



# How should loss of Native Title Interests be Compensated?

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# Introduction

At the time of writing the Federal Court in *Allan Griffiths and Lorraine Jones on Behalf of the Ngalinurru and Nungali Peoples v Northern Territory* has been asked to determine the quantum of compensation payable for the extinguishment of native title interests over the township of Timber Creek in the Northern Territory.<sup>1</sup> It is unclear how the Court will value such interests as the Court to date has not addressed such an issue. This essay seeks to outline factors that should be taken into account in such a valuation process.

Central to this issue is the proposition that loss of native title interests can only be justly compensated when the loss is understood from the position of the indigenous people.<sup>2</sup> It is the ‘quality’ or ‘empathy’ of the compensation that is of importance not merely the quantum of the compensation.<sup>3</sup>

This essay analyses the doctrine of native title to ascertain the nature of this compensable interest. It will examine Australian and International law in order to understand the current Australian position on this issue and to ascertain how other jurisdictions have compensated for extinguishment of native title rights.

Fundamental common law principles regarding the valuation of non-economic interests will be outlined and combined with those gleaned from academic literature to propose a model in which non-economic and economic losses are given equal weight in the determination of the quantum of compensation. Only when this approach is taken will Indigenous people be justly compensated.

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<sup>1</sup> *Allan Griffiths and Lorraine Jones on Behalf of the Ngalinurru and Nungali Peoples v Northern Territory* (P)NTD18/2011.

<sup>2</sup> Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 14.

<sup>3</sup> Raewyn Fortes, ‘Compensation Models for Native Title’ (Paper presented at Pacific Rim Real Estate Conference, Melbourne, 23-27 January 2005) 9.

## Native Title Defined

A clear understanding of the doctrine of native title is critical for assessing just compensation for its extinguishment. There are three distinct conceptualisations of native title;

- Native title is considered as a proprietary interest in land. According to Brennan J in *Mabo v Queensland (No. 2)*, native title is a proprietary interest in land possessed under the traditional laws and customs observed by the Indigenous peoples of that land;<sup>4</sup>
- The second conceptualisation is broader. In *Mabo* Deane and Gaudron JJ suggested<sup>5</sup> that native title is an ‘inclusive and heterogeneous concept.’<sup>6</sup> Toohey J referred to this understanding as the ‘spectrum of native title rights.’<sup>7</sup> Gummow J alluded to this concept of a spectrum stating that native title interests could range from that equivalent to an interest in a legal or equitable estate to a right to use the land for a ceremonial purpose;<sup>8</sup>
- The third conceptualisation broadens this spectrum further. Known as the bundle of rights approach, this understanding defines native title rights as personal rights the sum of which constitute native title.<sup>9</sup> In *Fejo v Northern Territory* Kirby J referred to ‘the bundle of interests we now call native title.’<sup>10</sup>

Some commentators such as Strelein<sup>11</sup> and Sheehan<sup>12</sup> argue that the High Court is deliberately moving towards defining native title as a ‘bundle of rights.’ In the light of inevitable

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<sup>4</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 51, 58-59 (Brennan J) (‘*Mabo*’).

<sup>5</sup> *Ibid* 85.

<sup>6</sup> Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 100; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 79,85 (Deane and Gaudron JJ) (‘*Mabo*’).

<sup>7</sup> *Wik Peoples v The State of Queensland* (1996) 187 CLR 1, 126–127 (Toohey J).

<sup>8</sup> *Ibid* 169 (Gummow J).

<sup>9</sup> *Fejo v Northern Territory* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

<sup>10</sup> *Ibid* 151 (Kirby J).

<sup>11</sup> John Sheehan, ‘Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia’ (Paper presented at FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji, 10-12 April 2002) 31.

<sup>12</sup> Lisa Strelein, ‘*Extinguishment and the Nature of Native Title: Fejo v Northern Territory*’ (Land, Rights, Laws: Issues of Native Title Issues Paper No 27, Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, February 1999) 7.

compensation claims such an approach is argued to be practical as each interest can be itemised and accordingly compensated.<sup>13</sup>

In order to achieve just compensation from an indigenous perspective an understanding of native title as a flexible construct, as the second conceptualisation suggests, gives most scope for the common law to incrementally advance and award just compensation. There is a limited body of law regarding the compensation of these interests. These principles, however, form a useful backdrop to establishing compensation principles fashioned from an indigenous perspective.

## **Native Title Act and Current Precedent for Native Title Compensation**

### ***Native Title Act***

There is limited existing authority in Australia regarding compensation for loss of native title. Compensation is assessed by the Federal Court pursuant to s 51 of the *Native Title Act 1993* (Cth).<sup>14</sup> The maximum quantum which may be awarded is limited to the amount that would be paid for the compulsory acquisition of a freehold estate.<sup>15</sup> Section 53, however, states that the compensation paid must be on ‘just terms’,<sup>16</sup> thus ensuring that s 51 is not *ultra vires* s 51(xxxi) of the *Australian Constitution*. Section 51(xxxi) states that ‘the acquisition of property.... from any state or person for any purpose in respect of which the Parliament has power to make laws’ must be ‘on just terms.’<sup>17</sup>

### ***Current Precedent***

There are two key cases in relation to compensation for the extinguishment of native title.

The first order for compensation for extinguishment of native title interests was made in *De*

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<sup>13</sup> John Sheehan, ‘Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia’ (Paper presented at FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji, 10-12 April 2002) 31.

<sup>14</sup> *Native Title Act 1993* (Cth) s 51.

<sup>15</sup> *Ibid* s 51A.

<sup>16</sup> *Ibid* s 53.

<sup>17</sup> *Australian Constitution* s 51(xxxi).

*Rose v South Australia*.<sup>18</sup> However, as the sum awarded was determined in a confidential settlement, no guidance was given regarding compensation for the loss of native title interests. The 1939 High Court case *Geita Sebea v The Territory of Papua* concerned the compulsory acquisition of land from Papuan natives vested with a communal right to occupy the land.<sup>19</sup> Compensation was awarded on strictly economic terms. The amount awarded was the sum of an approximation of the agricultural value of the land plus the value of the structures and improvements on the land.<sup>20</sup> This valuation process, framed purely in economic terms, communicated a lack of understanding of the values of the Indigenous culture. In *Allan Griffiths and Lorraine Jones on Behalf of the Ngaliwurru and Nungali Peoples v Northern Territory*<sup>21</sup> the Federal Court must establish *de novo* a method of compensation from an Indigenous perspective so that proper recognition is given to their connection with the land.

### ***Just Terms***

The most significant legal principle which should guide the Federal Courts is the ‘just terms’ requirement of s 51(xxxi) of the *Australian Constitution*. At the minimum just terms is a quantum equal to the value of the property plus an amount for the loss sustained by the individual over and above the market value of the land.<sup>22</sup> In *ICM Agriculture Pty Ltd v The Commonwealth of Australia* the High Court held that this section is to be given a ‘full and flexible operation’ so that this fundamental constitutional right is upheld.<sup>23</sup> Sheehan argues that because of the unique nature of native title interests, in order for there to be just compensation, the sum may not be restricted to the traditional method of compensating for

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<sup>18</sup> *De Rose v South Australia* [2013] FCA 988 (*De Rose*).

<sup>19</sup> *Geita Sebea v The Territory of Papua* (1943) 67 CLR 544, 551.

<sup>20</sup> *Ibid* 554.

<sup>21</sup> *Allan Griffiths and Lorraine Jones on Behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* (P)NTD18/2011.

<sup>22</sup> *ICM Agriculture Pty Ltd v The Commonwealth of Australia* (2009) 240 CLR 140, 217 (Heydon J).

<sup>23</sup> *Ibid* 198 (Hayne, Kiefel and Bell JJ).

Anglo-Australian land tenures.<sup>24</sup> Given that land to Indigenous people is their ‘source and locus of life’,<sup>25</sup> the Federal Court needs to use the flexibility of this term to achieve just valuation of Indigenous non-economic interests. To aid in this valuation, consideration will be given to the experiences of other jurisdictions and their application to the Australian context.

## International Experiences

### *Canada*

Native title law in Canada is centred in a fiduciary obligation which was held to exist between the Crown and the First Nations. In the landmark case of *Guerin v The Crown* the Supreme Court held that this obligation was founded in ss 18 and 37 of the *Indian Act* R.S.C 1952.<sup>26</sup> These sections respectively gave the Court discretion to act in the best interests of the Indian people and made Indian title inalienable except to the Crown.<sup>27</sup> Consequently, in cases regarding compensation for breach of this fiduciary duty, trust law principles are determinative of the quantum of compensation awarded.<sup>28</sup> A sum is awarded that would place the trust estate in the same position as if the breach had not been committed.<sup>29</sup>

The Canadian approach may be relevant to Australian native title compensation law for two reasons. Firstly, similarly to Canada, in Australia native title interests are inalienable except to the Crown. Behrendt, in her submission to the Commonwealth Parliament, stated that because native title interests are only alienable to the Crown, a fiduciary obligation may be held to exist

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<sup>24</sup> John Sheehan, ‘Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia’ (Paper presented at FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji, 10-12 April 2002) 31.

<sup>25</sup> Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 14.

<sup>26</sup> *Guerin v R* [1984] 2 R.C.S. 335 (Canadian Supreme Court).

<sup>27</sup> *Indian Act*, R.S.C. 1952, c 149, s 18; s37.

<sup>28</sup> *Guerin v R* [1984] 2 R.C.S. 335, 360 (Canadian Supreme Court).

<sup>29</sup> *Ibid*.

between the Crown and the Indigenous people.<sup>30</sup> Consequently, potentially the loss of native title interests may be compensated in Australia through the use of trust law principles

This approach is also particularly relevant for potential native title compensation claims in South Australia. Brian Slattery has stated that the fiduciary obligation in Canada is founded in the Canadian Royal Proclamation of 1763<sup>31</sup> which said that territories ‘not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds’ and any lands ‘the Indians should be inclined to dispose of .... the same shall be purchased only for Us in our Name.’<sup>32</sup> The Canadian Courts have followed this reasoning holding that the existence of this trust obligation stems from the Royal Proclamation.<sup>33</sup>

The founding documents of the colony of South Australia express similar injunctions. In the letters patent King William stated nothing ‘shall affect or be construed to affect the rights of any Aboriginal Natives ..... of any Lands therein now actually occupied or enjoyed by such Natives.’<sup>34</sup> The Colonization Commissioners, in an authoritative declaration, stated that Aboriginal proprietary interests were not to be interfered with and that such land could only be sold providing it had been previously ceded by the Natives to the Crown.<sup>35</sup>

The effect of these documents is similar to the effect of the Canadian Royal Proclamation of 1763, and, in the Australian context, is uniquely South Australian. It can be argued that given the effect of these legally binding requirements, a fiduciary relationship exists between the Crown and the Indigenous people in South Australia.<sup>36</sup> Compensation in South Australia

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<sup>30</sup> Larissa Behrendt, ‘The Protection of Indigenous Rights: Contemporary Canadian Comparisons’ (Research Paper No 27, Parliamentary Library, Parliament of Australia, 1999-2000).

<sup>31</sup> Brian Slattery, ‘Understanding Aboriginal Rights’ (1987) 66 *The Canadian Bar Review* 727, 753.

<sup>32</sup> *Royal Proclamation* (1763) R.S.C. 1970, App. II, No.1.

<sup>33</sup> *Mitchell v Penguic Indian Band* (1990), 71 D.L.R. (4<sup>th</sup>) 193, 225.

<sup>34</sup> Letters Patent establishing the Province of South Australia dated 19 February 1836 (19<sup>th</sup> February 2016) <[http://www.foundingdocs.gov.au/resources/transcripts/sa2\\_doc\\_1836.pdf](http://www.foundingdocs.gov.au/resources/transcripts/sa2_doc_1836.pdf)>.

<sup>35</sup> Letter of Instructions from Colonization Commissioners to Resident Commissioner James Hurtle Fisher dated 8 October 1836, as reproduced in *Second Report of the Colonization Commissioners of South Australia*, House of Lords, London, 1838.

<sup>36</sup> Sean Brennan, ‘The disregard for legal protections of Aboriginal land rights in early South Australia’ in Shaun Berg (ed), *Coming to Terms - Aboriginal Title in South Australia* (Wakefield Press, 2010) 90, 92.

may thus be assessed on the basis of trust law principles because of the trust-like relationship that arguably exists between the Indigenous people and the Crown.

However, the Canadian approach does not answer the question of compensation for the non-economic loss suffered by Indigenous communities when their land is acquired, as Canadian courts have only considered economic factors in assessing compensation. The question of the quality and empathy of the compensation for breach of this fiduciary obligation is still unanswered by this approach.

### ***United States***

In the United States economic loss is the sole measure for awards for compensation for loss of native title. Indian interests are inalienable except to the United States Government.<sup>37</sup> Consequently courts estimate the fair market value of the land, there being no actual market for Indian land.<sup>38</sup> The fair market value is assessed through an appraisal of each component resource of the land.<sup>39</sup> The highest and best uses to which the resources can be put are assessed, and the market value of the land calculated from the sum of the value of those resources.<sup>40</sup> Such resources include game, timber, vegetation and mineral resources.<sup>41</sup> Sales of nearby lands are also considered.<sup>42</sup>

As this method is centred in a Western economic view of land similar to that adopted by the High Court in *Geita Sebea v The Territory of Papua*,<sup>43</sup> it fails to address the connection that Indigenous people have with the land and thus fails to ensure quality compensation. Just principles of compensation must consider non-economic interests.

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<sup>37</sup> Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents Of Relevance To Native Title* (Australian Institute of Aboriginal and Torres Strait Islander Studies) 268.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Tlingit and Haida Indians v. United States* 182 Ct. Cl. 130, 389 F.2d 778 (1968).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Otoe & Missouri Tribe v United States* 131 F Supp 265 593 (1955), cert den 350 US 848. (As referred to in *A Guide to Overseas Precedents Of Relevance To Native Title* 268).

<sup>43</sup> *Geita Sebea v The Territory of Papua* (1943) 67 CLR 544, 551.

## Non-economic Principles of Compensation

Three distinct areas of law where the courts consider the valuation of non-economic interests are defamation law, personal injury law and land valuation law.

### *Defamation Law*

In defamation law courts award damages as consolation for the personal distress and harm caused by the defamatory material.<sup>44</sup> Though the emotional harm incurred by a plaintiff is not easily quantifiable, the courts analyse evidence of the effect of the defamatory material on the plaintiff.<sup>45</sup> A sum is then awarded that has an ‘appropriate and rational relationship’ to the harm incurred.<sup>46</sup> It is arguable that loss of reputation is more intangible than the loss of non-economic Indigenous land interests. If the former is a basis for compensation at law, why should it not be the same for the latter?

### *Personal Injury Law*

In personal injury law, courts award damages for pain and suffering.<sup>47</sup> Again it is impossible to achieve *restitutio in integrum* for such a loss.<sup>48</sup> However, the courts assess the suffering from the perspective of the individual concerned<sup>49</sup> and a ‘just’ sum is awarded<sup>50</sup> aimed at providing ‘pleasure or solace’<sup>51</sup> in proportion to the harm suffered.

Courts already value non-material Indigenous interests in personal injury cases involving Indigenous people. Under the head of pain and suffering courts compensate Indigenous people for losses such as loss of ‘cultural fulfilment,<sup>52</sup> or ‘loss of amenity of position within the tribe’<sup>53</sup>. Thus the courts are already valuing Indigenous non-material interests albeit in a different context. Courts can take this established approach and apply it in the context of awarding

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<sup>44</sup> *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 71 (Brennan J).

<sup>45</sup> Patrick George, *Defamation Law in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2012) 500.

<sup>46</sup> *Ibid* 529.

<sup>47</sup> *Teuber v Humble* (1963) 108 CLR 491, 505 (Windeyer J).

<sup>48</sup> Harold Luntz, *Assessment of Damages For Personal Injury and Death* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) 5.

<sup>49</sup> *Ibid* 229.

<sup>50</sup> *Ibid* 230.

<sup>51</sup> *Fletcher v Autocar & Transporters Ltd* [1968] 2 QB 322 (CA) 340-1 (Diplock LJ); 364 per Salmon LJ.

<sup>52</sup> *Dixon v Davies* (1982) 17 NTR 31.

<sup>53</sup> *Napaluma v Baker* (1982) 29 SASR 192.

compensation for loss of non-material Indigenous interests in cases concerning the loss of native title rights.

### ***Land Valuation Law***

In contrast to defamation law and personal injury law, in land valuation law there has been little valuation of non-economic land interests. Traditionally the courts have held that compensation must not be increased because of land's sentimental value.<sup>54</sup> However, courts do award sums over and above the market value of the land if the land is of a 'special value' to the owner.<sup>55</sup> Such a value must be grounded in some 'objectively ascertainable' or attributable feature of the land as distinct from 'mere subjective affection or emotional involvement' with the land.<sup>56</sup>

The perspective from which the courts approach the claim is thus determinative of whether compensation is awarded for non-economic losses. If the land is viewed by the judiciary from a Western perspective, Indigenous people's connection to the land may be deemed as a 'subjective affection or emotional involvement with the land.'<sup>57</sup> Accordingly such interest may not be compensated. Conversely, if an Indigenous perspective is adopted, the Indigenous interests will be considered to be an attributable feature of the land<sup>58</sup> and compensation will be awarded for the loss of non-economic connection with the land. Several models have been proposed regarding compensation for loss of indigenous interests each of which consider non-economic interests to differing extents. These models will now be considered.

### **Native Title Compensation Models**

In establishing principles for the just compensation of native title, consideration must be given to various models of compensation proposed by academics.

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<sup>54</sup> *Wilson Bros Pty Ltd v Commonwealth* [1948] SASR 61.

<sup>55</sup> *Commissioner of Highways v Tynan* (1982) 53 LGRA 1, 5.

<sup>56</sup> *Bronzel v State Planning Authority of SA* (1979) 21 SASR 513, 524 (Wells J).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

### ***Paul Burke's model***

Paul Burke proposes a system of compensation where non-economic losses form the predominant proportion of the quantum of compensation awarded.<sup>59</sup> He proposes three distinct components for non-economic compensation:

- **Component for Insult** – for the arbitrary nature in which the traditional connection to the land was severed;<sup>60</sup>
- **Component for Disruption to Social and Cultural Practices** – for the causation of social disruption i.e. the physical inconvenience and disruption to cultural practices caused by the extinguishment of Indigenous interests;<sup>61</sup>
- **Component for Mental Distress** – for grief caused by the loss of ability to, or interference in, performing or passing on traditional customs.<sup>62</sup>

### ***Brian Keon-Cohen's Model***

Brian Keon-Cohen proposes a more pragmatic approach.<sup>63</sup> Recognizing that valuation of native title land maybe problematic due to the inalienable nature of native title interests, he argues economic damages should be assessed in accordance with reinstatement principles.<sup>64</sup> Reinstatement is used by the common law to compensate in cases where no market value exists or is not calculable due some non-economic connection with the land<sup>65</sup> e.g. land on which a synagogue is built may only be properly compensated by assessing the value of acquiring a suitable site on which another synagogue may be built.<sup>66</sup> Similarly in native title cases the connection with the land may be irreplaceable. A dreaming site may just as much a place of

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<sup>59</sup> Paul Burke, 'How Can Judges Calculate Native Title Compensation' (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 27-28.

<sup>60</sup> Ibid 26.

<sup>61</sup> Paul Burke, 'How Can Judges Calculate Native Title Compensation' (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 26.

<sup>62</sup> Ibid 27.

<sup>63</sup> Brian Keon-Cohen, 'Compensation and Compulsory Acquisition Under the Native Title Act 1993' (2002) 28 *Monash University Law Review* 17.

<sup>64</sup> Ibid 40.

<sup>65</sup> Brian Keon-Cohen, 'Compensation and Compulsory Acquisition Under the Native Title Act 1993' (2002) 28 *Monash University Law Review* 17, 41.

<sup>66</sup> *Trustees of Carlton United Hebrew Congregation v Housing Commission* [1970] VR 56.

worship as a synagogue, church or mosque and so Keon-Cohen proposes that a sum should be awarded equal to the value of other lands within the traditional boundaries of the tribe or alternatively equal to the value of lands of similar dimensions.<sup>67</sup> Non-economic losses under this model are compensated under the head of Special Value already alluded to in this essay.<sup>68</sup> He argues that this head is a vehicle through which just compensation can be achieved<sup>69</sup> and should not be constrained by arbitrary limits so that interests ‘peculiar’ to the affected communities could be adequately compensated.<sup>70</sup>

### ***John Sheehan’s Model***

Sheehan proposes a formula equal to the value of the land plus a payment for solatium for ‘imponderable factors arising from the compulsory acquisition.’<sup>71</sup> Sheehan states that such a formula should be grounded in international law specifically Article 17 of the *Universal Declaration of Human Rights*, which he argues is the source of international protection of private property.<sup>72</sup>

### **Analysis of Models**

These three models of compensation represent a spectrum of methods of compensation ranging from Burke’s largely non-economic approach to Sheehan’s predominantly economic approach. Important considerations can be gleaned from each approach. Sheehan argues just compensation is a requirement of international law,<sup>73</sup> and, as a member of the international community, Australia should fulfil this internationally declared right and award just compensation to its Indigenous citizens. Keon-Cohen’s approach of using reinstatement principles to compensate for the economic value of the land together with an award for Special Value offers an

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<sup>67</sup> Brian Keon-Cohen, ‘Compensation and Compulsory Acquisition Under the Native Title Act 1993’ (2002) 28 *Monash University Law Review* 17, 43-44.

<sup>68</sup> *Ibid* 47 - 48.

<sup>69</sup> Brian Keon-Cohen, ‘Compensation and Compulsory Acquisition Under the Native Title Act 1993’ (2002) 28 *Monash University Law Review* 17, 48.

<sup>70</sup> *Ibid* 47.

<sup>71</sup> John Sheehan, ‘Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia’ (Paper presented at FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji 10-12 April 2002) 24.

<sup>72</sup> *Ibid* 22.

<sup>73</sup> *Ibid*.

incremental development in the common law.<sup>74</sup> Burke, by establishing a framework centred on non-economic compensation, increases the quality and empathy of the compensation.<sup>75</sup>

The weakness of Sheehan's position is that it is in essence old valuation principles recast in an Indigenous context. Burke is more innovative, however, considering the diversity of native title interests that exist, the practicality of Burke's proposed components is questionable due to the inherent difficulty of distinguishing between the individual components in the myriad of scenarios that will arise. Such a model may also be too radical a departure from current compensation principles for loss of land. Keon-Cohen's model has the benefit of being rooted in established principles whilst still having flexibility to compensate for loss of non-economic indigenous interests.

## **Proposed Model**

Economic and non-economic interests must be considered equally if courts are to achieve just compensation. Economic compensation must be awarded to achieve the minimum requirements of just compensation. Land over which native title interests exist often has no market value and thus the economic value of the land should be determined, as Keon-Cohen argues, in accordance with reinstatement principles.<sup>76</sup>

In addition, non-economic interests are critical to achieving just compensation from an Indigenous standpoint. Whilst evaluation of such interests maybe problematic, the common law has already established principles in other areas of law for such assessment. Courts need to undertake a subjective analysis of the non-economic interest lost. The extent of the connection may be determined from evidence of the people affected, evidence of third parties and analysis of the assets of the land critical to the Indigenous connection such as the existence of dreaming, hunting and business places and ceremonial sites.

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<sup>74</sup> Brian Keon-Cohen, 'Compensation and Compulsory Acquisition Under the Native Title Act 1993' (2002) 28 *Monash University Law Review* 17.

<sup>75</sup> Paul Burke, 'How Can Judges Calculate Native Title Compensation' (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002).

<sup>76</sup> Brian Keon-Cohen, 'Compensation and Compulsory Acquisition Under the Native Title Act 1993' (2002) 28 *Monash University Law Review* 17, 40-44.

Courts then need to award a sum that has an ‘appropriate and rational’ relationship to the loss incurred.<sup>77</sup> In personal injury law, courts are already practised in the valuation of Indigenous interests on an individual basis. As native title interests are communal, any sum arrived at on such a basis will need to be increased by an ‘uplift factor’ to reflect the number of people affected by the extinguishment of rights.<sup>78</sup> Given that each person will have a differing level of attachment to the land, the calculation of this factor will be complex. Burke further contends that an additional amount should be awarded that, if invested, would reproduce the same amount of compensation awarded when the children become adults. This will compensate for the fact that the younger generation never understood the extent of their connection to the land.<sup>79</sup> The error in this argument is that compensation must be assessed on the basis of the connection that exists rather than on the basis of the loss that may have existed.

This compensation framework maintains its foundation in the principles of the common law. As discussed above, land valuation law already provides a mechanism for compensating for non-economic loss, namely the head of Special Value. Under this head courts can only award compensation for objectively ascertainable connections to the land.<sup>80</sup> As Keon-Cohen has argued, this head may be readily adapted to accommodate loss of non-economic indigenous land interests.<sup>81</sup> This criterion also operates as a useful control preventing courts drifting into the vagaries of policy which is an ever-present risk when dealing with such broad issues. It ensures that only non-economic interests that have a connection to the land should be compensated. Using this approach the second conceptualisation of native

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<sup>77</sup> George, above n 46, 529.

<sup>78</sup> Paul Burke, ‘How Can Judges Calculate Native Title Compensation’ (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 35-37.

<sup>79</sup> Ibid 37 - 38.

<sup>80</sup> *Bronzel v State Planning Authority of SA* (1979) 21 SASR 513, 524.

<sup>81</sup> Brian Keon-Cohen, ‘Compensation and Compulsory Acquisition Under the Native Title Act 1993’ (2002) 28 *Monash University Law Review* 17, 47-48.

title referred to above,<sup>82</sup> namely that it is an 'inclusive and heterogeneous concept,'<sup>83</sup> is recognised by the law in a principled way.

## Conclusion

This year the Federal Court will assess a compensation claim for the extinguishment of native title interests over the township of Timber Creek. The final quantum awarded must adequately compensate the Indigenous people so that the constitutional requirement of just compensation of s 51(xxxi) is satisfied.<sup>84</sup> Just compensation will be awarded when the quality of the compensation to the Indigenous people is the focus rather than the quantum of the compensation awarded.<sup>85</sup> Compensation of economic and non-economic interests must be given equal consideration.

Traditionally non-economic interests have not been considered in Australian native title jurisprudence and in the majority of international jurisdictions. However, Indigenous people throughout the Western world are languishing behind mainstream society in every sector. The common law for too long has used Western concepts and mindsets to try and frame Indigenous interests to the detriment of the Indigenous people. Recognition of non-economic Indigenous interests through compensation will communicate to Indigenous people and the whole of the Australian community that the interests of Indigenous people are valued, respected and recognized. '*Advance Australia Fair*.'

Word Count: 3,502 words

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<sup>82</sup> See pg. 3 supra.

<sup>83</sup> Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 100.

<sup>84</sup> *Australian Constitution* s 51(xxxi).

<sup>85</sup> Paul Burke, 'How Can Judges Calculate Native Title Compensation' (Research Discussion Paper Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 14.

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