Abstract
Purpose – To explore value vs worth in the context of compulsory acquisition.
Design/methodology/approach – Analysis of statutory environment within the context of valuation theory.
Findings – Value and worth could be reconciled by redefining special value in Act.
Research limitations/implications – Public policy amendment.
Practical implications – Public policy amendment.
Social implications – Facilitate just compensation.
Originality/value – Topical issue in New South Wales, where massive compulsory acquisition programme underway to facilitate infrastructure development.
Keywords Market value, Valuation, Compulsory acquisition, Normative definition, Positive definition, Special value
Paper type Viewpoint

1. Introduction
In Australia, the New South Wales (NSW) Government is undertaking a massive infrastructure development program, noted by Infrastructure, NSW (2023) to comprise a commitment of A$116.50bn over four years to deliver schools, hospitals and public transport.

Such a large infrastructure development programme necessitates a significant amount of property acquisition from the private sector, either by agreement or by compulsory purchase. Data on such acquisition is published by the Centre for Property Acquisition with the Valuer General reporting the number of determinations made for compulsory acquisition and the Land and Environment Court reporting the number of determinations by the Valuer General that are appealed to and resolved by the Court, as summarised in Table 1.

Regrettably, the data are not synchronised, being simply the number of each activity undertaken in each financial year, such that it is not possible to determine, for example, what proportion of Valuer General determinations are appealed to the Land and Environment Court.

However, it is possible to conclude that typically 76–88% of acquisitions are settled by agreement, leaving only around 26–116 matters to proceed to compulsory acquisition. Further, of those that are appealed to the Land and Environment Court, typically 62–86% are finalised by agreement with only 10–17 matters proceeding to a hearing and resulting in a judgement.

Despite the unquantifiable impact of the lack of synchronisation, in broad terms it appears that only a very small proportion (possibly around 2%–3%) of acquisitions require a full Court hearing for resolution. Accordingly, with a high proportion being resolved by agreement (possibly around 97%–98%), the compulsory acquisition system in NSW may be contended to be working very effectively.

This is, however, at odds with the appearance in the media which suggests that the system is failing the dispossessed and that compensation payments are inadequate, being usually based on a small number of disgruntled parties often including dispossessed residential
property owners. A common complaint by such owners to the media is that “my property is worth more” though it is often challenging to understand what it is that the dispossessed are not being compensated for, other than perceptions.

However, such high-profile negative media attention erodes public confidence in the compulsory acquisition system giving the appearance that the system does not provide just compensation, despite the same being an overarching requirement of s54(1) of the Land Acquisition (Just Terms Compensation) Act 1991.

This paper seeks to explore, from a valuation theory perspective, the apparent gap between compensation for value offered under NSW compulsory acquisition legislation and the dispossessed’s expectation of compensation for the worth of their property to them. The paper concludes with the proposition of a solution that could facilitate payment of just compensation, quell disquiet with compensation payments and so contribute to restoring public confidence in the compulsory acquisition system.

2. Value vs worth

Returning to first principles, Whipple’s (2006) seminal text correctly draws attention to the fundamental distinction between normative and positive definitions of value, with:

(1) normative concerning what ought to be, through the prescription of rules and
(2) positive concerning what is, being that which has to be accepted as we find it.

Whipple (2006) notes that the origins of normative definitions of value in Australia appear to be found in public policy through compulsory acquisition being premised on the question what should the owner receive by way of compensation for the compulsory taking of this lot? Rather than the different positive definition question what will this lot sell for?

The parameters for such a normative definition of value may be found in Spencer v Commonwealth (1907) 5 CLR 418 (Spencer), comprising an exchange, a date, a hypothetical, willing, knowledgeable and prudent vendor and purchaser, an absence of compulsion and an assumption of highest and best use, such parameters having prevailed for over a century.
The fundamental elements of *Spencer* (except the explicit highest and best use assumption) may be found in the IVSC definition of *market value*:

Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. (IVSC, 2021)

with both *Spencer* and IVSC reflected in the definition of market value in the NSW *Land Acquisition (Just Terms Compensation) Act* 1991:

56 Market value

(1) In this Act:

**market value** of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):

- any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, and
- any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired and
- any increase in the value of the land caused by its use in a manner or for a purpose contrary to law.

For the purposes of compensation for compulsory acquisition in NSW, the definition of market value for the property acquired is clearly a normative definition concerning what the value ought to be through the prescription of rules.

It may be contended that a normative definition of market value for compulsory acquisition compensation benefits the acquiring authority, in that it precludes compensating the dispossessed for perceived idiosyncratic benefits of ownership and so protects the public purse. Conversely, whilst ensuring that the dispossessed will obtain market value for their property, it precludes any notion of value to the owner.

The normative definition may be distinguished from a positive definition of value concerning what is, being that which has to be accepted as we find it. Whipple (2006), citing Ratcliff in Graaskamp (1977, page 8), states a positive definition of value as follows:

The most probable price is that selling price which is most likely to emerge from a transaction involving the subject property if it were exposed for sale in the current market for a reasonable time at terms of sale which are currently predominant for properties of the subject type. (page 106)

Essentially, this is a definition of value being that which is, without restrictive assumptions about the seller and buyer. This positive definition is echoed by the IVSC in their definition of *value* (as distinct from *market value*):

The opinion resulting from a valuation process that is compliant with IVS. It is an estimate of either the most probable monetary consideration for an interest in an asset or the economic benefits of holding an interest in an asset on a stated basis of value. (IVSC, 2021, page 9)

Again, this is a definition of value being that which is, without restrictive assumptions about the seller and buyer or the state of the market – both are as is, not as should be.
Interestingly, IVSC define worth (investment value) as follows:

Investment value: The value of an asset to the owner or a prospective owner given individual investment or operational objectives (may also be known as worth). (IVSC, 2021, 20.11)

being value to an owner without restrictive assumptions about the seller and buyer or the state of the market – again, the owner/vendor are as is, not as should be.

In a compulsory acquisition compensation context, the dispossessed may be contended to seek a positive definition of value, being the value of the property to them, which is effectively an expression of worth or a notion of value to the owner. Whilst an acquiring authority may contend that this is idiosyncratic, subjective and difficult to support through evidence, the dispossessed may contend that it is simply fair, equitable and just.

Accordingly, a tension exists in compulsory acquisition compensation. The NSW Land Acquisition (Just Terms Compensation) Act 1991 requires just compensation but permits only the payment of market value compensation based on a normative definition which may be contended to be unfair, inequitable and unjust by the dispossessed who seeks the value to the owner based on a positive definition (which may be greater than market value).

3. Evolution of compulsory acquisition compensation

Brunton (2012) chronicles the history of compulsory land acquisition in NSW from specific authorising statutes such as the Public Railways Land Resumption Act 1874 and the Land for Public Purposes Acquisition Act (1880) through to the Public Works Acts of 1881 and 1900 and the Public Works Act 1912, which endured until the introduction of the NSW Land Acquisition (Just Terms Compensation) Act 1991. Brunton (2012) further notes that the early legislation did not prescribe how compensation was to be assessed, leaving it to the Courts to develop the relevant principles for the awarding of compensation.

From the viewpoint of the value vs worth issue, Brunton (2012) cites Pastoral Finance Association Limited v Minister (New South Wales) (1914) UKPC 77; AC1083 which stated, concerning the dispossessed:

Probably the most practical form in which the matter can be put is that he is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

noting that the principle that compensation should not only include the value of the land taken based on the amount that a prudent purchaser would pay but also any additional amount which a prudent purchaser in the position of the owner would pay, rather than fail to obtain the land, became known as the “value to the owner” principle.

Biscoe J in Bligh v Minister Administering the Environmental Planning and Assessment Act [2011] NSWLEC 220 states:

Before the Just Terms Act, the unifying concept of resumption legislation was “value to the owner”. Under this rubric sat both the value of the acquired land at the acquisition date and loss attributable to disturbance. Market value of the acquired land was, in most cases, the way of computing its value to the owner. However, the unifying concept was commonly applied to increase the amount of compensation over market value when the land had a positive special value to the owner. The unifying concept could also be applied to reduce the compensation when the land had a negative special value to the owner.

and:

Market value plus special value may, for convenience, be described as value to the owner. [78]

Jacobs (2009) considers special value in the context of pre-1991 Court decisions as a notion of “special value to the owner” at the date of valuation, being the economic value to the owner that does not enhance market value.
Therefore, prior to the introduction of the NSW *Land Acquisition (Just Terms Compensation) Act* 1991, the Courts may be contended to support compensation for compulsory acquisition as a positive definition of value or as a concept of worth, through compensation as “value to the owner” comprising a combination of market value (based on a normative definition) and special value (based on a positive definition).

However, the NSW *Land Acquisition (Just Terms Compensation) Act* 1991 then codified the bases for compensation for compulsory acquisition as follows:

### 55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

1. the market value of the land on the date of its acquisition,
2. any special value of the land to the person on the date of its acquisition,
3. any loss attributable to severance,
4. any loss attributable to disturbance,
5. the disadvantage resulting from relocation and
6. any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

With market value defined as stated above and special value defined as follows:

### 57 Special value

In this Act:

*special value* of land means the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person’s use of the land.

While the definition of market value under the Act is a normative definition of value, as considered above, the definition of special value is a qualified positive definition of value requiring advantage in addition to market value which is incidental to the dispossessed person’s use of the land.

It may be contended that the specific wording used by the legislature in the definition of special value has significantly narrowed its potential application as a means of providing “value to the owner” compensation following compulsory acquisition. Callinan J, in *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209 at 269 gave an example of the constraints provided by the definition for when special value may arise:

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

Reflecting the narrow definition of special value in the Act, compared to that adopted by the Courts before the Act was introduced, acquiring authorities and Courts are now obliged to apply the statute as written and generally choose to follow the decisions of other Courts, resulting in special value compensation now being only rarely granted.
4. Reconciliation
As noted in the above, it may be contended that the normative definition of market value in the Act benefits the acquiring authority, in that it precludes compensating the dispossessed for perceived idiosyncratic benefits of ownership and so protects the public purse. Conversely, whilst ensuring that the dispossessed will obtain market value for their property, it precludes any notion of value to the owner.

While the pre-1991 concept of special value provided scope to the acquiring authority and judiciary to provide compensation in addition to market value that then equated to “value to the owner”, the specificity of the Act concerning the definition of special value now severely constrains such scope.

However, special value as a concept exists with the Act and, appropriately redefined, could again combine with market value compensation to provide “value to the owner”.

5. Conclusion
In the interests of providing fair, equitable and just compensation to the dispossessed, the notion of “value to the owner” has considerable psychological appeal. For the Government, through acquiring authorities, it provides a counter argument to claims by the dispossessed that their property was “worth more” and that they were inadequately compensated by the value of the property acquired.

The notion of “value to the owner” could be introduced through a redefinition by the legislature of special value under the NSW Land Acquisition (Just Terms Compensation) Act 1991 to provide a broader gateway.

The onus of proving a claim for special value would still fall upon the dispossessed with a body of case law then gradually building over time to establish what may and may not be considered special value. Such an onus would address the challenge of understanding exactly what those who claim to be inadequately compensated are seeking additional compensation for.

Thus, having been provided with a means to obtain “value to the owner”, the ability for the dispossessed to claim that they were inadequately compensated by the value of the property acquired should be reduced (as a mechanism would exist to provide just compensation), the levels of adverse media coverage should diminish and public confidence in the effectiveness of the compulsory acquisition system should be enhanced.

References


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