AN EXAMINATION OF THE NEED FOR LEGISLATIVE REFORM ARISING FROM THE 'HOLDOUT' PHENOMENA IN THE REASSEMBLY AND TERMINATION OF COMMUNITY TITLES SCHEMES

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ABSTRACT

A significant number of Queenslanders reside in community titles schemes, and this figure is increasing annually as a result of population growth, changes in planning policies and economic opportunities. Many buildings constructed since the introduction of community titles legislation in the 1960s are now reaching or have exceeded their economic lifespan. Despite this, termination and redevelopment of schemes has received little attention until recently.

Section 78(1) of the *Body Corporate and Community Management Act 1997* (Qld) requires the passage of a resolution without dissent – unanimous approval by lot owners – to terminate a scheme, a necessary prerequisite to redevelopment of the scheme land. The requirement for unanimity prevents the termination of a scheme where a single dissenting owner exists. This inability to overcome what may be a single owner's dissent, when the vast majority of other owners support the termination, is problematic. This is particularly the case in circumstances where a dissenting owner is engaging in strategic holdout behaviour with a view to extracting the best financial and non-financial terms for a sale. Self-interested holdout behaviour, together with the economic and social impact discontinuation of a redevelopment proposal may have on the wider community, is a justification for reforming the termination provisions of the *Body Corporate and Community Management Act* to better balance the rights and interests of stakeholders.

Accordingly, this thesis identifies a sound theoretical basis upon which an assessment of reform of section 78 of the *Body Corporate and Community Management Act* may be based. The thesis then develops a well-balanced, clear and researched solution that seeks to balance the interests of all stakeholders in the termination and redevelopment process.

The research is important. Ageing buildings, increased densities being encouraged in planning scheme documents and government policies aimed at encouraging urban consolidation all rely on the availability of inner urban redevelopment land. However, much of this land is already locked up in community titles scheme developments. While redevelopment of many of those schemes will be necessary, there is currently no means of making scheme land available, other than through unanimous approval of the termination by scheme lot owners.

The thesis identifies that a fundamental difficulty exists with liberalism's application to Queensland community titles schemes. Concepts of individuality and autonomy contradict some of the

foundational principles in the *Body Corporate and Community Management Act.* By undertaking a resolution-based dialectic analysis, Balanced Termination Analysis Theory (BalTAT) was developed to address such contradictions. The theory focuses on the key truths of Radin's Personhood Theory and Heller's Anticommons Theory. The 'essential good' from both theories was combined to form a harmonised synthesis. BalTAT is used as the theoretical foundation for analysis of the law reform proposals in the thesis.

Elements of expropriations systems are analysed using BalTAT to determine desirable features and necessary safeguards for stakeholders in the development of a law reform system for section 78 of the *Body Corporate and Community Management Act*. Queensland and New South Wales compulsory acquisition laws, British compulsory purchase laws and US eminent domain laws are investigated, together with the change of corporate control provisions contained in Part 5.1 and Chapters 6 and 6A of the *Corporations Act 2001* (Cth). Consideration of these parallel areas of law highlights the strengths and weaknesses of each in order to develop a comprehensive system of law reform that appropriately balances the needs of individual stakeholders.

The theoretical analysis facilitated by BalTAT will have a wider application than the amendment of the *Body Corporate and Community Management Act.* The examination undertaken by this thesis demonstrates that BalTAT is an analytical tool enabling an assessment of reform proposals for strata termination laws. It may be applied to assess termination provisions and proposals contained in strata and community titles laws throughout Australia, and potentially other common law, western liberal legal systems that place a similar emphasis on property rights as Queensland.

The assessment of the strengths and weaknesses of parallel expropriation laws based on the theoretical foundation provided by BalTAT enables the development of a comprehensive law reform proposal for section 78 of the *Body Corporate and Community Management Act.* That proposal balances the need to increase efficiency in the assembly process by reducing strategic behaviour by sellers while safeguarding against too great a compromise in fairness and property rights. The results of this thesis will be presented to the Queensland Government with a view to recommending that section 78 of the *Body Corporate and Community Management Act* be amended.

STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Melissa Ann Pocock

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DIAGRAMS

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PUBLICATIONS

1. Pocock, Melissa, 'Holdouts, Site Amalgamations and Renewal of Urban areas: A Call for Legislative Reform', paper presented at the 18th Annual Pacific-Rim Real Estate Society Conference, Adelaide, Australia 16 January 2012, <http://www.prres.net/index.htm?http://www.prres.net/Conference/2012Conference.htm>.

2. Pocock, Melissa, 'Compulsory Acquisition, Public Benefits and Large-Scale Private Sector Redevelopments: Can Australia Learn from the United Kingdom?' (2014) 19 *Local Government Law Journal* 129.

3. Pocock, Melissa, 'Orgies of Seizure and Violence: Compulsory Acquisition and Private Sector Development – Lessons for Australia' (2015) 20(1) *Local Government Law Journal* 27.

CHAPTER 1

INTRODUCTION

PART 1 – SETTING THE SCENE

'Unless someone like you cares a whole awful lot,

Nothing is going to get better. It's not.'

— Dr Seuss, *The Lorax*.[1]

Surely, we can do better.

This thesis examines the need for law reform arising from the 'holdout' phenomenon in the reassembly and termination of Queensland community titles schemes. A problem exists with the termination provisions of the *Body Corporate and Community Management Act 1997* (Qld) ('*BCCM Act*'), which will only be rectified if someone is passionate enough about resolving the problem to pursue change. A well-balanced, clear and researched case for law reform must be developed, with a view to proposing workable solutions that protect the interests of all stakeholders. The aim of this thesis is to achieve just that: to do better.

As a property development lawyer, I assisted many of my clients in their attempts to acquire parcels of land in urban and fringe areas to reconfigure them into a development parcel upon which to construct a project. For those who chose undeveloped land, and were unable to acquire certain parcels, generally the approach was to redesign the development to exclude the parcels that could not be acquired. Pockets of older developed land were left interspersed among newer estates. In urban areas, though, developing around parcels that a developer was unable to secure was not always possible. In those areas, the land was often developed at higher densities, taking advantage of titling laws allowing both vertical and horizontal subdivisions.[2] Where an existing property was

[1] Dr Seuss, *The Lorax* (revised edition 2009), 58.

[2] Part 3, Division 2A *Land Title Act 1994* (Qld).

part of a community titles scheme regulated by the *BCCM Act,*[3] a developer faced difficulties in progressing the redevelopment when even a single owner did not support the proposal. The *BCCM Act* provides that a resolution without dissent is required to terminate a scheme; this is a preliminary step to a scheme's demolition and redevelopment.[4] If a single owner votes against a termination, the resolution will fail and the scheme will remain in existence until unanimous consent to its termination can be obtained, or a court orders its termination.[5] The cumulative wishes of every other owner of the building would not overrule the dissenting vote.

Resolutions without dissent are notoriously difficult to achieve when differing ownership of lots exists.[6] Currently, a developer will seek to acquire all lots in the scheme to enable passage of the resolution. Strategic, or 'holdout,' behaviour by one or more owners will prevent the reassembly of titles in the scheme. Those owners who are engaging in holdout behaviour generally seek to extract the most favourable financial and non-financial contract terms before agreeing to a sale. For example, the holdout may occur simply to prompt the offer of a higher price from the developer – that is, to achieve greater economic rent – or to otherwise add or remove conditions to the contract. Owners may also refuse to sell altogether. A myriad of reasons may prompt a refusal to sell, including an owner's emotional connection to the property. It is unlikely that any owner who refuses to sell to a developer will agree to vote in favour of a motion to terminate a scheme[7] because doing so, enables the dissolution of all titles within the scheme. Accordingly, where holdouts exist, redevelopment is unlikely to occur.

Until unanimous consent to terminate a community titles scheme is obtained, any structures constructed on the scheme land must be maintained.[8] Maintenance of body corporate assets must

[3] A number of other Acts regulate strata titling in Queensland. The *Building Units and Group Titles Act 1980* (Qld) and the *Integrated Resort Development Act 1987* (Qld) were both superseded by the *BCCM Act*; however, they remain in effect to regulate a limited number of developments that did not transition to the *BCCM Act* provisions. Other development-specific legislation also exists in respect of a number of individual resorts such as Sanctuary Cove and Southbank.

[4] Section 78(1) *BCCM Act*.

[5] Section 78(2) *BCCM Act*.

[6] Cathy Sherry, 'Termination of Strata Schemes in New South Wales – Proposals for Reform (2006) 13 *Australian Property Law Journal* 227, 230 and Property Council of Australia, *Renewing our strata titled city: a discussion paper on reforming strata title law* (July 2003), 9–10, <http://www.propertyoz.com.au/library/SUB%2003%20NSW%20Renewing%20Our%20Strata%20Titles%20City.pdf>.

[7] See, for example, *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003), discussed in more depth in Chapter 3: Compulsory Acquisition.

[8] Bodies corporate must establish and keep a sinking fund into which contributions for 'spending of a capital or non-recurrent nature (including the period renewal or replacement of major items of a capital nature' must be

preserve common property in 'good condition … in a structurally sound condition'.[9] Owners are bound to pay maintenance costs for the assets.[10] In circumstances where the improvements have exceeded their limited economic lifespan, those maintenance costs may increase significantly.[11] Many schemes constructed in the 1960s and 1970s under company title arrangements – the predecessor to strata and community titling – may already have reached the end of their economic lifespan.[12] As maintenance costs increase, the owners may receive more economic benefits from a termination of the scheme in order to make the land available for redevelopment than from paying for ongoing maintenance costs. As a result, lowering the threshold required to terminate a scheme under section 78 of the *BCCM Act* will benefit owners, particularly where maintenance costs are increasing because a building has exceeded its economic lifespan, because of age or a poor maintenance history.[13]

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paid: s 146 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), s 144 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld), s 105 *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) and s 80 *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld).

[9] Section 159 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), s 157 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld), s 115 *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld), s 93 *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) and s 31 *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2008* (Qld).

[10] Sinking fund provisions were incorporated into the *Building Units and Group Titles Act*, the predecessor to the *BCCM Act*, on 11 April 1988: ss 25 and 26 *Building Units and Group Titles Amendment Act 1988* (Qld) amending and inserting ss 38 and 38A *Building Units and Group Titles Act.* Owners of lots in schemes that were subject to the provisions of the *Building Units Titles Act 1965* (Qld) and the *Group Titles Act 1973* (Qld) were not required to contribute towards items of a capital or non-recurrent nature at all until the amendments to the *Building Units and Group Titles Act* came into force. Older buildings that are nearing or have exceeded their estimated economic life potentially have insufficient funds available to carry out major maintenance and repair work. See, for example, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301.

Where insufficient funds exist to carry out maintenance works, a special contribution is levied on current owners to contribute to the required maintenance works: s 141(2) *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), s 139(2) *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld), s 100(2) *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) and s 75(2) *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld).

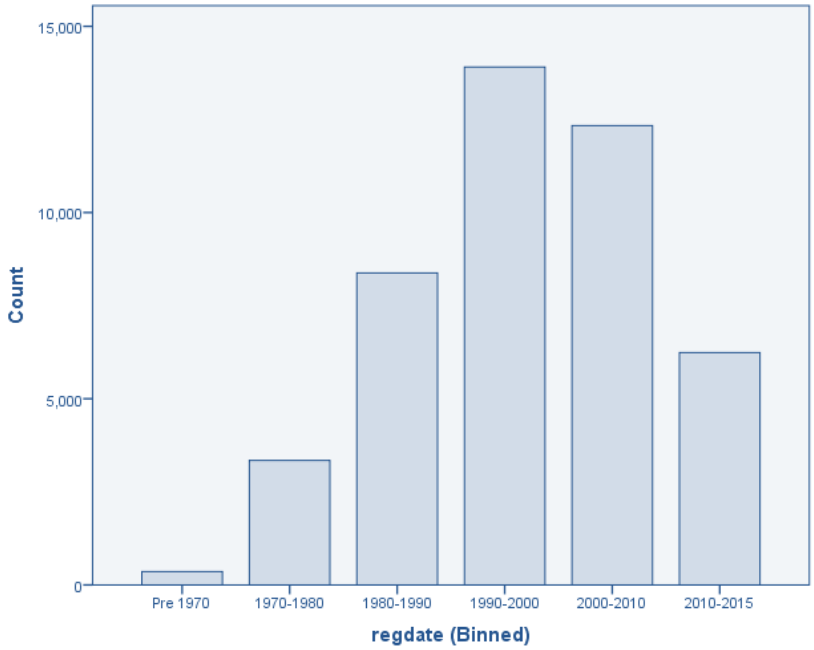
[11] Bruce Bentley, 'Termination Developing a Framework' (paper presented at the Australian College of Community Association Lawyers 4th Annual Conference, Surfers Paradise Australia, 1 September 2009), 6.

[12] See, for example, Nobbys Outlook CTS 14822 in *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301.

[13] Bentley, above n 11, 6.

Since the introduction of strata legislation in the 1960s, there has been marked growth in the construction of apartment-style buildings.[14] Figure 1.1 illustrates that the development of community titles schemes in Queensland increased significantly from the 1980s, in line with the property development boom of that time. Fewer schemes were built in the decade from 2000 to 2010, probably as a result of the impact of the Global Financial Crisis, which began in July 2007.[15] Registrations for the half-decade between 2010 and 2015 are on track to match the first decade of the century, and further growth is expected.[16]

FIGURE 1.1: NUMBER AND DECADE OF REGISTRATION OF QUEENSLAND COMMUNITY TITLES SCHEMES[17]



Australia is one of the most highly urbanised countries in the world, with 89 per cent of its population residing in urban areas.[18] By 2012, approximately one in eight Australians was living in a

[14] Hazel Easthope, Jan Warnken, Cathy Sherry, Eddo Coiacetto, Dianne Dredge, Chris Guilding, Nicole Johnston, Dawne Lamminmaki and Sacha Reid, 'How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-title Developments' (2014) 32(3) *Urban Policy and Research* 289, 292.

[15] Justine Davies, 'Global Financial Crisis – What Caused It and How the World Responded' (23 March 2014), <www.canstar.com.au/home-loans/global-financial-crisis>.

[16] Easthope et al., above n 14, 292.

[17] Sacha Reid and Melissa Pocock, 'Strata Title Scheme Termination' for the Property Council of Australia (Project Reference Number: 03/07/2560 RAD#47207, 2015), 7.

[18] Department of Economic and Social Affairs, *World Urbanization Prospects 2014 Revision* (2014), 25 <http://esa.un.org/unpd/wup/highlights/wup2014-highlights.pdf> at 10 February 2016.

strata and community titled development, and this number is growing.[19] Among other factors contributing to this growth is the adoption of urban consolidation policies by Australia's five largest cities – Sydney, Melbourne, Perth, Brisbane and Adelaide – to alleviate urban sprawl as a result of changing population demographics.[20] In terms of Queensland community titles schemes,[21] 50 per cent are located within Brisbane and the Gold Coast City Council regions, Queensland's most densely populated areas.[22]

A proportion of the 41,335 community titles schemes registered in Queensland as at 30 September 2012[23] are potentially nearing the end of their economic lifespans. As time progresses, this figure will increase.

The diverse ownership of lots within a community titles scheme increases the difficulties associated with termination of a scheme. Private sector developers may only assemble a site by negotiating the purchase of each adjoining property from the relevant owners. Uncertainty about whether a successful completion of the reassembly is possible and, if it is, the timeframe within which it may occur, increases the project's risk profile.[24] The risk of an unsuccessful reassembly increases if there is dissent among owners. Where one or more owners do not agree to sell their lot to the developer, the reassembly is delayed or may be prevented altogether. A developer's risk may increase further if the only alternative to the use of market forces to re-aggregate titles is the lodgement of a petition to the District Court for an order terminating the scheme under section 78(2) of the *BCCM Act*. In those circumstances, the project is likely to be discontinued.

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[19] Easthope et al., above n 14, 292.

[20] Ibid., 293; Hazel Easthope, Sarah Hudson and Bill Randolph, 'Urban Renewal and Strata Scheme Termination: Balancing Communal Management and Individual Property Rights' (2013) 45(6) *Environment and Planning A* 1421; Hazel Easthope and Bill Randolph, *Governing the Compact City: The Challenges of Apartment Living in Sydney* (2008) University of New South Wales, <http://www.be.unsw.edu.au/sites/default/files/upload/pdf/cf/research/cityfuturesprojects/higherdensity/DP0773388WorkingPaper2(Governance).pdf> and Strata Community Australia Ltd ACN 151 156 357, *Community Renewal* (2012) Strata Community Australia Ltd, <http://www.stratacommunity.org.au/sites/default/files/community_renewal_2012.pdf>.

[21] Of the 41,335 schemes registered in Queensland, 53.95 per cent were located within Brisbane (10,591 schemes) and Gold Coast City Council (11,710 schemes): Email from Michelle Virtue, Office of the Commissioner for Body Corporate and Community Management to Melissa Pocock, 2 November 2012.

[22] The Gold Coast is Australia's sixth largest city: Australian Bureau of Statistics, ABS Regional Population Growth, Australia, 2012, cat. no. 3218.0.

[23] Virtue, above n 21.

[24] Sara Wilkinson and Richard Reed, *Property Development* (5th ed, 2009), 93 and David Isaac, John O'Leary and Mark Daley, *Property Development Appraisal and Finance* (2nd ed, 2010) 55, 60, 78 and 104.

Access to developable land in inner urban areas is limited. However, ageing community titles schemes have the potential to remain indefinitely on a site because of the requirement for unanimous consent to terminate a scheme. The current practice of placing reliance on market forces in a developer's pursuit to secure titles to all scheme lots is insufficient, particularly when governments are actively pursuing urban consolidation policies. Those policies are being adopted because renewal of inner urban areas may help to ease scarcity concerns, slow down urban sprawl and meet housing needs for growing inner urban populations.[25] Yet the very sites upon which these policies rely are subject to veto by a single self-interested owner.

Discontinuation of a project – particularly one that may generate 'social and economic infrastructure'[26] – will result in significant negative public and private sector impacts that are wider than a mere loss of private sector profits.[27] The loss of community benefits from the inability to reassemble a site and carry out a redevelopment project may be significant. Failing to replace possibly 'decaying' or 'dysfunctional'[28] buildings may negatively impact the surrounding region, particularly where tourism is a large contributor to its economy.[29] Renewal encourages the supply of privately constructed public infrastructure through the imposition of development approval conditions. Where the infrastructure is to be developed in partnership between the public and private sectors,[30] discontinuation of a large-scale redevelopment project may, in turn, affect the delivery of that infrastructure.[31] Finally, economic opportunities[32] may be lost, impacting the

[25] Queensland Department of Infrastructure and Planning, Findings from the Gold Coast City Broadhectare Study, 6th ed, 2008, 6; Stateline NSW, *Sydney Housing 'Unaffordable'* (2010) Australian Broadcasting Commission, <http://www.abc.net.au>; Property Council of Australia, *The Urban Renewal Lifeline,* Property Council of Australia, <http://www.propertyoz.com.au>; City Futures Research Centre, Faculty of the Built Environment, University of New South Wales, *Metropolitan Strategy Review: Sydney Towards 2036: A Submission to the Metropolitan Strategy Review,* University of New South Wales, <http://www.fbe.unsw.edu.au> and Australian Bureau of Statistics, *Austats* (2011) Australian Government, <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>.

[26] Infrastructure Australia, Public Private Partnerships National Public Private Partnership Policy and Guidelines, <http://www.infrastructureaustralia.gov.au/public_private> and ER Yescombe, *Public–Private Partnerships: Principles of Policy and Finance* (2007), 17–18 and 20–4. These issues are discussed in more depth in Melissa Pocock, 'Compulsory Acquisition, Public Benefits and Large-scale Private Sector Redevelopments: Can Australia Learn from the United Kingdom?' (2014) 19 *Local Government Law Journal* 129, 129.

[27] Pocock, above n 26, 131–2.

[28] Property Council of Australia, above n 25, ii.

[29] For example, the Gold Coast: Jan Warnken, Roslyn Russell and Bill Faulkner, 'Condominium Developments in Maturing Destinations: Potentials and Problems of Long-term Sustainability' (2003) 24 *Tourism Management* 155, 155 and 160 and Property Council of Australia, above n 25.

[30] Yescombe, above n 26, 17–18 and 20–4.

[31] Ibid.

potential to create future employment for the property industry, Australia's second largest employment sector.[33] While protection of owners' and occupiers' rights is important, in certain limited circumstances wider community benefits should justify the redefinition or reallocation of an individual's property rights to facilitate renewal efforts.[34]

A new approach is needed. Things can get better; we can do better. The challenge is to strike an appropriate balance between protecting property rights while facilitating an optimal level of land assembly to occur. This thesis seeks to achieve this balance in the law-reform model recommended for section 78 of the *BCCM Act*.

The issues faced in Queensland are not unique. Globally, 54 per cent of the world's population lives in urban areas, a figure expected to grow to two-thirds of the global population by 2050.[35] New Zealand,[36] Singapore,[37] the United Kingdom[38] and numerous states within the United States[39] all have less than unanimous levels of consent required to terminate the ownership structures of strata and community titled developments. In Australia, thresholds traditionally have required unanimous agreement; however, changes are now being implemented. Part 2 of this chapter audits the Australian strata and community titles termination laws to facilitate a comparative analysis of the relevant laws and identify potential factors that may guide the development of the law-reform model proposed in this thesis.

Part 3 contains an overview of how the thesis approaches the research question on a chapter-by-chapter basis. The thesis has elected not to analyse strata title laws internationally with a view to recommending the adoption of similar processes; rather, it has briefly considered strata legislation from Australian states and territories, and placed a greater degree of focus on investigating analogous areas of law that deal with overcoming strategic and holdout behaviour, including the

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[32] Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1997–98) 111 *Harvard Law Review* 621, 639.

[33] AEC Group Pty Ltd, Report 17907, *Economic Significance of the Property Industry to the Australian Economy* (October 2015) <www.propertycouncil.com.au/downloads/propsignificance/Aus_Full.pdf>.

[34] Joseph Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations' (2006) 30 *Harvard Environmental Law Review* 309 and Heller, above n 32, 639.

[35] Department of Economic and Social Affairs, above n 18, 1.

[36] *Unit Title Act 1972* (NZ).

[37] *Land Titles (Strata) (Amendment) Act 1999* (Singapore).

[38] *Commonhold and Leasehold Reform Act 2002* (UK).

[39] Reid and Pocock, above n 17, 12.

United Kingdom's compulsory purchase laws and US eminent domain laws (as compulsory acquisition in those countries is known). In doing so, insight is gained into the scope of expropriation powers, and limitations imposed on those powers to protect minority owners. Governments and corporations have overcome issues of minority holdouts through the implementation of expropriation powers. Those powers are limited in order to control their use and to protect owners. As the ultimate goal of this thesis is to propose a legislative framework to amend section 78 of the *BCCM Act,* and overcome the holdout problem while ensuring owners are protected from abuse, the use of comparable areas of law to inform debate is appropriate.

The conclusions and recommendations chapter summarises the key elements of the proposals for a legislative framework to reform the termination of community titles schemes provisions in the *BCCM Act* based on the recommendations made throughout this thesis.

PART 2 – TERMINATION OF SCHEMES

It has been recognised by a number of state and territory governments that the requirement for unanimous consent to terminate a scheme is problematic.[40] Recent amendments have been passed to both the New South Wales and Northern Territory legislation, and the Western Australian government is currently drafting amendments to the *Strata Titles Act 1985* (WA) after the conclusion of its community consultation.[41] As a result of this recognition, and the drafting of legislation by each jurisdiction specific to the circumstances of that state or territory, there is a lack of uniformity in the termination regimes throughout Australia. This part of the chapter audits the current legislation in each Australian state and territory, and details the reforms to the termination provisions conducted in recent years. The similarities and differences between jurisdictions are highlighted. The audit demonstrates that the need to reform the *BCCM Act* termination provisions and other strata and community titles scheme legislation is an issue across multiple jurisdictions in Australia. It is critical

[40] See, for example, Department of Attorney-General and Justice, Northern Territory Government, *Cancellation of Units Plans and Schemes Under the* Unit Titles Act *and the* Unit Titles Schemes Act *Discussion Paper* (2012) 4–5; New South Wales Fair Trading, State of New South Wales, *Making NSW No. 1 Again: Shaping Future Communities Strata & Community Title Law Reform Discussion Paper* (2012) 24; Department of Justice and Attorney-General, Queensland Government, *Queensland Government Property Law Review Options Paper Body Corporate Governance Issues: By-laws, Debt Recovery and Scheme Termination* (2014) 53; and Landgate, Western Australian Government, *Strata Titles Act Reform Consultation Paper* (2014) 3.

[41] Landgate, *Strata Reform* (2016) Government of Western Australia, <http://www0.landgate.wa.gov.au/titles-and-surveys/strata-reform> accessed 2 February 2016.

to implement reforms effectively, or the potential exists to create long-term negative impacts on urban infill redevelopment, planning and housing affordability.[42]

QUEENSLAND

As noted above, section 78 of the *BCCM Act* prescribes two methods by which a community titles scheme may be terminated. First, the members of the scheme may, by a unanimous vote, resolve to terminate the scheme.[43] It is extremely difficult to achieve a resolution without dissent when ownership of lots is fragmented among numerous owners.[44] In order to secure unanimous consent, a developer will typically seek to acquire all lots in a scheme before presenting a motion for its termination to the body corporate.

In addition to the need for no dissents to be cast against the termination motion, all owners and their tenants must, to the extent necessary to manage the termination process, also enter into a 'termination issues' agreement.[45] The provisions of those agreements may extend to detailing how the sale of body corporate assets will be managed and the proceeds distributed; how body corporate assets will be held and maintained in the lead-up to their sale or distribution among owners; and the payment of outstanding liabilities of the body corporate.[46] The requirement for both the passage of the resolution without dissent and the entry into the termination issues agreement increases the difficulty of terminating a scheme by agreement of the owners.

The alternative means by which a scheme may be dissolved is by an order of the District Court, issued when the Court is satisfied that it is 'just and equitable' to terminate the scheme.[47] In making its determination, the Court will have regard to the views of owners, tenants, the local government and, if the land is in a priority development area, the Minister for Economic Development, Queensland.[48]

[42] Landgate, above n 40, 94.

[43] Section 78(1)(a) *BCCM Act*.

[44] Sherry, above n 6, 230.

[45] Section 78(1)(b) *BCCM Act*.

[46] Schedule 6 *BCCM Act*.

[47] Section 78(2) *BCCM Act*.

[48] Section 78(6) *BCCM Act*. The Minister for Economic Development, Queensland is authorised pursuant to Part 2, Chapter 3 *Economic Development Act 2012* (Qld) to declare priority development areas within the state.

The only case to come before the District Court since the introduction of the *BCCM Act* in 1997 has been *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301. In that case, the body corporate assets were in need of significant repairs, anticipated to cost approximately $3.8 million, or $100,000 per lot.[49] The body corporate received an offer from a developer to acquire the scheme land, provided all owners agreed to sell to the developer and a motion for termination of the scheme was passed by the body corporate. A general meeting of the members was called, and all owners except Mr Lawes voted in favour of the motion. Given the requirement for a resolution without dissent to terminate the scheme, the motion failed. The body corporate subsequently sought an order for termination of the scheme from the District Court under section 78(2) of the *BCCM Act*, and Mr Lawes objected to the application.[50]

The decision in *Body Corporate for Nobbys Outlook v Lawes*[51] did not relate to the termination of the scheme. Rather, it was to determine how costs, relating to the trial heard by the Court some months earlier, were to be awarded.[52] At the conclusion of the initial hearing, Kingham DJC was not satisfied Her Honour could make a declaration that it would be just and equitable to terminate the scheme. Her Honour was concerned that the owners did not understand the implications of terminating the scheme if a developer did not purchase the land.[53] Consequently, Kingham DJC ordered that the dispute be mediated to allow agreement to be reached on conditions regarded as problematic in the consent orders sought by the body corporate. Those consent orders related to the management of the termination process.[54]

The Court is empowered under section 78(3) of the *BCCM Act* to 'make an order, to the extent necessary for the effective termination of the scheme, about termination issues', including the management and sale of body corporate assets and the appointment of an administrator to implement those orders.[55] This thesis submits that the Court's referral of the matter back to mediation rather than making a determination on the issues was disappointing; it demonstrated a reluctance on the part of the Court to utilise the provisions for the benefit of the majority of owners.

[49] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301, [1].

[50] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301, [7–8].

[51] *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301.

[52] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301, [9].

[53] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301, [8].

[54] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301, [8].

[55] Section 78(5) *BCCM Act*.

The termination provisions of the *BCCM Act* were the subject of a legislative review in 2014.[56] The Options Paper issued by the then Attorney-General of Queensland, the Honourable Jarrod Bleijie MP, sought submissions on reforming the *BCCM Act* termination provisions in December 2014.[57] Submissions for the review of the scheme termination provisions closed on 30 January 2015,[58] the day before the 2015 Queensland state election was held, which resulted in a change of government for the state.[59] The broader review remains ongoing; however, no indication from the Attorney-General's office has been provided in respect of whether amendment of the termination provisions remains a priority. This thesis argues that it should be prioritised: amendment of section 78 of the *BCCM Act* is necessary.

NEW SOUTH WALES

The *Strata Schemes Development Act 2015* (NSW) was enacted on 29 October 2015, and creates a regime for both the termination and renewal of strata schemes. The Act allows for a collective sale of scheme land, or the creation of and carrying out of renewal plans.

TERMINATION

An owner, mortgagee, covenant holder, or the 'owners (sic) corporation'[60] may apply to the Court for an order terminating the scheme.[61] The application must have been signed by:

(a) all owners of lots in the scheme

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[56] Attorney-General and Minister for Justice The Honourable Jarrod Bleijie, *Review Modernises Queensland Property Law* (15 August 2013), The Queensland Cabinet and Ministerial Directory, <http://statements.qld.gov.au/Statement/2013/8/15/review-modernises-queensland-property-law>, accessed 3 February 2016.

[57] Department of Justice and Attorney-General, Queensland Government, above n 40.

[58] Ibid., 6.

[59] Electoral Commission Queensland, *2015 State General Election – Election Summary* (2015), <https://results.ecq.qld.gov.au/elections/state/State2015/results/summary.html#9>, accessed 3 February 2016.

[60] The 'owners (sic) corporation' is established upon registration of the strata plan for the strata scheme: s 8 *Strata Schemes Management Act 2015* (NSW). It is equivalent to a body corporate in the *BCCM Act* (Schedule 6 *BCCM Act*).

[61] Section 135(1) *Strata Schemes Development Act.* Upon an application being made, the Registrar-General may terminate the scheme; however, there is no obligation to do so: s 143(1)(b) *Strata Schemes Development Act*. Specific provisions also exist in respect of leasehold strata schemes. These provisions have not been detailed, given that the *Body Corporate and Community Management Act* does not apply to leasehold property.

(b) all registered lessees

(c) all registered mortgagees, chargees and covenant chargees where security is registered over the fee simple or leasehold interest in a lot or the common property, and

(d) the planning authority (if any) for the reconfiguration of the land.[62]

This requirement is even more comprehensive than the requirement in section 78 of the *BCCM Act* for the unanimous approval of the termination. It is anticipated that it will be difficult to satisfy the requirements of this section in practice.

STRATA RENEWAL PLANS

The *Strata Schemes Development Act* also provides for the implementation of renewal plans enabling either a collective sale of the scheme or its redevelopment. Any person may present a proposal for the drafting of a renewal plan to the owners (sic) corporation.[63] Within 30 days of its receipt, the strata committee must decide whether the renewal proposal warrants further consideration.[64] If further investigations into the proposal are justified, the committee must, within a further 30 days, convene a general meeting of the owners (sic) corporation.[65]

At the general meeting, the owners may determine that the proposal is worthy of further consideration. Upon that decision being made, a strata renewal committee is established to prepare the strata renewal plan.[66] Once that plan is complete, a further general meeting must be held to vote on the distribution of the plans to owners for wider consideration.[67]

Owners have a minimum of 60 days and a maximum of 90 days to sign and return the support notice.[68] That notice must also contain the mortgagees' or covenant chargees' consents.[69] Despite acceptance of

[62] Sections 142(3) and (4) *Strata Schemes Development Act*.

[63] Section 156(1) *Strata Schemes Development Act*.

[64] Section 157 *Strata Schemes Development Act*.

[65] Section 158 *Strata Schemes Development Act*.

[66] Section 160 *Strata Schemes Development Act*. The strata renewal plan must contain minimum information for owners' consideration as set out in s 170 *Strata Schemes Development Act*, together with a requirement that the consideration received for the sale or redevelopment of the lot is at least equal to the value of the lot determined under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

[67] Section 172(5) *Strata Schemes Development Act*. The *Strata Schemes Development Act* also contains authority for the owners to vote to amend the strata renewal plan or return it to the committee for amendment: s 172(3) *Strata Schemes Development Act*.

[68] Sections 174(1) and 177(1)(b) *Strata Schemes Development Act*.

[69] Section 174(1)(b) *Strata Schemes Development Act*.

the plan having been communicated by an owner, that owner may withdraw their support for the strata renewal plan.[70] Withdrawal of consent may occur at any time before the owners (sic) corporation secretary notifies the owners that 75 per cent of all lots in the scheme (excluding utility lots) support the plan.[71] At the expiry of the 90-day maximum period for owners to return the support notice, if the required level of support is not obtained, then the renewal plan will lapse.[72]

An additional general meeting of the owners (sic) corporation must then be held to determine whether to apply to the Court for an order giving effect to the renewal plan.[73] An objection to the strata renewal plan may be lodged by:

(a) dissenting owners
(b) mortgagees or covenant chargees of dissenting owners
(c) if the plan involves a collective sale, the proposed buyer under the strata renewal plan
(d) if the plan involves a redevelopment, the local government, and
(e) any other person directed by the Court.[74]

The Court may either order that the parties participate in mediation or conciliation to resolve the matter,[75] or approve the plan.[76] To approve the plan, Their Honours must be satisfied that the plan was prepared in good faith; the owners corporation demonstrates compliance with the procedures in the *Strata Schemes Development Act*; and consideration payable to dissenting owners is at least equal to the value of the lot determined under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).[77]

[70] Sections 175(1) and (2) *Strata Schemes Development Act*.

[71] Section 154 *Strata Schemes Development Act*. Upon the required level of support being obtained, the Registrar-General must note the existence of the renewal plan on the title to the common property: s 176(3) *Strata Schemes Development Act*.

[72] Section 177(1)(b) *Strata Schemes Development Act*.

[73] Section 178(1) *Strata Schemes Development Act*.

[74] Section 180 *Strata Schemes Development Act*.

[75] Section 181(2) *Strata Schemes Development Act*.

[76] Section 182(1) *Strata Schemes Development Act*.

[77] If a redevelopment is proposed, the consideration payable to a dissenting owner must be no less than they would have received had the owner supported the renewal plan: s 182(1) *Strata Schemes Development Act*.

If the Court approves a collective sale, each owner must sell their lot in accordance with the strata renewal plan and order approving it.[78] Alternatively, if a redevelopment was proposed, each dissenting owner must transfer their lot in accordance with the strata renewal plan and order approving it.[79]

Given the recent introduction of the legislation, no schemes have been terminated under the *Strata Schemes Development Act*. Despite this, comments may be made on the processes established in the legislation. First, there are numerous mandatory general meetings of the owners (sic) corporation, together with an initial review by the committee, the strata renewal committee and Court approval required before a proposal may be executed. The procedures allow intervention by a diverse range of stakeholders, giving a voice to those people who are not entitled to attend general meetings. The provisions allow for extensive stakeholder involvement and numerous opportunities for those stakeholders to object to and seek discontinuation of a renewal plan. While appropriate stakeholder consultation is desirable, this thesis submits that the provisions appear to set the level of consultation at a point where the termination could be the subject of such extensive delays and objections by vocal minorities that majority owners may withdraw their support for proposals.

Second, the *Strata Schemes Development Act* encourages involvement in, and ownership of, urban renewal projects by the scheme owners. The renewal project, and steps to be undertaken to achieve that project, are entirely up to owners to determine and draft into the strata renewal plan. This may prove problematic for a number of reasons. Redevelopment costs are borne by owners. Funding documents are likely to extend liability for repayment of financed amounts to all owners. Issues completely unrelated to the redevelopment may prompt a default by a party. Further, development risk is imposed on all owners participating in the renewal proposal. Disagreements among owners and unforeseen circumstances, such as a devaluation of redevelopment assets because of a downturn in market conditions or an unexpected increase in project costs, may expose owners to significant financial risk, without those owners necessarily having understood the risk profile of the project when entering into development contracts. As was evident from *Body Corporate for Nobbys Outlook v Lawes,*[80] the party drafting the plan may not foreshadow every foreseeable issue.[81] Mandating the independent review of the renewal plan may provide an additional level of protection for owners. However, imposing a requirement for an independent review will not entirely remove the redevelopment risk. This thesis questions whether it is desirable to implement a

[78] Section 184(2) *Strata Schemes Development Act*.

[79] Section 185(2) *Strata Schemes Development Act*.

[80] *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301.

[81] Kingham DCJ, *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301 [22–23].

statutory system with such a level of inherent financial risk to participants, particularly where there is no requirement on the owners (sic) corporation to seek professional advice on the project from appropriately qualified and experienced consultants, such as quantity surveyors, project managers and engineers.

NORTHERN TERRITORY

Prior to the *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) and *Termination of Units Plans and Unit Title Schemes Regulations* (NT) taking effect, the only means by which a units plan or scheme in the Northern Territory could be terminated was by application to the Supreme Court.[82] In November 2012, the Northern Territory Government issued a discussion paper that proposed amendments to the units plan and schemes termination provisions to facilitate their redevelopment.[83] The limited community consultation and feedback received on the discussion paper resulted in the September 2013 report,[84] upon which the *Termination of Units Plans and Unit Titles Schemes Act* and *Termination of Units Plans and Unit Title Schemes Regulations* were based. In the Northern Territory, the method of termination and criteria to be satisfied depends on size and age of schemes.

Newer schemes

For developments that are either less than 15 years old, or contain fewer than 10 units, termination must occur by unanimous resolution of all owners,[85] or by order of the Northern Territory Civil and Administrative Tribunal.[86] This requirement for unanimity is largely consistent with section 78 of the *BCCM Act*.

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[82] Section 95 *Unit Titles Act* (NT) and s14 *Unit Title Schemes Act* (NT). On 1 July 2009, amendments to the *Unit Title Schemes Act* came into force which permitted cancellation of a scheme with the agreement of 90 per cent of owners, provided that:

The management model regulating the scheme specifically provided for such terminations; and

The scheme was registered a minimum of 20 years ago.

The provisions are not retrospective, so are applicable only to those schemes that transfer by unanimous consent from being regulated by the *Unit Titles Act* to the *Unit Titles Schemes Act:* Regulation 6A *Unit Title Schemes General Provisions and Transitional Matters Regulations* (NT).

[83] Department of the Attorney-General and Justice, Northern Territory Government, above n 40.

[84] A total of nine submissions were made to the Discussion Paper: The Department of Attorney-General and Justice, Northern Territory Government, Report *Cancellation Provisions Under the* Unit Titles Act *and* Unit Title Schemes Act (September 2013), 4.

[85] Section 6(1)(a) *Termination of Units Plans and Unit Titles Schemes Act.*

[86] Section 15 *Termination of Units Plans and Unit Titles Schemes Act.*

Older schemes

The variances between Queensland and Northern Territory relate particularly to the Northern Territory provisions applicable to older schemes that contain 10 or more lots. As is the case in Queensland, a termination may occur by a unanimous resolution of the owners of units in the development.[87] However, unlike in Queensland, the Northern Territory legislation allows an owner (the 'proponent') to apply to the Schemes Supervisor for an approval certificate.[88] Proponents may seek the issue of the certificate if the development has a minimum of 10 lots and unanimous consent was not obtained at the meeting of the members. The issue of the certificate enables a proponent to petition for a further meeting of the body corporate to vote on the proposal.[89] A lower termination threshold exists with this process.

To call the meeting of the owners to vote on the proposed termination, the body corporate must provide all owners and their mortgagees with the notice of meeting, which sets out:[90]

(a) an explanation of the termination process in the *Termination of Units Plans and Unit Titles Schemes Act*
(b) confirmation that any redevelopment to be constructed on the land will also be a scheme
(c) the right of an owner to sell his, her or its unit in the development if the termination proceeds
(d) the proposals for the distribution or disposition of body corporate property before termination
(e) details of the proposed redevelopment of the site including architectural plans, an indication of construction timeframes, costings and estimated value for the redevelopment, relocation assistance to be granted to continuing owners and tenants, and the proposed statement for the scheme which will come into effect once the redevelopment is complete
(f) any contractual arrangements already entered into in respect of the redevelopment, and
(g) any other relevant information.[91]

Interestingly, the Western Australian Government has indicated that it proposes requiring that an information statement be issued to owners and mortgagees; this will contain similar requirements to notices of meetings under the *Termination of Units Plans and Unit Titles Schemes Act.*[92] Chapter 3: Compulsory Acquisition, Chapter 4: Changes to Corporate Control and Chapter 5: Protections for Lot

[87] Section 6(1)(a) *Termination of Units Plans and Unit Titles Schemes Act.*

[88] Section 9(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[89] Section 11(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[90] Section 11(2) *Termination of Units Plans and Unit Titles Schemes Act.*

[91] Section 9(2) *Termination of Units Plans and Unit Titles Schemes Act.*

[92] Landgate, above n 40, 97.

Owners all discuss the desirability and possible content of disclosure to owners as a recommendation for the law reform proposals for section 78 of the *BCCM Act*.

The Northern Territory legislation provides that if owners who hold the following interest entitlements[93] vote in favour of the motion, the resolution to terminate the development will be approved:[94]

Age of scheme	Resolution required to terminate scheme
Development age[95] is at least 15 but less than 20 years	95 per cent of the total interest entitlements for the development
Development age is at least 20 but less than 30 years	90 per cent of the total interest entitlements for the development
Development age is greater than 30 years	80 per cent of the interest entitlements for the development

An owner or mortgagee may seek an order of the Tribunal to prevent termination of the development, despite the resolution having been passed by the requisite number of owners.[96] When

[93] Interest entitlements are defined in the Northern Territory Acts as the share of the owner's interest in the scheme land and body corporate assets as a proportion to the other owners in the scheme. The proportion should reflect the differences in market value between the lots when the scheme was created, or the schedule last updated: ss 39(4) and (5)(b) *Unit Title Schemes Act.* An equivalent definition exists in s 4(1) *Unit Titles Act.* The definition of interest entitlement parallels the definition of Interest Schedule Lot Entitlement in s 47(3) *BCCM Act*.

[94] Sections 4 and 12(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[95] Development age relates to:

where the development contains buildings: the date upon which the buildings in the development were completed, or if that cannot be proven, the date upon which occupancy was first permitted under the *Building Act,* or the date the Registrar-General notifies that buildings existed on the site, or

where no buildings are constructed on the development, or the dates in (a) above cannot be determined, the date on which the scheme was formed or the units plan was registered: s 4 *Termination of Units Plans and Unit Titles Schemes Act.*

[96] Sections 12(1)(c) and (d) *Termination of Units Plans and Unit Titles Schemes Act.*

making its determination, the Tribunal must consider the factors set out in section 17 of the *Termination of Units Plans and Unit Titles Schemes Act*, discussed below.[97]

TRIBUNAL REVIEWS AND ORDERS FOR TERMINATION

The Tribunal may order a termination of the development if no unanimous resolution can be obtained in a scheme with fewer than 10 lots; it does not fall within the 'older schemes' criteria above;[98] or a stakeholder[99] lodges an application with the Tribunal.

In deciding whether to order a termination, the Tribunal must be satisfied that it is just and equitable to make the order; objections to the termination or redevelopment are unreasonable; and termination of the development is necessary.[100] The Tribunal must have regard to the following when making its decision:

(a) the likely adverse consequences on owners of units in the development if a termination was or was not ordered
(b) financial benefits and risks associated with the proposed termination and, if applicable, redevelopment
(c) whether orders other than a termination would be more appropriate in the circumstances
(d) the extent to which the development could operate as a functional neighbourhood if termination did not occur
(e) any other options apart from termination that may have been proposed in the application to the Tribunal, and
(f) whether the proposed distribution of proceeds between unit owners in the development is fair and reasonable.[101]

[97] The factors in section 17 of the *Termination of Units Plans and Unit Titles Schemes Act* are discussed below under the heading 'Tribunal reviews and orders for termination.'

[98] See the heading '

Older schemes'.

[99] Persons who may lodge an application with the Tribunal are set out in section 16 of the *Termination of Units Plans and Unit Titles Schemes Act.*

[100] Section 17(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[101] Section 17(2) *Termination of Units Plans and Unit Titles Schemes Act* and s 7 *Termination of Units Plans and Unit Title Schemes Regulations.*

The Tribunal must also consider submissions (if any) made by the Schemes Supervisor, the relevant local government, the body corporate, owners and mortgagees of units within the development or within a parent scheme of which the development is a subsidiary.[102]

It appears that the Western Australian Government's law reform proposals may have been influenced by the same considerations as those of Northern Territory when developing the factors that the Tribunal, in its role as a review body, must take into account.[103]

WESTERN AUSTRALIA

Currently, the *Strata Titles Act* provides for the termination of a scheme by two means. First, the passage of an unanimous resolution by the owners of all lots within the scheme may effect a termination.[104] Alternatively, upon an application by an owner or mortgagee, the District Court may order its termination.[105] As noted above, those provisions were the subject of a legislative review. The Bill containing the draft reforms to the *Strata Titles Act* is currently being drafted. It is anticipated that it will be introduced into Parliament in the second half of 2016.[106]

In 2003, the Western Australian Government tasked Landgate with the development of a reform package for the *Strata Titles Act* because of housing pressures caused by the growing Western Australian population.[107] Landgate undertook a series of briefings with key stakeholders before issuing a consultation paper in October 2014,[108] which set out a number of proposals for discussion.

The Consultation Paper proposed that the first step in the termination process should be the issue of an information statement to lot owners and their mortgagees,[109] which:

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[102] Section 17(3) *Termination of Units Plans and Unit Title Schemes Act.*

[103] Landgate, above n 40, 96.

[104] Sections 30(1) and 30A *Strata Titles Act 1985.*

[105] Section 31(1) *Strata Titles Act 1985.* Under s51 *Strata Titles Act 1985* the District Court may deem a resolution to be passed unanimously where the votes obtained on the motion were sufficient only to pass a special resolution. In a two-lot scheme, one owner may apply to the Court for termination of the strata scheme: s51A *Strata Titles Act 1985.*

[106] Landgate, *Strata Titles Act Reform Getting WA ready for the future* (undated) Government of Western Australia, <http://www0.landgate.wa.gov.au/__data/assets/pdf_file/0010/11521/STAR-Proposal-statement.pdf> accessed 2 February 2016, 1.

[107] Ibid.

[108] Ibid 1 and Landgate, above n 40.

[109] Landgate, above n 40, 97.

(a) explains the termination process
(b) notifies owners and mortgagees of their rights and obligations associated with objecting to the sale of the lot
(c) advises of the proposed plans for common property and other strata company assets post-termination
(d) gives details of any proposed redevelopment planned for the land including architectural plans, anticipated timeframe for commencement and completion, costings and the estimated value of the completed redevelopment
(e) sets out the proposed entitlements for the redeveloped scheme
(f) discloses any contractual or other arrangements already entered into, including agreements with developers in respect of the site, and
(g) details any other relevant information.[110]

Disclosure assists owners to make an informed decision on the acceptability or otherwise of a proposal.[111] As noted above, Chapter 3: Compulsory Acquisition, Chapter 4: Changes to Corporate Control and Chapter 5: Protections for Lot Owners discuss the merit of providing disclosure to owners on the proposals for the site and make numerous recommendations about the items that should be the subject of disclosure.

Landgate initially proposed that the termination threshold for Western Australia be dependent upon the age of the building – that is, a sliding scale reducing the level of resolution necessary in conjunction with the increasing age of the building. This proposal is consistent with the Northern Territory provisions in the *Termination of Units Plans and Unit Titles Schemes Act*.[112] However, after community consultation, this proposal was deemed inappropriate for Western Australia. Consultation revealed the accepted view that a building's age does not always correspond with the state of its maintenance.[113] Accordingly, the termination threshold proposed in the Bill to amend the *Strata Titles Act* is expected to be:

(a) for schemes with four or more lots – 75 per cent, and

[110] Ibid.

[111] Quentin Digby, 'Eliminating Minority Shareholdings' (April 1992) 10 *Companies and Securities Law Journal* 105, 129–30.

[112] The provisions of the *Termination of Units Plans and Unit Titles Schemes Act 2014* (NT) are discussed in more depth below under the heading '

Northern Territory'.

[113] Landgate, above n 106, 2.

(b) for schemes of two or three lots – a majority.[114]

Chapter 4: Changes to Corporate Control recommends the same termination threshold for Queensland.

The Western Australian Consultation Paper also sought feedback on the transfer of review powers for termination proposals from the District Court to the State Administrative Tribunal, maintaining the ability to appeal the decision at first instance to the Supreme Court.[115] It is now expected that the Bill will incorporate a requirement for a mandatory review by the State Administrative Tribunal once the minimum threshold of owner support has been reached.[116] Chapter 4: Changes to Corporate Control and Chapter 5: Protections for Lot Owners discuss the use of tribunals in the independent review of transactions, also recommending that termination decisions be subject to independent review before execution of resolutions.

The need for legislation to clearly define the criteria upon which a Tribunal must base its analysis of a termination proposal was also identified in the public consultation undertaken by Landgate.[117] It is anticipated that the amendments to the *Strata Titles Act* will incorporate this recommendation, and require the Tribunal to consider:

(a) whether the termination of the scheme is just and equitable
(b) the reasonableness or otherwise of objections to the proposal
(c) the extent that owners may suffer negative consequences if a termination is, or is not, ordered
(d) what the financial benefits and risks of a termination and redevelopment project are if it proceeds or does not proceed, and
(e) whether the making of an alternative order would achieve a satisfactory outcome.[118]

Like the *BCCM Act*, the *Strata Titles Act* does not currently contain any direction to the District Court on what factors their Honours must consider when making a determination on termination applications. Chapter 3 Compulsory Acquisition, Chapter 4 Changes to Corporate Control and

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Landgate, above n 40, 95–6.

[118] Ibid 96.

Chapter 5 Protections for Lot Owners discuss proposed issues for consideration during the independent review of the transaction.

OTHER AUSTRALIAN JURISDICTIONS

In the Australian Capital Territory, Tasmania and South Australia, the owners (sic) corporation or strata plan may be cancelled by an unanimous resolution of the owners, accompanied by written consent from select stakeholders.[119]

Termination of a strata plan or dissolution of an owners (sic) corporation may also occur as a result of an order by the South Australian Environment, Resources and Development Court, or the Australian Capital Territory Supreme Court, respectively.[120] By way of contrast, termination in Victoria may only occur by order of the Victorian Civil and Administrative Tribunal.[121]

[119] In the Australian Capital Territory, the unanimous resolution requesting the Planning and Land Authority to cancel the plan under sections 160(1) and (3)(a) of the *Unit Titles Act 2001* (ACT) must also include the written consent of all 'interested non-voters'. Interested non-voters are persons with an interest in a unit or the common property who are not entitled to vote at meetings of the owners corporation: ss 160(3)(b) and 173 *Unit Titles Act 2001*. The Planning and Land Authority may exempt the owners (sic) corporation from the requirement to obtain the non-voter's consent: s 160(4) *Unit Titles Act 2001.*

In Tasmania, section 26 of the *Strata Titles Act 1998* (Tas) provides that owners must unanimously consent to the making of the application under section 27(2)(a) of the *Strata Titles Act*, and all mortgagees and the local council must have also provided written consent: ss 27(2)(b) and (d) *Strata Titles Act.* The requirement for one or more mortgagees' consents may be waived where the Recorder is satisfied that no prejudice would occur through cancellation, or the mortgagee has unreasonably withheld its consent: s 27(3) *Strata Titles Act.*

A strata plan in South Australia may be cancelled by lodging a cancellation instrument with the Registrar-General approved by all unit owners and the holders of all registered interests in each unit or the common property: ss 17(1)(a) and (2) *Strata Titles Act 1988* (SA).

[120] The owners corporation may make an application to the Australian Capital Territory Supreme Court for an order to cancel the scheme under s161A(1) *Unit Titles Act.* The Supreme Court may make the order if it considers it just and equitable to do so having regard to the interests of all stakeholders: s 161A(3) *Unit Titles Act 2001*. The owners (sic) corporation, unit owners, holders of registered interests in the unit, insurers and the Director-General for the Territory may make submissions to the Supreme Court in relation to the termination: s 161D *Unit Titles Act.*

In South Australia, the strata corporation, a unit holder or other registered interest holder may make an application to the Environment, Resources and Development Court to terminate the strata plan: s 17(1)(b) and (4) *Strata Titles Act*. When making a determination on the application, the Court must have regard to:

The existence of and number of owners who object to the cancellation

Potential adverse consequences from the cancellation or retention of the strata plan, and the extent to which those consequences could be avoided by court order, and

Any other reasons why the grant or refusal of the cancellation application would be in the interests of justice: s 6A *Strata Titles Regulations 2003* (SA).

[121] An owners corporation may be wound up by the Victorian Civil and Administrative Tribunal upon an application by the owners (sic) corporation, a member of the owners (sic) corporation, an administrator of the

None of the Victorian, Australian Capital Territory, Tasmanian or South Australian Governments has indicated that a review of the strata legislation in those jurisdictions is planned. This thesis submits that a reform of the legislation in those jurisdictions may also be necessary.

It is clear from the audit conducted in Part 2 of this chapter that there are numerous jurisdictions throughout Australia seeking to implement, or that have already implemented, reforms to the termination provisions in the relevant strata and community titles Acts. Numerous similarities exist, particularly between the Western Australian proposals and the Northern Territory's provisions. The position in New South Wales diverges from some of the common features in the Northern Territory and Western Australia but, like the other jurisdictions, contains some elements that this thesis recommends as desirable for a Queensland context.

The review of the *BCCM Act* provisions is ongoing. It remains to be seen whether the current Government continues to consider the reform of section 78 of the *BCCM Act* a priority. This thesis argues that amendment of the termination provisions is necessary; ignoring the issue, or not resolving it effectively, may have long-term impacts on urban infill redevelopment and planning, and housing affordability.[122]

The remainder of this thesis investigates options for the amendment of section 78 of the *BCCM Act* with a view to balancing stakeholder concerns through the implementation of clear procedures and appropriate safeguards. Part 3 of this chapter provides an overview of those chapters.

PART 3 – THESIS OVERVIEW

This thesis examines the need for law reform arising from the 'holdout' phenomenon in the reassembly and termination of community titles schemes. In order to answer the research question, Chapter 2: Balanced Termination Analysis Theory develops a theoretical foundation upon which the features of laws incorporating expropriation powers and protections of ownership rights are analysed. The theory is used throughout the thesis to assess which elements of those parallel areas of law investigated in the thesis – compulsory acquisition and corporations law – may guide the development of reforms to section 78 of the *BCCM Act*.

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owners (sic) corporation or a registered mortgagee: s 34G(1) *Subdivision Act 1988* (Vic). The Victorian Civil and Administrative Tribunal may order the winding up if it is just and equitable having regard to submissions made by holders of estates or interests in the land, creditors of the owners (sic) corporation, or insurers of the land: ss 34G(2) and (3) *Subdivision Act 1988* respectively.

[122] Landgate, above n 40, 94.

As noted above, rather than analysing the amendments to the strata laws in New South Wales and the Northern Territory, this thesis focuses on concurrent laws that may guide reform. This approach avoids the difficulties with the lack of precedent and academic discussion relating to the New South Wales and Northern Territory legislation. Compulsory acquisition and corporate law principles are assessed to identify strengths, weaknesses and desirable elements of expropriations systems that may be utilised by Queensland as guidance towards the development of a law-reform model for the termination provisions of the *BCCM Act*.

Chapter 3: Compulsory Acquisition, Chapter 4: Changes to Corporate Control and Chapter 5: Protections for Lot Owners investigate those parallel areas of law that may contribute to the decision of what the appropriate termination threshold is and the extent of expropriation powers. The thesis ends with a conclusion and recommendations chapter, which sets out the elements of the law-reform model, together with further areas for research.

CHAPTER 2: BALANCED TERMINATION ANALYSIS THEORY

Chapter 2: Balanced Termination Analysis Theory begins with a clarification of how 'property' is defined in this thesis. While there are numerous definitions debated by philosophers and legal theorists, this thesis adopts the 'bundle of rights' approach. This view of property allows a focused consideration of one particular right – the right to security and immunity from expropriation[123] – while minimising impacts on the other rights in the bundle.

Ownership of community titles scheme lots poses distinct challenges to the traditional western liberal theoretical conceptions of private property. A scheme's common property is held by all lot owners in common,[124] while the lots themselves are held as individual indefeasible titles. Current property law theory neglects the social and economic relationships and interdependency between owners as a result of the self-management and governance systems of community titles schemes imposed by the *BCCM Act*.[125] The inadequacy of current theory in this context has resulted in the need to build a theory that is sensitive to stakeholder concerns in a community titles scheme termination scenario. The chapter builds the Balanced Termination Analysis Theory (BalTAT) to

[123] AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence (First Series)* (Clarendon Press, 1961), set out in Heller, above n 32, 663.

[124] Section 35(3) *BCCM Act*.

[125] Cathy Sherry, 'A bigger Strata Footprint: Are We Aware of the Implications?' Paper presented at the Strata and Community Title in Australia for the 21st Century 2011 Conference, Surfers Paradise, Queensland September 2011, 8.

underpin a reconsideration of how community titles scheme lots and the termination of schemes impact upon the bundle of rights definition of property. BalTAT is the theoretical framework upon which the analysis undertaken in the later chapters of the thesis is based.

BalTAT is developed using a resolution-based dialectic methodology to identify the mismatch between stakeholder concerns when the termination of a community titles scheme is proposed. The rights-based theory, Radin's Personhood Theory,[126] and the economics theory, Heller's Anticommons Theory,[127] are deconstructed.[128] The weaknesses in Personhood Theory are supplemented by the strengths in Anticommons Theory in order to develop a synthesised framework capable of valuing and respecting the social and economic relationships created in community titles scheme ownership and scheme termination.

Personhood Theory seeks to provide a moral justification for the increase of protections to property. It focuses particularly on property that is so intertwined with the way a person considers they are a personal entity in the world that loss of the property as a result of expropriation may negatively impact upon an owner's sense of self.[129] Radin asserts that protection granted to this type of property should be commensurate with the connection an individual has to it, even if the protections afforded to the property are at the expense of economic interests such as redevelopment.[130] The existence of a psychological connection between person and property, Radin argues, justifies the increased levels of protection for 'personal' property. However, there is a lack of empirical evidence supporting the existence of that psychological connection.[131] This lack of evidence is a major weakness in Radin's theory, and debunks the justification in the theory for subordinating economic interests to emotional connections.

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[126] Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.

[127] Heller, above n 32.

[128] Numerous other theories may be applicable and further an analysis of property rights, including for example Raz (see in particular Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986). Raz's theory challenges the neutrality of traditional legal doctrine and proposes an alternative form that attempts to encapsulate 'perfectionist moral premises' (see Robert P George, 'The Unorthodox Liberalism of Joseph Raz' (1991) 53(4) *The Review of Politics* 652). Autonomy features significantly in Raz's work. However, Radin's Personhood Theory has been selected because the thesis generally, and Balanced Termination Analysis Theory in particular, seeks to balance social and emotional concerns associated with real property against economic principles relating to the existence of that property as a valuable asset. Accordingly, two theorists who are at opposing ends of the social/economic spectrums have been chosen, in order to identify a 'middle ground' from which analysis of potential law reforms may proceed.

[129] Radin, above n 126, 958–9 and 988.

[130] Ibid., 992 and 1002.

[131] Refer to Chapter 2: Balanced Termination Analysis Theory for further detail in relation to this point.

Heller's Anticommons Theory overcomes Personhood Theory's weakness. The theory aims to achieve an optimal use of scarce resources.[132] In his seminal article, Heller identified that fragmented ownership of an asset causes the asset to become prone to underuse. Fragmentation of ownership grants each owner a right of veto, empowering all those owners with the ability to dispute and prevent a change of use.[133] In order to overcome the veto power, reassembly of ownership rights is necessary. However, the need to reassemble ownership of the asset creates the possibility that an owner may engage in holdout behaviour. The goal in acting strategically is to maximise the owner's share of the surplus value created from the assembler's aggregation of the fragmented titles. That is, the owner will 'hold out' until they are satisfied that the best possible deal has been secured. Where strategic behaviour by one or more parties to an aggregation is encountered, negotiations to purchase the interests may be protracted, or an agreement may not be reached.[134]

The possibility for holdout behaviour exists as long as fragmented ownership of the asset remains. As long as the veto power exists, the resource is subject to the risk of persistent long-term underuse, or 'anticommons use'. Anticommons property has potentially wide-reaching negative impacts on communities.[135] To overcome the holdout problem, and avoid anticommons use, reassembly of titles to the scarce resource must be facilitated. One means of achieving this is through the implementation of expropriation powers.

Given the shared ownership of common property in a community titles scheme, and the existence in section 78 of the *BCCM Act* of the requirement for unanimous consent to terminate a scheme, Anticommons Theory is applicable to community titles schemes. It is used to temper the somewhat extreme protectionist view of Personhood Theory, insofar as that theory relates to residential lots, to create a synthesised theory. BalTAT, the synthesised theory, respects individual owners' rights while balancing economic and wider community considerations arising in a termination scenario.

CHAPTER 3: COMPULSORY ACQUISITION

This chapter considers local government powers to expropriate real property, and the scope of those powers in Queensland, New South Wales and the United Kingdom.

[132] Heller, above n 32, 624 and 626.

[133] Ibid.

[134] Scott Duke Kominers and E Glen Weyl, 'Holdout in the Assembly of Complements: A Problem for Market Design (2012) 102(3) *American Economic Review* 360, 361.

[135] Michael Heller, *The Gridlock Economy* (2008), 44 and 48.

Internationally, governments exercise compulsory acquisition powers to facilitate redevelopment by the private sector, and this is regarded as an authorised function.[136] Compulsory acquisition powers in Australia, however, are limited to the carrying out of public purposes,[137] rendering acquisitions that predominantly benefit the private sector invalid.[138] This chapter considers Queensland laws and the limited interpretation of compulsory acquisition powers adopted in the leading Queensland case, *Prentice v Brisbane City Council* [1966] Qd R 394. This thesis argues that the decision in *Prentice v Brisbane City Council*[139] was unduly narrow, based on the background facts and circumstances of the case. The Court disregarded the extensive benefits to the public in order to preserve private property rights to a single individual landowner.

The principal Australian case, based on the New South Wales legislation, is *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603. That case, also considered in this chapter, sets out the High Court's position on the use of compulsory acquisition for economic development. Like in *Prentice v Brisbane City Council*,[140] the compulsory acquisition powers of the local authority were narrowly interpreted in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[141].

R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council[142] was an appeal from the New South Wales Court of Appeal, which allowed the acquisition in *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008). The Court of Appeal reasoned that when the development plans were considered holistically, the acquisition of all the parcels making up the site, including the land in question, was necessary to enable delivery of both the redevelopment project and the associated public benefits. The benefits

[136] For example, the United States (*Kelo v City of New London* 545 US 469 (2005)) and the United Kingdom (Pt IX *Town and Country Planning Act 1990* (UK)).

[137] *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 365; *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467; *Acquisition of Land Act 1967* (Qld) and *Local Government Act 1993* (NSW). Contrast *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 regarding the extended powers of compulsory acquisition held by the Northern Territory government.

[138] *Werribee Shire Council v Kerr* (1928) 42 CLR 1; *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[139] *Prentice v Brisbane City Council* [1966] Qd R 394.

[140] *Prentice v Brisbane City Council* [1966] Qd R 394.

[141] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[142] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

to the public from the redevelopment convinced the Court of Appeal that Parramatta City Council was exercising its compulsory acquisition powers for a public purpose.[143]

The High Court overturned the Court of Appeal's decision.[144] French CJ held that compulsory acquisition powers must be read down to minimise interference with private property rights.[145] His Honour regarded the acquisition as impermissible. The second judgment of the High Court, a joint judgment by Gummow, Hayne, Heydon and Kiefel JJ, differed from French CJ in His Honour's reasoning, but ultimately reached the same conclusion.[146]

The position in the United Kingdom may be contrasted with that of Queensland and New South Wales. The *Town and Country Planning Act 1990* (UK) empowers local authorities to expropriate land for development, redevelopment or improvement, or the proper planning of an area where the proposal will contribute to the economic, social or environmental well-being of an area. The legislation specifically authorises private sector involvement in redevelopment projects, in direct contrast to the position in both Queensland and New South Wales.[147]

The Alliance Spring Co Ltd & Ors v The First Secretary of State [2005] EWHC 18 (Admin) (*Arsenal Football Club Case*) was decided under Part IX of the *Town and Country Planning Act.* The objectors in that case appealed against the Minister's approval for the London Borough of Islington to expropriate 143 parcels of land.[148] The High Court of Justice Queen's Bench Division held that the comprehensive regeneration of the area justified the expropriation, irrespective of the initial trigger for its renewal – Arsenal Football Club's desire for a larger stadium.[149]

The chapter concludes with a recommendation that the well-being requirements in the UK legislation are beneficial features for a law-reform model permitting expropriation of privately

[143] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [162–3] applying *Werribee Shire Council v Kerr* (1928) 42 CLR 1 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[144] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[145] French CJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [43] and Marcus Jacobs, *Law of Compulsory Land Acquisition* (Law Book Co, 2010) 90 referring to French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [42].

[146] Gummow, Hayne, Heydon and Kiefel JJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [93].

[147] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[148] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [5].

[149] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [12–15].

held land for redevelopment. In addition, the extent of benefits to the public will likely vary with smaller redevelopment projects. The benefits of each project and justifications for allowing a termination to occur while there is dissent among owners should be assessed when determining whether an exercise of expropriation powers is appropriate in the circumstances.

CHAPTER 4: CHANGES TO CORPORATE CONTROL

An alternative means of reassembling ownership rights is investigated in this chapter. The use of schemes of arrangement and takeovers, and the associated expropriation powers in the *Corporations Act 2001* (Cth), are considered to identify any guidance that may be taken from those provisions.

A binding transfer scheme of arrangement assigns the buyer title to all shares in the class or classes covered by the arrangement, once the statutory processes in Part 5.1 of the *Corporations Act* are complied with.[150] By way of contrast, a takeover under Chapter 6 of the *Corporations Act* may be initiated only after the bidder's voting power in the company has increased above statutory defined minimums.[151] The power to expropriate the remaining shares under Chapter 6A of the *Corporations Act* is triggered once the bidder has successfully acquired shares up to the minimum threshold set out in the *Corporations Act*.

The chapter focuses on the attributes of each system that may be extracted and tailored for the development of reforms to the *BCCM Act* termination provisions. Disclosure, the first of those attributes, is required to empower a shareholder to make an educated assessment of the proposals,[152] including whether or not the offer price is acceptable. Valuations by appropriately qualified and experienced experts are fundamental components of disclosure. Relevantly, the next chapter (Chapter 5) discusses the need to select an appropriate valuation methodology. This chapter demonstrates how valuations may be incorporated into disclosure materials to provide a degree of transparency to transactions and what that disclosure may look like in a reassembly and termination proposal.

Form and content requirements for bids are also considered. The *Corporations Act* limits the permissible conditions on offers to ensure that affected owners have a degree of certainty on the

[150] See, for example, s 411(4) *Corporations Act*.

[151] Section 606(1) *Corporations Act.*

[152] Digby, above n 111, 129–30.

likelihood of an acquisition proceeding. This is an essential feature of a fair and balanced system. This chapter contains recommendations regarding the form and content requirements that may inform a law-reform model for section 78 of the *BCCM Act*.

The chapter also considers the statutory thresholds for both the successful implementation of a transfer scheme of arrangement under Part 5.1 of the *Corporations Act,* and the triggering of compulsory acquisition powers under Chapter 6A of the *Corporations Act.* The approval thresholds between each means of achieving a change in corporate control differ because of the characteristics of each method.[153] In the same manner that the thresholds for each method to achieve a change of corporate control differ because of the peculiarities of each, the chapter recommends that the termination threshold for Queensland community titles schemes be set with regard to the characteristics of Queensland schemes. The termination thresholds adopted in other Australian jurisdictions should be considered, but not regarded as binding. Nevertheless, the chapter recommends the same termination threshold as the Western Australian proposals.

Independent review of both the exercise of compulsory acquisition powers under Chapter 6A of the *Corporations Act* and Part 5.1 of the *Corporations Act* schemes of arrangement are in place. The existence of an avenue for independent review for expropriations is important to ensure that a fair balance is struck between stakeholder rights and powers. Therefore, this chapter also recommends that a mandatory independent review of a proposal to terminate a community titles scheme occur. The criteria upon which that review body makes a determination should also be set out in the law-reform model for section 78 of the *BCCM Act*.

CHAPTER 5: PROTECTIONS FOR LOT OWNERS

The importance of this chapter cannot be over-estimated. The chapter considers the implications resulting from the implementation of expropriation powers. If such provisions are incorporated into the *BCCM Act* to facilitate the acquisition of remaining lots and termination of schemes, the ability of 'holdout owners' to veto a redevelopment proposal will be removed. This concludes that expropriation powers must be limited. BalTAT demonstrates that a balance must be struck between stakeholder concerns in relation to a termination, and the powers contained in any expropriation provisions. Adoption of powers that are too broadly defined, or insufficiently controlled, exposes owners to the risk that expropriation powers will be abused. To achieve the balance mandated in BalTAT, it is necessary to first build controls on the use of expropriation powers and then to

[153] Sections 411(4)(a) and 661A *Corporations Act.*

incorporate protections into the reform package to avoid negative and potentially significant impacts on affected owners.

The 1940s to 1960s were the heyday of the United States urban renewal programs. Eminent domain, as compulsory acquisition is known in the United States, was systematically utilised to acquire properties for transfer to private sector developers appointed to engage in urban-renewal efforts over the assembled sites.[154] However, the programs largely failed, and many of the negative social impacts resulting from them still affect the United States today.[155] The watershed case, *Kelo v City of New London* 545 US 469 (2005), saw the US Supreme Court ruling that the acquisition of 115 properties was valid, notwithstanding that the private sector would receive the greatest proportion of economic gains from the project. The case was extensively criticised,[156] and prompted the variation of many state constitutions to limit the use of eminent domain powers.[157] This chapter investigates the protections law reform proposals for section 78 of the *BCCM Act* should implement to avoid the same negative consequences occurring in Australia that transpired in the United States.

When identifying the negative aspects of using expropriation powers to reassemble development sites, commentators focus on four common themes. Those themes – the coercive nature of expropriations, under-compensation and abuse of power, targeting of minorities and the poor, and the imposition of dignitary harms – are investigated in this chapter, which provides recommendations on how those criticisms may be overcome through proactive means. In relation to the coercive nature of expropriation powers, that element of coercion is often condemned. The

[154] Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006–07) 105 *Michigan Law Review* 101 and Amnon Lehavi and Amir N Licht, 'Essay Eminent Domain, Inc.' (2007) 107 Columbia Law Review 1704.

[155] Garnett, above n 154, 112 and Lehavi and Licht, above n 154, 1711.

[156] See for example, Eric Rutkow, '*Kelo v City of New London*' (2006) 30 *Harvard Environmental Law Review* 261; Castle Coalition, *50 State Report Card Tracking Eminent Domain Reform Legislation Since Kelo* (November 2012) Castle Coalition, <http://castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf>; Castle Coalition, *Myths and Realities of Eminent Domain Abuse* (June 2006), Castle Coalition, <http://www.castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf>; Castle Coalition, *Redevelopment Wrecks: 20 Failed Projects Involving Eminent Domain Abuse* (June 2006), Castle Coalition, <http://castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf>; Dick M Carpenter and John Ross, *Doomsday? No Way Economic Trends & Post-Kelo Eminent Domain Reform* (2008), Institute for Justice <http://www.ij.org/images/pdf_folder/other_pubs/doomsday-no-way.pdf>; Kevin Gray, 'There's No Place Like Home!' (2007) 11(1) *Journal of South Pacific Law* 73; Patricia H Lee, 'Eminent Domain: In The Aftermath of *Kelo v New London,* A Resurrection in *Norwood:* One Public Interest Attorney's View' (2006–07) 29 *Western New England Law Review* 121; Gideon Kanner, '*Kelo v New London:* Bad Law, Bad Policy, and Bad Judgement' (2006) 38 *The Urban Lawyer* 201; Nancy Kubasek and Garrett Coyle, 'A Step Backward is not Necessarily a Step in the Wrong Direction' (2005–06) 30 *Vermont Law Review* 43 and Eric Rutkow, '*Kelo v City of New London*' (2006) 30 *Harvard Law Review* 261.

[157] Castle Coalition, 50 State Report Card, above n 156.

chapter recommends that a mandatory preliminary step be implemented that requires buyers to conduct negotiations in good faith with owners before expropriation powers may be exercised. This is consistent with the recommendation in Chapter 4 in relation to the issuing of an offer to owners with disclosure materials to enable each owner to make an informed decision on the proposal.

Second, and as noted above in relation to Chapter 4, the selection of an appropriate methodology for valuations included in disclosure materials is critical. Use of market value to calculate the quantum of consideration for a purchase has been criticised. Market value as a methodology may be inappropriate in circumstances where the private sector is likely to generate significant profits from the expropriation of the property. In particular, where the aggregated parcel has a higher value than the combination of its individual components, the chapter recommends that market value not be used to value the affected lots. Under-compensation of affected parties is to be avoided if the balance between stakeholder rights prescribed by BalTAT is to be achieved. Accordingly, the chapter recommends reconsideration of 'market value' as the determinant for consideration payable to a lot owner for the expropriation of their lot. Additional financial and non-financial benefits, such as out-of-pocket expenses and the potential need for the provision of relocation advisory services are also discussed.

Concerns also exist in relation to the potential for expropriation powers to be abused through the targeting of minority and low socio-economic groups when selecting potential redevelopment sites. This chapter recommends controlling the scope of expropriation powers through stringent criteria. Options such as mandating good-faith negotiations, assessing the magnitude of benefits to the public generated from a redevelopment, community engagement and public consultation, and the independent review of proposals are all means by which a balance between stakeholders may be struck.

'Dignitary harm' describes the insult suffered by owners when an expropriation of their property occurs.[158] The insult occurs from the inference that the property is being used at below-optimal levels, making it unworthy of protection. The corollary of the inference is that a change of use, through redevelopment, may correct the underuse.[159] Mandatory disclosure and regulation of the minimum consideration payable to owners is recommended as a means of minimising dignitary harm.

[158] Garnett, above n 154, 109–10.

[159] Ibid., 110.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

This thesis concludes by outlining a series of recommendations for inclusion in a proposed model to reform section 78 of the *BCCM Act*. The recommendations aim to implement the key elements of BalTAT. This recognises that the bundle of an owners' rights are subject to statutory modification, but are worthy of protection. The potential emotional attachment to their property that a person may develop is acknowledged and respected through the proposed protections. The model ensures stability for owners without disregarding the wider community benefits obtainable when an optimal use of a scarce resource, such as redevelopment land, is achieved. The avoidance of underuse caused by holdouts, which result from fragmented ownership, is overcome through the implementation of expropriation powers. Finally, conflicting rights are balanced by the controlled application of expropriation powers. Those controls come in the form of limitations on the use of the power through both administrative and substantive protections extended to owners.

CONCLUSION

Strata and community titled developments are increasing in popularity, particularly as a result of population growth and the adoption of urban consolidation policies in Australia's largest cities. The current termination provisions in the *BCCM Act* do not allow for an efficient level of reassembly and termination of schemes to occur. The current practice of relying on a developer's ability to utilise market forces to acquire titles to all lots within a community titles scheme as a prerequisite to its redevelopment is insufficient, particularly in circumstances where governments are actively pursuing urban consolidation policies to encourage infill redevelopment.

There is a large economic impact on both owners and surrounding community from the retention of buildings that have exceeded their economic lifespan. Where those buildings are now subject to higher levels of maintenance and upgrades to continue functionality, owners may become trapped in a 'cycle of depreciating wealth' caused by the continued investment into a depreciating or under-performing asset.[160] It is unfair to grant the power to a single owner to veto a proposal despite the wishes of potentially all other lot owners. However, this is precisely what section 78 of the *BCCM Act* does. The requirement for unanimous consent to a termination renders all owners in the scheme subject to a veto by one owner who may be engaging in strategic behaviour purely for personal gain.

[160] Bentley, above n 11, 6.

The challenges faced in Queensland are not unique. The audit conducted in Part 2 of the chapter demonstrated that numerous jurisdictions throughout Australia are seeking to implement, or have already implemented, reforms to the termination provisions in the relevant strata and community titles Acts. There are a number of similarities and differences between the models chosen in the various jurisdictions, which highlight the legislature's response to jurisdiction-specific concerns. Each jurisdiction's laws contain elements that this thesis recommends for and against adopting in Queensland. In the same manner that the New South Wales, Northern Territory and Western Australian governments have responded to concerns of their electorates, it is important that Queensland adopt legislation specific to its needs.

The review of the *BCCM Act* provisions is ongoing; no indication has been received from the current government of its intention or otherwise to pursue changes to section 78 of the *BCCM Act*. This thesis argues throughout that the reform of Queensland's termination provisions is necessary. It is unacceptable to ignore the issue, or not to resolve it effectively.

Part 3 of the chapter set out the overview of how this thesis approaches the question of law reform, and identified the features and protections necessary for an effective and fair termination model. BalTAT, the theory created in the next chapter of the thesis, identifies key elements that each model should contain. The recommendations summarised in Chapter 6 and investigated in depth in Chapter 3, Chapter 4 and Chapter 5 aim to implement the key elements of BalTAT. Respect for land owners' rights and appropriate protection of those rights are balanced against the need to avoid an underuse of scarce resources. Fragmented ownership is overcome through the implementation of limited expropriation powers. BalTAT reflects the need to achieve an optimal use of scarce assets and capture wider community benefits without sacrificing western liberal society's respect for and protection of landowners' rights. The reforms proposed in this thesis seek to implement those key elements of BalTAT, which are discussed at length in the next chapter.

CHAPTER 2

BALANCED TERMINATION ANALYSIS THEORY

INTRODUCTION

Ownership of community titles scheme lots poses distinct challenges to the traditional theoretical conceptions of private property in western liberal society. The scheme's common property, held by all lot owners in common ownership,[161] makes for an uncomfortable fit within the liberal paradigm of an autonomous owner free to enjoy their property with limited constraints. Property law theory neglects the social and economic relationships necessitated by the self-management and governance systems of community titles schemes.[162] The topic of this thesis – termination of community titles schemes – provides an apt illustration of the uncomfortable fit when meshing property law theory into a community titles scheme setting.

Section 78 of the *BCCM Act* limits the methods by which termination of a scheme may occur. Members may pass a resolution without dissent at a meeting of the body corporate;[163] or the District Court may order the termination after considering all stakeholders' interests and concluding it is just and equitable to terminate the scheme.[164] The requirement for unanimous consent enables a single owner to veto a proposed termination. This power to veto proposals that affect an owner's rights is consistent with the liberal view of property as a bundle of rights held by that owner.[165] However, the

[161] Section 35(3) *BCCM Act*.

[162] Sherry, above n 125, 8.

[163] Section 78(1)(a) *BCCM Act*.

[164] Section 78(2) *BCCM Act.* It is submitted that the District Court is unlikely to order a termination where owners or tenants oppose it. For example, in the only case to be determined by the District Court, Kingham DCJ referred the matter for mediation rather than make the orders sought by the body corporate: *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301.

[165] William Blackstone, *Commentaries on the Laws of England: In Four Books*, quoted in Michael Heller, 'Three Faces of Private Property' (2000) 79 *Oregon Law Review* 417, 419.

exercise of veto powers has a negative side-effect too – strategic holdout behaviour.[166] Such tactics have the potential to impact directly on other owners' property rights. For example, some scheme owners may seek to take advantage of an offer by a developer. Where those offers are contingent upon the developer securing contracts to acquire all of the scheme lots, a veto by one owner will entitle the developer to terminate all contracts. The protection of individual ownership rights at the expense of community considerations highlights a limitation of liberalist theory so far as community titles scheme lots, and particularly terminations of schemes, are concerned.

This thesis examines options to amend the termination provisions of section 78 of the *BCCM Act* to limit the impact that holdout behaviour has on stakeholder groups. Necessarily, any recommendations made in this thesis will impact on property rights. Chapter 3 considers whether principles from local government compulsory acquisition powers may aid in the development of a system to overcome strategic behaviour by owners during the reassembly of the community titles scheme for redevelopment. Chapter 4 assesses another means of rebundling ownership rights: the ability for a private sector entity to expropriate minority shareholders' securities using the change of corporate control provisions in the *Corporations Act* as a model. Chapter 5 examines a variety of potential protections for owners to avoid abuse of expropriation powers and to ensure that a balance is struck between the rights of each and every stakeholder in terminating a community titles scheme. This chapter focuses on the development of a theory that balances stakeholder rights and concerns to overcome the negative impacts of holdouts on owners and the wider community.

In order to develop a theory, Part 1 of this chapter explains the definition of 'property' adopted in this thesis. It is clear that real property and, more specifically, community titles scheme lots meet the definition of property; however, that same clarity is not immediately evident when company shares are assessed against the definition. The intersection between company shares and real property is also investigated to determine whether shares may be defined as 'property.' This exercise is undertaken because Part 5.1 and Chapters 6 and 6A of the *Corporations Act* may provide useful guidance on the potential to balance stakeholder concerns while facilitating changes to control. Part 1 concludes that shares are property. Accordingly, the potential exists to adapt selected corporate law principles to community titles scheme laws in order to reconsider the traditional right of owners to determine whether and to whom to sell property, as against the wider community concerns associated with holdout behaviour.

[166] Heller, above n 32.

Part 2 focuses on the distillation of key components of the rights-based Personhood Theory[167] and the economics-focused Anticommons Theory.[168] Using a dialectic methodology, the mismatch between the two, insofar as the theories apply to community titles scheme lots, is identified. Part 2 begins with an overview of the resolution-based dialectic framework adopted throughout the chapter to perform the analysis. Radin's Personhood Theory and Heller's Anticommons Theory are then deconstructed with an initial focus on the competition between emotional attachment to housing[169] and property as a scarce economic resource.[170] The part then considers the arguments for increasing protection for residential properties as opposed to the creation of expropriation powers in order to mitigate the negative impacts of holdout behaviour.[171]

Throughout Part 2, the Balanced Termination Analysis Theory (BalTAT) is built. The chapter concludes with a graphic representation of the theory, which will form the theoretical basis for analysis of law reform options throughout the later chapters in this thesis.

PART 1 – DEFINING PROPERTY

The central premise of this thesis is an argument to amend the termination provisions of the *BCCM Act* to facilitate redevelopment of community titles schemes. Amendment of section 78 of the *BCCM Act* would impact upon owners' property rights, but no single consensus exists on the theoretical definition of property and the rights associated with its ownership. This part seeks to clarify the definition of property adopted in this thesis. In addition, it considers whether shares may be classified as property under the definition. Doing so will enable an identification of the parallel features and differences between shares and real property. It will also assist to determine the appropriateness of applying corporate law principles to real property, the subject of Chapter 4.

There are various definitions of property that have been debated by philosophers and legal theorists. For some, property is as vague as 'the exclusive authority to determine how a resource is used',[172] while others regard property as a collection of rights, with each right merely part of the

[167] Radin, above n 126, 960.

[168] Heller, above n 32, 624.

[169] Radin, above n 126.

[170] Heller, above n 32, 624.

[171] Ibid., 641.

[172] Arman A Alchian, 'Property Rights', in David R Henderson (ed), *The Concise Encyclopedia of Economics* (2008), <http://www.econlib.org/library/Enc/Property Rights.html>. See also Eric R Claeys, 'Property 101: Is Property a Thing or a Bundle? (2009) 32(3) *Seattle University Law Review* 617, 631.

bundle held by a property owner.[173] Occupation, personal labour invested in property, utilitarian and economic themes have all been used to describe the concept of property and sought to justify the rights granted to owners.[174]

This thesis seeks to develop key considerations upon which to base a new legislative model for the termination of community titles schemes. The 'bundle of rights' definition adopted allows a focused consideration of one particular right – the right to security of title and immunity from its expropriation – temporarily setting aside the other incidents of ownership without disregarding them. This approach is consistent with the inherent balancing of stakeholders' rights undertaken in this thesis.

The bundle of rights approach acknowledges that an interest may be regarded as a property right when a person may claim various rights – metaphorical sticks in the bundle – over an object.[175] This is therefore the circumstance in which property is said to exist. Honoré's list of 11 'sticks' or incidents[176] is generally regarded as being a representative originating point upon which to base a theoretical discussion of which rights are held by an owner.[177] Honoré's incidents include:

(1) The right to exclusive possession;
(2) The right to personal use and enjoyment;
(3) The right to manage use by others;
(4) The right to the income from use by others;
(5) The right to the capital value, including alienation, consumption, waste, or destruction;
(6) The *right to security* (that is, *immunity from expropriation*);
(7) The power of transmissibility by gift, devise, or descent;
(8) The lack of any term on these rights;
(9) The duty to refrain from using the object in ways that harm others;
(10) The liability to execution for repayment of debts; and

[173] Honoré, above n 123.

[174] Sukhninder Panesar, 'Theories of Private Property in Modern Property Law' (2000) 15 *Denning Law Journal* 113.

[175] Stephen Munzer, 'A Bundle Theorist Holds On to His Collection of Sticks' (2011) 8(3) *Econ Journal Watch* 265, 266.

[176] Honoré, above n 123.

[177] Munzer, above n 175, 266 and Heller, above n 32, 663.

(11) Residual rights on the reversion of lapsed ownership rights held by others.[178]

Ownership rights over real property, including community titles scheme lots, satisfy Honoré's incidents. One right owners hold in their bundle is the right to sell or refrain from selling – freedom, or autonomy, in their decision-making as owner.[179] The existence of autonomy, generally, may be identified from the presence of a number of factors, including the capacity to evaluate an adequate range of options, to choose a rational path, be physically able to carry out the choice without coercion or manipulation from external parties, and have affected one's life by those choices.[180] In the context of property ownership, Honoré's incidents may contribute to an understanding of the extent of owner autonomy. More particularly, an owner's freedom to determine whether and when to divest property is dealt with in the sixth incident. The right to security, and concomitant immunity from expropriation, means that an owner's decision in respect of the sale or retention of their property may only be overturned in limited circumstances. Strong property rights in the form of a right to security of title ensure that ownership is free from interference by the state and other individuals,[181] in turn preserving an owner's freedom – a concept of central importance in liberalism.[182]

It is argued that a negative side-effect of this right to security is the holdout problem. Accordingly, this thesis recommends implementation of a statutory scheme to overcome holdouts. Adoption of recommendations from this thesis would result in the reallocation or redefinition of ownership rights associated with Honoré's sixth incident – immunity from expropriation – through statutory intervention.

Land is a tangible asset, capable of satisfying all of Honoré's incidents. It shelters, protects and may provide economic security for its owners. Shares, however, do not have the same tangible presence as real property. The question of whether it is appropriate to consider corporate law as influencing potential law reform proposals for the *BCCM Act* is answered affirmatively in this thesis. It is

[178] Honoré, above n 123, set out in Heller, above n 32, 663 [emphasis added].

[179] Norman uses the terms 'freedom' and 'autonomy' in his analysis of Raz's *Morality of Freedom* interchangeably: W J Norman, 'The Autonomy-Based Liberalism of Joseph Raz' (1989) II(2) *Canadian Journal of Law and Jurisprudence* 151, 151.

[180] Ibid, 152 discussing Raz, above n 128.

[181] Davidson refers to the common law principle of '*sic utere tuo ut alienum non laedas* that property rights are limited by the obligation not to use property to harm others': Nestor M Davidson, 'Sketches for a Hamiltonian Vernacular as a Social Function of Property' (2011) 80 *Fordham Law Review* 1053, 1053.

[182] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979), 113.

submitted that intangibility alone is insufficient to conclude that shares are not property.[183] However, do the differences in regulatory environments for real property and shares[184] justify different classifications between the assets? Criticisms of the High Court's decision in *Gambotto v WCP Ltd* (1995) 182 CLR 432 have centred on the recognition of the proprietary nature of shares. Since then, the debate about whether or not shares satisfy Honoré's incidents has received renewed attention.[185]

Spender's analysis of the application of Honoré's incidents to shares reveals that all but the sixth incident, which is particularly relevant to this thesis, are clearly satisfied.[186] The *Corporations Act* establishes a statutory system of expropriations to effect changes to corporate control once certain prerequisites are met.[187] While Honoré regarded compulsory acquisition by government as an allowable exception to the sixth incident,[188] the *Corporations Act* provisions grant expropriation powers to majority shareholders. Bird considers the existence of the expropriation provisions problematic insofar as classifying shares as property.[189] She argues that Honoré classed protection from expropriation as one of the four 'cardinal'[190] incidents,[191] concluding that the statutory regime for expropriation in the *Corporations Act* prevents shares from being classified as property.[192] Spender disagrees, arguing that:

> [D]efeasibility … do[es] not stop the share having the quality of property in mature legal systems nor [does it] create any impediment upon the shareholder asserting ownership … Defeasible interests are still proprietary interests since the notion of property is relative and not absolute.[193]

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[183] James McConvill, 'Do Shares Constitute Property? Reconsidering a Fundamental, Yet Unresolved, Question' (2005) 79 *Australian Law Journal* 251, 251.

[184] See, for example, the *Land Title Act*, *Property Law Act 1974* (Qld) and *Land Act 1994* (Qld) as compared to the *Corporations Act*.

[185] See, for example, Peta Spender, 'Guns and Greenmail: Fear and Loathing after *Gambotto*' (1998) 22 *Melbourne University Law Review* 96, Helen Bird, 'A Critique of the Proprietary Nature of Share Rights in Australian Publicly Listed Corporations' (1998) 22 *Melbourne University Law Review* 131 and McConvill, above n 183.

[186] Spender, above n 185, 113–15.

[187] Part 5.1 and Chapters 6 and 6A *Corporations Act*.

[188] Honoré, above n 123, 119 quoted in Bird, above n 185, 151.

[189] Bird, above n 185, 150.

[190] Ibid.

[191] Ibid.

[192] Ibid.

[193] Spender, above n 185, 115 [footnotes omitted].

Fridman supports Spender's conclusion that shares are proprietary in nature,[194] noting that various forms of property are defeasible.[195] While Spender argues that the recognition of shares as proprietary necessitates the adoption of 'property rules',[196] Fridman disagrees. Instead, he concludes that 'liability rules' may apply.[197] The existence of liability rules do not result in a loss of the asset's classification as proprietary. Instead, they ensure an owner is compensated for the expropriation of his or her rights to preserve economic efficiency.[198]

The mere existence of a statutory system of expropriation does not prevent shares being classified as property. Similarly, property may be regulated through both the application of property rules and liability rules facilitating expropriation of the asset in exchange for adequate compensation. Use of liability rules does not convert the asset into a non-proprietary right.

A share, by definition, is a fractional part of a whole.[199] Corporate shareholders own a percentage of the company proportionate to their shareholding. In a community titles scheme, each owner's interest includes both title to the lot and a proportion of the common property,[200] held by the owners as tenants in common.[201] Shares are divided based on the interest schedule lot entitlements for the scheme.[202] Unlike ownership of a freestanding property, where the indefeasible title extends only to the immediate parcel of land, all owners of community titles scheme lots are also fractional owners of the larger scheme asset. This shared ownership of a larger asset, occurring in both corporations and community titles schemes, arguably renders corporate law principles relevant to schemes. That is, the principles in the *Corporations Act,* which establish a process to balance the conflicting interests of shareholders when changes of control are sought, may guide the implementation of a system that balances stakeholder rights in a community titles scheme termination. The *Corporations Act* balances stakeholders' interests by rendering proprietary rights

[194] Saul Fridman, 'When Should Compulsory Acquisition of Shares be Permitted, and, If So, What Ought the Rules Be?' in Ian Ramsay (ed), *Gambotto v WCP Ltd: Its Implications for Corporate Regulation* (1996) 117, 118.

[195] Ibid., 130–2.

[196] Property rules prevent expropriation of the right, instead requiring voluntary transfer: Spender, above n 185, 112–15.

[197] Fridman, above n 194, 130–2.

[198] Ibid., Digby, above n 111, 106 and Joylon Rogers, 'Compulsory Acquisition under Pt 6A.2 and Its Implications for Minority Shareholders (2003) 31 *Australian Business Law Review* 97.

[199] Susan Butler (ed), *The Macquarie Dictionary* (6th ed, 2013), <https://www-macquariedictionary-com-au.libraryproxy.griffith.edu.au/features/word/search/?word=share&search_word_type=Dictionary>

[200] Section 35(3) *BCCM Act*.

[201] Section 35(1) *BCCM Act*.

[202] Section 35(1) *BCCM Act*.

defeasible in nature. Owners are protected by the application of liability rules intended to ensure adequate compensation for an expropriation of those rights.[203]

While ownership of shares is accepted as contractual, real property is often regarded as absolute. Australia's land ownership system has its roots in the United Kingdom's feudal doctrine of tenure.[204] In medieval times, estates in land were granted to tenants in exchange for the rendering of services or provision of goods.[205] Absolute, or allodial, ownership was held only by the monarch, not the landholding tenants.[206] Three of the lesser forms of ownership granted in medieval times are still in place today.[207] With respect to freehold interests, land in Queensland may be held in one of two estates. The highest level of ownership in Queensland is an estate in fee simple.[208] Ownership rights in an estate in fee simple are limited[209] through the conditions imposed in the Crown deed granting the estate,[210] and as varied by law.[211]

This thesis argues that neither the existence of estates in fee simple, rather than allodial, ownership in land, nor controls imposed in the *Corporations Act*, should affect the identification of the item as property, or the abstract concept of property itself.[212] Similarly, the amendment of those ownership rights should not impact classification or conceptualisation of the item as property either.[213] Doing so would reduce a theoretical definition of property to an exercise in statutory interpretation.[214] It is an over-simplification of the bundle of rights theory to use Honoré's incidents as a checklist, non-

[203] Section 602 *Corporations Act.*

[204] Carmel MacDonald, Les McCrimmon, Anne Wallace, Michael Weir and Sally Sheldon, *Real Property Law in Queensland* (2nd ed, Law Book Co, 2005), 19.

[205] Ibid.

[206] Ibid.

[207] Those estates are an estate in fee simple, an estate in fee tail and a leasehold estate. In relation to the feudal doctrine of tenure, Brennan J held that it was of fundamental importance in today's understanding of Australian land law, and that any attempt to overturn its applicability would be impossible 'without fracturing the skeleton which gives our land law its shape and consistency': *Mabo v Queensland (No 2)* 1992 175 CLR 1, 45.

[208] Section 19 *Property Law Act*.

[209] Adrian J Bradbrook, Susan MacCallum and Anthony P Moore, *Australian Property Law Cases and Materials (*3rd ed, Thompson Law Book Co), 34.

[210] Section 21 *Land Act*.

[211] Bradbrook, MacCallum and Moore, above n 209, 34.

[212] Ibid.

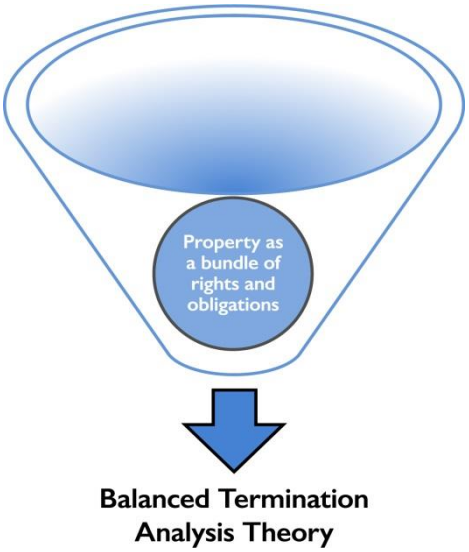
[213] Ibid.

[214] An example of this is Rogers, who concludes that 'Pt 6A.2 … is consistent with the view of shares as a form of financial investment, rather than as an inalienable property right': Rogers, above n 198, 112.

satisfaction of which precludes recognition of a proprietary interest.[215] This is particularly the case if the 'propertiness' of an object is contingent on a satisfactory interpretation of the property related laws in effect in any one jurisdiction at a set point in time. A more useful understanding of the bundle of rights held by an owner is achieved through the adoption of a modest interpretation.[216] That is, the incidents of ownership represent an owner's potential rights and obligations. Viewing the incidents as prerequisites for recognising the object as property creates a static and inflexible theoretical view of property,[217] instead of a more relative construct.

Freedom from expropriation is merely one of Honoré's incidents of property, or sticks in the bundle of ownership rights. Laws enabling fragmented ownership to be reassembled through expropriation impact on the sixth incident. Regulating the circumstances in which expropriation is permitted, and controlling the exercise of those powers by affording protections to stakeholders, will enable a balance to be struck between stakeholders with competing interests. The theoretical model developed in this chapter is a synthesis and reinterpretation of Personhood Theory and Anticommons Theory. Underpinning the synthesised theory is the view of property, as depicted in Figure 2.1, as a bundle of rights and obligations which are subject to statutory modification.

FIGURE 2.1: FIRST ELEMENT OF BalTAT



[215] Munzer, above n 175, 272.

[216] Henry E Smith, 'Property is Not Just a Bundle of Rights' (2011) 8(3) *Econ Journal Watch* 279, 288.

[217] Kevin Gray, 'Property in Thin Air' [1991] *Cambridge Law Journal* 252, extracted in Bradbrook, MacCallum and Moore, above n 209, 42.

Part 2 of this chapter seeks to further develop the synthesised BalTAT, in order to better balance stakeholder interests associated with terminations of community titles schemes.

PART 2 – BALANCED TERMINATION ANALYSIS THEORY

This part utilises a resolution-based dialectic methodology to develop a theoretical framework balancing rights between community titles scheme stakeholders in a termination. Margaret Radin's Personhood Theory,[218] which demands a high degree of protection to 'personal' property, is utilised as the 'thesis'. The weaknesses of Personhood Theory are identified, then supplemented by the strengths in the 'anti-thesis', Michael Heller's Anticommons Theory,[219] which regards property as a scarce economic resource prone to underuse where veto powers held by a multiplicity of owners exist. Using a resolution-based dialectic methodology to deconstruct Personhood Theory and Anticommons Theory creates an integrated theoretical framework from the strengths of each theory, while avoiding the weaknesses of each. BalTAT, derived from the analysis in this chapter, is then used as the theoretical yardstick to assess law reform options for the *BCCM Act* termination provisions in this thesis.

RESOLUTION-BASED DIALECTICS

Dialectics is a 'critically interrogative'[220] methodology[221] that aspires to a higher level of understanding through 'self-conscious and open critique'.[222] Discursive, or resolution-based, dialectics is a cyclical process of identifying contradictions that weaken a theoretical position.[223] Once identified, tensions, inconsistencies and weaknesses may be removed by engaging in a question-and-answer process,[224] which contrasts the theory with a divergent but potentially complementary theory.[225]

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[218] Radin, above n 126.

[219] Heller, above n 32, 624.

[220] Mark Zuss, 'A Dialogue on Dialectics' (2014) 9 *Cultural Studies of Science Education* 567, 569.

[221] Ibid., Robert Burch, 'Dialectic' (2004) 30(4) *English Studies in Canada*) 16, 16 and 18, David B Weaver, 'Asymmetrical Dialectics of Sustainable Tourism: Toward Enlightened Mass Tourism' 53(2) *Journal of Travel Research* 131, and Nicholas Rescher, *Dialectics: A Classical Approach to Inquiry* (Ontos Verlag, 1998), 1 and 6.

[222] Zuss, above n 220, 569.

[223] Rescher, above n 221, 5.

[224] Burch, above n 221, 18.

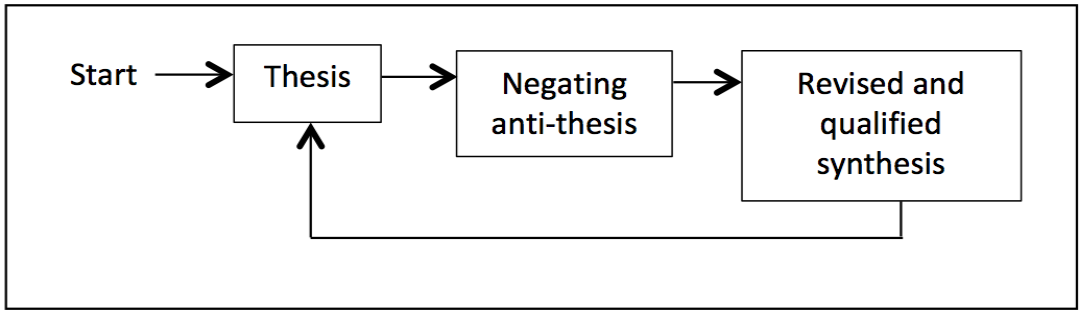
[225] Weaver, above n 221, 131.

Resolution-based dialectics does not seek to destabilise or debunk an individual theory, nor is either theory regarded as incorrect. Rather, the analysis undertaken in the exercise drills down to the key truths of each theory, assembling and synthesising the 'essential good' from both theories.[226]

The outcome sought from a dialectic analysis is the development of a strengthened hybrid from two opposing positions.[227] It is not, however, merely a combination of theories, or a balancing of competing priorities to achieve a compromise.[228] Instead, the synthesis seeks to transcend the conflicts in the thesis and anti-thesis, crafting an enlightened viewpoint.[229]

A diagrammatic portrayal of the process is presented in Figure 2.2. The resulting synthesis is not necessarily the mathematical mid-point between the thesis and anti-thesis. Rather, asymmetry is a temporary point in a cycle of continuous improvement, furthered through 'renewal and transformation' when tensions between competing points are identified.[230]

FIGURE 2.2: DIAGRAMMATIC DEPICTION OF DISCURSIVE OR RESOLUTION-BASED DIALECTICS[231]



There is vast potential scope for a resolution-based dialectic analysis of property rights and economic thinking. Discussion in this chapter is limited to a focus on Personhood Theory and Anticommons Theory in the context of the contradictions identified in their application to

[226] Ibid., 132.

[227] Rescher, above n 221*,* 4–5.

[228] Yrjö Engeström and Annalisa Sannino, 'Discursive Manifestations of Contradictions in Organizational Change Efforts' (2011) 24(3) *Journal of Organizational Change Management* 368, 371.

[229] Ibid., and Weaver, above n 221, 131–2.

[230] Weaver, above n 221, 132.

[231] Rescher, above n 221*,* 4.

community titles schemes. The investigation centres on emotional attachment and economic considerations, as well as protection of ownership versus the creation of a system for expropriation.

EMOTIONAL ATTACHMENT AND ECONOMIC ASSETS

THE THESIS: PERSONHOOD THEORY

Professor Radin's article, 'Property and Personhood',[232] describes Personhood Theory as an attempt to define the scope of desirable protections for certain types of property.[233] Radin acknowledges that Personhood Theory does not justify the existence of property rights in the same way that liberalism or utilitarianism do. Rather, Personhood Theory is intended to overlay existing property theories, such as liberalism, to provide a moral justification for protecting 'personal' property. Radin classifies property as 'personal' when it holds a special place of importance within a person's sense of self.[234]

Personhood Theory is not a stand-alone theory, but rather is intended to overlay existing property foundations. As a result, it is necessary to first explore liberalism, the foundation of property rights in western common law liberal legal systems. This thesis does not purport to challenge liberalism as the theoretical foundation of property rights. Instead, the recommendations proposed seek to reinterpret core foundational principles, such as Honoré's sixth incident. Accordingly, an initial exploration of liberalism demonstrates how Personhood Theory fits within a liberalist framework. Performing this analysis also enables identification of the points at which Personhood Theory departs from liberalism. Those unique aspects of Personhood Theory may then be critically analysed using a resolution-based dialectic methodology. Therefore, this sub-section begins with a simple overview of liberalist ideology. It highlights the difficulties in liberalism's application to community titles scheme ownership caused by the incongruity between foundational principles such as autonomy and interconnectivity. This uncomfortable fit between liberalism and community titles schemes provides an opportunity to consider Personhood Theory as an overlay to fill the gaps in liberalism. Personhood Theory's conceptualisation of a 'person' is analysed and Radin's conclusion that a person may develop a deep emotional attachment with their property are also considered.

[232] Radin, above n 126.

[233] Ibid., 958.

[234] Ibid., 959.

Liberalism theorises individuals as largely disconnected from the surrounding community.[235] This disconnect supports liberalism's primary ideology: freedom.[236] Freedom to own and deal with property at the owner's discretion is a foundational right of Australia's property law system. An individual may engage in self-interested behaviour and, by doing so, is presumed to act both autonomously and rationally.[237] Singer dismisses autonomous ownership as a fallacy.[238] He argues liberalism's assertion that owners are autonomous actors ignores the interdependence between those individuals and the communities they live and interact in.[239] The interdependence between those actors results in owners being intrinsicly linked to both their neigbours and the surrounding community from their membership as a citizen:[240]

> 'Part of what it means to be a member of society, to be an owner among owners, is to be part of a real or imagined social contract that limits liberty to enlarge liberty, that limits property to secure property'.[241]

Singer argues that an owners' membership of society in turn, creates obligations associated with property ownership. Those obligations include the requirement to comply with land use restrictions and planning laws and payment of taxes and other fees assessed on land. In addition, these obligations also extend to conforming with property related legislative requirements that expressly benefit others, without necessarily receiving a commensurate benefit or compensation.[242] This obligation is directly applicable to community titles schemes, for example the land use controls implemented via by-laws.

The inherently relational nature of property ownership means that autonomy cannot, without more, render an owner's rights absolute, despite the impact on neighbouring property owners' rights. Liberalism recognises the relational nature of property ownership through the concept of harm – self-interested, rational use of property may impose harms on others. Therefore, in order to protect

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[235] Blackstone, above n 165, 419 and Gregory S Alexander and Eduardo M Penalver, 'Properties of Community' (2009) 10 *Theoretical Inquiries in Law* 127.

[236] Atiyah, above n 182, 113, Singer, above n 34, 329.

[237] Alexander and Penalver, above n 235.

[238] Singer, above n 34, 329.

[239] Ibid.

[240] Ibid, 328.

[241] Ibid, 329.

[242] Ibid, 328.

all owners' freedoms, limited government regulation is justifiable.[243] However, that justification extends to the redefinition of an owner's bundle of property rights[244] and the limitation of an individual's autonomy by the state[245] only to the extent necessary to prevent harm to others or the public interest.[246]

In a community titles scheme setting, it is not possible to achieve complete autonomy from other owners. The interconnectedness[247] between owners and occupiers is recognised in the *BCCM Act*. Both the co-ownership of scheme common property and the regulation of use and enjoyment of lots and common property through by-laws[248] are examples of the inextricable link owners have with the surrounding community of other lot owners and occupiers. Given these statutory requirements, liberalist conceptions of an autonomous, independent owner do not accurately describe ownership of, or residence in, a community titles scheme lot.

Radin argues that liberalism's view of individual autonomy as an abstract concept fails to recognise the connection a person may have to their external environment[249] and the need to exercise control over 'things' that shape that environment.[250] Unlike liberalism, Radin does not regard liberty as the keystone to Personhood Theory; rather, Radin identifies 'personal embodiment or self-constitution in terms of "things,"' or 'personhood' as being of pre-eminent importance.[251] Those 'things' that are intimately bound with an individual's self deserve more stringent protection under law.[252]

In order to determine which property is deserving of additional protection, Personhood Theory begins with the conceptualisation of a philosophical person. Radin bases her theoretical person on Hegel's definition:[253] 'an abstract autonomous entity capable of holding rights, a device for

[243] Davidson, above n 181, 1053.

[244] Gregory S Alexander, 'The Complex Core of Property' (2008–09) 94 *Cornell Law Review* 1063, 1066.

[245] Davidson, above n 181, 1053.

[246] Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2008-2009) 94 *Cornell Law Review* 745.

[247] Foster and Bonilla state that humans are 'deeply interconnected beings that need each other to meet their physical and spiritual needs': Sheila R Foster and Daniel Bonilla, 'The Social Function of Property: A Comparative Law Perspective' (2011) 80 *Fordham Law Review* 101, 104–5.

[248] Section 169 *BCCM Act.* By-laws bind both owners and occupiers of scheme lots: Sections 59(1) and (2) *BCCM Act.*

[249] Radin, above n 126, 960.

[250] Ibid.

[251] Ibid., 958 and 960.

[252] Ibid., 959 and 960.

[253] G Hegel, *Philosophy of Right* (T Knox trans., 1821) referred to in Radin, above n 126, 958.

abstracting universal principles and hence by definition devoid of individuating characteristics'.[254] Radin, however, differentiates her theoretical person from Hegel's by acknowledging that individuating characteristics are what makes a person unique.[255]

Following Hegel, Radin places her theoretical person into the external world by adding property and, consequently, the need for property rights. Hegel sets relationships with personal objects as the first of numerous stages in developing the abstract autonomous into a fully-fledged individual.[256] By way of contrast, Radin argues that her theoretical person is inseparable from its relationship with personal objects. That is, a person's identity is constituted by their personal objects.[257]

Radin readily concedes that not all objects are intimately connected with a person's sense of self. She adopts Hegel's idea of embodied will[258] to acknowledge that people have ongoing relationships with goods. Those relationships may result in certain objects becoming closer to the centre of a person's self-identity, being and 'sanity'.[259] Continuous self-expression and self-development through an object is possible,[260] and memories serve to reinforce that self-identity.[261] Over time, goods used for self-expression and self-development become intertwined with the way a person considers who they are as a personal entity in the world.[262] To demonstrate the connection between object and self, Radin uses the example of a person expressing generosity through gifts of fruit from their orchard. She states that if the orchard ceases to be that person's property, they may no longer express their generosity.[263] The connection between self-identity and an object, such as the orchard,

[254] Radin, above n 126, 971.

[255] Ibid., 972.

[256] To complete the development of the abstract autonomous into an individual, Hegel considers that the person must engage in a 'property relationship with something external': Ibid., 972–3.

[257] Ibid., 968.

[258] Radin supports this connection, when the idea of embodied will is separated from Hegel's 'grand scheme of absolute mind': ibid., 977.

[259] Ibid.

[260] Radin states that the general idea of self-expression through objects is familiar: ibid., 968.

[261] This discussion is based on Locke's view of 'persons as continuing self-consciousness characterized by memory': ibid., 967. See also Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580, 598.

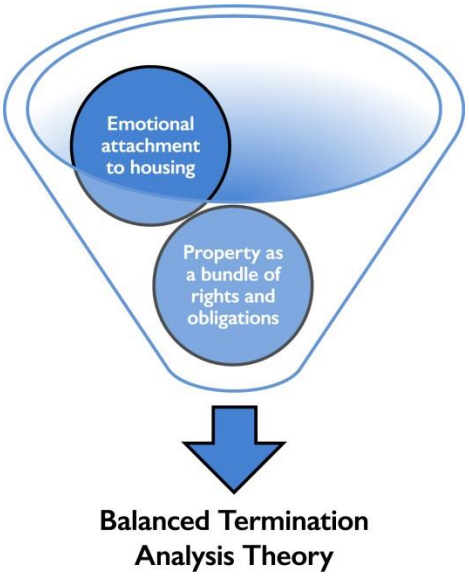
[262] Radin, above n 126, 988.

[263] Ibid., 968.

serves to justify control of the object being accorded to the person who has the strongest personal connection with it.[264]

Recognising that a person may develop an emotional attachment to their property affords respect to those owners and occupiers. The second element of BalTAT, depicted in Figure 2.3, is a respect of owners and occupiers through the recognition of that potential emotional attachment.

FIGURE 2.3: SECOND ELEMENT OF BalTAT



Ongoing control of an object utilised for self-expression and determination is important to enable realisation of future expectations associated with an expression of self.[265] However, there is a distinction between using property to express oneself and it being a necessary construct for self-development.[266] It is argued that Personhood Theory fails to recognise this nuance.

In order to classify a certain property as deserving of greater protection than another, Radin considers that a person must have an intimate connection with his or her property and the relationship must be 'good'[267] – healthy not unhealthy. The risk of 'object-fetishism'[268] means that

[264] Ibid., 960.

[265] Ibid., 968.

[266] Stephanie M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093, 1112.

[267] Radin, above n 167, 968.

[268] Ibid., 961.

'one should not invest oneself *in the wrong way* or *to too great an extent* in external objects'.[269] In Personhood Theory, differentiating a good person–object relationship from a fetishistic one is as simple as 'tell[ing] the difference between a healthy person and a sick person, or … a sane person and an insane person'.[270] The impact of classifying a relationship between person and object as fetishistic merely results in the property being 'fungible' rather than 'personal' property – it is deemed that a person lacks a sufficient relationship with the property to warrant its increased protection under law.[271]

Radin asserts that the 'caricature capitalist'[272] who subordinates people to market commodities, would likely be distasteful to many.[273] She posits that a moral cut-off point at which relationships with objects are deemed healthy or unhealthy allows Personhood Theory to protect against the fetishistic attachments to objects that caricature capitalists may display.[274] The test determining the level of attachment, and the appropriateness or otherwise of a person's relationship with an object, are merely an exercise in balancing competing factors.[275] Personhood Theory is an inwards-focused theory, considering only the relationship between an individual property-holder and their property. The protection of a person's property is of paramount importance, irrespective of the impact that protection has on others.

Personhood Theory suffers from the same deficiency as liberalism's autonomous person with regard to community titles scheme lots – the interconnectedness between property owners and the surrounding community is largely ignored. The unavoidable relationship with owners established by the *BCCM Act* may impact other owners of personal property to a large degree. This weakness may be overcome by considering the divergences in Anticommons Theory, which address an aspect of community titles scheme ownership unrecognised in Personhood Theory. Anticommons Theory acknowledges that fragmentation of lot ownership may have a wide-reaching impact on the wider community, necessitating a balancing of rights between owners and other stakeholders.

[269] Ibid.

[270] Ibid., 969.

[271] Ibid., 970.

[272] Ibid.

[273] Ibid.

[274] Ibid.

[275] Ibid.

THE ANTI-THESIS: ANTICOMMONS THEORY

There is an uncomfortable fit between property being viewed as the 'sole and despotic dominion which one man claims and exercises over … things … in total exclusion of … any other individual in the universe'[276] and the interconnectedness of community titles scheme lot owners. Personhood Theory seeks to increase protection of 'personal' property to preserve the attachment and importance the property has to a person's sense of self.[277] However, insisting on increased protections for some owners may impact negatively on others' rights. Anticommons Theory may help to achieve a balance between competing rights in this respect.

The reconfiguration of a development parcel into a community titles scheme, and subsequent sale of lots within that scheme, creates a fragmentation of ownership over the development parcel. A property (i.e. the development parcel as a whole) may become subject to underuse as a result of the fragmented ownership of scheme lots.[278] Anticommons property arises through the long-term underuse of a finite asset resulting from fragmented ownership, and has potentially wide-reaching impacts on communities.[279] This sub-section discusses the optimal use of scarce resources and how fragmentation of ownership may cause underuse.

Heller asserts that the goal for the identification and enforcement of property rights should be to find the 'sweet spot' between commons and anticommons property.[280] Commons property is a scarce resource that may be enjoyed by a potentially unlimited number of individuals.[281] There are no controls limiting consumption of the resource, despite its finite nature.[282] Unsustainable use of limited resources by a collection of individuals who enjoy it independently of others[283] renders that resource prone to over-consumption.[284] It is generally considered that the cure for over-use of commons property is privatisation – the allocation of private property rights to an individual to

[276] Blackstone, above n 165, 419.

[277] Radin, above n 126, 959.

[278] Heller, above n 32.

[279] Heller, above n 135, 44 and 48.

[280] Ibid., 27.

[281] Heller, above n 32 and Michael A Heller, 'The Boundaries of Private Property' (1998–99) 108 *Yale Law Journal* 1163, 1194.

[282] Heller, above n 32, 676.

[283] Ibid., 677.

[284] Heller, above n 135, 24.

enable them to control the resource's use.[285] However, privatisation may go too far.[286] Extreme privatisation of property rights may result in underuse because too wide a spectrum of owners are empowered to control the resource.[287] Each rights-holder may veto use of the asset by exercising control rights. Therefore, the 'sweet spot' property regulation should strive towards avoids both overuse and underuse, instead aiming for optimal use. Anticommons Theory approaches the question of what is optimal use from an economic[288] risk-regulation perspective.[289] Avoiding both over- and underuse becomes an exercise in considering sometimes contentious tradeoffs, which go to a society's core belief system.[290]

Heller presents empty Moscow storefronts as an example of underuse.[291] The fragmented ownership rights of the storefront owners rendered it too difficult for retailers to obtain all necessary consents to operate from an outlet.[292] Instead, business owners opened temporary kiosks on the streets. Payment of both bribes to government officials and protection money to the mafia was simpler than negotiating with myriad rights-holders to secure leases of the shops.[293]

Identification of underuse is relatively simple when considering tenanted versus empty storefronts in a city where, at the time, the monthly rent for office space was second in the world only to that of Tokyo.[294] Empty tenancies reflected 'foregone economic opportunities and lost jobs'.[295] However, if a property is occupied when assessing underuse, it is harder to determine what the optimal use is. Speaking in the context of eminent domain, as compulsory acquisition is known in the United States, Heller states:

[285] Ibid., 17 and Heller, above n 32, 677.

[286] Heller, above n 135, 19.

[287] Ibid., 35–7.

[288] Heller argues that the considerations are wider than an economic analysis; however, he goes on to state that 'we have to put dollar values on human lives and on the costs of overuse and underuse behaviours': ibid., 36.

[289] Ibid., 36–7.

[290] Ibid.

[291] Ibid., 624.

[292] Ibid., 639.

[293] Ibid., 643–4.

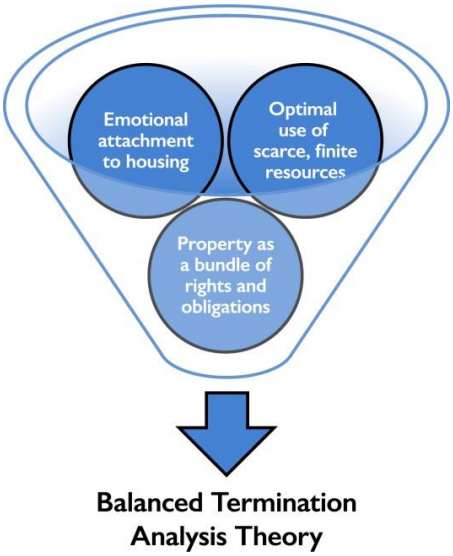
[294] Rents in Moscow at the time of Heller's article exceeded prices per square metre in London, Paris, New York, Chicago and Berlin: ibid., 656.

[295] Ibid., 639.

> Property often functions well as private property on one scale of aggregation, but as an anticommons on another … and justifies the routine decision to use eminent domain where private property is … more valuable in another scale of use, and cannot be collected for that use because of holdouts by dispersed owners. In these cases, there may be a tragedy of the anticommons at the level of the more valuable use ...[296]

The current occupancy of the property may not reflect its optimum use on that higher scale. The failure to reassemble fragmented ownership of a scarce resource, resulting in protracted low-value rather than optimal use of an asset, is a *tragedy of the anticommons*.[297] The third element of the model, set out in Figure 2.4, recognises the desirability of optimising use of scarce resources to avoid a tragedy of the anticommons.

FIGURE 2.4: THIRD ELEMENT OF BalTAT



Two types of anticommons property exist as a result of ownership fragmentation: legal and spatial anticommons.[298] Legal anticommons are caused by the initial endowment of substandard ownership rights over the same resource to multiple persons.[299] For example, upon privatisation occurring in Moscow, the government made separate grants of the right to sell, receive profits from sale, receive lease revenue, and determine use and occupation rights of the storefronts.[300] Use of the space was

[296] Heller, above n 281, 1221.

[297] Heller, above n 32, 624 and 626.

[298] Ibid., 671.

[299] Ibid., 651.

[300] Ibid., 638.

impossible without prior consent of all rights-holders.[301] Any single owner could veto use of the asset, rendering the space vacant and underused.[302]

By way of contrast, owners of resources affected by spatial anticommons generally hold more complete ownership rights than in legal anticommons scenarios. However, the anticommons problem arises because the property is too small for ordinary use.[303] Heller again refers to his experience in Moscow during the transition from socialism to capitalism, citing *komunalkas* as examples. *Komunalkas* were large central-city apartments housing multiple generations of different families in each bedroom, with shared kitchen and bathroom facilities.[304] Upon the privatisation of property in Russia, each tenant-family was granted ownership rights to their room. In order to change the use of a *komunalkas* – for example, to convert it into a single family dwelling or office space, consent of all tenant-families was required.[305] Unless unanimous consent was obtained, the *komunalkas* either continued as 'shared' housing or become vacant.[306]

The underuse of a property on a higher scale is a form of spatial anticommons. While the asset itself may be capable of ordinary use, it may be too small to be utilised at an optimum level. This is the case with community titles scheme lots. Each lot may be capable of ordinary use as, for example, a residence. However, given the limited size, potential location and elevation within a building, restrictions on use and enjoyment included in by-laws and limitations on further development in the community management statement, a lot on its own is incapable of redevelopment into an optimal

[301] Ibid., 623.

[302] Ibid., 624.

[303] Ibid., 651.

[304] Ibid., 650–1.

[305] Ibid., 651.

[306] *Komunalkas* are perhaps at the more extreme end of the spectrum of small-living spaces compared with Australian housing conditions; however, the example may be extrapolated to draw similarities with terminations of community titles scheme under the *BCCM Act.* While an individual lot may be of a satisfactory size to maintain its current use, redevelopment of the scheme cannot occur unless the consent of all lot owners is obtained. The requirement for unanimous consent to terminate the scheme under section 78(1)(a) of the *BCCM Act* creates the same veto power over a termination of the scheme that each *komunalkas* tenant holds in respect of the use of the apartment as a whole.

Interestingly, section 78(1)(b) of the *BCCM Act* also creates potential legal anticommons in terminations by requiring the consent of tenants under registerable and short leases in the termination issues agreement. Section 78(1)(b) *BCCM Act* renders an owner's bundle of rights incomplete to action a decision to terminate a scheme, instead granting an additional veto right to tenants whose leases may be for a term of less than a year. In this regard, Schedule 2 *Land Title Act* defines a short lease as:

'(a) for a term of 3 years or less; or

(b) from year to year or a shorter period.'

use that would otherwise be achievable if the scheme land as a total package was held. Underuse caused by fragmentation may be rectified through the rebundling of property rights to grant one owner control over the asset and, in turn, remove other right-holders' veto powers.[307] Unfortunately for purchasers, reassembling rights into a reusable bundle 'can be brutal and slow'.[308]

Heller uses a hypothetical example based on approximate *komunalkas* market values to demonstrate reassembly of ownership under a free market.[309] Sold separately, each of the four bedrooms in a *komunalkas* may be worth $25,000 (totalling $100,000); however, the market value of the entire *komunalkas* apartment may be $500,000. Use of each of the four bedrooms by separate families represents an anticommons use; while from a valuation perspective, the optimal use of the property may be its sale as a single large apartment. Converting the *komunalkas* from an anticommons use may represent a gross aggregation surplus[310] of $400,000, which potentially could be shared between the tenants and the purchaser. Knowing this possible gain, tenants would not agree to sell their bedrooms for $25,000. Instead, tenants would typically opt to take sole ownership of a substitute apartment in a different location valued at approximately $75,000. The $50,000 gain to each tenant represents that owner's share of the aggregation surplus they have extracted from the buyer. Assuming that all four tenants agree to the same $75,000 consideration in exchange for transferring ownership rights in their bedroom of the *komunalkas,* the assembler will pay $300,000 for a property valued at $500,000. The tenants will receive $50,000 each in addition to the $25,000 anticommons value of the property, and the assembler will be entitled to the remaining $200,000 from the assembled market value, less assembly costs.[311]

Difficulties arise in the reassembly of ownership when fragmentation has occurred. For example, transaction costs may prevent the market operating to achieve a successful reassembly.[312]
In addition, strategic behaviour by an owner to maximise their share in the gross aggregation surplus may delay negotiations between a purchaser and rights-holder or, potentially, cause those negotiations to fail.[313] This is the 'holdout problem'. Where no statutory mechanisms exist to

[307] Heller, above n 32, 625.

[308] Ibid.

[309] Ibid., 651–2.

[310] Kominers and Weyl, above n 134.

[311] Heller, above n 32, 651–2.

[312] Ibid., 625 and 629.

[313] Kominers and Weyl indicate that obtaining the unanimous consent of many complementary sellers is unlikely. There is a high probability that 'at least one genuinely stubborn holdout will undermine the assembly': Kominers and Weyl, above n 134, 361.

facilitate reassembly if no agreement is reached by the parties, strategic behaviour by owners may prevent the re-bundling of rights, and perpetuate the underuse problem.[314]

Those *komunalkas* tenants who acted strategically and sought to secure a greater share of the total aggregation surplus than other tenants are an example of holdouts. Heller concluded that where assembly costs exceed the economic benefits to the buyer,[315] the reassembly may be discontinued.[316] Interestingly, the holdout problem may occur despite informal norms, developed during occupation of the *komunalkas,* that previously ensured ongoing cooperation between tenant-families.[317] When exiting a *komunalkas*, 'each tenant is a monopolist with an incentive to engage in … strategic behaviour, such as holding out for the bundling surplus'.[318] That is, the one-off potential to obtain a financial gain may prompt behaviour outside of the informal norms.[319]

The impact of holdouts on the reassembly of fragmented ownership and resulting underuse of scarce resources is acknowledged as the fourth element of the model, shown in Figure 2.5.

The balance to be struck is delicate. Swinging the pendulum of property rights too far to facilitate regrouping of fragmented rights may encourage too much reassembly. Where that occurs, inefficient reassembly projects may proceed, undermining social standards and fairness.[320] Therefore, optimal use is not the only relevant consideration when redefining or reallocating private property rights.[321]

FIGURE 2.5: FOURTH ELEMENT OF BalTAT

[314] Hanoch Dagan, 'The Social Responsibility of Ownership' (2006–07) 92 *Cornell Law Review* 1255, 1259 and Patricia Munch, 'An Economic Analysis of Eminent Domain' (1976) 84(3) *Journal of Political Economy* 24, 474.

[315] In the case of the *komunalkas* example, this would be a reduction in, or loss of, the $200,000 gain from assembling the apartment uses.

[316] Heller, above n 32, 653.

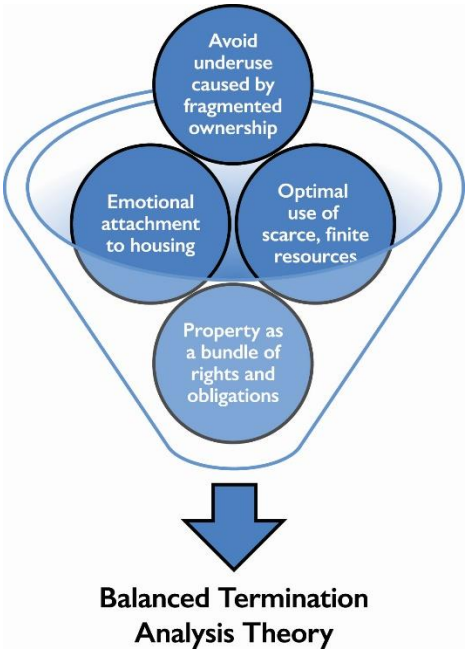
[317] Ibid.

[318] Ibid.

[319] Ibid.

[320] Kominers and Weyl, above n 134, 361.

[321] Singer, above n 34 and Heller, above n 32, 639.



Personhood Theory argues that an individual's dwelling deserves additional protection because of the special importance housing has on a person's sense of self and being. While Radin's theory suffers some weaknesses, it highlights additional concerns that help to balance the purely economic[322] risk-regulation[323] focused assessment of optimal use under Anticommons Theory. In the next section, Personhood Theory's classification of housing as 'personal' property, and the type of protection warranted by such a classification, are investigated. The weaknesses in Radin's theory are supplemented by Anticommons Theory's view of expropriation in order to develop a robust and balanced theoretical framework.

RESIDENTIAL PROTECTIONISM[324] AND EXPROPRIATION

THE THESIS: PERSONHOOD THEORY

A balancing of private property rights is a tradeoff between the interests of stakeholders. Protections granted to landowners by indefeasibility of title[325] are relaxed in order to grant another interested party the power to overcome holdouts. Anticommons Theory argues for a reallocation or redefinition of rights to prevent underuse and overcome negative economic impacts on the wider

[322] Heller, above n 135, 36.

[323] Ibid., 36–7

[324] Stern, above n 266.

[325] Section 184(1) *Land Title Act* provides that 'A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.'

community and other anticommons owners. Radin acknowledges the economic perspective but positions her argument as a moral one:[326] 'property for personhood gives rise to a stronger moral claim than other property,'[327] in turn justifying increased protection of those 'personal' property rights.[328] This sub-section discusses the classification of property as personal and explains Radin's justification for increased protection of those objects.

Property, according to Radin, is either 'fungible' or 'personal'.[329] The categories are not distinct; rather, they reflect a continuum of attachment to goods. The level of protection afforded to an item of property should correspond with the importance of the item to the owners' sense of self.[330] Fungible property, which is not closely connected with a person's self-identity and is substitutable by compensation, should not be protected as stringently.[331] Personal property, on the other hand, deserves a high degree of protection to ensure the continuity of the relationship between person and object.[332] The determination of which objects are personal property and which are fungible property is a moral judgement to be made by the appropriate decision-maker in order to grant a suitable level of protection.[333]

Radin expects owner-occupied housing to be at the 'personal' end of the continuum.[334] The relationship a person forms with their dwelling is not deleterious or 'fetishistic',[335] but rather a healthy attachment – that is:

> One's home ... is the scene of one's history and future, one's life and growth ... one embodies or constitutes oneself there. The home is affirmatively part of oneself – property for personhood – and not just the agreed-on locale for protection from outside interference.[336]

[326] Radin, above n 126, 985.

[327] Ibid., 978.

[328] Ibid.

[329] Ibid., 986.

[330] Ibid., 985–6.

[331] Ibid., 986.

[332] Ibid., 992.

[333] Ibid., 987.

[334] Ibid.

[335] Ibid.

[336] Ibid., 992.

Allowing an individual to control objects critical to their personhood is argued to further personal liberty and assist those individuals to develop their sense of self.[337] Continuity and stability in relation to goods is important; they are anchor points for an individual within the wider world.[338] Loss of that anchor – personal property interconnected with one's self-identity – causes that individual to suffer disruption and disorientation.[339]

Radin opines that certain items of property are so far along the personal end of the spectrum that their expropriation, and the resultant loss of 'self' to the individual, cannot be justly compensated.[340] In those circumstances, Radin suggests that a presumption preventing personal property from being expropriated would serve as a possible 'substantive due process' limitation on expropriation powers.[341] Radin finds it anomalous that this limitation has not developed in eminent domain law, citing two possible causes for the failure.[342] First, there is a need to uphold the perception of an impartial government and second, administrative budget restrictions may prevent the assessment of the suitability of individual properties for expropriation.[343]

Loss of personal property to another private sector entity through a legislative-empowered expropriation is similarly repugnant to Radin, particularly where the recipient will hold that property as 'fungible development rights'. [344] She argues the appropriateness of courts striking down such legislation in order to avoid destroying 'personality ties' with a person's home.[345]

Where multiple parties have competing interests over the same object, such as leasehold and reversionary interests over residential property, Radin argues that personhood interests should be

[337] Ibid., 960.

[338] Ibid, 1004.

[339] Ibid.

[340] Ibid., 1005.

[341] Ibid., 1005–6.

[342] Ibid., 1006.

[343] Ibid.

[344] Ibid. Kirby J expressed a similar view in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

[345] Radin, above n 126, 1006. It is interesting to note that the US Supreme Court in *Kelo v City of New London* 545 US 469 (2005) upheld the expropriation of Mrs Kelo's house. The property, together with 143 others, was earmarked for redevelopment by a private-sector developer. By way of contrast, the Australian High Court determined in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 that the proposed expropriation by the Parramatta City Council was invalid because of the presumption in *Clissold v Perry* (1904) 1 CLR 363 that legislation effecting a compulsory acquisition of property must be narrowly interpreted to protect private property rights. These cases are discussed in more depth in Chapter 5 and Chapter 3, respectively.

prioritised, even if it is at the expense of other interests. This issue does not arise in relation to owner-occupied housing: ownership and occupation rights – and, according to Radin, personhood – are vested in the same person. A leasehold interest, however, differs. A lease is a contractual right of occupation that the fee simple holder grants to a tenant.[346] While limited rights accrue to the tenant under law and contract, Radin considers that the leasehold interest should be prioritised over the lessor's reversionary estate because of personhood.[347] Radin classifies a lease as personal property; residence in the property allows the tenant to form a non-fetishistic attachment to it.[348] Once the leasehold interest is classified as 'personal' and becomes worthy of increased protection, the owner's reversionary interest in the property is necessarily classified as fungible.[349] Increasing protection for personal property means that any limitations on the term of occupancy rights would be void so as to preserve the tenant's personhood interest in the property.[350] The outcome would be to grant permanent tenure to the tenant provided that general compliance with the other lease terms continues,[351] in turn rendering the landlord's reversionary interest conditional upon the tenant's default.[352]

Personhood Theory seeks to redefine and reallocate property rights when moral claims override justifications for the continuation or acquisition of legal title to the land. Radin considers it acceptable to override fungible property rights to enable others to achieve self-constitution through property; fungible property is simply another form of wealth, entirely substitutable with monetary compensation.[353] In Radin's view, 'Object-loss is more important than wealth-loss.'[354] Destroying ties with the 'scene of one's history and future, one's life and growth … part of oneself' is immoral.[355]

[346] Statutes have interfered with freedom to contract around tenancy agreements, restricting terms in order to protect both parties: see for example *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) and *Retail Shop Leases Act 1994* (Qld).

[347] Radin, above n 126, 994-995.

[348] Ibid.

[349] Radin does acknowledge that there may be some personhood interests that relate to fungible property because of the existence of the continuum upon which attachment to property is measured: ibid., 993–5 and 1008.

[350] Ibid., 994–5.

[351] Ibid.

[352] Ibid.

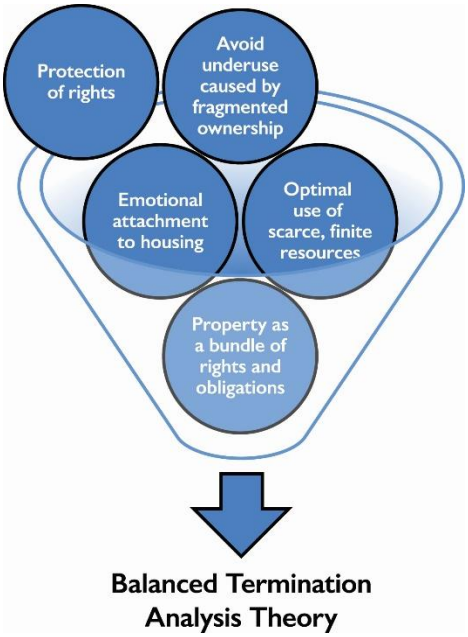
[353] Ibid., 990–1.

[354] Ibid., 1004.

[355] Ibid., 992 and 1002.

Protection of rights-holders is an important feature of a mature property rights system that encourages confidence in the market. While Radin's view on prioritisation of personhood property over fungible rights is extreme, the protection of rights-holders is essential. The fifth element of the model, depicted in Figure 2.6, reflects that desire to preserve strong property rights, in turn protecting the owners of those rights.

FIGURE 2.6: FIFTH ELEMENT OF BalTAT



Key to Personhood Theory is the assumption that people become intimately connected with their property, the loss of which may cause psychological damage.[356] However, empirical evidence generally does not support Radin's argument that ongoing control over a person's residence is necessary to preserve a person's sense of self.[357] Research suggests that while a person may like their house and personalise it to reflect their own identity,[358] expropriation of the house does not

[356] Ibid., 959.

[357] Stern, above n 266, 1096.

[358] A person may develop a connection with a new home as it becomes personalised: D Benjamin Barros, 'Home as a Legal Concept' (2005–06) 46 *Santa Clara Law Review* 255, 278–80. Factors such as the general location of the dwelling, feelings of belonging, continuity and stability, together with the social relationships established in a person's social networks may create feelings of home: 278–79.

Two studies question Radin's categorisation of a residence as personal property. In the first, 500 randomly selected households revealed that dwellings were regarded as necessities rather than 'symbolic possessions representing self or attachments to others'. Necessities also included money, furniture and transport – objects that, based on the other above-mentioned studies, do not indicate any deeper connection with self than other everyday objects: Marsha L Richins 'Valuing Things: The Public and Private Meanings of Possessions' (1994) 21 *Journal of Consumer Research* 504 in Stern, above n 266, 1112.

necessarily jeopardise the owner's concept of self, or hinder their psychological functions.[359] Research on personality and social psychology, environmental psychology and sociology suggests that social relationships and interactions,[360] rather than property ownership, are fundamental to development of self-identity.[361] This lack of empirical support for Personhood Theory is a significant

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In the second study, 55 per cent of participants did not refer to emotions in their description of feelings associated with their dwelling: Mihaly Csiksentmihalyi and Eugene Rochberg-Halton 'The Meaning of Things' (1981), 139 in Stern, above n 266, 1112.

[359] Stern differentiates between forced relocation into alternative housing and homelessness. Homelessness 'has serious mental-health effects due to extreme and chronic stress, insecurity, and disruption of social relationships' [footnotes omitted]: Stern, above n 266, 1115. Jones seeks special protection of housing because of its importance to personal and basic welfare: Jeffrey D Jones, 'Property and Personhood Revisited' (2011) 1(1) *Wake Forest Journal of Law and Policy* 93, 125, 127 and 135.

[360] Results of psychological research demonstrate that the assumed importance placed on the physical structure of the property may be false: Fox, above n 261, 592. There appears to be less of a connection between the physical structure of the building and an individual's interpretation of self than personal effects and social networks: D Benjamin Barros, 'Legal Questions for the Psychology of Home' (2008–09) 83 *Tulane Law Review* 645, 655.

[361] Research concludes that while a person's dwelling is an important possession, other items are more closely linked with self-identification than housing. In two 1987 United States studies:

A total of 248 participants ranked items such as housing, casual clothes, current vehicle and favourite book similarly. Somewhat surprisingly, participants rated favourite vacation place, hair and the United States as more representative to 'self' than their dwelling: Russell W Belk, 'Identity and the Relevance of Market, Personal and Community Objects' in Jean Umiker-Sebeok (ed), *Marketing and Semiotics* (1987) 151 in Stern, above n 266, 1111.

Fifty participants ranked the connection possessions had to self-identity. Heirlooms, diaries, photos and old letters were the most highly ranked items. Interestingly, dwellings were most frequently grouped with 'everyday possessions', including beds and telephones: Deborah A Prentice 'Psychological Correspondence of Possessions, Attitudes and Values' (1987) 53 *Journal of Personality and Social Psychology* 993 in Stern, above n 266, 1111.

By way of contrast, a third study asked 331 participants to rate 10 personal possessions, including the 'family home', on a scale rating the objects' connection to self. Those subjects rated the family home as the most connected: A Dwayne Ball and Lori Ho Tasaki 'The Role and Measurement of Attachment in Consumer Behaviour' (1992) 1 *Journal of Consumer Psychology* 155 in Stern, above n 266, 1111. However, this study has been criticised; the phrasing of 'family home' was emotively suggestive, yet too vague to determine whether the question related only to the physical structure, or included the personal possessions within it. The distinction is important. If the most important aspects of 'home' are feelings and social relationships independent of the physical structure of the property, those feelings and relationships may be replicated within another structure. Empirical data suggest that provided the physical structure meets the residents' basic amenity and security requirements, any structure may plausibly become 'home': Sandy G Smith, 'The Essential Qualities of a Home' (1994) 14 *Journal of Environmental Psychology* 31. The importance attributed to 'family home' in the study may only relate to the personal mementos of the residents, not the structure of the building.

Similar results are reported in studies from the United Kingdom. Saunders' 1986 study of 450 households in three English towns revealed that the top three answers respondents provided when questioned on the 'meaning of home' to them were 'family, love, kids'; 'relax, comfort' and 'owned, worked for': Peter Saunders, 'The Meaning of "Home" in Contemporary English Culture' (1989) 4(3) *Housing Studies* 177, 181. The responses do not relate to the physical structure of the property; rather, they refer to the social relationships and activities conducted within the structure and the economic nature of the asset. Recognising a person's dwelling as a key economic asset is important. It is plausible that a person may build an attachment to their dwelling because of its status as their main economic asset, rather than as a key construct of their identity:

weakness undermining it as a property rights theory.[362] The deficiency in Personhood Theory may be supplemented by tempering its rights protection stance through a focus on avoiding underuse and the means by which holdouts may be overcome.

THE ANTI-THESIS: ANTICOMMONS THEORY

Part 2 of this chapter has engaged in a resolution-based dialectic analysis of Personhood Theory and Anticommons Theory to identify and reinterpret key elements of a synthesised theoretical framework more suited to community titles schemes than existing theories. Those elements reflect competing interests: optimisation of use while recognising that owners may have an emotional attachment to the property, and protecting property rights. When these interests conflict and protracted underuse of scarce resources may occur, Anticommons Theory advocates for legislative intervention to achieve a balance between stakeholder rights. This sub-section investigates the justifications for the implementation of a law reform package to overcome holdouts in the reassembly of fragmented titles to scarce resources.

The vesting of ownership rights in multiple persons gives rise to a veto power; each owner must consent to a change of use prior to that change being effected.[363] Where unanimous consent cannot be achieved, the status quo must remain, even if the asset's current use is below optimal levels.[364]

The requirement for unanimous consent is a 'one-way ratchet',[365] locking in the status quo[366] until ownership changes to one or a small group of cooperative owners, or the requirement for unanimity is removed. Common Interest Communities, a form of housing in the United States, utilise a system of covenants that regulate management and use of the encumbered properties.[367] Covenants remain in force perpetually, and may only be removed or changed if the requisite level of consent is obtained in a vote of the owners, or a court rules that the covenant should be removed.[368] The

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Stern, above n 266, 1128. Forced relocation, regardless of the method adopted, may evoke concerns about financial security and the devaluing of the family unit's main asset: Stern, above n 266, 1128–9.

[362] Rescher, above n 221, 5.

[363] Heller, above n 32, 624.

[364] Heller, above n 281, 1185.

[365] Ibid.

[366] Sherry, above n 6, 230 and Property Council of Australia, above n 6, 9–10.

[367] Heller, above n 281, 1183 and 1184.

[368] There are limited exceptions that, if satisfied, will justify removal or amendment of the covenant: ibid. One of those exceptions is the 'changed condition' doctrine. The doctrine enables a court to amend or remove those covenants which are obsolete, including, for example, a covenant which regulates the process by which

encumbrance creates a potentially indefinite 'limited exclusion anticommons' through the requirement for minimum levels of owner consent to undertake prescribed activities.[369]

Veto powers held by minority dissenters engaging in holdout behaviour create blocks that may lock use at below optimal levels in perpetuity.[370] Anticommons use of an asset has a wider ranging and longer-term impact[371] than merely the immediate holdout owner. By definition, multiple owners hold rights in respect of legal anticommons property.[372] Veto rights exercised by one holdout owner impact upon the other rights-holders of the resource. Assets trapped in long-term underuse may draw owners of that resource into a 'spiral of depreciating wealth'.[373] When ageing assets near the end of their useful economic lifespan, renewal or redevelopment may become more cost-effective than maintenance.[374] Once an asset approaches this point, it becomes difficult for owners to exit the asset through a sale, as potential buyers will be unable to upgrade use while holdout owners remain.[375] Market values of affected assets are negatively impacted, particularly where under-maintenance becomes an issue.[376] Requiring unanimous consent to renew or change the asset's use indefinitely locks in existing and possibly 'decaying' or 'dysfunctional' improvements, unless a statutory solution to the holdout problem is implemented.[377]

In addition to the effect on the other rights-holders of the asset, holdouts may impact the wider community through the retention of economically obsolete assets trapped in anticommons use.[378]

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termination of a common interest community must proceed: Timothy C Shepard, 'Termination of Servitudes: Expanding the Remedies for "Changed Conditions"' (1983) 31 *UCLA Law Review* 226. By way of contrast, land use (both planning and restrictions on use) is regulated in Queensland by planning instruments created under the *Sustainable Planning Act 2009* (Qld) and, provided by-laws do not contradict planning approvals, scheme by-laws. Termination of schemes is regulated by s78 *BCCM Act.* Further, Queensland does not have an equivalent system of registerable covenants (see s 97A(2) *Land Title Act* which prohibits the registration of a covenant unless the covenantee is the State, a representative of the State or a local government). Given that termination is regulated via statute, not through covenants registered on the land, the ability for a court to amend or remove an obsolete land use or termination covenant is simply not relevant to Queensland. Accordingly, it is outside the scope of the thesis.

[369] Ibid., 1185.

[370] Ibid., 1185.

[371] Kominers and Weyl, above n 134, 361.

[372] Heller, above n 32, 651.

[373] Bentley, above n 11, 6.

[374] Warnken, Russell and Faulkner, above n 29, 155 and Property Council of Australia, above n 6.

[375] Bentley, above n 11, 6.

[376] Ibid.

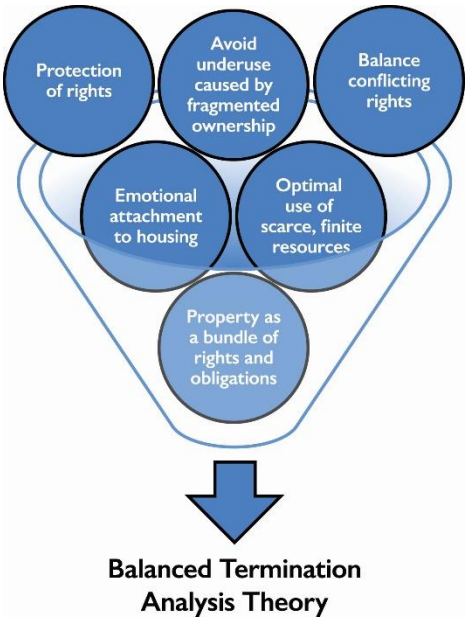
[377] Property Council of Australia, above n 6, ii.

[378] Warnken, Russell and Faulkner, above n 29, 160.

This is particularly the case where a region, such as South-East Queensland, relies on tourism as a large contributor to its domestic product.[379] Renewal of real estate assets that have reached the end of their economic lifespans also has numerous advantages: redevelopment may assist to ease scarcity concerns through higher density development or redesigned streetscapes, slow urban sprawl and meet housing needs for growing inner urban populations.[380]

While Radin argues for the grant of increased protections to personal property, that protection may have wider implications negatively affecting a much broader range of stakeholders than the immediate owner of an asset. The sometimes conflicting interests of these stakeholders must be balanced in order to minimise the negative impacts of anticommons use on both anticommons owners and the wider community. This need to balance stakeholder concerns and impacts of individuals' behaviour on others is the sixth element of the BalTAT model, represented by Figure 2.7.

FIGURE 2.7: SIXTH ELEMENT OF BalTAT



Identifying underuse of vacant property is an easier assessment than one conducted in respect of occupied property. Heller notes the difference between optimisation of use on different scales of aggregation, stating that a resource may be effectively used at one level, but act as anticommons

[379] Ibid.

[380] Queensland Department of Infrastructure and Planning, above n 25, 6; Stateline NSW, above n 25; Property Council of Australia, above n 25; City Futures Research Centre, above n 25 and Australian Bureau of Statistics above n 25.

property on another.[381] The examples of US Common Interest Communities and community titles schemes demonstrate this point. When each housing unit is considered individually, those properties' optimal use may be as a residence.[382] However, an assessment of the community land in its entirety may reveal that the larger asset, which is subject to fragmented ownership, is under-utilised. Holdouts impede the reassembly of properties with fragmented ownership,[383] and may prevent a consensus on the community's current or future use.[384] Without consensus, the land – a finite and scarce resource[385] – becomes prone to underuse.[386] The tragedy of the anticommons in this situation is the continuation of protracted low-value, rather than optimal use of the larger parcel of community land,[387] and the potential for that sub-optimal use to affect both anticommons owners and the wider community.

In order to overcome anticommons use, re-bundling of the fragmented rights is necessary. Titles may be reassembled via the free market: the negotiation of contracts to purchase all necessary rights. Agreement is likely to be reached only where there is a significant increase in value resulting from optimal, as opposed to anticommons, use, and where low transaction costs exist and there is little to gain from holdout behaviour.[388] However, where one of those factors does not apply, owners have an emotional attachment to the property[389] or act strategically to maximise personal

[381] Heller, above n 281, 1221.

[382] It is also pertinent to note that little fragmentation of ownership generally occurs at the individual housing unit level.

[383] Heller, above n 32, 626.

[384] Heller, above n 135, 2.

[385] Developable land is a scarce resource: see, for example, Queensland Department of Infrastructure and Planning, above n 25, 6. On the demand side, population growth (Australian Bureau of Statistics, above n 25), housing shortages (Housing Industry Association 2011, *Housing to 2020 Report Highlights Need to Boost Supply,* Embargo, Housing industry Association, Australian Capital Territory), and community problems, such as long commutes to employment centres, traffic problems, a lack of affordability and urban sprawl all impact on the availability of developable land (Stateline, above n 25), Property Council of Australia Limited, above n 25 and City Futures Research Centre, above n 25). Importantly, there are also a number of supply-side factors that limit the availability of developable land, including limitations imposed by planning legislation on the use or development of a site, statutory fees and charges associated with development, such as infrastructure charges levied under the *Sustainable Planning Act*, feasibility of development projects not satisfying developers and an inability to obtain finance to construct a project. Particularly in inner urban areas, it is often necessary to reassemble a number of parcels of land to increase the size of the redevelopment parcel. Where one or more of those parcels is a community titles scheme, the assembly process is more complicated.

[386] Heller, above n 32, 624.

[387] Ibid., 624 and 626.

[388] Ibid., 678 and 679.

[389] Ibid., 992.

gains,[390] a re-aggregation of titles is unlikely to be achieved through the free market.[391] Reliance on market forces results in a 'sub-optimal amount of [land] assembly'.[392]

Where the free market is ineffective in achieving a negotiated solution to overcome holdouts, purchasers and other anticommons owners may resort to corruption,[393] intimidation[394] and violence[395] to coerce the transfer of rights to the resource away from the holdout owner. Heller notes that there was an increase in the kidnapping and murder of elderly *komunulkas* owners during the transition from socialism to capitalism when reassembly of many titles was occurring.[396] Where negotiated outcomes are unachievable, dissenting owners may become vulnerable to 'predatory' practices.[397] In those circumstances, both other anticommons owners and the wider community are negatively impacted.

Common Interest Communities and community titles schemes encourage communal use of scarce resources and empower a certain degree of self-governance and management.[398] The interconnectedness between scheme owners and the wide, long-term impact that one dissenting owner may have on the community and wider region, justifies legislative intervention to overcome holdouts. A 'fair adjustment'[399] of stakeholder interests must be made through the regulation of those relationships and rights[400] when the self-interested acts of one owner conflict with another.[401]

Laws that prevent the strategic exercise of veto rights to create anticommons property are justified.[402] Mature, free-market legal systems often incorporate these mechanisms.[403] Where they do not, legislative intervention to include such powers is warranted.[404] Eminent domain is an

[390] Heller, above n 32, 678–9.

[391] Heller, above n 281, 1165 and 1166, Dagan, above n 314, 1259 and Munch, above n 314, 474.

[392] Munch, above n 314, 478–9.

[393] Heller, above n 32, 641.

[394] Ibid., 655.

[395] Ibid., 654.

[396] Ibid.

[397] Ibid.

[398] See, for example, ss 4(a) and (e) *BCCM Act.*

[399] *State v Shack,* 277 A. 2d 369, 374 (N.J. 1971) quoted in Singer, above n 34, 334.

[400] Singer, above n 236, 334.

[401] This is the premise of nuisance laws: ibid., 312–13.

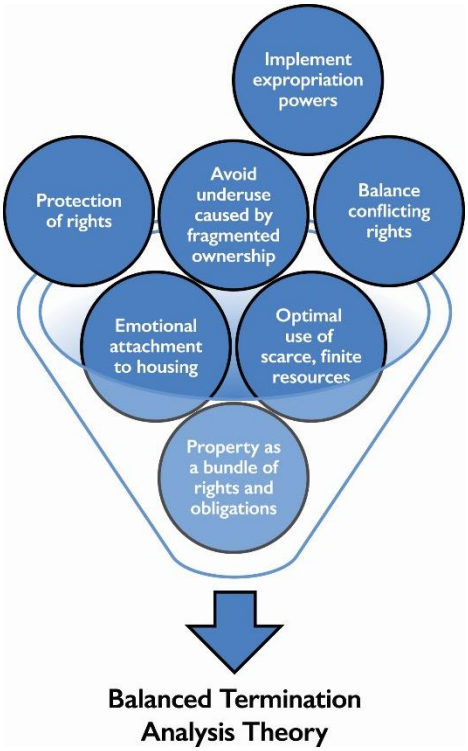
[402] Heller, above n 32.

[403] Ibid., 624.

[404] Ibid., 641.

imperfect solution that vests power in a single entity to remove all dissenters.[405] However, the risk of creating a 'minority tyrant' to acquire the rights from the holdout 'tyrant'[406] may be reduced by granting limited expropriation powers to purchasers, controlled through the implementation of protections to stakeholders.[407] The final element of the theoretical model, depicted in Figure 2.8, is the implementation of suitable expropriation powers to overcome strategic behaviour by owners.

FIGURE 2.8: SEVENTH ELEMENT OF BalTAT



Achieving an appropriate balance between stakeholder rights and concerns is the theoretical 'sweet spot'[408] aimed for in the development of Balanced Termination Analysis Theory.

[405] Heller, above n 135, 110–15.

[406] Ibid.

[407] Kominers and Weyl, above n 134, 11.

[408] Heller, above n 135, 27.

PART 3 – BALANCED TERMINATION ANALYSIS THEORY

BalTAT seeks to achieve an enlightened synthesis between Personhood Theory and Anticommons Theory more suited to community titles scheme terminations than the application of existing property theories.

The theory is a model that overlays existing theories, rather than seeking to justify the existence of property rights. Utilising the bundle of rights definition of property, Balanced Termination Analysis Theory is built around a reallocation or redefinition of Honoré's sixth incident: 'the right to security … [/] … immunity from expropriation'.[409] The focus of the theory is to achieve a balance between competing stakeholder rights to minimise the wider impacts of strategic behaviour by community titles scheme lot owners in a reassembly and termination of the scheme.

On the one hand, Radin's Personhood Theory informs the model. There is a recognition of the potential for an owner to develop an emotional attachment to their property and for that owner's rights to be protected. However, BalTAT does not go as far as Personhood Theory. Radin's somewhat extreme view that emotional ties to property should outweigh all other stakeholder interests, despite the potentially large financial costs associated with their loss, is a significant weakness. That weakness, however, may be tempered by revisiting the theory with an economics focus.

Anticommons Theory treats developable and redevelopable land as a scarce resource, which may be underused as a result of numerous factors. Fragmented ownership, the veto powers arising from a divestment of rights and the difficulty of reassembling titles all contribute towards underuse, in turn preventing optimum use of scarce resources at an appropriate scale. BalTAT recognises that in the context of a scheme termination, the exercise of a single veto may act to prevent the reassembly and/or termination of the scheme. Where the scheme land – typically located in urban and inner urban areas – is underused, there are wide-reaching and long-term negative impacts. The individualistic, inwards-focused Personhood Theory is reshaped by realigning it to take these broader impacts into account, balancing stakeholder concerns.

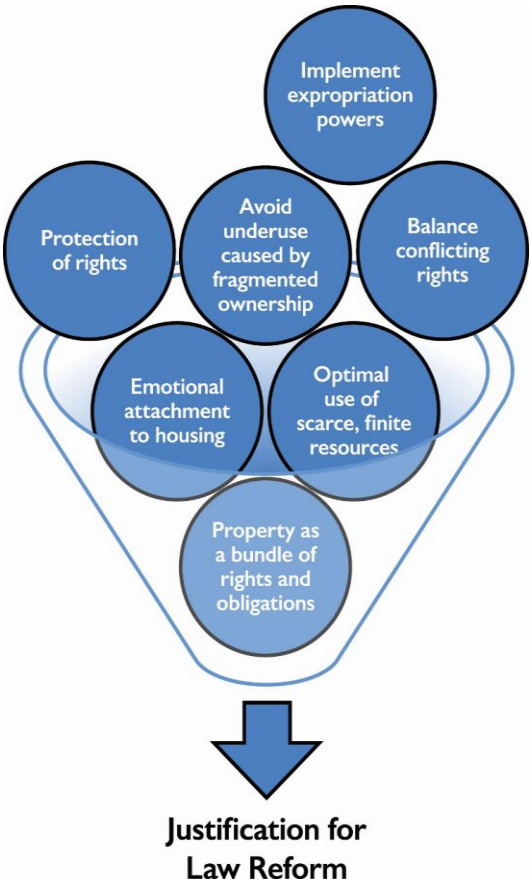
The exercise in theoretically balancing these rights and concerns will be futile if the free market remains the only means available to achieve a reassembly. Strategic behaviour by owners, or holdouts, renders the reassembly process 'brutal'[410] and the securing of a resolution without dissent

[409] Honoré, above n 123, set out in Heller, above n 32, 663.

[410] Ibid., 625.

to terminate a scheme notoriously difficult to achieve.[411] Increasing protection of property rights by further limiting expropriation powers, as proposed by Radin, may make dissenting owners vulnerable to predatory practices.[412] Protection of these owners is necessary, and may be achieved through the implementation of a law-reform package that results in a 'fair adjustment' of the competing stakeholder interests.[413] It is not achieved by providing unlimited expropriation powers to overcome holdouts. Rather, reforms should incorporate expropriation powers, limited by both administrative and substantive protections extended to owners. Figure 2.9 graphically represents the balance sought in BalTAT.

FIGURE 2.9 – BALANCED TERMINATION ANALYSIS THEORY



The form of the expropriation powers may vary. The remainder of this thesis is dedicated to identifying the features of a system that would, when analysed using the Balanced Termination Analysis Theory, protect the stakeholders' interests.

[411] Sherry, above n 6, 230.

[412] Heller, above n 32, 654.

[413] *State v Shack,* 277 A. 2d 369, 374 (N.J. 1971) quoted in Singer, above n 34, 334.

CONCLUSION

The liberal paradigm of autonomous individuals free to enjoy their property within limited constraints does not fit comfortably with laws designed for the co-ownership of common property, and self-management and governance of community titles schemes.[414] This thesis investigates options to reform the termination provisions in the *BCCM Act.* In doing so, it is important to utilise a suitable theoretical framework in the analysis of law reform options. Therefore, this chapter has focused on the development of BalTAT, a theory seeking to balance stakeholder rights and concerns to overcome the negative impacts of holdouts on owners and the wider community.

While redefining and reallocating property rights may facilitate assembly and overcome the holdout problem, excessively weakening rights may encourage too much assembly.[415] Safeguards against inefficient projects proceeding, which could undermine social standards and fairness, must be incorporated into legislative regimes.[416] Excessive assembly to the detriment of individual owners is as important a concern as insufficient levels of assembly.[417] To maintain the integrity of ownership rights and to avoid damaging investment incentives for the property industry,[418] it is important to maintain an appropriate level of protection for property rights. Any amendment to the *BCCM Act* must delicately balance increasing the efficiency of the assembly process and reducing strategic behaviour by sellers, while avoiding too great a compromise in fairness and property rights.[419]

Balanced Termination Analysis Theory respects stakeholder interests. It balances individuals' property rights against the community interest using the key considerations identified in the model in Figure 2.9 to recommend reforms to the *BCCM Act*. The remainder of this thesis utilises BalTAT as an analytic tool to identify which features of expropriation systems may provide guidance on the development of amendments to the termination provisions in the *BCCM Act*.

The Queensland and New South Wales compulsory acquisition laws and the UK compulsory purchase laws are investigated in Chapter 3. With particular reference to the compulsory purchase provisions contained in Part IX of the *Town and Country Planning Act*, property rights and obligations

[414] Section 35(3) *BCCM Act*.

[415] Kominers and Weyl, above n 134, 361.

[416] Ibid.

[417] Ibid.

[418] Ibid.

[419] Ibid.

of owners are considered in the context of the wider impact on, or benefit to, the community. Optimal use of scarce redevelopable land may be assessed and achieved through the exercise of expropriation powers.

In Chapter 4, schemes of arrangement, takeovers and compulsory acquisition under the *Corporations Act* are analysed to identify additional features that may contribute to the development of a model for reform. The chapter recognises the lack of emotional attachment to shares that may be experienced with respect to housing. The protection of minority rights throughout the expropriation process is highlighted, which in turn leads to a balancing of conflicting rights. The expropriation powers in the *Corporations Act* enable majority owners to overcome fragmented ownership in order to secure optimal use of the scarce company resources.

Chapter 5 focuses on the protection of owners' rights and the means by which the conflicting interests of various stakeholders may be balanced. It weighs the desire to achieve an optimal use of scarce redevelopable land and, consequently avoid underuse, against the impact on the affected stakeholders. Chapter 5 Protections for Lot Owners concludes that it is necessary to protect remaining owners from both the excessive use of expropriation powers and the negative consequences of their use.

From the analysis in Chapter 3, Chapter 4 and Chapter 5, recommendations are made relating to the desirable features that need to be incorporated into a legislative amendment model for the *BCCM Act* termination provisions. These recommendations are contained in Chapter 6.

BalTAT demonstrates in this chapter, and reinforces throughout this thesis, that there is a need to strike a delicate balance between stakeholder interests when reforming laws that will impact on a property owner's bundle of rights and obligations. The remaining chapters in this thesis seek to achieve this balance, starting with Chapter 3.

CHAPTER 3

COMPULSORY ACQUISITION

INTRODUCTION

This thesis seeks to examine statutory options to control and overcome holdout behaviour engaged in by owners of lots in community titles schemes targeted for redevelopment. Chapter 1 identified that termination of a scheme is a prerequisite to its redevelopment. Termination may occur in one of two ways. First, the owners may unanimously resolve to terminate the scheme.[420] Resolutions without dissent,[421] however, are notoriously difficult to achieve when differing ownership of lots exists.[422] The second means by which termination may occur is by order of the District Court.[423]

Chapter 2 demonstrated the tension with applying existing property theories to community titles schemes. BalTAT seeks to balance the impact of strategic behaviour by owners on the wider community during the termination and reassembly process. To achieve this balance, regard is had to the interests of a wider group of stakeholders than merely dissenting owners. Owners' property rights are respected and protected while it is recognised that there is an economic impetus to use scarce resources at an optimum level. The limited success of the free market in achieving an efficient level of assembly, caused by owners engaging in strategic behaviour, is noted in BalTAT. Unanimous consent to a termination motion may generally only be achieved if ownership of the entire scheme is vested in one co-operative party, or a small number of such parties. However, Munch concludes that reliance on the free market results in a 'sub-optimal amount of [land] assembly'.[424] Chapter 1 discussed the benefits of urban renewal and demonstrated that land availability is subject to a

[420] Section 78(1)(a) *BCCM Act*.

[421] A resolution without dissent is defined in s 105(3) *BCCM Act* as a resolution in which no vote is counted against the motion.

[422] Sherry, above n 6, 230 and Property Council of Australia, above n 6, 9–10.

[423] Section 78(2) *BCCM Act.* It is submitted that the District Court is unlikely to order that it is just and equitable for the winding up of the scheme to occur where owners or residents oppose the termination based on the decision of the Court in *Body Corporate for Nobbys Outlook v Lawes* [2013] QDC 301 to remit the matter for mediation.

[424] Munch, above n 314, 478–9.

number of constraints, including planning requirements, surrounding land uses, infrastructure availability, the market and geographical features of the landscape. As a result, redevelopable land, in particular, is a scarce resource. The excessive fragmentation of control over scarce resources makes those resources prone to underuse.[425] To enable a reassembly of ownership rights to scarce resources and, in turn, prevent underuse and the associated negative consequences of that underuse on stakeholders, BalTAT theorises that the introduction of expropriation powers is justifiable.[426] Those powers, however, must be subject to an appropriate acknowledgement of property rights and the implementation of safeguards to protect those rights. These safeguards are explored more fully in Chapter 5.

BalTAT seeks to analyse law reform options associated with the termination of community titles schemes by balancing competing stakeholder interests. It justifies a realignment of property rights to enable the interests of other community titles scheme owners and the wider community to be taken into account in a termination scenario. Expropriation forms part of the means of balancing stakeholder rights, as does mandatory review of terminations, among other measures to ensure the protection of owners' interests in the reassembly process.

This chapter investigates one means of reassembling rights through government intervention: the adaptation of local government compulsory acquisition powers to enable a developer to expropriate lots in a community titles scheme that are the subject of holdouts. When compulsory acquisition is investigated as an option for the reassembly of development parcels and to encourage urban renewal, guidance is often sought from eminent domain precedents in the United States.[427] Chapter 5 investigates the criticisms of the US approach in adopting a wholesale and widespread use of expropriation powers to reassemble fragmented ownership of community titles scheme lots.

Chapter 4 analyses the system of expropriation of shares to identify recommendations for a law-reform model for section 78 of the *BCCM Act* based on Part 5.1 and Chapters 6 and 6A of the *Corporations Act*. Chapter 5 considers the implications of the introduction of expropriation powers on owners, concluding that the scope of those powers must be limited in order to accord with the principles of BalTAT. This and the following two chapters identify a number of necessary protections

[425] Heller, above n 32, 624.

[426] Heller, above n 32, 641.

[427] See, for example, Kirby J in *Griffiths v Minister for Lands, Planning and Environment*; 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); Gray, above n 156 and Clifford Ireland, 'Should private property rights trump the public interest in renewal of the urban environment' (2009) 15 *Local Government Law Journal* 86.

to be incorporated into a law-reform model for section 78 of the *BCCM Act* to achieve a controlled creation of expropriation powers to facilitate the reassembly and termination of community titles scheme lots.

The exercise of compulsory acquisition powers by government to facilitate redevelopment by the private sector is regarded as a government function to promote economic development internationally.[428] Once a site is assembled using compulsory acquisition powers, it may be on-sold, or a private sector developer appointed to carry out the redevelopment works. This chapter does not recommend the extension of local government powers; rather, it analyses the features of compulsory acquisition systems in order to identify important principles and protections that may be adapted and included in an expropriation model for the *BCCM Act*.

In Australia, compulsory acquisition powers are limited to the carrying out of public purposes.[429] Acquisitions that are predominantly for the benefit of the private sector are invalid.[430] This chapter begins by discussing the legislative position in Queensland and the limited scope of compulsory acquisition powers adopted in the state's leading case, *Prentice v Brisbane City Council*.[431] The legislation on the basis of which *Prentice v Brisbane City Council*[432] was decided has now been repealed, limiting the application of the case to the development of general principles. However, the identification of these principles enable the formulation of recommendations for amendment of the *BCCM Act.* The High Court of Australia's decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[433] establishes the position on use of compulsory acquisition for economic development based on the New South Wales legislation. In the second part of this chapter, both the scope of New South Wales local government compulsory acquisition powers and the way those powers have been narrowly interpreted are considered, once again with a view to developing recommendations for a model for the reform of section 78 of the *BCCM Act*.

[428] *Kelo v City of New London* 545 US 469 (2005) and Part IX *Town and Country Planning Act.*

[429] *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 365; *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467; *Acquisition of Land Act 1967* (Qld) and *Local Government Act 1993* (NSW). Contrast *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 regarding the extended powers of compulsory acquisition held by the Northern Territory government.

[430] *Council for the Shire of Werribee v Kerr* (1928) 42 CLR 1; *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[431] *Prentice v Brisbane City Council* [1966] Qd R 394.

[432] *Prentice v Brisbane City Council* [1966] Qd R 394.

[433] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

Part 3 of this chapter considers whether legislation from the United Kingdom may contribute to the formulation of a possible model to overcome the holdout problem in Queensland community titles scheme terminations. The *Town and Country Planning Act* empowers local authorities to acquire land for development, redevelopment or improvement, or the proper planning of an area where the proposal will contribute to the economic, social or environmental well-being of an area. Interestingly, the legislation specifically authorises private sector involvement in redevelopment projects constructed on sites assembled by the local government using its compulsory purchase powers. This is in direct contrast to the position in both Queensland and New South Wales, where private-sector benefits generated from use of compulsory acquisition powers rendered the acquisitions invalid.[434] The *Arsenal Football Club* case demonstrates the practical implementation of the UK provisions, which balance local government strategies for urban renewal and consolidation with landowners' rights.

The fourth and final part of the chapter raises considerations specific to the use of expropriation powers to assemble a site for small-scale redevelopment projects where, for example, one community titles scheme is replaced with another privately owned scheme. The economic development that occurs from a small-scale project will likely be on a reduced scale to larger redevelopment projects, which may supply extensive public facilities and infrastructure, both temporary and permanent employment and the potential transfer of assets or payment of taxes to government. This part concludes with a recommendation that, while public benefits may not be as significant in a small-scale redevelopment, other factors may justify the termination of the scheme and expropriation of the remaining lots. The law-reform model for the *BCCM Act* should be flexible enough to recognise those other justifications and facilitate the needs of the stakeholders.

The primary recommendations made in this chapter for the law-reform model include:

- Expropriation powers must be precisely enumerated. General powers are read down, so it is necessary to authorise the use of the powers for the particular purpose of overcoming strategic behaviour by owners and the extent of those powers.
- Reforms must recognise that the private sector will seek to profit from projects. As such, private gains cannot be prohibited. Public gains are not necessarily lost when private gains

[434] *Prentice v Brisbane City Council* [1966] Qd R 394 and *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, respectively.

are earned, so it must be recognised that public and private sector benefits are not necessarily mutually exclusive.

- Public benefits must be generated from the exercise of expropriation powers. When assessing a project to determine public benefits, a holistic interpretation must be adopted.
- Public benefits should be assessed by an independent body using criteria set out in the legislation, including that the economic, social and environmental well-being of an area is likely to be enhanced by the redevelopment.
- Reduced levels of public benefits generated from the redevelopment of a small scheme should not automatically inhibit the exercise of expropriation powers. Rather, the termination threshold and criteria assessing the public benefits generated from the use of expropriation powers must be flexible enough to remain relevant to Queensland circumstances and the high number of small schemes throughout the state.

COMPULSORY ACQUISITION AS AN OPTION TO RESOLVE HOLDOUTS

Using compulsory acquisition as a means to overcome the holdout problem is a deeply contentious issue.[435] Numerous academics and interest groups argue that government acquisitions undertaken with the intention of transferring the acquired land to a private sector entity should not be permissible. They contend that expropriations are an unnecessary incursion on private property rights.[436] Ritchie suggests that the acceptability of using compulsory acquisition to assemble sites for private sector redevelopment may be tested by assessing the remoteness between the proposed use and the tangible or more traditional public benefits.[437] Where the public benefits are too far removed from the proposed use, employing compulsory acquisition as the method of assembly will be unacceptable.[438]

[435] Jonathan Riley, 'Well-being and the democracy of compulsory purchase' (2009) 2(3) *Journal of Place Management and Development* 230.

[436] See, for example, Sean Brennan, 'Compulsory Acquisition of Native Title Land for Private Use by Third Parties' (2008) 19 *Public Law Review* 179; Charles E Cohen, 'Eminent Domain after *Kelo v City of New London:* An Argument for Banning Economic Development Takings' (2005–06) 29 *Harvard Journal of Law and Public Policy* 491; Castle Coalition, *Redevelopment Wrecks,* above n 156 and Castle Coalition, *Myths and Realities,* above n 156.

[437] Marcus Ritchie, 'Compulsory Acquisition of Privately Owned Land in the Australian Jurisdictions: Is the (Compulsory Acquisition) Cart Before the (Planning and Environment) Horse?' (2013) 22 *Australian Property Law Journal* 28, 42.

[438] Ibid.

Compulsory acquisition powers with respect to land are not traditionally exercised by the private sector for the purpose of undertaking private projects, nor are expropriation powers limited to community titles scheme lots. This raises the question of whether it is equitable to design provisions that authorise the expropriation of community titles scheme lots specifically to facilitate redevelopment of the scheme by a private sector entity. That is, should expropriation for the purpose of promoting economic development extend to all land targeted for redevelopment, or only relate to the termination of community titles schemes? BalTAT holds that the introduction of expropriation powers in relation to the termination of community titles schemes is justifiable. The question of whether these powers should extend more generally is outside the scope of this thesis.[439] With respect to community titles schemes, the exercise of a veto on the termination negatively affects both the wider community and the other community titles scheme owners as a result of the potential for protracted underuse of scarce resources. Liberalism assumes that property owners are autonomous; however, that is not the case with community titles scheme lots. The *BCCM Act* creates a degree of interdependence among the owners. The existence of the ability of one owner to veto a redevelopment proposal, locking the other owners into an anticommons use, does not balance the competing stakeholder interests. This is particularly the case where the asset is of an age or nature that it may be more economically beneficial to redevelop rather than maintain it. Reliance on the requirement to obtain unanimous consent forces those owners in the majority who support a proposal to bend to the dissenting owners' will. Accordingly, the introduction of expropriation powers to remove holdouts does achieve this balance. BalTAT does not support the unlimited expansion of expropriation powers, as this would dilute protection of property rights too much. Instead, recommendations for a system of expropriation are pieced together from the models examined in this thesis and a tailored law reform package developed.

Expropriation through compulsory acquisition is used internationally as an option to overcome holdout behaviour. Use of such powers to assemble sites seeks to balance stakeholder concerns through the payment of compensation and procedural compliance requirements. This chapter seeks to identify what the requirements for compensation and other landowner protections are for adaptation into the system of expropriation for the *BCCM Act*. In order to do that, Part 1 of the chapter will discuss the current compulsory acquisition provisions and the limited interpretation of expropriation powers currently accepted in Queensland. Parts 2 and 3 discuss compulsory

[439] For a more detailed discussion on the extension of compulsory acquisition powers to promote urban renewal generally, see Melissa Pocock, 'Compulsory Acquisition, Public Benefits and Large-Scale Private Sector Redevelopments: Can Australia Learn from the United Kingdom?' (2014) 19 *Local Government Law Journal* 129.

acquisition powers in New South Wales and the United Kingdom, respectively. The final part of the chapter considers the use of expropriation powers in the context of small-scale redevelopments and makes appropriate recommendations.

PART 1 – COMPULSORY ACQUISITION IN QUEENSLAND

Recommendations:

- Government expropriation powers are narrowly interpreted. To overcome that narrow interpretation, provisions introducing expropriation powers into the *BCCM Act* would need to:
  (a) specifically authorise the exercise of expropriation powers to facilitate reassembly of titles to community titles scheme lots for the purpose of overcoming the holdout problem
  (b) authorise on-sales of the reassembled site at a profit, and
  (c) recognise that private sector benefits, and benefits to the public are not necessarily mutually exclusive.

Queensland's expropriation powers are strictly limited to enable acquiring authorities to achieve one or more 'public purposes'. Sections 5(1) and (2) of the *Acquisition of Land Act 1967* (Qld) provide:

> Section 5
>
> (1) Land may be taken under and subject to this Act—
> (a) where the constructing authority is the Crown, for any purpose set out in schedule 1;[440] or
> (b) where the constructing authority is a local government—
> (i) for any purpose set out in schedule 1 which the local government may lawfully carry out; or
> (ii) for any purpose, including any function of local government, which the local government is authorised or required by a provision of an Act other than this Act to carry out; or
> (c) in the case of a constructing authority other than the Crown or a local government—

[440] The authorised purposes in Schedule 1 of the *Acquisition of Land Act* include transportation; environment; educational and cultural facilities; health; natural resources; recreation; water; primary production; law enforcement; urban planning; sanitation; works, construction and facilities; non-profit and not-for-profit organisations and for 'other purposes' notified by regulation. No other authorised purposes have been set by regulation: *Acquisition of Land Regulation 2003* (Qld). The power to acquire land for urban planning purposes is limited to 'civic centres or squares' and allocating, reconfiguring or otherwise dealing with unallocated state land.

(i) for any purpose set out in schedule 1 which that constructing authority may lawfully carry out; or
(ii) for any purpose which that constructing authority is authorised or required, by a provision of an Act other than this Act, to carry out.

(2) The power to take, under and subject to this Act, land for a purpose (the primary purpose) includes power to take from time to time as required land either for the primary purpose or for any purpose incidental to the carrying out of the primary purpose.

Prentice v Brisbane City Council[441] is the leading Queensland case on the interpretation of the acceptability of an acquisition where private sector benefits are experienced. The case established that acquisitions will be *ultra vires* and consequently void where the true purpose of exercising the powers is to facilitate private sector-led projects.[442] In *Prentice v Brisbane City Council*,[443] Mansfield CJ held that local governments may acquire private land for public purposes, to regulate a city's development and subdivision of lands and to create infrastructure, including roads.[444] These statutory powers did not extend to a local government assisting the private sector to generate profits from land development.[445] Mansfield CJ considered that Brisbane City Council's main purpose in acquiring land along the Brisbane River was to enable the developer to construct a bridge and bridge head, which would have provided access to the developer's industrial subdivision. While the community would broadly have benefited from the land on the southern bank of the Brisbane River becoming more accessible, Mansfield CJ held that the local government did not use its statutory powers for the purposes granted to it, nor was it acting in good faith.[446] Rather, His Honour considered that the local government acted as the developer's agent by assisting it to implement a

[441] *Prentice v Brisbane City Council* [1966] Qd R 394.

[442] *Prentice v Brisbane City Council* [1966] Qd R 394 was followed in *Anka Builders (Gold Coast Pty Ltd v Maroochy Shire Council* [1986] QLPR 436. More recently it was considered in *Stubberfield v Redland Shire Council* [1993] Qd R 104; *RF Thompson (Qld) Pty Ltd v Noosa Shire Council* [1997] QOELR 103; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; *Glenvale Properties Pty Ltd v Toowoomba City Council* [2008] QPELR 609 and *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232. Three cases have distinguished *Prentice v Brisbane City Council* [1966] Qd R 394. *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276 distinguished the case on the grounds that the legislation in Western Australia differed from Queensland. Both *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 and *CTC Project Management Pty Ltd v Gold Coast City Council* [1996] QPELR 127 distinguished the case on the basis that the parties did not pursue arguments of the kind raised in *Prentice v Brisbane City Council* [1966] Qd R 394.

[443] *Prentice v Brisbane City Council* [1966] Qd R 394.

[444] Mansfield CJ, *Prentice v Brisbane City Council* [1966] Qd R 394*,* 406.

[445] Mansfield CJ, *Prentice v Brisbane City Council* [1966] Qd R 394*,* 406.

[446] Mansfield CJ, *Prentice v Brisbane City Council* [1966] Qd R 394*,* 405.

proposal to construct the bridge.[447] Mansfield CJ held that the Council exceeded its statutory authority when it acted to aid the developer, rather than represent the interests of the Brisbane City Council electorate.[448]

Provisions extending expropriation powers to facilitate the termination of community titles schemes would raise the concerns expressed by Mansfield CJ in *Prentice v Brisbane City Council.*[449] While it is not proposed that a local government be involved in the acquisition process, the extension of the powers to the private sector would raise the issue of profit-making at the expense of affected owners. That is, the power to expropriate remaining lots from dissenting owners would enable the developer in question to make a profit on the acquisition and, using the limited interpretation of expropriation powers adopted by Mansfield CJ, would likely be regarded as *ultra vires*. In order to ensure the exercise of expropriation powers was authorised, the powers incorporated into the law reform proposal for section 78 of the *BCCM Act* would need to first authorise the appropriate party to exercise the powers and second specifically empower the use of expropriation powers to overcome holdouts and effect a reassembly of titles to the scheme land. The reforms must also extend to permitting the developer or another private sector entity to carry out the development works, or on-sell the site. Similarly, the generation of profits from either venture must also be specifically authorised.

This thesis argues that Mansfield CJ's interpretation in *Prentice v Brisbane City Council*[450] was unduly narrow. The Brisbane City Council changed the classification of the subject land to remove it from the 'Green Belt'[451] and permit construction on it. Subsequent to this occurring, the developer lodged its development application for the reconfiguration of the site and change of its use into an industrial estate. Until the change in classification, which prompted lodgement of the development application, the lack of development nearby meant that there was no prior need to consider access to that particular section of land from the opposite side of the Brisbane River. When the proposal by the developer was submitted, Brisbane City Council recognised that a bridge would generate public benefits. The Council required the developer to comply with the Council's specifications for siting

[447] For a discussion on the undesirability of minority interest control and majoritarian interest control of government, see Glynn S Lunney Jr, 'Compensation for Takings: How Much is Just?' (1992–93) 42 *Catholic University Law Review* 721, 750.

[448] Mansfield CJ, *Prentice v Brisbane City Council* [1966] Qd R 394*,* 404–5 and 410.

[449] *Prentice v Brisbane City Council* [1966] Qd R 394.

[450] *Prentice v Brisbane City Council* [1966] Qd R 394.

[451] The Green Belt was an area in which the native flora and fauna on the site was protected: *Prentice v Brisbane City Council* [1966] Qd R 394, 399.

and design of the bridge. The location of the bridge was approved by the Establishment and Co-ordination Committee after receiving recommendations from a Council sub-committee, but was subsequently changed after seismic surveys and borings were undertaken. Selecting the site of the bridge was not simply left to the developer's discretion. It is argued that compliance with the Council's processes demonstrates that Brisbane City Council recognised the need for a bridge arising from changes to the town plan. The Council took steps to control the siting and design of the bridge, and it sought to recover construction costs from the developer. It is further argued that passing on construction costs to the developer made the transaction more commercially attractive to Brisbane City Council,[452] ensuring that the Council could supply the infrastructure to the public without the investment of significant funding that may or may not have been available immediately. Arguably, this approach is an example of responsible fiscal management by a local government entity.[453]

Without the bridge, the plans for the industrial subdivision were unattractive. It is acknowledged that the developer would have experienced economic gains from construction of the bridge; however, the existence of financial benefits to the developer did not prevent or detract from

[452] *Council of the Shire of Werribee v Kerr* (1928) 42 CLR 1 may be distinguished from *Prentice v Brisbane City Council* [1966] Qd R 394 because, in the former case, the local government had no intention of constructing the road on the acquired land. The High Court invalidated the purported expropriation because the acquisition of Kerr's land was not for the Council's benefit, but rather for the benefit of Commonwealth Oil Refineries Limited. Commonwealth Oil Refineries Limited had earlier laid a pipeline through Kerr's land in an area that both the Council and Commonwealth Oil Refineries Limited mistakenly believed was a public road. As a result, Commonwealth Oil Refineries Limited's pipeline (which was laid at considerable cost to the company) trespassed on Kerr's land. Kerr demanded compensation for this trespass and Commonwealth Oil Refineries Limited sought an alternative resolution: the acquisition by the Council of Kerr's land to reopen the road. Commonwealth Oil Refineries Limited's offer to pay all costs associated with the compulsory acquisition was accepted by the Council and it passed the necessary minutes to facilitate reopening the road. However, the location of the pipeline was unsuitable for a road and the Council did not have the funds to carry out the significant rectification works.

Knox CJ and Higgins J, with Powers and Starke JJ agreeing in separate judgments (Isaacs J wrote a separate dissenting judgment), focused on the purpose of the Council's acquisition. Their Honours generally agreed with Wasley A-J's decision at first instance, who determined that the 'real' purpose of the acquisition was not to open the road, but to avoid Commonwealth Oil Refineries Limited being put to the expense and inconvenience of relocating the pipeline. The Court held that the *Local Government Act* 1915 (Vic) authorised Werribee Shire Council to compulsorily acquire land for purposes including, but not limited to, the making and opening of roads. The majority followed the decision in *Municipal Council of Sydney v Campbell* (1923) AC 338, in which Duff J held that a local government may only compulsorily acquire land for the purposes specified in the enabling legislation, not for other purposes. The Court considered all the facts and circumstances surrounding the acquisition and the project as a whole when determining the 'real' purpose of the acquisition. The majority concluded that the purpose of the acquisition was to avoid Commonwealth Oil Refineries Limited having to relocate its pipeline, not the opening of the road. Only the opening of the road was an authorised purpose, and therefore the acquisition was invalid.

[453] This argument parallels the position in the United Kingdom, where developers are commonly required to sign indemnity and other agreements that regulate the provision of resources by the parties: Paul Winter and Richard Lloyd, 'Regeneration, Compulsory Purchase Orders and Practical Related Issues' [2006] (June) *Journal of Planning & Environment Law* 781, 790.

benefits to the public sector and wider community. The two concepts are not mutually exclusive, despite seemingly being treated as such by the courts.[454]

The key question in cases where both public and private sector benefits are generated is how to balance those benefits. That is, at what point are sufficient benefits to the public created to justify the expropriation of private land, despite the potential private sector benefits? At what point is it acceptable to acquire an individual's community titles scheme lot to facilitate termination and redevelopment of the scheme? BalTAT considers that expropriation of community titles scheme lots is justified where it is a fair adjustment of the competing stakeholders' interests. That is, if protecting private property rights will lock a scarce resource into protracted underuse that negatively impacts on the other anticommons owners and the wider community, the redefinition or reallocation of those private property rights through expropriation may be justifiable.

In *Prentice v Brisbane City Council,*[455] Mansfield CJ concluded that the Council's actions were for the benefit of the developer, not the citizens of the Brisbane City Council electorate, despite generation of public benefits. This thesis argues that it is appropriate to reassess the issue of public benefit in Queensland, created in the termination and redevelopment of community titles schemes based on the principles of BalTAT. Chapter 1 identified that Australia's five largest cities have adopted urban consolidation policies in an attempt to slow urban sprawl and make more efficient use of existing infrastructure. The delivery of both social and economic infrastructure by the private sector as part of a redevelopment may, in addition to providing the community with that infrastructure, further the aims of those government policies and planning strategies geared towards urban consolidation.[456]

BalTAT theorises that where expropriation powers are incorporated into a termination model, the method of assessing the public benefits generated from the exercise of those powers should be considered. Where the level of social and economic infrastructure to be provided as part of the termination and redevelopment of a community titles scheme is high, the recognition of public benefits is easier. However, the inverse is also true: where the level of social and economic infrastructure provided in the redevelopment project is low, the recognition of public benefits becomes more difficult. The next two parts of the chapter discuss compulsory acquisition powers of

[454] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[455] *Prentice v Brisbane City Council* [1966] Qd R 394.

[456] Easthope, Hudson and Randolph, above n 20; Easthope and Randolph, above n 20 and Strata Community Australia Ltd, above n 20.

local governments in New South Wales and the United Kingdom and how public benefits in the exercise of those powers have been interpreted.

PART 2 – COMPULSORY ACQUISITION IN NEW SOUTH WALES

Recommendations:

- A holistic assessment of the public benefits and future use of the scheme land (and any other land upon which the redevelopment project will extend) on a 'whole of project' basis is required. This method of interpreting the project must be set out clearly in any law-reform model.
- There must be an acknowledgement that private sector involvement in the redevelopment of scheme land into new projects is acceptable.
- Entry into contracts with preferred partners in anticipation of the termination of the community titles scheme is also recommended as permissible, provided that disclosure of the agreement is made to affected parties.

New South Wales local governments are authorised to expropriate land under the *Local Government Act 1993* (NSW), which provides:

> Section 186
> (1) A council may acquire land (including an interest in land) for the purpose of exercising any of its functions.
> (2) Without limiting subsection (1), a council may acquire:
> (a) land that is to be made available for any public purpose for which it is reserved or zoned under an environmental planning instrument, or
> (b) land which forms part of, or adjoins or lies in the vicinity of, other land proposed to be acquired under this Part.
> Section 187
> (1) Land that a council is authorised to acquire under this Part may be acquired by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991.*
> (2) A council may not give a proposed acquisition notice under the *Land Acquisition (Just Terms Compensation) Act 1991* without the approval of the Minister.
> Section 188
> (1) A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale.
> (2) However, the owner's approval is not required if:
> (a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale, or

(b) the owner of the land cannot be identified after diligent inquiry has been made and at least 6 months has elapsed since that inquiry was made.

In *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*,[457] the High Court held that the validity of an acquisition turns on the future use of the land, the identity of the intended owner and beneficiaries of the acquisition.[458] In that case, Parramatta City Council's attempt to expropriate land for redevelopment was challenged. The acquisitions arose as a result of the Council's Parramatta Central Business District Master Plan, prepared in the early 2000s. The Master Plan sought to rejuvenate the city centre and deliver a number of public benefits. It proposed a redevelopment of land bordered by Smith, Darcy, Church and Macquarie Streets in Parramatta (the Civic Place Site) into a $1.4 billion integrated mixed-use project incorporating:

- residential and office towers
- local government chambers and offices
- community facilities including public library, art gallery and car park
- meeting rooms
- a childcare centre
- a retail centre
- public transport pedestrian access ways, and
- approximately 13,000 square metres of public open space.[459]

It was also estimated that 8800 jobs would be created as a result of the project, and approximately $96 million in assets would be transferred to the local government virtually debt free and at minimal risk.[460]

Parramatta City Council entered into a public private partnership with Grocon (Civic Place) Pty Ltd and Grocon Contractors Pty Ltd (collectively Grocon) to carry out the redevelopment.[461] The local

[457] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[458] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[459] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [23].

[460] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [100].

[461] This approach is not uncommon. On 29 November 2008, the Council of Australian Governments endorsed the National Public Private Partnership Policy and Guidelines. These Guidelines recognise that public private partnerships which appoint the private sector to deliver 'social and economic infrastructure' on behalf of the public sector are vitally important: see Infrastructure Australia, above n 26. Some of the benefits associated with the partnering of the two sectors to deliver public infrastructure include:

- the use of private funding in project delivery allows the acceleration of infrastructure that would otherwise be delivered on a staged basis or delayed if the projects were publicly funded;

government sought to use its compulsory acquisition powers under section 186(1) of the *Local Government Act* to acquire ownership of the two remaining parcels needed to assemble the Civic Place Site. Those parcels were necessary because the project's financial viability was based on redevelopment of the entire Civic Place Site.[462] Furthermore, sufficient funding was not available to the local government to develop the public infrastructure itself. Private sector investment was essential.[463]

Parramatta City Council applied for and obtained Ministerial consent to the acquisitions on the basis that the public facilities and jobs created from the project satisfied the public purpose requirement under section 186(2)(a) of the *Local Government Act*.[464] The minister's decision was challenged[465] and that decision was appealed to the New South Wales Court of Appeal.

Tobias JA delivered the primary judgement for the Court of Appeal in *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd*.[466] His Honour held that the New South Wales Parliament intended the *Local Government Act* would enable local governments to:

- make goods, services and facilities available to the local government area, and
- manage, improve and develop resources for the local government area.[467]

- the ability to transfer some of the development risk to the private sector;
- improving economies of scale by constructing larger projects rather than smaller, piecemeal ones;
- where private sector operators provide ongoing management of the constructed infrastructure, the incentivisation of a 'whole of life' cost calculation to reduce ongoing maintenance costs, and
- the use of private sector development and delivery skills for projects: Yescombe, above n 26, 17–18 and 20–24.

It should be acknowledged that some of the public benefits associated with developing infrastructure in partnership between the public and private sectors may be offset by the higher financing costs experienced in the private sector. Those expenses increase the cost of project delivery and may render the feasibility analysis unfavourable: Yescombe, above n 26, 17–18 and 20–24. Nevertheless, the benefits of these partnerships seem considerable, as outlined above.

[462] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [51].

[463] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [55].

[464] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty* Ltd [2008] NSWCA 132 (11 June 2008), [8] and [55].

[465] *Mac's Pty Ltd v Minister Administering Local Government Act 1993; R&R Fazzolari Pty Ltd v Minister Administering Local Government Act 1993* [2007] NSWLEC 623; (2007) 155 LGERA 362.

[466] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008).

[467] Section 7 *Local Government Act* referred to by Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [14] and [133].

Tobias JA considered that drafting and implementing the Master Plan fell within Parramatta City Council's ambit of responsibilities under the *Local Government Act*.[468] His Honour agreed that the local government was correct in treating the Civic Place Site redevelopment holistically, as it was integrated into the wider city rejuvenation plans and would deliver a number of public benefits. Therefore, the assembly of the entire development parcel, including the disputed properties approximating 2.8 per cent of the Civic Place Site,[469] was a necessary prerequisite to implement the Master Plan.[470] Tobias JA determined that the goals for the Master Plan demonstrated that Parramatta City Council exercised its powers for a public purpose, not for Grocon's private benefit.[471]

Tobias JA regarded the transfer to Grocon of certain completed components of the redevelopment as simply the financial structure adopted in the partnership, which ensured its commercial viability for Grocon.[472] The partnership's financial structure merely enabled performance of the development works.[473] It remained incidental to the primary purpose of furthering Parramatta City Council's legitimate provision of public facilities and infrastructure under the Master Plan.[474] As such, rather than considering the use of individual parcels, Tobias JA adopted a 'whole of project' approach to interpret the future use of the Civic Place Site. His Honour concluded that implementation of the Master Plan was legislatively authorised, validating the acquisitions under section 186(2) of the *Local Government Act*.[475]

[468] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [5].

[469] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [69] and *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [71].

[470] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [49], [55] and [176].

[471] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [162-163] applying *Werribee Shire Council v Kerr* (1928) 42 CLR 1 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[472] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [101].

[473] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [147].

[474] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [147-148].

[475] Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [176].

The High Court overturned Tobias JA's decision.[476] French CJ followed the decision in *Clissold v Perry*,[477] which established that to ensure the greatest protection of private property rights, ambiguities in compulsory acquisition legislation must be read in a way that minimises interference with those rights.[478]

French CJ rejected Tobias JA's 'whole of project' interpretation when determining future use of the disputed parcels, concluding that the proposed future use of each property must be considered, not the characteristics of the overall project.[479] This was required even though the Master Plan treated the Civic Place Site holistically.[480] His Honour held that 'a substantial ... non-trivial purpose' of the local government's actions to acquire the land was to satisfy its contractual obligations to Grocon.[481] French CJ ruled against the expropriation of the two disputed parcels in the Civic Place Site.

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[476] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[477] *Clissold v Perry* (1904) 1 CLR 363.

[478] French CJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [43] and Jacobs, above n 145, 90 referring to French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [42].

[479] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [43]. French CJ adopted a novel interpretation of s7B *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) and s188(2)(a) *Local Government Act* in reaching the conclusion that no exemption to the requirement for owners' consent under s188(1) applied. His Honour held that section 7B of the *Land Acquisition (Just Terms Compensation) Act*, not the *Local Government Act*, authorises a local government to acquire land from itself where it is held in different capacities. Parramatta City Council argued that it was acquiring the land adjacent to the disputed parcels concurrently with those disputed parcels. This land was dedicated as a road, and therefore was held by the local government in a different capacity. His Honour rejected Parramatta City Council's argument that its concurrent acquisition of land dedicated as a road satisfied the requirement in section 188(2)(a) of the *Local Government Act*. [*Note:* Tobias JA did not need to consider whether the exemption in section 188(2)(a) applied because of his Honour's conclusion that the Council was not reselling the land, therefore rendering the requirement for owners' consent in section 188(1) of the *Local Government Act* inoperable: Tobias JA, *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008)*,* [6], [179–96] and [202]]. As a result of French CJ's dual conclusion that:

- the proposed future use of each individual parcel must be considered; and
- the Council's power to acquire the adjoining parcels being conferred by section 7B of the *Land Acquisition (Just Terms Compensation) Act*, not the *Local Government Act*,

the exemption to the requirement for owners' consent in section 188(1)(b) of the *Local Government Act* was rendered inapplicable: Ireland, above n 427, 90 and 93. Therefore, owners' consent to the acquisition became necessary under section 188(1) of the *Local Government Act*. In response to the decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, the New South Wales Parliament passed the *Land Acquisition (Just Terms Compensation) Amendment Act* 2009 (NSW) to clarify a local government's powers when acquiring land in these circumstances are derived from the *Local Government Act*.

[480] French CJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [45].

[481] French CJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [50-53] and [55].

In the second of the High Court's judgments, Gummow, Hayne, Heydon and Kiefel JJ recognised that advancing the Master Plan was a valid local government function under section 186 of the *Local Government Act*.[482] However, Their Honours considered that the development agreement was evidence that the land was being acquired for resale under section 188(1) of the *Local Government Act*. The agreement obliged the local government to transfer the disputed parcels to Grocon, rather than making the land available for a public purpose under section 186(2)(a) of the *Local Government Act*. The High Court held that the public infrastructure being delivered, and the transfer of approximately $96 million in assets to Parramatta City Council, were not relevant in determining public purpose.[483] Rather, Their Honours supported French CJ's conclusion that the proposed future use of each disputed parcel must be considered, not the development proposal as a whole.[484] The High Court appears to have adopted an individual liberalistic approach to the interpretation of the landowners' property rights. In seeking to strike a balance between those property rights and the community benefits that may have been generated from the redevelopment of the site, the High Court favoured the rights of the individual landowners.

A number of principles may be derived from the two cases relating to the redevelopment of the Civic Place Site. First, preparation of the Master Plan was regarded as within a local government's ambit of responsibilities. The Master Plan was created by the local government. It was not proposed by a private sector developer seeking to redevelop the site. The distinction between the two is important, but ultimately was not enough to change the outcome in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council.*[485] Mansfield CJ expressed concerns in *Prentice v Brisbane City Council*,[486] holding that the local government was not acting in good faith and within the scope of its authorised powers if it compulsorily acquired land at the behest of a private sector entity. The High Court affirmed that the execution of local government-driven urban renewal plans was also unacceptable. On the face of it, it would appear that government initiated redevelopment projects are different in nature to those instigated by the private sector because of the varying mandates of each organisation.[487] However, this did not change the outcomes of the

[482] Gummow, Hayne, Heydon and Kiefel JJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [93].

[483] Gummow, Hayne, Heydon and Kiefel JJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [95-96] and [98].

[484] Gummow, Hayne, Heydon and Kiefel JJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* [45] and [53]. See also Ireland, above n 427, 91 and 93.

[485] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[486] *Prentice v Brisbane City Council* [1966] Qd R 394.

[487] But see criticisms of the state-led US urban renewal programs discussed further in Chapter 5.

cases. Therefore, any recommendations for the reform of section 78 of the *BCCM Act* should make clear that the use of expropriation powers to further private sector initiated projects is acceptable. In the author's view, the initiator of the project should not be determinative of the acceptability or otherwise of a proposal. Rather, the proposal itself and the benefits it will potentially generate should hold more weight than the identity of the developer, particularly in relation to the proposed reassembly and termination of community titles schemes. Assessing the benefits of each redevelopment proposal will assist in achieving a better balance between competing individual rights, community benefits and economic efficiency goals.

Second, the structuring of the agreements was relevant to the Courts' decisions. Tobias JA's determination that the agreements were a means to an end to enable performance of the development works was overturned by the High Court. By way of contrast, in the United Kingdom, the financial viability of a project is considered in the context of who the 'preferred developer' is, and whether that entity has committed to deliver the project by signing enforceable agreements.[488] The High Court held that the entry into those agreements in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[489] was one factor leading to the acquisitions being invalid. During the acquisition of lots in anticipation of a termination and redevelopment of a scheme, a developer may seek to employ consultants and other relevant parties to facilitate planning. Contracts with those consultants and other relevant parties should be authorised, subject to their disclosure in accordance with the recommendations made in Chapter 4.

The third issue a legislative model should address is the method of assessing public benefits from a redevelopment. Is Tobias JA's holistic interpretation of the entire project appropriate? Or should the High Court's requirement that each acquired lot be used for a public purpose in the future development be adopted? BalTAT requires that the benefits to, and impacts upon, the wider community be considered when determining whether a termination is warranted. This may only be achieved by looking at the redevelopment proposal as a whole. The protracted underuse of scarce resources is undesirable, particularly having regard to the negative consequences for both the other lot owners within the scheme and the public if the current state of underuse continues. BalTAT confirms that Tobias JA's view in treating the entire site as one project was correct. The redevelopment of the Civic Place Site was an integrated large-scale, mixed-use development. Planning, funding, design and construction related to the entire site, not the individual portions to

[488] Winter and Lloyd, above n 453, 789–91.

[489] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

be acquired. This thesis submits that drilling down to the future use of selected components of the site is an artificial means of protecting private property rights and does not afford the necessary respect and protection to those rights demanded by BalTAT. That is, if the Master Plan for the Civic Place Site was changed so that the future use of the disputed 2.8 per cent of the land was any one or more of the local government chambers and offices, the library, the community facilities, the art gallery, the public transport pedestrian access ways or the public open space, the acquisitions would likely have been authorised. This is not an ambiguity in the *Local Government Act* that the precedent in *Clissold v Perry*[490] would require to be determined in the landowners' favour; rather, it is a question of architectural design. The design of the Civic Place Site redevelopment was at the discretion of Parramatta City Council and Grocon. It is submitted that in circumstances where the acquired land makes up a small portion of the assembled site, such as that which may occur with a holdout owner in a community titles scheme, property rights are put in greater danger by placing reliance on the architectural design of the project to allocate a public use to the expropriated areas of land. Using the High Court's reasoning, if individual portions of a large-scale redevelopment project must be used in the future for a public purpose, the project may simply be designed to satisfy that requirement. It does not follow that the overall project will benefit the public.

The High Court sought to protect the individual owners' private property rights; however, it did not achieve greater protections for owners in circumstances where a project may be designed to ensure that expropriated portions are used in the future for a public purpose. BalTAT demands that the rights and interests of all stakeholders be weighed to ensure protection of private property rights while achieving the desired level of economic efficiency in overcoming strategic behaviour by owners.[491] As a result, the future use of individual portions of the scheme land is not relevant. Rather, the redevelopment project as a whole must satisfy the public benefit requirements set by the model proposed in this thesis to reform section 78 of the *BCCM Act*.

Finally, the level of public benefits to be generated and what benefits are regarded as acceptable are important considerations. There are extensive public benefits associated with a development such as the Civic Place Site redevelopment; however, this will not always be the case. In particular, where the termination and redevelopment of a single community titles scheme is proposed in which no significant community facilities incorporated, public benefits associated with the redevelopment will remain indirect. Those indirect community benefits may include, for example, job creation and

[490] *Clissold v Perry* (1904) 1 CLR 363.

[491] Kominers and Weyl, above n 134, 361.

potentially increased local government taxes from a higher density use.[492] Are indirect benefits enough to justify use of compulsory acquisition to redefine or reallocate private property rights? Or are the public benefits too remote from the proposed future use?[493] Relevantly, the provisions of the *Town and Country Planning Act* and guidance notes contain benchmarks for determining what public benefits are acceptable to justify use of compulsory acquisition powers. These criteria will be considered in Part 3 of this chapter.

In New South Wales, where a redevelopment site is within a declared growth centre,[494] the *Growth Centres (Development Corporations) Act 1974* (NSW) grants an apparently wide discretion to determine what the public interest is. Development corporations may expropriate land in a 'growth centre … which the corporation considers should be made available in the public interest for any purpose of the growth centre'.[495] The courts have not yet interpreted the expropriation powers granted by that Act.

Unlike local governments, development corporations declared by the *Growth Centres (Development Corporations) Act* are regarded as state government agencies.[496] Given a development corporations' standing, there are likely two possible interpretations of the expropriation powers that a court may adopt. In *Griffiths v Minister for Lands, Planning and Environment*,[497] the majority of the High Court permitted the Northern Territory government's expropriation of native title rights where the beneficiary of the acquisition was a private sector entity.[498] However, since then, a differently constituted High Court

[492] These public benefits were recognised as sufficient to permit a large-scale redevelopment of waterfront land in Fort Trumbull: *Kelo v City of New London* 545 US 469 (2005).

[493] Ritchie, above n 437, 42.

[494] Queensland's equivalent of designating priority development areas is contained in the *Economic Development Act 2012* (Qld). That Act only allows for priority processing of development approvals, not the establishment of a statutory body to take over responsibility for development of a region.

[495] Section 9(2)(a) *Growth Centres (Development Corporations) Act*. While section 9(2) of the *Growth Centres (Development Corporations) Act* does authorise development corporations to compulsorily acquire land within growth centres, the power is limited to development corporations created by and listed in Schedule 1 of the Act. There are currently only three development corporations: the Hunter, Central Coast and the UrbanGrowth NSW Development Corporations.

[496] Section 4(5) *Growth Centres (Development Corporations) Act*.

[497] *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

[498] The majority of the Court was made up of Gummow, Hayne and Heydon JJ who prepared a joint judgment, and Gleeson CJ and Crennan J who agreed with the comments made in that joint judgment. Kirby and Kiefel JJ were in dissent. The majority of the High Court held in favour of the minister and allowed the compulsory acquisition of the native title interests to facilitate the grant of the fee simple estate. This was on the basis that before the *Northern Territory (Self-Government) Act* 1978 (Cth) came into force on 1 July 1978, the Commonwealth could only acquire land within the Northern Territory for 'a public purpose'. Following the enactment of the *Northern Territory (Self-Government) Act*, the *Lands Acquisition Act* was enacted. Section 43

handed down the decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*,[499] which strongly endorsed the *Clissold v Perry*[500] principle that ambiguities in expropriation legislation must be interpreted narrowly to protect private property rights. A development corporation is regarded as a state government agency, which is more akin to the Northern Territory government in *Griffiths v Minister for Lands Planning and Environment*[501] than a local government, a statutory body.[502] However, while this is the case, the High Court's clear adoption of *Clissold v Perry*[503] in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[504] suggests that the powers in the *Growth Centres (Development Corporations) Act* will be read down. Therefore, section 9 of the *Growth Centres (Development Corporations) Act,* which requires acquisitions fulfil the 'public interest for any purpose of the growth centre', is likely to be limited to public purposes traditionally accepted by the courts.[505]

The limited scope of local government expropriation powers in Queensland and New South Wales indicates that if compulsory acquisition principles are to be adopted in a law-reform model for the termination of community titles schemes, the acquiring entity must be permitted to act where there are recognisable and measurable public benefits, despite the potential private sector profits that may also be generated. To date, protection of private property rights has occurred through invalidating acquisitions by refusing to recognise that private sector-led renewal may engender

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of the *Lands Acquisition Act* provided that the 'Minister may acquire land *for public purposes*' [referred to in *Griffiths v Minister for Lands Planning and Environment* (2008) 235 CLR 232*,* emphasis added in the judgment of Gummow, Hayne and Heydon JJ, [24]]. Section 43 of the *Lands Acquisition Act* was then amended to provide that, 'Subject to this Act, the Minister may, under this Act, acquire land' [referred to in *Griffiths v Minister for Lands Planning and Environment* (2008) 235 CLR 232*,* emphasis added in the judgment of Gummow, Hayne and Heydon JJ, [27]]. Section 43 of the *Lands Acquisition Act* was then amended again to authorise acquisitions 'for any purpose whatsoever'. The removal of the limitation provisions in the *Lands Acquisition Act* permitted the acquisition of land 'for *any purpose whatsoever*' [Section 43(1)(b) *Lands Acquisition Act*, referred to in *Griffiths v Minister for Lands Planning and Environment* (2008) 235 CLR 232*,* emphasis added in the judgment of Gummow, Hayne and Heydon JJ, [19]], which included the grant of a fee simple estate over Crown land where the beneficiary of the acquisition was the private sector.

[499] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[500] *Clissold v Perry* (1904) 1 CLR 363.

[501] *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

[502] See, for example, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[503] *Clissold v Perry* (1904) 1 CLR 363.

[504] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[505] A good example of those public purposes accepted by the Courts is contained in Schedule 1 of the *Acquisition of Land Act*: transportation; environment; educational and cultural facilities; health; natural resources; recreation; water; primary production; law enforcement; urban planning; sanitation; works, construction and facilities and non-profit and not-for-profit organisations.

contemporaneous public benefits and private sector profits.[506] In *Clissold v Perry,*[507] it was held that ambiguities in legislation were read down because of the presumption that private property rights were not to be interfered with unless clearly noted to be contrary in the Act. This presumption may be displaced by the passage of legislation that clearly establishes the powers and restrictions associated with a use of such power.[508] A model that may be adapted to evidence a clear scope of expropriation powers, rebutting the presumption in *Clissold v Perry,*[509] is contained in the *Town and Country Planning Act.* That Act permits the use of expropriation powers to aid in the acquisition of properties for development, redevelopment or improvement,[510] subject to fulfilment of a number of built-in safeguards. One of these safeguards is that the local government must be satisfied that the economic, social or environmental well-being of the area is likely to be enhanced by the proposal. This 'well-being' requirement helps define what public benefits the surrounding community may expect to be generated from such developments.

PART 3 – UK PROVISIONS: PART IX OF THE *TOWN AND COUNTRY PLANNING ACT 1990* (UK)

Recommendations:

- Expropriation powers be legislated which empower the acquiring entity to expropriate the remaining lots in a community titles scheme to facilitate the development, redevelopment or improvement on, or in relation to, the scheme land (and any other land upon which the project will extend).
- The economic, social and environmental well-being of the area in question be enhanced as a result of the exercise of expropriation powers.
- A review body be required to assess the contribution to the well-being of an area. The review body should consider:
  (a) whether the proposed project fits within the planning framework, strategies or plans that were the subject of community consultation
  (b) to what extent the proposed use of the land will contribute to the achievement of the

[506] *Prentice v Brisbane City Council* [1966] Qd R 394 and *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[507] *Clissold v Perry* (1904) 1 CLR 363.

[508] *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 136.

[509] *Clissold v Perry* (1904) 1 CLR 363.

[510] Section 226 *Town and Country Planning Act*.

economic, social or environmental well-being of the area in question

(c) the forecast financial viability of the proposals for the site, after funding or third-party investment proposals are considered, and

(d) the feasibility of any alternatives to the proposal.

Unlike the position in Queensland and New South Wales,[511] local governments in the United Kingdom may exercise expropriation powers to acquire land for redevelopment and urban-renewal purposes.

Section 226 of the *Town and Country Planning Act* establishes two heads of power under which a local government may expropriate properties. Section 226 provides:

> Section 226
>
> (1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area
>
> (a) If the authority think that the acquisition will facilitate the carrying out of the development, redevelopment or improvement on or in relation to the land, or
>
> (b) Which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

The Office of the Deputy Prime Minister's Circular 06/2004 (ODPM Circular 06/2004) explains that the powers in Part IX of the *Town and Country Planning Act* are intentionally expressed in broad terms to assist in overcoming social exclusion, facilitating regeneration, improving the environmental quality of local authority areas and otherwise authorising expropriations where powers are not contained elsewhere.[512] While the powers are expressed broadly, there are a number of limitations. A local authority cannot exercise its expropriation powers unless it complies with section 226(1A) of the *Town and Country Planning Act*, which provides:

[511] In the United Kingdom, the identity of the developer is irrelevant. Section 226(4) *Town and Country Planning Act* provides:

> (4) It is immaterial by whom the local authority propose that any activity or purpose mentioned in subsection (1) or (3)(a) should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).

[512] Jonathan Riley, 'Well-being and the Democracy of Compulsory Purchase' (2009) 2(3) *Journal of Place Management and Development* 230, 231 and Office of the Deputy Prime Minister, *Compulsory Purchase and The Crichel Down Rules (ODPM Circular 06/2004)* (June 2004), 21, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/1918885.pdf>.

Section 226

(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects-
(a) The promotion or improvement of the economic well-being of their area;
(b) The promotion or improvement of the social well-being of their area;
(c) The promotion or improvement of the environmental well-being of their area.

The limitation on the local government's powers may appear tenuous when the standard for exercising the expropriation power is whether the economic, social or environmental well-being of an area may be improved by the acquisition.[513] However, the local government's discretionary power is also limited by the requirement to comply with the procedures in the *Acquisition of Land Act 1981* (UK)[514] and the obligation on the Secretary of State to assess each acquisition proposal. ODPM Circular 06/2004 requires the Secretary of State to consider the following matters in an assessment of the proposed expropriation under section 226(1):

(a) Does the reason for acquiring the land fit within the planning framework, strategies or plans that were the subject of community consultation?
(b) To what extent will the proposed use of the land contribute to the achievement of the economic, social or environmental well-being of the area in question?
(c) What is the forecast financial viability of the proposals for the site, after funding or third-party investment proposals are considered?
(d) Could the development, redevelopment or improvement proposals for the land be achieved in another way – for example, by adopting one of the alternative proposals for use, or by locating the redevelopment elsewhere as suggested by owners or objectors?[515]

A local government will often partner with a private sector entity to implement a redevelopment proposal.[516] Given the significant costs associated with undertaking an expropriation of land for

[513] Riley, above n 512, 231.

[514] Sections 226(1) and (7) *Town and Country Planning Act*. The procedures in the *Acquisition of Land Act 1981* (UK) entail the issue of a draft compulsory purchase order (Sch 1, s 1(2)), publication of that draft order in newspapers (s 11 and Sch 1, s2), service of notice on owners and tenants (s 12 and Sch 1, s 3(1)) and a minimum 21-day objection period (s 12(1)(c) and Sch 1 s3(1)(c)). If there are no objections, the compulsory purchase will proceed: s 13(1) and Sch 1, s 4(1). If objections relate to more than compensation questions that are considered by the Land Tribunal (s 13(4) and Sch 1 s4(5)), a public local inquiry is held (s 13(2) and Sch 1, s4(2)). The minister must consider the inquiry report and may make the compulsory purchase order with or without amendments from the draft: s 13(2) and Sch 1, s 4(3). Where disputes arise regarding the quantum of compensation, such disputes are assessed under the *Land Compensation Act 1961* (UK).

[515] Office of the Deputy Prime Minister, above n 512, 24–5.

redevelopment, the partnership agreements will often be conditional on planning permission being obtained, acquisition of the site and execution of the development.[517] The indemnity the developer grants to the local government would usually extend to the costs of preparation, issue, challenge and implementation of the compulsory purchase order.[518] This is an interesting contrast to the position in both Queensland and New South Wales, where the agreements entered into by the local governments to progress the developments undermined the acquisitions.[519]

The *Arsenal Football Club Case*[520] demonstrates how the provisions in Part IX *Town and Country Planning Act* assist with redevelopment efforts in practice by balancing the need to implement local government urban renewal policies, avoid the disadvantages of relying on the free market in the site assembly process and assure due process throughout.

In the *Arsenal Football Club Case,*[521] the Court was asked to reconsider the Secretary of State's approval for the compulsory acquisition of 143 properties by the London Borough of Islington to enable construction of Arsenal Football Club's new stadium and the following additional facilities:

- a learning centre
- a new waste and recycling centre
- new and refurbished housing and live-work units
- commercial, retail and café/restaurant spaces
- public open spaces, gyms, health clubs and the Arsenal Sports and Community Centre
- four community health facilities, and
- childcare centres.[522]

Numerous objections to the issue of the compulsory purchase order prompted a public local inquiry. The report prepared at the conclusion of the inquiry recommended that all land in the redevelopment zone was necessary to carry out the project. The report also found that the extensive

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[516] Winter and Lloyd, above n 453, 789.

[517] Ibid., 790.

[518] Ibid.

[519] Mansfield CJ, *Prentice v Brisbane City Council* [1966] Qd R 394*,* 406 and Gummow, Hayne, Heydon and Kiefel JJ, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603*,* 96.

[520] *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin).

[521] *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin).

[522] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [5].

stadium-led regeneration scheme for the area, the benefits of which became obvious at the inquiry hearing, provided a compelling justification for the compulsory purchase order.[523]

When the Secretary of State assessed the application by the London Borough of Islington to compulsorily acquire the land under section 226(1) of the *Town and Country Planning Act*, the redevelopment scheme was considered holistically. That is, the entire package of proposals was examined, rather than what would be constructed on each plot.[524] The Secretary of State concluded that the benefits to the public from the 'comprehensive regeneration' were 'compelling'.[525]

The objectors appealed the Secretary of State's decision to the High Court of Justice Queen's Bench Division, arguing that the real purpose of the scheme was the construction of a new stadium, not regeneration of the area. Collins J deferred to the Secretary of State's decision, and in doing so upheld that the purpose to be achieved from the compulsory purchase order was acceptable. His Honour considered that the most persuasive justification for the expropriation was the comprehensive regeneration of the area. It did not matter that the regeneration scheme was triggered by the Arsenal Football Club's desire for a larger stadium.

The wording of sections 226(1) and 226(1A) of the *Town and Country Planning Act* was critical to the outcome of this case. Specific enabling provisions allowed the local government to recognise the potential for the generation of public benefits from Arsenal Football Club's development proposal and act to secure those benefits for the wider community. The regeneration to date has created over 2600 new jobs, including 1800 permanent positions, in addition to the community facilities constructed. Arsenal Football Club reports that £35 million worth of community benefits have been generated.[526]

Given the differences in compulsory acquisition legislation between Australia and the United Kingdom, it is perhaps unsurprising that there is a significant divergence between the *Arsenal Football Club Case*,[527] the Queensland Supreme Court's decision in *Prentice v Brisbane City Council*[528] and the High Court's decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v*

[523] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [12].

[524] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [15].

[525] Collins J, *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [15].

[526] Arsenal Football Club, *Environment and Regeneration*, <http://www.arsenal.com/the-club/community/environment-and-regeneration>.

[527] *The Alliance Spring Co Ltd & Ors v The First Secretary of State* [2005] EWHC 18 (Admin).

[528] *Prentice v Brisbane City Council* [1966] Qd R 394.

Parramatta City Council.[529] The powers granted under the *Town and Country Planning Act* enable local governments to pursue strategies and policies for economic development without the risk of veto by one or more holdout owners. The Court's interpretation in the *Arsenal Football Club Case* reinforces the recognition that the public benefits generated from a private sector-led rejuvenation project were sufficient to offset or reallocate private property rights. That recognition is consistent with the principles of BalTAT.

In relation to the proposed amendment of the termination provisions in the *BCCM Act*, Part IX of the *Town and Country Planning Act* contains a framework that allows for the limited and defined use of expropriation powers with appropriate controls built into it. The in-built limitations and controls on the expropriation powers in the *Town and Country Planning Act* provide protection of private property rights while encouraging renewal of scarce redevelopment land. Adoption of similar controls on expropriation powers in a reform model for the amendment of section 78 of the *BCCM Act* would ensure lot owners' private property rights are respected and protected, but not at the expense of wider community benefits able to be generated from the optimal use of the scarce resource.

The 'well-being' requirement in the *Town and Country Planning Act* reinforces the need for the Secretary of State to ascertain the measurable public benefits to be generated from a project and the likelihood of their materialisation. Chapter 4 and Chapter 5 recommend the inclusion in the reform proposals of an independent review by a court or tribunal. Implementing such a requirement would oblige the relevant review body to assess the potential public benefits able to be generated from the termination of the scheme and redevelopment of the scheme land (and any other land upon which the redevelopment project will extend). This would allow, after considering the remaining issues relevant to the proposal, a determination on the acceptability or otherwise of the scheme's termination and use of expropriation powers to acquire the remaining lots. To do this effectively, the reviewer of the proposal must be empowered to interpret redevelopment plans all-inclusively rather than looking at what the future use of individual parcels or lots will be. If this does not occur, promotion or improvement of the social, economic or environmental well-being of an area will be hampered. As noted above, provisions must also clearly permit private sector involvement and profit from projects, so that the status of the developer as a private sector entity will not prejudice the interpretation of expropriation powers.[530] Adoption of these principles, together with those others discussed earlier in the chapter, will assist to overcome the concerns raised by the High Court in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v*

[529] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[530] Section 226(4) *Town and Country Planning Act*.

Parramatta City Council[531] and Mansfield J in *Prentice v Brisbane City Council*[532] regarding the promotion of private sector profits at the expense of private property rights.

The focus on both the provisions and cases in this chapter so far has been on large-scale developments where extensive community benefits were generated from construction of public facilities, employment opportunities and the transfer of assets to local governments. This will not always be the case; small-scale redevelopments often occur. Public benefits generated by small-scale redevelopments may not be as pronounced because of the construction and/or transfer of fewer, if any, public facilities, infrastructure or assets to local governments and the temporary nature of construction jobs created. Is the adoption of compulsory acquisition principles in those circumstances an acceptable solution? The next part of the chapter investigates this issue further.

PART 4 – COMPULSORY ACQUISITION AND SMALL-SCALE REDEVELOPMENTS

Recommendations:

- The reduced level of public benefits potentially able to be generated from a redevelopment of a small-scale scheme should not automatically inhibit the exercise of expropriation powers in the process of terminating the scheme.
- The termination threshold and criteria assessing the use of expropriation powers must be flexible enough to remain relevant to Queensland circumstances and the proliferation of small schemes in the state.

In the case of small-scale developments, the proposed use should be analysed to identify the potential public benefits the project may generate. While the extent of public benefits generated on a small-scale redevelopment project may not be as great as for a large-scale one, this should not inhibit the ability to terminate the scheme. In this respect, the termination of the scheme may be necessary to protect the interests of the stakeholders, irrespective of what will be redeveloped on the site. A small scheme that will be replaced with an equivalent small scheme may be in as much need of renewal as a large-scale site. Its retention may negatively impact on the other owners and the wider community in the same manner as a larger development. That is, excessive maintenance

[531] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[532] *Prentice v Brisbane City Council* [1966] Qd R 394.

costs, for example, may be driving owners of smaller schemes into a 'spiral of depreciating wealth' where little, if any, economic return will be generated from the spend on maintenance of existing structures.[533] As a result, the owners of lots in small schemes should be equally protected and empowered by the law-reform model, despite the potential to generate more limited public benefits from a redevelopment.

The concern raised by Mansfield CJ in *Prentice v Brisbane City Council*[534] that the Council was acting as the developer's agent on the face of it appears greater when a developer will provide such limited public benefits in exchange for the grant of expropriation powers. However, BalTAT still demands a balancing of stakeholder interests. While the benefit to the public may be smaller, the benefit of a termination to the other owners of scheme lots may still justify the winding up of the scheme and use of expropriation powers to reassemble ownership of the fragmented titles.

By way of example, Paringa Lodge CTS 114 was targeted for a small-scale redevelopment in the inner-city Brisbane suburb of St Lucia. The scheme land was 2033m^2,[535] and comprised 12 lots and common property on Macquarie Street. It was registered as a strata scheme on 20 December 1966.[536] In 2002, FKP Limited attempted to redevelop the site, but it was only successful in purchasing nine of the 12 lots.[537] It is unclear what the redevelopment proposal for the site entailed because FKP Limited did not lodge the development application with Brisbane City Council.[538] The resolution passed at a meeting of the members of the body corporate, which authorised FKP Ltd to lodge the development application, was disputed.[539] However, assuming that the proposal included replacing the current improvements on the site with buildings similar to those constructed along much of Macquarie Street,[540] the likely benefits that would have been generated from such a development would have related to increased local government rates from intensifying the density on site, additional state government taxes including stamp duty and land tax, employment generated from the construction and/or maintenance of the new improvements and provision of

[533] Bentley, above n 11, 6.

[534] *Prentice v Brisbane City Council* [1966] Qd R 394.

[535] Interview with Brisbane City Council (Telephone interview 18 September 2014).

[536] *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003).

[537] *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003).

[538] Brisbane City Council, <http://pdonline.brisbane.qld.gov.au/MasterView/masterplan/enquirer/default.aspx?page=wrapper&key=678292>

[539] *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003).

[540] Macquarie Street, St Lucia has a number of high-density medium-rise residential buildings with some private open space. Parking generally appears limited to residents and guests.

additional housing on the street. Nevertheless, while these benefits are more limited and indirect than what may be generated in a large-scale redevelopment project, the circumstances surrounding the desire to terminate the scheme should be assessed.

The surrounding circumstances which may justify a termination of the scheme and the expropriation of the dissenting owners' lots (subject to satisfaction of the termination threshold discussed in Chapter 4) is demonstrated in *Miles v Secretary of State for Environment, Transport and Regions* [2000] JPL 192 (QBD). In that case, use of section 226(1)(b) of the *Town and Country Planning Act* was endorsed by the Court because the obvious neglect and resulting poor condition of the dilapidated house negatively impacted on the amenity of the local area. This case appears to be a unique one in that persistent efforts by the local government to have the condition of the property improved had failed.[541] In the case of Paringa Lodge, there was no overt evidence of dilapidation or lack of maintenance. However, while this is the case for Paringa Lodge, it is not necessarily the same for all other smaller schemes.

Factors such as age, level of maintenance of improvements, neighbourhood amenity and planning scheme amendments permitting higher density development all contribute to the attraction of land as a redevelopment target. These factors – particularly the requirement to perform higher levels of maintenance on older buildings – may also influence the desire by owners of community titles scheme lots to terminate. Over 82 per cent of Queensland community titles schemes have up to 10 lots, and 91.08 per cent contain up to 20 lots.[542] Small-scale redevelopments are equally affected by the possibility of strategic behaviour by owners, preventing the reassembly of lots into a larger redevelopment site. Small schemes may be assembled into conglomerations of assembled schemes to form larger redevelopment parcels, or where larger conglomerations do not occur, the small schemes may themselves be redeveloped into other small-scale redevelopments.

Given the prevalence of small schemes in Queensland, it is important that any law-reform model for section 78 of the *BCCM Act* factor in the different levels of public benefits that may be obtained. It is questionable whether the development, redevelopment or improvement of a small scheme, which is likely to generate low-level indirect public benefits, will be enough to promote or improve the economic, social or environmental well-being of an area as required by section 226(1A) of the *Town and Country Planning Act.* However, where there are other factors that suggest a termination and

[541] *Miles v Secretary of State for Environment, Transport and Regions* [2000] JPL 192 (QBD), 194–5.

[542] Of the 41,335 community titles schemes registered in Queensland, 82.73 per cent have up to 10 lots in them: Virtue, above n 21.

redevelopment are appropriate, the model should allow the expropriation to occur. That is, the balance between stakeholder interests should not be solely dependent upon the public benefits able to be generated from a termination proposal.

Chapter 4 discusses the recommended termination threshold for schemes. Small schemes will likely fall outside the application of a law-reform model unless a sliding scale threshold is adopted. The chapter recommends a sliding scale threshold based on the size of the scheme as follows:

Scheme size	Resolution required to terminate scheme
Two lots	The owner of one lot may petition the review body for an order to terminate the scheme.
Three lots	The owners of a majority of lots in the scheme may resolve to terminate the scheme.
Four or more lots	The owners of 75 per cent of lots in the scheme may resolve to terminate the scheme.

In its review of termination proposals, the review body must be empowered to flexibly assess the benefits generated from differently scaled projects. Compulsory acquisition principles identified in this chapter may be utilised to develop a package of amendments to the *BCCM Act* which balances the interests of stakeholders to avoid strategic behaviour while protecting private property rights from abuse.

CONCLUSION

Active government involvement in reassembling the ownership of community titles scheme lots to enable termination and redevelopment is undesirable. However, compulsory acquisition principles may influence the development of expropriation powers in a law-reform model that complies with the requirement to balance competing stakeholder interests under BalTAT. In doing so, the power held by one owner to veto a redevelopment of the scheme will be removed. Compulsory acquisition is used to successfully control and overcome holdout behaviour. This chapter recommends adapting those principles into a law-reform model for section 78 of the *BCCM Act* to overcome strategic behaviour engaged in by owners of community titles schemes lots targeted for redevelopment.

Expropriation powers that facilitate economic development would enable the assembly of redevelopment sites. Those sites could then be developed or on-sold for redevelopment by a third party. Compulsory acquisition uses expropriation powers to transfer titles held by owners. Currently, legislation in both Queensland and New South Wales is interpreted narrowly to contemporaneously limit those powers and protect private property rights. Australian courts have raised a number of factors in interpreting the provisions that should be specifically addressed in any law reform package for section 78 of the *BCCM Act*. These issues include: who initiated the project that will be facilitated by the acquisitions; how the entry into agreements with preferred partners prior to termination occurring impact on the exercise of the powers; how public benefits are assessed; and what level of public benefits are acceptable to justify use of expropriation powers.

The *Town and Country Planning Act* empowers British local authorities to acquire land for development, redevelopment or improvement, or for the proper planning of an area where the proposal will contribute to the economic, social or environmental well-being of that area. Features of that Act may provide useful guidance for reforms to the termination provisions of the *BCCM Act*. The 'well-being' requirement in the *Town and Country Planning Act* may be satisfied when large-scale redevelopments, such as those in the *Arsenal Football Club Case*[543] and *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[544] are undertaken. The significantly reduced contribution to the economic, social or environmental well-being of an area that may be engendered by small-scale redevelopments, and the prevalence of small schemes in Queensland, necessitate flexibility in the provisions. Any expropriation powers that require a consideration of the public benefits of a termination proposal must balance those benefits from the project with other relevant factors when determining whether use of the expropriation powers is justified.

[543] *The Alliance Spring Co Ltd & Ors v The First Secretary of State* [2005] EWHC 18 (Admin).

[544] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

CHAPTER 4

CHANGES TO CORPORATE CONTROL

INTRODUCTION

This thesis examines options to amend the termination of scheme provisions in section 78 of the *BCCM Act*. The recommendations aim to limit the negative impact of strategic behaviour on stakeholders when a scheme is targeted for renewal. This is achieved through a lowering of the threshold to pass a resolution to terminate a scheme, and by implementing an expropriation power to overcome holdout behaviour, whilst protecting owners by building in safeguards.

Prior to its redevelopment, a scheme must be terminated. Termination may only occur if no owner objects to the motion seeking the scheme's termination.[545] Resolutions without dissent are notoriously difficult to achieve when differing ownership of lots exist.[546] Typically, a developer will seek to acquire all lots in a scheme before a motion for its termination is presented to the body corporate. The only other means by which a termination may occur is through a District Court order for the termination. The Court may issue the order if it is just and equitable to terminate the scheme.[547]

An opportunity for owners to act strategically is created by the need for a developer, or a small group of cooperative owners, to assemble ownership of the lots in the target scheme. Some owners may hold out to extract the most favourable financial and non-financial contract terms, or otherwise refuse to sell altogether. An individual's ability to act in this manner impacts the other owners of lots in the scheme: the developer, where they have already acquired one or more lots, and other lot owners whose contracts are conditional upon the developer acquiring all the other lots in the scheme. If the developer does not succeed in contracting to purchase all the lots in the scheme, they are likely to withdraw from the purchase of any lots.

[545] Section 78(1)(a) *BCCM Act*.

[546] Sherry, above n 6, 230.

[547] Section 78(2) *BCCM Act.* It is submitted that the District Court is unlikely to order that it is just and equitable for the winding up of the scheme to occur where owners or residents oppose the termination.

BalTAT, the theory developed in Chapter 2, seeks to balance competing stakeholder rights to minimise the wider impacts of strategic behaviour by lot owners in the reassembly and termination of a community titles scheme. BalTAT recognises and respects the property rights of owners, but does not disregard community interests in renewal and redevelopment. Balanced Termination Analysis Theory also reveals that reliance should not be solely placed on the market to achieve an efficient level of assembly, as there are limited circumstances where this will occur. Instead, it theorises that legislative intervention is justified to prevent holdout behaviour trapping scarce resources into long-term underuse, and their owners into a 'spiral of depreciating wealth'.[548]

Chapter 3 investigated local government compulsory acquisition powers to determine which principles may guide the development of a law reform package for section 78 of the *BCCM Act*. The chapter focused on the identification of the scope and interpretation of those expropriation powers, to guide the creation of a system to facilitate the reassembly of titles to a scheme that is subject to holdout behaviour. This chapter considers another means of reassembling ownership rights: the use of schemes of arrangement and takeovers, and the associated expropriation powers in the *Corporations Act*. This chapter draws on the processes and protections in the *Corporations Act* to further guide the development of a law reform package for section 78 of the *BCCM Act*.

Recognition of the need for expropriation powers in company law is attributed to the Greene Committee report.[549] That report characterised the refusal by minority shareholders to sell their shares to a party seeking control of a corporation as oppressive. The Greene Committee labelled such actions as Greenmail.[550] A direct analogy may be made between a shareholder seeking to acquire control of a company and a developer attempting to reassemble ownership of a community titles scheme: both seek to take advantage of the benefits and flexibility associated with sole ownership of the asset. Notwithstanding the commonality, it is acknowledged that shares do not have the same tangible presence as real property. Chapter 2 argued that shares satisfy the definition of property adopted in this thesis. Accordingly, as shares are a proprietary asset, corporate law principles may be considered to guide reform of the *BCCM Act*.

[548] Bentley, above n 11, 6.

[549] Board of Trade, Company Law Amendment Committee Report 1925–1926 (UK), 43 referred to in Michael Whincop, '*Gambotto v WCP Ltd*: An Economic Analysis of Alterations to Articles and Expropriation Articles' (1995) *Australian Business Law Review* 276, 278.

[550] The Committee described the actions of the minority as 'oppression of the majority': ibid.

Chapter 2 argued that the differences between shares and real property – intangibility and the existence of expropriation powers in the *Corporations Act* – do not render corporate law principles inappropriate. That is, intangibility alone is insufficient to render shares non-proprietary. Honoré's list of 11 features of property[551] is generally regarded as the starting point for an analysis of whether an object is property. Shares satisfy all except one of those incidents; they are not immune from expropriation as a result of the provisions of the *Corporations Act.*[552]

Further, Chapter 2 demonstrated the over-simplification of the bundle of rights theory, which results when shares are regarded as non-proprietary because of their defeasibility. The chapter supported the view that Honoré's incidents are better regarded as potential rights and obligations held by an owner than an exhaustive list – to conclude otherwise would reduce a theoretical discussion of the definition of property to an exercise in statutory interpretation.

BalTAT theorises that law reform is justified where strategic behaviour by owners may prevent the reassembly of fragmented ownership and lead to a protracted underuse of scarce resources. Law reform should strike a balance between those stakeholders with competing interests by including a power to overcome that strategic behaviour – lowering the threshold to terminate a community titles scheme and the inclusion of an expropriation power to transfer ownership of remaining lots. The expropriation provisions in the *Corporations Act* contain extensive protections for shareholders, balancing the desire by a majority owner to control the company and receive the benefits of sole ownership, while respecting

[551] Honoré's incidents include:

(1) The right to exclusive possession;
(2) The right to personal use and enjoyment;
(3) The right to manage use by others;
(4) The right to the income from use by others;
(5) The right to the capital value, including alienation, consumption, waste, or destruction;
(6) The *right to security* (that is, *immunity from expropriation*);
(7) The power of transmissibility by gift, devise, or descent;
(8) The lack of any term on these rights;
(9) The duty to refrain from using the object in ways that harm others;
(10) The liability to execution for repayment of debts; and
(10) Residual rights on the reversion of lapsed ownership rights held by others:' Honoré, above n 123 and Heller, above n 32, 663.

[552] Takeovers and the compulsory acquisition of remaining shares are regulated by Chapters 6 and 6A of the *Corporations Act,* respectively. Part 5.1 *Corporations Act* regulates schemes of arrangement. Membership transfer schemes are the most relevant to a change of corporate control: Tony Damian and Andrew Rich, *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement to Effect Change of Control Transactions* (Sydney Herbert Smith Freehills, 2004), 5. There are a number of less-popular options to effect the change of control of a company, including share sale agreements, selective reductions of capital and selective buy-backs: Alberto Colla, 'Schemes of Arrangement as an Alternative to Friendly Takeover Schemes: Recent Developments' (1998) 16 *Companies & Securities Law Journal* 365, 365–6.

the minority owners' proprietary rights in their shares. This chapter seeks to identify some of the features and safeguards of the *Corporations Act* to guide and reform the *BCCM Act.*

There are two principal methods by which a change of corporate control may be effected in the *Corporations Act:* first, a takeover followed by the compulsory acquisition of remaining shares under Chapters 6 and 6A *Corporations Act* respectively and, second, a membership transfer scheme of arrangement under Part 5.1 of the *Corporations Act.* Part 1 of this chapter contains an overview of each change of control option to introduce their conceptual features. As a result, it does not seek to compare takeovers and schemes of arrangement to determine the benefits of one approach over the other, nor does it provide an in-depth analysis of the provisions and their effectiveness or otherwise in a corporate law setting.

Part 2 analyses four themes that underscore both Part 5.1 and Chapters 6 and 6A of the *Corporations Act,* and may inform the development of reforms to section 78 of the *BCCM Act*. Those themes include:

- disclosure, including the provision of an independent valuation, to shareholders
- form and content requirements for expropriation documentation
- selection of a suitable acceptance threshold, and
- independent review of expropriations, and the criteria by which reviewers assess exercises of expropriations powers.

The discussion in this chapter is centred on these topics. It demonstrates that the adoption of principles based on the disclosure, form and content, and review procedures – all features of Part 5.1 and Chapters 6 and 6A of the *Corporations Act* – may prove useful guidance to develop balanced law reform proposals for the termination of Queensland community titles schemes.

The primary recommendations made in this chapter include:

1. In order to commence the termination process, the developer must provide a disclosure statement to lot owners. This may occur immediately prior to, or contemporaneously with, the issue of contracts to effect a reassembly of the scheme. That disclosure statement should include information on the proposed future plans for the site, how the acquisition will be funded, an independent valuation, and any other information materially relevant to an owner's determination.

2. Contracts between the developer and individual owners are entered into for the acquisition and reassembly of titles to lots within a scheme. The content of those contracts should be regulated, so that:
    a. offers conditional upon a developer securing sufficient lots in the scheme to meet the statutory termination threshold are permitted
    b. clauses granting a discretion to the buyer to determine whether or not the outcome of a condition is satisfactory (for example 'subject to finance' and 'subject to satisfactory due diligence' clauses) are prohibited, and
    c. Consideration for the purchase cannot be varied during the period commencing upon the issue of the contracts and ending once all expropriations are concluded, in order to minimise the impact of holdout behaviour.
3. A requirement that offers must remain open for a minimum of 60 and a maximum of 90 days.
4. The termination threshold for a community titles scheme should be based on a sliding scale, dependent upon the number of lots within a scheme, rather than the unanimous consent presently required. The motion for the termination of the scheme would not be presented to the body corporate for inclusion in the agenda for a general meeting until the statutory timeframe for acceptance has expired.
5. The transaction and termination proposal should be subject to an independent review where one or more of the owners holding the remaining 25 per cent of lots object to the termination. The criteria upon which a reviewer may make his or her assessment, and the weight to be accorded to each consideration (that is, determining whether individual or community concerns should be prioritised) should be detailed in the legislation.
6. Upon resolution of a review in favour of terminating the scheme, the developer may expropriate the remaining lots from the dissenting owners according to the terms of the draft contract issued to those owners, or as amended by the review body.

Each of these recommendations is discussed in more depth below.

PART 1 – OPTIONS TO EFFECT A CHANGE OF CORPORATE CONTROL

Typically, a change of corporate control will be achieved either through a takeover bid or a scheme of arrangement. Numerous differences exist between the takeover and compulsory acquisition provisions in Chapters 6 and 6A of the *Corporations Act* and schemes of arrangement regulated by Part 5.1 of the *Corporations Act*. This part provides an overview of the methods.

A binding transfer scheme of arrangement assigns title over all shares in the class or classes covered by the arrangement to the buyer.[553] That is, once the company has complied with the statutory processes in Part 5.1 of the *Corporations Act,* including the passage of a resolution approving the scheme, all affected shares are transferred to the buyer pursuant to the terms of the arrangement.[554]

Perhaps the most significant difference between a scheme of arrangement and a takeover is the need for the target company to cooperate in the process. Part 5.1 of the *Corporations Act* arrangements is dependent upon the collaboration and active involvement of the target company and its board. That is, the target company, rather than the buyer, must comply with the statutory requirements for implementing the scheme of arrangement. One of those requirements is the obligation to obtain the Court's approval to issue the explanatory statement to shareholders.[555] Once the company has approved the arrangement at a meeting of its members, the company must then obtain a second order of the Court to authorise implementation of the arrangement.[556]

Schemes of arrangement avoid the need to undertake negotiations with individual shareholders through a collective sale process – members of the company approve the company's entry into the scheme of arrangement at a members' meeting, in turn binding all shareholders in the affected class or classes to the arrangement.[557] The holdout problem is minimised because the threshold to approve the arrangement is less than unanimous. A balance, however, is achieved between the majority shareholders and the rights and interests of the dissenting and minority shareholders through the protections in the *Corporations Act*.[558]

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[553] 'Cancellation' and 'transfer' schemes of arrangement are the most commonly utilised options (Damian and Rich, above n 552, 9); however, only the latter is the focus of this chapter. 'Cancellation' schemes facilitate mergers of corporate entities and therefore, it is submitted, are different in nature from the acquisition and termination of a community titles scheme.

[554] Section 411(4) *Corporations Act*. See also n 670 and accompanying text. The position in *Re Albert Street Properties Ltd* (1997) 18 ACLC 62, that *Gambotto v WCP Ltd* (1995) 182 CLR 432 presumed parliament legislated for the protection of minority interests, directly contrasts with the reading down of compulsory acquisition laws to protect landowners. See, for example, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 interpreting the principle in *Clissold v Perry* (1904) 1 CLR 363.

[555] Section 411(1) *Corporations Act*.

[556] Section 411(4)(b) *Corporations Act* and Jennifer Payne, 'Schemes of Arrangement, Takeovers and Minority Shareholder Protection' (2011) *Journal of Corporate Law Studies* 67, 70.

[557] Section 411(4) *Corporations Act*.

[558] Hanrahan, Ramsay and Stapledon argue that schemes of arrangement avoid the holdout problem more effectively than takeovers, because of the lower threshold triggering the ability to acquire all shares. That is,

By way of contrast, where a hostile relationship exists between the bidder and the target company, the acquisition of control may only be achieved using a takeover under Chapter 6 *Corporations Act.* Bidders in a takeover may initiate a takeover without relying on the target company's cooperation in the following circumstances:[559]

(a) when that shareholder's voting power in the company has increased above 20 per cent; or
(b) if the shareholder's voting power already exceeds 20 per cent, the shareholder has increased his, her or its voting power in the company to an amount not exceeding 90 per cent.[560]

At the conclusion of the bid period, if a sufficient number of shareholders have accepted the offer to satisfy the minimum statutory threshold, the bidder may compulsorily acquire the remaining shares under Chapter 6A *Corporations Act*.

Chapter 6 *Corporations Act* seeks to balance efficiency, competition and operation within an informed market.[561] It does so through implementation of procedures which create a 'reasonable and equal opportunity to participate in any benefits' of the takeover.[562] However, critics of the system argue that Chapter 6 *Corporations Act* is overly restrictive,[563] criticising the lack of a mandatory bid rule[564] and the requirement to apply increases in the offer price to all shareholders in the bid class. The basis for these criticisms is the added expense to bidders,[565] Hutson arguing that

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the compulsory acquisition provisions in Chapter 6A of the *Corporations Act* apply once the bidder secures 90 per cent of the voting control of the company (s 661A(1)(b) *Corporations Act*). Where the voting power of a single or small group of shareholders exceeds 10 per cent, the potential exists for holdouts to occur until a higher bid price is offered: Pamela Hanrahan, Ian Ramsay and Geof Stapledon, *Commercial Applications of Company Law* (14th ed, CCH, 2013), 488.

[559] Section 616 of the *Corporations Act* identifies the two types of bids that may occur as 'off market bids', for quoted and unquoted securities, and 'market bids', which relate to securities quoted on stock exchanges. Given the highly prescriptive nature of the takeovers provisions in Chapter 6 of the *Corporations Act*, the discussion in this chapter is limited to identifying the key features that establish the mechanics of making and executing off-market bids.

[560] Section 606(1) *Corporations Act.*

[561] Section 602(a) *Corporations Act.*

[562] Sections 602(c) and (d) *Corporations Act*.

[563] See, for example, Elaine Hutson, 'Australia's Takeover Rules: How Good are They?' (2002) 4 *JASSA* 33, 37 and Elaine Hutson, 'Our Iron Takeover Law: Why Australia Needs a Mandatory Bid Rule' (2000) 2 *JASSA* 2.

[564] A mandatory bid rule would allow a shareholder to purchase a block of shares to take the shareholder's security interest above 20 per cent, provided that acquisition pre-empts a takeover bid: Hutson, 'Mandatory Bid Rule', above n 563, 2.

[565] Ibid., 3.

both factors impede the striking of an appropriate balance between controlling and minority shareholders being struck.[566]

While the takeovers system is not perfect, the existence of stringent processes ensures that ownership of minority shareholders' securities may only be expropriated in certain circumstances. That is, shareholders' rights are protected without disregarding economic efficiency and the benefits of sole ownership of corporations. Part 2 of the chapter investigates some of the selected features of the schemes of arrangement and takeovers systems in order to identify potentially desirable characteristics for reform of section 78 of the *BCCM Act.*

PART 2 – CHANGES TO CORPORATE CONTROL

Balanced Termination Analysis Theory recognises the need to balance the rights of stakeholders in the context of the termination and redevelopment of community titles schemes. There are a number of principles in Part 5.1 and Chapters 6 and 6A of the *Corporations Act* that may provide guidance on how to achieve harmony in the reform of the *BCCM Act*.

This part considers four areas identified from an analysis of the change of corporate control provisions in the *Corporations Act*: disclosure to shareholders; form and content requirements for expropriation documentation; the identification of a suitable acceptance threshold; and the independent review of exercises of expropriation powers. Aspects of each of these themes may be beneficially and appropriately adopted in the reform of the termination provisions of the *BCCM Act*.

DISCLOSURE, VALUATION AND EXPERT REPORTS

Disclosure is discussed in Chapter 5 as a tool to minimise the potential for affected owners to suffer feelings of dignitary harm. In the *Corporations Act,* disclosure ensures that target shareholders may make an educated decision about whether to accept a takeover offer under Chapter 6, object to a compulsory acquisition under Chapter 6A, or vote in favour of a scheme of arrangement in Part 5.1 of the *Corporations Act*.

The disclosure provisions in Chapter 6 and Part 5.1 of the *Corporations Act* contain some correlations – a logical outcome given the potential availability of both options to effect a change of control.[567]

[566] Ibid., 2–3.

The similarities prevent shareholders from being prejudiced against if one option is chosen over another, a determination outside a minority shareholder's control. However, given the mechanical differences between takeovers and schemes of arrangements, the provisions are, understandably, not mirror images. Both the similarities and differences, and the justifications for each, may illuminate considerations for proposals to reform section 78 of the *BCCM Act*.

Disclosure is intended to empower shareholders by furnishing material information to them;[568] fairness underpins the provisions.[569] This same fairness principle may be extrapolated to apply to expropriations of land: disclosure creates transparency and enables an educated assessment of the likelihood that a project will proceed.[570] Chapter 5 notes that disclosure may also facilitate the identification of concerns regarding potential projects, and the examination of those concerns in an independent review of the transaction. This chapter recommends that certain features of those *Corporations Act* disclosure requirements, discussed below, may guide the identification of potential protections for owners in any proposals for the amendment of section 78 of the *BCCM Act*.

SPECIFIC DISCLOSURE ITEMS

Recommendations:

- The issue of disclosure documents by the developer to the lot owners prior to, or contemporaneously with, the issue of draft purchase contracts at the commencement of the termination process would assist:
    - lot owners' assessment of the developer's proposal, and
    - the evaluation of measurable public benefits potentially generated from the project.
- In order to keep costs associated with the termination of very small schemes manageable, it is recommended that the issue of detailed disclosure should only be mandated in respect of

[567] Colla, above n 552, 377; Alberto Colla 'Eliminating Minority Shareholdings – Recent Developments' (2001) 19 *Companies and Securities Law Journal* 7, 7; Payne, above n 556, 67; Digby, above n 111 and Corporations and Advisory Committee, Parliament of the Commonwealth, Members' Schemes of Arrangement Report December 2009, 1.

[568] Section 602 of the *Corporations Act* provides that Chapter 6 ensures takeovers occur in 'informed markets' and shareholders are 'given enough information … to assess the merits' of proposals put to them for consideration. Section 411(3) *Corporations Act* requires both prescribed information and information that is 'material' to shareholders' decision-making.

[569] Australian Securities and Investments Commission Regulatory Guide 60, *Schemes of Arrangement,* 22 September 2011, RG60.69, <http://download.asic.gov.au/media/1239045/rg60-published-22-september-2011.pdf> and *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[570] Digby, above n 111, 129–30.

schemes with four or more lots. It is recommended that a 'short-form' disclosure document containing funding information and a valuation be mandated for offers relating to two- and three-lot schemes.

- In addition to the information required by the 'short-form' disclosure document, the:
  (a) future plans for a site, and
  (b) funding arrangements for the acquisition and/or construction of the proposed project, and
  (c) any other materially relevant information
  should be disclosed when a termination proposal for a scheme with four or more lots exists.
- Disclosure should be prepared by, or on behalf of a developer at the developer's expense.

Disclosure during a takeover occurs in the form of the bidder's statement and the target company's response.[571] When a scheme of arrangement is used to achieve a change of corporate control, disclosure is made using the explanatory statement.[572] This sub-part considers some of the disclosure items in the bidder's statement and explanatory statement, and their relevance to the reassembly, termination and redevelopment of community titles schemes.

Bidders' statements, issued to shareholders at the commencement of the takeover process, must comply with the requirements in section 636 of the *Corporations Act*.[573] In addition to the general information contained in the statement, such as the identity of the bidder and which classes of securities are included in the offer, it must also set out, in a clear and concise manner,[574] any further background data that may influence a shareholder's decision. Similar requirements apply in

[571] The target company directors must provide the shareholders with a written response to the takeover bid. That response must contain the directors' recommendations on whether or not to accept the bid: s 638(3) *Corporations Act*.

[572] Section 411 *Corporations Act*.

[573] If the bidder's statement does not also contain the terms of the offer, the bidder must also provide an offer document: ss 620 and 621 *Corporations Act*.

[574] ASIC considers that an effective bidder's statement must be clear, concise and drafted with the target shareholders' needs in mind: Australian Securities & Investments Commission, Regulatory Guide 9, *Takeover Bids*, 21 June 2013, RG 9.251, <http://download.asic.gov.au/media/1236869/rg9.pdf> quoting Bryson J in *ICAL Ltd v Country Natwest Securities Aust Ltd* (1988) 13 ACLR 129 at 137 and RG 9.253. By way of contrast, many explanatory statements distributed to shareholders in respect of a proposed scheme of arrangement are 'voluminous and complex': Corporations and Markets Advisory Committee Report, above n 567, 60. The Corporations and Markets Advisory Committee recommended the introduction of a 'clear, concise and effective' requirement consistent with RG 9.251. Regulatory Guide 60 Schemes of Arrangement (RG 60.55 and 60.56) refers to explanatory statements being complete and clear, but there are no references to conciseness other than in relation to the criteria for concise-form expert reports (see RG 60.84): Regulatory Guide 60 *Schemes of Arrangement,* above n 569.

Schedule 8, Part 3 of the *Corporations Regulations 2001* (Cth) in relation to explanatory statements issued for a scheme of arrangement.

The requirement to provide disclosure is not limited to corporate law. In respect of land sales, a developer must provide a buyer with disclosure materials where title to the land in question has not issued as at the date of the contract.[575] However, an exemption exists on the requirement to provide disclosure where a development contains five or fewer parcels of land.[576] While it is not recommended that an exemption from disclosure be incorporated into law reform proposals for section 78 of the *BCCM Act*, it is recommended that the interests of the stakeholders will be better balanced if a 'short-form' disclosure document is required for schemes containing two or three lots. The content of the short-form document is discussed below. It is submitted that the issue of short-form disclosure will provide owners with the minimum information required to allow them to make an assessment of the favourability of the terms of the offer from a financial perspective while ensuring costs of disclosure do not become onerous in respect of two- and three-lot schemes.

The disclosure items – the bidder's intentions, how the acquisitions will be funded and the obligation to disclose any other materially relevant information – are discussed below.

BIDDER'S INTENTIONS FOR A TARGET COMPANY

Disclosure of the bidder's intentions for the target company enables an assessment of the wider impacts that the proposal may have.[577] Section 636(1)(c) *Corporations Act* obliges disclosure of a bidder's intentions regarding:

(i) the continuation of the business of the target; and
(ii) any major changes to be made to the business of the target, including any redeployment of the fixed assets of the target; and
(iii) the future employment of the present employees of the target.

While it is not necessary for the bidder to have obtained board approval of its plans prior to disclosure in the bidder's statement, it is expected that consideration has been given to the future of

[575] Section 10 *Land Sales Act 1984* (Qld) and s 213 *BCCM Act*.

[576] Section 3(4) *Land Sales Act*.

[577] A failure to make a determination on the future plans for the target company may breach the underlying intentions of s 602(a) and (b)(iii) *Corporations Act: Mildura Co-operative Fruit Company Limited* [2004] ATP 5, [85]–[87] and *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18, [76]. A breach of this nature may give rise to 'unacceptable circumstances' entitling the Takeovers Panel to make declarations in relation to the company: Takeovers Panel Guidance Note 18 *Takeover documents* (GN 18) referred to in Regulatory Guide 9 Takeovers, above n 574, RG9.257 and s657A *Corporations Act*.

the target company. As a result, any bidder who has not developed a direction for a target company must disclose this fact, together with the reasons why little progress has been made.[578]

The schemes of arrangement disclosure requirements in Rule 8310, Part 3, Schedule 8 of the *Corporations Regulations* almost mirror the takeover obligations in section 636(1)(c) of the *Corporations Act.*[579]

In the case of the redevelopment of a community titles scheme, a developer must have formed a preliminary proposal in order to undertake a feasibility analysis.[580] Development proposals are not routinely disclosed until the project is announced to the public after development approval is obtained and presales commence.[581] Disclosure of a developer's preliminary plans for a site would provide owners with the opportunity to understand what, if any, public benefits will accrue from the proposal. The requirement that the expropriation and redevelopment create public benefits was a key consideration in the exercise of compulsory purchase powers under the *Town and Country Planning Act*[582] and the resulting recommendation made in Chapter 3 Compulsory Acquisition. The knowledge of what is being created from the site may also potentially lessen feelings of dignitary harm, as discussed in Chapter 5 Protections for Lot Owners.[583] Further, disclosure of future plans may aid in an independent reviewer's evaluation of the reassembly and termination proposal for the scheme.

It is recommended that an overview of the developer's preliminary proposal for the site be incorporated in the disclosure materials issued to owners of lots in schemes containing four or more lots.

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[578] Regulatory Guide 9 Takeovers, above n 574, RG 9.259.

[579] Rule 8310 Part 3 Schedule 8 *Corporations Regulations* requires the following to be disclosed in the explanatory statement:

(a) The continuation of the business of the company or, if the undertaking, *or any part of the undertaking, of a company is to be transferred, how that undertaking or part is to be conducted in the future*; and

(b) Any major changes to be made to the business of the company, including any redeployment of the fixed assets of the company; and

(c) The future employment of the present employees of the company.' (additional provision emphasised).

[580] Richard Reed and Sally Sims, *Property Development* (6th ed, Routledge, 2015), 7.

[581] Chapter 5, Part 2 *BCCM Act.*

[582] Section 226(1A) *Town and Country Planning Act*.

[583] Janice Nadler and Shari Seidman Diamond, 'Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity' (2008) 5(4) *Journal of Empirical Legal Studies* 716.

FUNDING ARRANGEMENTS

Disclosure of funding arrangements enables shareholders to assess the likelihood that a bidder will have the financial capacity to comply with its contractual obligation to purchase the shares upon acceptance of the bid and satisfaction of the bid conditions.[584]

Section 636 of the *Corporations Act* obliges disclosure of funding arrangements for the cash consideration component of a takeover offer. A bidder must advise:

(a) what cash amounts are held in reserve to pay acquisition costs; and
(b) the identity of, and the terms upon which, a third party will contribute cash for the takeover.[585]

There are no equivalent provisions in Part 3 Schedule 8 of the *Corporations Regulations* relating to schemes of arrangement. From a shareholder perspective, the reasoning behind this difference is unclear. If shareholders under a takeover may find this information relevant when assessing an offer, it seems apparent that shareholders voting on a scheme of arrangement would also benefit from having this information.

Disclosure of funding information at the commencement of a reassembly project may serve the same role as in a takeover. That disclosure, recommended to be provided to all owners irrespective of the size of the scheme being acquired, should extend to how a reassembly is to be funded, and the amount and any conditions precedent of that finance.

Contracts subject to finance being obtained 'on terms satisfactory to the [b]uyer'[586] provide an element of uncertainty for lot owners. Finance terms, such as the loan amount and interest rate offered by a lender, may be unsatisfactory to a developer. In addition, a loan approval may be conditional on the satisfaction of a number of conditions, including the lender being satisfied with the property's valuation. Application of a provision such as section 629(1) of the *Corporations Act* to

[584] Regulatory Guide 9 Takeovers, above n 574, RG 9.272.

[585] Section 636(1)(f) of the *Corporations Act* provides that for any cash offered as consideration for the bid, the bidder must disclose details of:

(i) the *cash amounts (if any) held* by the bidder for payment of the consideration; and
(ii) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds; and
(iii) any *arrangements under which cash will be provided* by a person referred to in subparagraph (ii).'

[586] See, for example, clause 3.1 REIQ and Queensland Law Society Contract for Houses and Residential Land (10th ed).

contracts for the reassembly of community titles scheme lots would render 'subject to finance' clauses invalid. The discretion inherent in the clause allowing the developer to determine whether the finance terms are acceptable or not is problematic under section 629(1) of the *Corporations Act*. Imposing an obligation to disclose the developer's finance arrangements in place as at the date of the offer, and prohibiting contracts being conditional upon satisfactory finance being obtained, would provide a degree of reassurance to owners that the buyer is financially capable of completing the purchase of the scheme. This approach helps to achieve a balance between stakeholder rights and interests by providing owners with a contract that minimises the opportunities for a developer to withdraw, while enabling the developer to make an offer over the entire scheme at a fixed price.

It is worth noting that a developer who holds land acquisition funding will not necessarily be granted construction funding to complete a project on the site, and therefore disclosure of land acquisition funding is not an assurance that construction of the development project will be completed. An additional item that may be considered for disclosure to owners of lots within schemes containing four or more lots is the provision of information on what contractual or funding arrangements (if any) are in place for completion of the redevelopment proposal on the site.[587]

OTHER MATERIAL INFORMATION

Section 636(1)(m)(i) of the *Corporations Act* contains a 'catch-all' provision requiring a bidder to disclose any other information within his, her or its knowledge that is '*material to the making of the decision by a [share]holder* … whether to accept an offer under the bid'.[588] A largely equivalent provision is contained in Rule 8302, Part 3, Schedule 8 of the *Corporations Regulations*, which mandates disclosure in the explanatory memorandum of any other materially relevant information

[587] An analogy may be drawn with the provisions of the *Town and Country Planning Act* in this context. In their assessment of the proposed acquisition under section 226(1), the Secretary of State must consider the forecast financial viability of the proposals for the site, after funding or third-party investment proposals are considered: Office of the Deputy Prime Minister, above n 512, 24–5.

[588] Section 636(1)(m) of the *Corporations Act* provides that the bidder must disclose *any other information* that:

(i) is *material* to the *making of the decision* by a holder of bid class securities whether to accept an offer under the bid; and

(ii) is known to the bidder; and

(iii) does not relate to the value of securities offered as consideration under the bid. (emphasis added)

within the knowledge of a director, liquidator or official manager that has not previously been disclosed to shareholders.[589]

It is recommended that a similar requirement to disclose other materially relevant information also be incorporated into the disclosure obligations with respect to schemes containing four or more lots. A 'catch-all' provision will add flexibility to disclosure requirements ensuring all materially relevant information relating to the reassembly of the community titles scheme is disclosed. The provision of materially relevant information also assists with transparency in negotiations, enables professionals to properly advise owners, and promotes opportunities for meaningful engagement with owners.

USE OF EXPERTS IN DISCLOSURE

Recommendations:

- Incorporation of a requirement that the developer commission an independent valuation of the lot/scheme to be acquired is highly recommended. Guidance must be provided on the valuation methodology to be adopted by the valuer (discussed in Chapter 5).

In order to make an informed decision about the acceptability or otherwise of a takeover offer, or a proposal in an explanatory statement for a scheme of arrangement,[590] a shareholder must be able to reasonably determine the appropriateness of the price offered for the securities. However, the value of a share may not be readily apparent to shareholders, particularly where the shares are not publicly traded on a stock exchange. In a change of corporate control setting, an expert is appointed to advise the company of the value of the shares that are the subject of the offer. This expert's opinion is provided to shareholders with the target's statement.[591] Experts are uniquely positioned

[589] Section 636(1) *Corporations Act* exempts the bidder from re-disclosing information previously provided to shareholders within the bid class.

[590] Section 602 *Corporations Act*.

[591] Section 640(1) *Corporations Act* provides that an expert's report must be included with the target's statement in response to a takeover offer by a bidder where:

(a) the bidder's voting power in the target is 30% or more; or
(b) for a bidder who is, or includes, an individual – the bidder is a director of the target; or
(c) for a bidder who is, or includes, a body corporate – a director of the bidder is a director of the target.

In the context of a scheme of arrangement, an expert's report is required when the other party to the scheme holds a minimum of 30 per cent of the voting shares in the company or the class of shares, or there are shared directors in the company and the transferee: Rules 8303 and 8306 Part 3, Schedule 8 *Corporations Regulations*.

because of their skills and experience to opine[592] whether a takeover offer is 'fair and reasonable',[593] the scheme is in the 'best interest of the members'[594] or the consideration for the compulsory acquisition represents 'fair value'.[595]

In the context of a community titles scheme termination, it is recommended that the developer be required to appoint, at its own cost, an appropriately qualified and experienced independent expert to provide an opinion on the value of the lot using established criteria. Doing so would provide owners with an independently calculated estimate of the value of the lot.[596] At a minimum, provision of a valuation will assist a developer to determine an offer price appropriate for the lots within the scheme, and enable owners to make an assessment of that offer, balancing the stakeholder interests in these circumstances.[597]

Both Chapters 6 and 6A and Part 5.1 of the *Corporations Act* also utilise experts in the independent review of transactions to ensure both procedural compliance and protection of shareholders.[598] Adoption of an independent review mechanism, in addition to independent valuation of the lots to be acquired, is also recommended in this chapter as part of the reform package for the *BCCM Act* termination provisions.[599]

[592] Expert reports must advise of both the expert's opinion and the reasons for that determination: s 640(1) *Corporations Act*, Rule 8303, Part 3, Schedule 8 *Corporations Regulations* and s 667A(1)(c) *Corporations Act*.

[593] Section 640(1) *Corporations Act.*

[594] Rule 8303 Part 3 Schedule 8 *Corporations Regulations*.

[595] Section 667A(1) *Corporations Act*.

[596] Chapter 5 Protections for Lot Owners discussed potential considerations to take into account when developing valuation criteria in more depth.

[597] McHugh J in *Gambotto v WCP Ltd* (1995) 182 CLR 432 discusses substantive fairness being achieved when an offer price favourably compares to an expert's valuation. Chapter 5 discusses the alternatives to using market value to determine the quantum of consideration payable to owners of community titles scheme lots which are the subject of a reassembly.

[598] Section 657A *Corporations Act*.

[599] This issue is discussed further under the heading 'Review process and considerations for decision makers.'

FORM AND CONTENT REQUIREMENTS

Recommendations:

- In contracts for the reassembly of community titles scheme lots:
    - clauses rendering offers conditional upon securing sufficient lots to meet the statutory termination threshold should be permitted
    - clauses enabling the buyer to exercise a discretion in determining whether or not the outcome of a condition is satisfactory (for example 'subject to finance' and 'subject to satisfactory due diligence' clauses) should be prohibited, and
    - Restrictions should be placed on varying the consideration during the period in which offers remain open for acceptance, and in respect of any later expropriations.

The *Corporations Act* seeks to provide shareholders with equal opportunities to participate in changes to corporate control. This is achieved through two means: first, requiring offers to be presented in a prescribed form[600] and, secondly, by mandating that offers made to all shareholders in a bid class be on the same terms (including the consideration payable to those shareholders).[601]

Despite variances in each of the mechanisms to effect a change of corporate control, there are a number of similarities in the form and content requirements of each. Chapter 6 of the *Corporations Act* necessitates that offers for a takeover bid are to be issued on the same date to all shareholders within the class.[602] Once the minimum acceptance threshold is satisfied, Chapter 6A of the *Corporations Act* permits a bidder to issue compulsory acquisition notices to all remaining shareholders within the bid class, effecting the expropriation of the outstanding shares.[603] Both takeover offers and compulsory acquisition notices must be in writing,[604] and in the case of compulsory acquisition notices, be on the same terms as the takeover.[605] In addition, the method of

[600] Section 618 *Corporations Act*.

[601] Section 619 *Corporations Act*.

[602] Section 618 *Corporations Act*.

[603] Section 661B *Corporations Act* requires that notices in the prescribed form be issued to shareholders and lodged with both ASIC and the market operator on which the securities are listed.

[604] The content of the bidder statement and expert's report are discussed further under the heading ' Disclosure, Valuation and Expert Reports'.

[605] Section 661C(1) *Corporations Act*.

acceptance for an offer must be specified[606] and payment terms for the acquired shares must comply with statutory timeframes.[607]

Given the likeness of all shares within a class, the imposition of a requirement that all offers comply with minimum standards and be on the same terms ensures all individual shareholders are treated equally. In relation to the drafting of contracts for the purchase of community titles scheme lots, both the *Property Law Act* and the *BCCM Act* prescribe compliance with disclosure, and form and content requirements before a contract for the sale of a lot will be enforceable.[608] In addition to form requirements, however, the *Corporations Act* also limits what conditions may be imposed upon offers. For example, a clause that sets a minimum level of acceptance required before a takeover will proceed is permitted.[609] In the context of a community titles scheme termination, such a clause would enable a developer to make offers to purchase lots conditional upon a sufficient number of contracts being entered into to pass the motion to terminate the scheme. Where this condition is not satisfied, the developer would be entitled to terminate all contracts. A similar condition authorising the developer to terminate contracts with owners where they were unable to secure the resolution without dissent to terminate the scheme under section 78 of the *BCCM Act* is often included in contracts under the current system. Developers must continue to be able to include like provisions in contracts – if the developer cannot secure contracts over a sufficient number of lots to meet the statutory threshold for termination, the redevelopment is unlikely to proceed, and it is appropriate for the developer to withdraw from the purchase. This type of clause, it is argued, ensures that an appropriate balance between the stakeholders' interests may be achieved.

Section 629(1) of the *Corporations Act* prohibits criteria enabling the bidder or an associate to determine, at their discretion, whether or not to proceed with a takeover. During a scheme reassembly, in addition to a requirement that the developer secure a minimum number of lots, the inclusion of due diligence, planning[610] and finance[611] clauses is common. An application of

[606] Section 620(1) *Corporations Act*.

[607] Section 620(2) *Corporations Act*.

[608] See, for example, Part 6 Divisions 3 and 4 *Property Law Act* regarding the sale of land generally in Queensland, including the requirement for written sale agreements and Chapter 5 Part 1 *BCCM Act* incorporating the specific contractual requirements to effect the sale of an existing community titles scheme lot.

[609] Section 629(1) *Corporations Act*. Most commonly, minimum acceptance levels are set at 90 per cent, the point at which the compulsory acquisition provisions in Chapter 6A of the *Corporations Act* are triggered: Hutson, *Australia's Takeover Rules,* above n 563.

[610] Section 263 *Sustainable Planning Act* requires owners' consent to the making of an application for a material change of use or reconfiguration of a lot, meaning that a developer is unable to lodge an application

section 629(1) of the *Corporations Act* to a community titles contract would render many of those clauses impermissible because of the discretionary element in each of them. On the face of it, limiting the permissible conditions of purchase is likely to significantly increase the risk profile for a development. The developer must either perform due diligence and obtain approvals prior to securing contracts for the site, or purchase the site without the benefit of having completed those investigations. While commercially it is more desirable for a developer to enter into a contract conditional upon the buyer being satisfied by their investigations, prohibiting such conditions would add certainty for owners. This thesis recommends an expropriation power be granted to developers as part of the amendments proposed for section 78 of the *BCCM Act.* This power must be limited by both strict conditions and protections for affected owners.[612] Ensuring a degree of certainty for affected owners on the likelihood of an acquisition proceeding is an essential element to achieve a fair and balanced approach to the issue. This balance, which seeks to achieve an optimal level of use without excessively weakening rights, is a fundamental aspect of BalTAT. As a result, it is recommended that a similar prohibition on clauses with a discretionary element as contained in section 629(1) of the *Corporations Act* be incorporated into law reform proposals for section 78 of the *BCCM Act*.

In contrast to Chapters 6 and 6A of the *Corporations Act*, Part 5.1 of the *Corporations Act* is not so highly prescriptive. Rather, Part 5.1 facilitates the company's voluntary entry into a collective sale agreement,[613] subject to compliance with a number of prerequisites.[614] As noted above, one of those requirements is the issue of a court-approved explanatory statement to shareholders.[615] That statement must accompany the notice calling the members' meeting to consider the proposal.[616]

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for planning approvals without either appropriate consents being granted in a contract for the purchase of the land, or owners having previously consented to the making of an application.

[611] See, for example, clause 3.1 REIQ and Queensland Law Society Contract for Houses and Residential Land (19th ed), which provides that a buyer 'may terminate a contract for the purchase of land up until the Finance Date if the buyer does not secure finance 'on terms satisfactory to the Buyer'.

[612] Refer to the discussion in Chapter 5 for more information on this point.

[613] Corporations and Markets Advisory Committee, Parliament of the Commonwealth, *Members' Schemes of Arrangement Report,* December 2009, 10.

[614] For a more detailed discussion of each stage in the preparation and execution of a scheme of arrangement see Colla, above n 552, 369–73.

[615] Sections 411(1) and 412(1)(a) *Corporations Act.*

[616] Section 412(1)(a) of the *Corporations Act* requires that an explanatory statement be included with notice of meeting sent to members, and where applicable creditors. The explanatory statement must explain the 'effect of the compromise or arrangement', disclose any material interests of the directors in the proposed arrangement and set out prescribed information material to the making of a decision by the members. The content and approval process of the explanatory statement are considered further under the heading ' Disclosure, Valuation and Expert Reports'.

When making a determination about whether to issue its approval, the Court must take into account the Australian Securities & Investments Commission's (ASIC) findings on the draft explanatory statement.[617] Chapter 3 and Chapter 5 recommend that the law-reform model for the *BCCM Act* include a requirement for an independent review of termination proposals where one or more owners object to the termination. Consideration of this issue in the context of *Corporations Act* requirements is discussed in more depth below.[618]

The second means by which equality of participation in a change of corporate control is ensured, relates to the requirement that the offer price for every share within a class is the same.[619] Takeover bid prices must at least equal the maximum agreed consideration for any acquisition occurring in the preceding four months.[620] If, during the bid period, the offer price is increased, the higher price is payable in respect of all securities in the class, irrespective of whether acceptance at the lower price has occurred.[621] Any compulsory acquisition notices must be presented on the same terms as the takeover offer.[622] The requirement for a universal application of price increases has been criticised as adding unnecessary expense to the takeover process.[623] However, such an approach potentially neutralises the effectiveness of holding out. That is, the price for every security within a class will remain equal throughout both the bid period and compulsory acquisition process, therefore preventing a dissenting shareholder from receiving a benefit unique to them as a result of engaging in holdout behaviour.

Unlike shares in a particular class, lots in a community titles scheme may vary widely in value because of their unique configuration and positioning within a scheme.[624] Accordingly, it is unjust to require equal consideration be paid to all owners.[625] This thesis recommends against the corporate

[617] Section 411(2) *Corporations Act*.

[618] See the discussion under the heading 'Review process and considerations for decision makers'.

[619] Section 619 *Corporations Act*.

[620] Section 621(3) *Corporations Act.*

[621] Section 650(B)(1) and (2) *Corporations Act*.

[622] Section 661A *Corporations Act.*

[623] Hutson, *Australia's Takeover Rules,* above n 563, 4.

[624] Features specific to individual properties such as size, view, level of maintenance and exclusive use areas may all impact on the market value for a lot.

[625] See Chapter 5 for a discussion on the use of market value, and both Chapter 5 and the discussion in this chapter under the heading '

Disclosure, Valuation and Expert Reports' in the determination of appropriate consideration for the transaction.

law principle of applying equal consideration to each lot within a community titles scheme because of the uniqueness of each lot within a scheme.[626]

An alternative to the application of sale price variations to all lots in the scheme would be to limit changes to the offer price during the period for acceptance. This would effectively lock in the price for each community titles scheme lot for the offer period. If the minimum statutory threshold for acceptances is reached, any expropriations that occur subsequent to the passage of the resolution would also be capped at the offer price. Such an approach would effectively prevent a windfall gain being paid to holdout owners because variations in consideration payable during the termination process are not permitted. As in a takeover, the benefit to a developer with this approach is the certainty of a fixed purchase price, while the disadvantage to owners is an inability to negotiate consideration once a draft contract is issued. A developer is not entitled to exercise expropriation powers until the statutory termination threshold is achieved and the resolution passed. Individual owners are still empowered to refuse any offer placed before them. In those circumstances, it is up to the developer to make an offer to the owners as a collective that is attractive enough to secure agreement of as many of those owners as possible – at least the minimum statutory threshold for the termination of the scheme and exercise of expropriation powers. The question of what the consideration offered should be is a separate matter touched upon earlier in this chapter in the context of valuation and expert reports, and in Chapter 5 in relation to the criticisms of using market value as a determinant of price.

ACCEPTANCE TIMEFRAME AND THRESHOLDS

Recommendations:

- A requirement that offers must remain open for acceptance for a minimum of 60 and a maximum of 90 days, mirroring the provisions in the *Strata Schemes Development Act* should be incorporated.
- The termination threshold must be set having regard to the characteristics of Queensland community titles schemes. It is recommended that a sliding scale threshold be adopted based on the number of lots within the scheme as follows:

[626] Refer to the discussion under the heading 'Form and content requirements' for further information on this point.

- Two-lot schemes - the owner of one lot may petition the review body for an order to terminate the scheme.
- Three-lot schemes – the owners of a majority of lots in the scheme may resolve to terminate the scheme.
- Schemes containing four or more lots – the owners of 75 per cent of lots in the scheme may resolve to terminate the scheme.

- The threshold must be based on the number of lots in the scheme, not the number of votes cast at a meeting of the body corporate called to consider the motion to terminate.

While expropriation provisions are contained in the *Corporations Act,* the triggering of the buyer's right to exercise those powers is in the hands of the shareholders. That is, in order to exercise compulsory acquisition powers, the bidder must have acquired the mandated minimum percentage of shares during the takeover period. This process is highly structured and regulated; however, acceptance of the offer is at the discretion of each of the shareholders.[627] Similarly, the approval of motions authorising the entry into a scheme of arrangement is dependent upon the outcome of a vote at a meeting of the members of the company.[628] The issue of a takeover offer or the calling of a meeting of the members to consider a scheme of arrangement does not guarantee acceptance by the requisite number of shareholders. If an insufficient number of shareholders accept the proposal, the minimum threshold required to exercise compulsory acquisition powers, or pass the scheme of arrangement, will not be achieved. Therefore, both the timeframe for communication of acceptances and the statutory threshold for acceptances to trigger the expropriation powers in the *Corporations Act* are key elements of the change of corporate control methods.

Takeover offers may remain open for acceptance for up to 12 months.[629] By way of contrast, the *Strata Schemes Development Act* prescribes that owners of New South Wales schemes targeted for redevelopment have a minimum of 60 days and a maximum of 90 days to return the notice in support of the reviewal plan.[630] It is recommended that a statutory acceptance timeframe consistent with the *Strata Schemes Development Act* be implemented in a law reform package for section 78 of

[627] Section 624 *Corporations Act*.

[628] Section 411(4) *Corporations Act*.

[629] Section 624 *Corporations Act*.

[630] Section 174(1) *Strata Schemes Development Act.*

the *BCCM Act.* Fixing this timeframe ensures owners will be provided with a sufficient time to seek and obtain professional advice on the offer, without exposing owners to an uncertain future for the scheme for a significant period. It is argued that a 12-month timeframe renders owners subject to uncertainty for too long, an undesirable position under BalTAT.

The approval thresholds between a scheme of arrangement under Part 5.1 of the *Corporations Act* and a takeover/compulsory acquisition under Chapters 6 and 6A of the *Corporations Act* differ as follows:

Change of control option adopted	Approval threshold
Takeover/compulsory acquisition under Chapters 6 and 6A *Corporations Act*	Compulsory acquisition powers may be exercised when, as a result of the takeover bid, the bidder has: (a) secured a relevant interest in a minimum of 90 per cent of the number of securities in the bid class; and **(b)** obtained a minimum of 75 per cent, by number, of those securities during the takeover bid period.[631]
Scheme of arrangement under Part 5.1 *Corporations Act*	Schemes of arrangement are approved by the company when the motion is passed in each meeting of the shareholder subclasses[632] by:

[631] Section 661A *Corporations Act.* The court may permit compulsory acquisition of securities in circumstances where a bidder does not reach the minimum thresholds: s 661A(3) *Corporations Act*.

[632] Section 411(4) of the *Corporations Act* requires the company to divide its shareholders into sub-classes and call meetings of those sub-classes of members to consider and vote upon the scheme of arrangement. The sub-classes nominated by the company do not necessarily reflect the classes of shares. Rather, sub-classes must be based upon the legal rights and interests of shareholders. For example, where ordinary class shareholders have divergent interests, the company may need to divide the class into a number of smaller groups and hold separate meetings for each subclass to consider the scheme: s 411(5) *Corporations Act*. This approach enables voters with common interests to meaningfully discuss a proposed scheme at a members' meeting: *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583 (Bowen LJ) in Damian and Rich, above n 552, 14.

The requirement that each meeting of the members pass the resolution increases the difficulty of securing enough votes to approve a scheme of arrangement; if any one class rejects the arrangement, it will fail: Colla, above n 552, 379.

(a) a majority in number of the members, or class of members present and voting in each meeting; and
(b) a special majority (i.e. 75 per cent) in votes of those shareholders present and voting in each meeting.[633]

It is immediately evident that a difference exists in the statutory thresholds between each change of corporate control option. This difference is justified by the dual layer of judicial review and ASIC's input into schemes of arrangement, together with the requirement to obtain the shareholders' approval as a collective at a meeting of the members.[634] By way of contrast, the takeovers system, which contains less independent oversight, has a higher threshold to be satisfied.

This thesis argues that it is necessary to adopt a lower threshold in the reform of the *BCCM Act* than the compulsory acquisition threshold in the *Corporations Act*.[635] Over 65 per cent of the 44,563 community titles schemes registered in Queensland contain six lots or fewer.[636] If a 90 per cent threshold consistent with Chapter 6A of the *Corporations Act* is adopted, schemes with nine or fewer lots will only be able to meet the threshold where every owner accepts the developer's offer, a situation no different to the current regulatory regime. With over 65 per cent of schemes having six or fewer lots, and a much higher

[633] Section 411(4)(a) *Corporations Act.* Prior to implementation of the scheme of arrangement, the company must seek approval of the arrangement from the Court: s 411(4)(b) *Corporations Act*. The Court is not required to approve the scheme of arrangement if it appears that the process was undertaken to avoid the requirements in Chapter 6 *Corporations Act*: s 411(17) *Corporations Act*.

ASIC may also appear before the Court and object to the scheme: s 411(17) *Corporations Act*. ASIC may appear during the second hearing, irrespective of whether it also appeared at the first hearing. The Court must not approve the scheme of arrangement if ASIC objects to it, but is not obliged to approve the scheme merely because ASIC has not objected: s 411(17)(b) *Corporations Act*. ASIC will intervene if it is of the view that new developments should be brought to the Court's attention, if it has concerns about the manner in which the meetings were conducted or ASIC considers the scheme should be altered or conditions imposed on its operation: Regulatory Guide 60, Schemes of Arrangement, above n 569, RG60.99.

[634] Payne, above n 556, 72. As noted above, once approved a scheme of arrangement applies to transfer all shares within the company or class nominated in the arrangement to the acquirer, subject to the terms of that agreement: s 411 *Corporations Act.* By way of contrast, the bidder under a takeover may only compulsorily acquire remaining shares once that bidder has secured 90 per cent of the voting control in that company within the timeframes specified in the *Corporations Act*: s 661A(1)(b) *Corporations Act*.

[635] Section 661A *Corporations Act*.

[636] Reid and Pocock, above n 17.

proportion containing 10 lots or fewer,[637] the level at which a developer becomes entitled to acquire the remaining lots should reflect the prevalence of smaller schemes.

Chapter 1 discussed the varying thresholds within Australia and internationally for the termination of a community titles scheme. Within Australia, three jurisdictions are noteworthy: the Northern Territory, New South Wales and Western Australia. The Northern Territory's *Termination of Units Plans and Unit Titles Schemes Act* provides for a sliding scale threshold for terminations based on the age of the scheme. That is, for schemes with 10 or more lots,[638] the threshold is as follows:[639]

Age of scheme	Resolution required to terminate scheme
Development age[640] is at least 15 but less than 20 years	95 per cent of the total interest entitlements for the development
Development age is at least 20 but less than 30 years	90 per cent of the total interest entitlements for the development
Development age is greater than 30 years	80 per cent of the interest entitlements for the development

First, if the Northern Territory model is adopted in Queensland, the legislation will be inapplicable to a large proportion of Queensland schemes. Second, and perhaps more importantly, the age of the scheme is not readily discernible by owners. Adopting a threshold that must be determined by reference to building records maintained by local government is complex and confusing. BalTAT promotes a balanced recognition and protection of owners' rights. Adopting a termination threshold that adds to the complexity of the termination system is, it is submitted, undesirable.

[637] As at 2 November 2012, over 80 per cent of the 41,335 schemes in Queensland had 10 or fewer lots and 91.08 per cent had a maximum of 20 lots: Virtue, above n 21.

[638] Schemes with fewer than 10 lots require unanimous consent to terminate: s 9(1) *Termination of Units Plans and Unit Titles Schemes Act*. If the development has less than 10 lots or Part 4 of the Act does not otherwise apply, the Tribunal may, under s 17(1)(a) *Termination of Units Plans and Unit Titles Schemes Act,* order the termination of the development in limited circumstances. Refer to Chapter 1 for a detailed overview of the provisions.

[639] Sections 4 and 12(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[640] Refer to n 95 and accompanying notes for the definition of 'development age'.

The 75 per cent fixed termination threshold in New South Wales' *Strata Schemes Development Act* would hold more relevance to Queensland's strata conditions; however, it is not ideal either. A more suitable option is the Western Australian proposal to adopt a sliding scale threshold based on the number of lots within the scheme. This figure is readily ascertainable in Queensland by reference to the community management statement, a publicly available document registered against the title of every lot within a scheme.[641] Chapter 1 discussed that the Western Australian threshold is expected to be:

(a) for schemes with four or more lots – 75 per cent; and
(b) for schemes containing two or three lots – a majority.[642]

It is essential that both the threshold for termination and activation of expropriation powers be tailored for Queensland, taking into account the characteristics of Queensland schemes. Provided that a range of safeguards are introduced in accordance with the principles in BalTAT, this thesis argues that the prevalence of small schemes warrants a tailored approach to include those schemes within the termination regime. Therefore, this thesis recommends that the following termination threshold be adopted in Queensland:

Scheme size	Resolution required to terminate scheme
Two lots	The owner of one lot may petition the review body for an order to terminate the scheme.
Three lots	The owners of a majority of lots in the scheme may resolve to terminate the scheme.
Four or more lots	The owners of 75 per cent of lots in the scheme may resolve to terminate the scheme.

[641] Section 115L *Land Title Act.*

[642] Landgate, above n 106, 2.

It is argued that this threshold achieves a balance between the stakeholder interests, while avoiding the potential for holdouts to negatively impact upon the optimal use of a scarce resource.

In a takeover under the *Corporations Act*, once the 90 per cent threshold is satisfied and statutory processes are complied with,[643] a bidder may compulsorily acquire the remaining shares in that class on the same terms as the takeover offer.[644] Acceptance by 90 per cent of shareholders is, on the face of it, evidence that the terms of the takeover bid, including the price offered, were considered fair by the vast majority of shareholders.[645]

A shareholder is deemed to have refused a takeover offer if they fail to respond to the bidder. This applies irrespective of whether a non-response was due to the shareholder's apathy, death or merely being uncontactable. Only acceptances of the takeover bid contribute towards meeting the 90 per cent threshold for the compulsory acquisition of remaining shares. Therefore, the lack of a response by shareholders increases the difficulty of satisfying the thresholds for both the triggering of extensions to the acceptance date,[646] and the entitlement to compulsorily acquire remaining shares.[647]

Equivalent deeming provisions are not contained in Part 5.1 of the *Corporations Act* in respect of schemes of arrangement, because the decision to proceed with the arrangement is made by a resolution of the members present and voting at the general meeting.[648] As long as a quorum for that meeting is achieved, the rate of attendance by shareholders is largely irrelevant. Consequently, the number of members who attend and vote at a meeting to consider a scheme of arrangement

[643] Section 661B *Corporations Act* requires that notices in the prescribed form be issued to shareholders and lodged with both ASIC and the market operator upon which the securities are listed.

[644] Section 661A *Corporations Act*.

[645] Owen J in *Elkington v Vockbay* (1993) 10 ACSR 785, 793-794 discussed in Elizabeth Boros, 'Compulsory Acquisition of Minority Shareholdings – The Way Forward?' (1998) 16 *Company and Securities Law Journal* 279, 292.

[646] Takeover offers may be accepted by target shareholders at any time until the acceptance period expires. The offer period must remain open for a minimum of one month and a maximum of 12 months: s 624 *Corporations Act*. An automatic 14-day extension occurs if, during the last seven days prior to expiry of the bid period, the bidder's voting power in the company increases above 50 per cent: s 624(2) *Corporations Act*. This extension of time enables remaining shareholders to reconsider their decision on the offer. Relevantly, it is generally accepted that in thin markets, where a particular company's shares are rarely traded because a single shareholder owns a large proportion of the shares in the company, the future market value of the minority shareholding may be affected negatively: *Elkington v Shell Australia Limited* (1993) 11 ACSR 583 (Sheller JA), discussed in Damian Grave, 'Compulsory Share Acquisitions: Practical and Policy Considerations' (1994) 12 *Companies and Securities Law Journal* 240, 249.

[647] Section 624(2) of the *Corporations Act* requires an increase in the voting control of the company to 50 per cent and section 661A of the *Corporations Act* requires the bidder to have acquired a relevant interest in 90 per cent of the shares in the bid class to trigger the compulsory acquisition powers in the Act.

[648] Section 411(4)(a)(ii) *Corporations Act*.

may be significantly lower than the total shareholding of the affected classes of shares. For example *In re the Matter of Chevron (Sydney) Ltd,*[649] only 55 per cent of shareholders and 60 per cent of debenture holders voted at the meeting. Nevertheless, the Court sanctioned the arrangement, authorising its implementation because, first, the appropriate quorums were reached and, second, conditions imposed by the Court in Their Honours' review of the explanatory memorandum were complied with. Similarly, in *Re Australian Foundation Investment Co Ltd,*[650] attendance at the general meetings of the nine companies to consider the scheme of arrangement formed a quorum and the votes cast at those meetings were overwhelmingly in favour of the arrangement.[651] However, given the low overall attendance, shareholders present and voting at the meetings represented only half of the share capital issued in the companies.[652] Despite this, the Court authorised implementation of the arrangement.

Given that the threshold recommended in respect of the termination of a community titles scheme is tied to the number of lots in the scheme, an approach consistent with a Chapter 6 takeover must be adopted. That is, the threshold must be calculated having regard to the number of lots in the scheme, and not the votes cast at the meeting of the body corporate to consider the termination. This is a more conservative approach than occurs in a scheme of arrangement; however, it is argued that such an approach is justified in the termination of community titles schemes; BalTAT recognises a possible emotional connection that an owner may develop with their property. Further, the resulting need for a family to relocate from a dwelling upon the exercise of expropriation powers justifies the use of lot numbers rather than the votes cast at a meeting of the body corporate. Therefore, if an owner does not communicate acceptance of an offer to purchase the lot, or does not attend the meeting to consider a termination proposal, that silence must be taken as a refusal (that is, a vote against the motion to terminate the scheme).[653]

The change of control provisions in the *Corporations Act* seek to achieve a balance between shareholder protection and facilitating changes to corporate control. Takeovers under Chapters 6 and 6A of the *Corporations Act* seek to protect shareholders and achieve efficiency through the

[649] *In re the Matter of Chevron (Sydney) Ltd* [1963] VR 249.

[650] *Re Australian Foundation Investment Co. Ltd* [1974] VR 331.

[651] Between 80 and 99 per cent of owners present and voting supported the entry into the scheme of arrangement: *Re Australian Foundation Investment Co. Ltd* [1974] VR 331.

[652] *Re Australian Foundation Investment Co. Ltd* [1974] VR 331, 333.

[653] This is consistent with established contract law principles. See *Felthouse v Bindley* (1862) 142 All ER 1037 in relation to silence not constituting acceptance of an offer.

adoption of a highly structured process. Part 5.1 of the *Corporations Act* provides more flexibility for corporations to act within a system that contains a high level of external review and shareholder approval. Both methods effect a change of corporate control while minimising the holdout problem, and simultaneously balancing protections for dissenting shareholders.

External review of proposals and the formulation of detailed guidance on assessment criteria is a further option to consider in reforming the termination provisions in the *BCCM Act.* The following sub-part discusses the independent review of proposals and on what criteria those reviews must be based.

REVIEW PROCESS AND CONSIDERATIONS FOR DECISION MAKERS

Recommendations:

- A mandatory independent review of contract terms and the proposal to terminate a community titles scheme is recommended where one or more objections to the termination are made.
- Further research is recommended to determine which form the review body should take to appropriately balance the rights and interests of stakeholders and achieve a level of efficiency in the system.
- The review body or bodies must be able to consider issues including, but not limited to, the contract price and more substantive issues in relation to the termination to ensure outcomes fair to all stakeholders may be achieved.
- Criteria upon which termination proposals must be assessed, and the weight accorded to those considerations should be detailed in legislative amendments.

Under Chapter 6A of the *Corporations Act,* the bidder is entitled to exercise their compulsory acquisition powers once they have acquired 90 per cent of the shares in the bid class in the target company, 75 per cent of which must have been purchased as a result of the takeover offer.[654]
A shareholder may object to the compulsory acquisition notice if they believe that the consideration for the compulsory acquisition represents less than fair value for the shares.[655] If objections lodged

[654] In addition, the bidder must have acquired 75 per cent of the target company's shares during the takeover process: s 661C(1) *Corporations Act*.

[655] Section 664E *Corporations Act*.

with the company equal 10 per cent of the remaining 10 per cent of shareholders in the bid class, the bidder must either discontinue the acquisition,[656] or seek the Court's approval to continue.[657]

The Court's jurisdiction in objection hearings extends only to determining whether consideration in the compulsory acquisition notice reflects fair value for the shares.[658] If the Court concludes that fair value is payable under the notice, the exercise of the compulsory acquisition powers must be authorised.[659]

The existence of an avenue for independent review of expropriations is important to ensure that the fairest balance is struck between stakeholder rights and powers. Therefore, it is recommended that a mandatory independent review of the proposal occur where an objection is made by one or more owners of the remaining 25 per cent of lots in the scheme after the statutory termination threshold has been met.

The criteria upon which that independent review is based are also relevant. In section 78(2) of the *BCCM Act,* the District Court may make an order for the termination of a scheme if it is 'just and equitable' to do so; however, no guidance on the interpretation of this phrase is given in the legislation. By way of contrast, in a compulsory acquisition under Chapter 6A of the *Corporations Act*, the payment of fair value for the shares is the only item for the Court to assess.[660] The presumption that fair value was paid, given the high percentage of acceptances of the offer, is rebuttable if the facts of the case suggest otherwise. That is, if evidence is presented demonstrating that consideration payable is below fair value,[661] widespread acceptance of the takeover bid was not achieved[662] or the shareholders were not in possession of all or the correct information when

[656] Section 664E(4) *Corporations Act*.

[657] Section 664F(1) *Corporations Act.*

[658] Section 664F(3) *Corporations Act.*

[659] Section 664F(3) *Corporations Act.*

[660] Section 664F(3) *Corporations Act*.

[661] This includes both where compensation was not representative of the fair value of the securities (*Re John Labbatt* (1959) 20 DLR (2d) 159 and *Freeland (Singapore) Private Ltd v Consolidated home Industries Ltd* (1977) CLC 29,891 discussed in Peta Spender, 'Compulsory Acquisition of Minority Shareholdings' (1993) 11 *Company and Securities Law Journal* 83, 99) and the company was operated in a manner that resulted in the substantial devaluation of the minorities' shares (*Perpetual Trustee Co Ltd v Bell Resources Ltd* (1990) 2 ACSR 337 and *Re Sheldon* (1986) 3 NZCLC 100,058, 100,059 discussed in Spender, 99).

[662] In *Re Rees Application* [1972] QWN 47, discussed in Boros, above n 645, 292, the owners of 90 per cent of the target shares were related to the bidder.

making a determination, the Court may prevent the acquisition.[663] However, proving that below fair value consideration for the shares was offered is difficult; numerous challenges have failed.[664]

Both Spender and Boros criticise the compulsory acquisition judicial review process. Boros argues that limiting grounds of objection to compensation issues is too narrow. It leaves little scope for preventing acquisitions where the majority owner has acted oppressively, unfairly or inappropriately while still offering fair value.[665] This may be the case in respect of judicial review processes for compulsory acquisition; however, the powers of the Takeovers Panel[666] are much wider and include the ability to determine that the conduct of a company's affairs resulted in 'unacceptable circumstances'.[667] A finding of 'unacceptable circumstances' entitles the Panel to make broad-ranging orders protecting the rights and interests of the affected parties.[668] Accordingly, given the already wide powers of the Takeovers Panel, it is redundant to argue that the scope of the oppression remedy in *Gambotto v WCP Ltd*[669] should be extended to cover takeovers.[670]

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[663] In *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192, 207 in Grave, above n 646, 249–50, the owners of 90 per cent of the target shares accepted the offer without all relevant information having been disclosed; were victims of improper dealings such as cheating or deception (*In re Sussex Brick Co Ltd* [1961] Ch 289 discussed in Spender, above n 661, 99); may have been induced to act contrary to their best interests because of misleading and deceptive statements relating to material facts (*In re Western Manufacturing (Reading) Ltd* [1956] Ch 436, *Re John Labbatt* (1959) 20 DLR (2d) 159, 163 and *Re Rees Application* [1972] QWN 47 discussed in Spender, above n 661, 99); or received a recommendation from the board to accept the bid that was based on an expert's report that was incorrect (*Re Lifecare International Plc* [1990] BCLC 222 discussed in Spender, above n 661, 99).

[664] *Pauls Ltd v Dwyer* [2004] 2 Qd R 176, *Re Goodyear Australia Limited; Kelly-Springfield Australia Pty Limited v Green* [2002] NSWSC 53, *Capricorn Diamonds Investments Pty Ltd v Catto* [2002] VSC 105 and *Austrim Nylex Limited v Kroll* (2002) 170 FLR 265 (appealed from *Austrim Nylex Limited v Kroll* (No 4908 of 2001 heard by Warren J in the Supreme Court of Victoria – judgment pending at the time of the article) discussed in Nicole Calleja, 'Takeovers and Public Securities' (2002) 20 *Company and Securities Law Journal* 236, 236.

[665] Boros, above n 645, 296.

[666] The Takeovers Panel has replaced the courts as the primary forum for resolution of takeovers disputes: s 659AA *Corporations Act*. It seeks to achieve quick and efficient decision making by a panel with specialist expertise: Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (17th ed, Thomson Reuters, 2014), 694.

[667] The Takeovers Panel may declare 'circumstances in relation to the affairs of a company to be unacceptable circumstances … whether or not the circumstances constitute a contravention of a provision of this Act': s 657A *Corporations Act*.

[668] Section 657D(2)(a) *Corporations Act*.

[669] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[670] In *Gambotto v WCP Ltd* (1995) 182 CLR 432, Their Honours appear to have concluded that Parliament is presumed to have legislated for the protection of minority interests: *Re Albert Street Properties Ltd* (1997) 18 ACLC 62, 28 and Colla, above n 552, 373. McHugh J considered that the timing, structure, negotiation and disclosure to shareholders, together with the method by which approvals impacted on the fairness or otherwise of the company's actions. The lack of information provided to the minority shareholders in *Gambotto* caused the company to act oppressively (*Gambotto v WCP Ltd* (1995) 182 CLR 432, 460). Chapters 6

Nevertheless, the question of whether or not to limit a court's scope of review has relevance to the effectiveness of an independent review process in the termination of a community titles scheme. It is inequitable to owners to restrict the reviewer's jurisdiction to determining whether consideration for the expropriation of a lot is fair. This thesis submits that to achieve a balance between the competing interests of the stakeholders, review powers must extend to more substantive issues on terminations, such as those heard by the Takeovers Panel pursuant to Chapter 6 of the *Corporations Act.*

Spender considers that the protection of minority shareholders through the court review process is pointless if it is 'essentially illusory' because the presumption of fairness and the onus of proof are too difficult to overcome.[671] This thesis argues that the lack of success of challenges to the exercise of compulsory acquisition powers does not render the protections illusory. Rather, the presumption of fairness reflects the Court's balancing of the stakeholders' rights against a commercial arrangement considered acceptable by an overwhelming majority of owners in the bid class, and supported by an expert's determination that the offer price represented fair value. Difficulties in meeting the onus of proof may be overcome by reversing it;[672] however, this would then oblige the majority shareholder to satisfy the court that the offer was fair, in addition to the requirement in section 664F(4) of the *Corporations Act* to pay the objectors' costs of the hearing. Reversing the onus of proof would place a heavy burden on the bidder and defeat any deterrent effect in the legislation against acting improperly, vexatiously or unreasonably.[673]

By way of contrast, the Court's power to determine whether to authorise the implementation or otherwise of a scheme of arrangement is much wider. The statutory framework for independent assessment of a scheme of arrangement provides for the review to be conducted by an impartial, expert body allowing a consideration of the circumstances surrounding each proposal. It enables stakeholders to communicate concerns, and an independent examiner to consider compliance with the Court's previous directions.[674] ASIC will intervene if it is of the view that new developments

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and 6A of the *Corporations Act* mandate that minimum disclosure be made to affected parties and provide avenues to dispute the actions of a company as unacceptable. Non-compliance with statutory requirements is not a prerequisite to a finding that the conduct of a company's affairs was unacceptable circumstances: s 657A *Corporations Act*. The requirement for the presentation of expert reports and other relevant information to affected shareholders reinforces the research undertaken in respect of minimising dignitary harm from expropriations of land discussed in Chapter 5. Transparency through disclosure may create a fairer environment for minority or remaining owners: Digby above n 567, 129–30.

[671] Spender, above n 661, 101.

[672] Ibid.

[673] Calleja, above n 664, 237.

[674] Section 411(17) *Corporations Act*.

should be brought to the Court's attention, if it has concerns about the manner in which the meetings were conducted, or ASIC considers the scheme should be altered or conditions imposed on its operation.[675] The Court must have regard to ASIC's submissions on a scheme of arrangement.[676]

It was noted above that one justification for the differing termination threshold between schemes of arrangement and takeovers, was the dual review of a scheme of arrangement by the Court. By way of contrast, a higher threshold exists for a takeover where an administrative tribunal holds primary jurisdiction to hear and resolve disputes.[677] Dispute resolution for community titles schemes is dealt with under Chapter 6 of the *BCCM Act*. That chapter grants wide powers to adjudicators and specialist adjudicators to resolve disputes between the relevant parties on just and equitable grounds.[678] The jurisdiction to hear a dispute under Chapter 6 of the *BCCM Act* does not currently extend to the authority to order a termination. However, the advantages of extending the dispute resolution powers under Chapter 6 of the *BCCM Act* in place of the District Court as review body pursuant to section 78(2) of the *BCCM Act* should be investigated. This is a potential area that may benefit from further research. The bodies already established under the *BCCM Act* may have the potential to interact in the termination process in the same way that the Takeovers Panel does in respect of a takeover under Chapter 6 of the *Corporations Act*. Further research may benefit from an investigation of whether an appropriate balance between stakeholder rights may be achievable if an administrative tribunal, rather than a court, is empowered to authorise a termination to occur. This is particularly relevant if the threshold to approve a termination is lowered to the recommended sliding scale set out in this chapter.

Irrespective of what form the review body takes, the criteria upon which a termination proposal must be assessed should be detailed in any amendments to the *BCCM Act*. Chapter 3 and Chapter 5 contain recommendations for review, including but not limited to an assessment of:

[675] Regulatory Guide 60, Schemes of Arrangement, above n 569, RG60.99.

[676] Section 411(17) *Corporations Act* provides that the Court must not approve the scheme of arrangement if ASIC objects to it. Conversely, it is not obliged to approve the scheme merely because ASIC has not objected: s 411(17)(b) *Corporations Act*. ASIC may appear and object to the scheme at the second hearing, irrespective of whether it appeared at the first hearing.

[677] The Takeovers Panel may make declarations under section 657A of the *Corporations Act* and orders protecting the rights and interests of the affected parties under section 657D(2)(a) of the *Corporations Act.*

[678] Section 276(1) *BCCM Act*.

a) the extent to which the proposed future use of the scheme land will contribute to the achievement of the economic, social or environmental well-being of the area in question pursuant to section 226(1A) of the *Town and Country Planning Act*[679]
b) the fit of the proposed use of the land within the planning framework for the area[680]
c) the forecast financial viability of the proposals for the site after funding or third-party investment proposals are considered[681]
d) the extent which negotiations were conducted in good faith with owners, and
e) the consideration offered to owners and whether it will cover out of pocket expenses, enable a replacement property to be acquired and whether the provision of further financial and relocation assistance is necessary.

Importantly, the proposed reforms must also guide the review body on the weight to attribute to individual concerns as against factors relevant to the wider community. Expropriation powers, such as compulsory acquisition by local governments in circumstances where private sector benefits are generated, will be narrowly interpreted by the courts. That is, owners' rights will be prioritised over collective benefits to the wider community.[682] By way of contrast, reviews of takeover activity are focused on the collective or greater benefits from consolidation of corporate ownership into single holdings.[683] Takeovers legislation seeks to prevent 'dictation'[684] by 'bloody-minded minorit[ies]'[685] and abuse by the majority,[686] while requiring payment of a fair price for the acquisition.[687] In its assessment of

[679] Office of the Deputy Prime Minister, above n 512, 21.

[680] Ibid., 24–5.

[681] Ibid.

[682] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

[683] Vanessa Mitchell, 'Has the Tyranny of the Majority Become Further Entrenched?' (March 2002) 20 *Company and Securities Law Journal* 74, 76. Spender notes that while there is extensive research on takeover activity, the research has not investigated numerous relevant issues such as 'productive capacity, competition, external balances, business investment, research and development and employment,' meaning that it has not yet been resolved in Australia whether takeovers are beneficial: Spender, above n 661, 89 quoting FM McDougall, 'Some Evidence on the Determinants and Effects of Corporate Takeovers in Australia', in *Takeovers and Corporate Control: Towards a New Regulatory Environment* (Centre for Independent Studies, 1987), 123.

[684] Companies and Securities Advisory Committee (CASAC), Compulsory Acquisitions Issues Paper, 3, referred to in Rogers, above n 198, 98.

[685] Spender, above n 661, 84.

[686] Rogers, above n 198, 98.

[687] Section 661E(1) *Corporations Act* and Boros, above n 645, 284.

those factors, the court takes into account the fairness of a takeover bid having regard to the circumstances of the shareholders of the bid class as a whole, rather than as individuals.

BalTAT argues that the incorporation of expropriation powers into the *BCCM Act* is justified in circumstances where fragmented ownership may result in the long-term underuse of scarce redevelopable land. Stakeholders' conflicting interests and the recognition that a person may develop an emotional connection to his or her dwelling, necessitates a balanced approach to determining when expropriation powers may be exercisable. As in the assessment of a takeover, this balanced approach in respect of a community titles scheme termination may only be achieved when the benefits and impacts upon both the wider community and individual owners are considered,[688] together with the potentially vast differences in ownership holdings of the parties.

An additional consideration when establishing a review mechanism is the time and expense associated with the preparation and running of an application for review.[689] Excessive costs of objecting to proposals may inhibit access to objection avenues because of cost constraints, in turn reducing the effectiveness of the protections granted by the provisions.[690] Chapter 5 discussed access to justice, calling into question the efficacy of the objection process for compulsory purchases in the United Kingdom. Some of the primary concerns raised by Imrie and Thomas were the technical knowledge divergences between the parties and the costs associated with appointing specialists to advise on and present evidence in respect of a proposal. These issues may render an objection financially unviable for an owner.[691] Provision of the short-form disclosure document recommended in this chapter for two- or three-lot schemes will not bridge the knowledge divergence between the parties as effectively as the more comprehensive disclosure recommended for schemes containing four or more lots. However, the time and expense associated with preparation of a detailed disclosure document will be an onerous imposition where comprehensive

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[688] In respect of Chapters 6 and 6A *Corporations Act*, Mitchell describes this approach as a '"utilitarian" or "majoritarian"' one: Mitchell, above n 683, 76.

[689] James McConvill, 'Getting a Good Buy with a Little Help from a Friend: Turning to the United States to go Forward with Australian Takeovers Regulation' (2006) 34(153) *Syracuse Journal of International Law and Commerce* 153, 193. The same concerns apply in relation to the preparation of disclosure materials at the commencement of a termination proposal. This thesis proposes that a short-form disclosure be provided to owners of lots in schemes with two or three lots. See the discussion under the heading '

Disclosure, Valuation and Expert Reports' for a more detailed information.

[690] An independent review process has been adopted in relation to the sale and redevelopment of schemes in Singapore. Contractual and disclosure documents and termination resolutions are considered to determine whether the terms are fair and equitable: Sherry, above n 44. A discussion of those provisions is outside the scope of this thesis; however, is a topic worthy of future research.

[691] Rob Imrie and Huw Thomas, 'Law, Legal Struggles and Urban Regeneration: Rethinking the Relationships' (1997) 34(9) *Urban Studies* 1401, 1413 and 1415.

disclosure materials are to be provided to a maximum of three owners. Therefore, this thesis argues that the provision of a shorter form disclosure is justifiable in the circumstances.

Chapter 6A of the *Corporations Act* seeks to address access to justice issues by providing that any costs incurred by objectors in relation to the court proceedings must be paid by the majority shareholder on an indemnity basis.[692] This approach has been criticised because it effectively removes any deterrent by objectors to lodge unreasonable or vexatious objections.[693] The use of specialist tribunals which do not adhere to the rules of evidence, are informal and do not require legal representation, may overcome some of these concerns. However, Imrie and Thomas' concerns discussed above remain relevant.

The review body selected should be well equipped to balance the conflicting interests of stakeholders. The need to achieve an optimal use of scarce resources by preventing holdouts must be accorded weight, while also protecting the bundle of owners' rights and ensuring appropriate consideration is paid upon an expropriation.

CONCLUSION

BalTAT focuses on the striking of a balance between competing stakeholder rights to prevent strategic behaviour by fragmented owners, leading to a protracted underuse of scarce redevelopable land. This balance is achieved through recommending amendments to the termination provisions of the *BCCM Act*. Balanced Termination Analysis Theory theorises that the implementation of expropriation powers is justified where strategic behaviour results in the inability to terminate a community titles scheme, rendering the resource prone to prolonged underuse.

This chapter has considered two means in the *Corporations Act* by which a change of control may be effected while avoiding the holdout problem. Part 5.1, and Chapters 6 and 6A of the *Corporations Act* contain processes to obtain complete control over a corporation, limited by the numerous safeguards implemented to protect shareholders. Both the processes and the safeguards employed in Part 5.1, and Chapters 6 and 6A of the *Corporations Act* may provide useful guidance for the development of a law-reform model for section 78 of the *BCCM Act*. None of those provisions may be inserted 'as is' into the *BCCM Act;* however, selected principal features of the systems may be tailored to suit a community titles scheme context. Those features extend to disclosure, including the provision of an independent valuation to shareholders; form and content requirements for

[692] Section 664F(4) *Corporations Act*.

[693] Calleja, above n 664, 237.

offers; selection of a suitable acceptance threshold to terminate a scheme and activate expropriation powers; and the implementation of a requirement for independent review. Adoption of these features will accord with the principles of BalTAT.

CHAPTER 5

PROTECTIONS FOR LOT OWNERS

INTRODUCTION

Community titles schemes are subject to holdout behaviour because of the inability to terminate a scheme without the unanimous consent of owners.[694] Resolutions without dissent are notoriously difficult to achieve when differing ownership of lots exist.[695] Therefore, developers will often seek to have lots acquired by one owner, or a small group of cooperative owners, prior to requesting that a motion for the scheme's termination be included in a general meeting agenda. It is this process of purchasing every lot within a scheme that creates the potential for holdouts to arise. BalTAT, discussed in Chapter 2, seeks to achieve a balance in the conflicting rights and interests of the stakeholders in order to achieve an optimal use of scarce resources while protecting the property rights of the owners in question. It is argued that retaining the current system does not achieve an equitable balance between the stakeholders as necessitated by BalTAT.

BalTAT seeks to limit the impact of owners' strategic behaviour by allowing an expropriation of lots, while ensuring tight enough limitations on the expropriation powers are in place, and an appropriate price is payable to the owner for their title to the property. It would be undesirable to extend expropriation powers too far; the stability of property rights and the real estate market may be undermined, investment discouraged and welfare of affected owners placed at risk.[696] Therefore, the implementation of protections to owners is a crucial step to ensuring fair and equitable treatment for all parties under BalTAT.

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[694] Section 78(1)(a) of the *BCCM Act* requires a resolution without dissent to effect a termination of a community titles scheme. A resolution without dissent is defined in section 105(3) of the *BCCM Act* as a resolution in which no vote is counted against the motion.

[695] Sherry, above n 6, 230.

[696] O'Connor J criticised the broad application of the 'public purpose' test in the application of compulsory acquisition (or eminent domain, as it is known in the United States) powers because it rendered all property subject to the risk of economic development takings: *Kelo v City of New London* 545 US 469 (2005), 503.

BalTAT theorises that the implementation of expropriation powers is justified where strategic behaviour engaged in by owners of a scarce resource may veto optimal use of the asset, resulting in its prolonged underuse. However, BalTAT also recognises the emotional connection that the owners of that asset may have developed through their ownership. This conflict results in the need to achieve balance in the rights and interests of the stakeholders. Part of that balance is to ensure that owners are protected from possible negative impacts of the use of expropriation powers and the potential abuse of those powers.

Chapter 3 considered features of local government compulsory acquisition powers as a basis for the development of recommendations for a system of expropriation. That chapter identified principles of compulsory acquisition and the manner in which expropriation powers are interpreted. Those principles may be extrapolated to guide the development of law reforms for section 78 of the *BCCM Act.* Assessment of public benefits resulting from an acquisition ensures the contributions to the wider community will justify the reallocation of rights in respect of a lot upon a scheme's termination.

Chapter 4 provided recommendations in relation to disclosure, expert advice and valuation of lots, form and content requirements for contracts, identification of a suitable threshold for the termination of a scheme, the use of expropriation powers to enable a reassembly of titles to the scheme, and independent review of the exercise of those expropriation powers.

This chapter investigates the safeguards necessary for a system of expropriation. It begins with a review of the three US cases that interpret the use of compulsory acquisition powers, or 'eminent domain' as it is known there, to enhance the economic development of a region through urban renewal. The cases considered in this chapter – *Berman v Parker* 348 US 26 (1954), *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) and *Kelo v City of New London*[697] – have, subject to statutory limitations now in place,[698] interpreted the 'public use' limitation in the Fifth Amendment to the US Constitution broadly, expanding eminent domain powers. Part 1 of the chapter analyses the development of the case law in the area and discusses the historical conditions in the United States during urban renewal projects from the 1940s to the 1960s. The first part facilitates Part 2's identification of the common criticisms of the US expropriation system. It then analyses those criticisms in order to avoid the same weaknesses in the law-reform model for section 78 of the

[697] *Kelo v City of New London* 545 US 469 (2005).

[698] For a summary of the legislative changes made to date, see Castle Coalition, *50 State Report Card,* above n 156.

BCCM Act. Part 2 seeks to determine the necessary and desirable safeguards to be built into such a system to ensure a balance between the conflicting interests of the stakeholders may be achieved.

The primary recommendations made in this chapter include:

- reconsidering the use of 'market value' as the basis for the valuation of the scheme land
- implementation of limitations on expropriation powers, rather than designating blight as a precondition of use, and
- providing a forum for independent review of termination proposals.

These recommendations are discussed in Part 2.

PART 1 – EMINENT DOMAIN IN THE UNITED STATES: EXPROPRIATION TO PROMOTE ECONOMIC DEVELOPMENT

Eminent domain powers are limited by the Fifth Amendment to the US Constitution, which provides 'nor shall private property be taken for *public use*, without just compensation'.[699] 'Public use' has been broadly interpreted by the United States Supreme Court in *Berman v Parker,*[700] *Hawaii Housing Authority v Midkiff* [701] and *Kelo v City of New London.*[702] This broad interpretation extended eminent domain powers to allow the relevant government agency to promote economic improvement of a region through private sector involvement in property redevelopment.

Unlike the Australian and UK cases on compulsory acquisition,[703] which are administrative in nature, the eminent US domain cases interpret whether the taking by the relevant government agency was constitutional. Consideration of the US cases in this chapter does not suggest that they provide any precedent for use in an Australian or UK context. Rather, the US experience of using eminent domain to facilitate redevelopment of land may influence the development of law reform proposals for section 78 of the *BCCM Act.* The recommendations focus on the necessary safeguards for owners to ensure an appropriate balance between the extension of expropriation powers and protections for lot owners may be achieved. The aim of investigating the United States' position is to avoid the

[699] *United States Constitution Amend V* (emphasis added).

[700] *Berman v Parker* 348 US 26 (1954).

[701] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

[702] *Kelo v City of New London* 545 US 469 (2005).

[703] These cases and the associated legislation are discussed in detail in Chapter 3.

widespread negative social impacts and displacement of vulnerable members of the community that occurred in the United States from the 1940s to the 1960s.[704]

The urban-renewal programs that operated in the United States from the 1940s to the 1960s systematically utilised eminent domain to acquire rundown properties in America's largest, but decaying, cities.[705] The programs enabled private sector developers to redevelop the assembled sites into middle- and upper-class housing. It was intended that renewal would halt the rapid decline of targeted areas into slums; however, the projects resulted in hundreds of thousands of families and businesses being displaced from run-down but close-knit, vibrant areas.[706] Urban-renewal zones were predominantly populated by minority and low socio-economic households. Many projects were labelled 'negro clearance'[707] measures because of their targeted impact, and it was considered that planners 'had a knack for picking low income neighborhoods where residents had deep attachments to friends, relatives, neighbors, churches, schools, and local businesses'.[708]

Insufficient relocation efforts were made for residents displaced by the early urban renewal projects.[709] The combination of a lack of relocation assistance and low compensation payments further exacerbated the socio-economic difficulties experienced by many families, business owners and their employees due to displacement.[710] In addition to the issues affecting displaced residents in the inner cities, newly developed suburban land was heavily subsidised. These subsidies encouraged

[704] Merrill identifies a further danger associated with the use of eminent domain for economic development. He discusses the corruption of public officials and political legitimacy resulting from the pressure to exercise eminent domain powers in circumstances where the expropriation wholly, or predominantly, benefits the private sector, not the public: Thomas W Merrill, 'The Economics of Public Use' (1986) 72(61) *Cornell Law Review* 61, 112. While this concern is of critical importance to address in a discussion on the extension of government powers of eminent domain, or compulsory acquisition for economic development, this thesis does not recommend that approach. Rather, this thesis recommends the grant of a compulsory acquisition power to private sector owners (as opposed to government). That power would facilitate the majority owner's acquisition of remaining lots in the scheme in circumstances where they have already acquired a minimum percentage of scheme lots.

[705] Nicole Stelle Garnett, 'The Neglected Political Economy of Eminent Domain' (2006–07) 105 *Michigan Law Review* 101, 112 and Amnon Lehavi and Amir N Licht, 'Essay Eminent Domain, Inc.' (2007) 107 Columbia Law Review 1704, 1711.

[706] Garnett, above n 154, 112 and Lehavi and Licht, above n 154, 1711.

[707] Nicole Stelle Garnett, 'The Public-Use Question as a Takings Problem' (2003) 71 *George Washington Law Review* 934 and Derek Werner, 'The Public Use Clause, Common Sense and Takings' (2000–01) 10 *Public Interest Law Journal* 335–59.

[708] Garnett, above n 707, 946 (citations omitted).

[709] Melissa Pocock, 'Holdouts, Site Amalgamations and Renewal of Urban Areas: A Call for Legislative Reform', paper presented at the 18th Annual Pacific-Rim Real Estate Society Conference, Adelaide, 16 January 2012, 7, <http://www.prres.net/index.htm?http://www.prres.net/Conference/2012Conference.htm>.

[710] Ibid.

a mass exodus of both people and resources from the cities into the suburbs, further complicating inner-city revitalisation efforts. The mid-twentieth century urban renewal schemes failed abysmally, with many negative social impacts still affecting the United States today.[711]

In the midst of the US urban-renewal efforts, the Supreme Court decided *Berman v Parker*.[712] The Court ruled on the constitutionality of the *District of Columbia Redevelopment Act of 1945, 60 Stat. 790* (*Redevelopment Act*), which sought to modernise streetscapes and clear dilapidated areas. The *Redevelopment Act* achieved this by authorising the taking of 'blighted' properties for transfer to and redevelopment by the private sector.[713] While the legislation did not define 'blight', it was clearly intended to include properties outdated as a result of improvements to technology and societal changes.[714] Berman challenged the expropriation of his department store on the basis that, despite the property being in a modernisation and improvement area, it was not dilapidated or unfit for occupation.

The US Supreme Court upheld the constitutionality of the *Redevelopment Act* on the basis that it furthered the public welfare. The Court interpreted the 'public use' limitation in the Fifth Amendment to the US Constitution as having been met if the land was to be used for a 'public purpose'. Their Honours deferred to the legislature's definition of 'public purpose', which extended to protecting public welfare by improving the aesthetic appeal, sanitation, design and safety of urban areas.[715] Therefore the expropriation was constitutional, despite the on-sale of the acquired land to private sector developers being permissible under the *Redevelopment Act*.

Three decades after *Berman v Parker*,[716] the US Supreme Court decided *Hawaii Housing Authority v Midkiff,*[717]ruling on the validity of the *Land Reform Act of 1967.* The *Land Reform Act* attempted to overcome historical conditions in Hawaii, which caused an unusual concentration of home ownership,[718] by acquiring land from the small collection of owners and transferring it to the tenants who resided in the properties. O'Connor J, delivering the decision for the Court, followed *Berman v*

[711] Garnett, above n 154, 112 and Lehavi and Licht, above n 154, 1711.

[712] *Berman v Parker* 348 US 26 (1954).

[713] *Berman v Parker* 348 US 26 (1954) at 29, quoted in Benjamin Barros, 'Nothing "Errant" About It: The *Berman* and *Midkiff* Conference Notes and How the Supreme Court Got to *Kelo* With Its Eyes Wide Open' (Widner Law School Legal Studies Research Paper Series no. 08-30), 3, <http://ssrn.com/abstract=902926>.

[714] *District of Columbia Redevelopment Act* of 1945, 60 Stat. 790, Ch. 7 s5-701 in Barros, above n 713, 4.

[715] *Berman v Parker* 348 US 26 (1954), 33.

[716] *Berman v Parker* 348 US 26 (1954).

[717] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

[718] On Oahu 22 people owned 72.5 per cent of the fee simple titles in land: Barros, above n 713, 14.

Parker[719] by once again deferring to the legislature's assessment of 'public purpose'. The Court upheld the constitutionality of the legislation,[720] reading 'public use' in the Fifth Amendment to the US Constitution as 'public purpose'. That is, '[w]here the exercise of the [expropriation] power is rationally related to a conceivable *public purpose*', the acquisition is permitted.[721] O'Connor J concluded that deconstructing the concentration of control in the real estate market was a public purpose, justifying the expropriation of land. The benefits the tenants received were irrelevant because the public purpose behind the legislation rendered it constitutional.

Berman v Parker[722] and *Hawaii Housing Authority v Midkiff*[723] established that 'public use' in the Fifth Amendment to the US Constitution was satisfied where a 'public purpose' justified the expropriation. *Kelo v City of New London*[724] was an apparently natural expansion of the principles regarding public purpose and private benefit established in those earlier cases,[725] but was nevertheless widely criticised.[726] Many academics and interest groups saw the case as an opportunity for the Court to rein in the use of expropriation powers where land was being transferred to one or more private sector entities for redevelopment.[727] The Supreme Court, however, permitted the expropriation,[728] which many people viewed as a significant diminution of private property rights in the United States.[729] The decision shocked both the legal profession and

[719] *Berman v Parker* 348 US 26 (1954).

[720] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984), 232–3.

[721] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984), 232–3.

[722] *Berman v Parker* 348 US 26 (1954).

[723] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

[724] *Kelo v City of New London* 545 US 469 (2005).

[725] *Berman v Parker* 348 US 26 (1954) and *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

[726] One of the predominant reasons for this criticism is that *Kelo v City of New London* 545 US 469 (2005) did not establish a detailed and workable test that effectively balances property rights against eminent domain powers: Rutkow, above n 156, 269. As a result, most of the states have enacted legislation to regulate or prohibit economic development takings; however, the effectiveness of many of these reforms have been called into question: Castle Coalition, *50 State Report Card,* above n 156. For additional discussion on *Kelo v City of New London* 545 US 469 (2005)*,* see above n 156 and accompanying discussion.

[727] Rutkow, above n 156, 261.

[728] *Kelo v City of New London* 545 US 469 (2005).

[729] See, for example, above n 156 and accompanying discussion.

wider community,[730] caused public uproar,[731] was the subject of 'near universal condemnation' and created a 'political maelstrom'.[732]

Kelo v City of New London[733] arose from the New London Development Corporation's (NLDC) proposal to expropriate 115 properties to facilitate a 90-acre redevelopment project on the Fort Trumbull waterfront in New London, Connecticut. The site was located adjacent to the $300 million research facility proposed by Pfizer Inc.

New London City was classified as a 'distressed municipality' in the 1990s, stemming from the closure of the Naval Undersea Warfare Centre, which at one time employed 1500 local residents. The size of the local population had deteriorated considerably over an extended timeframe, and unemployment was double the state average.[734] The New London City Council sought to revive the municipality by establishing the NLDC to draft and implement plans to redevelop Fort Trumbull's waterfront area. The development proposal included plans for a hotel and conference centre, marinas, a pedestrian access way along the riverfront, apartments, a museum, commercial office space and a retail centre. A US$1 per year, 99-year lease with the developer, Corcoran Jennison, was negotiated by the NLDC to undertake the works. The project was anticipated to create between 1700 and 3150 jobs, significantly increase property tax revenues,[735] encourage public access to the waterfront and be the catalyst for the city's rejuvenation.[736]

The owners of 15 non-blighted properties challenged the NLDC's proposal to acquire and on-sell the 115 parcels earmarked for redevelopment. Kelo and the other petitioners argued that the expropriation and subsequent transfer of land to the developer were permissible only where the land was blighted. By a majority of five to four, the US Supreme Court disagreed, ruling the acquisitions valid notwithstanding that the private sector would receive the greatest gains from the project. The Court determined that the 'public purpose' test in *Berman v Parker*[737] and *Hawaii*

[730] Barros, above n 713, 1.

[731] Lee, n 156 at 123 and 129.

[732] Abraham Bell and Gideon Parchomovski, 'The Uselessness of Public Use' (2006) 106 *Columbia Law Review* 1412, 1418 and 1423.

[733] *Kelo v City of New London* 545 US 469 (2005).

[734] The population declined almost 30 per cent from the 1960s: *Kelo v City of New London* 545 US 469 (2005), 470.

[735] It was anticipated that property tax revenues would increase by between US$680,544 and US$1,249,843: *Kelo v City of New London* 545 US 469 (2005), cited in Rutkow, above n 726, 262.

[736] *Kelo v City of New London* 545 US 469 (2005), cited in Rutkow, above n 726, 262.

[737] *Berman v Parker* 348 US 26 (1954).

Housing Authority v Midkiff[738] was satisfied; economic development was an accepted government function indistinguishable from other public purposes carried out by government.[739] Adoption of the NLDC's plans was, in the Court's view, evidence that the government believed there was a public purpose associated with the acquisitions. Once public purpose is established, the plans implemented to achieve the desired public purposes, the acceptability of expectant benefits likely to be generated and which properties are required for the project are issues for the government to determine.

Unlike the majority, the dissenting judges rejected the taking as unconstitutional. Rehnquist CJ, Scalia and Thomas JJ agreed with O'Connor J's rejection of Her Honour's earlier decision in *Hawaii Housing Authority v Midkiff,*[740] concluding that the broad interpretation of 'public use' as 'public purpose' in that case was 'errant'.[741] O'Connor J sought to limit a government's use of eminent domain for the economic development of a region to circumstances where the targeted properties were blighted, or the expropriation was necessary to correct 'widespread social injustice'.[742]

In Thomas J's separate dissenting judgment, His Honour limited the interpretation of 'public use' in the Fifth Amendment to 'actual use by the public',[743] citing that on-sales of acquired land to the private sector ran counter to principles of social justice.[744] His Honour determined that the future use of the property must be analysed to determine whether the 'public use' requirement was met.[745]

There is a close alignment between Thomas J's dissenting judgment, *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[746] and *Prentice v Brisbane City Council*.[747] The Australian cases have consistently held that where a private sector entity participates

[738] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

[739] *Kelo v City of New London* 545 US 469 (2005), 484.

[740] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

[741] *Kelo v City of New London* 545 US 469 (2005), 501. O'Connor J's explanation that *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) was 'errant' has been criticised as being unconvincing. Barros argues that a more convincing argument may have been that, with the benefit of hindsight, the decisions in *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) and *Berman v Parker* 348 US 26 (1954) were wrong to interpret the 'public use' requirement so broadly: Barros, above n 713, 1–3 and 20.

[742] Rutkow, above n 726, 267.

[743] Ibid., 268.

[744] *Kelo v City of New London* 545 US 469 (2005), 521–22 cited in Rutkow, above n 726, 268.

[745] *Kelo v City of New London* 545 US 469 (2005), 506–12.

[746] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[747] *Prentice v Brisbane City Council* [1966] Qd R 394.

in a project, the public purpose requirement for the acquisition cannot be satisfied.[748] For example, French CJ held in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[749] that the future use of each parcel must be determined, not the characteristics of the overall project.[750] Gummow, Hayne, Heydon and Kiefel JJ considered that the agreement between Parramatta City Council and the developer, which obliged the Council to transfer certain parcels to the developer in exchange for approximately $96 million in public assets,[751] evidenced that the Council intended to on-sell the land, not utilise it for a public purpose.[752]

By way of background, in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council,*[753] Parramatta City Council attempted to compulsorily acquire two parcels, making up 2.8 per cent of the redevelopment site. The parcels were earmarked for inclusion in a $1.4 billion integrated mixed-use project incorporating a number of public facilities and assets, in addition to residential and commercial office towers.[754] The owners of the two parcels to be expropriated challenged the validity of the acquisition.

In the New South Wales Court of Appeal's decision in *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd*,[755] which was overturned by the High Court,[756] Tobias JA held that it was appropriate to treat the redevelopment holistically because the planning extended to the entire redevelopment site. As such, the acquisitions were necessary to implement the Council's master plan, not merely to assist the developer to profit from the project. Tobias JA held that the developer's profit from the structuring of the agreements between the Council and

[748] In *Prentice v Brisbane City Council* [1966] Qd R 394, the Queensland Supreme Court held that acquisitions will be *ultra vires* and consequently void where the true purpose of exercising the powers was to facilitate private sector-led projects.

[749] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[750] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [45].

[751] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [100].

[752] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [95–6] and [98].

[753] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[754] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [23].

[755] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008).

[756] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

developer was ancillary to the generation of public benefits.[757] This approach parallels the decision in the *Arsenal Football Club Case*, in which Collins J considered the acquisition of 143 properties for redevelopment into Arsenal Football Club's new stadium and numerous public facilities and assets.[758] His Honour upheld the Secretary of State's decision that the most compelling justification for the compulsory purchase was the comprehensive regeneration of the area, despite the regeneration scheme being triggered by Arsenal Football Club's desire for a new stadium.[759] Interestingly, the redevelopment of Parramatta's central business district was expected to create new public assets and community benefits at a greater level than in both *Kelo v City of New London*[760] and the *Arsenal Football Club Case*.[761]

While the benefits in the Parramatta project were significant and, it is argued, justified the taking, there are many criticisms of using expropriation powers where other private sector entities will primarily benefit. Many of these criticisms have arisen as a result of the practice in the United States of using eminent domain to reassemble land for urban renewal. Part 2 of this chapter identifies a number of criticisms applicable to the use of expropriation powers to reassemble titles to development sites. In addition, Part 2 examines how the negative consequences associated with those common criticisms may be avoided in the law reform proposals for section 78 of the *BCCM Act.* It seeks to determine whether the lessons learned from the United States may guide the limitations necessary for a system of expropriation. While the criticisms identified relate predominantly to the use of eminent domain in the United States, the solutions proposed are drawn from both property and corporate law.

PART 2 – CRITICISMS OF EXPROPRIATION POWERS AND POSSIBLE SAFEGUARDS FOR OWNERS

Unlike the insertion of Part IX into the *Town and Country Planning Act*, which received relatively little attention from academics,[762] the use of eminent domain to promote economic development in the

[757] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [147–8].

[758] This case was also discussed in more depth in Chapter 3 Compulsory Acquisition.

[759] *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin), [15].

[760] *Kelo v City of New London* 545 US 469 (2005).

[761] *The Alliance Spring Co Ltd & Others v The First Secretary of State* [2005] EWHC 18 (Admin).

[762] Imrie and Thomas, above n 691; Winter and Lloyd, above n 453; Gill Castorina, 'Regeneration of Compulsory Purchase' (15 May 2004) *The Estates Gazette* 158; Martin Edwards and John Martin, 'A Thorny Issue' (9 October 2010) *The Estates Gazette* 96 and Riley, above n 435.

United States has been criticised extensively. Those criticisms are unsurprising: early urban renewal efforts were unsuccessful and yet courts have since expanded the scope of the expropriations power.[763] Chapter 1 identified the issues associated with reassembly of fragmented titles to a community titles scheme and its subsequent termination. Chapter 2 set out the theoretical basis for analysis of the expropriation systems investigated in Chapter 3 and Chapter 4. That theoretical foundation seeks to guide law reform, particularly in relation to the selection of the resolution level to terminate a community titles scheme and the key elements of the expropriation powers. This part now examines what protections will limit negative consequences for owners affected by expropriation powers.

Commentators' criticisms of the US system centre on four common themes: the coercive nature of the power; under-compensation of owners and the risk that acquirers will abuse their powers; the targeting of minority and low socio-economic groups through site selection; and the imposition of what have been termed 'dignitary harms'[764] on owners. These criticisms and some of the safeguards incorporated into selected eminent domain statutes from the United States, Australian corporate law and the United Kingdom's compulsory purchase provisions are discussed. In addition, numerous considerations are identified which, if effectively implemented into the reform proposals for section 78 of the *BCCM Act*, may reduce the negative impact of a use of expropriation powers. Utilising experiences from international jurisdictions may avoid the undesirable wholesale and widespread use of expropriation powers contrary to BalTAT. However, neither the criticisms, nor the legislative safeguards discussed are exhaustive; numerous areas for further research are recommended.

COERCIVE NATURE OF EXPROPRIATION POWERS

Recommendations:

- Genuine good faith dealings may be evidenced by transparency through negotiations; provision of information to owners on their rights; offers remaining open for a sufficient time to enable owners to obtain legal, financial and valuation advice; the offer of an appropriate purchase

[763] Garnett, above n 154, 112 and Lehavi and Licht, above n 154, 1711.

[764] Garnett uses the phrase 'dignitary harm' to describe the sense of upset and discomfort owners may suffer as a result of being exposed to the risk of losing their economic autonomy from a taking of his or her property: Garnett, above n 154, 109–10.

price; and availability of support services, if any.

When compulsory acquisition powers are exercised, the element of coercion is apparent from the limited ability an owner has to prevent the acquisition of their property. Opponents argue that it is objectionable to interfere so dramatically and unnecessarily with settled property rights by extending expropriation powers in circumstances where the private sector will benefit, particularly when the free market may achieve the same outcome through agreement.[765] However, Munch's research concluded that an insufficient level of reassembly occurs when reliance is placed on the free market.[766] BalTAT theorises that implementation of expropriation powers is justified to facilitate a reassembly and avoid prolonged anticommons use of an asset in certain circumstances – for example, where a veto by fragmented owners of a scarce resource impedes a change of use to an optimal level, and the reassembly of titles is not possible because of strategic behaviour by those owners.

Perhaps because of the fundamentally coercive aspect of expropriation powers, US eminent domain statutes typically oblige government to negotiate purchases in good faith before exercising expropriation powers.[767] The effectiveness of the obligation to negotiate in good faith has been questioned, however. That is, if expropriation powers may be exercised to acquire land, irrespective of the owner giving their consent, that owner's exercise of free will in participating in those negotiations may be rendered fallacious – if an owner's property is going to be taken anyway, can they really refuse to sell?[768]

Interestingly, there is no equivalent requirement to negotiate in good faith in the UK *Town and Country Planning Act.* Instead, the *Town and Country Planning Act* requires the Secretary of State to be satisfied about the economic, social and environmental benefits that a project will contribute to

[765] Gray, above n 156, 74; Douglas Brown, *Land Acquisition* (LexisNexis Butterworths, 6th ed, 2009), 1; Glen McLeod and Angus McLeod, 'The Importance and Nature of the Presumption in Favour of Private Property' (2009) 15 *Local Government Law Journal* 97; Sean Brennan, 'Government Expropriation for Private Profit Hits Aboriginal Land Hardest' (2008) 7(6) *Indigenous Law Bulletin* 2; Cohen, above n 436; Castle Coalition, *50 State Report Card,* above n 156; Castle Coalition, *Myths and Realities,* above n 156 and Bell and Parchomovsky, above n 732.

[766] Munch, above n 314, 473; Cohen, above n 436, 536 and Garnett, above n 154, 129–30.

[767] Munch, above n 314, 473; Cohen, above n 436, 536 and Garnett, above n 154, 129–30.

[768] O'Connor J described these discussions as negotiating under the 'spectre of condemnation': *Kelo v City of New London* 545 US 469 (2005), 503. See also Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1; Thomas S Ulen, 'The Public Use of Private Property: A Dual-Constraint Theory of Efficient Government Takings', in Nicholas Murcuro (ed) *Taking Property & Just Compensation: Law & Economics Perspectives of the Takings Issue* (Kluwer Academic, 1992) 168 and Garnett, above n 154, 127.

an area if it proceeds. In addition, if there are objections on substantive issues in respect of the expropriation, an independent local inquiry must be held.[769]

In corporate settings, it appears to have been accepted in the past that acquiring minority shareholdings to avoid Greenmail[770] and promote economic efficiency was desirable.[771] However, since the High Court's attribution of property rights to shares in *Gambotto v WCP Ltd*,[772] some have argued that the change of corporate control provisions in the *Corporations Act* are a fundamental attack on ownership rights.[773]

The coercive element to changes of corporate control will only activate upon satisfaction of the minimum statutory thresholds for passage of a resolution approving a scheme of arrangement in Part 5.1 *Corporations Act,* or an overwhelming majority of owners have accepted a takeover offer under Chapter 6 *Corporations Act.* Shareholders are provided with detailed disclosure documents to enable a fully informed decision to be made on the desirability or otherwise of the proposal[774] after seeking any professional advice the shareholder wishes to obtain. Disclosure, and the implementation of statutory procedures for the presentation of offers and the timeframes in which these offers must remain open are, it is argued, a more effective mechanism to ensuring an owner is aware of his, her or its right to refuse a developer's offer than a requirement for the parties to negotiate in good faith.

UNDER-COMPENSATION AND ABUSE OF POWER

Issue:	Recommendation:

[769] See Chapter 3 and Pocock, above n 439, 135.

[770] In 1926, the Greene Committee characterised holdout behaviour in the context of a change in corporate control as oppression by the minority of majority shareholders: Board of Trade, *Company Law Amendment Committee Report* (1925–26), 43. Whincop describes the problem thus:

'By holding out, the minority shareholder holds the corporation to ransom by expropriating benefits that properly accrue to the corporation. Admittedly, the ransom is paid by the majority shareholder and the benefits that belong to the corporation are reflected in the value of the shares of the majority shareholder. However, the conduct of the minority shareholder prejudices the corporation while he or she "holds out" because the corporation is prevented from increasing its net assets.' Whincop, above n 549, 278.

[771] Board of Trade, referred to in Whincop, above n 549.

[772] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[773] See for example, Spender, above n 185; Bird, above n 185; Fridman, above n 194 and McConvill, above n 183.

[774] Refer to Chapter 4 for a detailed discussion on disclosure requirements.

Consideration payable to owners for the expropriation of lots.	• If market value remains as the valuation methodology, ensure out of pocket expenses, such as moving costs and government charges, are reimbursed to affected owners.
	• Investigate the option of changing the valuation methodology for the scheme land away from market value. Possible options include:
	  ○ use of 'replacement value' of the acquired property. This would, on the face of it, enable owners to purchase alternative and equivalent residential accommodation; or
	  ○ an apportionment between the owner and developer of the increase in value (if any) expected from the reassembly of the fragmented titles into a larger redevelopment site known as the 'total aggregation surplus.' The method of calculating the apportionment of the total aggregation surplus between owners must be determined in order for this to represent an equitable option.
	• Conduct further research on the benefit and feasibility of relocation advisory services, the provision of long-term low or nil-interest government loans and/or awards of non-repayable government grants.

Avoiding abuses of expropriation powers by acquiring entities	• Do not limit use of expropriation powers to areas already in decline because of blight because of the potential to withhold maintenance to schemes to accelerate the deterioration of improvements.
	• Control the exercise of acquisition powers through:
	  ○ an assessment of the magnitude of benefits to the public generated from redeveloping the scheme (for example, provision of public open space areas), and
	  ○ consideration of the background facts and circumstances of the owners' acceptance of the developer's proposal to determine whether the owners approved the termination motion to appease the developer in circumstances where it was not appropriate to do so.
	The public benefits from the proposal must also be considered in this respect, to identify whether expropriation of the lots was warranted. In addition to the recommendations in Chapter 3, additional

considerations may include identifying the real purpose of the acquisition, if there was a lack of good faith in the dealings between the parties and whether an ulterior purpose disadvantages the owners.

In the context of compulsory acquisition, the acquisition of real property entitles the former owner to compensation at an assessed level, often based on market value.[775] The standard professional definition of market value[776] has been criticised as normative;[777] market value depends upon a hypothetical sale at an assumed price – the very figure the definition is being used to calculate.[778] This estimate lends itself to calculation errors, resulting in under- or over-estimating values, particularly in cyclical markets such as the real estate market. In addition, the definition was developed in an attempt to reduce compensation paid to owners by government organisations. It was not implemented to calculate the appropriate consideration payable by a developer to owners for the expropriation of lots to facilitate a reassembly and redevelopment of the scheme land.[779] Accordingly, it is argued that use of market value as the methodology upon which each lot is valued is inappropriate in the context of a reassembly to enable the termination and redevelopment of a community titles scheme.

McHugh J's dictum in *Gambotto v WCP Ltd*[780] presents an interesting view of using market value to determine whether the purchase price of expropriated shares is fair. His Honour was of the view that even offers for amounts above the market value of shares may be insufficient and, accordingly, oppressive[781] because shareholders have no control over the timing of acquisitions. This lack of

[775] See, for example, s 20 *Acquisition of Land Act*, s 54 *Land Acquisition (Just Terms Compensation) Act* and, internationally, s 5 *Land Compensation Act 1961* (UK).

[776] The standard professional definition of market value adopted by the International Standards Valuation Committee is:

'Market Value is the estimated amount for which a property should exchange on the date of valuation between a *willing buyer and a willing seller* in an arm's-length transaction after proper marketing wherein the parties had each acted *knowledgeably, prudently, and without compulsion'*: JJ Hockley and Tom Whipple, 'How Relevant is *Spencer's Case* 100 Years On? The Need for a New Valuation Definition: The most probable price' (2009) 17(2) *Australian Property Law Journal* 202, 204.

[777] Ibid. and Lehavi and Licht, above n 154, 1718.

[778] Hockley and Whipple, above n 776, 205–7.

[779] Ibid., 207–8.

[780] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[781] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 457.

control makes minority shareholders subject to fluctuations in the share market.[782] Mason CJ, Brennan, Deane and Dawson JJ indicated a similar viewpoint, holding that 'a shareholder's interest cannot be valued solely by current the market value of the shares'.[783] The High Court's position on this point has been criticised;[784] however, it is clear from *Gambotto v WCP Ltd*[785] that the proprietary rights the High Court attributed to shares were sufficient to require above-market value consideration to be offered. It is interesting that this same requirement for above-market value compensation does not apply to expropriations of land.

The High Court is not alone in its concerns that using market value for expropriations results in under-compensation. Researchers have raised the same concerns in respect of real property expropriations, arguing that under-compensation is caused by or contributed to by a number of factors. First, market value does not incorporate the premium that an owner subjectively places on a property, known as the subjective value premium.[786] Use of market value may, in fact, encourage an owner to sell to a third party at a price below the perceived value of their property, but above the anticipated market value assessment, in an attempt to capture a proportion of that subjective value premium not otherwise recoverable if the lot is valued at market value.[787]

Second, the interpretation applied to the legislation may impact the calculation. In the context of corporate takeovers, section 636(2) of the *Corporations Act* requires that, in certain circumstances, a takeover offer must include an independent expert's report indicating whether the expert considers the offer price to be 'fair and reasonable'. This requirement for expert valuation corresponds to the recommendation in Chapter 4 regarding the provision of both short-form and detailed disclosure to owners upon the commencement of the termination process, which must include a valuation by a

[782] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 458.

[783] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 447.

[784] Whincop states:

'[F]or shares publicly traded, the notion that a judge (assumed to be untrained in finance), on the basis of evidence selected by litigants, can systematically outperform a market in which experienced persons and institutions, with access to high quality information, stake their reputations and fortunes in a battle on market prices, seems ludicrous.' Michael Whincop, 'An Economic Analysis of *Gambotto*', in Ian Ramsay (ed), *Gambotto v WCP Ltd: Its Implications for Corporate Regulation* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 102, 113.

[785] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[786] Frank Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1966–67) 80 *Harvard Law Review* 1165.

[787] Thomas Miceli and Kathleen Segerson, 'A Bargaining Model of Holdouts and Takings' (2007) 9(1) *American Law and Economics Review* 160, 162.

qualified and appropriately experienced independent valuer having regard to the recommendations made in this chapter regarding the valuation methodology to be adopted.

ASIC's interpretation of 'fair and reasonable' in Regulatory Guide 111 encourages experts to utilise a range to express a value for the shares.[788] Where it is unlikely that a higher bid will be achieved, ASIC's interpretation creates the potential for an expert to recommend a price as fair and reasonable, despite it being below what the expert believes market value of the shares to be.[789] While ASIC's Regulatory Guide is not law, ASIC's opinion of the correct interpretation of the *Corporations Act* does carry a high degree of weight in practice.[790]

Setting the minimum offer price for an expropriation of a community titles scheme lot in a scheme targeted for termination at market value may result in owners being forced to pay out-of-pocket expenses, such as incidental moving costs and government charges relating to the acquisition of a new property, without the right to reimbursement of those fees.[791] A further and more concerning situation arises when market value represents a fair payment for the expropriated property, but is insufficient to enable an owner to purchase appropriate or equivalent replacement housing.[792] Owners in those circumstances must resort to increased debt to purchase replacement housing (assuming additional borrowing is possible), and are likely to experience negative cash flow effects resulting from higher repayments on their loans.

Market value compensation was paid to owners whose properties were acquired in 1973 to enable expansion of the Brisbane Airport. The 340 acquired houses had a low market value – approximately one-third were valued below $10,000 – and were some of the most affordable in metropolitan Brisbane at the time. The market value compensation paid to owners was insufficient to enable a

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[788] Australian Securities and Investments Commission, Regulatory Guide 111, *Content of Expert Reports*, RG 111.10 and RG 111.78, <http://download.asic.gov.au/media/1240152/rg111-30032011.pdf>.

[789] Hulme stated that 'in cases of compulsory acquisition … one tends to go to the top of the range [for valuation for compensation purposes], not the bottom:' SEK Hulme AM QC, 'Section 640 of the Corporations Law: Independent Experts' Reports and the RTZ Takeover of Comalco Ltd (2001) 19 *Companies and Securities Law Journal* 134, 150. Basing compensation for the compulsory acquisition of shares on the lowest end of the range may reflect fair value, but it is questionable whether such an amount is fair and reasonable to shareholders, given the coercive element in Chapter 6A of the *Corporations Act.*

[790] Ibid., 142–3.

[791] Section 20 *Acquisition of Land Act*; Cohen, above n 436, 538 and Garnett, above n 154, 106. These costs may include, for example, costs relating to removal and storage costs, solicitor's fees, stamp duties, mortgage discharge and registration fees and loss of business operating profits from moving.

[792] Section 20(2) *Acquisition of Land Act* limits compensation to the value of the estate or interest in the land that is acquired. No additional compensation is available if the owner is unable to secure replacement housing at the same value as the taken property. See also Garnett, above n 154, 106–7.

number of those displaced to secure alternate, equivalent and affordable housing. Unfortunately, many of the displaced owners fell within an older demographic and were unable to service bank loans with their retirement funds. As a result, many owners were forced to relocate outside of metropolitan Brisbane entirely or rely on rental accommodation despite the compensation award.[793]

While market value alone may not reflect the ideal level of consideration for an expropriation, the following adjustments may be made to mitigate under-compensation concerns:

- requiring the purchase price to reflect the higher of the market values determined by two valuers, one appointed by the developer and the other by the owner. In all cases, the two valuers should be independent of both parties,[794] and appropriately qualified and experienced to value the property in question.[795] Allowing the owner to appoint a valuer may appease a potential perception that the developer has instructed the valuer to nominate a low market value for the property;[796] or

[793] The Law Reform Commission: The Law Reform Commission, *Lands Acquisition and Compensation,* Report No. 14 (1980), 142.

[794] In *Pauls Limited v Dwyer* [2001] QSC 067, Pauls Limited and its wholly owned subsidiary Pauls Trading Pty Ltd (collectively 'Pauls') was the overwhelming majority owner of Pauls Victoria Limited. Pauls sought to compulsorily acquire the remaining shares under Part 6A.2 of the *Corporations Act*. Ferrier Hodgson and two other experts were nominated by ASIC to provide an expert report on the fair value of the shares. Rather than setting an offer price, Pauls appointed Ferrier Hodgson to value the minority shareholding. Ferrier Hodgson valued the shares between $2.30 and $2.57 per share. Pauls resolved to offer $2.57 per share and appointed Ferrier Hodgson to provide an expert report on whether the offer price was fair and reasonable. The prior relationship between Pauls and Ferrier Hodgson was not disclosed to shareholders. The compulsory acquisition was challenged by the minority shareholders. Douglas J held that as the offer price was at the higher end of the range determined by Ferrier Hodgson, it was fair and reasonable (*Pauls Limited v Jennifer Mary Dwyer* [2001] QSC 067, [32]). In His Honour's view, it did not matter that it was the same valuer who performed the valuation and provided the independent expert report as long as the valuation was carried out on the correct basis (*Pauls Limited v Jennifer Mary Dwyer* [2001] QSC 067, [23]). Davies, Jerrard JJA and Jones J in *Pauls Ltd v Dwyer* [2004] 2 Qd R 176 upheld Douglas J's decision in *Pauls Limited v Jennifer Mary Dwyer* [2001] QSC 067.

[795] ASIC's Regulatory Guide 111 Content of Expert Reports and Regulatory Guide 112 Independence of Experts reflect ASIC's interpretation of requirements in the *Corporations Act* and gives practical guidance on how to meet obligations under that Act. It would be possible to incorporate these requirements into statutory guidance notes, such as Regulatory Guides issued by ASIC, or into Regulations.

[796] See Garnett, above n 154, 129 for a discussion on the use of dual appraisals in the calculation of compensation for eminent domain in the United States. In relation to the owners' appointment of a valuer, payment of that valuer's costs must also be considered. That is, owners will not necessarily be in a position financially to pay the costs of appointment. Affordability issues are discussed in Chapter 4 and later in this chapter.

- requiring the award of an additional fixed percentage, fixed amount, or sliding scale premium based on the length of residence in a property[797] to owners in addition to the market value of the property.[798]

While these options may reduce the likelihood of under-compensation for the expropriated property, they will not necessarily ensure that displaced owners can secure alternate, equivalent and affordable housing. Therefore, their utility as an effective means of protecting owners is limited. By way of contrast, incorporating a requirement that consideration for an expropriation be at least equal to the 'replacement value' of the lot in question would, on the face of it, enable owners to purchase alternative and equivalent residential accommodation.[799] This is particularly of benefit to households in lower socio-economic brackets whose borrowing capacity is limited.[800] Relocation advisory services, the provision of long-term low or nil-interest government loans and/or awards of non-repayable grants may also assist in re-housing persons affected by the exercise of expropriation powers;[801] however, these financial awards may be more appropriately provided by government. While the services may be a beneficial inclusion in any amendment to the *BCCM Act* it may be inappropriate in the circumstances to impose additional requirements on government where it is

[797] This is consistent with Nadler and Diamond's finding that the length of ownership of a property impacts on the subjective value an owner applies to it. However, they found that in some cases no monetary amount would compensate the owners for the subjective value they place on their property: Nadler and Diamond, above n 583, 715 and 743.

[798] Where the land taken is the owner's principal place of residence, this premium is termed 'solatium'. It is already payable in some jurisdictions in Australia, but the awards vary across states and territories. At a federal level, solatium is $10,000 indexed to inflation since 1989, Victoria and Western Australia are set at 10 per cent of market value, New South Wales awards up to $15,000 (not indexed to inflation) and the Australian Capital Territory awards $15,000 indexed to inflation since 1994. The quantum of solatium in the Northern Territory is not specified and South Australia, Tasmania and Queensland do not award solatium at all. Internationally, there are numerous jurisdictions where the percentage ranges between 5 and 30 per cent: Mike Todd and John McDonagh, 'Solatium Payments for Public Works – An International Comparison', paper presented at the 17th Annual Pacific Rim Real Estate Society Conference, Robina, Australia 16 to 19 January 2011, 14, <http://researcharchive.lincoln.ac.nz/bitstream/10182/3665/1/mcdonagh_solatium_payments.pdf>

[799] For example, the *Uniform Relocation Assistance and Real Properties Acquisition Act* 1971 (US) seeks to ensure that losses, not otherwise adequately compensated by traditional compensation awards are reimbursed to displaced individuals. The Act requires:

- payment of replacement value compensation, rather than fair market value;
- payment of moving expenses, mortgage costs and re-establishment expenses, and
- 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 a replacement 'decent, safe, and sanitary' dwelling that is large enough to accommodate all occupants adequately, is affordable and is in a no less desirable location: Garnett, above n 154, 121–2.

[800] Law Reform Commission, above n 793, 142.

[801] Ibid.

likely that the private sector developers undertaking the expropriation will receive the most significant benefits. Nevertheless, further research on the feasibility and effectiveness of these options is recommended.

In addition to concerns that market value may result in under-compensation, critics argue that a property's market value is at risk of government manipulation and abuse,[802] especially where government is the acquirer of the property (as was the case, for example, in *Kelo v City of New London*[803]). In this respect, government often controls much of the services and infrastructure available to a municipality which, in turn, are key determinants of market value. The discontinuation or removal of services by government in response to an announcement that an area is the subject of urban renewal may negatively impact on the market values within that municipality.[804] Announcements relating to urban renewal programs may be made well in advance of the acquisitions occurring and spur the exodus of residents and businesses from planned redevelopment sites.[805] Following that, a gradual removal of public infrastructure may occur. When the migration of people and reduction in services reaches critical mass, those areas may become unliveable and unrenewable, irreversibly and significantly depreciating property values in the area.[806] This classification and subsequent devaluation are termed 'condemnation blight' and constituted another factor rendering the US urban renewal projects of the 1940s to the 1960s a failure.

This thesis does not recommend that local government compulsory acquisition powers be extended. Nevertheless, it is conceivable that a form of condemnation blight may occur within a community titles scheme. That is, if one or a small group of cooperative owners hold a significant proportion of the lots within the scheme, those owners may vote against the completion of maintenance works in respect of scheme land. Persistent avoidance of maintenance obligations, resulting in a deterioration of improvements, may impact on the market value of the lots within the scheme.[807] As many of the

[802] See, for example, Cohen, above n 436; Castle Coalition, *50 State Report Card,* above n 156 and Castle Coalition, *Myths and Realities,* above n 156.

[803] *Kelo v City of New London* 545 US 469 (2005).

[804] Garnett, above n 707 and Gideon Kanner, 'Do we need to impair or strengthen property rights in order to "fulfil their unique role"? A response to Professor Dyal-Chand' (2008–09) 31 *University of Hawaii Law Review* 423.

[805] Garnett, above n 707, 955.

[806] Bell and Parchomovsky, above n 732; Pocock, above n 709, 7 and Lee, above n 156 (but contrast Ann E Gergen, 'Why fair market value fails as just compensation' (1993) 14 *Hamline Journal Pubic Law and Policy* 181).

[807] See note 812 and accompanying notes for a discussion on the obligation on a body corporate to maintain common property. Chapter 6 *BCCM Act* entitles owners to commence dispute resolution proceedings in circumstances where a recognised dispute exists. Non-compliance with maintenance obligations is a valid dispute under section 227(1) of the *BCCM Act*.

fragmented owners would already have sold their lots within the scheme to the one or small group of cooperative owners, those remaining owners may find their lots unsaleable, and unliveable, leaving a transfer to cooperative owners the only option to exit the scheme. There is evidence to suggest that the deterioration of improvements on scheme land has wider impacts than merely the owners and tenants of the scheme.[808]

One means of controlling condemnation blight is to limit use of expropriation powers to areas already in decline because of blight, a principle that may be extended to community titles schemes. For example, in the Northern Territory a lower termination threshold exists for older buildings.[809] The difficulty with restricting expropriation powers to areas in blight is that it does not necessarily provide a sufficient degree of protection to owners. Rutkow raises the concern that limiting expropriations to blighted properties may result in the 'perverse position' that cities promote the decline of neighbourhoods to trigger the application of expropriation legislation.[810] This could, in effect, create a second-generation condemnation blight problem, particularly because vague blight definitions expose properties, which are simply outdated against modern standards (for example, because of the number of bathrooms and lack of a double garage), to the risk of expropriation.[811] The same risk may occur in respect of community titles schemes that are in need of maintenance.[812] When maintenance costs reach a certain point, it may be cheaper and more economically beneficial for owners to terminate the scheme and make it available for redevelopment, rather than continuing to pay increasing maintenance and upgrade costs. Each scheme will face this point at a different period in its

[808] Warnken, Russell and Faulkner, above n 29.

[809] Sections 4 and 12(1) *Termination of Units Plans and Unit Titles Schemes Act.*

[810] Rutkow, above n 726, 269.

[811] James J Kelly, 'We Shall not be Moved: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation' (2006) 3 *St John's Law Review* 923, 221.

[812] Common property must be maintained in 'good condition … in a structurally sound condition': s 159 *Body Corporate and Community Management (Standard Module) Regulation*, s 157 *Body Corporate and Community Management (Accommodation Module) Regulation*, s 115 *Body Corporate and Community Management (Commercial Module) Regulation*, s 93 *Body Corporate and Community Management (Small Schemes Module) Regulation* and s 31 *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation*. Refer to above n 8 and accompanying text regarding the requirement to establish and contribute to the sinking fund. Refer to above n 10 and accompanying text regarding the incorporation of sinking fund provisions into the *BCCM Act.* Owners that cannot afford to pay the special levy must either borrow the funds or sell their lot. The body corporate may impose penalties for late payment and may commence proceedings against owners to recover outstanding amounts: s 144 and Chapter 7, Part 4 *Body Corporate and Community Management (Standard Module) Regulation*, s 142 and Chapter 7, Part 4 *Body Corporate and Community Management (Accommodation Module) Regulation*, s 103 and Chapter 7, Part 4 *Body Corporate and Community Management (Commercial Module) Regulation*, s 78 and Chapter 7, Part 4 *Body Corporate and Community Management (Small Schemes Module) Regulation* and Chapter 5, Part 3 *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation*.

lifecycle. The balancing of the rights of an owner who wishes to avoid future investments into maintenance costs by selling their lot to a developer for redevelopment, and the owner who wishes to retain ownership, is key.[813] It is argued that adopting a policy position that potentially encourages the neglect of a building in order to trigger expropriation powers to overcome holdouts is not a desirable approach that is appropriate under BalTAT, or acceptable in Australia.

There are two alternatives to using market value as a method of calculating value of a property for use in expropriations. These options may remove the ability for government and other scheme owners to manipulate values through the removal of services and withholding of maintenance. However, further research on both are needed to determine the practical benefits and pitfalls associated with them.

The first option, and the one that has been foreshadowed above, is to use replacement value as the methodology for the valuation to be incorporated in the disclosure documents recommended in Chapter 4. This would allow owners to determine whether the price offered by the developer in the draft contract is at least equal to or above the amount to purchase equivalent replacement housing.

The second option is particularly relevant where an increase in value is expected from the assembly of the fragmented titles to the scheme. In those circumstances, the expected uplift – the total aggregation surplus[814] – may be apportioned between the owners and developer. Current use of market value disregards the appreciation in a property's value upon its incorporation into a larger redevelopment site.[815] In the context of a community titles scheme lot, this uplift in value may occur where the value of the assembled scheme as a redevelopment parcel is higher than the aggregated value of the individual lots. This may occur where, for example, a site may be developed at a higher density than the existing scheme improvements, which would increase the potential sales yield from a development.[816] Presently, the assembly of that redevelopment parcel must occur within the framework set by section 78 of the *BCCM Act.* Accordingly, any appreciation in value can only occur after all lots have been transferred to one or a small group of cooperative owners and the scheme may be terminated under section 78 of the *BCCM Act*. Given that the transfer of ownership of all lots to the developer is the trigger for the appreciation in value to occur, only the developer is likely to

[813] Bentley, above n 11, 6.

[814] Kominers and Weyl, above n 134.

[815] Nadler and Diamond, above n 583, 724.

[816] Isaac, O'Leary and Daley, above n 24, 55, 78 and 104.

experience the gains from the assembly.[817] In the context of the expropriation of remaining lots, the market value would be calculated as at the valuation date, very early on in the process.[818]

Use of total aggregation surplus as the valuation methodology seeks to apportion the gain from reassembly of the fragmented lots equitably between all owners and the developer.[819] The difficulty in this approach is that the method of calculating how payments to owners should be apportioned must be determined. Use of the scheme's interest schedule lot entitlements would potentially be appropriate in many, but not all, cases. The interest schedule lot entitlements are set out in the community management statement, recorded against the title particulars of each lot in the scheme.[820] The interest schedule lot entitlements reflect the market value of the lot as compared with the other lots in the scheme and, relevantly, are used to calculate the owner's interest in the scheme on termination.[821] Where a scheme is subdivided using a building format plan,[822] so that the proportions listed in the schedule are likely to reflect the value of the lot and all improvements on and in it around the time of the proposed termination, the interest schedule lot entitlements will likely be appropriate to apportion purchase consideration. However, the interest schedule lot entitlements may not be appropriate where the community titles scheme lots are individual parcels of land upon which owners have, after creation of the scheme and calculation of entitlements, built detached houses that differ in size and features.

While use of the total aggregation surplus has the potential to result in a higher amount being paid to owners, it does suffer from the same limitation as market value: it is an estimate subject to under- or over-estimation because of cyclical market fluctuations. In the context of compulsory acquisition, where taxpayer-funded public bodies acquire real property, the obvious difficulty in awarding higher compensation payments is that a local government's capacity to fund those payments is limited. In the United Kingdom, these compulsory purchase funding problems have been overcome through the use of indemnifications issued by developers in favour of acquiring entities. Those indemnities extend to any costs associated with the exercise of the powers, including the payment of

[817] Cohen, above n 436, 539 and Garnett, above n 154, 110.

[818] Hockley and Whipple, above n 776, 204 (emphasis added).

[819] Nadler and Diamond, above n 583, 724.

[820] Section 115L *Land Title Act*.

[821] Section 47(3) *BCCM Act*.

[822] Section 48(c) *Land Title Act* defines a 'building format plan' as using the 'structural elements of a building, including, for example, floors, walls and ceilings' to delineate the boundaries of the lot.

compensation to owners.[823] In a law-reform model for section 78 of the *BCCM Act,* it is appropriate to limit the downward pressure on the amount payable to owners because expropriations are privately, not publicly, funded. BalTAT requires the protection of owners' rights and the balancing of conflicting interests. A balance would not be achieved if a policy to keep consideration low was incorporated into amendment proposals.

It has been argued in the context of compulsory acquisition that the obligation to make compensation payments to owners may deter governments from 'overconsuming private property',[824] in turn constraining government from exploiting vulnerable owners.[825] However, the effectiveness of using compensation to deter governmental abuse of expropriation powers is arguable.[826] It is submitted that it is more appropriate to treat consideration in respect of private sector expropriations as a separate issue to regulation of the expropriation itself. Provision for adequate payment to owners should be made to achieve justice for those owners, not to deter abuse on the part of the developer. Rather, the developer's actions should remain separately controlled through the use of statutory-based tests that limit the scope of expropriation powers and the circumstances under which those powers may be used.

In order to limit the scope of expropriation powers and regulate the circumstances in which those powers may be used, it is necessary to incorporate a detailed and workable test into the law-reform proposals for section 78 of the *BCCM Act*. One of the key criticisms of the dissenting judges in *Kelo v City of New London*[827] was that the interpretation of the 'public purpose' test was so broad as to render all property subject to the risk that it would be expropriated in order to promote the economic improvement of a region.[828] It was suggested in Chapter 3 that the test based on the United Kingdom's compulsory purchase system is a good limitation on the scope of expropriation powers. That system requires both the acquiring authority and overseeing ministers to assess the

[823] Winter and Lloyd, above n 453, 790.

[824] Garnett, above n 707, 951 and Jeffrey G Durham, 'Efficient Just Compensation as a Limit on Eminent Domain' (1984–85) 69 *Minnesota Law Review* 1277, 1278.

[825] Glyn S Lunney, 'Compensation for Takings: How Much is Just?' (1992–93) 42 *Catholic University Law Review* 721, 723; Garnett, above n 707, 952 and Michael Heller and James E Krier, 'Deterrence and Distribution in the Law of Takings' (1999) 112 *Harvard Law Review* 997. In the Australian context, see Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351, 377.

[826] Bell and Parchomovsky, above n 732, 1433 and 1440; Durham, above n 824, 1278 and Garnett, above n 154, 138.

[827] *Kelo v City of New London* 545 US 469 (2005).

[828] *Kelo v City of New London* 545 US 469 (2005), 503.

urban regeneration proposals against measurable criteria.[829] The existence of detailed criteria against which to assess projects may overcome the concerns expressed by O'Connor J in *Kelo v City of New London.*[830] Combined with an independent review of expropriations, controls on the exercise of expropriation powers may be further tightened by the implementation of the requirement to:

1. assess the magnitude of project features generated from the redevelopment of the scheme which benefit the public,[831] and
2. consider the facts and circumstances relating to the passage of the motion to terminate the scheme, to determine if the motion was passed simply to appease the developer, or whether the public benefits from the proposal warrant expropriation of the lots.[832] This may be achieved by considering the real purpose of the acquisition,[833] whether there was a lack of good faith in the dealings between the parties[834] and whether there was an ulterior purpose for the termination which disadvantages the owners.[835]

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[829] For a detailed discussion on the United Kingdom criteria, including both the *Town and Country Planning Act* and the Office of the Deputy Prime Minister's Circular 06/2004 see Chapter 3 and Pocock, above n 439.

[830] *Kelo v City of New London* 545 US 469 (2005).

[831] For example, in *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008) and *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, the public benefits generated from the redevelopment of the Civic Place Site were significant. See also Singer, above n 34, Heller, above n 32, 639 and Pocock, above n 439, 129–30. Lesser public benefits being generated from a project may not warrant the use of compulsory acquisition as a method of assembling a site.

[832] For example, the developer's appointment prior to the acquisition of the land was held to be an indicator that the local government acquired the land with the intention of reselling it to the developer: *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [95–6] and [98]. This step should; however, also consider whether there were plans to redevelop the site prior to the appointment of the developer (which may have been finalised only after the developer was appointed) and whether the developer was selected using a competitive process: Ilya Somin, 'The Judicial Reaction to Kelo' (2011) 4(1) *Albany Government Law Review* 1, 25 and Kelly, above n 811, 218–20. In *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), Grocon Pty Ltd submitted a tender in response to Parramatta City Council's Request for Tender and Information Memorandum relating to the redevelopment of the Parramatta CBD site. Parramatta City Council did not accept any of the tenders, but resolved to negotiate with Grocon Pty Ltd regarding the contractual arrangements to be put in place for the redevelopment of the site. Following that a public–private partnership was entered into between Parramatta City Council and Grocon (Civic Place) Pty Ltd and Grocon Contractors Pty Ltd: *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008), [67–8] and [71].

[833] *Council of the Shire of Werribee v Kerr* (1928) 42 CLR 1.

[834] *CC Auto Port Pty Ltd v Minister for* Works (1965) 113 CLR 365.

[835] *Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board* (1982) 41 ALR 467.

TARGETING OF MINORITIES AND THE POOR

Recommendations:

- An independent forum within which objections to the passage of termination motions and expropriation of remaining lots may be reviewed is recommended.
- Consider the appropriateness of utilising the established alternative dispute resolution programs in the *BCCM Act* and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to provide an independent review body to consider stakeholder concerns and/or enable review of both resolutions and offers made by developers.
- Ensure substantive equality exists in the independent review system to address inequalities resulting from resourcing and technical knowledge disparities between the stakeholders.

In addition to issues of condemnation blight, the mid-twentieth-century US urban renewal projects displaced thousands of low socio-economic and minority households.[836] Racial minorities and the poor lacked political influence; they were 'helpless' to discourage expropriations.[837] By way of contrast, powerful, politically active and tight-knit social organisations avoided expropriations of members' properties through political clout and connections.[838] In the context of eminent domain, Munch's research reveals that owners of lower value properties are at a higher risk of under-compensation than owners of high value properties.[839] These lower valued properties may already be targets for redevelopment, particularly where local government planning instruments permit development at a higher density than the current use. Owners who lack the political sway to avoid expropriations are more likely to be under-compensated, exacerbating existing socio-economic difficulties, especially where appropriate and affordable replacement housing cannot be purchased with the payment made to the relevant owner.

[836] Garnett, above n 154, 120.

[837] Ibid., 115–16 and 120.

[838] In the 1950s, the Catholic Church successfully redirected freeways into Chicago, protecting churches from demolition (Garnett, above n 154, 115–16 and 120) and in *Kelo v City of New London* 545 US 469 (2005), O'Connor J noted that the NLDC spared the Italian Dramatic Club: *Kelo v City of New London* 545 US 469 (2005), 495. Garnett notes that the club is politically well-connected: Ibid., 115.

[839] Munch, above n 314, 495.

As noted above, requiring blight as a precondition to the exercise of expropriation powers for the reassembly of a scheme may not effectively protect at-risk groups.[840] This thesis recommends a change of 'market value' to another methodology, such as replacement value of the lot or the total aggregation surplus for the scheme. Chapter 4 recommended the provision of a valuation to owners as part of the disclosure documents issued at the commencement of the termination process. This information enables owners to assess the acceptability or otherwise of the developer's offer. In addition to payment of appropriate consideration for the lots, the provision of further financial and relocation assistance may aid owners who are identified as being, for example, in a low socio-economic bracket. Government relocation assistance has been provided in Australia in both the Northern Territory[841] and South Australia;[842] however, it is argued that the extension of publicly funded government welfare in circumstances where a private sector entity will potentially gain from the acquisition of land and conversion of its use into a redevelopment project is inappropriate. Nevertheless, further research may be appropriate to determine the feasibility or otherwise and benefits of requiring developers to either provide, or contribute towards funding of existing government-run relocation measures.

[840] Rutkow, above n 719, 269 and Kelly, above n 811, 221.

[841] The *Lands Acquisition Act 1978* (NT) enables the relevant minister to compensate owners of expropriated land, with cash payments or through the transfer of substantially equivalent land, having regard to the improvements constructed on the acquired land and the land itself: s 50(2) *Lands Acquisition Act 1978* (NT). Special provision is made for native title claimants: s 50 *Lands Acquisition Act*. See also Celia Winnett, '"Just Terms: or Just Money? Section 51(xxxi), Native Title and Non-monetary Terms of Acquisition' (2010) 33(3) *University of New South Wales Law Journal* 776. Another alternative may be to physically relocate a person's home or other assets onto a new parcel of land: Lee, above n 156.

[842] The South Australian Re-Housing Committee was established by section 26a of the *Land Acquisition Act 1969* (SA). Part 4A (containing s 26a) was repealed on 13 December 1998 (Act No. 59 of 1998); this terminated the South Australian Re-Housing Committee. During its existence, the Committee's responsibilities were:

- to assist with re-housing persons whose principal place of residence was compulsorily acquired;
- to help overcome social problems arising from compulsory acquisition; and
- to provide recommendations to the acquiring authority on which persons affected by a compulsory acquisition should be granted financial assistance.

This assistance was in the form of non-repayable grants, interest-free loans (where owners of acquired properties had no alternative but to upgrade housing) and low interest mortgage-secured loans (where owners of acquired properties elected to upgrade their home). The loans were generally repayable on the sale of the property, or death of the owner or their surviving spouse: Law Reform Commission, above n 793, 139.

The Committee provided non-financial assistance to many affected persons and managed the administrative process for seven grants, 17 interest-free loans and seven interest bearing loans between 1 July 1973 and 30 June 1978: ibid.

Community engagement and public consultation would add an additional layer of protection to owners and allow stakeholders to voice concerns with proposals.[843] The *Acquisition of Land Act 1981* (UK) enables affected persons to object to proposed acquisitions. If objections relate to issues other than the quantum of compensation, the minister must appoint an independent inspector to chair a public local inquiry. At the conclusion of the inquiry, the minister must consider the inspector's report when deciding whether to approve the acquisition.[844] Both the *BCCM Act* and the *Queensland Civil and Administrative Tribunal Act* have established alternative dispute resolution programs that may be adapted to provide an independent review body to assess stakeholder concerns.

On the face of it, creation of a forum to raise concerns is desirable; however, the appropriateness and affordability of legal representation,[845] technical knowledge divergences between the parties and the complexity of body corporate, property and expropriation laws may all impact on owners' rights and their ability to successfully stay an expropriation. Substantive equality may not be achieved by simply providing objection or review processes, particularly where applicants do not have the legal or technical expertise to run their own case, or the financial means to hire representation and experts.[846] Educational brochures and pamphlets may provide useful guidance on review procedures. However, legal complexities and disparities in financial and specialist resources available to the parties may relegate the use of the independent review body to a procedural speed bump, rather than providing a meaningful avenue to challenge the expropriation of remaining lots and termination of a community titles scheme.[847] Further research would be useful to determine the benefit of adopting one or more of these options in conjunction with other protective measures.

SUFFERING OF DIGNITARY HARMS

[843] However, Imrie and Thomas concluded that the local public inquiry merely reinforced views that owners had little likelihood of success against the government acquiring authority: Imrie and Thomas, above n 691, 1412–13.

[844] Sections 11, 12, 12(1)(c), s 13(4) and 13(2) and Sch 1, ss 1(2), 2, 3(1), 3(1)(c), 4(5) and 4(2) *Acquisition of Land Act 1981* (UK).

[845] The benefit of a tribunal hearing is that parties are generally not able to be represented by counsel, avoiding the imposition of representation costs on applicants. However, representation may serve the interests of justice where an applicant is disadvantaged because he or she lacks the legal knowledge to fully explore all the issues of the case.

[846] Garnett, above n 154, 128.

[847] Imrie and Thomas, above n 691, 1413 and 1415.

Recommendations:

- Disclosure of future plans for a redevelopment site, together with any public benefits to be expected to be generated from a redevelopment, will help to minimise dignitary harm.

Different protections are granted to landowners under property law than shareholders under corporate law. Unlike shareholders in respect of shares, an owner of real property may develop an emotional connection to their property. BalTAT recognises this potential connection. It is conceivable that this emotional connection has been implicitly recognised in compulsory acquisition laws too. That is, compulsory acquisition laws reflect the view that real property should only be expropriated in limited circumstances.[848]

Prior to *Gambotto v WCP Ltd,*[849] shares were commonly regarded as capitalised dividend streams. Since the High Court's decision, however, shareholders have been conferred proprietary rights to their shares. The actions of the company and its majority shareholder in that case were oppressive, and negatively impacted on the property rights the shareholders held in their shares. Protections granted to owners in the case of compulsory acquisition and shareholders in relation to the oppression remedy are discussed in this sub-part.

REAL PROPERTY

Taking a similar approach to Radin's Personhood Theory, Garnett concluded that an expropriation of one's real property engenders a sense of discommode, and exposes owners to the risk of losing their economic autonomy.[850] She used the phrase 'dignitary harm' to describe these feelings – the psychological harm or 'insult' suffered by owners.[851] It has been theorised that there are a number

[848] Radin, above n 126, 988.

[849] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[850] Garnett, above n 154, 109–10.

[851] Chapter 2 discusses and largely disproves Radin's 'Property and Personhood' theory (see Radin, above n 126). It is acknowledged that expropriations do impact owners; however, the extent of the impact is arguable. Garnett states that many residents displaced by the Chicago freeway projects 'suffered severe psychological trauma': Garnett, above n 154, 109. But see Marc Bolan, 'The Mobility Experience and Neighborhood Attachment' (1997) 34 *Demography* 225; Stern, above n 266, 1111–12 and 1115; Sandy G Smith, 'The Essential Qualities of a Home' (1994) 14 *Journal of Environmental Psychology* 31; Fox, above n 261, 592; Marsha L Richins, 'Valuing Things: The Public and Private Meanings of Possessions' (1994) 21 *Journal of Consumer Research* 504; Peter Saunders, 'The Meaning of "Home" in Contemporary English Culture' (1989) 4(3) *Housing Studies* 177, 181; Douglas Porteous, 'Domicide: The Destruction of Home' in David Benjamin, David Stea and

of factors that contribute to, amplify or trigger feelings of dignitary harm. Owners may be offended by numerous inferences arising from a taking: first, the implication that an owner's use of the property was not optimal; second, that another person may optimise use of the property by discontinuing its current use and redeveloping the site; and third, that the property was not worthy of being saved from redevelopment because of its current sub-optimal use.[852] The feelings of dignitary harm may be particularly apt to describe the position of low socio-economic and minority households who reside in areas targeted for redevelopment: these owners typically lack the political wherewithal to effectively oppose expropriations, yet they are also the most likely group to be under-compensated.[853]

Another factor that contributes to feelings of dignitary harm is the owner's perception of the acquirer. Developers are often seen as politically powerful and financially well-off entities who act at the expense of the owners whose properties are expropriated.[854] One way of minimising dignitary harm in this scenario is to offer to purchase the lot at a level of consideration consistent with a proportion of the total aggregate surplus for the scheme land.[855]

Nadler and Diamond's research identified that, generally, landowners more readily accept an expropriation to assemble a redevelopment site where the proposed future use of the property conforms to a more traditional public purpose. For example, owners surveyed were more comfortable with an expropriation to allow construction of a children's hospital than a shopping centre.[856] Where there are genuine and significant public benefits generated by a project, communication of these benefits to the affected owners may reduce feelings of dignitary harm. In a corporate takeover scenario, sections 636(1)(c), (d) and (f) *Corporations Act* require a bidder to divulge its intentions to shareholders regarding the continuation of the company's business activities, whether significant changes to those activities will occur, plans for the continued employment or otherwise of the company's employees and how the bid will be funded.[857] ASIC adopted a broad interpretation of the

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Eje Aren (eds), *The Home: Words, Interpretations, Meanings and Environments* (1995), 159. However, data relating to the psychological impact of relocations do not necessarily apply to all persons equally; the effect on the elderly is more pronounced: Shirley L O'Bryant, 'The Value of Home to Older Persons: Relationship to Housing Satisfaction' (1982) 4(3) *Research on Aging* 349, Stern, above n 158, 1118–19 and Janet Finch and Lynn Hayes, 'Inheritance, Death and the Concept of the Home' (1994) 28(2) *Sociology* 417, 428.

[852] Garnett, above n 707, 110.

[853] Munch, above n 314, 495 and Garnett, above n 154, 107.

[854] Garnett, above n 707, 145–6.

[855] Nadler and Diamond, above n 583, 724.

[856] Ibid., 716.

[857] These disclosure requirements are discussed in further depth in Chapter 4.

disclosure requirements in Regulatory Guide 9.[858] Disclosure of future plans for sites and funding information was recommended in Chapter 4 as enabling an owner to make an educated assessment on the terms of the offer. If this disclosure is combined with an accessible forum for owners to object to the passage of the motion to terminate the scheme and the use of expropriation powers, owners will be empowered to have their concerns independently assessed.

CORPORATE LAW

The *Corporations Act* contains detailed provisions prescribing the methods by which shares may be expropriated from minority shareholders. Overlaying all corporate conduct, including changes of corporate control, is the oppression remedy in section 232 of the *Corporations Act.* That section seeks to protect shareholders against 'managerial and majority abuses of power',[859] and is regarded as an effective protection for minority shareholders in change of corporate control scenarios. The interpretation of the general oppression principles may offer guidance on additional protections for owners for the reform of section 78 of the *BCCM Act.*

Section 232 *Corporations Act* provides:

> Section 232
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
> (b) an actual or proposed act or omission by or on behalf of a company; or
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
>
> is either:
>
> (d) contrary to the interests of the members *as a whole*; or
> (e) *oppressive to, unfairly prejudicial to, or unfairly discriminatory against*, a member or members whether in that capacity or in any other capacity.[860]

[858] Australian Securities and Investments Commission, Regulatory Guide 9 Takeover Bids, above n 574, RG 9.259 and RG9.260.

[859] CCH, *Australian Corporations Law Principles and Practice* ¶3.4.0100, <www.lexisnexis.com>.

[860] Section 232(e) *Corporations Act* (emphasis added). Once oppression is established by the plaintiff, the court may make any order it deems appropriate under section 233 of the *Corporations Act.* In *Gambotto v WCP Ltd* (1995) 182 CLR 432, the High Court's decision that the resolution authorising the insertion of expropriation powers into the company's articles was invalid was sufficient to dismiss the case. In other cases, the court may resort to the other remedies in section 233 of the *Corporations Act.* Those remedies that may be relevant to the expropriation of land include orders:

Section 232(e) *Corporations Act* requires an element of 'commercial unfairness' before conduct is regarded as oppressive.[861] That is, a reasonable director considering the conduct of the company's affairs, actions, omissions or resolutions must conclude the conduct was unfair,[862] unjust or inequitable before that conduct will be oppressive.[863] Determining what is fair or unfair has traditionally involved balancing the interests of majority and minority groups within the company, rather than adopting a single member's perspective.[864] BalTAT holds that a redefinition or reallocation of private property rights is justifiable where holdouts negatively impact on other anticommons owners and the surrounding community. In those cases, a reassembly of the fragmented titles and optimisation of use may generate significant community benefits. Similarly, in oppression cases, having regard to what is in the company's interests as a whole acknowledges that

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- 'that the company be wound up': s 233(1)(a) *Corporations Act*
- 'regulating the conduct of the company's affairs in the future': s 233(1)(c) *Corporations Act*
- 'for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law': s 233(1)(d) *Corporations Act*
- 'for the purchase of shares with an appropriate reduction of the company's share capital': s 233(1)(e) *Corporations Act*
- 'appointing a receiver or a receiver and manager of any or all of the company's property': s 233(1)(h) *Corporations Act*
- 'restraining a person from engaging in specified conduct or from doing a specified act': s 233(1)(i) *Corporations Act*
- 'requiring a person to do a specified act': s 233(1)(j) *Corporations Act.*

[861] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704, cited in *Reid v Bagot Well Pastoral Co Pty Ltd* (1993) 61 SASR 165, and *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd* (1991) 6 ACSR 63, 67 in CCH, above n 859, ¶ 3.4.0130. See also *Wayde & Anor v New South Wales Rugby League Ltd* (1985) 180 CLR 459 in which the court held that it may infer a decision of the board was not made in good faith and for an authorised purpose if no reasonable board of directors would have reached the same decision. However, the board's 'special expertise and experience' must be taken into account when making a determination in order to avoid the court assuming management of the company on an unwarranted basis: *Wayde & Anor v New South Wales Rugby League Ltd* (1985) 180 CLR 459; (1985) 61 ALR 225, 231 and 232.

[862] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704 CCH, above n 859, ¶ 3.4.0130.

[863] *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 cited in *ASC v Multiple Sclerosis Society of Tas* (1993) 10 ACSR 489, 515 in CCH, above n 859, ¶ 3.4.0130.

[864] *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 cited in *Reid v Bagot Well Pastoral Co Pty Ltd* (1993) 61 SASR 165 in CCH, above n 859, ¶ 3.4.0130. However, the idea that the majority may suffer oppression as a result of minority shareholder actions has not been accepted by the courts. In *Re Polyresins Pty Ltd* [1999] 1 Qd R 599, the court refused to grant relief under section 260 of the *Corporations Law,* the predecessor to section 232 of the *Corporations Act,* to the owner of 11 out of the 18 issued shares of a company. The shareholder sought relief when he became aware that the minority shareholders, all of whom were directors of the company, were acting to benefit their own interests rather than the company's interests as a whole. The articles of association of the company permitted directors and shareholders to be appointed and removed at a general meeting of the corporation. Chesterman J concluded that:

'[I]t is unrealistic to suppose that a company's affairs may be conducted in a manner that is oppressive or which unfairly prejudices or discriminates against a member who controls a majority of votes that may be cast at a general meeting and who can thereby remove directors and appoint others in their stead' (*Re Polyresins Pty Ltd* [1999] 1 Qd R 599, 603).

the wider corporate community may be better served by allowing the company's conduct, actions, omissions or resolutions, despite the impact on the minority shareholder.[865] In *Gambotto v WCP Ltd,*[866] the High Court adopted a two-limbed test that increased protections for minority shareholders by attributing proprietary rights to shares. BalTAT acknowledges the parallels between land and shares. Therefore, the test in *Gambotto v WCP Ltd*[867] may provide guidance on the interpretation of the parties' behaviour during the expropriation process.

The decision in *Gambotto v WCP Ltd*[868] has been the subject of much debate in academia,[869] and is perhaps as loathed by some economics proponents as *Kelo v City of New London*[870] was in the United States. The main theoretical objection to *Gambotto v WCP Ltd*[871] was the determination that shareholders have proprietary rights over their shares.[872] This part will not investigate the theoretical criticisms of the case, nor will it assess the appropriateness of the amendments to the company's articles of association[873] that *Gambotto v WCP Ltd*[874] considered. Rather, some of the parallels that may be drawn between the protections granted to minority shareholders by section 232 of the *Corporations Act* because of *Gambotto v WCP Ltd*[875] and the interpretation of expropriations legislation in Australia are discussed. More importantly, this part considers whether the 'proper purpose' and 'fairness' tests adopted by the High Court may help to develop amendments to the termination provisions in the *BCCM Act*.

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[865] This approach has been criticised: Lynden Griggs, 'Specific problems with the oppression section' (1993) 9 *Queensland University of Technology Law Journal* 101.

[866] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[867] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[868] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[869] See, for example, Mitchell, above n 683; Brendan Pentony, 'Case Notes Majority Interests v Minority Interests: Achieving a Balance' (1995) 5 *Australian Journal of Corporate Law* 117; Ian Ramsay (ed) *Gambotto v WCP: Its Implications for Corporate Regulation* (1996); Spender, above n 185; Roger Walton, '*Gambotto v WCP Ltd:* A Justified Reassertion of Minority Shareholder Rights or Unwelcome Step Back in Time' (2000) 12 *Australian Journal of Corporate Law* 20; Whincop, above n 549 and Michael Whincop, 'The Institutional Politics of Corporate Law in Australia: From Gambotto to DB Management' (2000) 11 *Australian Journal of Corporate Law* 247.

[870] *Kelo v City of New London* 545 US 469 (2005).

[871] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[872] Spender, above n 185, 110.

[873] Section 136 of the *Corporations Act* provides that a company may adopt a constitution. The term 'articles of association' is now obsolete. Specific discussion of the resolutions in *Gambotto v WCP Ltd* (1995) 182 CLR 432 will continue to refer to 'articles of association'; however, the term 'constitution' will be used in all other places.

[874] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[875] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

Gambotto v WCP Ltd[876] arose because of a resolution by the majority shareholders of WCP Ltd to amend the company's articles of association. The amendment authorised the holder of at least 90 per cent of the company's shares to expropriate the minority shareholders' securities at a set value.[877] Gambotto and Sandri challenged the resolution on the basis that it was oppressive.[878]

The change to the articles of association was motivated by a desire to offset a potential tax liability amounting to approximately A$4.235 million against retained tax losses held by the corporate group holding 99.69 per cent of WCP Ltd's shares. The tax liability was likely to arise during the forthcoming winding up of the company's business activities and could only be offset against the parent company's retained tax losses if WCP Ltd became a wholly owned subsidiary of the parent company.[879] In addition to the tax saving, it was anticipated that if WCP Ltd had only one shareholder, it could save another $4300 annually in administrative costs.[880]

The High Court delivered two judgments. In the first, Mason CJ, Brennan, Deane and Dawson JJ concluded that the amendment of a company's articles of association to insert expropriation powers could only occur where the power was being exercised for a 'proper purpose' and the amendment did not oppress the minority shareholders.[881] Their Honours considered that the introduction of expropriation powers to benefit a majority shareholder may be justifiable where:

a) the continued minority shareholding was detrimental to existing shareholders generally because of a disadvantage to the company, its affairs or undertaking,[882] and
b) taking the shares to eliminate such a detriment was reasonable in the circumstances.[883]

Mason CJ, Brennan, Deane and Dawson JJ used two examples to demonstrate the application of the 'proper purpose' test: first, the removal of a shareholder competing with the company and second,

[876] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[877] The majority owners, subsidiaries of Industrial Equity Limited held 16,929,441 shares. This equated to 99.69 per cent of all the company's shares. The minority owners held 50,590 shares. The appellants in the case, Mr Gambotto and Ms Sandri owned 15,898 shares between them: *Gambotto v WCP Ltd* (1995) 182 CLR 432, 437.

[878] McLelland J's decision in *Gambotto and Anor v WCP Ltd* (1992) 8 ACSR 141 was overturned by the Supreme Court of New South Wales in *WCP Ltd v Gambotto* (1993) 30 NSWLR 385. This decision was subsequently appealed to the High Court.

[879] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 450 and 451.

[880] The anticipated savings included $3,000 per annum in accounting fees and approximately $1300 per annum in costs associated with maintaining a share register: *Gambotto v WCP Ltd* (1995) 182 CLR 432, 451.

[881] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 445.

[882] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 445.

[883] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 445–6.

to ensure continued compliance with statutory obligations governing the company's principal business activities.[884]

In the context of community titles schemes, the main statutory function of a body corporate is to administer common property and scheme assets for the benefit of owners.[885] Increasing maintenance costs may impede regular maintenance of built form assets; however, higher costs because of a building's age do not negate the statutory functions of a body corporate. Rather, owners may recognise that termination and redevelopment of a scheme will avoid ongoing maintenance costs. In *Gambotto v WCP Ltd,*[886] Mason CJ, Brennan, Deane and Dawson JJ determined that expropriations are not justifiable where the primary motivation is to secure a commercial advantage unavailable while the minority shareholding exists.[887] Only 'exceptional circumstances'[888] would justify an expropriation, because to do otherwise would allow the majority to obtain a personal benefit at the expense of the minority owners' proprietary rights. Their Honours concluded that, while significant, the application of the taxation losses and other cost savings to the company were not exceptional circumstances justifying the amendment to the articles.[889] The 'exceptional' circumstances that may arise in relation to the termination of a community titles scheme and the expropriation of the remaining lots relate to the community benefits arising from the redevelopment proposal that would not otherwise be possible where fragmented ownership of the scheme has resulted in a protracted underuse of scarce resources.

In His Honour's separate judgment in *Gambotto v WCP Ltd*,[890] McHugh J restated a narrower version of the 'proper purpose' test. His Honour held that a company's articles of association may be amended where the powers enabling the acquisition are necessary 'to protect or promote the interests of the company'.[891] The general power[892] in the *Corporations Law*[893] to amend a company's

[884] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 445.

[885] Section 94(1)(a) *BCCM Act*. Sections 94(1)(b) and (c) of the *BCCM Act* respectively require enforcement of by-laws and the carrying out of other functions under the *BCCM Act* and community management statement.

[886] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[887] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 446.

[888] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 446.

[889] Whincop was scathing in his commentary of their Honours' decision to render the insertion of the expropriation powers in WCP Ltd's articles of association invalid:

'Their Honours found that no "proper purpose" existed. Apparently, taxation benefits exceeding $4.235 m can be ignored, since the proprietary rights of persons holding $21,700 worth of shares (who will receive $28,600 by way of compensation) will be imperilled': Whincop, above n 549, 287.

[890] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[891] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 453.

articles of association did not authorise amendments that were at the expense of minority shareholders. However, the adoption of the expropriation powers could occur where the company would be able to minimise exposure to external risks or maximise an opportunity to undertake a 'significant goal'.[894] His Honour held that the achievement of cost savings or convenience in the administration of a company could never, on its own, justify an amendment of the kind proposed in *Gambotto v WCP Ltd.*[895] McHugh J's conclusion that general powers are insufficient to erode another's private property rights parallels French CJ's decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council.*[896] In that case, French CJ upheld the presumption that legislation will not be interpreted to interfere with private property rights unless the power and restrictions on its use are clearly established and defined in that legislation.[897] Chapter 3 recommended that expropriation powers incorporated in the law reform proposals for section 78 of the *BCCM Act* explicitly set out the scope of the powers and the points upon which the independent review of the proposals should be based. This chapter reiterates this recommendation.

McHugh J held that the resolution in *Gambotto v WCP Ltd*[898] was invalid because the majority shareholder did not demonstrate to His Honour's satisfaction that the company's conduct was fair (the second limb of the test). All of Their Honours considered both the procedural aspect of fairness, which required full disclosure by the majority shareholder, and the substantive component, which required valuation of the shares by an independent expert. Mason CJ, Brennan, Deane and Dawson JJ did not conclude whether the fairness limb of the test was satisfied because the appellants did not challenge the valuation of the shares at $1.365 each or the offer price of $1.80 per share.[899] By way of contrast, McHugh J concluded that the procedural aspect of fair dealing involved considering the timing, structure, negotiation and disclosure to shareholders, together with the method by which approvals were obtained. His Honour held that WCP Ltd failed to prove that it, and the majority shareholders, acted fairly because the minority shareholders were given very little

[892] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 453.

[893] Section 176 of the *Corporations Law* provided that, 'Subject to this Law, a company may by special resolution alter or add to its articles.' Section 136 of the *Corporations Act* now provides that 'The company may modify or repeal its constitution, or a provision of its constitution, by special resolution.'

[894] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 453 and 455.

[895] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[896] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[897] French CJ adopted the principles in *Clissold v Perry* (1904) 1 CLR 363 and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 136: *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 [42–3].

[898] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[899] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 437.

information.[900] This requirement for information reinforces the recommendations made in Chapter 4 in relation to the issue of disclosure materials to lot owners – that is, transparency through disclosure may create a fairer environment for remaining owners.[901]

In relation to the substantive aspect of fairness, it is interesting that all Their Honours' decisions in *Gambotto v WCP Ltd*[902] challenged the use of market value as the most appropriate method of determining the price for an expropriation. While Whincop criticises this part of the Court's decision as 'ludicrous',[903] Their Honours' criticisms of using market value in the context of an expropriation reflects those concerns relating to under-compensation and abuse discussed earlier in this chapter. Their Honours concluded that factors such as the company's assets, potential future dividends and anticipated future activities of the target company may affect the compensatory value of the shares.[904] In the context of a scheme termination, the proposed future use of the scheme land, the potential public benefits from the redevelopment, the likelihood of the project proceeding and other relevant factors may all have an impact on the appropriate consideration payable to owners to ensure those owners are not under-compensated.

CONCLUSION

Legislating expropriation powers into the *BCCM Act* to facilitate the termination and redevelopment of schemes will remove the ability of 'holdout owners' to veto a redevelopment proposal. However, simply enacting amendments to the legislation would not be enough to ensure the balance between competing stakeholders' rights and interests mandated by BalTAT. There is a risk that expropriation powers will be abused if those powers are too broadly defined, or there are insufficient controls in place. It is necessary to build protections into the reform package to avoid negative and, potentially, significant impacts on affected owners. This chapter examined a variety of potential protections for owners.

[900] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 460.

[901] Digby, above n 567, 129–30.

[902] *Gambotto v WCP Ltd* (1995) 182 CLR 432.

[903] Whincop states:

'for shares publicly traded, the notion that a judge (assumed to be untrained in finance), on the basis of evidence selected by litigants, can systematically outperform a market in which experienced persons and institutions, with access to high quality information, stake their reputations and fortunes in a battle on market prices, seems ludicrous.' Whincop, above n 784, 113.

[904] *Gambotto v WCP Ltd* (1995) 182 CLR 432, 447 and 457.

Three key US cases – *Berman v Parker,*[905] *Hawaii Housing Authority v Midkiff*[906] and *Kelo v City of New London*[907] – were examined. The discussion focused on the identification of lessons from the decades-long practice in the United States of using eminent domain to assemble redevelopment sites, particularly where a targeted area was in a perceived state of disrepair and at risk of declining further into slums. Requiring the existence of blight as a condition precedent to the use of expropriation powers and the consequent risks of condemnation blight occurring were also assessed. This analysis revealed a need to control the use of expropriation powers and the implementation of owner protections, such as independent review and payment of appropriate consideration, to avoid the ongoing negative social impacts experienced in the United States. In addition, the expansion of the 'public use' requirement in the Fifth Amendment of the US Constitution into the broader 'public benefit' criterion, which incorporated both direct and indirect public benefits, was assessed. An analogy was drawn between *Kelo v City of New London,*[908] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council,*[909] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd*[910] and the *Arsenal Football Club Case*.[911] Similarities in the factual parallels in each case and how the courts assessed the quantum and acceptability of public benefits in urban renewal programs were investigated.

The review of the US cases also enabled the identification of numerous criticisms associated with the use of expropriation powers to reassemble fragmented titles to community titles schemes. The criticisms centred on four common themes: the coercive nature of the power; the potential for under-compensation of owners and using compensation to minimise the risk that developers will abuse those powers; the targeting of minority and low socio-economic groups through site selection; and the imposition of dignitary harms on affected owners. The assessment of each of these criticisms revealed that a combination of measures is required to protect remaining owners from both the excessive use of expropriation powers and the negative consequences of their use.

Before the protections suggested throughout the chapter may be incorporated into any law reform proposals for the *BCCM Act*, it is recommended that further research be undertaken, particularly in

[905] *Berman v Parker* 348 US 26 (1954).

[906] *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

[907] *Kelo v City of New London* 545 US 469 (2005).

[908] *Kelo v City of New London* 545 US 469 (2005).

[909] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

[910] *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* [2008] NSWCA 132 (11 June 2008).

[911] *The Alliance Spring Co Ltd & Ors v The First Secretary of State* [2005] EWHC 18 (Admin).

relation to the valuation methodology and the appointment of an appropriate review body to assess terminations.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

This thesis has examined the need for legislative reform arising from the 'holdout' phenomena in the reassembly and termination of Queensland community titles schemes. It has argued throughout for the need to reduce the termination threshold and incorporate expropriation powers into the *BCCM Act*. Recommendations for a law-reform model have been proposed in each chapter of the thesis.

The scope of the thesis, introduced in Chapter 1, demonstrated the need for reform of the *BCCM Act*. The chapter highlighted the impediment to redevelopment and urban renewal arising from the requirement for a unanimous resolution to terminate a community titles scheme under section 78 of the *BCCM Act*. A veto by one owner prevents a resolution without dissent being secured. That is, if a single owner votes against the motion proposing termination of the scheme, the resolution fails and the scheme remains in existence until such time as the resolution may be passed, or a court order for the scheme's termination is obtained.[912] Rather than attempt to have the body corporate pass a resolution without dissent to terminate a scheme while diverse ownership of lots exists, a developer will typically seek to purchase all of the scheme lots before calling a meeting of the members. However, the reassembly process is impacted by the 'holdout problem'. That is, where one or more owners engage in strategic behaviour, the reassembly of titles to the scheme lots is delayed or becomes unachievable. The inability to reassemble titles into single ownership, or into a small group of cooperative owners, impacts directly on the termination of a scheme – it is doubtful that an owner who will not agree to sell their lot to a developer will vote in favour of the termination of a

[912] Section 78(2) *BCCM Act*.

scheme to facilitate its redevelopment.[913] When this occurs, redevelopment of the scheme in question is unlikely to occur.

An owner may engage in strategic behaviour to extract the most favourable financial and non-financial contract terms in the sale of their property. While this may benefit those owners who secure an agreement, negative consequences associated with this behaviour also exist. Where a developer is unable to successfully negotiate the purchase of each lot within the scheme to assemble the site, or the timeframe within which this may occur becomes too uncertain, the developer is likely to discontinue a redevelopment proposal.[914]

An owner of a lot within an ageing scheme who is presented with an offer to sell their lot to a developer will likely lose the deal if other owners within the scheme engage in holdout behaviour. The collective of the owners may find themselves trapped in a 'spiral of depreciating wealth', expending ever-increasing funds on the maintenance of or improvements to scheme land with little, if any, corresponding addition to the value of the individual lots.[915] In those circumstances, termination of the scheme – in order to make the land available for redevelopment – may provide the greatest economic return to the owners.

From a wider community perspective, the implementation of urban consolidation policies in Australia's largest cities[916] would be hampered by the retention of ageing buildings that are not developed to their optimal level. Access to developable land in inner urban areas is limited because of the existing buildings on sites. A reassembly of titles in order to form a redevelopment parcel is often necessary; however, this can only be achieved through reliance on market forces. Current practices produce a 'sub-optimal amount of [land] assembly',[917] a concerning occurrence when government is actively pursuing urban consolidation policies to ease scarcity concerns, slow urban sprawl and meet housing needs for growing inner urban populations.[918]

[913] See for example *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003) discussed in more depth in Chapter 3.

[914] Isaac, O'Leary and Daley, above n 24, 55, 78 and 104 and Wilkinson and Reed, above n 24, 93.

[915] Bentley, above n 11, 6.

[916] Easthope et al, above n 14, 293; Easthope, Hudson and Randolph, above n 20; Easthope and Randolph, above n 20 and Strata Community Australia Ltd, above n 20.

[917] Munch, above n 314, 478–9.

[918] See above n 25 and accompanying notes.

In addition, the generation of both 'social and economic infrastructure'[919] may be delayed or discontinued as a result of the inability to reassemble land and consequent abandonment of a project. Social and economic infrastructure benefits the wider community.[920] Discontinuation of a project results in the loss of economic opportunities,[921] which impacts potential future employment opportunities for the property industry, Australia's second largest employment sector.[922]

The challenges faced in Queensland in the termination of community titles schemes are not unique. Chapter 1 audited the termination provisions of the Australian state and territory legislation, and noted that only New South Wales and the Northern Territory have amended their laws to lower the threshold required from unanimous to between 75 and 95 per cent.[923] Western Australia is in the process of drafting a Bill to present to Parliament in the second half of 2016, which will also reduce the termination threshold to a sliding scale as follows:

(a) for schemes with four or more lots – 75 per cent; and
(b) for schemes of two or three lots – a majority.[924]

While Queensland has invited community input on the potential to amend section 78 of the *BCCM Act,* it has not progressed the issue of terminations since January 2015, the conclusion of the consultation period. Victoria, South Australia, Tasmania and the Australian Capital Territory have not yet acted to amend their respective Acts.

In Chapter 1, this thesis identified the concurrent aims of developing a well-balanced, clear and researched case for law reform, and the proposal of workable solutions to protect all stakeholders' interests. It has sought throughout to improve on the current system by analysing Australian corporate law, compulsory acquisition laws in Queensland, New South Wales, the United Kingdom and United states and strata and community titles laws in Australia. The purpose of the analysis was to identify underlying principles to guide law reform in the area, and build a framework based on the

[919] Infrastructure Australia, above n 26 and Yescombe, above n 26, 17–18 and 20–4 discussed in more depth in Pocock, above n 439, 129.

[920] Pocock, above n 439, 131–2.

[921] Heller, above n 32, 639.

[922] AEC Group Pty Ltd, above n 33.

[923] Sections 4 and 12(1) of the *Termination of Units Plans and Unit Titles Schemes Act* provide that the threshold to terminate a development in the Northern Territory is 80 per cent for developments aged over 30 years, 90 per cent for developments aged at least 20 but less than 30 years and 95 per cent for developments aged at least 15 years but less than 20 years. A threshold of 75 per cent exists in New South Wales: s 154 *Strata Schemes Development Act.*

[924] Landgate, above n 106, 2.

strengths identified in the analysis. Beginning with an examination of liberalist property theory to determine the underlying theoretical foundation, this thesis highlighted liberalism's inadequacy in the context of community titles schemes and their terminations. The analysis resulted in an acknowledgement of the need to build a theory that is sensitive to stakeholder concerns. Those concerns arise as a result of the lack of recognition in liberalism of the interconnectedness between owners and occupiers in a community titles scheme, as liberalism instead focuses on autonomy of owners. The *BCCM Act* structures ownership of common property and regulates use and enjoyment of lots and common property in a manner which statutorily entrenches an inextricable link with the surrounding community of lot owners and occupiers. As a result of this interrelationship, it is necessary to reconsider autonomy as a foundational principle in respect of community titles scheme ownership.

Chapter 2 built BalTAT using a resolution-based dialectic methodology. BalTAT is a synthesised framework that utilises the strengths of Heller's Anticommons Theory[925] to supplement the weaknesses in Radin's Personhood Theory,[926] so as to present a theoretical model capable of valuing and respecting the social and economic relationships created in community titles scheme ownership and scheme termination. The theory was the foundation for analysis of the research problem in Chapter 3, Chapter 4 and Chapter 5.

One of the strengths of BalTAT is its recognition of the potential emotional attachment an owner may have to a property, and the resulting protections granted to safeguard owners' rights. The integration of economic principles into the model ensures that financial considerations, which impact both the other owners within the scheme and the wider interests of the surrounding community, are not disregarded in favour of preserving emotional connections to property. The seven elements of BalTAT assisted in the identification of desirable characteristics for a law-reform model. Emotional attachment and protection of owners' property rights were balanced against the reality of property as a scarce resource which must be utilised to an optimal extent. In order to avoid a tragedy of the anticommons, a statutory mechanism must exist to overcome fragmented ownership and avoid holdout behaviour. Statutory modification of the bundle of owners' rights to include expropriation powers was justified, subject to constraints imposed to ensure appropriate protections for affected owners.

[925] Heller, above n 32.

[926] Radin, above n 126.

Chapter 3 analysed the local government compulsory acquisition powers in Queensland and New South Wales, noting the narrow interpretation applied to expropriation powers in those jurisdictions. It was not proposed that an extension of local government authority to overcome the holdout problem in community titles scheme terminations occur; rather, numerous recommendations were noted in relation to the scope of the powers and the manner in which Australian courts interpret those expropriation powers. These points are particularly relevant to the drafting of expropriation legislation as part of the law-reform model developed in this thesis.

In addition, the provisions of the UK *Town and Country Planning Act* were investigated. That Act empowers governments to facilitate urban renewal and infill redevelopment through the use of expropriation powers exercised to benefit the economic, social and environmental well-being of an area. Many elements of the law-reform model proposed in the thesis were influenced by the UK system, including a number of the constraints incorporated into the *Town and Country Planning Act,* designed to protect owners from a misuse of the powers.

Chapter 4 considered another legislative system specifically designed to overcome strategic behaviour by remaining owners in the reassembly of corporate shareholdings. The chapter analysed the two primary methods by which a change in corporate control may be achieved: a transfer scheme of arrangement under Part 5.1 of the *Corporations Act,* and a takeover and subsequent compulsory acquisition of shares under Chapters 6 and 6A of the *Corporations Act.* Elements that may influence law reform in community titles scheme terminations were identified from the investigation of the two methods. Disclosure to owners, including the provision of a valuation by an appropriately qualified and experienced independent expert; control of form and content requirements for offers; the thresholds for acceptance to achieve a change in corporate control and activate expropriation powers; and the existence of an avenue for independent review all influenced the law reform recommendations made in this thesis.

Chapter 5 considered the negative outcomes from the use of eminent domain in the United States, and framed recommendations for a law-reform model in terms of necessary safeguards for owners. The coercive element of expropriation powers was discussed in the context of an owner being unable to prevent the acquisition of their property, and recommendations were made to lessen the negative impact this may have on an owner. Furthermore, the setting of compensation levels was discussed, and the appropriateness of using market value as the valuation methodology challenged. Controls on the expropriation powers, in addition to the requirement to pay fair consideration, were deemed necessary to protect owners. Many of the recommendations contained in the chapter

influenced the key elements of the law-reform model proposed and the areas for further research set out in this thesis.

This chapter presents the recommendations made throughout the thesis as a comprehensive law-reform model. In order to do so, the key elements of BalTAT are discussed. Part 1 of this chapter restates how the theory assists to develop a law-reform model for the termination of community titles schemes. Part 2 sets out the recommendations developed from Chapter 3, Chapter 4 and Chapter 5. The six key features of the model are introduced and depicted in a flowchart to demonstrate the interrelationship between the elements before examining them in greater depth. Part 3 of this chapter discusses the two primary areas for further research identified in the thesis, the outcomes of which may influence the final form of the law-reform model.

PART 1 – BALANCED TERMINATION ANALYSIS THEORY

The need for a new theory in relation to the termination of community titles schemes was identified because existing theories are not sympathetic to the competing stakeholder viewpoints. A resolution-based dialectic methodology was adopted to achieve the goal of creating a new and more suitable theory. Importantly, resolution-based dialectics does not seek to discredit existing theories. Rather, the weaknesses of each theory are supplemented by the strengths of the other in order to form an enlightened viewpoint that transcends the conflicts in each.[927]

BalTAT recognised the emotional attachment in property and the previous arguments that the attachment justifies the high level protection of owners' property rights.[928] It balanced those considerations with an economic perspective to overcome the negative impacts on the wider community from owners' actions to prevent renewal of redevelopable land. While BalTAT acknowledged that a person may develop an emotional attachment to their property, it tempered Personhood Theory's assertions that a loss of property may destabilise a person's sense of self where the property has become intimately connected with the person. Nevertheless, the recognition of a potential emotional connection to a person's property affords respect to owners and occupiers.

Personhood Theory is, however, inwards focused, considering only the relationship between an individual and their property. It fails to recognise that a person's actions in respect of their property may

[927] Engeström and Sannino, above n 228, 371 and Weaver, above n 221, 131–2.

[928] Radin, above n 126, 968.

impact on others. A significant weakness in the theory results from this, in that the theory largely ignores the interconnectedness between property owners and the surrounding community.

The divergence from this in Anticommons Theory, which recognises the wide-reaching impact that fragmented ownership of an asset may have on the broader community, supplements Personhood Theory's weakness. Anticommons Theory states that a property, such as a development parcel as a whole, may become subject to underuse as a result of diverse or fragmented ownership of the asset. The ownership rights distributed among the fragmented ownership body empower each owner to veto a change of the asset's use. This veto power may cause the asset to fall into protracted, below-optimal use. When a property is subject to long-term underuse, the wider community – both the other owners of the asset who are in favour of a change in use and the surrounding community – is negatively impacted.

The recognition that an owner may have an emotional attachment to their land has previously been used to justify increased protection of owners' rights. In this respect, it was acknowledged in BalTAT that protection of rights-holders is an important feature of a mature property rights system that encourages confidence in the market. However, the implementation of one-sided protections conflicts with encouraging a change of use in order for a property to operate at an optimal level. The scale of use and the interpretation of the fragmentation as spatial or legal, are relevant considerations in determining the extent of underuse, but ultimately, result in the same conclusion – underuse should be avoided. Therefore, while BalTAT recognised and respected the emotional attachment an owner may have to their property, it did not state that those emotional ties should devalue the economic interests in the lot. Rather, it acknowledged that the conflicting interests of the various stakeholders must be balanced so as to minimise the negative impacts of underuse.

Fragmentation of ownership and the need to overcome a veto power provides motivation to owners to act strategically in a reassembly. Combined with the necessity for a resolution without dissent to terminate a scheme under section 78 of the *BCCM Act*, underuse becomes likely; the requirements lock in the status quo,[929] acting as a 'one-way ratchet'[930] until ownership changes to one owner, or a small group of cooperative owners, or the requirement for unanimity is removed.

Therefore, a balancing of stakeholder interests is necessary. A tradeoff between the interests of stakeholders must occur. In order to grant an interested party the power to overcome strategic

[929] Sherry, above n 6, 230 and Property Council of Australia, above n 6, 9–10.

[930] Heller, above n 281, 1185.

behaviour, and achieve the optimal use of a scarce resource, a redefinition of the bundle of an owners' rights becomes necessary. Honoré's list of 11 incidents of property are often regarded as a representative originating point for the enumeration of the bundle of owners' rights.[931] Of those 11 incidents, the sixth – the freedom from expropriation and security of title – is the most relevant to this thesis. BalTAT called for legislative intervention to redefine the incident, with a view to achieving a balance between stakeholder rights. Further, BalTAT sought to minimise the wider impacts of strategic behaviour by community titles scheme lot owners in a reassembly and termination of the scheme, whilst protecting owners' rights.

The use of expropriation powers was justified in BalTAT as a means to overcome the problems caused by a fragmentation of ownership rights. In respect of company shares, it has been argued that shares cannot be classified as 'property' within the bundle of rights definition because of the expropriation powers in the *Corporations Act,* which impact on Honoré's sixth incident.[932] However, this thesis has argued that Honoré's incidents should not be regarded as a checklist. Doing so reduces a theoretical definition of property into an exercise in statutory interpretation.[933] Viewing Honoré's incidents as prerequisites for the recognition of the object as property creates a static and inflexible theoretical view,[934] instead of a more useful relative construct. This thesis adopts a more useful relative construct: Honoré's incidents form an originating point to determine owners' rights, not a checklist of mandatory features, meaning that the incorporation of expropriation powers does not detract from the classification of the item as property. The purpose of the adoption of a relative construct is twofold. First, shares may be classified as property, which affirms the relevance of the general principles in the *Corporations Act* change of control provisions to the development of a law-reform model for section 78 of the *BCCM Act.* Second, constructing Honoré's incidents as an originating point also confirms that the addition of expropriation powers to the *BCCM Act* to facilitate the termination of schemes will not impact the theoretical classification of community titles scheme lots as 'property'.

BalTAT held that in order to minimise the impact of holdout behaviour on a reassembly and achieve an optimal use of an asset with which owners may have emotional ties, a system for expropriation was necessary. A balance cannot be brought about by reliance on the free market. Rather, implementation of

[931] Munzer, above n 175, 266 and Heller, above n 32, 663.

[932] Bird, above n 185, 150.

[933] Munzer, above n 175, 272.

[934] Gray, above n 217 and Bradbrook, MacCallum and Moore, above n 209, 42.

expropriation powers was supported by the need to achieve an optimal use of scarce resources, and avoid the negative impacts of anticommons use on the other owners within the scheme and the wider community. Powers must not be too wide-reaching in favour of the developer and protections for owners must also be implemented, in order to achieve a 'fair adjustment' of the competing stakeholder interests.[935] Expropriation powers must be shaped to overcome holdouts, yet be limited by administrative protections, such as the requirement for an independent review of the termination proposal, to ensure an equitable outcome may be reached for all parties.

Part 2 of this chapter now collates the key elements of the law-reform model identified in Chapter 3, Chapter 4 and Chapter 5. The analysis of the parallel areas of law in those chapters used BalTAT as the theoretical foundation for the assessment of how those parallel laws may usefully be adapted in the context of a law-reform model for the termination of community titles schemes.

PART 2 – PROPOSED TERMINATION MODEL FOR QUEENSLAND

Chapter 1 noted that the ultimate goal of this thesis was the proposal of a legislative framework to amend section 78 of the *BCCM Act*, to overcome the holdout problem while ensuring owners are protected from an abuse of expropriation powers. This thesis elected not to analyse strata title laws internationally, with a view to recommending the adoption of similar processes. Instead, it focused its analysis more broadly on analogous areas of law that successfully overcame strategic and holdout behaviour. Comparable jurisdictions were chosen to add an international element to the analysis; however, the focus remained on Australian law. The concurrent areas of law examined in the thesis – compulsory acquisition and changes to corporate control – provided insight into the scope of expropriation powers and the limitations imposed on those powers to protect minority owners. Governments and corporations have overcome issues of minority holdouts through legislated expropriation powers. Those powers are limited in order to control use and protect owners. As the ultimate goal of this thesis was to propose a law-reform package to amend section 78 of the *BCCM Act*, overcome the holdout problem and protect owners, the use of these comparable areas of law to inform the debate was appropriate.

From the analysis undertaken in the thesis, numerous recommendations were made. This Part sets out those recommendations in the form of a model for the termination of a scheme, graphically depicted below, which contains the following key elements:

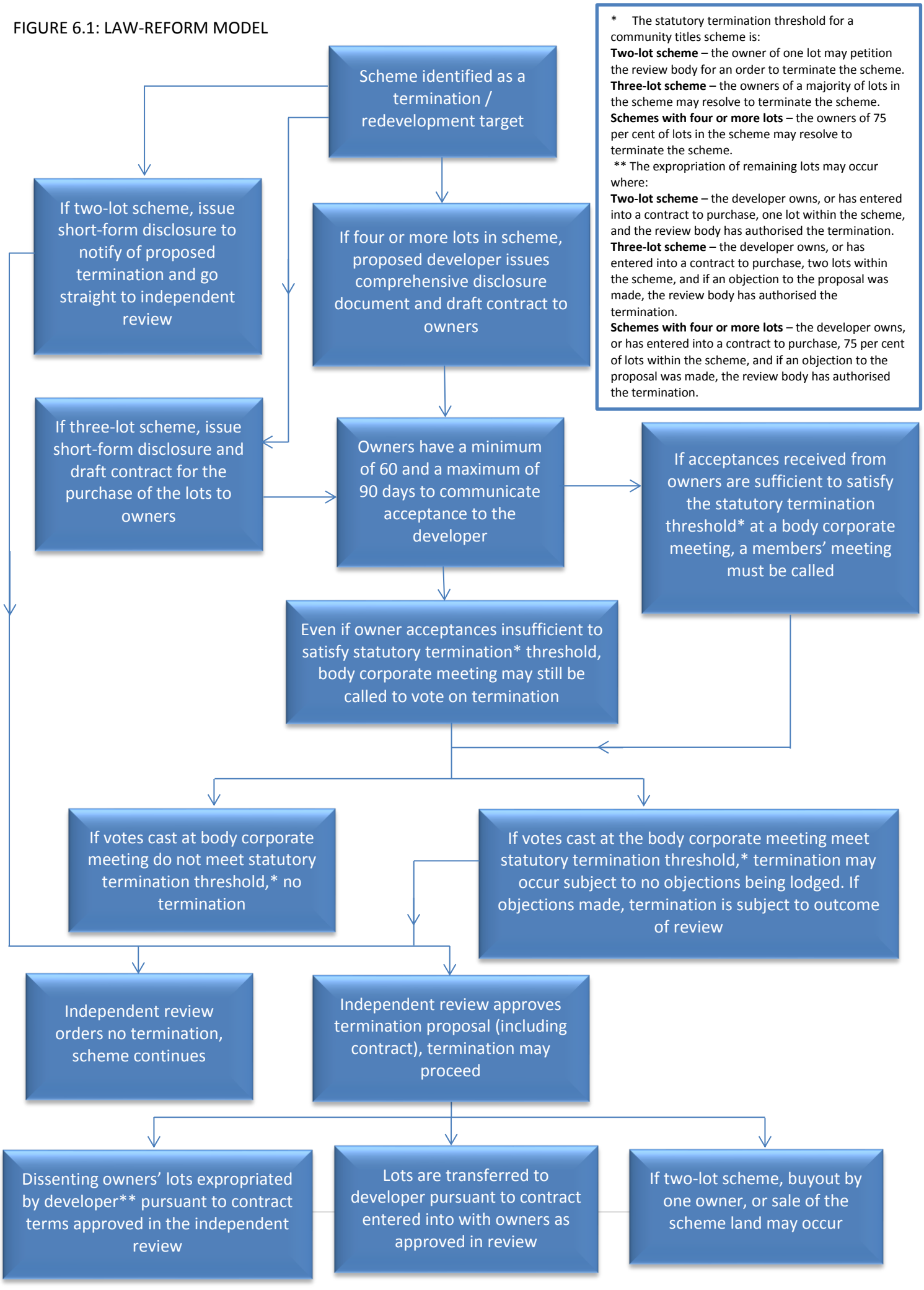
[935] *State v Shack,* 277 A. 2d 369, 374 (N.J. 1971) quoted in Singer, above n 34, 334.

Model for termination of Queensland community titles schemes

1. Detailed disclosure be provided to owners in order to commence the process of terminating schemes with four or more lots. A short-form disclosure is recommended for two- and three-lot schemes.
2. If a developer proposes to buy the lots, the disclosure must be delivered prior to, or contemporaneously with, a draft purchase contract. Those proposed contracts must comply with the recommended statutory restrictions relating to the content of clauses.
3. A minimum consultation period enabling owners to seek advice from experts and communicate their acceptance of an offer must be provided in accordance with the recommended statutory timeframes.
4. Reduce the resolution required to terminate a scheme from a resolution without dissent, to a sliding-scale threshold dependent upon the number of lots within the scheme. This will remove the veto power held by one owner in a termination situation.
5. A mandatory independent review of termination proposals be undertaken by a review body if:
    a. any objection is made to the termination motion for the scheme or the expropriation of the remaining lots or
    b. in the case of a two-lot scheme, upon an application by one owner being lodged.
6. Subsequent to the ratification of the proposal by the review body, the possibility of an expropriation of remaining lots.

Figure 6.1 represents the steps to be undertaken in order to secure the termination of a community titles scheme, depending upon the size of the relevant scheme. Each of the key elements of the proposed law-reform model is discussed in more depth following the flowchart.

FIGURE 6.1: LAW-REFORM MODEL



* The statutory termination threshold for a community titles scheme is:
Two-lot scheme – the owner of one lot may petition the review body for an order to terminate the scheme.
Three-lot scheme – the owners of a majority of lots in the scheme may resolve to terminate the scheme.
Schemes with four or more lots – the owners of 75 per cent of lots in the scheme may resolve to terminate the scheme.

** The expropriation of remaining lots may occur where:
Two-lot scheme – the developer owns, or has entered into a contract to purchase, one lot within the scheme, and the review body has authorised the termination.
Three-lot scheme – the developer owns, or has entered into a contract to purchase, two lots within the scheme, and if an objection to the proposal was made, the review body has authorised the termination.
Schemes with four or more lots – the developer owns, or has entered into a contract to purchase, 75 per cent of lots within the scheme, and if an objection to the proposal was made, the review body has authorised the termination.

DISCLOSURE TO OWNERS

Where a scheme has been targeted for reassembly and redevelopment, the first step in the termination process should be the developer's notification of the proposal to owners. Disclosure is a means of communicating key information to an owner to enable them to make an educated decision on the option that the developer has presented to the owners. In order to commence the termination and reassembly process, the developer must, at its own expense, present a disclosure document to owners. Disclosure of future plans for the site, and the financial means by which that use may be achieved, together with any other materially relevant factors, largely reflects the pre-acquisition due diligence investigations a developer would conduct in any event.[936] It is recommended that an obligation to disclose this information should be placed on developers where proposals exist to acquire schemes containing four or more lots.

In relation to small schemes, a parallel may be drawn between the sale of small developments and the termination of two- and three-lot schemes. When developments containing five or fewer parcels of land are sold prior to registration of titles, the developer is exempted from providing disclosure.[937] A more conservative approach is proposed for the reform of section 78 of the *BCCM Act.* It is recommended that the interests of the stakeholders will be better balanced if, instead of an exemption from disclosure, a 'short-form' disclosure document is required for schemes containing two or three lots. It was argued in Chapter 4 that the issue of short-form disclosure will provide owners with the minimum information required to allow them to make an assessment of the favourability of the terms of the developer's offer, while ensuring costs of disclosure do not become onerous in respect of those small schemes.

The educative role that the issuing of disclosure documents performs helps to achieve a balance between the competing rights of the stakeholders by 'levelling the playing field' – that is, an owner has the information necessary to enable them to make an informed decision about whether to accept or decline the developer's offer. The formalisation of the disclosure process also allows owners to obtain information regarding their rights and obligations, and seek upfront professional advice on the terms offered.

[936] See for example, Mary Ann Hallenborg, *Real Estate Due Diligence: A Legal Perspective* (Taylor and Francis, 2016).

[937] Section 3(4) *Land Sales Act*.

The content of disclosure documents issued to owners – and shareholders, in the case of a change in corporate control – was explored in Chapters 3, 4 and 5. In each of those chapters, numerous recommendations were made for inclusion into, and the interpretation and assessment of, disclosure documents by review bodies. It is recommended that disclosure documents must be clear and concise, and incorporate the following:[938]

Disclosure obligations:
Short-form disclosure requirements (two- and three-lot schemes):
1. The identity of, and contact details for the developer seeking to acquire the lots and terminate the scheme 2. An outline of the termination process and information on owners' rights and obligations. It is recommended that this information be in the form of a brochure issued by the Department of Justice and Attorney General's Body Corporate Commissioner's Office 3. Funding arrangements in place for the acquisition of the site 4. A valuation by an appropriately qualified and experienced independent expert. The methodology to be adopted by the valuer should be the subject of further research to ensure that a fair balance of the stakeholders' interests is achieved.
Comprehensive disclosure requirements (schemes containing four or more lots):
1. All the items contained in the short-form disclosure requirements above 2. Future plans for the proposed redevelopment of the scheme land, together with any other land the proposed development extends to 3. A discussion of any public benefits that may be generated from a proposal[939] 4. If construction funding has been secured, details of the finance in place for the construction of the project 5. Disclosure of any contracts the developer has entered into with preferred partners in

[938] ASIC considers that an effective bidder's statement must be clear, concise and drafted with the target shareholders' needs in mind: ASIC, Regulatory Guide 9, *Takeover Bids*, above n 574, RG 9.251 quoting Bryson J in *ICAL Ltd v Country Natwest Securities Aust Ltd* (1988) 13 ACLR 129 at 137 and RG 9.253.

[939] See below under the headings 'Generation of public benefits' and 'Future plans for the site' for more information on demonstrating public benefit.

anticipation of the termination of the scheme occurring

6. What (if any) available support services are offered, such as relocation advice or assistance, and how those services may be accessed
7. Any other material information that may assist owners in making an informed decision on the termination proposal

A developer seeking the termination of a scheme to facilitate a redevelopment of the site will likely endeavour to reassemble titles to the lots as part of the redevelopment process. Accordingly, contracts for the purchase of lots within the scheme will also be required. The proposed contracts should be issued to lot owners contemporaneously with the disclosure document, to enable those owners to seek advice on the terms of the offer. Recommendations for form and content requirements in respect of proposed contracts are set out below.

ISSUE OF PROPOSED CONTRACT TO OWNERS

In order to acquire lots within the scheme, a developer must enter into contracts with lot owners. In the same manner that a takeover bid and a scheme of arrangement apply consistent terms among all shareholders, this thesis recommends that, with the exception of the consideration offered to owners, each contract for the acquisition of lots within a scheme be consistent. It is important that the terms of the contract remain constant in respect of all lots for the duration of the termination process. This will ensure that no owners receive a windfall gain from holdout behaviour, and others are not penalised for agreeing to a sale early in the process.

Given that a disclosure document must be issued to owners to commence the termination process, it is recommended the draft contract accompany disclosure. This will enable an owner to seek professional advice on the terms of the offer, including the consideration, should they wish to do so.

The regulation of contract terms seeks to balance the need for a developer to withdraw from a project if they are unable to secure a sufficient number of lots to cause the passage of the resolution to terminate the scheme. It limits the discretion a developer may otherwise use to avoid contracts in order to provide owners with certainty as to the outcome of the termination process. Accordingly,

this thesis recommends that, in addition to compliance with other statutory requirements,[940] contracts must comply with the following:

Contractual clauses:

1. A clause rendering offers to owners conditional upon the developer securing sufficient lots within the scheme to meet the termination threshold, is permitted.
2. Clauses enabling the developer to exercise a discretion to determine whether or not the outcome of a condition is satisfactory (for example 'subject to finance' and 'subject to satisfactory due diligence' clauses) are prohibited.
3. An appropriate purchase price is offered for the lot. It was recommended above that a valuation be included in the disclosure document. The purchase price set out in the contract may be based on this figure, or an alternative amount appropriate to the individual lots. It is not recommended that a mandatory requirement be incorporated in the legislation which requires consideration for an offer to be the same for all lots in the scheme.
4. The developer's offer must remain open for acceptance by owners during the minimum statutory timeframe. The *Strata Schemes Development Act* sets this as a minimum of 60 and a maximum of 90 days,[941] in turn balancing the interests of those stakeholders. It is recommended that the timeframe implemented be 60 to 90 days to ensure sufficient opportunity for those owners to seek advice and make an educated determination on the information presented to them, without rendering owners subject to the uncertainty of a possible termination over an extended period.[942]

As noted above, consistency of contract terms between owners is an important feature of the reform model in order to minimise the impact of holdouts on both owners and the developer. Therefore, it is recommended that contract provisions be fixed for the period during which offers

[940] For example the *Property Law Act* and the *BCCM Act*.

[941] Section 174(1) *Strata Schemes Development Act.*

[942] Contrast the 60 to 90 day timeframe in the *Strata Schemes Development Act* with section 624 of the *Corporations Act*, which requires takeover offers to remain open for a minimum of one month and a maximum of 12 months. It is argued that this lengthy timeframe would expose owners to an uncertain future for too long.

remain open for acceptance. As required by Chapter 6A *Corporations Act,* expropriations after a successful takeover offer must be on the same terms as the takeover bid. This thesis recommends the same approach – upon the passage of the resolution to terminate the scheme, the expropriation of remaining lots must be on the terms set out in the contract issued to the owner with the disclosure document, or as amended by the review body.

It is acknowledged that the restriction on negotiating contract terms, including the consideration offered, will benefit developers by providing them with a degree of certainty over the form of the contracts. Further, it will also simultaneously disadvantage an owner by restricting their ability to negotiate those same terms. While this is the case, it is submitted that any advantages to developers are offset by the ability held by every owner alike to refuse the developer's offer. As a result, when making an offer, the developer has no guarantee of acceptance. Given that passage of the resolution to terminate the scheme is a necessary prerequisite to termination and the exercise of expropriation powers, an individual owner's ability to refuse any offer placed before them offsets any perceived advantage to a developer. This means that developers are likely to present a contract to the owners that is attractive enough to secure agreement by a sufficient number of those owners to pass the termination resolution and enable the exercise of expropriation powers.

LOWERING OF THE THRESHOLD TO TERMINATE A SCHEME

Upon expiry of the statutory timeframe for acceptance, the developer will be better positioned to determine whether to request that a meeting of the body corporate be called, in order to present a motion for its termination. If enough owners have accepted the developer's offer to secure a resolution for the scheme's termination at a meeting of the body corporate, the proposed law-reform model requires the meeting to be called. A meeting may still occur even if acceptances are below the termination threshold. This allows those owners who have not accepted the offer from the developer to purchase the lot to voice their opinions in support of a termination, despite being dissatisfied with the terms offered by a developer. Owners in those circumstances may present arguments to the review body to seek variation of the offer made to the owners.

The key element of the law-reform proposal in this thesis relates to the lowering of the resolution required to terminate a scheme in section 78 of the *BCCM Act*. In order to ensure the applicability of the provisions to schemes of all sizes, a sliding scale resolution threshold is recommended. This

sliding scale adapts the thresholds recommended by the Western Australian review.[943] The threshold for a resolution to terminate a scheme is based on the size of the scheme as follows:

Termination threshold:	
Scheme size	**Resolution required to terminate scheme**
Two lots	The owner of one lot may petition the review body[944] for an order to terminate the scheme.
Three lots	The owners of a majority of lots in the scheme may resolve to terminate the scheme.
Four or more lots	The owners of 75 per cent of lots in the scheme may resolve to terminate the scheme.

The size of the scheme is readily apparent from a review of the scheme's community management statement, a publicly available document. It is a clearer determinant than using the age of a scheme, as is required in the Northern Territory.[945] It is also more suited to Queensland's existing community titles scheme environment than the 75 per cent threshold in the *Strata Schemes Development Act*, because of the large number of small schemes.

Importantly, and consistent with the recommendation in Chapter 4, the resolution thresholds may only be met if the motion is approved by a minimum number of lots within the scheme, not merely by those owners who attend and vote at the meeting of the body corporate. This reflects the more conservative approach adopted in a takeover, rather than the procedure in a scheme of arrangement that is based on representation at the meeting. BalTAT supports a position whereby a threshold is based on the total number of lots in a scheme because of the emotional attachment a person may develop to their property, and the need to protect owners who will be required to

[943] Landgate, above n 106, 1.

[944] Refer to the discussion under the headings '

Independent review of termination proposals' and '

Part 3 – Areas for further research' for a discussion relating to the review body.

[945] See s 4 *Termination of Units Plans and Unit Titles Schemes Act.*

relocate away from their dwelling after its expropriation. This conservative approach is another protection inherent in the system.

INDEPENDENT REVIEW OF TERMINATION PROPOSALS

A safeguard commonly built into expropriation systems is the ability to have a termination proposal and associated exercise of expropriation powers reviewed by an independently appointed body.[946] Such a review enables the examination of proposals to ensure a fair balance is struck between competing stakeholder rights and powers, including the interests of the relevant local community. This thesis recommends that a mandatory review of a termination proposal be conducted by an independent review body where one or more owners object to the termination. In principle, owners who support the termination may vote in favour of the termination motion at the meeting, while retaining the right to challenge the terms upon which an expropriation will occur.

The question of what is the appropriate review body to hear termination proposals has been noted in this thesis as an area recommended for further research. The suitability of a court or administrative tribunal to determine issues associated with termination and redevelopment of a community titles scheme must be considered from a number of perspectives, once again to ensure appropriate protections are implemented for all relevant stakeholders.

The review body must first be appropriately equipped to balance conflicting interests of stakeholders. The policy to optimally use scarce resources through the avoidance of holdouts caused by fragmented ownership must be accorded weight, while also protecting the bundle of owners' rights and ensuring appropriate compensation is paid upon expropriation.

Second, the time and expense[947] associated with the preparation and running of an application for review must be taken into account. The review process must be cost-effective in order to avoid constraining access to those avenues by which owners may object to termination proposals. That is, the cost of obtaining a decision in any objection proceeding must not be excessive, or the efficacy of the protections granted to owners through the implementation of an independent review will be compromised. The appropriateness and affordability of legal and expert representation,[948] technical knowledge divergences between the parties and the complexity of community titles, property and

[946] See, for example, Part 5.1 and Chapters 6 and 6A of the *Corporations Act, Strata Schemes Development Act, Termination of Units Plans and Unit Titles Schemes Act* and the *Town and Country Planning Act.*

[947] McConvill, above n 689, 193.

[948] Garnett, above n 154, 128.

expropriation laws may all impact on an owner's rights. This impact may extend to an owner's ability to successfully stay the termination of a scheme and expropriation of their lot. Educational brochures and pamphlets may provide useful guidance on review procedures; however, reliance on this option in order to achieve substantive equality in the expertise of the parties as against each other is inappropriate. The provision of a brochure or pamphlet is unlikely to achieve that equality. One aim of the recommendation that further research is required on the most appropriate form of review body is to ensure that substantive access to the review process is available for all stakeholders.

Chapter 3 established that compulsory acquisition powers are narrowly interpreted.[949] That chapter also demonstrated that the specification of review criteria in a compulsory purchase system has successfully operated in the United Kingdom; these provisions have influenced the development of the recommendations in this thesis for the reform of section 78 of the *BCCM Act*. The criteria considered by the courts pursuant to the *Strata Schemes Development Act,* the *Termination of Units Plans and Unit Titles Schemes Act* and the proposals for Western Australia have also assisted in the development of recommendations. In addition, the review powers in respect of both schemes of arrangement, and takeovers and compulsory acquisitions in Part 5.1 and Chapters 6 and 6A of the *Corporations Act,* respectively, have assisted in the definition of a set of criteria for review bodies to consider during the decision-making process.

The recommendations from this thesis, and the principles associated with the interpretation of expropriation powers, revealed features relating to the review body's powers. Those powers must be broad enough to consider the development proposal as a whole, yet provide the reviewer with clear guidance on the relevant considerations and the appropriate weight to attribute to each in the decision-making process. It is recommended that the reform package enumerate a non-exhaustive list of considerations that the review body is directed to take into account when ruling on a termination proposal. These considerations are set out below.

1. PAYMENT OF FAIR CONSIDERATION

Chapter 5 Protections for Lot Owners identified that good faith negotiations around both the decision to sell and the content of contract terms may be rendered fallacious because of the existence of expropriation powers – that is, if a person's property will be expropriated anyway, can they really refuse to sell? The steps in the law-reform model set out in this chapter demonstrate that

[949] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 and *Prentice v Brisbane City Council* [1966] Qd R 394.

there are multiple points in time where an owner may validly refuse to sell: at the disclosure/offer stage, in the body corporate meeting and later by objecting to the proposal during the independent review. However, evidencing of good faith dealings between the parties was feasible.

One of the prime concerns to ensure the protection of lot owners is the requirement that the developer's offer reflects fair consideration for the acquisition. Chapter 4 demonstrated the similarity that exists in respect of the uncertainty in determining the value of unlisted shares in a thin market, and real property, where each lot or parcel is unique. In the case of shares, the uncertainty is minimised through the provision of an independent valuation. This thesis recommends that the same approach occur in respect of the expropriation of community titles scheme lots: the developer must provide a valuation by an independent and appropriately qualified and experienced valuer as part of the disclosure made to owners at the commencement of the termination proposal. While the recommendations in this thesis do not extend to requiring that a developer offer at least the amount set out in the valuation, a prudent developer is likely to set the valuation as a minimum benchmark for the consideration payable in order to secure as many acceptances of the offer as possible.

The review body's task in respect of the consideration is to assess whether the contract provisions, and in particular the consideration, are fair. However, it must be recognised that consideration below the valuation is not necessarily unfair. The review body may determine that other relevant factors counterbalance a lower offer price – for example, the incorporation of a rent-free period for an owner to remain in occupation, additional relocation assistance or other in-kind contributions to an owner. At a minimum, the review body should ask the following questions in order to reach its decision:

Payment of fair consideration:

(a) Is the proposed distribution of proceeds between lot owners fair and reasonable?
(b) Does the proposed consideration reflect a fair amount for the lots taking into account the value of the scheme land as assembled, and any other benefits payable in cash or in kind to owners?

2. EXISTING JUSTIFICATIONS FOR A TERMINATION

BalTAT requires that a balance be struck between stakeholders' competing interests. Chapter 5 frames this as a concern with the use of blight as a justification for the expropriation of property for redevelopment. It demonstrated that setting criteria requiring that a building, or wider community area, be in decline prior to expropriation powers becoming available is dangerous. Such an obligation may prompt both local governments and lot owners alike to engage in behaviour that accelerates decline – for example by refusing to carry out or contribute towards maintenance works.[950]

Nevertheless, some justification for a termination proposal should exist, whether that justification is the state of repair of the scheme land, planning related issues or other issues relevant to the stakeholders. The cases discussed in Chapter 3 demonstrated that a local government's exercise of expropriation powers merely to appease a developer is invalid.[951] Extrapolating this principle, it is important to ensure that a resolution to terminate a scheme passed by the body corporate was not made merely for the benefit of a developer, particularly in circumstances where that developer has engaged in tactics using intimidation and/or violence towards the owners.[952] The independent review of termination proposals in these circumstances may act as a protective measure for owners, enabling them to overturn a termination where a developer's behaviour is regarded as highly inappropriate. As such, the review body should be concerned to ask:

Justifications for a termination:

(a) Is it just and equitable to terminate the scheme? Do the dealings to date between all parties reflect that the developer has acted in 'good faith' in respect of their dealings with the scheme?

(b) Was there an 'ulterior purpose' for the termination that disadvantages the owners?[953] The review body must take into account the facts and circumstances surrounding the owners' entry into contracts of sale with the developer, and the passage of the

[950] Rutkow, above n 726, 269.

[951] *Council of the Shire of Werribee v Kerr* (1928) 42 CLR 1.

[952] Heller, above n 32, 641, 654 and 655.

[953] *Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board* (1982) 41 ALR 467.

resolution to terminate the scheme in the general meeting of the body corporate. In doing so, the reviewer may determine that the proposals were approved because termination of the scheme was justified, or the resolution was passed to appease a developer.[954]

(c) Are the objections to the termination proposal reasonable or unreasonable?

(d) Can the scheme continue to operate at a functional level if termination does not occur?

(e) Would an alternative approach to termination be more appropriate in the circumstances, taking into account both financial and non-financial factors?

(f) Is there a feasible alternative proposal that may be more beneficial to all stakeholders?

3. GENERATION OF PUBLIC BENEFITS

The termination and redevelopment of a scheme have a wider impact than the developer and individual owners. BalTAT seeks to minimise the negative impact on owners and the surrounding community in the protracted underuse of scarce resources, or anticommons use. The benefits and/or risks associated with a change of use should be factored into an assessment of a termination proposal. Those benefits may relate to publicly accessible social and economic infrastructure, taxes and job creation generated from a redevelopment proposal. Conversely, the risks should also be factored into the assessment, such as the financial viability of a project and the degree of risk to which an owner may be exposed.

In order to assess both the benefits and risks associated with a project, the project must be examined holistically. That is, the proposals in their entirety must be considered, rather than limiting an assessment to the lots being expropriated.[955]

However, it is important to avoid the trap of requiring high levels of public benefits with each redevelopment proposal. There is a proliferation of small schemes within Queensland. Their redevelopment may not generate as large a degree of public benefits as those obtainable in larger projects, such as the Civic Place Site redevelopment in *R & R Fazzolari Pty Ltd v*

[954] *CC Auto Port Pty Ltd v Minister for* Works (1965) 113 CLR 365.

[955] This occurred in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

Parramatta City Council; Mac's Pty Ltd v Parramatta City Council.[956] Therefore, it is recommended that the criteria are sufficiently flexible to allow smaller schemes to meet the requirements if the circumstances warrant it.

In addition, it must be recognised that private sector financial gains earned from a redevelopment project do not reduce the possible social, economic and environmental benefits to the public. These concepts are not mutually exclusive. Given that private sector developers will seek to profit from termination and redevelopment proposals, and are unlikely to proceed without a minimum level of anticipated profit from a project, it is recommended the provisions allow a degree of flexibility. That is, a developer must be able to receive a financial return from undertaking a project, or from the on-sale of the site to a third party.

In order to assess the issues associated with the generation of public benefits, the review body should consider submissions on the following questions:

Public benefits:

(a) What are the likely adverse consequences to lot owners if a termination does, or does not, occur?
(b) What are the financial benefits and risks associated with the proposed termination and, if applicable, redevelopment?
(c) What is the forecast financial viability of the reassembly and proposed redevelopment of the site, after funding or third party investment proposals are considered?

4. FUTURE PLANS FOR THE SITE

It is recommended a similar holistic assessment of the future use of the 'whole of project' site also be adopted. Assessing the benefits of each redevelopment proposal as an entire plan will assist to achieve a better recognition of the benefits and risks of a project, in turn more effectively balancing competing individual rights, community benefits and economic efficiency goals. Drilling down to the future use of selected components of the site is an artificial means of protecting private property

[956] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

rights based on architectural design.[957] It does not afford the necessary respect and protection to those rights demanded by BalTAT. The reliance on the placement of public infrastructure (if any) within a redevelopment plan in order to assess 'public use' does not ensure that the termination and future redevelopment will benefit the stakeholders.

Many of the public benefits generated from a redevelopment arise from the proposed future use of a site. Accordingly, the questions considered by the review body should seek to identify what the future use is likely to be and how it will fit within the broader community by asking:

Future plans for the site:

(a) To what extent will the proposed future use of the scheme land (and any other land upon which the redevelopment project will extend) contribute to the economic, social or environmental well-being of the area in question?

(b) Does the proposed future use for the scheme land (and any other land upon which the redevelopment project will extend) fit within the planning framework, strategies or plans that were the subject of community consultation?

EXPROPORATION OF REMAINING LOTS

The final step in the termination process set out in Figure 6.1, above, is the transfer of lots to the developer. Where owners have signed a contract with a developer, the transfer will occur pursuant to the terms of that contract, or as varied by the decision of the independent reviewer. Alternatively, where there are dissenting owners whose lots are liable to be expropriated by the developer, expropriation must be on the terms of the proposed contract presented to the owner at the commencement of the termination process, or as varied by the review body. Accordingly, it is recommended that the expropriation of lots pursuant to the law-reform model presented in this thesis, only be authorised in circumstances where:

[957] *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

Scheme size	Prerequisites to expropriation of remaining lots
Two lots	The developer owns, or has entered into a contract to purchase one lot within the scheme, and the review body has authorised the termination of the scheme.
Three lots	The developer owns, or has entered into contracts to purchase two lots within the scheme, and if an objection to the proposal was made, the review body has authorised the termination of the scheme.
Four or more lots	The developer owns, or has entered into contracts to purchase 75 per cent of the lots within the scheme, and if an objection to the proposal was made, the review body has authorised the termination of the scheme.

Upon those thresholds being met, the developer may issue a notice to remaining owners for the expropriation of the remaining lots within the scheme.

The recommendations made in this part for the reform of section 78 of the *BCCM Act* are made subject to the outcome of the further research identified in Part 3 below. These issues must be taken into account to ensure that a balancing of the competing stakeholder interests is achieved in accordance with BalTAT.

PART 3 – AREAS FOR FURTHER RESEARCH

The primary areas for further research have been identified from the analysis conducted in this thesis. Prior to an amendment of section 78 of the *BCCM Act* occurring, it is recommended that these issues be investigated. First, the methodology adopted in assessing the value of scheme land in respect of a redevelopment proposal must be considered. Current use of the market value of a lot is inappropriate for a number of reasons, the most significant of which is that it often results in under-compensation of owners.

Market value as a definition has been criticised because of its circularity – the figure it attempts to calculate is based upon a hypothetical sale at an assumed price.[958] This approximation may result in an under- or over-estimation of values, particularly in cyclical markets. Development of the definition occurred in an attempt to reduce compensation payments to owners for acquisitions by government organisations. Chapter 5 argued that it is not suitable to extend the use of the definition to expropriations by privately funded developers.[959] This is particularly the case because, first, market value does not incorporate the subjective value premium an owner may place on their residence.[960] Second, the interpretation applied to the relevant legislation may result in a recommendation that a figure below market value is 'fair and reasonable' compensation.[961]

Chapter 5 recommended that out-of-pocket expenses such as moving costs and government charges should be reimbursed to owners where market value of a lot is payable. Another option may be to calculate consideration for an acquisition on the basis of the average values determined by two independent valuers. However, changing 'market value' as the valuation methodology may be a better approach. The value may be based on the 'replacement' value of the lot, or a methodology implemented that requires an apportionment of the total aggregation surplus for the assembled development parcel between each of the lot owners.

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[958] Hockley and Whipple, above n 776, 205–7.

[959] Ibid., 207–8.

[960] Michelman, above n 786.

[961] Chapter 4 discussed the impact that the interpretation applied to the legislation may have on the calculation of market value. In the context of corporate takeovers, section 636(2) of the *Corporations Act* requires that, in certain circumstances, a takeover offer must include an independent expert's report indicating whether the expert considers the offer price to be 'fair and reasonable'. ASIC's interpretation of 'fair and reasonable' in Regulatory Guide 111 encourages experts to utilise a range to express a value of the shares. Where it is unlikely that a higher bid will be achieved, ASIC's interpretation creates the potential for an expert to recommend a price as fair and reasonable despite it being below what the expert believes market value of the shares is: ASIC, Regulatory Guide 111, *Content of Expert Reports,* above n 788, RG 111.10 and RG 111.78 and Hulme, above n 789.

Whichever approach is adopted, it must accord with the principles of BalTAT. Owners' rights must be protected through a recognition of the emotional connection that an owner may have with their property. However, this must also be weighed against the economic and wider community concerns to achieve an optimal use of scarce resources and avoid the negative implications associated with their sustained underuse. The valuation methodology adopted must strike a balance between the stakeholders. Further research is recommended to determine which methodology achieves that balance in the most effective and appropriate manner.

The second area identified for further research relates to the protection of owners' rights and the legislating of an ability to overcome fragmented ownership through the use of expropriation powers, and whether these competing considerations warrant implementation of a review mechanism. Advantages and disadvantages exist in respect of each of a court or tribunal being selected to fulfil the role of review body. Affordability of representation, delays, the divergence in knowledge between the parties in respect of the proposed project and the development industry generally, together with the complexity of property, community titles and expropriation laws all impact on an owner's ability to access justice.

Efficiency and cost-effectiveness of the system are both relevant considerations from a law-reform perspective; however, these are not the only factors to be taken into account. BalTAT's focus on balance requires an assessment of whether it is appropriate to allow a diminution of property rights over community titles scheme lots by permitting their expropriation upon an order of an administrative tribunal. Would a court be a more suitable forum to hear matters of such significance to the stakeholders? On the other hand, does the requirement to present a case to, for example, the District Court, render as unaffordable to many the protections granted to owners by the review process? Further research is necessary to consider these issues and determine the appropriate review body in the circumstances. Guidance on many of these considerations may be obtained from the existing research on this area.

CONCLUSION

This chapter outlined a series of recommendations for inclusion in a proposed model to reform section 78 of the *BCCM Act* based on the research undertaken in this thesis in accordance with the key elements of BalTAT. The law-reform model presented recognises that while the bundle of an owners' property rights are subject to statutory modification, those rights must still be protected. The potential emotional attachment a person may develop to their property is acknowledged and

respected through the proposed protections incorporated into the reforms. As a result, the model ensures stability for owners without disregarding the wider community benefits obtainable when an optimal use of a scarce resource, such as redevelopment land, is achieved. The avoidance of underuse caused by holdouts, resulting from fragmented ownership, is overcome through the implementation of expropriation powers. Finally, conflicting rights are balanced by the controlled application of expropriation powers – through the use of both administrative and substantive protections extended to owners – and the implementation of an avenue to have termination proposals reviewed.

Throughout this thesis, it has been demonstrated that a problem exists with the termination provisions of the *BCCM Act*. The difficulties in terminating a scheme called for a change in the form of a well-balanced, clear and researched case for law reform. This thesis has proposed workable solutions to protect the interests of all stakeholders and avoid the stalemate that may occur because of the need for unanimous consent in circumstances of fragmented ownership. The aim of this thesis was to provide a model to improve the current laws – to do better, to improve Queensland's *BCCM Act* termination provisions. Now I call on the Queensland Government to bring about change. After all …

It's not about what it is, it's about what it can become.'[962]

[962] Dr Seuss, *The Lorax* (Directed by Chris Renaud and Kyle Balda) (Universal Pictures and Illumination Entertainment, 2012).

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