Intersections and adaptations — Utilising corporate law principles to avoid Greenmail in developer-initiated multi-owned property terminations

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There has been marked growth in the multi-owned property industry in recent decades. In addition, government policy is seeking to alleviate urban sprawl, placing reliance on infill redevelopment. These factors reinforce the importance of a system to efficiently terminate multi-owned properties without diminishing owners' rights to too great an extent.

Part 5.1 and chs 6 and 6A of the Corporations Act 2001 (Cth) (the 'Corporations Act') contain systems to effect a change of corporate control to a sole shareholder, while safeguarding minority rights through the prescription of procedural requirements including disclosure, facilitating objections via the review process, and setting an appropriate statutory threshold to effect changes in control. This article considers how the procedures and safeguards implemented in takeovers, compulsory acquisitions and schemes of arrangement under the Corporations Act may inform laws relating to the termination of multi-owned properties so as to overcome dissenting owners' veto, while safeguarding those owners' property rights.

The issue in context

Multi-owned properties are not a new phenomenon but are becoming more commonplace — by 2012, approximately one in eight Australians was living in a multi-owned property,[1] and this figure is expected to increase.[2] In this regard, 89 per cent of Australia's population reside in urban areas.[3] Further, governments of Australia's five largest cities — Sydney, Melbourne, Perth, Brisbane and Adelaide — have all adopted urban consolidation policies to accommodate changing population demographics and alleviate urban sprawl.[4]

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1 Hazel Easthope et al, 'How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-title Developments' (2014) 32 *Urban Policy and Research* 289, 292.

2 Ibid.

3 Department of Economic and Social Affairs, United Nations, *World Urbanization Prospects: 2014 Revision* (2014) 25 <https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.Pdf>.

4 Easthope et al, above n 1, 293; Hazel Easthope, Sarah Hudson and Bill Randolph, 'Urban Renewal and Strata Scheme Termination: Balancing Communal Management and Individual Property Rights' (2013) 45 *Environment and Planning A* 1421; Hazel Easthope and Bill

The focus on redevelopment of infill areas[5] is likely to result in the construction of additional multi-owned properties. The growth of the industry and reliance on infill redevelopment to house increasing populations necessitates that the regulatory system for the creation, management and, eventually, renewal of multi-owned properties is effective.[6] This article focuses on the final point in a multi-owned property's lifecycle — termination, and in particular, the acquisition of lots within a multi-owned property by a third party — labelled, in this article, as a developer — who intends to redevelop the land.

Each of the entities established upon registration of a multi-owned property are perpetual in nature, indissoluble unless active means to terminate the multi-owned property is undertaken.[7] The need for an effective way to terminate a scheme and enable its redevelopment is, however, constrained by the broader property law framework in which multi-owned properties are situated. In this regard, strong property rights are a feature of western liberal legal systems, and protections existent in the majority of Australian states and territories require owners to unanimously consent to the termination of a multi-owned property.[8]

Generally, termination of a widely-held multi-owned property is preceded by the attempt to reassemble the titles to all lots within it. In doing so, however, an interested party will often experience strategic, or 'holdout', behaviour by one or more of the owners. Some who engage in holdout behaviour will 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 buyer — that is, to achieve greater economic rent — or to otherwise add to or remove conditions from the contract. Other owners may refuse to sell altogether for myriad reasons, including but not limited to an owner's emotional connection to the property. It is unlikely that any owner who refuses to sell their lot will agree

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Randolph, *Governing the Compact City: The Challenges of Apartment Living in Sydney* (2008); Strata Community Australia Ltd ACN 151 156 357, *Community Renewal* (2012).

5 Eg, the Draft South East Queensland Regional Plan has set a target of 60 per cent infill redevelopment: Department of Infrastructure, Local Government and Planning, *ShapingSEQ Draft South East Queensland Regional Plan* (October 2016) 35. This reflects an increase from the former 50 per cent target in the existing plan: Department of Infrastructure, Local Government and Planning, Queensland Government, *South East Queensland Regional Plan 2009–2031* (2009) 91.

6 For termination, see the *Unit Titles Act 2001* (ACT), *Strata Schemes Development Act 2015* (NSW), *Termination of Units Plans and Unit Title Schemes Act 2014* (NT), *Body Corporate and Community Management Act 1997* (Qld), *Strata Titles Act 1988* (SA) ('*Strata Titles Act* (SA)'), *Strata Titles Act 1998* (Tas) ('*Strata Titles Act* (Tas)'), *Subdivision Act 1988* (Vic) and *Strata Titles Act 1985* (WA) ('*Strata Titles Act* (WA)').

7 *Unit Titles (Management) Act 2011* (ACT) s 9(2)(a), *Strata Schemes Management Act 2015* (NSW) s 8(1), *Unit Titles Act* (NT) s 30, *Body Corporate and Community Management Act* s 78, *Strata Titles Act* (Tas) 71(3)(a), *Subdivision Act* s 28(2) and *Strata Titles Act* (WA) s 32(2).

8 For a detailed summary of the requirements for all states and territories see Melissa Pocock, *An Examination of the Need for Legislative Reform Arising From the 'Holdout' Phenomena in the Reassembly and Termination of Community Titles Schemes* (PhD Thesis, Griffith University, 2016) 8–23.

to vote in favour of the multi-owned property's termination,[9] because doing so enables the dissolution of all titles within that development. Accordingly, where holdouts exist, termination and, therefore, redevelopment is unlikely to occur because any dissent to a termination motion will cause it to fail.

Steps are already being taken in a number of Australian jurisdictions to amend the termination systems in place. The Northern Territory adopted a lower termination threshold in 2009,[10] followed by New South Wales in 2015.[11] In addition to lowering the termination threshold, New South Wales laws also facilitate the renewal of existing schemes by the current owners. That is, the *Strata Schemes Development Act 2015* (NSW) enables the collective of owners to either purchase dissenting owners' lots and redevelop the land, or resolve to sell all titles in the scheme (including dissenting owners' lots) to a third party.

The Western Australian Government is also implementing amendments to its legislation, and is on track to present a Bill to Parliament in mid-2018 which adopts a sliding-scale termination threshold dependent on the size of the scheme.[12] On 13 February 2017, the Queensland Government released the independent report it commissioned from the Queensland University of Technology which proposed a number of revisions to termination laws contained in the *Body Corporate and Community Management Act 1997* (Qld). That report recommended that the approval threshold be lowered to a minimum of 75 per cent.[13] While different, each state and territory's legislative system or proposals are designed to overcome the power by a single owner to holdout on a sale and veto a motion proposing termination.

In a corporate context, the 1925–26 Greene Committee report recognised the disadvantageousness of a single owner potentially vetoing a proposal to

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9 See, eg, *Paringa Lodge* [2003] QBCCMCmr 489 (1 May 2003). Paringa Lodge CTS 114 is a 12-lot scheme located in the inner-city Brisbane suburb of St Lucia. In 2002, FKP Ltd targeted the site for a small-scale redevelopment, however, it was only successful in purchasing nine of the 12 lots. FKP Ltd sought to lodge a development application with Brisbane City Council in anticipation of acquiring the remaining lots and being in a position to secure a termination of the scheme to enable its redevelopment. At a meeting of its members, the body corporate resolved to authorise lodgement of the development application with the Council. One of the owners disputed the validity of the resolution arguing that he had refused to sell to the developer. He raised the concern that the mere lodgement of the application with the Council could be construed as a grant by the body corporate of rights to the developer, or alternatively led to the expectation of rights being granted in respect of the scheme land. The adjudicator dismissed the application, stating that termination under s 78(1) of the *Body Corporate and Community Management Act* would be prevented as long as the lot owner voted against the motion.

10 On 1 July 2009, amendments to the *Unit Title Schemes Act* (NT) 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.

11 *Strata Schemes Development Act 2015*.

12 Landgate, Government of Western Australia, *Strata Reform* (20 November 2017) <https://www0.landgate.wa.gov.au/titles-and-surveys/strata-reform>.

13 Queensland University of Technology, *Government Property Law Review: Options Paper Recommendations Body corporate governance issues: By-laws, debt recovery and scheme termination* (2017) 73–5.

acquire control of a company. The act of a minority shareholder refusing to sell their securities, and consequently preventing execution of the proposal to acquire ownership, was labelled oppressive. The Greene Committee called it Greenmail,[14] and recommended that expropriation powers be incorporated in company law to overcome strategic 'holdout' behaviour by shareholders.[15] Part 5.1 and chs 6 and 6A of the *Corporations Act* have since been enacted, and provide avenues to achieve a change of corporate control with less than unanimous support.

There is, arguably, a comparison that may be drawn between a widely-held corporation and a multi-owned property. Broadly speaking, collective ownership of shares and the common property, respectively, each result in the need to obtain consent from owners on certain aspects of management and control. However, despite any potential comparability, reassembly of ownership in a corporation and a multi-owned property vary widely. Changes to corporate ownership and control are facilitated through the mechanisms in the *Corporations Act*, which require a specified majority of shareholders consent to a change. By way of contrast, with the exception of New South Wales and to a lesser extent the Northern Territory, there is no equivalence in multi-owned property legislation.

Thresholds for termination are changing across a number of jurisdictions. Nevertheless, there is a controversy in applying the Greene Committee's view of the desirability to overcome Greenmail to multi-owned properties. Notwithstanding that both corporations and multi-owned properties have a degree of collective ownership, there is a fundamental difference between the two asset classes that must be acknowledged. Shares do not have the same tangible presence as real property and property is not merely an economic asset. It provides shelter and a safe space for individuals and families to reside. As a result, broader considerations must be taken into account when determining whether to lower the termination threshold and implement expropriation powers. Adopting such a system would likely overcome holdout behaviour; however, it would also negatively impact the occupiers of the lots in question, and the owners' property rights. This impact may be profound if expropriation powers are too broad, and protections for affected stakeholders insufficient. Therefore, a balance must be struck between competing interests to ensure occupants are not forced out of their dwellings without appropriate safeguards in place, while overcoming the ability by a single dissenting owner to veto a proposal otherwise supported by an overwhelming majority of other owners.

The *Corporations Act* balances majority and minority shareholders' interests by introducing procedural requirements, requiring that objections are heard by an independent review body, and empowering an industry watchdog to oversee elements of the change of control process.[16] This article approaches

14 The Committee described the actions of the minority as 'oppression of the majority': Board of Trade, *Company Law Amendment Committee Report 1925–26* (UK), 43 referred to in Michael Whincop, '*Gambotto v WCP Ltd*: An Economic Analysis of Alterations to Articles and Expropriation Articles' (1995) 23 *Australian Business Law Review* 276, 278.

15 Board of Trade, above n 14.

16 The system is not without its critics. Eg, Elaine Hutson, 'Australia's Takeover Rules: How Good are They?' (2002) 4 *Journal of Applied Science in Southern Africa* 33, 37 and Elaine

the question of lowering the termination threshold from a different perspective to that discussed in prior research.[17] The *Corporations Act* provides an avenue to achieve a change of corporate control with less than unanimous support. This article investigates whether adopting the same approach — introducing procedural requirements, reducing the consent threshold and introducing expropriation powers based around the systems in pt 5.1 and chs 6 and 6A of the *Corporations Act* — may have broader relevance to multi-owned properties, while ensuring strong property rights protections, particularly for dissenting owners.

The discussion in this article is divided into two parts. The first, entitled 'Options to effect a change of corporate control', contains an overview of the processes in pt 5.1 and chs 6 and 6A of the *Corporations Act*. It identifies a number of principles which may be extrapolated and tailored for application to a system for the termination of multi-owned properties — disclosure to owners, form and content requirements for documents, acceptance timeframes and the opportunity for decisions to be independently reviewed. Those items are then investigated in greater depth in the second part of the article, 'Broader adaptation of *Corporations Act* principles to inform the termination of multi-owned properties'. It concludes with some general recommendations for future consideration by lawmakers.

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 chs 6 and 6A of the *Corporations Act,* and schemes of arrangement regulated by pt 5.1 of the *Corporations Act*. This part provides an overview of the methods by which a change of control occurs, and identifies some features which may have broader application to property law.

A binding transfer scheme of arrangement assigns to the buyer title over all shares in the class or classes covered by the arrangement.[18] That is, once the company has complied with pt 5.1 of the *Corporations Act,* including passing

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Hutson, 'Our Iron Takeover Law: Why Australia Needs a Mandatory Bid Rule' (2000) 2 *Journal of Applied Science in Southern Africa* 2.

17 Eg, Bruce Bentley, 'Termination Developing a Framework' (Paper presented at the Australian College of Community Association Lawyers 4th Annual Conference, Surfers Paradise, 1 September 2009); Dianne Dredge, 'Perspectives on Strata Title Planning Research' (Paper presented at the Strata and Community Title in Australia for the 21st Century 2009 Conference, Gold Coast, Queensland, 2–4 September 2009); Easthope, Hudson and Randolph, above n 4; Easthope and Randolph, above n 4; Easthope et al, above n 1; K Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13 *Australian Property Law Journal* 1; and Cathy Sherry, 'Termination of Strata Schemes in New South Wales — Proposals for Reform' (2006) 13 *Australian Property Law Journal* 227.

18 'Cancellation' and 'transfer' schemes of arrangement are the most commonly utilised options: 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) 9. However, only the latter is the focus of this article. 'Cancellation' schemes facilitate mergers of corporate entities and therefore, it is submitted, are intrinsically different in nature from the acquisition and termination of a multi-owned property.

a resolution to approve the scheme, all affected shares are transferred to the buyer pursuant to the terms of the arrangement.[19]

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. In order to implement a scheme of arrangement, the target company must comply with the statutory requirements in pt 5.1 of the *Corporations Act*. This includes the obligation to prepare an explanatory statement and disseminate it to shareholders after obtaining the court's approval.[20] Information in the explanatory statement enables shareholders to make an educated decision on the proposal when casting their vote at the general meeting. Disclosure obligations in the context of multi-owned property terminations may be guided by *Corporations Act* principles.

Once the scheme of arrangement has been approved at a meeting of the company's members, the company must then obtain a second court order to authorise its implementation.[21] The dual review by an independent arbiter seeks to protect the proprietary interests of minority shareholders. Independent review is another important area where protections for owners may be enforced.

Schemes of arrangement avoid the need to negotiate with individual shareholders through the collective sale process — shareholders approve the company's entry into the scheme of arrangement, in turn, binding all members of the affected class or classes to it.[22] The holdout problem is minimised because the threshold to approve the arrangement is less than unanimous. This advantage to the majority shareholders is, however, countered by the safeguards for minority shareholders in the *Corporations Act*.[23]

The threshold to achieve a change of control under pt 5.1 and chs 6 and 6A of the *Corporations Act* varies, a logical outcome given the different processes and protections established in each method. Selection of a suitable threshold at which to set approval is essential. It should be guided by the level of protection and oversight granted by legislation and, it is argued, any jurisdiction-specific characteristics. This is another area in which the *Corporations Act* may inform the laws on multi-owned property terminations.

Schemes of arrangement require cooperation of the company. Where hostilities exist between the bidder and target company, and cooperation is unlikely to be achieved, the acquisition of control may only be achieved using

19 *Corporations Act* s 411(4).

20 Ibid s 411(1).

21 Ibid s 411(4)(b) and Jennifer Payne, 'Schemes of Arrangement, Takeovers and Minority Shareholder Protection' (2011) 11 *Journal of Corporate Law Studies* 67, 70.

22 *Corporations Act* s 411(4).

23 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, the compulsory acquisition provisions in ch 6A of the *Corporations Act* apply once the bidder secures 90 per cent of the voting control of the company: s 661A(1)(b). 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* (CCH, 14th ed, 2013) 488.

a takeover under ch 6 of the *Corporations Act.* Bidders may initiate a takeover in the following circumstances:[24]

(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.[25]

Chapter 6 of the *Corporations Act* sets out a number of mandatory form and content requirements for takeover bid documents. Prescription of compulsory inclusions for contract and disclosure documents may benefit owners by ensuring minimum standards of compliance. This may, in turn, aid them to seek professional advice on a proposal, enabling owners to make an informed decision on whether to accept or reject the offer.

At the conclusion of the bid period, if the number of shareholders who have accepted the offer satisfy the minimum statutory threshold, the bidder may compulsorily acquire the remaining shares under ch 6A of the *Corporations Act*. As noted above, a system of expropriation has already been implemented in New South Wales, where legislation facilitates the transfer of dissenting owners' lots in order to effect a collective sale or renewal of the strata scheme.[26] The processes in that State may be compared with the *Corporations Act* provisions.

Chapter 6 of the *Corporations Act* seeks to balance efficiency and competition while operating in an informed market.[27] It does so by implementing procedures which create a 'reasonable and equal opportunity to participate in any benefits' of the takeover.[28] Critics of the system argue that ch 6 of the *Corporations Act* is overly restrictive.[29] For example, the lack of a mandatory bid rule,[30] and the requirement to apply increases in the offer price to all shareholders in the bid class, add expense to bidders.[31] Hutson argues that both factors impede an appropriate balance being struck between controlling and minority shareholders.[32] While the takeovers process is not perfect, the existence of prescriptive systems ensures that minority shareholders' securities may only be expropriated in defined circumstances. Safeguards exist to protect shareholders' rights, without disregarding economic efficiency and the benefits of sole ownership of corporations.

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24 *Corporations Act* s 616 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 of ch 6, the discussion in this article is limited to identifying the key features that establish the mechanics of making and executing off-market bids.

25 Ibid s 606(1).

26 *Strata Schemes Development Act* ss 184–5.

27 *Corporations Act* s 602(a).

28 Ibid ss 602(c)–(d).

29 See, eg, Hutson, 'Australia's Takeover Rules', above n 16 and Hutson, 'Our Iron Takeover Law', above n 16.

30 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, 'Our Iron Takeover Law', above n 16.

31 Ibid 3.

32 Ibid 2–3.

The next part of this article now discusses the various features of pt 5.1 and chs 6 and 6A of the *Corporations Act* identified above. It seeks to ascertain potentially desirable characteristics which may be implemented into systems for the termination and reassembly of titles to multi-owned properties in order to facilitate redevelopment of those properties.

Broader adaptation of *Corporations Act* principles to inform the termination of multi-owned properties

There are, undoubtedly, competing and sometimes fundamentally opposing interests in the termination of a multi-owned property. On the one hand, there may be owners seeking to exit the development via a buyout from a developer, those wanting to take advantage of an opportunity to redevelop the property themselves, or those searching for a means to avoid investment in continued maintenance costs for a potentially obsolete asset. On the other, there are those who desire to retain ownership of their lot — some may have strong emotional ties to the property, have purchased the lot because it was ideal for them, or are settled in the neighbourhood and simply do not wish to relocate. Similarly, in a corporate context, some shareholders would seek to retain ownership of their securities, while others are desirous of achieving a change of control. Finding a legislative balance which respects the subjective motivations of each class of owner is difficult. There are a number of elements from corporate law which, when implemented into a statutory system for the termination of multi-owned properties, may potentially facilitate the parties achieving a fair outcome.

The *Corporations Act* focuses on ensuring that owners are empowered to make educated decisions on a transaction, and are given appropriate time to consider an offer and seek professional advice. It also prevents owners being bound to a proposal which does not have significant majority support, and establishes a system of independent review for transactions. This part considers the four themes identified from the analysis of pt 5.1 and chs 6 and 6A of the *Corporations Act* above. Elements of each may be extrapolated to guide law reform for systems enabling the reassembly of ownership and termination of multi-owned properties.

Disclosure, valuation and expert reports

In the *Corporations Act,* disclosure is intended to empower shareholders by furnishing material information to them.[33] It assists shareholders to make an educated decision on whether to accept a takeover offer under ch 6, object to a compulsory acquisition under ch 6A, or vote in favour of a scheme of arrangement in pt 5.1 of the *Corporations Act*. Chapter 6 and pt 5.1 disclosure requirements contain some correlations — a logical outcome given the potential availability of both options to effect a change of control.[34] The

33 *Corporations Act* s 602 provides that ch 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) requires both prescribed information and information that is 'material' to shareholders' decision-making.

34 Alberto Colla, 'Schemes of Arrangement as an Alternative to Friendly Takeover Schemes:

similarities prevent prejudice to shareholders if the bidder or subject corporation chooses one option over another — the decision on which approach to adopt is outside a minority shareholder's control.

Fairness underpins the disclosure provisions[35] and this same principle may be extrapolated to apply to terminations of multi-owned properties: disclosure creates transparency and enables an educated assessment of a proposal.[36]

Specific disclosure items

Disclosure during a takeover occurs in the form of the bidder's statement and the target company's response.[37] When a scheme of arrangement is utilised, disclosure is made using the explanatory statement.[38] This subsection considers some of the mandatory disclosure items in both the bidder's statement and explanatory statement.

Bidders' statements, issued to shareholders at the commencement of the takeover process, must comply with the requirements in s 636 of the *Corporations Act*.[39] 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[40] any further background data that may influence a shareholder's decision. Similar requirements apply in sch 8 pt 3 of the *Corporations Regulations 2001* (Cth) in relation to an explanatory statement for a scheme of arrangement.

The obligation to provide disclosure is not limited to corporate law. In Queensland, when a developer sells property to a buyer before title to the land has been issued, the developer must provide the buyer with a disclosure plan

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Recent Developments' (1998) 16 *Company and Securities Law Journal* 365; Alberto Colla 'Eliminating Minority Shareholdings — Recent Developments' (2001) 19 *Company and Securities Law Journal* 7, 7; Payne, above n 21, 67; Quentin Digby, 'Eliminating Minority Shareholdings' (1992) 10 *Company and Securities Law Journal* 105 and Corporations and Markets Advisory Committee, Parliament of the Commonwealth, *Members' Schemes of Arrangement Report* (2009) 1.

35 Australian Securities and Investments Commission ('ASIC'), *Schemes of Arrangement*, Regulatory Guide No 60 (September 2011) RG 60.69 <http://download.asic.gov.au/media/1239045/ rg60-published-22-september-2011.pdf> and *Gambotto v WCP Ltd* (1995) 182 CLR 432.

36 Digby, above n 34, 129–30.

37 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: *Corporations Act* s 638(3).

38 Ibid s 411.

39 If the bidder's statement does not also contain the terms of the offer, the bidder must also provide an offer document: ibid ss 620–1.

40 ASIC considers that an effective bidder's statement must be clear, concise and drafted with the target shareholders' needs in mind: ASIC, *Takeover Bids*, Regulatory Guide No 9 (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, 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, Parliament of the Commonwealth, above n 34, 60. The Corporations and Markets Advisory Committee recommended the introduction of a 'clear, concise and effective' requirement consistent with RG 9.251. Regulatory Guide No 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): ASIC, *Schemes of Arrangement*, above n 35.

and disclosure statement.[41] However, the developer is exempted from the requirement to issue that disclosure where the subdivision contains a maximum of five parcels of land.[42] In the development of small subdivisions, a trade-off is made between the cost of producing detailed disclosure for buyers, and the benefit those buyers may receive from the information provided in the materials.

Chapter 6 of the *Corporations Act* makes a similar distinction between 'small' and 'large' corporations in relation to the application of the takeover process — it does not apply to unlisted corporations with fewer than 50 members.[43] Where ch 6 does apply, disclosure to all shareholders in an affected class, or classes, ensures equality and informed decision-making. In relation to possible disclosure requirements in the termination of a multi-owned property, a similar trade-off may need to occur; however, exempting developers from providing any disclosure is undesirable. Granting an exemption would reduce an owner's ability to assess a proposal, in turn, reducing the effectiveness of provisions directed at protecting dissenting owners. In circumstances where a motion may be passed with less than unanimous consent, the effect of which would be to dissolve title to the lot in question, the lessening of protections aimed at enabling owners to make an informed decision is particularly problematic. Nevertheless, given the potentially high costs of preparing detailed disclosure for a very small number of owners, limiting the breadth of disclosure may be appropriate. That is, a 'short-form' package may be better suited to the proposed termination of small multi-owned properties which contain, for example, two or three lots.

Irrespective of the number of lots a 'small' multi-owned property is legislatively deemed to contain, in order to be effective, disclosure must include the minimum information required to enable owners to assess the terms of the offer. Short-form disclosure containing:

- the name and contact details of the offeror;
- information on how acquisitions of lots in the multi-owned property will be funded; and
- a valuation by an appropriately qualified expert,

will ensure the costs imposed on a developer to produce the disclosure document will not be onerous, yet owners will be provided with essential information to aid their decision-making.

In respect of larger schemes, it may be appropriate to require more detailed disclosure similar to that contained in the *Corporations Act*. Additional to the information required by the 'short-form' disclosure document, detailed disclosure documents might also include:

- a description of the future plans for the site;
- information on how additional acquisitions and/or construction of the proposed project will be funded; and
- any other information materially relevant to the proposal.

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41 *Land Sales Act 1984* (Qld) s 10. Detailed disclosure requirements apply to proposed community titles scheme lots pursuant to *Body Corporate and Community Management Act* s 213.

42 *Land Sales Act* s 3(4).

43 *Corporations Act* s 602(a)(i).

Each of the disclosure items are discussed below in the context of *Corporations Act* requirements.

The bidder's intentions for a target company/future plans for a redevelopment site

Disclosure of the bidder's intentions for the target company enables an assessment of the wider impacts from the proposed takeover.[44] Section 636(1)(c) of the *Corporations Act* obliges disclosure of a bidder's intentions regarding:

- the plans for the continuation of the target company's future business operations;
- major proposed changes to the target's business, including any planned redeployment of the company's fixed assets; and
- the future employment of the target company's current employees.

While it is not necessary for the bidder's board to have approved its plans for the target company prior to disclosure in the bidder's statement, the bidder is expected to have given consideration to the future of the target company. 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.[45]

The schemes of arrangement disclosure requirements in sch 8 pt 3 r 8310 of the *Corporations Regulations* almost mirror the takeover obligations in s 636(1)(c) of the *Corporations Act.*[46]

When a developer seeks the termination of a multi-owned property in order to carry out the redevelopment of an assembled site, that developer will likely have undertaken a feasibility analysis of the proposal.[47] In order to do so, the developer must have formulated a preliminary proposal for the site. However, preliminary proposals are not routinely disclosed. Rather, a developer will often lodge applications with the relevant local government seeking approval of the proposal prior to any announcement being made in respect of the site.

An analogy may be drawn with the provisions of the *Town and Country Planning Act 1990* (UK) in this context. In their assessment of the proposed compulsory acquisition of land for redevelopment under s 226(1), the Secretary of State must consider the forecast financial viability of the

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44 A failure to make a determination on the future plans for the target company may breach the underlying intentions of *Corporations Act* ss 602(a), (b)(iii):*Mildura Co-operative Fruit Co Ltd* [2004] ATP 5 (8 March 2004) [85]–[87] and *Multiplex Prime Property Fund 01 and 02* (2009) 74 ACSR 248, 259 [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, *Takeover documents*, Guidance Note 18 ('GN 18') referred to in ASIC, *Takeover Bids*, above n 40, RG 9.257 and *Corporations Act* s 657A.

45 ASIC, *Takeover Bids*, above n 40, RG 9.259.

46 *Corporations Regulations* sch 8 pt 3 r 8310 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. (emphasis added).

47 Richard Reed and Sally Sims, *Property Development* (Routledge, 6th ed, 2015) 7.

proposals for the site, after funding or third-party investment proposals are considered.[48]

Disclosure of a developer's preliminary plans for a site may provide owners with an opportunity to understand, subject to the required approvals being obtained and, perhaps, the performance of a full feasibility analysis, what if any, public benefits the developer intends to incorporate into the proposal. Disclosure of future development plans for a site may also aid an independent reviewer's evaluation of the proposal for the multi-owned property, including the level of consideration payable in respect of an offer.

Funding arrangements/acquisition of lots and construction of redevelopment projects

Disclosure of funding arrangements for a change of corporate control is intended to enable a shareholder to assess the bidder's financial capacity to comply with its contractual obligations.[49] In this regard, s 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.[50]

There are no equivalent provisions in pt 3 sch 8 of the *Corporations Regulations* relating to schemes of arrangement.

Disclosure of how a developer will fund the acquisition of lots in a multi-owned property to facilitate its termination and redevelopment may serve the same role as in a takeover. Information provided should extend to how a reassembly is to be funded, and the amount and any conditions precedent for finance approval. Given the significance of adequate funds being available to meet contractual obligations, funding information should, ideally, be provided to all owners irrespective of the size of the scheme being acquired.

Section 629(1)(a) of the *Corporations Act* prohibits the imposition of conditions which a bidder may, in its discretion, determine satisfaction of. Land contracts are often subject to finance being obtained 'on terms satisfactory to the [b]uyer';[51] however, these clauses provide an element of uncertainty for owners because of the inbuilt discretionary element. Finance terms, such as the loan amount and interest rate offered by a lender, may be unacceptable to a developer. In addition, a loan approval may be conditional

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48 Office of the Deputy Prime Minister, *Compulsory Purchase and The Crichel Down Rules*, Circular 06/2004 (2004) 24–5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/1918885.pdf>.

49 ASIC, *Takeover Bids*, above n 40, RG 9.272.

50 *Corporations Act* s 636(1)(f) 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). (emphasis added).

51 See, eg, cl 3.1 of the Real Estate Institute Queensland (REIQ) and Queensland Law Society Contract for Houses and Residential Land (10th ed).

on the fulfilment of a number of requirements outside the developer's control, for example, the lender being satisfied with the property's valuation. Application of s 629(1) of the *Corporations Act* to contracts for the reassembly of lots in multi-owned properties would render conditions such as those 'subject to finance' clauses invalid.

Disclosure of finance arrangements in place as at the date of the offer, and prohibiting discretionary conditions in contracts, would allow owners to draw their own conclusions on whether the buyer is financially capable of completing the purchase. This approach aids in balancing stakeholder rights and interests. That is, owners will benefit from the legal certainty that a contract is not subject to the developer exercising its discretion. Developers, on the other hand, will have in place a system enabling them to make an offer over the entire development, rather than the current system involving acquisition of lots on a piecemeal basis. Reduction of the voting threshold will also balance stakeholder rights, removing the ability for one owner to veto a project to the detriment of the others.

Other materially relevant 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'.[52] A largely equivalent provision is contained in sch 8 pt 3 r 8302 of the *Corporations Regulations*, which mandates directors, liquidators or official managers to disclose in the explanatory memorandum any other materially relevant information within their knowledge which has not previously been disclosed to shareholders.[53]

A similar requirement to disclose other materially relevant information may also be incorporated into disclosure obligations with respect to larger multi-owned properties. A 'catch-all' provision would add flexibility and ensure that all materially relevant information relating to the reassembly of the multi-owned property is communicated. Its provision also assists with transparency in negotiations, enables professionals to properly advise owners, and promotes opportunities for meaningful engagement with those owners.

Use of experts in disclosure

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,[54] a shareholder must be able to reasonably determine whether the consideration offered for the securities is appropriate. However, the value of a share may not be readily apparent to shareholders, particularly where the

52 *Corporations Act* s 636(1)(m) 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).

53 Ibid s 636(1) exempts the bidder from re-disclosing information previously provided to shareholders within the bid class.

54 Ibid s 602.

shares are not publicly traded on a stock exchange. The *Corporations Act* requires that an expert be appointed to advise the company on the relevant share values, and mandates provision of the expert's report to shareholders with the target's statement.[55] Experts are uniquely positioned because of their skills and experience to opine[56] whether a takeover offer is 'fair and reasonable',[57] the scheme is in the members' 'best interest[s]'[58] or the consideration for the compulsory acquisition represents 'fair value'.[59]

In relation to determining fair value, it is interesting that all their Honours' decisions in *Gambotto v WCP Ltd*[60] challenged the use of market value as the most appropriate method of calculating the price for an expropriation. While Whincop considers this part of the Court's decision was 'ludicrous',[61] their Honours' criticisms of using market value reflect concerns relating to under-compensation of expropriated real property and the abuse of expropriation powers.[62] In *Gambotto v WCP Ltd,*[63] 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.[64] With respect to terminations of multi-owned properties, the proposed future use of the assembled site, the potential public benefits from the redevelopment, the likelihood of the project proceeding and other relevant factors may all impact upon the appropriate consideration payable to owners. It is outside the scope of this article to consider which valuation methodology to adopt where the redevelopment of a reassembled multi-owned property in its entirety is proposed. However, it

55 Ibid s 640(1) 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: *Corporations Regulations* sch 8 pt 3 rr 8303, 8306.

56 Expert reports must advise of both the expert's opinion and the reasons for that determination: *Corporations Act* s 640(1), 667A(1)(c) and ibid sch 8 pt 3 r 8303.

57 *Corporations Act* s 640(1).

58 *Corporations Regulations* sche 8 pt 3 r 8303.

59 *Corporations Act* s 667A(1).

60 (1995) 182 CLR 432.

61 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.

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.

62 These issues were discussed in Melissa Pocock, 'Orgies of Seizure and Violence: Compulsory Acquisition and Private Sector Development — Lessons for Australia' (2015) 20 *Local Government Law Journal* 27.

63 (1995) 182 CLR 432.

64 *Gambotto v WCP Ltd* (1995) 182 CLR 432, 447, 457.

should be the subject of further research.

In the context of disclosure to lot owners, the developer would be best positioned to appoint, at its own cost, an appropriately qualified and experienced independent expert to provide an opinion on the value of the lot. The valuation methodology should be based on criteria established to ensure an equitable value may be calculated for those lots that are the subject of the developer's offer. At minimum, provision of a valuation will assist a developer to determine an appropriate offer price, and enable owners to assess that offer as against the valuation, in turn, balancing the stakeholders' interests.[65]

Both ch 6 and 6A and pt 5.1 of the *Corporations Act* also utilise experts in the independent review of transactions to ensure procedural compliance and protection of shareholders.[66] Adoption of an independent review mechanism, in addition to independent valuation of the relevant lots, is discussed further under the heading 'Review processes and considerations for decision makers'.

Form and content requirements

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[67] and, second, by mandating that offers made to all shareholders in a bid class be on the same terms (including the consideration payable to those shareholders).[68]

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.[69] Once the minimum acceptance threshold is satisfied, ch 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 all outstanding shares.[70] Both takeover offers and compulsory acquisition notices must be in writing,[71] and in the case of compulsory acquisition notices, be on the same terms as the takeover.[72] In addition, the method of acceptance for an offer must be specified[73] and payment terms for the acquired shares must comply with statutory timeframes.[74]

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.

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65 McHugh J in ibid discusses substantive fairness being achieved when an offer price favourably compares to an expert's valuation.

66 *Corporations Act* s 657A.

67 Ibid s 618.

68 Ibid s 619.

69 Ibid s 618.

70 Ibid s 661B of the 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.

71 The content of the bidder statement and expert's report are discussed further under the heading 'Disclosure, valuation and expert reports'.

72 *Corporations Act* s 661C(1).

73 Ibid s 620(1).

74 Ibid s 620(2).

As noted above, the *Corporations Act* limits what conditions may be imposed upon offers. While discretionary clauses are prohibited, clauses whose satisfaction are objectively determinable do not breach s 629(1) of the *Corporations Act* and are, therefore, permissible. For example, a clause that sets a minimum level of acceptance as a prerequisite for the takeover to proceed is permitted.[75] In the context of the termination of a multi-owned property, such a clause would enable a developer to make its offers conditional upon entering into sufficient contracts to secure passage of the motion terminating the development. Where this condition is not satisfied, the developer may withdraw from the transaction.

During the reassembly of a multi-owned property, in addition to a requirement that the developer secure a minimum number of lots, the inclusion of due diligence, planning[76] and finance[77] clauses is common. An application of s 629(1) of the *Corporations Act* to a contract for the acquisition of lots in a multi-owned property would render many of those clauses impermissible because of the discretionary element in each. 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 before securing contracts for the site, or purchase the site without the benefit of having completed those investigations. For a developer, it is commercially desirable to enter into a contract conditional upon them being satisfied with the investigations undertaken after securing the purchase of the site. However, prohibiting such conditions would add certainty for owners.

In the same way that bidders may withdraw their takeover offer because of insufficient acceptances, developers must continue to be able to include provisions in contracts allowing them to withdraw if they cannot ensure passage of a termination motion at a general meeting. If the developer cannot purchase enough lots to meet the statutory threshold for termination, the redevelopment is unlikely to proceed.[78] It is appropriate in those circumstances for the developer to withdraw from the purchase, so that the owners retain title to their lots. This type of clause, it is argued, ensures an appropriate balance between the stakeholders' interests.

In contrast to chs 6 and 6A of the *Corporations Act*, pt 5.1 of the *Corporations Act* is not as highly prescriptive. Rather, pt 5.1 facilitates the company's voluntary entry into a collective sale agreement,[79] subject to

75 Ibid s 629(1). Most commonly, minimum acceptance levels are set at 90 per cent, the point at which the compulsory acquisition provisions in ibid ch 6A are triggered: Hutson, 'Australia's Takeover Rules', above n 16.

76 *Sustainable Planning Act 2009* (Qld) s 263 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 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.

77 See, eg, cl 3.1 of the 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'.

78 See under the heading 'The issue in context' for a discussion on this point.

79 Corporations and Markets Advisory Committee, above n 34, 10.

compliance with a number of prerequisites.[80] As noted above, one of those requirements is the issue of a court-approved explanatory statement to shareholders.[81] When making a determination about whether to issue its approval, the court must take into account the Australian Securities and Investments Commission's ('ASIC') findings on the draft explanatory statement.[82] The independent review of termination proposals, considered in the context of *Corporations Act* requirements, is discussed in more depth below.[83]

The second means by which equality of participation is ensured in a change of corporate control relates to the requirement for an equal offer price for every share within a class.[84] 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 already occurred.[85] Following on from that, any compulsory acquisition notices must be presented on the same terms as the takeover offer.[86] The requirement for a universal application of price increases has been criticised as adding unnecessary expense to the takeover process.[87] However, such an approach potentially neutralises the effectiveness of strategic owner behaviour in that holdouts may be prevented by legislative removal of the veto power.[88] That is, the price for every security within a class will remain equal throughout both the bid period and compulsory acquisition process, thus preventing a dissenting shareholder from receiving a benefit unique to them and from engaging in holdout behaviour.

Unlike shares in a particular class, however, lots in a multi-owned property may vary widely in value because of their unique configuration and positioning within a development.[89] Accordingly, it is unjust to require equal consideration be paid to all owners in a termination.[90] An alternative to the application of sale price variations to all lots in the development would be to

80 For a more detailed discussion of each stage in the preparation and execution of a scheme of arrangement see Colla, 'Schemes of Arrangement', above n 34, 369–73.

81 *Corporations Act* ss 411(1), 412(1)(a). Section 412(1)(a) of the 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'.

82 Ibid s 411(2).

83 See the discussion under the heading 'Review processes and considerations for decision makers'.

84 *Corporations Act* s 619. Takeover bid prices must at least equal the maximum agreed consideration for any acquisition occurring in the preceding four months: s 621(3).

85 Ibid ss 650B(1)–(2).

86 Ibid s 661A.

87 Hutson, 'Australia's Takeover Rules', above n 16, 4.

88 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621, 641.

89 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.

90 See the discussion touched upon earlier in this article in the context of valuation and expert reports, and in Pocock, 'Orgies of Seizure and Violence', above n 62, in relation to compulsory acquisition powers.

limit changes to the offer price during the period for acceptance, effectively locking in the price for each lot once an offer is presented to owners. Such an approach would effectively prevent a windfall gain being paid to holdout owners because variations in consideration payable during the termination process would not be permitted. However, it would significantly alter the way real property contracts are negotiated, and is likely to be regarded as impacting too greatly on the rights of owners to agree on the purchase price for a lot.[91]

Acceptance timeframe and thresholds

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 secured the mandated minimum percentage of shares during the takeover period.[92] While this process is highly structured and regulated, acceptance of the offer remains at the shareholders' discretion. Similarly, the resolution to enter into a scheme of arrangement depends upon the outcome of a vote at a meeting of the members of the company.[93] The issue of a takeover offer, or the calling of a members' meeting to consider a scheme of arrangement, does not guarantee its 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 minimum number of 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.[94] In New South Wales, the *Strata Schemes Development Act* provides owners with a minimum of 60 days and a maximum of 90 days to return the notice in support of the renewal plan,[95] a document setting out the redevelopment or renovation plans proposed for the scheme land. The recommendations contained in the Queensland University of Technology's independent review for the Queensland Government recommends a 90-day timeframe.[96] These shorter periods for acceptance are more appropriate for the termination of a multi-owned property than the 12-month period allowed in the *Corporations Act.* In this regard, it is undesirable to prolong the uncertainty arising when a termination is proposed. Owners and occupiers face housing loss and relocation and, therefore, while the 60 to 90-day timeframe is shorter than in the *Corporations Act*, it avoids owners and occupiers being exposed to an uncertain future for a significant period of time. However, the two to three-month period still ensures that they have sufficient time to seek and obtain professional advice on the offer before a decision must be made.

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91 Ibid.
92 *Corporations Act* s 624.
93 Ibid s 411(4).
94 Ibid s 624.
95 *Strata Schemes Development Act* s 174(1).
96 Queensland University of Technology, above n 13, 11.

The approval thresholds between a scheme of arrangement under pt 5.1 of the *Corporations Act* and a takeover/compulsory acquisition under chs 6 and 6A of the *Corporations Act* differ as follows:

Change of control option adopted	Approval threshold
Takeover/compulsory acquisition under chs 6 and 6A of the *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.[1]
Scheme of arrangement under pt 5.1 of the *Corporations Act*	Schemes of arrangement are approved by the company when the motion is passed in each meeting of the shareholder subclasses[2] by: (a) a majority in number of the members, or class of members present and voting in each meeting; and (b) a special majority (ie 75 per cent) in votes of those shareholders present and voting in each meeting.[3]

Note 1 Section 661A of the *Corporations Act*. The court may permit compulsory acquisition of securities in circumstances where a bidder does not reach the minimum thresholds: s 661A(3) of the *Corporations Act*.

Note 2 Section 411(4) of the *Corporations Act* requires the company to divide its shareholders into subclasses and call meetings of those subclasses of members to consider and vote upon the scheme of arrangement. The subclasses nominated by the company do not necessarily reflect the classes of shares. Rather, subclasses 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) of the *Corporations Act*. This approach enables voters with common interests to meaningfully discuss a proposed scheme at a members' meeting: *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, 583 (Bowen LJ) in Damian and Rich, above n 18, 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, 'Schemes of Arrangement as an Alternative to Friendly Takeover Schemes: Recent Developments', above n 34, 379.

Note 3 Section 411(4)(a) of the *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) of the *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 ch 6 of the *Corporations Act*: s 411(17) of the *Corporations Act*.

ASIC may also appear before the Court and object to the scheme: s 411(17) of the *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) of the *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 35, RG 60.99.

There is a clear variation in the statutory thresholds between each change of corporate control option. The 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 at the members' meeting.[97] By way of contrast, the takeovers system, which contains less independent oversight, requires satisfaction of a higher threshold.

This article argues that in respect of the termination of multi-owned properties, adoption of a threshold lower than for compulsory acquisition in s 661A of the *Corporations Act* may be desirable. In Queensland, for example, over 65 per cent of the 44 563 registered community titles schemes contain six lots or less.[98] If a 90 per cent threshold consistent with ch 6A of the *Corporations Act* was adopted, schemes with up to nine lots will only meet the threshold with unanimous consent, a situation no different to the current regulatory system. With over 65 per cent of schemes having six or fewer lots, and a much higher proportion containing up to 10 lots,[99] the level at which a termination could proceed, and expropriation powers be exercised to acquire the remaining lots, should reflect the prevalence of smaller schemes.

Reid and Pocock discussed the varying thresholds within Australia and internationally for the termination of a multi-owned property.[100] Of these, the Northern Territory and NSW systems and proposals for Western Australia and Queensland are noteworthy. The Northern Territory's *Termination of Units Plans and Unit Title Schemes Act 2014* (NT) provides for a sliding scale threshold for terminations based on the age of the scheme. That is, for schemes with 10 or more lots,[101] the threshold is as follows:[102]

97 Payne, above n 21, 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 of the *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).

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

99 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: Email from Michelle Virtue, Office of the Commissioner for Body Corporate and Community Management to Melissa Pocock, 2 November 2012.

100 Reid and Pocock, above n 98, 13–14.

101 Schemes with fewer than 10 lots require unanimous consent to terminate: *Termination of Units Plans and Unit Title Schemes Act* s 9(1). If the development has less than 10 lots or pt 4 of the Act does not otherwise apply, the tribunal may, under s 17(1)(a), order the termination of the development in limited circumstances.

102 Ibid ss 4, 12(1).

Age of scheme	Resolution required to terminate scheme
Development age[1] 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

Note 1 Development age relates to:

(a) 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

(b) 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 of the *Termination of Units Plans and Unit Title Schemes Act.*

A significant disadvantage with the Northern Territory's threshold is that the age of a multi-owned property may not be readily discernible by an owner, or the prospective buyers of an existing scheme. Adopting a threshold determinable only by reference to building records maintained by local government is complex and confusing. A termination threshold which adds to the complexity of the termination system is, it is submitted, undesirable.

The 75 per cent fixed termination threshold in New South Wales' *Strata Schemes Development Act* would hold more relevance to those jurisdictions which have a prevalence of small multi-owned properties; however, like the Northern Territory's threshold, it does not cater to all developments. That is, the threshold cannot be satisfied by developments with fewer than four lots without the unanimous consent of owners. By way of contrast, the proposed Western Australian model will reflect a sliding scale threshold based on the number of lots within the scheme as follows:

(a) for schemes with four or more lots — 75 per cent; and
(b) for schemes containing two or three lots — a majority.[103]

Queensland University of Technology's report prepared for the Queensland Government's Property Law Review recommends a minimum 75 per cent threshold to approve a termination proposal.[104]

This article does not advocate for a uniform approach to multi-owned property terminations throughout Australia. Unlike in a corporate context, where the regulatory regime is nationwide, each jurisdiction has specific legislation drafted to suit its market conditions and characteristics. Likewise, in each jurisdiction the threshold for termination and the activation point for any expropriation powers should be tailored to suit the current and future

103 Landgate, *Strata Titles Act Reform: Getting WA ready for the future*, (undated) Government of Western Australia, 2.
104 Queensland University of Technology, above n 13, 73–5.

expected characteristics of multi-owned properties in that jurisdiction. Provided that a range of safeguards are introduced, the prevalence of small schemes may warrant an approach which includes those schemes in a termination system requiring less than unanimous consent.

In a takeover under the *Corporations Act*, once the 90 per cent threshold is satisfied and statutory processes are complied with,[105] a bidder may compulsorily acquire the remaining shares in that class on the same terms as the takeover offer.[106] 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.[107]

A shareholder is deemed to have refused a takeover offer if they fail to respond to the bidder. This applies irrespective of whether a lack of 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[108] and the entitlement to compulsorily acquire remaining shares.[109]

Equivalent deeming provisions are not contained in pt 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.[110] As long as a quorum for that meeting is achieved, the rate of shareholder attendance is largely irrelevant. Consequently, the number of members who attend and vote at a meeting to consider a scheme of arrangement may be significantly lower than the total shareholding of the affected classes of shares. For example in *Re Chevron (Sydney) Ltd*,[111] only 55 per cent of shareholders and 60 per cent of debenture holders voted at the meeting. Nevertheless, the Court sanctioned the

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105 *Corporations Act* s 661B 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.

106 Ibid s 661A.

107 Owen J in *Elkington v Vockbay Pty Ltd* (1993) 10 ACSR 785, 793–94 discussed in Elizabeth Boros, 'Compulsory Acquisition of Minority Shareholdings — The Way Forward?' (1998) 16 *Company and Securities Law Journal* 279, 292.

108 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 1 month and a maximum of 12 months: *Corporations Act* s 624. An automatic 14-day extension occurs if, during the last 7 days prior to expiry of the bid period, the bidder's voting power in the company increases above 50 per cent: s 624(2). 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 Ltd* (1993) 11 ACSR 583 (Sheller JA), discussed in Damian Grave, 'Compulsory Share Acquisitions: Practical and Policy Considerations' (1994) 12 *Company and Securities Law Journal* 240, 249.

109 *Corporations Act* s 624(2) requires an increase in the voting control of the company to 50 per cent and s 661A 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.

110 Ibid s 411(4)(a)(ii).

111 [1963] VR 249.

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*,[112] 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.[113] However, given the low overall attendance, shareholders present and voting at the meetings represented only half of the share capital issued in the companies.[114] Despite this, the Court authorised implementation of the arrangement.

Given that the termination thresholds discussed above are tied to the number of lots in a multi-owned property, an approach consistent with a ch 6 takeover rather than a pt 5.1 scheme of arrangement is recommended. That is, it is appropriate that the threshold be calculated having regard to the number of lots in the development, and not the votes cast at the meeting of the owners corporation, strata company, strata corporation or body corporate to consider the termination. This is a more conservative approach than occurs in a scheme of arrangement. Nevertheless, it is argued that such an approach is warranted. The possibility that an owner or occupier may have an emotional connection with their property,[115] and the resulting need for those residing in a dwelling to relocate away from it upon termination of the scheme, justifies the use of the more conservative threshold. Therefore, if an owner does not communicate acceptance of a developer's offer, or does not vote at the meeting to consider a termination proposal, their silence must be taken as a rejection.[116]

Once the takeover offer has been accepted by a sufficient number of shareholders,[117] or a scheme of arrangement has been given final approval by the court,[118] the buyer is authorised to exercise its expropriation powers over the remaining shares. The same approach may be implemented in the termination of a multi-owned property. As noted above, New South Wales has already adopted a collective sale process which, once approved by a 75 per cent majority of owners and the court, obliges every owner to transfer title to their lot.[119] Similarly, where a renewal plan is approved rather than a collective sale, dissenting owners must again transfer ownership of their lot in order to facilitate redevelopment or renewal of the site.[120]

A balance between stakeholder interests must be ensured in any system for the expropriation of assets from one entity to another. The *Corporations Act* seeks to balance majority and minority stakeholders' rights through disclosure, appropriate approval thresholds, mandated contractual provisions,

112 [1974] VR 331.
113 Between 80 and 99 per cent of owners present and voting supported the entry into the scheme of arrangement: ibid.
114 *Re Australian Foundation Investment Co Ltd* [1974] VR 331, 333.
115 Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.
116 This is consistent with established contract law principles. See *Felthouse v Bindly* (1862) 142 ER 1037 in relation to silence not constituting acceptance of an offer.
117 *Corporations Act* s 661C.
118 Ibid s 411(4)(b).
119 *Strata Schemes Development Act* s 184(2).
120 Ibid s 185.

compensation for acquisitions and the independent review of proposals. If the same approach is to be taken in relation to a multi-owned property, expropriation powers must be limited by both strict conditions on acquisitions and safeguards for owners.

External review of proposals and the formulation of detailed guidance on assessment criteria is a further consideration. The following subpart discusses the independent review of proposals and the criteria upon which those reviews must be based.

Review processes and considerations for decision makers

Under ch 6A of the *Corporations Act*, the bidder may compulsorily acquire remaining shares once they hold 90 per cent of the target company shares in the bid class, 75 per cent of which must have been purchased in the takeover offer.[121] A shareholder may object to the compulsory acquisition notice if they believe that the consideration payable represents less than fair value for the shares.[122] If objections lodged 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,[123] or seek the court's approval to continue.[124]

In objection hearings, the court's jurisdiction extends only to determining whether the compulsory acquisition consideration reflects fair value for the shares.[125] If the court concludes fair value is being paid, the exercise of the compulsory acquisition powers must be authorised.[126]

It is important that an avenue for independent review of expropriations exists to ensure that the fairest balance is struck between stakeholder rights and powers. Implementation of a mandatory review for termination proposals would, on the face of it, provide dissenting owners with access to an independent arbiter to rule on the proposal once the statutory termination threshold has been met.

The criteria upon which that independent review is based are also relevant. In a compulsory acquisition under ch 6A of the *Corporations Act*, the payment of fair value for the shares is the only item the court may assess when their Honours conduct a review.[127] 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 the consideration payable is below fair value,[128] widespread acceptance of the

121 In addition, the bidder must have acquired 75 per cent of the target company's shares during the takeover process: *Corporations Act* s 661C(1).
122 Ibid s 664E.
123 Ibid s 664E(4).
124 Ibid s 664F(1).
125 Ibid s 664F(3).
126 Ibid.
127 Ibid.
128 This includes both where compensation was not representative of the fair value of the securities (*Re John Labatt Ltd* (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

takeover bid was not achieved[129] or the shareholders were not in possession of all or the correct information when making a determination, the court may prevent the acquisition.[130] However, proving that below fair value consideration for the shares was offered is difficult; numerous challenges have failed.[131]

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.[132] This may be the case in respect of judicial review processes for compulsory acquisition; however, the powers of the Takeovers Panel[133] are much wider. The Panel may find that the conduct of a company's affairs resulted in 'unacceptable circumstances',[134] entitling the members to make broad-ranging orders to protect the rights and interests of the affected parties.[135]

Nevertheless, the question of whether or not to limit a court's scope of review has relevance to whether an independent review process for the termination of multi-owned properties is effective. It is inequitable to owners if the reviewer's jurisdiction is restricted to determining whether fair consideration for the expropriation is being paid. In order to achieve a balance between the competing interests of the stakeholders, review powers must

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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, above n 128).

129 In *Re Rees' Application* [1972] QWN 47, discussed in Boros, above n 107, the owners of 90 per cent of the target shares were related to the bidder.

130 In *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192, 207 in Grave, above n 108, 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 (*Re Sussex Brick Co Ltd* [1961] Ch 289 discussed in Spender, above n 128); may have been induced to act contrary to their best interests because of misleading and deceptive statements relating to material facts (*Re Western Manufacturing (Reading) Ltd* [1956] Ch 436, *Re John Labatt Ltd* (1959) 20 DLR (2d) 159, 163 and *Re Rees' Application* [1972] QWN 47 discussed in Spender); 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).

131 *Pauls Ltd v Dwyer* [2004] 2 Qd R 176, *Re Goodyear Australia Ltd; Kelly-Springfield Australia Pty Ltd v Green* (2002) 167 FLR 1, *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 5 VR 61 and *Austrim Nylex Ltd v Kroll* (2002) 42 ACSR 18 (appealed from *Austrim Nylex Ltd v Kroll* ([2001] VSC 168 heard by Warren J in the Supreme Court of Victoria — judgment pending at the time of the paper) discussed in Nicole Calleja, 'Takeovers and Public Securities: Balancing the Rights of Majority and Minority Shareholders — has Part 6A.2 failed?' (2002) 20 *Company and Securities Law Journal* 236, 236.

132 Boros, above n 107, 296.

133 The Takeovers Panel has replaced the courts as the primary forum for resolution of takeovers disputes: *Corporations Act* s 659AA. 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* (Thomson Reuters, 17th ed, 2014) 694.

134 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 of the *Corporations Act*.

135 Ibid 657D(2)(a).

extend to more substantive issues, such as those that may be considered heard by the Takeovers Panel pursuant to ch 6 of the *Corporations Act.*

Spender regards the protection of minority shareholders through the court review process as pointless if it is 'essentially illusory'.[136] She argues that the presumption of fairness and the onus of proof are too difficult to overcome.[137] The lack of success of challenges to the exercise of compulsory acquisition powers does not of itself render the protections illusory. Rather, the presumption of fairness reflects the court's balancing of the stakeholders' rights. One should not disregard the fact that a bid is 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.[138] However, this would then oblige the majority shareholder to prove that the offer was fair, in addition to being required to pay the objectors' costs of the hearing.[139] Reversing the onus of proof would place a heavy burden on the bidder and defeat any deterrent effect in the legislation against objectors acting improperly, vexatiously or unreasonably.[140]

The court's power to make a determination on a scheme of arrangement is much wider. The statutory framework for independent assessment of a scheme of arrangement requires the review 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 before authorising implementation of the scheme.[141] 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 members' meetings were conducted, or it considers the scheme should be altered or conditions imposed on its operation.[142] The court must have regard to any submissions made by ASIC.[143]

It was noted above that a justification for different termination thresholds in existence between the change of corporate control methods is the courts' dual review of a scheme of arrangement. A higher threshold exists for a takeover because an administrative tribunal holds primary jurisdiction to hear and resolve disputes.[144] Dispute resolution for multi-owned properties is also contained in each state and territory's legislation.[145] In some jurisdictions, the

136 Spender, above n 128, 101.
137 Ibid.
138 Ibid.
139 *Corporations Act* s 664F(4).
140 Calleja, above n 131, 237.
141 *Corporations Act* s 411(17).
142 ASIC, *Schemes of Arrangement*, above n 35, RG 60.99.
143 *Corporations Act* s 411(17) 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). ASIC may appear and object to the scheme at the second hearing, irrespective of whether it appeared at the first hearing.
144 The Takeovers Panel may make declarations under ibid s 657A and orders protecting the rights and interests of the affected parties under s 657D(2)(a).
145 *Unit Titles (Management) Act 2011* (ACT) pt 8, *Strata Schemes Management Act* pt 12, *Unit*

dispute resolution power does not extend to the authority to order a termination.[146] Nevertheless, the advantages of extending the dispute resolution powers to a tribunal in place of the courts as review bodies should be investigated. This is a potential area that may benefit from further research. The tribunals already established under the existing multi-owned property regulatory landscape 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 ch 6 of the *Corporations Act*.

In the Northern Territory, the tribunal may review a termination resolution after it is passed by the requisite number of owners.[147] When making its decision on whether the termination should proceed, 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.[148] In order to reach a conclusion on those three points, the tribunal must take into account any submissions made by various stakeholders.[149] In addition, the tribunal must also have regard to the following factors:

(a) the likelihood of owners suffering adverse consequences as a result of the order, or refusal to order a termination;
(b) any financial benefits and risks emanating from the proposed termination and redevelopment of the site;
(c) whether there are other, more appropriate, orders apart from a termination that may be made in the circumstances;
(d) the functionality of the development as a neighbourhood if termination did not occur;
(e) the existence of alternative options which may avoid the need to terminate the development; and
(f) whether the suggested proposed distribution of proceeds to affected owners is fair and reasonable.[150]

By way of contrast to the position in the Northern Territory, New South Wales' *Strata Schemes Development Act* requires the court to assess whether the renewal plan was prepared in good faith, its compliance with the legislation

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Titles Schemes Act pt 3.3, *Body Corporate and Community Management Act* ch 6, *Strata Titles Act* (SA) pt 3A, *Strata Titles Act* (Tas) pt 9, *Subdivision Act* ss 34A, 39 and *Strata Titles Act* (WA) pt VI.

146 See, eg, *Body Corporate and Community Management Act* Item 10 sch 5 and *Unit Titles Schemes Act* s 84(2).

147 *Termination of Units Plans and Unit Title Schemes Act* ss 12(1)(c)–(d). 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 discussed above; or a stakeholder (see s 16) lodges an application with the tribunal).

148 Ibid s 17(1).

149 Those stakeholders include the schemes supervisor, the local government, the body corporate, owners and mortgagees of units within the development or a parent scheme: ibid s 17(3).

150 Ibid s 17(2) and *Termination of Units Plans and Unit Title Schemes Regulations 2015* (NT) s 7.

and whether 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).[151]

In a compulsory acquisition context, s 226(1A) of the United Kingdom's *Town and Country Planning Act* requires an assessment of the extent to which the proposed future use of the land will contribute to the achievement of the economic, social or environmental wellbeing of the area in question.[152] The relevant Minister must consider how the proposed use of the land fits within the planning framework for the area,[153] and the forecast financial viability of the proposals for the site after funding or third-party investment opportunities are taken into account.[154]

Irrespective of what form the review body takes, the criteria upon which a termination proposal must be assessed should be detailed. Guidance must also be provided to the review body on the weight to attribute to individual concerns as against those that are relevant to the wider community. While a person may develop an emotional connection to his or her dwelling, there may be significant impacts or benefits for the broader community to be considered.[155] Therefore, it is important to ensure an appropriate balance is achieved between the competing stakeholder interests.

An additional concern when establishing a review mechanism is the time and expense associated with the preparation and running of an application for review.[156] 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.[157] Technical knowledge divergences between the parties and the costs associated with appointing specialists to advise on and present evidence in respect of a proposal were noted by Imrie and Thomas as having the potential to negatively impact access to justice, and render an objection financially unviable for an owner.[158] Provision of short-form disclosure will not bridge the knowledge divergence between the parties as effectively as the more

151 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: *Strata Schemes Development Act* s 182(1).

152 Office of the Deputy Prime Minister, above n 48, 21.

153 Ibid 24–5.

154 Ibid.

155 In respect of *Corporations Act* chs 6, 6A, Mitchell describes this approach as a '"utilitarian" or "majoritarian"' one: Vanessa Mitchell, 'Has the Tyranny of the Majority Become Further Entrenched?' (2002) 20 *Company and Securities Law Journal* 74, 76.

156 James McConvill, 'Getting a Good Buy with a Little Help from a Friend: Turning to the United States to go Forward with Australian Takeovers Regulations' (2006) 34 *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. See the discussion under the heading 'Disclosure, valuation and expert reports' for more detailed information.

157 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 17. A discussion of those provisions is outside the scope of this article; however, is a topic worthy of future research.

158 Rob Imrie and Huw Thomas, 'Law, Legal Struggles and Urban Regeneration: Rethinking the Relationships' (1997) 34 *Urban Studies* 1401, 1413, 1415.

comprehensive disclosure document. However, the time and expense associated with preparation of a detailed disclosure document must be taken into account.

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.[159] This approach has been criticised because it effectively removes any deterrent by complainants to lodge unreasonable or vexatious objections.[160] The use of specialist tribunals which do not adhere to the rules of evidence, which are informal and do not require legal representation, may overcome some of these questions. However, Imrie and Thomas' concerns noted 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 strategic holdout behaviour must be accorded weight, while also protecting the owners' rights and ensuring appropriate consideration is paid upon an expropriation.

Conclusions and recommendations

Corporate law principles provide an example of an established expropriation system which is operating to balance efficiency and rights protection. Part 5.1 and chs 6 and 6A of the *Corporations Act* achieve changes to control and avoid the problem of owners engaging in strategic holdout behaviour in a corporate context. Further, the existence of expropriation powers enables dissenting shareholders' securities to be transferred once the statutory criteria have been met. Limitations on the powers safeguard those dissenting shareholders. Much can be learned from the systems in place in parallel areas of law. The change of corporate control systems in the *Corporations Act* may inform the amendment of systems for the termination of multi-owned properties. That is, adaptation of the processes employed in pt 5.1 and chs 6 and 6A of the *Corporations Act* may provide a feasible structure for the reassembly and termination of multi-owned properties, while protecting affected stakeholders from the unfettered diminution of owners' rights.

Extrapolating the disclosure obligations in a takeover to the proposed acquisition of a multi-owned property for redevelopment would ensure that developers provide sufficient and relevant information to lot owners, enabling them to assess the acceptability or otherwise of the offer. Similarly, regulating both the contract process and the form and content of agreements may provide a degree of certainty for owners involved in the process, and aid to achieve an appropriate balance between competing stakeholders' interests.

Implementing a requirement for the independent review of transactions and termination proposals, similar to those contained in both pt 5.1 and chs 6 and 6A of the *Corporations Act,* will provide dissenting owners with a means to object to undesirable offers. The identity of the review body, the criteria upon which a reviewer must assess the proposal, and the weight to be accorded to

159 *Corporations Act* s 664F(4).
160 Calleja, above n 131, 237.

each consideration, should be taken into account, once again with a view to achieving a balance between majority and minority owners, and individual and community concerns.

In the same way that the thresholds in the *Corporations Act* vary in respect of takeovers, compulsory acquisitions and schemes of arrangement, the termination threshold selected by each jurisdiction should weigh the need for efficiency against the protection of proprietary rights. This assessment should also take into account the characteristics of the state or territory's legislation and other inbuilt safeguards, together with the predominance or otherwise of small schemes.

Finally, the *Corporations Act* may provide guidance on the implementation of an expropriations system. Development of such a system in respect of a collectively held asset, such as a corporate shareholding, is arguably desirable; however, the philosophical and tangible differences between shares and real property must be acknowledged. Protection of owners of multi-owned properties is essential — the role of real property in our society as both an important economic asset and a family space must not be undervalued. Accordingly, inbuilt safeguards of ownership rights are a necessity, yet doing so at the expense of broader-ranging impacts may be disadvantageous. This article demonstrates that *Corporations Act* principles may guide law reform on the issue in order to aid in achieving the critical balance between competing stakeholder interests.