

# ***Compensation or Restitution for loss of native title***

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# Introduction

- Right to bargain
- NTA S 51(2)(3)(4) =
  - Compulsory acquisition laws
  - Entitlement to just terms compensation
  - Similar compensable interest test
  - Compensation principles

# Mining compensation SA

- SA compensation MA s 61
  - Economic loss
  - Hardship and inconvenience
  - Damage to land
  - Loss of productivity or profits
  - Agreed or determined

# Mining Compensation WA

- No compensation s 123(1) MA
  - For permitting entry
  - For value of minerals
  - For rent or royalty
  - Non-monetary
- Agreed or determined s 123(2) MA
- Compensation
  - Deprivation of use of surface
  - Damage to land
  - Severance
  - Loss or damage to improvements
  - Social disruption
  - Private land under cultivation – substantial loss of earnings, loss of time, negotiation expenses, disruption agric, disturbance balance, fail to observe requirements of law
  - Reasonable expense of reducing damage

# Mining Compensation Qld

- MRA s 13 - Any compensable effect each owner/occupier
  - Deprivation of possession of surface
  - Diminution of value
  - Diminution of use land or improvements
  - Severance
  - Cost, damage or loss caused by activities
  - Reasonable accounting, legal, valuation costs of agreement

# NTA s 51A & 'Just terms'

- (1) Total compensation must not exceed compulsory acquisition of freehold
- (2) Subject to s 53 – just terms
- Section 53(1)(b) – where Const s 51(xxxi) acquisition of property – just terms
- Past acts by Commonwealth only – NTA s 23J
- Past acts of the State: NTA (Cth) ss 20(1) + 17; s 20(3) power to recover from State

# State Compensation provisions

- NT(SA) Act, s 27A: same principles as Cth NTA
- NT (Qld) Act s 27: Cpo only to extent not ext other than under Qld Act
- Titles Valid/n etc Act (WA)s 12 and 12P: entitled to cpo under s 17 and Part 2 Div 5 NTA (Cth)
- = 'just terms'

# Acquisition by agreement

- LAA (SA) s 19, 22B, 23 negotiated -
  - Entitlement if interest divested, diminished, adversely affected
  - Negotiation in good faith
  - Court mediate
  - Non-monetary cpo
  - Loss of value of land
  - Loss by severance, disturbance, injurious affection
- LAA (SA) s 20 determined
  - ADR
  - Continuing negotiations
- LAA (SA) s 21
  - Enjoyment native title
  - Way of life, culture and traditions
  - Social, cultural and economic structures
  - Freedom of access
  - Significant sites
  - Native title parties' wishes
  - Economic significance
  - Public interest
- LAA (SA) s 25 principles
  - Special suitability/adaptability not to be taken into a/c
  - Cost equivalent reinstatement
  - Allowance for enhancement of adjoining land
  - Improvements after notice not taken into account
  - Total cpo not more than for fee simple



# Pre-RDA Extinguishment

- *Mabo (No 2)*
  - Crown power to create property rights in property it holds
  - No power to extinguish property rights of subjects by grant by Crown to others
  - Native title not granted by Crown extinguished by grant to others: ***WA v Cth (Native Title Act Case)***
- *Prof McNeil* – rule of non-derogation



# *Property in International and Common Law*

- ‘Property’:
  - a legal relationship with a thing: *Dalziel*
  - A legally endorsed concentration of power over things and resources: *Yanner v Eaton*

Native title, as property in land and waters, includes property in the resources that are part of or are associated with the land and waters. As property, it necessarily connotes a capacity to control the land, the waters and those resources.

Right to own property alone as well as in association with others:  
UDHR Art. 17; CERD Art. 5(d)(v); *Koowarta*; *Mabo (No 1)*

Care and Management: *Bropho* and RDA S 10(3)

Arbitrary deprivation: UDHR Art. 17 *Mabo (No 1)*; *Bropho*

Just terms broader than compensation

- *Wurridjal* – more than monetary
- *Nelungaloo* - fair dealing
- *Tasmanian Dams* – just compensation – within a reasonable time

# Market Value

- Willing buyer and Willing seller for a fair price not desirous of selling: *Spencer v Cth*
- Adaptation: *Geita Sebea* when there is no market – agricultural value + cost improvements less depreciation
- Value to taker: *Taylor* – not profit to purchaser
- Special value to owner
  - future advantages/potential for owner as at time of sale: *Arkaba Holdings*
  - Cultural value
  - Remuneration for permission

# Restitution & compensation:

- Just terms
- Compensation – reversal of loss
- Restitution
  - undoing the acquirer's gain
  - Giving something up
  - Giving something back

# Fiduciary

- Trustee of property & beneficiary
- Abuse of trustee's position
- Undivided loyalty
- Unauthorised profit
- Disgorgement/account of profit
- Conversion of property
- Self-dealing –trustee's sale to itself
- State extinguishment in favour of own interest –  
granting to mining companies
  - Royalties for State

# Equitable remedies

- Account of profits
- Disgorgement
- Constructive trust
- Setting aside self-dealing
- Beyond common law right to compensation under NTA
- Jurisdiction of Federal Court – statutory (NTA) + accrued

# Measure of damage

- Restoration
- Reparation – put back in same position
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- Benefit to trespasser – measured by wrong – invasion of rights – if no loss: *Blake's case*
- Wrongdoer ought not to gain/profit
- Cost to wrongdoer to obtain benefit
- Fair result of hypothetical negotiation – right to prevent
- Percentage of profit