

Native Title Compensation:

A Review of Recent Literature and Annotated Bibliography

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History of Native Title Compensation

In March 2019, the High Court handed down a historic determination – the first fully litigated and successful claim for native title compensation since the instigation of the *Native Title Act (1993)*, 26 years ago.

The only other successful native title compensation determination, *De Rose Hill v South Australia*, was settled by mediation in 2005, however the amount and method of reaching the compensation amount was not made public (Song 2014; Tait 2015; Palmer 2018, 228). A further case, *Ward v State of Western Australia*, over the Gibson Desert Nature Reserve, was heard in 2012. In this case, however, the Judge ruled that the claimants did not have exclusive native title rights over the area prior to the creation of the Reserve (due to a historical oil licence over the area reducing their native title rights to a non-exclusive nature) and, on this finding, the claimants chose to withdraw their application (Tait 2015, 17-18; Palmer 2018, 229). Only two other compensation claims have been determined, the Tjauwara Unmuru Compensation Application and the Barkinji (Paakantyi) People #11. In both of these cases compensation was pursued at the same time as their claim for native title and claimants were unable to establish that they continued to hold native title rights and interests. It was determined in both of these cases that claimants were ineligible for compensation (Palmer 2018, 228-9). This was also true of the Yulara claim, *Jango v the Northern Territory*, which resulted in their compensation claim being dismissed (Palmer 2018, 228).

The ‘Timber Creek decision’: Griffiths v Northern Territory of Australia

The ‘Timber Creek decision’ or *Griffiths v Northern Territory of Australia* was determined under appeal to the High Court of Australia on the 13 March 2019. The original judgement was made by Justice Mansfield on the 12 June 2014 and an appeal the Full Court was determined on 24 August 2016.

Following the Timber Creek decision, many authors are describing the decision as providing a ‘methodology’ for evaluating native title compensation into the future (see Herbert Smith Freehills 2019; Ashurst 2019). This is particularly true of the economic loss aspect to native title compensation which received significant scrutiny and revision in both appeals. However, other authors are instead emphasising the ‘intuitive’ manner in which economic loss was calculated and that there is plenty of work yet to be done in this area (Hughston and Jowett 2018, 54; Moss and Isadale 2019; Isdale and Fultcher 2019). Even less clear, however, was the part of the compensation awarded for non-economic loss. It was in respect of this component that the Judge paid particular attention to the anthropologists report and the claimants’ evidence. The way in which the Judge reached the final awarded amount for ‘solatium’, that is, the emotional pain and suffering caused by the loss of native title rights, is unclear. The appeal to the Full Court and to the High Court did not alter this component of the compensation awarded and the original amount awarded for non-economic loss remained unchanged (Hughston and Jowett 2017, 55; McLeish 2019, 11) providing little additional clarity as to how this amount was reached.

The majority of the areas subject to compensation in the Timber Creek claim included parcels of land where claimants’ native title rights and interests had been extinguished by exclusive possession acts

by the Northern Territory government. Further, it was determined that the rights and interests of claimants that were extinguished by these acts, were non-exclusive rights and interests, due to the prior granting of a pastoral lease over the area, extinguishing their exclusive native title rights (Hughston and Jowett 2018, 53). The applicants claimed compensation under two heads: economic loss and non-economic loss. The Northern Territory and the Commonwealth did not oppose this framework and Mansfield J assessed the compensation claim accordingly (ibid, 53-4). The details of the calculations and reasons are outlined in a number of articles (see McLeish 2019; Hughston and Jowett 2018; and Flynn 2017b for a comprehensive discussion). Here, I wish to highlight some key points regarding each aspect of compensation, as raised by the judgements.

Importantly, the Full Court criticised the framework of dividing compensation into economic and non-economic components, stating that this approach is reflective of principles of compensation in Australian land law, however “native title rights have a unique and indissoluble character” and that it “might rather be more appropriate to seek to place a money value as best as can be done on the one indissoluble whole” (Hughston and Jowett 2018, 54). None-the-less, the Full Court went on to consider the amount of compensation awarded according the method laid out by the claimants and as considered by Mansfield. In both of the appeals the majority of the decisions made by Mansfield J were upheld (Flynn 2017b, 71; McLeish 2019, 11). However it was the assessment of the economic loss which received the most scrutiny and was ultimately significantly reduced from Justice Mansfield’s original judgement.

Economic loss:

In the original judgement, Mansfield J ruled that the economic value of the Ngaliwaurry and Nungali people’s non-exclusive native title rights was equivalent to 80% of the freehold value of the land. He noted that the manner in which he arrived at this figure was an intuitive one and, importantly, took into consideration the rights and interests of the native title holders. Under the appeal in the Full Court, the Ngaliwaurry and Nungali people valued their rights and interests as 100% of the freehold land while the Commonwealth believed it equal to 50% (Hughston and Jowett 2018, 54). The Full Court reduced the economic value to 65% of the freehold value, noting that Mansfield J did not give adequate discount to the fact that the native title holders did not have the right to exclude others from the areas concerned (ibid, 54; Flynn 2017b, 71-2). The High Court placed even more significance on the absence of this right, reducing the economic value to 50% of freehold land value (McLeish 2019, 11).

There are three key implications that have been drawn out in publications and commentaries in relation to future compensation claims:

1. Exclusive native title rights have been effectively valued at 100% of the freehold value of the land (Flynn 2017b, 71; McLeish 2019, 11);
2. The percentage of economic loss is tied to the specific rights and interests of the native title holders, which will vary from claim to claim (Hughston and Jowett 2018, 53; Moss and Isdale 2019; Zillman & Kilvert 2019);
3. Emphasis has been placed on Justice Mansfield’s and the High Court’s explicit use of intuition in calculating economic loss (Hughston and Jowett 2018, 54; Moss and Isdale 2019; Isdale and Fultcher 2019), noting that there is still plenty of ‘intuitive work to be done’ in future claims (Isdale and Fultcher 2019).

Interest on economic loss:

Mansfield J ruled that simple interest was the appropriate type of interest that should apply to the economic loss component of compensation, applicable from the date that the entitlement to compensation arose (McLeish 2019, 11; Hughston and Jowett 2018, 54). His Honour noted that this was due to the fact that it was likely that had compensation been awarded at the time the acts

occurred, it would have been distributed to individuals and not invested commercially (Hughston and Jowett 2018, 54). This decision was upheld by all three Courts, despite the fact the native title holders claimed compound interest (McLeish 2019, 11; Flynn 2017b, 72). McLeish (2019: 11) notes that it is, however, rare to receive compound interest on compensation claims in courts more generally and that the findings in relation to interest points to the fact that compound interest might be achievable for some groups in the future (see also Hughston and Jowett 2018, 54; Flynn 2017b, 72).

Cultural loss or 'solatium' – awarded for pain and suffering caused by loss of native title rights:

In Mansfield's consideration of his calculation of the solatium included the following points:

1. "the collective and communal nature of native title";
2. "the extent to which native title rights and interests are not exclusive";
3. "requires an evaluation of the relevant compensable intangible disadvantages, which in turn requires an appreciation of the effects of that loss on the specific native title holders" (Hughston and Jowett 2018, 54)

These considerations suggest that compensation for cultural loss would be higher where exclusive native title rights exist. Further, the effects of that loss will differ from claim to claim, as will the nature of native titles holders' connection to country and that this would impact on assessments of solatium.

Mansfield described his decision as one that was guided by 'intuition', taking the following factors into consideration:

1. site damage – the construction of a water tank on a site of significance;
2. impact on native title holders ability to conduct ceremonies and spiritual activities on the area and the adjacent area; and
3. that the compensable acts had the effect of reducing the geographical area over which native title claimants could exercise their rights and interests and has affected their spiritual connection across their whole country (Hughston and Jowett 2018, 54-5; Palmer 2019, 232-3).

Importantly, Mansfield J noted that these three elements have been experienced for three decades and the effect has not diminished over time. The amount assessed takes into consideration the impact on the past three decades and the effects into the future (Hughston and Jowett 2018, p. 55). In this way, his Honour is noting that this amount is intended to include considerations of interest *and* compensation for future generations.

Both the Full Court and the High Court did not revise Mansfield's decision. They considered that a 'homely touchstone' for the exercise of discretion in awarding damages is that the defendant "can hold up his head among his neighbours and say with approval that he has done a fair thing" (Hughston and Jowett 2018, 55). Similarly, "The High Court's measure for compensation for cultural loss is a 'social judgement...of what, in the Australian community, at this time...is appropriate, fair or just'" (McLeish 2019, 11). The Full Court noted that the unusual nature of this decision is that there is no other awards of compensation of this nature (non-economic loss for the extinguishment of native title) to which a comparison can be drawn (Hughston and Jowett 2018, 55). However the Full Court did give some consideration to similar cases from the Inter-American Court of Human Rights (Flynn 2017b, 73).

It is worth noting that the amount that Mansfield J awarded for solatium was slightly more than the twice the determined economic value of the claimants native title rights and interests in the land (originally valued by Mansfield J as 80% of freehold value) (Hughston and Jowett 2018, 55; Flynn 2017b, 71). The Northern Territory argued that the solatium should be 10% of the determined value of economic loss arguing that "extinguishment was not the direct cause of their sense of cultural loss and

pain, analysing each town block separately” (McLeish 2019, 11; Hughston and Jowett 2018, 55). The Commonwealth assessed that the non-economic value should be \$5, 000 per parcel of land (Hughston and Jowett 2018, 55). Mansfield J, however, dismissed these views stating that “the people, ancestral spirits, the land and everything on it are organic parts of indissoluble whole” and that the extinguishment of parcels of land across their broader country had damaged the integrity of the cultural landscape as a whole (McLeish 2019, 11). McLeish (ibid) notes that this decision recognises the “interconnectedness of everything on country, rejecting a technical block-by-block interpretation” of the impact of the extinguishment of native title on cultural loss. McGrath (2017, 2) notes that this finding points to the extent to which feelings of hurt and anxiety are not constrained by legal tenure.

Outstanding issues raised by publications and online commentaries

Publications regarding the Timber Creek decision to date have focused primarily on summarising the legal findings of the decision and the implications for future claims (see McLeish 2019; Hughston and Jowett 2018; Flynn 2017b). Some anthropological commentary has been provided to date by Palmer (2018), Pannell (2018) and McGrath (2017) regarding the ‘solatium’ aspect of the compensation and they provide some insight into how anthropologists might assist in compensation claims in the future. Both McGrath (2017, 3) and Pannell (2018) offer further anthropological sources that could be drawn on to assist with demonstrating the impacts of the loss connection to country, or the physical transformation of country, on the health and wellbeing of Indigenous peoples, including the integrational trauma experienced. Some authors (such as Dillon 2019) have provided some insight into the possible future implications of the Timber Creek decision on public policy. Some online legal and other commentaries (such as Herbert Smith Freehills 2019; Moss and Isdale 2019; Ashurst 2019; Zillman & Kilvert 2019; Fultcher 2019) have also speculated about the financial implications for State, Territory and Commonwealth governments and also have laid out a number of key issues that the Timber Creek decision has not addressed (see also Dillon (2019, 6-8) for an analysis of media coverage of the decision).

One key issue raised by the Timber Creek decision is that it did not include economic valuations of customary activities associated with land into calculations for economic loss. Mansfield J did not give any weight to Jon Altman’s evidence on this point, deciding to consider this within the non-economic loss valuations (McGrath 2017, 3; Dillon 2019, 3-4). Palmer (2018, 230) notes that this question might be brought to bear on future claims, despite the decision made in the Timber Creek case that this aspect should be included in the ‘less tangible cultural losses’ aspect of compensation (Palmer 2018, 230; McGrath 2017, 3). Dillon (2019, 3-4, 10) also argues that this aspect of the economic value of native title should be reconsidered in future claims.

In response to the De Rose decision, Song (2014, 12) questioned the idea of tying native title rights to freehold values of land, noting that areas where native title rights are strongest are often in places where the economic value of land is lowest. His view was that assessing native title on this basis could lead to highly inequitable valuations of native title around Australia (ibid). This issue has also been raised by Burke (2002, 3-4). In the Timber Creek decision, this point was, however, addressed by the High Court, stating that in more developed areas where the economic value of the land is higher, it is also likely that the non-economic loss component will be less because the claim group’s sense of connection to country may have already considerably declined prior to the compensable act/s occurring (Prokuda 2019). On a similar but slightly different note, Song (2014, 12), points out that in the De Rose decision, the areas subject to compensation were in a very remote location without a clear pattern of freehold grants upon which to establish the freehold value of the land, and that this made valuation in the De Rose case very difficult to establish and to agree upon between the parties. Burke (2002, 28) also draws attention to this point noting that land valuations are usually based on highest or best use of the land, which is reasonably straightforward in crop growing or grazing areas, but less so in areas where there is no clearly identified use for the land in economic terms. He also

notes that in pastoral areas, land valuations are made up almost entirely of the value of stock, infrastructure and improvements made to the land, and raises the question of whether the economic loss should include the improved value of the land (Burke 2002, 3, 46-7). It remains to be seen whether this relationship between native title rights and interests and freehold valuations creates inequities between compensation claims around Australia. It also points to a broader issue of the need for transparency in negotiated settlements and other agreements of native title compensation in the future (Smith 2001, 44-5).

Song (2014, 12) also points out that the loss of the 'right to negotiate' over areas where native title has been extinguished has the potential to be a significantly valuable right in areas subject to mining and exploration interests. The Yamatji Marlpa Aboriginal Corporation (2019) has pointed to a similar issue, identifying on its website that the Timber Creek decision addresses only compensation for areas where native title has been extinguished, and that it did not consider compensation for areas of partial extinguishment of native title. They raise this issue particularly in relation to areas where mining interests have developed in the absence of an agreement with native title holders. This issue has also been raised by other online commentaries, such as Herbert Freehills Smith (2019) and AIATSIS (2019).

Another key point raised by a number of authors, is that the intergenerational impact of the loss of native title rights was not addressed by the Timber Creek decision (Dillon 2019, 3; Moss and Isadale 2019). In circumstances where the full compensation amount is distributed as individual cash payments, the inevitable consequence is that compensation will not be accessible to future generations. Burke (2002, 37) points out that it is arguable that younger generations' cultural loss is more profound than that of their elders as they may have completely lost their ability to access their country and may not have had the opportunity to know their country in way that older generations did. He makes the suggestion that an additional amount could be added to compensation payments which would be intended for investment and put aside for the benefit of younger generations (Burke 2002, 37-38). He notes that the amount added to the payment should equate to that which would reproduce the original compensation amount, if invested in low risk investments for a 25-30 year period (or the time it takes for the younger generation to become the senior group members) (ibid). He notes however that Judges are likely to be reluctant to provide direction that any portion of the compensation should be invested and therefore he suggests that a legislative response would be required to ensure that this took effect. He notes that given the relative poverty of native title holders around Australia there would be much pressure for all funds to be distributed immediately (ibid, 40).

Another glaring issue with compensation under the *Native Title Act (1993)*, is its failure to deal with acts affecting native title rights and interests that occurred prior to the introduction of the *Racial Discrimination Act (1975)*. There have been suggestions by some legal commentaries that there may be other avenues for compensation under the Constitution dating back to 1901 (see Moss and Isadale 2019; Isdale and Fulcher 2019). Dillon (2019, 7), on the other hand, suggests that these views are overly speculative. Recent developments in November last year have however seen the lodging of a compensation claim against the Commonwealth on behalf of the Gumatj people of north-east Arnhem Land, which intends to do just that (Gordon and Roberts 2019). This claim seeks compensation for the granting of a mining lease in the Gove Peninsula in the early 1969. This decision was made with disregard to the wishes of the traditional owners at the time and resulting in the loss of their native title rights and the destruction of important cultural sites. This case seeks to establish that the land was not acquired under "just terms" as required by the Constitution (Daley 2019). Similar, but different to the Timber Creek case, this claim, if successful, could set a precedent for making claims for compensation under the Constitution, rather than just under the Native Title Act.

A number of authors have also drawn attention to the past experiences of conflict and pain that has been caused to individuals and communities as a consequence of monetary distribution processes. They have seen native title compensation as another potential avenue of causing distress to

Indigenous communities, the exact thing that compensation is being sought for (Smith 2001, 41-3; McGrath 2017, 3-4). Smith (2001, 38) considers whether the inclusion of other non-monetary forms of compensation (such as land transfers together with the provisions of funds to manage it) could help address this issue. Aside from monetary compensation, some authors have suggested that there may be other modes of compensation that could be sought as a form of redress that might help limit this affect. (Dillon 201, 3; McGrath 2017, 4; McLeish 2019, 11; Smith 2001).

Finally, Dillon (2019, 3) notes that native title compensation does not address native title holder's loss of political sovereignty. He points to current political movements, such as the Uluru Statement from the Heart, including the Markarrata and the Voice to Parliament as possible modes of addressing this loss of Indigenous people's rights (ibid, 9). Smith (2001) in particular, and as cited by others on this point (see Dillon 2019, 3 and McGrath 2017, 3), suggests that there may be other ways in which Aboriginal forms of compensation could provide more holistic and culturally appropriate forms of addressing past wrongs perpetrated towards Indigenous Australians.

We can see from publications and commentaries to date regarding the Timber Creek decision, that there is still much to be learnt about how to best compensate native title holders for their loss of their native title rights and interests. As McLeish (2019, 11) explains, "This area of law has a long way to develop, and will adapt to the range of unique cultures and circumstances around Australia". Similarly Zillman & Kilvert (2019) have noted that the Timber Creek decision has not provided a "formula that can simply be applied to every situation to determine compensation", while others have noted that the Timber Creek decision has created an illusion of certainty but does not reflect the reality of years of uncertainty that will follow as the numerous factors and circumstances that affect native title compensation are worked out (Ashurst 2019). According to Flynn (2017, 73) there is "a long way to go before native title compensation assessment is straightforward and predictable."

Annotated bibliography

I have ordered the references below according to year of publication, with the most recent publications discussed first. This annotated bibliography provides a summary of the key sources identified as relevant to the issue of native title compensation and particularly the role of anthropologists valuing ‘cultural loss.’ I have focused primarily on references regarding outcomes from the Timber Creek decision, however I also discuss and number of articles that pre-date the decision that appear to be relevant to the current discussion. A more comprehensive list of publications on native title compensation has also been included at the end.

Further, I note that Wiseman, through AIATSIS, completed an annotated bibliography on native title compensation in 2009 and covers some additional references to those presented here. This annotated bibliography can be found at <https://aiatsis.gov.au/publications/products/native-title-compensation-annotated-reference-list>.

Dillon, M 2019, ‘Policy implications of the Timber Creek decision’, Working Paper 128, Centre for Aboriginal Economic Policy Research, Canberra.

Dillon argues in this paper that the policy implications flowing from the Timber Creek decision are limited. However, it’s his opinion that it is “what is absent from the Court’s decision that demands new approaches” to Indigenous policies (p. 9). One key issues discussed by Dillon is that the High Court’s decision and the NTA’s compensation regime, does not deal with the dispossession and cultural loss experienced by Indigenous peoples prior to the 1975. However he notes that it does bring sharply into light the extent of the losses experienced by Indigenous peoples and sees this as an opportunity for other avenues of compensation to be pursued such as those presented through the Uluru Statement from the Heart, including the Makarrata and the Indigenous Voice to Parliament. He notes that these issues would go some way to address issues of redress of past injustices not addressed by the Timber Creek decision, including the intergenerational effect of dispossession and loss of political sovereignty over one’s country. Further, Dillon also points to the manner in which the Court’s assessed the appropriate amount awarded for non-economic loss was tied to what the Australian community might perceive as being fair and just compensation. Dillion argues that this suggests that the viability of compensation claims in the future will “depend on ongoing community education relating to the history of the nation’s treatment of Indigenous peoples, and the maintenance of momentum in the national reconciliation process” (p. 10). He also notes that economic loss was assessed to not include non-market values of land (such as for fishing, foraging, and ochre mining, for example). His view is that this should be reconsidered, and he proposes that making compound interest payments on economic loss component mandatory would be a positive symbolic gesture. He notes that the ‘framework’ presented by the Timber Creek decision will no doubt form the basis for State and Territory governments to formulate negotiated settlement processes for native title compensation. He also notes, however, that there is still much that remains to be resolved regarding Commonwealth involvement in the funding and payout of compensation claims. He argues that other related issues, such as funding of Prescribed Bodies Corporate and the Indigenous Land Fund should be reassessed to better reflect Indigenous dispossession and provided better support to native title holder groups, post-native title and compensation. Dillon also summaries some of the commentary and speculation that has circulated since the Timber Creek decision, which focuses on the potential cost of native title compensation, and he notes that there has been little consideration of the enormous economic benefit to governments of the access to land previously owned by Indigenous interests, nor has there been any regard to the significant losses suffered by compensation beneficiaries which are intergenerational.

McLeish, C 2019, 'Compensation awarded in Australian first', *Land Rights News: Northern Edition*, April 2019, p. 11, viewed 5 November 2019, <https://www.nlc.org.au/uploads/images/LRN-APRIL-2019-p11-Cath-McLeish.pdf>

The author of this article is a Senior Legal Adviser with the Northern Land Council and assisted with the Timber Creek case for around two years. This brief article provides a clear and concise summary of the High Court decision. She also discusses a number of implications of the decision for future compensation claims. In particular she points to the fact that significantly larger amounts of compensation will be claimable by native title holders that hold exclusive native title rights. She also notes that there will be many native title holders that will not be able to access compensation for post-1975 acts and will no doubt seek other avenues for compensation. McLeish notes that the decision demands a new national consideration of Indigenous dispossession, discrimination and sovereignty. McLeish also notes that governments, native title holders and other land users are closely studying the decision and the focus is already turning to alternative negotiated settlements of compensation for reasons of "time, cost and fair process". In her view, the real value of the Timber Creek decision is that it represents "a binding legal recognition of the real economic value of native title, as well as the unique cultural value of country."

Hughston, V and Jowett, T 2018, 'Native title compensation claims', *Bar News: The Journal of the NSW Bar Association*, Autumn, pp. 52-55.

This article provides a comprehensive and clear summary of the Timber Creek decision and the approach taken to the assessment of native title compensation by Justice Mansfield, and by the Full Court under the first appeal. This article was published prior to the final judgement of the High Court in March 2019. Hughston and Jowett conclude that there are two key points that have come out of the Full Court appeal: that there is a significant additional value attached to exclusive native title rights and interests; and that calculations must include compensation for intangibles such as 'loss of amenities, pain and suffering and reputational damage' (p. 55). Finally they note that this remains a very uncertain area of law and hope that the High Court decision would add further clarity (p. 55).

Palmer, K 2018, 'Compensation' in *Australian Native Title Anthropology: Strategic Practice, The Law and the State*. ANU Press, Canberra, pp. 227-238.

The author of this chapter (and book), Dr Kingsley Palmer, was one of the expert anthropologists engaged on behalf of claimants for the Timber Creek native title compensation claim. Palmer provides a discussion of three key aspects of non-economic loss that anthropologists can provide some insight into. Principally, he notes that 'The anthropologist's job is to provide an understanding of how pain and suffering might be manifest as well as how such emotional distress develops from an alienation of land' (p. 234). Palmer provides three key ways that this can be demonstrated. Firstly, he explains that understanding how emotions are expressed through the use of language (whether that be traditional language or Aboriginal English) is key to understanding how and why claimants were distressed by the compensable acts (p. 235-6). Secondly, he identifies that there should be a focus on the cultural duties of native title holders to manage country (including rituals of introducing self and strangers to country and the importance of the performance of ceremony to the vitality and health of country), and that a failure to do so comes with social sanctions as well as spiritual consequences. Finally, he notes that the spiritual relationship between native title holders and their country was key to understanding non-economic loss, and that it was the Judges' view that this assessment should not focus on the specific parcels, but should consider the totality of the claimants' country (p. 237-8). Therefore the anthropologist should provide a 'full and comprehensive account of the relationship to country in terms of spiritual correspondence to the entirety of country' (p. 238).

Pannell, S 2018, 'Framing the Loss of Solace: Issues and Challenges in Researching Indigenous Compensation Claims', *Anthropological Forum*, vol. 28, no. 3, pp. 255-274.

Pannell's article focus on the 'solitum' aspect of compensation payments that is compensation payable for non-economic loss. Pannell highlights some of the issues and challenges faced in researching cultural loss and the emotions of pain and suffering experienced as a result of this loss. To begin with, Pannell draws from Albercht's (2005) concept of 'solastalgia' which links the loss of and / or the transformation of Indigenous homelands, ecosystems and landscapes with strong emotional feelings, declining sense of self and often social problems and physical and mental illness.

In order to discuss these issues, Pannell considers her experience of undertaking research into two native title compensation claims, one in North Queensland and one in the Northern Territory. Through these examples she explores a number of issues she encountered in her research. In both examples a key issue that arose from her research was the difficulty of disentangling the loss and disadvantage associated with the specific extinguishing act and the broader history of region. That is, that the impairment or extinguishment of rights did not occur in a vacuum separate from other historical events which effected people's lives, culture and wellbeing. In her first case study, she also noted the complex history of claimants with the pastoral industry and the complexity of documenting loss when Aboriginal people had feelings of sentimentality towards the pastoralists and the industry and could also identify a range of benefits that came from this engagement. She also noted that in this example, the extinguishing act, the granting of the pastoral lease, did not materially change the way claimants interacted with their country, and, in the case of some individuals, they remained unaware that from a legal perspective that their rights and interests had been extinguished. Pannell also discusses the conflict between the fact that native title compensation is a communal and inter-generational entitlement, but that emotions are felt individually and differentially based on a person's age, knowledge and connection to the affected area. In relation to the Timber Creek case, she points out that considerable emphasis was placed on the relationship between memory and emotions such as anger, pain and shame, and the causal relationship between emotions, its' effects and the extinguishing act. She argues there is a methodological difficulty of recording the feeling and emotional effect some decades after the event occurred. Pannell also discusses the limitations of researching emotions in a cross-cultural context. She mentions ethnographic examples of enquiry into past events that one would expect to have been met with emotions of sadness and anger, but which were instead met with silence and seeming disinterest. She also discusses the performative nature of emotions in Indigenous culture. For example, an emotion such as anger is often expressed in relation to cultural expectations rather than expressing a raw experience. Pannell concluded that 'solastalgia' provides a helpful understanding of how people who continue to live on traditional homelands, however still experience a sense of 'powerlessness and injustice and a loss of solace, from their present relationship to that 'home''.

Flynn, L 2017, 'Full Court upholds findings in Timber Creek native title compensation case', *LSJ : Law Society of NSW Journal*, vol. 37, pp.71-73.

This article provides a detailed summary of both Mansfield J's judgement and the Full Court's decision of the Timber Creek compensation claim. This article was published prior to the High Court determination. Flynn discusses each of the elements of compensation considered in the claim and notes that the Full Court upheld the majority of the decisions made by Justice Mansfield. This was with the exception of the economic loss component. They found that he had overvalued the non-exclusive rights and interests of the claimants. Flynn also highlights that the Full Court suggested that the manner in which compensation was assessed in two separate components (economic and non-economic loss) "may not be of 'any real assistance' in future compensation claims" and that there is "still a long way to go before native title compensation assessment is straightforward and predictable" (p. 73).

McGrath, P 2017, 'Native Title Anthropology after the Timber Creek Decision', *Land, Rights, Laws: Issues of Native Title*, vol. 6, no. 5, pp. 1-5.

McGrath's paper provides a summary of the role of anthropologists in native title compensation claims, as recognised in the Timber Creek decision. She notes that the value of the anthropological evidence, according to Justice Mansfield, was providing assistance in the interpretation of the evidence provided by the Ngaliwurru and Nungali witnesses, and the anthropologists ability to "articulate not only connections to country but the qualities and consequences of the social impacts that accompany the loss of connections to country" (p. 1). She notes that the non-economic loss aspect of compensation was not constrained by the legal tenure of the blocks which hosted the extinguishing acts and that Mansfield acknowledged the interconnectedness of site and cultural landscape and that cultural loss and feelings of pain and anxiety were not limited to individual parcels of land. She also noted that the focus of anthropological research should be on individuals and their deep primary and embodied emotions as this was given significant weight in the Judges consideration of solatium. She also noted that the loss of cultural reputations through failed responsibility to care for country was recognised in the decision as compensable.

McGrath also turns her attention to the potential negative impact of compensation claims on claimants. She notes that there is real potential for research into cultural loss to cause further trauma for claimants. She notes that some claimants have only come to realise the full extent of loss of rights to country under Australian law in the process of making a compensation claim and that this points to the fact that dispossession is an "ongoing cumulative experience", rather than a single historical occurrence. Further she notes that claimants may already be weary from pursuing their native title determination process. McGrath suggests that one way of limiting some of these negative effects, might be to contract anthropologists to consider cultural loss at the same time as connection evidence. She also speculates as to whether anthropologists may need to become involved in the distribution of compensation monies as RNTBCs are presently ill-equipped and under-resourced in their capacity to deal with intra-group disputes. Finally she suggests that perhaps there are other non-monetary avenues for compensation and that traditional processes for dealing with cultural transgressions such as trespass and intrusion are based more in principles of healing of underlying relationships. It is McGrath's view that the anthropologist's role in compensation claims is not only in providing advice to the court in relation the evidence surrounding cultural loss and its impacts, but also in "assisting Aboriginal and Torres Strait Islander peoples in the difficult task of navigating this new and highly complex legal terrain" (p. 5)

Song, W 2014, 'What's next for native title compensation: The De Rose decision and the assessment of native title rights and interests', *Indigenous Law Bulletin*, vol. 8, no. 10, pp. 11-14.

Song's article provides a useful summary of what is known about the only other successful determination of native title compensation, *De Rose v South Australia*. Song highlights some of the issues with tying assessments of economic loss to freehold valuations of land. She identifies that differing land valuations of country where native title is held around Australia has the potential for highly inequitable awards of compensation to be reached. She also highlights that, in this case, as is often the case in remote areas, it can be difficult to reach accurate land valuations for parcels of land where there is no clearly comparable areas of freehold grant in the surrounding area. Song also discusses that the loss of the 'right to negotiate' in areas where native title has been extinguished, has the potential to hold significant value in areas where there are mining and mineral exploration interests. Another key point raised by the De Rose decision was that the impact on sacred sites was considered an important factor in the assessment of non-economic loss. Song concludes that despite this positive determination of the native title compensation, how it should be assessed is still largely unknown.

Smith, D 2001, 'Valuing native title: Aboriginal, statutory and policy discourses about compensation', Discussion Paper No. 222. Centre for Aboriginal Economic Policy Research, Canberra.

Smith's paper is one of the most comprehensive papers produced on Native Title compensation, particularly from an anthropological perspective. At the time of writing there were no determinations of native title compensation and therefore this paper is a theoretical discussion of what native title compensation might look like.

Of particular value is Smith's ethnographic analysis of Aboriginal compensation processes and exploration of ways in which they might be applicable and contribute to the conceptualisation of native title compensation. In this regard, Smith outlines behaviour and incidents that under Aboriginal law would require a compensatory response, such as theft of objects, personal / bodily injury, physical, verbal or spiritual trespass or committing damage to land and sites (p. 8). She also notes that the effects of these incidents are not easily quarantined into specific effects, but are seen to have multifaceted impacts, such as affecting country, social relationships, spiritual and physical wellbeing, as well as systems of knowledge and religious life (p. 9-11). Smith notes that compensation in Aboriginal Australian cultures "reveals social values and preferences" and is "framed as a necessary stabilising expression of the law" (p. 15). She goes on to describe examples of traditional forms of compensation, such as gifts (including food, household goods or cash), ceremonies or ritualised fights (often referred to as 'square up' fights), small exchanges of territory or access to resources within a territory, ostracism, or punishment inflicted by spirits, to name a few (p. 15-17). Smith also notes that the "critical feature of Aboriginal compensation is that it is essentially a process-based system in which the relationship between people, the land, law and Dreaming is paramount" (p. 17) Further, "the outcome should restore the expectations and satisfaction of reciprocity...and acquit individuals and groups of indebtedness entailed by their inclusion in the field of perpetrators" (p. 18).

Smith also discusses the 'inalienability' of traditional lands, which are described as having an 'infinite utility and absolute value' which is 'beyond commodification' (p. 19). She notes that Aboriginal land is not a possession that is exchangeable or replaceable and that loss of country diminishes both individual and a group identity (p. 20). In this way she argues that it is "legally ethnocentric and reductionist to equate native title compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology" (p. 32). Finally, Smith proposes a model of 'Heads of Damages' under which she identifies nine 'heads' or 'categories of loss' under which compensation could be sought (p. 39-40). She also highlights a number of issues associated with monetary compensation, such as its inadequacy in providing intergenerational equity and considers ways in which compensation benefits could be passed on to future generations who are also affected by the loss of native title rights (p. 41-2). A further issue discussed is the often negative impact of monetary distributions and the conflict that regularly arises in this context (p. 42-3). She also notes that there is need for transparency in compensation outcomes, noting that currently ILUAs and future act agreements, which often include aspects of compensation, are not publicly accessible or available for scrutiny nor can they be used for the creation of benchmarks (p. 44-5). Smith concludes that it "remains to be seen...whether the common law recognition of native title will be able to create a recognition space for compensation that addresses the intrinsic value of land to dispossessed Aboriginal owners" (p. 47).

Burke, P 2002, 'How can judges calculate Native Title compensation?' [online], Discussion paper, Australian Institute for Aboriginal and Torres Strait Islander Studies, Canberra, viewed 22 October,
https://aiatsis.gov.au/sites/default/files/products/discussion_paper_research_outputs/how-can-judges-calculate-native-title-compensation.pdf

Burke's article faces up to the inherent problem of native title compensation, that is, incommensurability, and the fact that compensation can never adequately redress loss of native title

rights and interests, nor can it ever restore traditional owners to their previous position. He notes however that this “should not stop us from searching for the best compensation principles and it certainly will not stop judges from making decisions” (p. 3). On this basis, he embarks on the difficult task of searching for comparisons in other areas of Australian law and identifying principles which could be considered relevant to the native title compensation and, provides a possible framework, if not a loose one, to approaching calculations of native title compensation. Burke also provides three fictional claims of native title compensation which are used to tease out the complexities of applying these principles to native title claims with the varying circumstances around Australia. These cases draw out some key issues, some of which were contemplated to some extent in the Timber Creek decision, such as the impact on cultural loss depending on whether sites are located within or outside of the compensation area, or if any steps were taken to protect sites or allow for continued access (p. 50). He also poses the question of what considerations should be made where land was acquired to provide infrastructure and services which served to benefit the native title holders (for example a Telstra tower, or the building of a clinic) (p. 51-2).

As a key starting principle, Burke notes that native title compensation claims should “err on the side of generosity”. He notes that this is because of the importance of rights to land for Indigenous people (p. 1). He notes that there is a long standing acceptance of this fact by Australian courts, and can be drawn from existing areas of law including native title, land rights and stolen generation litigation (p. 22-4, 31). To this point, he notes that economic value alone could never pass for ‘just terms’ (p. 4), and suggests that ‘solatium’ (a term borrowed from land acquisition law) should make up the major component of compensation. He notes that this is opposite to the usual approach to compulsory acquisition of land (p. 7-8). This poses an issue as the largest component of native title compensation has no guidance as to how to quantify it – “only the outer limits [of compensation] can be identified with precision” (p. 8). Burke considers that there needs to be a focus on elaborating on the nature of non-economic loss and identifies three broad aspects which could be considered: insult associated with loss of important rights without consent; disruption to cultural practises; and mental distress associated with loss of homelands. In regard to insult, he draws comparisons with ‘solatium’ in cases for the resumption of land and also torts or civil wrongs relating to trespass (p. 26, 31). For disruption of cultural practises, he looks at a number of Indigenous personal injury law cases, where the loss of cultural status or loss of ability to participate in cultural activities has been compensated for (p. 13, 26-7, 31). He also looks at civil wrongs or torts law for injury to property, including the concept of non-pecuniary loss (personal loss of a non-financial nature including pain and suffering, nervous shock, interference with enjoyment of property and loss of amenities (p. 13, 21, 31). The same areas of law were considered relevant to considerations for mental distress (p. 27, 31). In relation to the market value of land, he considers that exclusive native title rights could be considered equal to freehold value and non-exclusive rights could be compared with that of easements or licences (p. 28). He also notes that economic loss could include loss of access to resources from the land, for example access to food resources and raw materials for making artefacts, and that it is possible to also consider the future loss of these resources (p. 28). As noted in the review above, Burke provides some key issues with calculating and comparing market valuations around Australia (p. 28, 46-7).

Burke also draws from defamation law, noting that this area provides a precedent for courts dealing in indeterminacy and incommensurability (p. 8). He also notes that it provides a touchstone for considering what might be considered excessive compensation (p. 33-4). He explains that in defamation cases, compensation is *not* intended to be equal to what would set up the claimant financially for life and it’s considered that damages for defamation should be less than that is awarded in cases of serious personal injury (p. 34). Whilst he points out perspectives on this matter may be different from an Australian legal perspective and from an Indigenous perspective, he considers that excessive compensation might be considered as that which provides all family groups within the claim group a reasonable ongoing income (p. 35).

On considering these principles taken from other areas of law and applying them to native title, he points out that the key issue with these examples is that they generally all apply to compensation entitlements for individuals and awarded amounts are not comparable to what would be awarded to losses experienced on a group level (p. 35). He points out the possible relevance of

class action law, however he also notes that in these cases each individual must provide evidence in order to access compensation. In native title compensation he notes that there would need to be the assumption that the evidence of a few would count as evidence for the group (p. 36). He also notes that there would need to be consideration made for the differing effects of loss on those within the group, particularly those groups with clear sub-groups within the claim who may have more or less connection to the affected area (p. 36). He notes that consideration of the size of the group or number of individuals affected also needs to be considered in calculations (p. 36-7).

As discussed in the review above, Burke also provides some thoughtful suggestions on how compensation might address the losses experienced by future generations (p. 37-40). This is not a point addressed in any practical detail in any other articles included in this annotated bibliography.

Long List Bibliography

This bibliography has been arranged by date, then by author, with the most recent publications listed first. Those highlighted in bold were either included in the annotated bibliography above or were cited in the introductory review of the literature.

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