HOW CAN JUDGES CALCULATE NATIVE TITLE COMPENSATION ?

DISCUSSION PAPER

A research project commissioned by the Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies.

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"The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are."

Viscount Haldane in *Amudu Tijani v The Secretary, Southern Nigeria* (1921) 2 AC 399 at 411.

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Summary

As we continue to await the Delphic utterances of the courts the task of developing a distinctive body of jurisprudence about native title compensation languishes. This is probably because of the complexity of the intercultural event we are all awaiting: the first contested compensation determination. Money can never equal native title. Yet despite this inherent incommensurability and complexity, pragmatic criteria, such as consistency with the legal theory of native title, consistency with our knowledge about actual traditional connection and the availability of evidence, can be developed to assess potentially useful principles. Using an idealised example of a compulsory acquisition of full native title rights for a government purpose, this paper makes an initial exploration of some possible principles. The example is 'idealised' because compulsory acquisition is a risky strategy from both a legal and political perspective.

The huge variation in the market value of land in Australia has major implications for what is "just terms" in native title because it is likely that those areas with the strongest native title will coincide with those areas of least economic value. It is argued that the minimal implication of "just terms" is that, in compensating for loss of native title rights, the economic value of analogous tenures should be included but it should not in any way constrain the calculation of non-economic loss. Because of the sui generis nature of native title new principles need to be developed for a sui generis compensation regime.

The first and overriding proposed principle is based on the long-standing acceptance by Australian courts of the importance of land to the indigenous people of Australia. The principle could be stated as:

> *The scale of compensation in native title should err on the side of generosity because the importance of rights to land for Indigenous people.*

In practice this could be implemented in relation to the calculation of non-economic loss which will be the main component of the compensation.

> *Compensation for the loss of native title rights should focus on elaborating the nature of the non-economic loss.*

The potentially indeterminate scale of compensation for non-economic loss can become more manageable if subheadings of non-economic loss in native title could be adopted. On the basis of their consistency with the legal conceptualisation of native title, with the likely evidence of loss, and principles from various areas of the law are drawn upon to propose the following as the three subheadings of non-economic loss:

- *Compensation for the insult associated with the loss of important rights without consent;*
- *Compensation for disruption to social and cultural practices; and*
- *Compensation for mental distress associated with the loss of homelands.*

Compensation for non-economic loss would be in addition to compensation for economic loss. Economic loss would be calculated by selecting the closest analogy

with existing interests in land and calculating the economic value of such an interest based on the usual principles of land valuation, that is principally market value.

The proposed subheadings of non-economic loss do not necessarily assist in suggesting a starting point for the allocation of dollar amounts or respond to the 'communal' nature of native title, including diversity within the native title group. To address these issues following proposals are made:

- The starting point for calculation of non-economic loss should be based on the individual most affected by the acquisition. The range of dollar amounts for the individual should be based on a minimum amount relates, in a general way, to non-economic loss for injury to a home under various torts related to injury to property. The maximum amount would be the amount, if invested, would generate an income similar to average weekly earnings for an individual.

- The figure for the most affected individual should then be adjusted from an individual to a group figure. The scale of the adjustment should reflect the number of native title group members directly affected by the acquisition and the varying degrees of impact on individuals and subgroups within that group.

- In cases where the younger generation in the native title group is the object of instruction and preparation for assuming responsibility for the area concerned, an additional amount should be awarded for their 'aggravated' loss. This amount would be calculated on the basis of providing a similar amount of compensation to them, when they eventually become the senior, responsible generation.

These proposed principles are then applied to several hypothetical examples assuming varying degrees of disturbance and loss of traditional country. The examples attempt realistic scenarios and informed descriptions of likely evidence.

1. Introduction

One of the most interesting throwaway comments from John Sheehan at one of the National Native Title Tribunal's compensation workshops was that despite the difficulties of valuing native title, it shall be done one way or another. It is impossible to put a value on a severed hand, he said, but that is done every day in the workers compensation jurisdiction.[1] The comparison with the body is probably more apt when it comes to native title than he realised. For body imagery is pervasive in many Indigenous descriptions of the significance of land and the Dreaming ancestors.[2] But I wish to focus on two other aspects of the comment: incommensurability and inevitability. The starting point for developing an overall framework for native title compensation must be the incommensurability of native title and monetary compensation. Dollars can never equal lost native title rights. But this should not stop us from searching for the best compensation principles and it certainly will not stop judges making decisions.

The dollar amounts based on market value do not reflect the importance of country to indigenous people. This is most dramatically demonstrated at the margins of economically productive land. For example, in the market valuation of marginal pastoral leases in central Australia, a typical practice among professional valuers is to value the land itself at, or close to, zero so that the value of a pastoral lease consisted almost entirely of the value of any stock plus the value of improvements such as houses, bores, dams and fences. And the difference in the valuation of freehold versus pastoral leases in the same area is minimal.[3]

Beyond these marginal areas lie the vast desert areas of Western Australia that make up most of the land in Australia available for the full native title claims, that is areas where there has not been any partial or total extinguishment of native title rights. The Western Australian Valuer General's Office does produce comprehensive figures for land values throughout most of Western Australia, based on a selection of local government areas.[4] But the telling point about these figures is that they do not extend to the vast desert area. It is as if these areas lie outside the market and the whole valuation system.

The point about the huge variation in the market value of the land can also be made by examining various categories of economically productive land. Two sets of valuation figures,

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[1] Comments to this effect were made by John Sheehan during the presentation of his paper (Sheehan, 1997) on 18 August 1997 but do not appear in the text of his paper.

[2] This observation is a commonplace in most Australianist ethnographies. One recent example is Keen 1994 (at 103, 106, 135). Nancy Munn has argued that this aspect of traditional Aboriginal life is one of the keys to understanding the traditional Aboriginal frame of mind (Munn 1970).

[3] Section15 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 provides for the payment of rent to the relevant land council for the continuing occupation of Aboriginal land by the Crown under s.14 if the occupation was not for a community purpose. The Minister for Aboriginal and Torres Strait Islander Affairs must set a rate having regard to the economic value of the land. In one instance the purpose, a former pastoral lease that had become a pastoral research station, was interpreted not to be a community purpose. The Minister, following the advice of land valuers determined the "rent" to be approximately $10,000 per annum. One would have to wonder whether the cost of the land council administering the distributing this income among the hundreds of traditional owners was more than the total income itself.

[4] A summary table is available at *www.vgo.wa.gov.au/index.asp?activemenu=Products_andServices&nav=coverpage.asp*.

readily available on the Internet, are for Western Australia[5] and New South Wales.[6] The WA figures for rural land are presented conveniently for comparison in dollars per hectare of cleared land excluding buildings. For the year 1998 the range of values was between $325 per hectare in Sample Area 10(b) North and $10,000 for the horticultural land in Sample Area 5. Therefore, an area of land can be 30 times the market value of land in another part of rural WA.

In New South Wales, Land and Property Information in the Department of Information Technology and Management maintain an internet site that presents the historical progress of land values in New South Wales in various tables under headings such as "Wheat Properties", "Coastal Grazing", "Tablelands Grazing", "Western Grazing" and they set out the land value of particular sized properties in various localities.[7] Needless to say, there is a huge variation in value of land from $1,468 per hectare for a sheep grazing property in Bathurst[8] to $2 per hectare for a sheep grazing property at Cobar.[9] If we take these values as indicative of market values in the two regions, the question arises as to why native title rights in Bathurst should be worth 700 times more than native title rights in Cobar. One suspects that similar variation could be established in other States and Territories. It would be even more dramatic if land values in urban centres were included in the comparison.

The point to be made from this cursory examination of variation in the market value of land is that economic value by itself could never provide the basis for 'just terms' compensation for the acquisition of native title rights. What is required is a more fundamental investigation into what is being acquired and how its non-economic value can be calculated.

In an attempt to focus on fundamental questions and principles that could be taken up by the courts some important questions have been bracketed. The first is the question of partial extinguishment (or suppression) in the situation of coexisting tenures. Much of the recent legal literature on native title compensation was prompted by the Wik decision and it tends to focus on the search for analogies for residual native title rights in our legal system such as easements or *profits à prendre* (see Sheehan 1998). This focus begs the question of the valuation of native title in the first place and accordingly is not the best case to examine. The case of loss of native title rights in natural resource development also contains distractions from fundamental issues. These situations, especially mining, are windfall situations. The value of the ore body provides a convenient limiting framework for calculating the quantum of compensation. It tends to suggest the answer that indigenous interests are entitled to a percentage of the value of the resource on the assumption that the native title holders are the owners of the resource or, at least, the controllers of access to it. This underlying conceptualisation does not translate well to other circumstances (perhaps more frequent) where what is being acquired is, in European terms, rights in relation to fairly ordinary land.

To be sure, there are a number of legal contexts under the NTA in which the issue of compensation will arise for determination by the courts or an arbitral body. But this

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[5] *www.vgo.wa.gov.au/index.asp?activemenu=Products_andServices&nav=coverpage.asp*
[6] *www.lpi.nsw.gov.au/facts*
[7] The tables can be found at *www.lpi.nsw.gov.au/facts*, Table 13-Wheat Properties at */revtable13.html*, Table 14-Coastal Grazing at */revtable14.html*, Table 15-Tablelands Grazing at */revtable15.html*, Table 16-Western Grazing at */revtable16.html*.
[8] Table 15-Table lands Grazing, locality of Bathurst, Area 800 hectares, carrying capacity of 3,500 sheep, 1998 land value of $1,175,000.
[9] Tables 16-Western Grazing, locality of Cobar, area of the 25,470 hectares, carrying capacity of 4,800 sheep, land value of $53,200.

discussion paper focuses on one such context only: the compulsory acquisition of native title rights as provided for under Part 2, Division 3, Subdivisions M and N of the NTA.[10] The other contexts include:

- the total or partial extinguishment of native title resulting from the validation of grants under the NTA as 'past acts' or 'intermediate period acts';[11]
- future acts that involve any loss, diminution or impairment of native title;[12] and
- compensation for the effect of mineral exploration or mining on native title rights. [13]

These legal contexts have already been adequately described elsewhere: see Orr 1994, Ritter 1996, Ritter 1999, Neate 1999, Bartlett 2000: Ch 21).

The kind of example that most starkly raises the fundamental questions is the compulsory acquisition of native title for some permanent government infrastructure project such as housing, roads, railways, or a permanent defence facility, the main hypothetical example considered in this paper. The NTA now mandates that the compulsory acquisition of native title rights completely extinguishes native title,[14] thus there will be no issues of coexisting rights. Also, for simplicity and focus, the main hypothetical example will assume:

- a determination of native title giving exclusive possession as in the court order in Mabo No. 2[15] and the original determination the Miriuwung Gajerrong case[16]; and
- that future use by native title holders will be impossible.

Compulsory acquisition is an extreme example and not likely to be typical of native title compensation practice because of the many pressures, both legal and political, for negotiated outcomes. This example is used purely for the clarity it brings to the analytical process. It should also be noted that while this example always requires an investigation into what is 'just terms' compensation, there are other circumstances contemplated in the NTA where 'just terms' will not be the overarching legal principle.[17]

Critique of current approaches

One of the current approaches has been the attempt to select some of the more promising principles from compulsory land acquisition jurisprudence. Stephenson 1995 provides a fairly comprehensive list of principles to choose from in her summary of the principles set out in the various compulsory acquisition statutes. They include:

- Market value: the price that a willing buyer will pay and what a willing seller will accept.
- Highest and best use: valuation according to the most advantageous use of the property.
- Special value to the owner: usually in the sense of a particular feature of the land that involves a financial advantage to the owner.

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[10] See especially s.24MD(3) and s.24NA(5).
[11] NTA ss. 17, 20, 22D, 22G, 22L, 23J.
[12] NTA ss. 24GC(3), 24GD(4), 24GE(4), 24HA(5), 24ID(1), 24JB(4), 24KA(5).
[13] NTA ss. 36C(5), 41(3), 42(5). Note: these provisions relate to the assessment of compensation under the right to negotiate provisions by arbitral bodies. Only State and Territory arbitral bodies can determine compensation. The National Native Title Tribunal as a Federal body is affected by the separation of judicial and executive functions in the Constitution and has not been given a power to determine compensation.
[14] *Native Title Act* 1993 (Cth), s.24MD(2), s.24NA(3).
[15] *Mabo v Queensland* (No. 2) (1992) 175 CLR 1.
[16] *Ward v Western Australia* (1998) 159 ALR 483.
[17] For acts affecting native title that are not a compulsory acquisition a court may adopt compensation principles from other laws if those laws equate the compensation rights of the native title holders with the rights of the holders of 'ordinary title' ie if the act passes the 'similar compensable interest test': see NTA s.51(3), s.240. For the application of the similar compensable interest test by the National Native Title Tribunal see *Re Koara People* (1996) 132 FLR 73 and *Western Australia v Thomas* (1996) 133 FLR 124.

- Severance: "where land is severed from the balance of the owners land than compensation is allowed for the reduction in the market value of the land retained by the owner".
- Injurious affection: "Where part of a property is acquired compensation will be allowed for loss that is caused to the balance of the land because of the use which the acquiring body in tends for the acquired land".
- Reinstatement: the cost of reinstating the dispossessed owner in comparable land.
- Disturbance: costs directly incurred as a consequence of the acquisition.
- Special compensation or solatium: for hardship, inconvenience and injured feelings.

Of these most likely contenders for taking into account the unique nature of native title rights were thought to be the concepts of "special value to the owner" and "solatium". Thus Sheehan (1997) states:

> The limited literature presently available suggests that special value to the owner and solatium can be constructed to cover compensation, for example, for loss of access to ceremonial lands, spiritual deprivation and loss, and loss or perceived loss of social environment. (1997:4)

Before going any further, "special value to the owner" needs to be put to one side. Although the words themselves seem to be apt, Neate is correct in pointing out that they have a technical meaning that is still firmly within the framework of a market value, even if a notional market (i.e. what the prudent person would be willing to give for the land rather than fail to obtain it) (1997:63).

Solatium has always seemed more promising. Brown describes it as follows:

> The question is whether the claimant is entitled to an additional sum in respect of his or her injured feelings for the insult due to the unilateral action of the acquiring authority in arbitrarily expropriating his or her land. (1996: para 3.35)

No doubt why various commentators have seized upon solatium is that it seems to be the one hole in the dyke of the pervasive market approach. It represents a crossover from principles more usually associated with personal injuries compensation to land valuation principles. Where unregulated by statute, its quantum would depend upon the evidence from the owners of the land about how the resumption affects them. Thus in relation to native title it promises to allow the use of the most relevant evidence available: the evidence of the native title holders about the effect of the acquisition on them.

Legislatures around Australia have been busy trying to plug the solatium hole or at least install a slow dripping tap. The slow dripping tap has taken various forms. It includes the codification of personal factors that can be taken into account in calculating solatium (e.g. limiting it to the situation of the compulsory acquisition of private homes). Alternatively governments have limited the quantum of solatium to a percentage (e.g. 10%) of the total amount of compensation calculated under other heads of compensation, but principally market value. It is this apparently tight legislative grip around solatium that has caused some lawyers to wonder whether it can realistically be set free and adapted for use in native title. O'Rourke (1998) has the answer: the concept of "just terms" can be used to vault over the statutory constraints. In native title compensation, the argument goes, just terms is the ultimate criterion and to reach just terms in this new field, the common law concept of solatium can be adopted and developed separately from its various legislative contexts: a general approach developed in this paper.

Keon-Cohen's 1995 paper was the first and is still the most comprehensive attempt to suggest ways of adapting solatium. His list of factors is highly relevant:

- the extent of the native title interest;
- length of occupation;
- inconvenience caused;
- period of time allowed to remain on the land after acquisition;
- period of time of likely occupation after acquisition;
- age, number and circumstances of the claimants (1995:109).

My proposals below, coming at the problem from a slightly different angle, could be seen as an attempt to elaborate some of these factors and reformulate others in a more compelling and specific way.

I have represented the project of adapting solatium in graphical form in Figure 1.

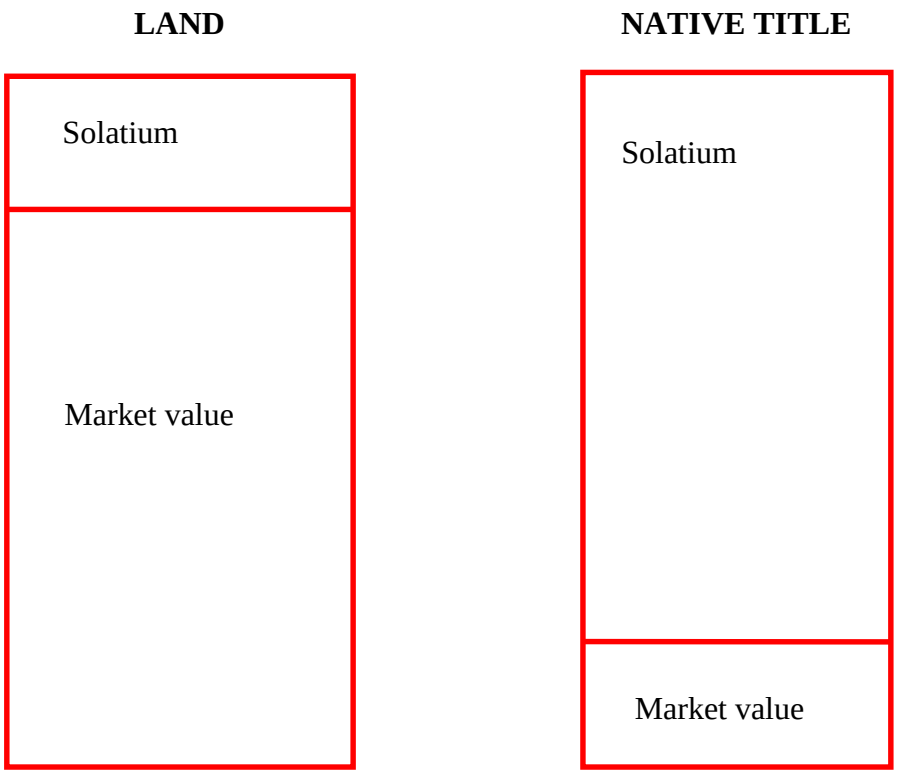

Fig. 1: The Keon-Cohen/Sheehan/O'Rourke model of the expected relative proportions of the basic elements of compensation in compulsory acquisition.

This diagram really describes the problem, not any solutions. For once solatium, a non-economic loss, becomes the major component of compensation the courts are left with no guidance to quantify it. In most situations of a monetary remedy in tort or contract the total figure is typically composed of amounts that can be fairly accurately calculated (called "special damages", "economic loss", or "pecuniary loss") plus those amounts that cannot be calculated with any degree of precision (called "general damages", "damages at large", "non-economic loss", or "non-pecuniary loss").[18] In most circumstances the non-economic loss is less than the economic loss.[19] The economic loss could be thought of as exercising an invisible gravitational pull on non-economic loss, keeping it within a close orbit of what can be calculated. In native title, by admitting that non-economic loss will be the main component of compensation, the calculation of compensation has broken free from that orbit. Only the outer limits can be identified with precision: zero at one end and the total gross domestic product of the nation at the other end!

The likelihood that in native title the bulk of compensation will be for non-economic loss suggests that it may be instructive to consider other areas of law in which the scale of damages is indeterminate. One such area is damages in defamation. For in defamation damages are "at large" in the sense of not being limited to pecuniary loss that can be specifically proved and, typically, non-pecuniary loss will be the major element of compensation. Also, defamation sits awkwardly within the law of torts, just as native title sits awkwardly in the jurisprudence of compulsory acquisition of property. There is a continuing theme in the critique of defamation law that there is something fundamentally wrong in the system that attempts to restore an injured reputation by means of monetary compensation to the injured person rather than more direct means of helping to restore reputation. This resembles the incommensurability of loss unique native title rights and monetary compensation.

While damages in defamation will not provide a starting point for the allocation of dollar amounts in native title compensation, it does provide a precedent for the courts grappling with issues of indeterminacy and incommensurability.

Compensation is essentially about restoring people to their previous position after a loss. Even in our own society, the extent to which this is possible depends on the nature of the loss.[20] Using incommensurability as the starting point in native title compensation should make us a little more relaxed about being able to practically evaluate the different solutions that we know, in advance, can never be perfect.

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[18] See discussion of terminology in Tilbury *Civil Remedies* para [3003]-[3013]. Note: the terms "economic" and "non-economic" in this discussion paper are being used as broad categorisations from legal discourse. In the discourse of the social science of Economics, an "economic" analysis may incorporate much broader issues than are contemplated by the use of the word "economic" in legal discourse. Thus, if I understand his project, Campbell (2000), an economist, draws upon contingent valuation theory to adopt a broad concept of "economic value" being "the relative preference for the benefits obtainable from the ownership of an item relative to the benefits obtainable from some other item and willingness to go without something in order to obtain more of something else" (2000:3). Whether such an approach will yield anything of practical utility to judges faced with the calculation task remains to be seen.

[19] An exception worth investigation is damages in defamation.

[20] In making these broad comparisons one has to be aware of Occidentalism. Our own society is not homogeneous and compulsory acquisition laws give little weight to personal feelings of resumed owners to not tell the whole story. See, for example Nathalie Haymann's account of community reaction to a road resumption in inner city Brisbane *Resumed in Protest: the human cost of roads*. This is the tip of an iceberg of this genre.

This approach attempts to move beyond the roadblock identified by Lavarch and Riding (1998). Their conclusion seems to be that because of inherent incommensurability, all efforts that involve the inapplicable concept of market value will inevitably fail. In their view, the only option is to aim for acquisition of native title rights by agreement and to minimise the impact on the actual continuing exercise of native title rights. In a similar vein, Stephenson (1995:149) suggests compensation in the form of the return of lost items of cultural heritage or art, and funds for the preservation of language. Developing innovative ideas such as these in compensation agreements will continue to be the major task of native title compensation practice. No one would argue against developing such proposals and the NTA facilitates this approach through the ILUA provisions and the obligation on governments to negotiate in good faith requests for non-monetary compensation.[21] Indeed, agreement may be the only absolutely certain way for governments to avoid the breach of international human rights standards relating to indigenous peoples.[22] But focusing on agreements does represent the option of avoiding the question that the courts will face, rather than trying to point them in the right direction. Principles from the eventual judicial determination of the compensation issue will also feed back into what can be achieved in negotiated compensation agreements because the question of what amount of compensation would be ordered by a court if negotiations were abandoned is always in the background. Thus agreement making and the plausible estimation of monetary compensation are inextricably linked.

When courts come to the question of the allocation of dollar amounts, they will confront evidence that has no direct counterpart in most valuation tasks. This evidence might include:

- a religious context of the loss being ancient traditions, stories, and beliefs internally linked with the land, the features of which may be the transformation of Dreaming ancestors or be the repository of unique spiritual power;
- a relatively large group of 'owners', diverse in ages, kinds of traditional connection to the area concerned and also in capacity to 'speak for' the country;
- strong feelings of irreplaceable loss, hurt, and anger in the context of historic injustices; and
- traditional laws and customs that will continue to be observed, to the extent that they can be, despite the loss of native title rights.[23]

Responding with dollar amounts to this kind of evidence is the central conundrum of the calculation of the compensation for the acquisition of native title rights.

Outline of the paper

The following section of the paper, Part 2, backtracks a little to return to the fundamental question of what is being compensated. It examines the legal conceptualization of native title and its relationship to other legal categories, in particular interests in land. Given the legal nature of native title, Part 3 asks the question of what compensation principles may be consistent with the legal conceptualisation of native title and with other areas of law. One general principle and a number of more specific principles are proposed. Part 4 continues the search for appropriate compensation principles by focusing on the issue of how the actual calculation will be made. This reveals problems of establishing a starting point for allocating dollar amounts and a number of issues arising from the need to compensate the diverse group

[21] NTA, ss.51, 79.
[22] See "The Relevance of International Law Standards" in Part 2.
[23] For more detailed examples of possible evidence see the hypothetical examples in Part 6 of this paper.

of native title holders. These principles and suggested methods of calculation are then subjected to examination by applying them to hypothetical situations of the acquisition of native title rights in Part 5. Part 6 provides an overall summary and assessment of the proposed principles.

2. What is being compensated

One of the fundamental problems in native title is the variety of approaches to the legal conceptualisation of native title. In *Mabo No 2* itself at least four different approaches can be identified:
1. The Brennan formulation that is distinguished by the apparent acceptance of variation in native title rights according to variation in traditional laws and customs.[24]
2. The Gaudron/Deane approach in which native title rights are non-proprietary, usufructuary rights, the extinguishment of which requires compensation.
3. Justice Toohey's "traditional title" which is based on the exclusive occupation of an area by an organised society at the time of the assertion of sovereignty.[25] This formulation is very similar to the formulation of "aboriginal title" eventually adopted by the Canadian Supreme Court in *Delgamuukw*.[26]
4. Justice Toohey's "common law aboriginal title" or "possessory title" that is a presumption of title arising from actual adverse possession of land.[27] This formulation was the main thesis of Kent McNeil's book *Common Law Aboriginal Title*.[28]

Mantziaris and Martin (2000) are among the few to have proposed a coherent conceptual framework that can assist in making sense of the various approaches. Put simply, they view native title as a recognition technique used by the Australian legal system, allowing aspects of a foreign system, that is the indigenous traditional laws and customs, to be incorporated into the Australian legal system. The technique is essentially one of the translation of concepts from the system of traditional laws and customs into native title rights and interests that are part of the Australian legal system. They represent this as occurring in a recognition space that is the intersection of the two legal systems. It is represented diagrammatically in Figure 2.[29]

Translation is also the process whereby potentially incommensurable systems, the indigenous and the Australian legal system, are made compatible. An illustration of the potential

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[24] Although even within Justice Brennan's judgment there are various, seemingly contradictory conceptualisations. For example:

> The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners.

and,

> Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. (Both in *Mabo v Queensland* (1992) 175 CLR 1 at 51)

[25] *Mabo v Queensland* (1992) 175 CLR 1, at 182-192.
[26] See *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 [1997] 3 SCR 1010 (SC Can), Lamer CJ at para [143-154]].
[27] *Mabo v Queensland* (1992) 175 CLR 1, at 206-214.
[28] Kent McNeil *Common Law Aboriginal Title* Oxford University Press. Oxford. 1989
[29] As they note, their use of the term 'recognition space' is different to Noel Pearson's original use of the term. It should also be understood that the model is just that: a device for explaining a complex reality. All such devices are better at explaining some aspects of complex phenomena than others. This device is good for untangling the conceptual confusion found in some judicial reasoning and academic commentary that assumes the judicial recognition of native title simply involves the recognition of the a pre-existing legal system like ours. On the other hand, it tends to assume a continuing separation of systems that in fact have interpenetrated each other over the period of colonisation. This is not necessarily a defect in the model as it appears to approximate the legal conceptualisation of "traditional laws and customs" which insists upon some kind of continuity with ancient traditions.

incommensurability would be the comparison of some of the radical differences between the two systems, for example, a claim to rights in sacred songs (and hence land associated with those songs) because the spirit of the Dreaming ancestor referred to in those songs animated the conception of the person, versus rights to land of a person because their name appears on a register of certificates of title backed by an elaborate web of legal and political institutions.

From this perspective, *Mabo No 2* could be seen as a ruling that this potential incommensurability is only partial and that some translation into "rights" is possible. Mantziaris and Martin identified this as the pragmatic assumption that indigenous systems of traditional law and custom constitute legal systems (although there are probably other ways of interpreting this).[30] They also identify two other ways in which they say incommensurability is addressed:

1. through categorising native title as “sui generis”; and
2. through flexibility with the rules of evidence.

They argue that if the courts are not more conscious of the fact that they are engaged in translation, it will lead to a disappointed expectation of 'traditional laws and customs', for example, that there is an authoritative source for the declaration of traditional laws and customs.

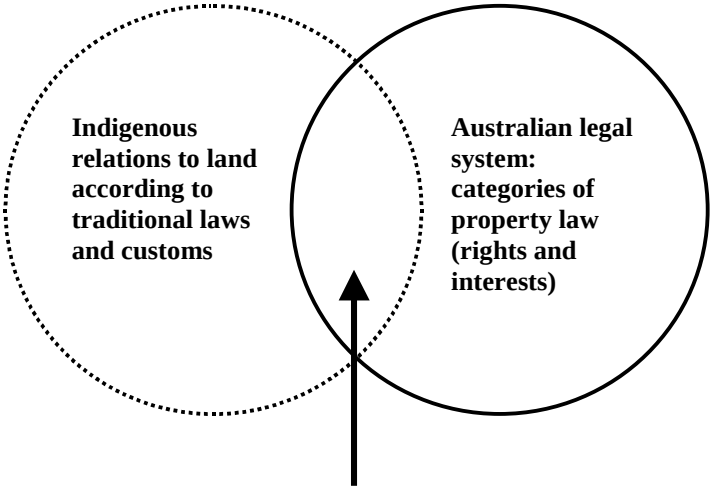

Figure 2: The native title recognition space from Mantziaris and Martin (2000) Figures 1.1 & 2.2.

[30] Consistent with Mantziaris’ and Martin's overarching metaphor of translation, the apparent side stepping of the problem of the incommensurability by the courts could be seen as the courts assuming that the concept of 'rights and interests' is a viable bridgehead to another culture. This is not a totally outrageous assumption and some anthropologists have fruitfully used the language of 'rights and obligations' and other legal metaphors to describe indigenous society. The problem in not acknowledging it as a means of translation is that it underplays the very different implications of 'rights and interests' in the two societies.

Rather than recapitulate their account in full,[31] two broad implications of this framework for native title compensation will be considered:

1. The first, and perhaps most obvious point, is that what is lost in the acquisition of native title rights interests is the rights as recognised in the Australian legal system. They are rights that result from a translation process. They are not the relations to land that are governed by "traditional laws and customs". The continuation of traditional laws and customs depends upon other factors apart from legal recognition. Typically, traditional laws and customs will continue to be observed following the compulsory acquisition of native title rights, notwithstanding that the observance of laws and the carrying out of customs that require physical presence on the land may be severely circumscribed or no longer possible. This way of looking at what is being compensated also broadly reflects an Indigenous reality: that some traditions relating to land such as stories, songs, dances, beliefs and the passing on of such traditions to a younger generation may continue in some truncated form despite the loss of access to the land in question. Examples of this occurring are to be found in the many Aboriginal settlements/missions on the fringes of the Western Desert, where some traditions and ceremonies relating to land continue despite the huge geographical separation from their homelands.[32] No doubt, lack of presence on traditional country and the extreme difficulty of return will have its debilitating effect as well. These questions of degree can only be resolved by evidence in particular cases. The general point is that loss of traditional laws and customs does not automatically flow from loss of legally recognised native title rights.

2. The second major implication flowing from viewing native title as a translation process, is that the significance of the loss of the recognised native title rights can only be fully understood by examining those rights from both the perspective of the Australian legal system and the perspective of the traditional relations to land (traditional laws and customs). This is the key to the argument elaborated below that economic value is a necessary minimum requirement, but that 'just terms' requires an additional amount which can only be assessed by reference to the effect of the loss of the legal rights from the perspective of traditional laws and customs. This is consistent with the approach the courts have taken in relation to the assessment of damages in personal injury cases involving Aboriginal people and, more recently, in the assessment of additional damages for breach of copyright under the *Copyright Act* 1968 (Cth).

Consider some of the personal injury cases:

- In *Napaluma v Baker*[33] the Court recognised a "special loss of amenity of position within the tribe" as part of the assessment of the loss of amenities of life. The case concerned a relatively young Pitjantjatjara man who had received a severe head injury in a motor vehicle accident and consequently would not proceed to further stages of initiation because of the assessment of other members of the tribe that he could not be entrusted with secret aspects of their Law. Therefore, he could not become a ceremonial leader, and, generally, would be less than a full member of the Aboriginal community.
- Similarly, in *Dixon v Davies*[34] an Aboriginal person from Alice Springs who was partially crippled in a motor vehicle accident received compensation for loss of "cultural fulfillment" under the usual general heading of "pain and suffering and loss of amenities

[31] See Mantziaris and Martin *Native Title Corporations* Chapters 1 & 2
[32] While this may be broadly true, there are obviously interconnections between the loss of legally enforceable rights to land and traditional rights that arise from the community of native title holders.
[33] (1982) 29 SASR 192.
[34] (1982) 17 NTR 31.

of life". The injuries to his legs prevented him from engaging in full tribal initiation rites and other ceremonies and caused him substantial loss of status in his tribe.

- Again, in *Weston v Woodroffe*[35] the cultural significance of the loss of a foot in a motor vehicle accident was taken into account, in particular the shame of not being able to dance in important rituals.

The case of *Milpurrurru v Indofurn*[36] involved a breach of the copyright of several well-known Aboriginal artists whose paintings had been illegally used for carpet designs. The *Copyright Act*, as well as allowing damages for conversion of the original work to another form and depreciation in the value of the copyright, also allows for additional damages, having regard to "all other relevant matters" (s.115(4)(b)(iv)). Under this heading the Court awarded damages for "culturally based harm" which was chiefly the embarrassment and contempt within the artists' own communities caused by the illegal copying. Indeed, referring to the three personal injury cases summarised above Justice von Doussa states:

> Losses resulting from tortious wrongdoing experienced by Aboriginals in their particular environments are properly to be brought to account.[37]

All four cases were referred to in the hypothetical discussion of damages in the Cubillo/Gunner Stolen Generations Case.[38] Although the Court found against the plaintiffs on the question of liability, it proceeded to cover the issue of damages. After referring to the above-mentioned cases, it accepted as an established legal proposition that "cultural loss" will sound in damages.[39]

The relevance to native title compensation is that these cases demonstrate a consistent line of authority accepting that the significance of a loss can only be fully appreciated by examining its implications within the indigenous society from which the plaintiff comes.[40]

'Native title' in relation to other legal concepts

The categorisation of native title as sui generis and the differing kinds of conceptualisations of native title within the majority judgments of *Mabo No 2* explain why there has been some continuing uncertainty about the exact legal implications of the category 'native title' in relation to other legal concepts such as 'property', 'ownership', 'interests in land', 'proprietary right', 'personal rights', 'rights in rem', 'usufructuary rights' and 'exclusive possession'.

It is beyond the scope of this paper to examine these issues systematically,[41] but some general observations can be made:

- It is widely accepted that native title rights fall within the meaning of property for the purposes of the constitutional guarantee of the 'just terms' compensation for the acquisition of property by the Commonwealth.
- The characterisation of native title determinations by the Federal Court as judgments *in rem*, tends to make redundant the question of the classification of native title as

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[35] (1985) 36 NTR 43.
[36] (1994) 130 ALR 659 [54 FCR 240].
[37] (1994) 130 ALR 659 at 692.
[38] *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000).
[39] *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000), para [1499].
[40] Also seeYoung et al (1999: 168-9).
[41] See Bartlett 2000, Chs 10-12, and Mantziaris and Martin 2000, Ch 1 and 2.

'proprietary', 'personal' or 'usufructuary'. All native title rights, once determined, no matter how limited in scope, will be rights enforceable against the whole world.

- There is a continuing judicial reluctance to use existing legal categories to encompass all the legal implications of the category 'native title'. Instead, native title's many characteristics are elaborated. These include:
  1. Native title can only be established by a recognisable native title group maintaining traditional connection with the land.
  2. Native title is 'communal' in the sense that it is both a group right and a right they can be exercised by individuals, including the protection of native title rights via individual legal action in the Australian legal system.
  3. On the view that appears to be accepted by the courts, the content of native title varies according to variation in traditional laws and customs.

These aspects are all suggestive of the need to develop new principles of native title compensation rather than reformulate existing ones designed for conventional interests in land. Native title is an ancient title compared to a freehold title which needs only to have been owned for an instant before full market value is payable upon acquisition. Native title is an ancient title the recognition of which comes to a historic and usually irreversible end upon compulsory acquisition.[42] If the content of native title is to be found in the hearts and minds and practices of the members of the native title group than so should quantifying compensation for loss of native title.

It is also highly relevant that native title can only be surrendered to or acquired by the Crown. The implications of this for compensation have not yet been adequately explored. Typically, it is acknowledged that there is no real market for native title rights but it does not lead to any positive alternative (as in Whipple 1997a and b) or it becomes a justification for giving up the project of calculating monetary compensation altogether (Lavarch and Riding 1998). Possibly the lack of exploration of this issue is because of the distracting debate about whether native title rights should be equated with freehold title. This debate misses the point about valuation of native title rights. It is not just a matter of there being no indigenous equivalent of a market for native title rights. As a matter of Australian law there can be no market in native title rights. *Mabo No. 2* made it clear that only governments can acquire native title rights. Therefore, any valuation based on a market value involves making an analogy for there is no actual market for native title rights.[43]

This legal reality also approximates a persistent and widespread understanding of traditional claims to land being based not on purchase but on such things as place of conception, place of birth, inheritance of rights to stories and ceremonies relating to specific places, knowledge and possession of sacra, participation in ceremonies etc. Even in parts of Australia where these practices have become attenuated, there is still no concept of purchasing traditional connection.

This reinforces the point made earlier in this paper that 'just terms' compensation must include economic and non-economic value.

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[42] The current amendments make sure of that: see current s.24MD of the NTA. Under the original NTA extinguishment was not automatic upon compulsory acquisition. Extinguishment occurred only if any act done in giving effect to the purpose of the acquisition extinguished native title: see the original s.23(3).

[43] See *Greita Sebea v Territory of Papua* (1941) 67 CLR 544 for an example of a court prepared to make an analogy between 'communal usufructuary occupation' and 'fee simple' for valuation purposes (discussed in Bartlett 2000: para 21.22, 21.30).

Other approaches to the conceptualisation of native title

Noel Pearson has been a consistent critic of any legal conception of native title that would authorise rights less than exclusive possession of land. In his first published commentary on the Mabo decision he stated:

> Whilst reference to the traditional laws and customs must be the correct way of ascertaining intra-group rights, surely the most convenient means of characterising native title as against the whole world (where it has not been extinguished) is to recognise it as constituting at least the equivalent of the fullest estate known to the common law, a fee simple estate. (Pearson 1993: 79)

Later he states:

> However, the retention of the notion of the 'variable nature' of native title, which has clear support in precedent, could still see courts making determinations of the nature of a particular indigenous group's title and in so doing *ranking* certain groups as having a title consisting of full beneficial ownership as understood by the common law, and others having lesser interests. Having abandoned the pitfalls of persisting in characterising certain groups 'as people to lower in the scale of social organisation to be acknowledged as possessing rights and interests in land', there is a grave danger that courts will persist in characterising certain groups as possessing particular kinds of rights in interests in land, presumably in accordance with the nature of their particular social organisation. (Pearson 1993: 81)

Indeed, Pearson's fears have proven well founded as in at least two subsequent determinations of native title, in the Croker Island case[44] and in the Alice Springs claim,[45] findings have been made that the evidence in those cases did not warrant a determination of native title rights amounting to exclusive possession.

Since then, Pearson has made two attempts at a summary statement of his preferred position (Pearson 1997 and 2000). While the latter attempt is more considered and contains reference to particular aspects of the Mabo decision, the Delgamuukw decision and the writings of Professor Kent McNeil, the full exposition of his view is still awaited. In terms of the content of native title, the later summary states:

> 4. The community of native title holders hold communal native title (as distinct from 'native title rights and interests' which may be carved out of the communal native title, or which are dependent upon, or parasitic upon, the communal title).
> 5. The communal native title is an exclusive title, held by the community of native title holders 'as against the world'.
> 6. The content of this communal native title 'as against the world' is a sui generis proprietary title arising from the fact of occupation. It is sui generis for the following reasons:
>
> 1. It is inalienable.
> 2. It is a communal title which has an internal dimension regulated by Aboriginal Law and custom.
> 3. It is subject to extinguishment by the valid exercise of Legislative and the Executive power in circumstances where other titles to land are not.

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[44] *Yarmirr and Ors v Northern Territory* (1998) 82 FCR 533. Also see the Full Federal Court appeal decision *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426.
[45] *Hayes v Northern Territory* (1999) FCA 1248 (9 September 1999).

> 7. The communal native title also has an 'internal dimension' - which allocates rights and interests according to Aboriginal Law and custom. This internal dimension is also cognisable to and enforceable under the common law as rights in interests which are carved out of the communal title. (It is the content of this internal dimension to which Brennan J. is actually referring in his of quoted passage from Mabo No 2).[46]

The other points relate to issues of proof (points 1-3) and further explanation of the relevance of evidence of Aboriginal Law and custom (point 8). But, it is the content of native title that is relevant to compensation for compulsory acquisition of native title.

Accepting for the moment that Pearson's summary statement represents a coherent theory of native title, what would be the consequences for a theory for compensation? On one view, the idea that the incidents of native title are uniform, that is they always amount to exclusive possession, could be a justification for equating the value of native title with the value of the existing exclusive tenures such as freehold or exclusive leasehold interests. But again, this does not take into account the sui generis nature of native title that is still an integral part of this formulation. Compensation would have to take account of the 'internal dimension' of communal native title and the significance of the loss could only be adequately assessed by examining the consequences of the loss of legally enforceable rights from both the perspective of the Australian legal system and the perspective of Aboriginal law and custom.

Accordingly, the analysis of compensation presented here should be applicable irrespective of what legal conceptualisation of native title is eventually confirmed by the High Court.

The relevance of international law standards

International law standards, particularly those relating to racial equality and property rights, were critical in the history of the recognition of native title in Australia. The right to own property alone as well as in association with others and the right to inherit property, implemented locally via the *Racial Discrimination Act* 1975 (Cth) (RDA), have their origins in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (see Prichard 1997, Nettheim 1998). The RDA enabled the High Court to find invalid a 1985 Queensland Act to extinguish native title in the Torres Strait and allowed the Mabo case to proceed to judgment. International law standards were influential *in Mabo No 2* as is demonstrated by this often quoted passage:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J. at p 42.

Some international law instruments may continue to have a role particularly in the interpretation of ambiguous statutory provisions in the NTA and what could be more

[46] Pearson 2000, p 4-5, footnotes omitted.

ambiguous than applying the notion of 'just terms' to sui generis native title rights. Although the NTA is not implementing an international covenant in the same way as the RDA, it could be argued that the preamble to the NTA, in mentioning particular international instruments, does show an intention for the NTA to be consistent with them. Those mentioned are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights. Even if these international instruments were not referred to they would still be relevant to resolving ambiguous provisions. As Pearce and Geddes state in *Statutory Interpretation in Australia*:

> Increasingly, the courts are also taking international agreements into consideration in the process of interpreting legislation with which those agreements have no explicit connection. It is clear that international agreements such as the International Covenant on Civil and Political Rights, which was signed by Australia in 1972 but is not part of Australian domestic law, may be taken into account to resolve ambiguities in domestic legislation. In *Chu Khen Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97 at 123, citing English authority, Brennan, Deane and Dawson JJ said:
>
> > We accept the proposition that the courts should, in a case of ambiguity, favour a construction of Commonwealth statute which accords with the obligations of Australia under an international treaty.[47]

Whether described as rights that apply to 'peoples' or 'minorities', these international instruments suggest broad standards for the treatment of indigenous people that include equality rights, property rights, cultural rights and participation rights (Nettheim 1998). A more complete survey of international human rights relating to indigenous peoples would include at least some analysis of the ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (not yet ratified by Australia) and the Draft Declaration on the Rights of Indigenous Peoples (not yet adopted by the General Assembly).[48] Here, a few points may be noted briefly.

The ILO Convention contains the most explicit provisions relevant to the key example used in this discussion paper. Although the relevant Article uses terminology associated with the forced relocation of indigenous people from traditional lands occupied by them, it is analogous to the issue of compulsory acquisition of native title rights, particularly where the land subject to native title rights is occupied by the native title holders. Article 16 states:

> 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
> 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of peoples concerned.
> 3. Whenever possible, these peoples shall have the right to return to their traditional

[47] Pearce and Geddes 2001, pp. 57-58. Also see para 5.14 on the legal assumption that legislation is presumed not to violate the rules of international law.
[48] For a comprehensive and critical overview see Prichard and Heindow-Dolman 1998.

> lands, as soon as the grounds for relocation cease to exist.
> 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
> 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

If ratified by Australia it would set a high standard of procedural rights.[49] It is doubtful that the NTA would meet this standard. It is true that section 79 goes some way towards a process for providing alternative lands of equal quality and legal status by providing for the negotiation in good faith of requests for non-monetary compensation. But it is not explicit and there is the fundamental practical problem in Australia that alternative lands are likely to be the traditional lands of other indigenous people. Another way in which the NTA procedures would fall short of the Article 16 standard is that, as of the 1998 amendments to the NTA, compulsory acquisition of native title rights now automatically involves permanent extinguishment of native title. The non-extinguishment principle (s.238), that would allow for the revival of native title "as soon as the grounds for relocation cease to exist", can only be included in voluntary arrangements under the ILUA provisions.

For the purposes of this discussion paper, though, there is little explicit guidance as to what being "fully compensated for any resulting loss or injury" would mean in a particular case. Understandably, the ILO Convention and other relevant international instruments are essentially aimed at protecting indigenous rights. The Draft Declaration aspires to an even stronger statement against relocation. The corresponding provision to Article 16 is Draft Article 10 that states:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and, where possible with the option of return.

Compulsory acquisition of land rights is essentially antithetical to the preservation of indigenous rights. This is even more apparent when one considers the centrality of the principle of self-determination in the Draft Declaration. Respected legal commentator, S. James Anaya, in his authoritative text *Indigenous Peoples in International Law* (Anaya 1996) describes self-determination as the foundational principle from which other norms flow. There would seem nothing more opposite to self-determination and the need for informed consent[50] than compulsory acquisition. But recognition of this in itself may add an important context to the judicial consideration of native title compensation in compulsory acquisition situations. It emphasises the extreme nature of the event and its manifold destructiveness.

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[49] Note: the ILO Convention fell short of indigenous aspirations in a number of key respects noted by Prichard and Heindow-Dolman 1998 at p 479.

[50] See General Recommendation XXIII of the CERD Committee.

3. Proposed principles of compensation

Criteria for evaluating proposed compensation principles

Two aspects of incommensurability need to be distinguished in native title compensation. The first has already been referred to in the introduction: monetary compensation for the severed hand, for example, based on the so-called table of maims, can never really put the victim back in the same position as before the injury. Likewise, money can never fully replace lost native title rights. The other sense, as described by Mantziaris and Martin in *Native Title Corporations*,[51] is the incommensurability of 'traditional laws and customs' and the legal system that seeks to translate them into enforceable 'native title rights and interests'.

The acknowledgement of incommensurability is a precondition for problem solving in native title. But the recognition of ultimate incommensurability does not necessarily provide answers. It is more like a context in which answers must be found. In other words, Mantziaris and Martin's use of 'incommensurability' is really about the limits of translation not about whether one translation is better than another. Mantziaris and Martin use the word "pragmatic" as a description of judicial reasoning that conceals too much by equating incommensurable systems. “Pragmatic” is used in a more positive way in this paper, as an acknowledgement that, because of the very context of incommensurability, there can be no perfect or ideal solution to the problem of the calculation of monetary compensation. One is forced to identify the purpose of the translation and look for other criteria to justify why one solution is better than another in relation to that purpose. This paper proposes two limited criteria:

- consistency with the legal conceptualisation of native title; and
- consistency with other established legal principles.

Mantziaris and Martin are also critical of the fact that the sui generis formula that allows so much discretion in translating rights from the foreign indigenous systems into our own legal system has not been used to its full potential. They say that the courts have not taken up the opportunity of describing common law rights in terms provided by the indigenous system but rather have tended towards the use of analogies from our own legal system. They seem to imply that this is a negative thing. But it could equally be argued that avoiding Indigenous terms and concepts has its advantages. For example, it limits the process of the codification of traditional laws and customs and allows for greater privacy for the internal dynamics of traditional laws and customs to evolve. Moreover, legal concepts that are readily recognised in our legal system are potentially more useful to the native title holders themselves, particularly in dealing with third parties. Again, Mantziaris and Martin give the impression that all efforts at translation are equally flawed because of the incommensurability problem. But this is not the case. Translations can be evaluated in relation to the purpose for which they are made.

If we consider the sui generis formulation of native title as a context for problem solving in native title it provides scope for creativity as well as the inevitable gravitational pull back towards existing legal categories. For the purposes of this paper, for example, the analysis of

[51] Mantziaris/Martin *Native Title Corporations*, page 3, 29-43.

the sui generis nature of native title justifies the assertion that the principles of native title compensation must be sui generis as well. That is, there can be no justification for insisting exclusively upon principles of compensation arising out of the acquisition of land. Equally, there can be no objection to adapting principles from other legal contexts if they more adequately respond to the unique nature of native title.

Consistency with existing legal principles

This criterion is suggested by the typical way the courts tend to approach novel questions: by the application and extension of established principles. In native title the identification of relevant "established principles" is not straightforward because of some continuing uncertainty about the legal conceptualisation of native title and because of its sui generis nature. Instability in the legal conceptualisation of native title can be addressed to some extent by considering separately the alternative theories as is done in Part 2. But the sui generis nature of native title means that there is an unavoidable tension between the two proposed criteria of consistency with the legal formulation of native title and consistency with existing principles.

To restate my critique of current approaches, this tension has thus far been resolved in one direction only -- the analogy with interests in land and the adoption of principles from the jurisprudence of compulsory acquisition of land. But there are vast areas of jurisprudence that should also be considered for principles relevant to native title compensation. Civil wrongs (or torts) that cause injury to persons or land is a fruitful area to consider. One of the attractions is the acceptance in this area of the law of the concept of "non-pecuniary loss" that seems to articulate better with what we know about the strong feelings Aboriginal people have for their traditional country. This is what Michael Noone says about it in the relevant part of *Laws of Australia*:

> 'non-pecuniary loss' comprehends personal loss of a non-financial nature including pain and suffering, nervous shock, interference with enjoyment of property and loss of amenities. These kinds of loss have no real monetary equivalent. The theory is that damages have the capacity to furnish solace through the provision of financial security and some roughly substitutionary enhancement of lifestyle.[52]

Just to make it absolutely clear, the argument is not that the compulsory acquisition of native title rights is a tort. In compulsory acquisition no civil wrong is being redressed. To use Michael Tilbury's phrase, the act of compulsory acquisition is "legally neutral",[53] that is it could be considered to be an unfortunate necessity in order for the government to achieve its objectives. Rather, the point is that in developing legal concepts for novel areas of the law, it is legitimate to draw on existing areas of law by way of analogy. The argument is that the analogy with some torts, especially those relating to injury to land, is appropriate. Just as in the torts of trespass, nuisance and negligent injury to property, the wrongful interference does not change the ownership of the land or property, so too the compulsory acquisition of the recognised native title rights does not essentially change the traditional laws and customs in relation to the land. Of course there is not an exact correspondence here. Exact correspondence is not necessary for this is a search for any relevant principles that may help us respond to the sui generis nature of the lost native title rights.

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[52] 1993: subtitle 33.10 Damages, para 2.
[53] M. J. Tilbury *Civil Remedies, Volume One: Principles of Civil Remedies* Butterworths. Sydney. 1990. p 35.

The idea of principles

The concept of "principles" indicates an intermediate level of generality somewhere between the general propositions about native title that are found in *Mabo No. 2* and the complexity and specificity of likely evidence in all its detail. It is also consistent with a generalising judicial methodology where a principle is a generalisable norm. It seeks a national uniformity at one level while allowing a complexity and diversity at the level of "facts".

The idea of "principles" can carry with it unwarranted assumptions about the uniformity of Indigenous people across Australia. In that respect it cuts across a debate in anthropology about the critique of notions authenticity and the role of anthropology in identifying Aboriginal culture only with remote areas. This debate was always bound to run parallel with the development of native title jurisprudence ever since Justice Brennan introduced the distinction between:
a) traditional connection legitimately changing over time; and
b) traditional connection being washed away through lack of observance of laws and customs.
The consequences of resolving this central indeterminacy is highlighted by the Yorta Yorta determination that their traditional connection has been lost and no native title rights now exist.[54] For the purposes of this paper it suggests another possible criterion for evaluating principles: their application to the variety of Aboriginal cultures within Australia. Hypothetical example No 3 in Part 5 is an attempt to address this issue.

A. The scale of compensation in native title should err on the side of generosity because the importance of rights to land for indigenous people.

An acknowledgement of the importance of land to indigenous people underlies the result in *Mabo No 2* but there are only a few explicit statements of this in the judgment. It is mostly an assumed background and unstated rationale, perhaps because the court already had before it the extensive findings of fact by Justice Moynihan of the Queensland Supreme Court. The judgment of Justices Deane and Gaudron does contain some broad generalisations that could be seen as the extent to which they were willing to take judicial notice of the significance of indigenous relations to land:

> Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognised by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common-law notions of property or possession. As was the case in other British Colonies, the claim to the land was ordinarily that of

[54] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (1998) 1606 FCA (18 December 1998); *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001) FCA 45 (8 February 2001).

> the tribe or other group, not that of an individual in his or her own right. (*Mabo v Queensland* (1992) 175 CLR 1, Deane and Gaudron JJ at pp. 99-100.)

Based on the evidence presented in the Gove Land Rights case, Justice Blackburn was prepared to make the following generalisations before turning to the specifics of the evidence:

> As I understand it, the fundamental truth about aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. This was not in dispute. It is a particular instance of the generalisations upon which I ventured before, that the physical and spiritual universe is not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole. (*Milirrpum v Nabalco Pty Ltd* 17 FLR 141, Blackburn J. at p. 167)

Justice Lee in Miriuwung Gajerrong case drew on generalisations from leading anthropologists (R. M. and C. H. Berndt *The World of the First Australians* and Ken Maddock *The Australian Aborigines -- a Portrait of Their Society*) to emphasise the religious nature of the relationship of indigenous people to their traditional country.[55]

Another classic statement from an eminent anthropologist, adopted by Justice Brennan (as he then was) in *Re Toohey; Ex parte Meneling Station,*[56] comes from Professor W E H Stanner's famous Boyer lectures, *After the Dreaming*:

> No English words are good enough to give a sense of the links between an aboriginal group and its homeland. Our word "home", warm and suggestive though it be, does not match the aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre" and much else all in one. Our word "land" is much too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The aboriginal would speak of "earth" and use the word in a richly symbolic way to mean his "shoulder" or his "side". I have seen an aboriginal embrace the earth he walked on. To put our words "home" and "land" together into "homeland" is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call "land" we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. (p. 44)

The point of these quotations is to suggest that there is widespread acknowledgement of the special significance of land to indigenous people that probably amounts to a kind of judicial notice, requiring no further proof of the fundamental contention. Thus, in a recent determination of native title, Justice Merkel commenced his judgment as follows:

> [1] The traditional relationship between Aborigines and their land has been said to be, above all, a religious relationship (*The Queen v Toohey; Ex Parte Meneling Station Proprietary Limited* (1982) 158 CLR 327 ("*Meneling Station*") at 356 per Brennan J). Professor W. E. H. Stanner, in his Boyer Lectures "After the Dreaming" (delivered in 1968 and reproduced in the book of his essays, White Man Got No Dreaming (1979) at 230), observed that no English words can adequately express the links between an Aboriginal group and their homeland. He stated that to them it is their "hearth, home, the source and locus of life, and everlastingness of spirit". As such, he suggested that it formed part of the set of constants that gave Aboriginal persons their affiliation with

[55] *Ward v Western Australia* (1998) 159 ALR 483 at p. 522-523.
[56] (1982) 44 ALR 63 at 86; (1982) 158 CLR 327 at ?.

> other Aboriginal groups, linked their whole network of relationships and provided the foundation for the complex structure of their social groups. Brennan J and Professor Stanner made their observations in respect of land Aboriginal groups called their "country" that is, their traditional lands.
>
> [2] This case is concerned with a particular part of "country", a traditional Aboriginal law ground of the Yawuru people ("the claim area").[57]

The argument made here is that the judicial acceptance of the special relationship between Aboriginal people and their traditional "country" will tend to support a higher scale of compensation than would otherwise be expected from a solely economic perspective. This conclusion is also reinforced by the general just terms argument outlined above: that in native title just terms compensation requires more than the economic value of the land.

Even if this principle is accepted as an overriding or guiding principle, there is still the difficulty of how it would be applied in particular cases and particular calculations. There may be various ways of doing this. The following sections of this paper contain one possible implementation proposal.

B. Compensation for loss of native title rights should focus on elaborating the nature of the non-economic loss.

The need for elaborating non-economic loss arises from the likelihood that it will form the bulk of the monetary compensation and there is no guidance about how it should be estimated. This is in the nature of non-economic loss. However, the modest proposal here is that by separately identifying and naming aspects of non-economic loss, further guidance will be provided, making it more likely that a "just terms" scale of compensation will be achieved.

It also seems likely that this is the way of the law will develop to impose some shape on the apparent indeterminacy by way of relevant subheadings. To some degree, this has happened in defamation damages. Leaving aside the issue of exemplary damages,[58] compensatory damages in defamation have not remained completely amorphous. There has emerged recognised subheadings such as:
-injury to reputation;
-injury to feelings and health; and
-special or actual damage.[59]

In order to anticipate such a development in native title compensation, any proposal, at this early stage, should be:

- consistent with the legal conceptualisation of native title as a unique legal category; and
- consistent with established legal principles; but also
- should not prejudge the cultural diversity between different groups of native title holders within Australia by favouring particular cultural concepts.

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[57] *Rubibi Community and another v The State of Western Australia and others* [2001] FCA 607 (29 May 2001). To similar effect, also see *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000), para [1506].
[58] Tobin and Sexton (eds) *Butterworths Australian Defamation Law and Practice* (looseleaf service), para 22,180.
[59] Tobin and Sexton (eds) *Butterworths Australian Defamation Law and Practice* (looseleaf service), para 20,030.

There is probably a fourth requirement as well: a clear conceptual difference between the proposed subheadings of non-economic loss. This needs to be demonstrated in the description of the subheadings and in identifying separate kinds of evidence that can be used to support each subheading.

Various suggestions have been made by anthropologists for identifying relevant subheadings of cultural loss that reflect indigenous and anthropological conceptualisations. For example, in the very different cultural context of the Marshall Islands, Kirsch has suggested that the loss of 'cultural property rights' can be considered under the following sub-headings:

- Loss of 'a way of knowing' or local knowledge, such as loss of canoe building knowledge resulting from loss of access to trees suitable for canoe building;
- Loss of subsistence production and consequent emergent inequalities with those who still have subsistence production possibilities; and
- Loss of place and community, in the sense of a place of belonging and a neighbourhood. (Kirsch 2001: 172-176)

Kirsch's discussion focuses on a compensation claim in the Nuclear Claims Tribunal in the Marshall Islands relating to the forced relocation of the whole population of one island due to radioactive contamination following American nuclear testing. An anthropologist involved in the same claim described it in the following terms:

> Reparations sought include claims for loss of land and all its cultural meanings, loss of a way of life that has been passed down from ancestors, loss of social interactions leading to the ongoing viability of society, loss of the basis of indigenous belief systems and loss of the right of self-determination. (Pollock 1999: 1)

It is beyond the scope of this paper to give a full account of the jurisprudence arising out of the Nuclear Claims Tribunal, although that would be an interesting study. The point is to demonstrate that there are many ways to conceptualise loss that reflect particular historical and cultural circumstances of the indigenous people concerned. The conceptual scheme outlined by Kirsch and Pollack could perhaps be applicable to the Torres Strait Islands, for example, where there appear to be some cultural similarities. But, if they were applied to a contemporary mainland desert situation, for example, it would tend to overemphasise subsistence production that may currently play only a minor part in the diet and economy of the native title group.

One way of trying to overcome the problem of regional cultural variation is to conceptualise the subheadings of non-economic loss in a way that transcends particular cultural circumstances but still allows the particularities of culture to be relevant evidence in the proof of loss. This is obviously a delicate balancing act. The following proposals take into account the likely form of evidence that would be given in support of an application for compensation and existing legal formulations from various areas of law.

The proposal is that three broad aspects of non-economic loss could be distinguished:

- the insult associated with the loss of important rights without consent;
- the disruption to cultural practices caused by the loss; and
- mental distress associated with the loss of homelands.

Each of these shall be described in further detail.

C. Non-economic loss should include a separate component of insult

The word "insult" is taken from Brown's legal definition of solatium.[60] It seems particularly apposite to the description of loss of native title rights given the typical strength of feeling associated with indigenous relations to land. It also responds to the lack of control and essential arbitrariness of compulsory acquisition. In relation to native title it is an ongoing insult. This is because the rights and obligations under traditional laws and customs do not cease because of the loss of native title rights. The only thing that ceases is the recognition of those rights and obligations in Australian law.

This principle draws loosely on the ideas of trespass and loss of expectations of life, reformulated for the native title context. An alternative formulation may be: the loss of enjoyment of the exercise of some control over the area subject to the procedural rights provided by the NTA. The Right to Negotiate, for example, while not providing a veto over mining, gives the native title holders the means to have a substantial influence over mineral exploration and mining.

It could be thought that "insult" overlaps too much with "mental distress". But what is proposed is that "insult" should include only the affront to the native title holders in their capacity as the holders of distinct rights to land. The evidence supporting "insult" would simply be the formal determination of native title rights and the fact of compulsory acquisition. The affront to a person's home can be assumed because, by definition, native title rights relate to the "homeland" of the native title holders.

More particular concerns could be covered under the heading "mental distress".

D. Non-economic loss should include a separate component of disruption to social and cultural practices

This is intended to encompass all kinds of physical inconvenience caused by the loss of the native title rights and to cover cultural practices that can no longer take place or become more difficult to do.

Physical inconvenience would include practical annoyance, inconvenience and discomfort (sometimes called vexation) caused by the loss of the rights to the land, for example having to find alternative access routes around the acquired area. Cultural practices could include such things as hunting, collecting raw materials for the production of artifacts and for use in ceremonies, visiting important sites, instructing the younger generation about the country and about sites, and so on.

As mentioned elsewhere in the paper, the actual disruption to cultural practices will vary. In some cases stories, songs, ceremonies, paintings about a particular place may continue notwithstanding that physical access is no longer possible. In other cases the disruption may be more extensive, for example if the ceremony is required to be held on a particular part of

[60] Brown 1996, para 3.35.

the country that is no longer accessible, or if the retouching of rock paintings can no longer take place, or sacred objects have to be relocated.

This category of native title compensation would lend itself to more straightforward, objective evidence about the previous uses of the land that would no longer be possible.

It could be compared to loss of amenities of life in personal injuries and inconvenience in relation to injury to property particularly when it is a home.[61]

The concept of 'social disruption' has an analogous meaning and has been adopted in the context of compensation for disruption caused by mining and exploration in Western Australia.[62]

E. Non-economic loss should include a separate component of mental distress

In calculating non-economic loss related to injury to property in tort law, inconvenience and mental distress are included under the one head of damage. But in native title there are good reasons for identifying mental distress separately:

- as mentioned elsewhere in this paper, there are ongoing responsibilities under traditional laws customs, the most important of which may be responsibilities relating to the preservation of sacred sites;
- typically these responsibilities would include teaching a younger generation about the area. Depending upon the degree of interference to access resulting from the compulsory acquisition, the practice of educating a younger generation about the sides could be totally disrupted;
- changes in the use of the land following compulsory acquisition raise ongoing concern and apprehensions;
- the loss of the rights to land could also mean a reduction of the status of the native title holders within Indigenous society. For example there would be the loss of an ability to assert ownership through presence on the land.

It is not envisaged that to achieve compensation under this heading, nervous shock, including the attendant requirement for expert medical evidence, would have to be established. The evidence would be taken from a selection of senior native title holders. It would cover the reasons for any feelings of distress and apprehension. This kind of evidence would raise questions about whether any imagined scenarios are a real possibility or merely fanciful.

F. Compensation for loss of native title rights should include economic loss[63]

It might be thought that the necessary implication of the critique of the use of market value is the complete abandonment of it as a relevant principle in the calculation of native title compensation. But the argument pursued in this paper, is that it has a place, just not a central

[61] See cases referred to in "D. Compensation for mental distress".
[62] See *Mining Act* 1978 (WA) s.123(4)(f).
[63] The term "economic loss" is used in this paper to indicate a loss that can be calculated with a reasonable degree of certainty, that is in the same sense as "special damages" and "pecuniary loss". It is not meant in the sense of "pure economic loss" in tort law: see for example Mason "The Recovery and Calculation of Economic Loss" in Mullany (Ed) *Torts in the Nineties* LBC Information Services, Sydney, 1997.

place. Indeed, one cannot completely disentangle the native title holders from our contemporary society. Although native title has its origins in the ancient traditions of indigenous people, native title holders have only limited opportunities to completely disengage from the contemporary economy. Not to include the economic value of the native title rights to the broader society would probably not meet the minimum requirements of just terms compensation. The economic loss will be a type of "special damage" because it will be the only element of native title compensation that can be ascertained with some degree of precision.

In assessing the economic value of the native title rights a two-step process, implicit in some of the suggestions coming from professional land valuers, is involved:
1. Choose an analogy with an existing land tenure that best matches the nature of the native title rights in the particular case.

> For example, for the purposes of this limited exercise, exclusive native title rights like the determination in *Mabo No. 2* could be equated with freehold and non-exclusive native title access and hunting rights could be equated with easements, non-exclusive licenses, or *profits à prendre*.

2. Adopt the economic value derived from the market for such tenures.

> Market value is typically calculated in relation to the highest or best use of the land. This is relatively straightforward where the land is in a region with an established economic land use such as grazing or crop growing. But the remoteness of much native title land means that there may not be any apparent use for the land and that there will be consequent difficulties of establishing economic value. This is something that land valuers will have to grapple with.[64]

This approach is consistent with one of the few relevant precedents in the whole area of compensation for compulsory acquisition of customary land title: *Greita Sebea v Territory of Papua* (1941) 67 CLR 544. As Bartlett observes, that case is authority for the proposition that a restriction on alienation should not have a detrimental effect on the determination of the value of the land. The kind of customary title in the case was described as ' communal usufructuary occupation' and for valuation purposes was equated with fee simple (see Bartlett 2000: para 21.22, 21.30).

Other aspects of economic loss could relate to the contribution of the resources of the land to diet, raw materials for artifacts and heating (e.g. firewood). It may be difficult to quantify this loss, particularly if there are alternative sources available. There is also the issue of future economic loss, the full discussion of which is beyond the scope of this paper.

The inclusion of economic loss as an essential part of just terms compensation would lead to differing proportions of economic and non-economic loss in the total compensation amount: see figure 3. This is suggestive of the need for another adjustment upwards to be made in the final calculation of non-economic loss in cases where economic loss is very low.

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[64] Of necessity, this oversimplifies the task of the professional valuer. The full range of methodologies and their use for valuing different kinds of land is set out in Rost and Collins *Land Valuation and Compensation in Australia* (Rost and Collins 1984). For the legal perspective see Brown *Land Acquisition* chapter 4, Fricke *Compulsory Acquisition of Land in Australia* chapter 10, and Jacobs *The Law of Resumption and Compensation in Australia* chapters 13-28.

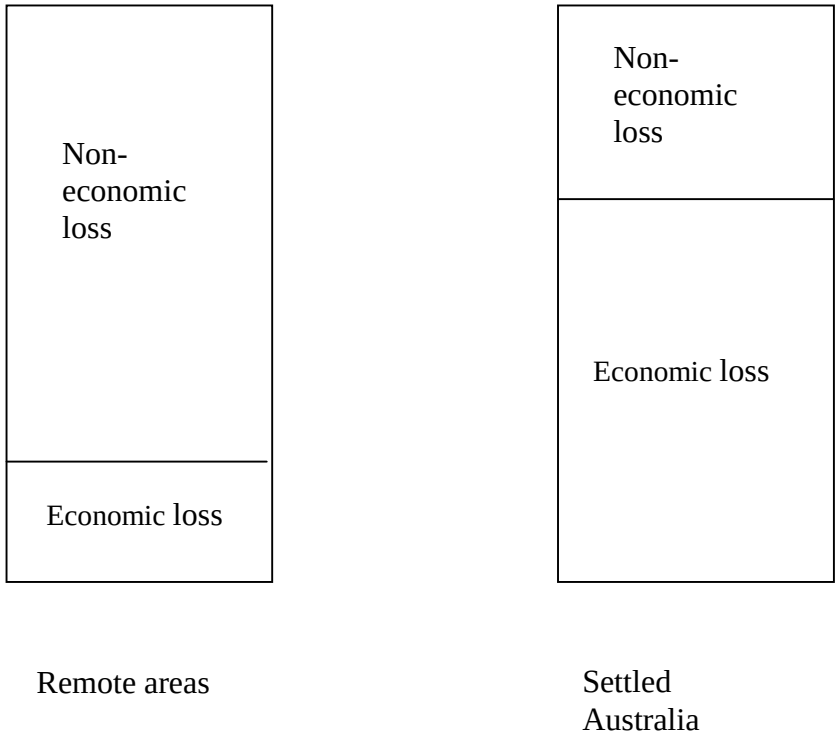

Figure 3: Relative proportions of non-economic loss in 'settled' and remote Australia.

But it seems unlikely that the high economic values associated with highly productive agricultural land and urban centres will arise often in native title compensation. This is because the tenures in these areas will typically have extinguished native title completely. Similarly, the general observation could be made that the areas of the highest economic value are also the areas where indigenous relations to land have been most devastated, making it difficult to prove the continuing traditional connection that is required for a native title claim to succeed. Of course, there will be exceptions to both these general observations. The Alice Springs native title claim[65] and the Broome native title claim[66] could be seen as exceptional. The claimants in those claims managed to prove strong traditional connection very close to relatively large regional centres.

Evaluation of principles

At the beginning of this part of the paper, two criteria were suggested as critical in evaluating the likely applicability of native title compensation principles developed in advance of any judicial determination: consistency with the legal conceptualization of native title and other

[65] *Hayes v Northern Territory* [1999] FCA 1248 (9 September 1999)
[66] *Rubibi Community & Anor v The State of Western Australia & Ors* (2001) FCA (29 May 2001).

legal principles. The principle of erring on the side of generosity, is formulated at a fairly general, overriding level. It is particularly aimed at the calculation of non-economic compensation. Although well supported by legal authority, it tends to beg the question of what is a reasonable range of compensation figures in the first place. This issue will be taken up in the next part of the paper.

The three proposed subheadings of non-economic loss (insult, disturbance to social and cultural practices, mental distress) respond to the sui generis nature of native title and also to the realisation that the economic value alone will not be sufficient to meet the requirements of just terms in most cases. All the proposed principles draw on existing legal principles in some way as demonstrated in Figure 4. In this sense, they could be seen to be consistent with existing legal categories, even though there is an obvious tension between the sui generis nature of native title and the use of existing principles that can never adequately be applied in a direct and unmodified way to native title.

Several features of native title have not been address so far. The most important of these is the 'communal' nature of native title, that is, its dual nature as both an individual and a group right. This and other issues will be addressed in the next part of the paper on calculation issues as the question of how to compensate the diverse members of the native title group arises naturally there.

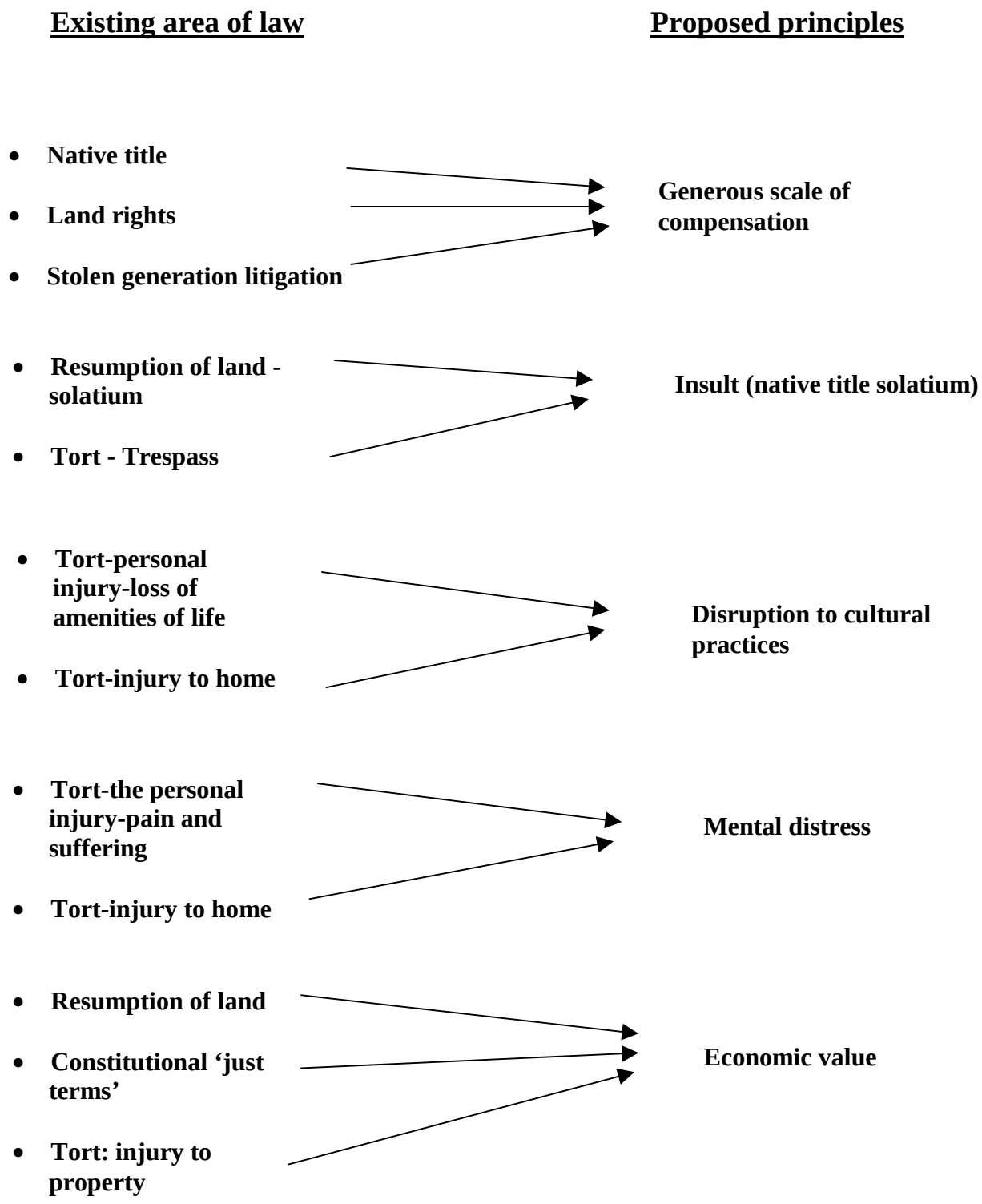

Figure 4: Summary of the relationship between existing legal principles and the proposed principles for native title compensation.

4. Evidence and approaches to calculation

The discussion of economic loss and the subheadings of non-economic loss may unrealistically assume a straightforward method of calculation – the addition of amounts allocated to each of the subheadings (leaving aside for the moment the technical issues of the calculation of interest on the amount awarded, and taxation issues). This is the kind of calculation that typically takes place in personal injuries and compulsory acquisition judgments. But it has submerged some of the evidential and calculation issues that are peculiar to native title. The intention of this part of the discussion paper is to raise some of those issues to the surface for examination.

As outlined in the discussion of the appropriate scale of compensation, there has been a high level of judicial recognition of the special relationship of Australia's indigenous people to land. Translating the special relationship into dollar amounts presents an extremely difficult problem for the courts. The modest suggestions here include:

- A proposal for a scale of compensation to be used as a starting point;
- The need for an adjustment to reflect the communal nature of the rights; and
- A calculation method that responds to the longer term loss to the current younger generation within the native title group.

The problem of the appropriate scale of compensation

A lower limit

In establishing what may be a lower limit in the appropriate range of dollar amounts to be allocated to non-economic loss in native title two comparisons suggest themselves.

The first comparison is to statutory schemes for calculating solatium in the case of the compulsory acquisition of a home by reference to the economic value of the home. In native title this would mean using the value of economic loss of the native title rights, calculated by reference to the market value of analogous interests in land, as the basis for the allocation of amounts to the sub-headings of non-economic loss. It could be a proportion of the economic value or a multiple of the economic value. The main attraction of this approach is that, although such calculations rely on drawing analogies to non-indigenous titles, it would make maximum use of the expertise of professional valuers to provide a relatively objective, ascertainable amount. The obvious problem, as discussed in relation to just terms, is that for remote areas the market value is likely to be very low and in no way reflect the scale of non-economic loss. There would be a tendency for an initial low base figure to have a severe constraining effect on the calculation of non-economic loss.

In theory, adjustments could be made to off-set low market value, for example, by making the non-economic compensation in low market value areas a multiple of the economic

compensation. But the huge variation in market values means that equitable adjustments would be practically impossible to make. In remote areas beyond agricultural and pastoral use, should the value of non-economic compensation be 10 times or 100 times the very low economic compensation?

A second comparison would be with the average scale of non-economic compensation for injury to property in tort law. The justification for this has already been mentioned, that is the analogy of loss of home with loss of homeland and the analogy between the ongoing ownership in property related torts and the continuing obligations under traditional laws customs in native title.

Some of the cases include the following:

- *Gabolinsky v Hamilton City Corporation* (1975) 1 NZLR 150 -- house fractures caused by the negligence of the city Corporation allowing houses to be built upon disused gravel pit: $3,615 for repairs and $500 before "inconvenience and worry".

- *Rowlands v Collow* (1992) 1 NZLR 178 -- negligence of an engineer in designing a driveway that did not successfully provide access to a steep property. Damages of $75,000 included $41,000 for repairs, $16,000 for consultants and $18,000 for "distress, anxiety inconvenience, etc".

- *Campbelltown City Council v Mackay* (1998) 15 NSWLR 501 -- substantial damages for inconvenience and vexation when a home subsided and eventually was rendered uninhabitable because of the negligence of planning authorities.[67]

If one were to apply these cases mechanically to non-economic loss in native title compensation, they are suggestive of a lower limit in the tens of thousands of dollars. These figures have the advantage of not being tied to economic value, but they do have their problems. They do not reflect the judicially recognized special relationship of indigenous people to land and they relate to compensation for one or two individuals, not many individuals as is likely to be the case in native title groups. Moreover, restoring people in these situations to their original positions, either by repairs or providing funds for purchasing a similar house in a similar location, is relatively achievable. But alternative native title rights cannot be purchased. Accordingly, such figures could be seen as an absolute minimum and would only be useful in the native title context if there were an adjustment from what is essentially an individual scale of compensation to a group scale of compensation. This issue will be dealt with below under the heading “Individual evidence and group rights”.

An upper limit

Another way to arrive at an appropriate scale of compensation is to consider what the courts would regard as an excessive amount of compensation. Of course, there is no guidance directly from native title jurisprudence, but it is instructive to consider how this issue is dealt with in relation to defamation damages.

[67] Note: it is not possible to ascertain from the report of the case the proportion of the total compensation allocated for inconvenience and vexation.

The leading Australian case on what are excessive damages in defamation, justifying intervention by an appellate court, is *Carson v John Fairfax & Sons Ltd*[68] (*Carson*). There is a rich social, political and legal context to this case that can only be touched upon here because the main purpose in examining this case is to extract the main ideas for characterising damages awards as excessive. Whether these ideas could be used as a potential guide to establishing an upper limit in native title compensation will then be examined.

Briefly, the jury in two related New South Wales defamation trials awarded $200,000 and $400,000 for two articles published in the Sydney Morning Herald imputing that a lawyer, the plaintiff, had misused legal processes in various ways. These were record amounts for a defamation that did not seem as serious as other cases of defamation and the amounts were much more in total than was being awarded for pain and suffering and loss of amenities of life in the most serious personal injury cases at the time. Overcoming a well entrenched reluctance to interfere with a jury verdict, a majority of the NSW Court of Appeal and a majority of the High Court found that the award of damages should be overruled and that the issue of damages be retried with more specific instructions being given to the jury. Essentially, two kinds of instruction, that would tend to guide a jury against excessive awards, were authorised:

1. Comparison with general damages in serious personal injury cases; and
2. Analysis of the income producing value of the award.

The most succinct expression of the principle underlying the first instruction is as follows: 'I do not believe that the law today is more jealous of a man's reputation than his life and limb.'.[69] In other words, the general damages in defamation (for hurt feelings, loss of reputation) should be less than the general damages (pain and suffering/loss of amenities of life) for serious personal injury. The majority in *Carson* expresses this as a need for a "rational relationship" between the two and that general damages in serious personal injury cases "transcends" injury to reputation.[70] They demonstrated the excessive nature of the $200,000 + $400,000 award of damages by comparison with what was considered an excessive award of general damages in a case of negligent hospital care causing the total blindness of a plaintiff ($250,000) and general damages awarded in two contemporary cases of the most serious kinds of negligence causing quadriplegia in a young person ($275,000, $250,000).[71]

To be clear, it is not proposed that the idea of comparison with general damages in serious personal injury cases can be transferred directly to establishing an upper limit for non-economic aspects of native title compensation. But the comparison is suggestive of the high level of generality at which decisive comparisons are likely to be made in native title. There may be a general assessment of whether the law should be more jealous of the permanent loss of traditional rights to land as opposed to pain and suffering in serious personal injury cases. As is obvious when stated in this way, the comparison is not so easily made with native title as it is between defamation and personal injury. There is no easy aphorism to apply. Again, there is the difficulty of comparing individual rights and group rights. Generally speaking, the courts will treat the loss of rights to land as less important than a serious and debilitating

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[68] (1993) 178 CLR 44.

[69] Lord Justice Diplock in *McCarey v Associated Newspapers Ltd* [No 2] (1965) 2 QB 86, at p 109, referred to in *Andrews v John Fairfax & Sons Ltd* (1980) 2 NSW LR 225, at p 245, which in turn was quoted in the majority judgment in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at p. 58.

[70] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at p. 64 and p. 58-59.

[71] See the cases referred to in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at p. 63.

physical injury. Whether this will apply with the same force to native title is difficult to say. From the indigenous perspective, it may be more difficult to decide which is the greater tragedy.

The second kind of analysis that appellate courts undertake to assess whether an award of damages is excessive is to look at the income producing potential of the amount awarded. For example, in *Carson* the $200,000 + $400,000 was analysed in terms of the approximate annual income that would be produced if the total amount were invested in relatively low-risk investments.[72] Similar calculations are, no doubt, undertaken on a regular basis by self-funded retirees. Using the alternative figures of a 11% or a 15% return on investment produced a yearly income of $74,300 or $111,540 respectively. Taking out about half of the amount as a generous estimate of the likely amount of tax payable results in an annual income of $37,150 or $55,770. The one judge in the majority on the NSW Court of Appeal who did this analysis considered these amounts would provide the plaintiff a reasonable income for life. In his view, it went well beyond compensation, into the realm of exemplary damages associated with punishment of the defendant and general deterrence. Express colloquially, the principle to be extracted is that defamation damages are not intended to set a person up for life.

On reflection, this analysis assumes some absolute standard for what is a reasonable or good income. Indeed, statistical figures for average weekly earnings and average household expenditure may be available to a Court if it wished to make a more exact analysis. Intuitively, we may feel that there is something fundamentally inappropriate in assimilating the native title holders into the world of “average weekly earnings” and “self-funded retirees” given actual poor social and economic circumstances of Indigenous people. But the point is that only a broad brush assessment of reasonableness was undertaken by the appellate court.

This second mechanism provides greater potential for application to native title compensation because it is not reliant on historically awarded compensation in another area of law, it relates to seemingly objective average living expenses and income however inappropriate that may be. Again, there can be no direct application to native title because of the group nature of native title rights. In theory, an excessive amount of native title compensation could be defined as an amount, if invested, would deliver an ongoing reasonable income for all of the family groups in the native title compensation claim. The term "in theory" is used because it is not absolutely certain that such amounts would be excessive in all cases. In hypothetical example No 1 outlined below, for the subgroup whose loss of native title rights is total and who have no other traditional country or any other valuable assets, maybe such amount would not appear to be excessive.

Individual evidence and group rights

It is apparent from the preceding section that if the scale of compensation for non-economic loss in native title compensation is to be based on the scale of loss for individuals in analogous torts there is a need for an "uplift factor" or "native title adjustment" that reflects the communal nature of the title and in particular the number of individuals directly affected by the loss. This raises three issues:

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[72] *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at p. 59.

-how to identify the individuals affected;
-the level of evidence required of each individual's loss; and
-the scale of the adjustment to be made.

The degree of difficulty in identifying the individual native title group members affected by a particular compulsory acquisition of native title rights will depend upon the scale of the acquisition, the description of the native title group in the formal determination of native title rights and the complexity of the traditional connections to the area in question. There is a detailed example outlined in the next part of this discussion paper. Generally speaking, there would be little problem with a relatively small area, particularly if the native title group members had been identified in the determination. At the other end of the scale would be a broad acre determination like the Miriuwung Gajerrong determination[73] that also identifies the native title group at the most general level. In such cases, the compulsory acquisition of a part of the total area of the determination would require evidence to be adduced from those native title group members with recognised traditional authority about the various subgroups and individuals that would be affected by the acquisition. Thus, evidence in the compensation claim would not only have to cover kinds of loss but the nature and extent of the affected group.[74]

The second issue of the level of evidence required can be thrown into relief by comparison with representative proceedings (also known as class actions).[75] Generally speaking, in representative proceedings numerous individual issues of liability are consolidated, but each individual still has to prove the quantum of damages claimed in their particular case. Applying this sort of analogy strictly to native title would mean that no native title holder would be entitled to a share of the compensation unless he or she gave evidence of their particular loss. In suggesting that this will probably not be required, I am relying to some extent on the practice that has developed in the hearing of native title claims and previously in the hearing of land claims under the *Aboriginal Land Rights (Northern Territory) Act* 1976 in which only the most senior and knowledgeable native title holders/traditional owners give evidence (even though this may be in a group situation). The reasons for this relate to the dynamics of traditional authority in Indigenous societies where authority to speak for traditional country is highly circumscribed. But it is also a question of convenience and efficiency. The question of whether other members of the group share the beliefs of the main witnesses is usually demonstrated in indirect ways such as through their presence during the giving of evidence, proof of genealogical connection, involvement in group ceremonies and site visits and the evidence of expert witnesses. The assumption made in this compensation proposal is that, similarly, the evidence of loss of the few will count for evidence of loss of the group. On the other hand, if the evidence of these key witnesses is challenged there will be pressure on applicants to produce more and more witnesses.

In relation to the scale of the adjustment required to move from an assessment of an individual's compensation to group compensation, the simplest case is a good starting point. This would be a situation where there are a small number of native title group members, say

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[73] *Ward v Western Australia* (1998) 159 ALR 483.

[74] There may be a legal issue here of the proper identification of the native title rights by the acquiring authority. It is assumed that it will be sufficient for the acquiring authority to describe the area and referred to all native title rights that relate to the area. But there may be a question of whether this sufficiently identifies the rights to be acquired.

[75] See Part IVA Representative Proceedings of the *Federal Court of Australia Act* 1976; Australian Law Reform Commission *Grouped Proceedings in the Federal Court* Report No. 46 (1988).

10 adults, who all have equal traditional rights to the area in question and who are all equally affected by the acquisition, that is they will all lose their homeland. In this case, adjusting from individual compensation to group compensation would be a matter of multiplying the original figure by 10.

Of course, compulsory acquisition of native title rights is unlikely to be that simple. There will be adults and children, senior ceremonial leaders and others with less knowledge of traditions, subgroups that have lost the most important country to them, others who may have lost a lesser interest. Much will depend upon the actual complexity of the traditional relations to land involved and the degree to which these complexities can be simplified in the presentation of the compensation claim. But once any of these variations are factored into the calculation of the individual to group adjustment, the calculation could become quite complex. For example, if different degrees of importance of traditional relations to land are recognised, the differences could be reflected by providing those with a lesser interest a proportion only of the compensation applied to those with the highest traditional interest. Thus a group with conditional hunting rights because of the co-residence or shared ceremony, might be apportioned 20% (or some such figure) of the compensation of the group with the full traditional rights. Further adjustments would have to be made reflecting the number of individuals in each group.

The alternative would be to leave the scale of adjustment to the discretion of the Court after taking into account the different kinds of traditional connections to the area and the number of individual native title group members in each category or subgroup. This approach has the advantage of avoiding the invidious attribution of relative values to the different kinds of traditional pathways to native title group membership. For example, the process could be that after reviewing the evidence of the most affected individuals with the highest traditional connection, the court would arrive at a figure for individual compensation of *x*. Then the judge would take into account that there are, for example, 50 adult people in the same group who would be similarly affected, that there was another group of say 100 adults with the secondary rights, and further group of 200 adults with highly qualified traditional rights, the appropriate adjustment would be 100*x* (or 50*x* or 20*x* etc depending on the assessment of the particular judge)

Compensation for the younger generation

It is possible to imagine that in some unusual circumstances the native title group would be composed entirely of the most senior native title holders. But the more usual case is that the native title group is likely to be made up of family groups of adults and children covering the full range of ages, but mostly of younger people. In the normal course of things the younger generation would be the object of instruction in traditional ways by the older generation, in some cases moving through the stages of formal initiation into the ceremonial life of the group and eventually becoming the elders of the group. The degree to which this is happening will depend upon the evidence adduced in each case.

Although the younger generation may well not be the key providers of evidence about the extent of the loss resulting from the acquisition of native title rights, it is arguable that their loss is even more profound than the loss suffered by the current elders who have had at least some access to their traditional country. The younger generation, and in particular children, may never be able to know their traditional country in the same way if, for example, future

access is not possible. Thus there is a question of whether compensation will adequately cover their loss. This section suggests that there is a way of addressing this issue.

What is proposed is that the last step in assessing compensation for native title is to add an additional amount that would, if invested in low-risk investments, reproduce the original amount of compensation for the children in the native title group when they become the senior generation. What is a typical length of time for this process for each group of native title holders will already be a matter of evidence in genealogies. It is usually between 25 and 30 years. Because of the vagaries of future interest rates and inflation, the calculation of this amount could only be a broad approximation of a suitable amount based on the best available information. The fact that it can be calculated, even in an approximate way, may be its best recommendation in an otherwise nebulous area.

This amount could not be calculated in an exact way as one needs to make a prediction of the likely returns on low-risk investment over a 25 year period, adjust that for the likely rate of inflation over the same period and for the amount that is likely to be lost in tax. Combining all these elements is fairly speculative. Expert evidence could be obtained about the previous 25 years and pragmatic assumptions could be made about continuity over the next 25 years.

Despite the difficulties, the attempt should be made because the principle is right. In the hypothetical examples that follow the calculation has been simplified to a compound interest formula. This formula may still be of some use in giving some general guidance provided that, in selecting the likely rate of return, judges err on the side of generosity so that the real value for the children in the native title group is not completely obliterated by inflation and taxation.

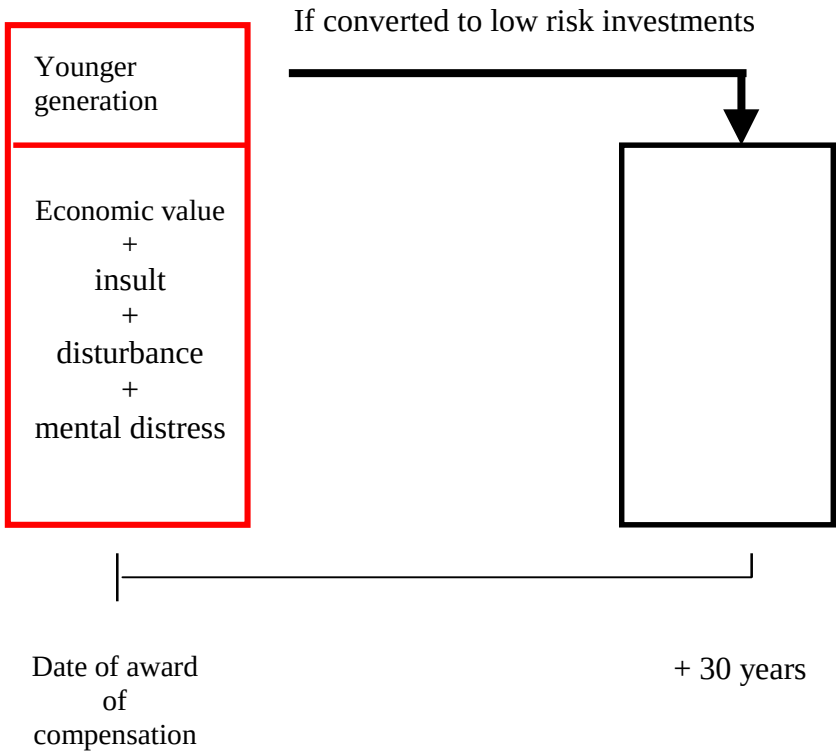

Figure 5: Compensation for the younger generation in the native title group.

The courts may accept some additional amount for the younger generation of the native title group, particularly as only a modest amount would be required to notionally reproduce the original figure after a relatively long period of time. This is basically because of the benefits of compounding interest. However, the courts would probably be reluctant to make a specific direction to invest the amount. For there is a well entrenched policy in civil remedies for finality in an order for damages.[76] The same principle will probably apply to native title compensation. It would probably remain only a moral obligation on the native title group as a whole. This discussion highlights the need to return to the question of a legislative response rather than a judicial one. For given the widespread poverty of native title holders, this arrangement would set up great pressures to distribute the compensation immediately.

Conclusions about calculating non-economic loss.

This section has been concerned with the pragmatics of applying dollar amounts to the difficult question of non-economic loss in native title compensation. While there are some analogies that can be drawn with injuries to homes, the key problem is that the scale of compensation in such analogies relates to individuals rather than groups. If the home /homeland analogy is to be used, even as a starting point, there has to be an adjustment from the individual to the group situation. The proposal for doing this is to initially concentrate on calculating a figure for the most seriously affected individual and then to make an adjustment to that figure to take account of the whole native title group. The final figure would be a multiple of the figure the most affected individual, but it would not be as simple multiplication by the total number of native title group members. Allowance would have to be made for diversity within the native title group, for example the number of individuals to have a similar interest to the individual most affected and those that have other lesser interests and the number of those with lesser interests.

This section now completes the exploration of possible native title compensation principles to be evaluated in terms of consistency with the legal conceptualisation of native title and with other areas of law. It was essential that the 'communal' nature of native title be reflected in any proposed principles. This has been achieved at the level of calculation in two ways: by suggesting an individual to group adjustment and by proposing a modest additional amount for the younger generation of native title group members.

The next step in the analysis of the principles will be to use them in relation to a variety of hypothetical examples. This should determine whether the proposed principles are capable of application, that is whether they would be judicially manageable. It should also reveal any further underlying problems.

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[76] See M. J. Tilbury *Civil Remedies, Volume One: Principles of Civil Remedies* Butterworths. Sydney. 1990. p 43, para [3016].

5. Testing the proposed principles against likely evidence of loss

Imagining the likely evidence of the native title holders is difficult and this is possibly the explanation of the current focus among commentators on other aspects of the problems such as describing the legal framework in which compensation decisions will be made and searching for analogies with interests in land. Even though all cross-cultural communication is difficult, it is not impossible. Extrapolations can be made from the evidence given in hearings under the *Aboriginal Land Rights (Northern Territory) Act* 1976 and native title hearings and from the anthropological literature. These sources are not the limit of knowledge because there is always room for improving the kind of questions asked of indigenous witnesses and informants that may lead to an understanding of new dimensions of native title. The fictional examples given below of possible indigenous evidence is presented in a tentative way that is subject to further comment and refinement.

The benefits of attempting an informed, imaginative approach to likely evidence is that it can test the consequences of adopting certain principles and can assist the assessment of whether they will "work" for judges, but also in the limited sense of whether there will be evidence to support them.

Analysing the interaction between possible principles and evidence can be seen as a two-way process whereby we also examine factual situations in detail to see what relevant principles might emerge from them -- in this way hoping to anticipate the case-by-case development of the common law.

Hypothetical Example No 1: large-scale, maximum disturbance.

The X people have a native title determination over a large, semi-desert area in remote northern Australia that has always been vacant Crown land. As part of a general relocation of the defence forces to northern Australia, the army requires a substantial part of the determination area, about the size of an average pastoral lease in the region, for a live ammunition military training area and bombing range. Because of the nature of the intended activities and the possibility of unexploded bombs, no future access will be allowed indigenous people once the training area commences operation. Initial negotiations by the native title representative body for an Indigenous Land Use Agreement have broken down.[77]

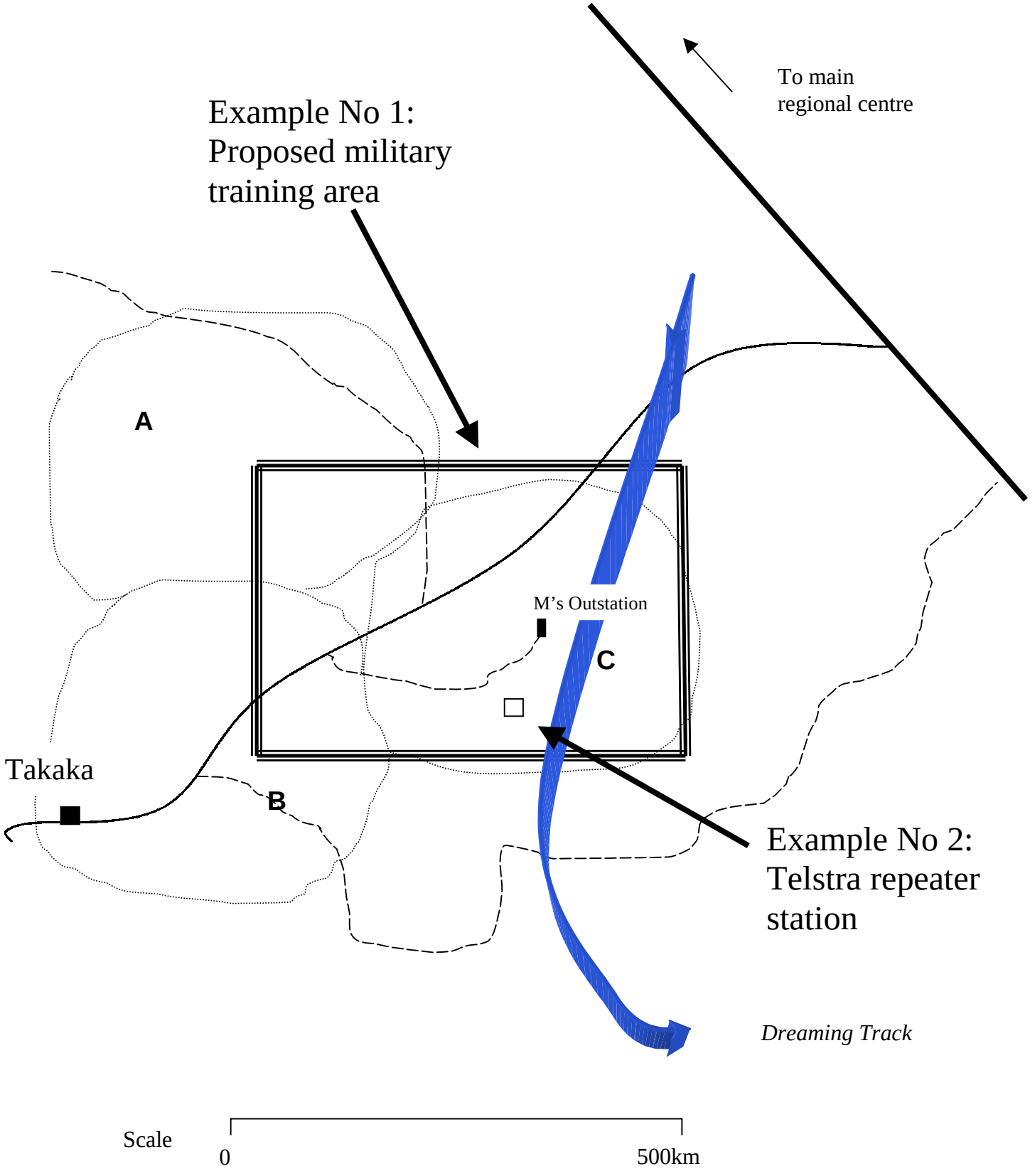
The Commonwealth acquired all the native title rights in the area under the *Land Acquisition Act* 1989 (Cth) and by virtue of s.24MD of the NTA. Now the native title holders through the representative body dispute the amount of compensation being offered. For the sake of

[77] Unlike judicially determined compensation an ILUA could have contained such matters as:
-the exclusion of certain areas following a sacred site clearance procedure to be funded by the government;
-non-extinguishment;
-substantial upfront payments to the native title group;
-a preference for Aboriginal businesses in tendering for any works associated with the training area;
-a few educational scholarships for native title group members; and
-a yearly payment in the nature of rent to the native title group, indexed for the life of the training facility.

simplicity we will assume that the native title holders make a claim for compensation under the NTA in the Federal Court.[78]

[78] This assumption glosses over some important technical questions that in practice would have to be addressed. The first of these is whether a native title compensation claim could be made under the Land Acquisition Act 1989 (Cth) instead of the NTA. If there is a choice between the two Acts, a careful analysis would have to be made of whether there is any particular advantage in making the claim under one Act or the other. For example, the question of costs seems to be handled quite differently. The general rule in the NTA is that each party bears their own costs, although it is open to the Federal Court to order otherwise (see s.85A). Whereas under the Land Acquisition Act the statement of general compensation principles in section 55 indicates that legal and professional costs reasonably incurred would be included in the total amount of compensation.

Figure 6: Sketch plan of hypothetical example Nos 1, and 2.



At the hearing of the native title claim five years ago the presiding judge had been impressed by the evidence of traditional connection. This included:

- accounts of various dreaming ancestors creating the features of the landscape
- named sacred sites that are the physical transformation of the dreaming ancestors themselves and accounts of some sites that are considered dangerous because of the power of the dreaming ancestors is still there;
- women's and men's ceremonies associated with different dreaming sites;
- the continuation of initiation ceremonies;
- the continuation to a large degree of traditional marriage rules, avoidance rules and taboos;
- the severe consequences of revealing sacred/sacred parts of stories and ceremonies;
- particular kin groupings having a special relationship with tracts of the claim area by virtue of their inheritance of the sacred stories, songs, ceremonies and sacred objects associated with it and by exercising control over that area (for the purposes of the claim called "estate groups");
- accounts of inheritance of rights through the claimants fathers and being taught about the country by fathers and grandfathers;
- repeated assertions of ownership and the right to be asked about developments such as mineral exploration and tourism;
- examples of seeking permission to use another estate group's area; and
- extensive accounts of hunting and gathering of bush foods at particular locations on the claim area.

The determination of native title of the X people was made in the following terms that made it clear that the native title rights amounted to exclusive possession of the area.[79]

At the hearing there was a difference of opinion about how to describe the group which should be named as the holder of the communal native title rights: whether it should be the smaller estate groups or the overarching group described in relation to the language "X". Ultimately the judge opted for the overarching name and was influenced by the fact that the more fine-grained identification of particular native title holders for particular purposes seem

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[79] For example, the determination could have been in the following terms:
1. Native title exists in the determination area.
2. The native title existing in the determination area is held by the X people.
3. The nature and extent of the native title rights and interests in the determination area are an entitlement as against the whole world to possession, occupation, use and enjoyment of the determination area. This includes:
(a) the right to make decisions about the use and enjoyment of the determination area;
(b) the right of access to the determination area;
(c) the right to control the access of others to the determination area;
(d) the right to use and enjoy of the traditional resources of the determination area;
(e) the right to maintain and protect places of importance under traditional laws and customs and practices in the determination area.
4. Other interests in the determination area include various non-exclusive leases and licences and permits granted under the various Commonwealth and State laws.
5. To the extent that any inconsistency exists between the native title rights and interests described in paragraph 3 and the other interests described in paragraph 4, the native title rights and interests must yield to the other rights and interests.
6. In relation to those parts of the determination area not covered by a non-exclusive agricultural lease or non-exclusive pastoral lease, the native title rights and interests confer possession, occupation, use and enjoyment of that the land to the exclusion of all others.

to be the job of prescribed body corporate. After much dispute and delay the ABC Aboriginal Corporation was ultimately nominated as the agent PBC.[80]

The area required by the army although large, covers only part of the determination area. It directly affects of three estate groups A, B and C. While the training area covers some of the traditional estate of A and B, it covers of the entire area associated with the C estate (see attached sketch map). The evidence at the hearing revealed that the so-called "estates" did not necessarily represent exclusive areas. From the perspective of individual native title holder, a number of possible cross-cutting claims to country were accepted as legitimate. These could be based on association with place of conception, place of birth, the place of death of parents and grandparents, long-term residence, and participation in and knowledge of particular ceremonies associated with particular areas. Notwithstanding these cross cutting individual rights, the C group and in particular, the brother and sister M and N are acknowledged as the major spokespersons when any decision relating to the area was required. This occurred recently when site clearance work was required for the realignment of the only public road going through the area. The C estate is the area where others should seek the permission of M and N before entering and is the area where M and N do not have to ask anyone for permission to enter. The seeking and granting of permission for hunting purposes has become less formal for most of the long-term residents of Takaka, where many of the X people live. M and N have themselves never been refused a request to go hunting in the estate areas belonging to other groups. Hunting provides an important supplement to their diet, although most of the food they eat comes from the general store at Takaka.

M and N have, over the years, been trying to establish a homeland centre/outstation near one of the importance sites on the estate. The outstation consists of a bore and some sheds but at the time of the acquisition of the native title rights the outstation had not been occupied for some months because of the recent death of M and N's father who had spent his last days there.

M and N are both ceremonial leaders in their own right and are a formidable team in regional ceremonies in which both men and women participate. There is a major site on their estate, a spring and rock formation, that is part of a major dreaming track the joins various Aboriginal communities hundreds of kilometres away. The particular dreaming is one of the bases for a major regional ceremony. The rock formation is the transformation of the body of the dreaming ancestor turning back to look at other dreaming ancestors, one of the various landscape creating events depicted in the long song cycle associated with the dreaming. Some of the details of the events surrounding this incident are secret and the place itself is considered to be very dangerous. The compulsory acquisition of the native title rights and the proposed use of the area has caused concern to many Aboriginal people associated with the particular dreaming even those in distant communities, who were not named at the original hearing, and do not considered themselves to be part of the X people. The total number of people associated in some way or another with the dreaming may in fact be 3000.

There are various other sites and dreamings associated with the estate and with the A and B estates. There are approximately 100 known sites in the area, but there may be more as the fieldwork for of the original claim was spread over a much broader area and thus was not focused in an intensive way on the proposed military training area.

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[80] In a more complex example, the situation could be that there was still no agreement about the nomination of the PBC at the time the Commonwealth acquired the native title rights for the military training area.

At the hearing of the compensation claim various native title holders who had given evidence at the original hearing, presented further more particular evidence about the proposed military training area and the consequences of the compulsory acquisition. M, in his affidavit, raised the following concerns on behalf of all the native title holders of the C estate:

- his profound sadness, disbelief, hurt, anger and apprehension at the compulsory acquisition;
- if particular dreaming sites are damaged a great catastrophe would befall both Aboriginal and non-Aboriginal people in the area;
- apart from the general devastation, he may be held responsible by other people associated with the dreaming of the site for not protecting the site;
- similarly, if other sites are interfered with, illness or worse may strike down their owners;
- he will lose his traditional home, the place where he and his close relations are the undisputed 'bosses'. The current living descendants of his father and his father's brother plus those who can claim some recognised right to the estate through their mother or through the performance of the ceremonies associated with the estate, number approximately 200. Many of these are children.
- although his tenure at Takaka is secure under non-indigenous law, he and other Aboriginal people are aware that Takaka is part of the traditional country of B estate, which is always one of the undercurrents in the politics of the local council. There will always be a sense in which M is beholden to others, a situation that did not occur on his homeland/outstation. His outstation was also somewhat of a refuge from Takaka with its rampant vandalism, occasional outbreaks of petrol sniffing among the children and occasional drunken fights.
- Although the performance of ceremonies associated with the dreamings for the estate will continue to be performed both locally for initiation ceremonies and at the larger regional ceremonies (not having been held on the land itself for a generation) he will not be able to show his children the rock formation that is the transformation of the dreaming ancestor, nor would they be able to participate in the ritual of the proper approach to an important site and to experience its power.
- There are fewer and fewer people among the current owners of their country that were born there and have walked around the country on foot and have direct knowledge of the land and the location of sites. This is a great disappointment to him, as well as the fact that he too will not be able to be buried in his own country.
- The road through the area was the shortest route to the major regional service centre that includes the only hospital, and government services including the Aboriginal medical service, Aboriginal legal aid and the office of the representative body. Until an alternative all-weather route (promised by the army) is completed, he and the rest of the community will have to use an older track in poor condition. The road to be blocked off to their use also facilitated access to A's estate and hunting and gathering expeditions in the area generally.

Other senior witnesses provide similar evidence. The expert evidence broadly supports the evidence of the main witnesses, although, under cross-examination, differences re-emerged about the appropriate grouping to be the holder of the communal native title rights.

There is also evidence from professional valuers about the market value of the native title rights using the analogy of freehold title. Because of the remoteness of the area the calculation has been difficult to make. There are very few precedents for the sale of such a

large area of land. The closest comparison is of the sale of nearby pastoral leases. However, 90 percent of the value of recent sales of pastoral leases is attributable to the value of the stock plus the value of improvements (fencing, dams, buildings, bores, yards etc.) with little or no value being attributable to the lease itself. Moreover, most of the land is beyond established pastoral regions. Taking into account the lack of improvements on the proposed military training area (except for M.'s outstation), the market value is recommended to be $50,000 (most of which comprises the value of the bore and water tanks at the outstation).

To keep the example relatively simple, details about mineral prospectivity or about the prospects for tourism or bio prospecting have not been included. Adding these details would raise questions such as whether the loss of the right to negotiate in a highly prospective area, for example, could be another head of damage. An analogy might be with loss of expectations of life. The principle could perhaps more generally be stated as compensation for the loss of special procedural rights under the NTA. One of the benefits of framing the principle this way is that it does not depend on a successful outcome of the legal question of whether any native title rights to minerals have been extinguished by mining legislation.

Another potential aspect of a maximal example would be if the area of the denial of access contained some unique natural resource such as a particular quality of red ochre or particular species of trees required for the production of spears or other traditional artifacts or unique bush foods.

The other unrealistic assumption is the absence of the contesting of evidence of loss.

Also the mere existence of Indigenous heritage protection legislation which gives blanket protection to sacred sites, in theory, may be used to argue for some “discount” of the amount of mental distress. The contra argument is that despite such legislation, desecration of sacred sites may still occur.

Calculation for hypothetical example No 1

Step 1: allocation of amounts for different heads of non-economic loss for the individual native title group member most affected.

Based on the evidence of the 10 principal witnesses:

A: insult	$10,000
B: disruption social/cultural practices	$10,000
C: mental distress/anxiety	$20,000

Step 2: adjustment from individual to group compensation.

This adjustment must take into account the fact that a large group of people is affected in different ways and to varying degrees by the loss of the traditional country. Later apportionments of the total amount of compensation will address the issue of the differential effect of the loss of the traditional country as between different individuals and groups of

native title holders. This adjustment principally relates to the question of the appropriate scale of compensation. At a broad level it would take into account the devastating effect upon the native title holders of estate C (200 people), the substantial effect on the holders of estates A and B (400 people), and the lesser but important effects on all the members of the X language group (1200 people) which was named as the title holding group in the original determination. It is doubtful that all the people associated with the particular dreaming mentioned (3000) would be entitled to compensation as most of them would not answer the description of the native title group "the X people".[81]

Taking all these considerations into account, an adjustment upwards is made by multiplying by 100.

$40,000 × 100 = $4,000,000

[compare with this with an uplift factor of 10: $40,000 × 10 = $400,000]

Step 3: add economic value

$4 million + $50,000 = $4,050,000.

[Or $450,000]

Step 4: additional amount for the younger generation

The evidence from the genealogies is that a new generation comes into existence approximately every 25 years. The formula used to calculate this amount is:

Total = Principal × $(1 + \text{rate})^n$ where

"Total" is the resulting amount;
"Principal" is the specified beginning amount;
"Rate" is the yearly return rate/interest rate; and
"n" is the number of years.[82]

The amount that would have to be invested today to produce the amount of $4,050,000 in 25 years time would be as follows:
-at 3% $1,934,302
-at 5% $1,195, 976
-at 10% $373, 798

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[81] This aspect of the example was suggested to me by my own observations of the involvement of a very widely distributed group of Aboriginal people in the Alice Springs dam saga. Though definitely in Arrernte country, opposition to the proposed dam also came from Pitjantjatjara women who justified their involvement partly on the basis of shared dreaming tracks. Peter Sutton outlines even more complex patterns of contingent rights in his *Kinds of Rights in Country* (Sutton, 2001). Query whether an amendment could be made to the original determination under section 13 of the NTA. Under subsection 13(5) a determination may be varied if events have taken place since the determination was made that have caused the determination no longer to be correct or that the interests of justice require the variation.

[82] Compare the formula for compound interest: $I = P(1+r)^n$ where "I" is the amount of interest, "n" is the number of periods separately calculated, "P" is the principal sum and "r" is the rate of interest (Source: *A Dictionary of Finance* Oxford University Press, Oxford 1993).

After reviewing the evidence presented on this point, including the history of interest rates for low risks securities and the current interest rates for long-term securities, the judge determines that the amount for future generations should be based on an average 5% return, thus $1,195,976.

[In relation to the figure of $450,000, the corresponding future generations amounts would be as follows:
-at 3% $214, 922
-at 5% $132, 886
-at 10% $41, 533]

Step 5: total amount

Total amount of compensation = $4,050,000 + $1,195, 976 = $5,245,976

[or $450,000 + $132, 886 = $582,886]

Form of the order (s.94 of the NTA)

Section 94 of the NTA will have a major bearing on the level of evidence required in a compensation hearing. It requires the Federal Court in making an order of compensation to set out:
(a) the name of the person or persons entitled to the compensation or the method or for determining the person or persons; and
(b) the method (if any) for determining the amount or kind of compensation to be given to each person; and
(c) the method for determining any dispute regarding of the entitlement of the person to an amount of the compensation.
The language of the provision leaves scope for a variety of approaches. At one end of the spectrum, representing the most certain and most detailed order, the court could specify the exact amount of compensation for each named individual. At the other end of the spectrum, one could imagine a court, following the lead of the majority in the Full Federal Court decision in *Mirriuwung Gajerrong*, leaving the individual distributions to the Registered Native Title Body Corporate (RNTBC) with some general direction.[83] In between these extremes, there could, for example, be the identification of subgroups and broad apportionments between those subgroups. Even so, distribution within the subgroups will be difficult.[84]

The order for hypothetical example No 1 might read as follows:

> The amount of $5,245,976 shall be paid to the Registered Native Title Body Corporate $4,050,000 of which is to be distributed to the to the A, B, and C groups in the following proportions:
> A 20%
> B 20%
> C 60%
> according to the wishes of the A, B and C groups respectively. If the groups A, B and C cannot agree upon a formula for the distribution of the compensation, it shall be

[83] *State of Western Australia* v *Ward* [2000] FCA 191 (3 March 2000), para 196-201.
[84] The problems this sort of decision-making will engender for the RNTBC are set out in detail in Mantziaris and Martin *Native Title Corporations* (see especially chapter 5, p 161-181, and chapter 8).

> divided equally among the adult members of each group according to the genealogies presented at the compensation hearing.
> These funds are to be distributed within one year of the date of this order.[85]
> The amount of $1,195, 976 shall be paid to the Registered Native Title Body Corporate for the benefit of the younger generation of A, B and C groups and to be distributed at the discretion of the Registered Native Title Body Corporate.

Observations about hypothetical example No 1

1. As anticipated, the final figure still depends on the scale of the initial figure for which there is little guidance.

2. This example was designed in part to illustrate what is arguably one of the central features of native title compensation: the differential effect of the loss of rights as between individuals and subgroups within the native title group. Rather than dealing with the differential impact of the loss of rights to country through apportionment of the total amount between subgroups, perhaps subgroups of native title holders should receive an additional amount depending on how the particular acquisition affects the totality of their traditional country.

This kind of idea has resonances with some of legal principles arising out of the jurisprudence of the compulsory acquisition of land, namely "injurious affection" and "severance". As explained by Brown:

> Severance is the act of taking part of an owner's land. Severance damage is the depreciation in the value of the retained land caused by the loss of the resumed portion. Injurious affection is the depreciation in the value of retained land caused by actual or intended use of the portion resumed.[86]

Consistent with one of the major themes of this paper, a literal application of the principle from the jurisprudence of compulsory acquisition is not contemplated. It is more whether the principle is consistent with the sui generis nature of native title and could be supported by evidence. If one accepts for the time being an oversimplified account of traditional land tenure that assumes relatively well bounded estates, one can imagine if one loses native title rights to the only source of water on the whole traditional estate, then the value of the remaining part of the estate is diminished. Similarly, one could argue that if access to the most important sacred sites on the whole traditional estate, then the value of the remaining part of the estate is diminished. But there are still the difficult questions of how to quantify the decrease in value.

3. There seems to be a great deal of potential for controversies about the identification of the exact location and boundaries of sacred sites to arise in compensation questions. There is a general principle in all civil litigation that a plaintiff claiming damages must mitigate his or her loss. The argument could be made by an acquiring authority, that, in circumstances like example No 1, the mental distress aspect could be mitigated by the native title holders disclosing the whereabouts of all the known sacred sites so that special efforts could be made for their avoidance. A similar issue of the mitigation of the cultural loss arose in the

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[85] There may also be an issue of whether the RNTBC can charge an administration fee for providing the service of distributing the compensation.

[86] Brown *Land Acquisition* para 3.33. Also see Fricke *Compulsory Acquisition of Land in Australia* page 335-338, Jacobs *The Law of Resumption and Compensation in Australia* chapter 13, 21.

Cubillo/Gunner Stolen Generations Case.[87] In the hypothetical discussion of damages, the court commented unfavourably on Mrs Cubillo's minimal efforts to re-establish her connections with her traditional community once her own children had grown up compared to Mr Gunner's efforts. Later in life he had returned to live in his mother's community. The court held that both were under an obligation to mitigate their damages.[88]

Hypothetical example No 2: Small scale, maximum disturbance

Assuming similar facts to the first hypothetical example, what would be the compensation payable for the compulsory acquisition of a small area of land (say 500×500 metres) for a telecommunications repeater tower to provide telephone services to the local Takaka community, something that they greatly desire. After construction the area would be surrounded by a high wire fence and locked gates. No sacred sites would be directly affected. Occasional maintenance would be required and this would be carried out using existing roads to M's outstation and bush tracks. Unable to reach agreement, the issue of the quantum of damages reaches the Federal Court.

As the most directly affected person, the main evidence of loss is M's affidavit. It canvasses his affront at the overriding of his rights, the permanent loss of country and the possible marginal increase in the threat to sacred sites and his privacy. While not contesting M's evidence, Telstra point out the benefits to the Takaka community where most of M's kin (and M) live for most of the year.

After hearing all the evidence the court proposes the following calculation:

Insult	$100
Disruption social/cultural practices	$50
Mental Distress	$100
Sub-total	$250
Native Title Adjustment (×10)	$2,500
Economic Value	$50
Sub-total	$2,550
Younger Generation (25 yrs, 5%)	$753
Total	$3,303

However, because of the direct benefit to M and to all the members of C group, the amount of compensation is adjusted downward to $1,000 as, in the opinion of the judge, this would more accurately represent "just terms".

[87] *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000), at para [1512]-[1521].
[88] *Cubillo v Commonwealth* [2000] FCA 1084 (11 August 2000), para [1521].

Observations about Hypothetical example No. 2

1. There is an analogous principle in land acquisition jurisprudence. A resumption of part of a person's land that leads to a betterment of the residue may lead to zero compensation if the value of the residue is more than the value of the whole land prior to the resumption (see Jacobs *The Law of Resumption and Compensation in Australia* para 21.11.1)

2. This hypothetical example is a cautionary tale that "just terms" cuts both ways sometimes against the interests of those entitled to compensation. One can imagine that compulsory acquisitions for schools, health clinics, air strips, roads and other essential services in remote communities where the native title holders directly benefit may fall into the same category. But there would be counterexamples such as the compulsory acquisition of land for an oil or gas pipeline.

3. Hypothetical example No 2 reveals that one of the underlying aspects of example No 1 that will generate compensation is the lack of direct benefit to the native title holders.

Hypothetical example No 3: Large scale, maximum disturbance ('settled' Australia)

One of the aims of a hypothetical example in 'settled' Australia is to assess whether the proposed compensation principles are biased towards the kind of evidence that may only be available in remote/northern claims. This example could assume a successful determination of native title based on the kind of evidence presented in the Yorta Yorta claim and draws on such work as Keen 1988 and Sutton 1998.

The Y Aboriginal Community have a native title determination that covers a patchwork of discrete areas of vacant crown lad, reserves and the bed and banks of certain rivers in rural Victoria. The largest of these areas is a forestry reserve that the Commonwealth now wishes to acquire for a live ammunition military training area and bombing range.

The determination of native title is in similar terms to the determination in Example No 1.

The kinds of evidence given at the hearing did not include any evidence of contemporary ceremonies or subgroups owning particular parts of the Y country under traditional laws and customs. The original Y claim was made by an overarching group containing thousands of people who are descendants of the ancestors that were associated with the Y people at the time of first settlement. Y refers to the name of a regional language, not now spoken but from which numerous words survive and are commonly used among the Y people among themselves.

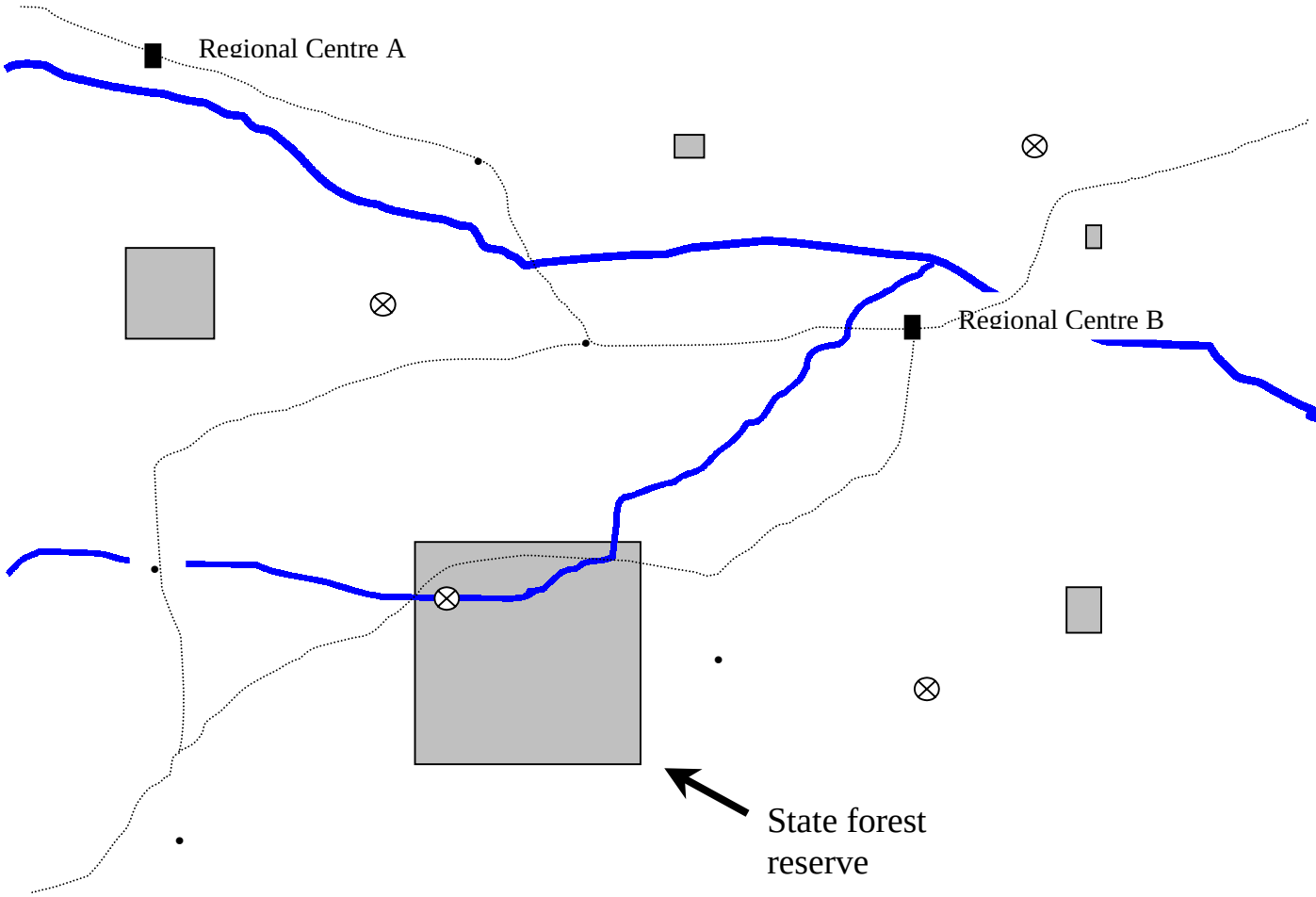
The following kinds of evidence was presented at the original hearing of the claim:

- Extensive knowledge of important archaeological and historical sites in the region including middens, scarred trees, burial sites and knowledge of some ancient ceremonial sites;
- Actions of the claimants to prevent disturbance of these sites, such as co-operating with State heritage authorities;
- Continuing physical presence in the general region of the traditional country and continuing use of the area for hunting of emu, kangaroo and possum, for fishing and

for the gathering of wood for making Aboriginal artefacts and the gathering of medicinal plants;

- Assertions that they and no other Aboriginal people are the owners of the country and that they do not have to ask permission of any other Aboriginal group to use the country;
- Shared beliefs about a great spirit creating the land and entrusting it to them to look after including the broad outlines of creation stories for main rivers in the area, and beliefs about the continuing presence of spirits in the land;
- Smoking ceremonies for funerals and for the re-burial of skeletal remains returned from museums;
- Evidence of being taught about the country by ancestors;
- Authority being exercised by elders of the community, who are not elected but respected as custodians of the traditions and heritage of the Y community.

At the compensation hearing evidence is given about that fact that the area compulsorily acquired was the largest and only useable piece of their traditional country over which native title has not been extinguished.



Scale

0 100km

⊗ = Archaeological site

• = Small Town

= Determination Areas

= roads

= rivers

Figure 7: Sketch plan of hypothetical example No 3.

Other evidence about loss included:

- individual accounts of the humiliation, anger and hurt associated with the loss of the last piece of usable traditional country;
- concern about the environmental degradation that will result from the proposed use of the land;
- the forced abandonment of their plans for a cultural centre on the area and, generally, the decreased opportunity to show their traditional country to the younger generation; and
- concern about the protection of the known archaeological sites, including burial grounds, in the forest reserve and the lack of future access.

In response to some of these concerns the Commonwealth submitted that the sites concerned would be protected under State and Commonwealth legislation and that there would be various opportunities for the continued involvement of the Y people in the management of the area and a heritage protection committee. Because of the breakdown in the negotiations about the compulsory acquisition, the committees are not functioning at the time of the hearing.

Calculation for hypothetical example No 3

Step 1: initial allocation under different heads of non-economic loss based on the evidence of key witnesses.

Insult	$10,000
Disturbance social/cultural practices	$5,000
Mental distress	$5,000

Step 2: adjustment from individual to group compensation

Genealogical evidence given at the hearing indicates that approximately 2000 people could claim descent from the known ancestors of the Y. people.

Adopting an adjustment factor of 100:

$20,000 × 100 = $2,000,000

[Alternatively adopting an adjustment factor of 10: $200,000]

Step 3: add economic value

Using the analogy of freehold title, expert land valuers assess the market value of the native title rights to be $3,000,000.

$3,000,000 + $2,000,000 = $5,000,000

[Alternatively,$3,000,000 + $200,000 = $3,200,000]

Step 4: additional amount for younger generation

The genealogies revealed that for this group a new generation appears about every 25 years. At compounding investment growth rates outlined below the possible amounts for future generations would be as follows:

3%	$2,388,028
5%	$1,476,514
10%	$461,480

[Alternatively for the figure of $3,200,000:

3%	*$1,528,337*
5%	*$944,969*
10%	*$295,347]*

Following a survey of relevant current interest rates and any evidence of long-term projections, the judge decides that a reasonable rate of return to be expected would be 5%. Thus the amount for future generations would be:

$1,476,514

[Alternatively $944,969]

Step 5: total amount

Total amount of compensation: $5,000,000+$1,476,514 = $6,476,514

[Alternatively: $3,200,000 + $944,969 = $4,144,969]

Observations about hypothetical example No 3

It would be tempting to claim that this example demonstrates that the general approach proposed in this discussion paper also "works" for native title holders who are not in remote areas. The claim would be based on the fact that adding the economic value of the native title rights prior to the calculation of an amount for future generations would tend to offset the lower amounts allocated to the non-economic heads of compensation. The degree to which the lower initial amounts would be offset depends upon the economic value of freehold title being greater than in remote areas. Whether the amounts quoted here are realistic needs to be checked with land valuers. A rough comparison can be made using the NSW figures published by of the NSW Department of Information Technology and Management. According to the scale in figure 7, the State forest reserve would be approximately 25 km by 25 km = 625 sq km = 62,500 hectares. Only adopting the lowest value property in the Western Grazing table ($2 per hectare) would result in an approximate value of $125,000. If instead we take a value from the Tablelands Grazing table of say $1000 per hectare, it would be $62,500,000.

Other unrealistic assumptions need to be reconsidered such as finding 625 sq km of unalienated Crown land in settled Australia.

A potential principle that emerges from this kind of hypothetical example could be: native title holders whose native title rights to their traditional country have mostly been extinguished, should receive an additional amount for further losses of their native title rights. In other words, the loss of the last remaining remnant of traditional country should require greater compensation than the first incursion. In example No 1 this issue was dealt with by apportioning the total amount of compensation between relatively well-defined subgroups on the assumption that the subgroups would be associated with particular focal tracts of country or homelands (even though this is an oversimplification of the complex possible individual pathways to claim to country). In example 3 the assumption is that there is not the same degree of internal differentiation relating to particular tracts of land, rather that all Y have broadly similar rights to all Y's traditional country. Accordingly, the principal suggested above will have greater applicability to this example. Alternatively, the loss of a last remnant should feed into the calculation of insult, disturbance and distress.

6. Conclusion

This paper began with the suggestion that it is worthwhile examining the issue of native title compensation notwithstanding that there is, as yet, no judicial guidance on most of the basic issues to be resolved. In essence, the approach has been to use existing legal and anthropological knowledge to imaginatively project us into the practical situation that a court would face. This practical situation could be characterised by:

- particular kinds of evidence of the cultural implications of the loss;
- limited guidance from existing legal precedents about the legal nature of native title rights; and
- a fairly wide variety of analogies that could be drawn with other kinds of legal categories.

Obviously, this is a speculative enterprise, but, hopefully, it has been informed speculation. The aim has been to steer a course between the novelty of native title and established principles of compensation in other areas of law to develop a plausible approach.

In accepting that most of the compensation for acquisition of native title rights is likely to be for non-economic loss, structuring this potentially indeterminate amount has been the focus of this paper. Analogies with various torts and the consideration of likely evidence, suggested a way of developing appropriate 'heads of damage': insult, disruption to social/cultural practices and mental distress. The overall approach suggested in this paper could be summarised in the following table:

Principles	**Evidence**	**Calculation**
Insult	• the formal determination of native title rights. • (if no determination) the formulation of native title rights determined in the compensation hearing.	• Based on the most affected individual. • Minimum based loosely on non-economic loss for injury to homes in tort cases. • Maximum on the income producing value of total figure. • Individual to group adjustment.
Disturbance	• loss of access to sites, hunting grounds, other natural resources; • loss of access through the area to other areas;	As above.
Mental distress	• Feelings about the loss of homeland; • concern about sites and the proposed use of the country; • concerns about future generations; • expert anthropological evidence on the above.	As above
Economic value	• justification of the selection of analogy (freehold, leasehold, profit a prendre etc). • Expert evidence of valuation of the market value of the chosen analogy, considering the highest and best use.	The straightforward notional figure similar to special damages.
Younger generation	• Age composition of the native title group, current instruction of the younger generation in traditional laws customs relating to the area; • The typical time span of each generation based on genealogical records of the native title group; • Expert evidence of current long-term return on secure investments.	An estimation based on projected real returns using the compound interest formula and making allowances for inflation and taxation.

In relation to the indeterminate amounts that could be allocated to each 'head of damage' in non-economic loss, damages in defamation were considered. This may seem an unwise place to look for native title solutions. It is an extremely contentious area, constantly at war with freedom of speech, plagued by doubts about its fundamental concepts and, seemingly, constantly under review by law reform agencies. But it is the aspect of the law grappling with the problem of indeterminacy that makes it relevant. The examination of damages in defamation has been suggestive and confirming of some of the approaches suggested here, namely:

- elaborating sub-headings of general damages (non-economic loss);
- the inclusion of special damages (economic loss); and
- the use of broad comparisons with the level of damages in other areas of the law.

The problems with defamation damages may point the way to the future in other less useful respects as well. For one of the features of the leading case about the role of appellate courts in curbing excessive awards (*Carson*), was the fairly evenly divided opinion among the various judges on whether the award was excessive or not. It seems likely that because of the novelty of native title and the inherent difficulty of allocating dollar amounts to evidence of loss, there would be highly divergent approaches taken in the Federal Court.

While a range of dollar values for non-economic compensation has been suggested, the range is very wide and there is a need for an individual to group adjustment. As the hypothetical examples demonstrate, this means that the end result in a particular calculation will vary enormously depending on the initial figure allocated and the multiple chosen for the individual to group adjustment.

Further research

One of the underlying assumptions of this research project has been that the major impediments to making progress in the technical aspects of native title compensation are conceptual and thus amenable to a small-scale research project such as this one. But various additional research projects have suggested themselves in the course of this project. They include:

- a more thorough analysis of the actual variation of the market value of land in parts of Australia where native title has not been extinguished;
- more direct research with actual native title group members about the cultural implications of loss, rather than relying upon extrapolation from existing sources;
- how the concept of the duty to mitigate losses and the limitation on damage that is considered too remote, may be used to limit the scale of native title compensation;
- whether the proposed principles would be applicable in other contexts such as the interference with native title rights not amounting to extinguishment or the loss non-exclusive native title rights; and
- the analysis of the legal framework and jurisprudence arising out of the Marshall Islands Nuclear Claims Tribunal.

Furthermore, consideration should be given to both the positive and negative consequences of choosing the extreme example of the complete loss of exclusive possession native title rights. These extreme examples have been helpful in presenting the consequences of loss in a

dramatic fashion. The cost, however, is to possibly exaggerate the likely average loss and, therefore, to exaggerate the likely scale of compensation in most cases. As demonstrated in hypothetical example No 1, much of the loss contemplated there depends upon the total probation on future access. It would seem likely that, other things being equal, the scale of the loss would be dramatically reduced if the sacred sites were protected and continuing access to sites allowed.

A legislative solution?

This paper has been aimed squarely at judicial solutions to compensation problems. But the very difficulties encountered at every turn tend to raise the question of whether native title compensation should be the subject of legislative reform that would guide the courts, to a limited extent, by listing relevant factors to be taken into account when assessing compensation. The analysis undertaken in this paper would suggest at least the following list:

- economic and non-economic loss
- individual and group rights
- disruption to cultural and other practices
- insult
- hurt feelings
- special compensation for the younger generation of the native title group
- the capacity to pay of the entity responsible for paying compensation
- the likely effect of the payment of compensation on other sources of income and support.

In the meantime, this excursion into the various conundrums of the calculation of compensation provides further justification, if any more were required, that negotiating ILUAs is the preferable course of action for all parties in the current period of uncertainty.

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