned by R & R Fazzolari Pty Ltd and Mac's Pty Ltd, Council could not acquire it without first obtaining the owners' consent. The High Court's narrow interpretation of the legislation contradicts the approach it took in *Griffiths* and other cases where a private benefit accrued from an acquisition (*Werribee Shire Council v Kerr* (1928) 42 CLR 1, *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 356 and *Samrein Pty Ltd v Metropolitan Sewerage and Drainage Board* (1982) 41 ALR 467).

After the High Court's decision in *Fazzolari and Mac's*, the New South Wales Parliament adopted the *Land Acquisition (Just Terms Compensation) Amendment Act 2009* (NSW), enabling Council to proceed with development of Civic Place. It appears, however, that the project has progressed little since the amending legislation was passed in June 2009 (Parramatta City Council n.d.).

Based on the High Court's narrow reading of the powers in *Fazzolari and Mac's*, could *Griffiths* represent the high water mark for interpreting compulsory acquisition powers for private-to-private transfers? The lack of legislation, the need for increased infill development and the inconsistent High Court cases mean that developers must rely on the open market to amalgamate sites for redevelopment, an uncertain method having regard to the possibility for holdouts. While legislative change to assist site amalgamations would fetter owners' private property rights (Kirby J in *Griffiths* and Brennan 2008a) it would also achieve a greater community purpose. Comparing the current and historical position in the United States, where compulsory acquisitions for private-to-private transfers is permitted, allows analysis of the pros and cons of the system.

LESSONS TO BE LEARNT FROM THE UNITED STATES

Current and historical problems: urban renewal programs and condemnation blight

Before 2005, compulsory acquisition powers in the United States could only be used for a private-to-private transfer where the properties had fallen into disrepair to an extent that they became blighted. Concerns by government that blight was widespread prompted measures between the 1940's and 1960's to initiate the wholesale redevelopment of many of America's largest cities (Stelle Garnett 2003, Kanner 2008-2009 and Lehavi and Licht 2007). It was thought that the rapid decline of cities could be halted by a program of urban renewal geared at replacing 'blighted' properties with middle and upper income housing (Stelle Garnett 2003). In fact, the urban renewal programs were destined for failure from their commencement. American cities began to decline when suburban land was heavily subsidised after World War II, resulting in it often being cheaper to purchase than rent (Kanner 2008-2009). This caused a large-scale migration from cities into suburbs and associated scaling back of police and education services during the 1960's. Urban decline worsened after innumerable low cost inner city homes that were shabby, but perfectly habitable were demolished (Kanner 2008-2009). The urban renewal programs were a "resounding failure" (Lehavi and Licht 2007) because the political realities of the time and their flawed design resulted in large scale community destruction (Stelle Garnett 2003 and Kanner 2008-2009).

The urban renewal projects displaced hundreds of thousands of families and tens of thousands of businesses from run down, but close-knit, vibrant communities (Stelle Garnett 2003 and Lehavi and Licht 2007). They affected, for the most part, minorities and low-socio economic households, the projects being labelled "negro clearance" measures (Stelle Garnett 2003 and Werner 2001-2001). Planners "had a knack for picking low-income neighbo[u]rhoods where residents had deep attachments to friends, relatives, neighbo[u]rs, churches, schools, and local businesses" (Stelle

Garnett 2003). Insufficient relocation efforts made for those displaced residents further exacerbated the socio-economic problems they experienced because of the urban renewal projects (Stelle Garnett 2003 and Kanner 2008-2009).

In addition to the disastrous urban renewal programs, the United States is dogged by problems of ‘condemnation blight’, which occurs when a government intentionally adopts a course of action that devalues the land. By manipulating the market value of land before an acquisition occurs, governments minimise the compulsory acquisition compensation payable to owners, while still complying with the “just compensation” requirement in the Fifth Amendment of the United States Constitution (Bell and Parchomovsky 2006).

To devalue land the government may, for example, announce a proposed acquisition some time in advance. Once the announcement is made, property values decline because both public and private capital is removed from an affected area and the number of residential sales decreases (Bell and Parchomovsky 2006 and Lee 2006-2007 (but contrast Gergen 1993)). Provided sufficient time elapses between the announcement and the acquisitions, market values of the affected properties decline. However, this approach may go awry. The removal of too much public infrastructure, such as policing, from an area may render it “uninhabitable, and therefore ‘unrenewable’” (Stelle Garnett 2003) because of the extent of vacant buildings and skyrocketing crime rates (Kanner 2008-2009).

The failure of the urban renewal programs and problems of condemnation blight prompted United States legislators to implement measures limiting the injurious effects of compulsory acquisition on affected owners. The *Uniform Relocation Assistance and Real Properties Acquisition Act* 1971 (US) seeks to ensure that losses not otherwise adequately compensated by traditional compulsory acquisition legislation are reimbursed to displaced individuals. That Act requires:

- a) payment of replacement value compensation, rather than fair market value;
- b) payment of moving expenses, mortgage costs and re-establishment expenses (Stelle Garnett 2006-2007); and
- c) the provision of relocation advisory services to assist with identification of comparable replacement housing. If comparable replacement housing is not available, those agencies may take necessary or appropriate action to provide it (including payment of subsidies) (Stelle Garnett 2006-2007).

Since the urban renewal programs, compulsory acquisition laws in the United States have developed significantly, however, before 2005 blight was a necessary precursor to the valid exercise of compulsory acquisition powers in favour of private entities. The 2005 Supreme Court decision in *Kelo* extended compulsory acquisition powers for private-to-private transfers to non-blighted properties. It caused a public uproar (Lee 2006-2007) being described as “the most visible public backlash in recent years” (Brennan 2008), resulting in “near universal condemnation” and “political maelstrom” (Bell and Parchomovsky 2006). While *Griffiths* received some media and academic coverage (‘Land Appropriation in the NT’ 2008, Brennan 2009, Strelein 2008, Reale 2009 and Brennan 2008b), it was certainly not subject to the type of ‘backlash’ which occurred after *Kelo*. United States laws may inform the Australian debate on private-to-private transfers because of the common heritage of the legal systems, recognition of lands’ economic value, the balancing of private property rights (s51(xxxi) of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict and Fifth Amendment, Constitution of the United States of America) and the significant academic, media and political debate that has centred around the issues. The shortcomings of the system are identifiable, so by considering them, Australia may adopt a system that avoids, or at least minimises, the same shortcoming of the United States system.

***Kelo v City of New London* 545 U.S. 469 (2005)**

The *Kelo* decision recognised that a town’s economic development is a desirable public purpose, removing the limitation on private-to-private transfers to blighted properties. The case arose when the New London Development Corporation (“NLDC”), a government instrumentality, proposed to acquire 115 properties, including 15 allotments owned by Suzette Kelo and the other petitioners, none of which were blighted. The 90 acre project was earmarked for the Fort Trumbull waterfront, in New London, Connecticut, adjacent to the \$300 million research facility built by Pfizer Inc.

New London City was a “distressed municipality” in the 1990’s caused by the closure of the Naval Undersea Warfare Centre, which employed 1,500 residents in the Fort Trumbull area. The local population was significantly deteriorating over an extended timeframe and unemployment was twice the state’s average. The New London City Council sought to revive the city. NLDC’s redevelopment plan for the waterfront proposed a hotel and conference centre, marinas, a pedestrian ‘river walk’, apartments, a museum, commercial office space and a retail centre. The NLDC was negotiating a 99-year lease for certain parcels to Corcoran Jennison, a developer, at \$1 per year rent to carry out all development work. It was anticipated that the project would:

- a) create between 1700 and 3150 jobs;
- b) increase property tax revenues by between US\$680,544 and US\$1,249,843;
- c) encourage public access to the waterfront; and
- d) be the catalyst to rejuvenate the rest of the city (*Kelo* cited in Rutkow 2006).

Mrs Kelo, and the other petitioners, argued that private-to-private transfers were only permissible where the properties were blighted. The United States Supreme Court disagreed by a majority of five-to-four, holding that the indirect benefit to the community from the potentially increased property taxes was sufficient to satisfy the public use test, even though private entities would experience the greatest gain from the project. The majority’s decision relied on two previous cases, *Berman v Parker* 348 U.S. 26 (1954) (“*Berman*”) and *Hawaii Housing Authority v Midkiff* 457 U.S. 229 (1984) (“*Midkiff*”). These cases broadly interpreted the ‘public use’ requirement in the United States Constitution to include promoting the economic development of a city. The Court held that once the public purpose is established, the extent of acquisitions is irrelevant. That is, large scale acquisitions are acceptable, even where there is uncertainty on whether public benefits will accrue.

By way of contrast, the dissenting judges, O’Connor and Thomas J disagreed that the acquisitions were valid. O’Connor J specifically rejected Her Honour’s own earlier decision in *Midkiff* concluding that the broad language of the decision was “errant” (*Kelo* cited in Barros 2007). Her Honour upheld the limitation on compulsory acquisition powers for private-to-private transfers to circumstances where it is necessary to remove blight or to correct “widespread social injustice” (*Kelo* cited in Rutkow 2006).

O’Connor J’s explanation for arriving at a decision, which appeared to contradict Her Honour’s earlier position, has been criticised as unconvincing (Barros 2007). A more convincing argument may have been that, with the benefit of hindsight, the decisions in *Midkiff* and *Berman* wrongly interpreted the ‘public use’ requirement broadly, rather than the decision being ‘errant’ (Barros 2007).

Thomas J also delivered a dissenting opinion in *Kelo*. His Honour considered that the ‘public use’ requirement in the United States Constitution should be limited to “actual use by the public” (Rutkow 2006) and applied a social justice approach to the case, commenting that private-to-private transfers disproportionately affect “poor communities” (*Kelo* cited in Rutkow 2006).

While the 1940’s to 1960’s urban renewal projects in the United States were an abject failure, there is potential for modern urban renewal projects, such as the project proposed in *Kelo*, to contribute to local economies and increase the socio-economic base of the locality by stimulating jobs growth and providing community facilities. Despite this, there are significant drawbacks with the United States system as a whole. It would be wholly inappropriate to adopt a like system in Australia without weeding out the considerable attacks on private property rights inherent in the system. However, notwithstanding the undesirable features of the United States laws, these problems may be avoided in Australia even if compulsory acquisition legislation is extended to permit private-to-private transfers. That is, provided legislation contains limitations on its use and adequate protections and flexible compensatory measures for owners are implemented, Australia may benefit from facilitating site amalgamations whilst avoiding the undesirable elements of the United States system.

POTENTIAL OPTIONS FOR LEGISLATIVE REFORM IN AUSTRALIA

Considerations

In the United States, private-to-private transfers to facilitate redevelopment of infill areas are recognised as fulfilling a public purpose (*Kelo*). This recognition should be mirrored in Australian law to enable compulsory acquisition to facilitate site amalgamations. The failed urban renewal programs and problems of condemnation blight must not be forgotten, so while government intervention is warranted, the following considerations should be taken into account when developing those legislative reforms:

1. The payment of replacement value compensation, rather than fair market value and other expenses such as moving expenses, mortgage costs and re-establishment expenses (Stelle Garnett 2006-2007);
2. The use of relocation advisory services to re-house displaced persons, help overcome social problems arising from compulsory acquisitions and to recommend the grant of financial assistance (Law Reform Commission Report No. 14 1980);
3. The provision of non-repayable grants or loans, the latter being favoured by the Law Reform Commission, to owners whose property is compulsorily acquired (Law Reform Commission Report No. 14 1980);
4. Adopting land restitution principles (or the provision of alternative housing as opposed to re-housing assistance) into legislation, possibly including the physical relocation of a person's home to a new parcel of land, as many affected owners prefer resettlement over monetary compensation (Law Reform Commission Report No 14 1980, p. 99). An effective resettlement occurs where alternative land is "equal in quality, size and legal status" (Winnett 2010 and Nau 2009), owners' connections to the region are considered and they are involved in the relocation process (Winnett 2010);
5. how to overcome the difficulties of using compulsory acquisition powers for private-to-private transfers in the United States, including:
 - a) Responsibility remaining on a developer to amalgamate sites, rather than governments, the latter often being the practice in the United States (Werner 2000-2001 and Gray 2007);
 - b) Ensuring private sector resistance by developers as significant land owners, to government actions prompting the removal of capital or infrastructure that may, in turn, lower values and cause condemnation blight;
 - c) Compensation to affected landowners being funded by developers, rather than government (the latter occurring in the United States (*Kelo*)). Separating responsibility in this manner will reduce the ability to manipulate values in an area; and
 - d) Setting precise limits on compulsory acquisition powers to avoid the potential for abuse. This may extend to making a developer's application for use of compulsory acquisition powers conditional upon it demonstrating satisfaction of certain conditions. These conditions may include the developer owning a predetermined percentage of the site, with the remaining unsecured properties being instrumental to the proposed development. Unsuccessful negotiations with owners should also have included an offer of a minimum of fair market value, plus, perhaps, an additional allowance. The development itself may also be considered by the developer demonstrating that public benefits accrue from the development (such as, by increasing the housing stock in an area experiencing shortages, creating employment, adding public use space or reinvigorating an area within a community). To appease likely community concerns regarding the certainty of the development proceeding, perhaps the developer should also have taken steps towards implementing its proposals for the site (such as the drafting of preliminary applications and plans).

Community and industry consultation is necessary before an exhaustive list of conditions and considerations may be identified for inclusion into legislative reform proposals.

Proposals for the extension of compulsory acquisition powers

Based on the considerations outlined above, two preliminary proposals have been developed for discussion. These proposals may provide an appropriate mechanism for government intervention to facilitate site amalgamations for infill developments.

Proposal 1: A developer makes an application to the relevant State Minister for the one-off delegation of compulsory acquisition powers to the developer. This delegation would only extend to those lots and/or allotments nominated in the developer's application.

Proposal 2: Local governments are empowered to compulsorily acquire lots and/or allotments, for later transfer to a developer, exercisable only upon approval of a developer's application by a State Minister.

These proposals only serve to separate responsibilities between government and private entities to avoid the potential for abuse of compulsory acquisition powers. In addition, adequate protections for landowners should be built into legislation by adopting some or all of the considerations set out above.

CONCLUSION

It is in Australia's best interests to promote infill redevelopment. Site amalgamations are the key to enabling infill developments, but are affected by holdouts. The free market does not provide an efficient means of amalgamating sites and factors such as land scarcity, urban sprawl and population growth warrant government intervention to aid in site amalgamations to promote urban renewal.

Australia may take advantage of the lessons learned in the United States by tailoring any legislative response to Australian circumstances and having regard to the features, good or otherwise, of the United States system. Protection of landowner's rights is essential. These rights must, however, be balanced against the wider community need for renewal of urban environments so that housing for Australia's growing population may be provided. Legislation must give certainty to landowners and developers alike and compensation must be fair. Developers must be able to redevelop infill areas, but landowners must not be dispossessed and be unable to secure appropriate, safe and affordable alternative housing. After all, the big bad wolf might not have been as big and bad if he helped the three little pigs find new houses instead of gobbling them up!

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