Compensation for the Taking of Indigenous Common Property:

The Australian Experience

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Abstract

Indigenous common property rights and interests and the associated traditional land use management systems have proved to be much more environmentally appropriate, multi faceted, and capable of survival than originally predicted. Indeed, Western spiritual and cultural value systems, and especially "scientific" land management techniques, have exhibited far less resilience and appropriateness.

In the face of mounting evidence of the environmental and climatic impact of Western approaches to property resources, there is an increasing recognition of the need to introduce regimes of property titling and land use management which meld those most evident desirable features of Western and indigenous approaches.

Concomitant with this change in attitude towards property rights, there has been an increasing recognition in common law countries such as Australia, that when indigenous common property resources are expropriated by the state, compensation must address the full range of losses born by indigenous people. To do otherwise, would expose the state to claims of racial discrimination counter to international obligations such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.

Nevertheless, the assessment of compensation for the diminution, impairment or extinguishment of indigenous common property resources has proved to be a chimera, for Australian valuation law and practice. It is alleged in some quarters that fundamental compensation issues have stubbornly resisted resolution because of the communal nature of many indigenous property resources. The alleged conceptual difficulties have often been identified as an obstacle to the assessment of fair and just compensation, and of course a hindrance to the panacea of Western style economic development in Australia.

This pattern is repeated in many other states in the South Pacific, such as Papua New Guinea and Kiribati.

The conceptual framework within which compensation has evolved in anglo-Australian land law paradoxically offers significant hope for the development of a methodology which permits the assessment of compensation for the losses born by indigenous people when their common property resources are partially or wholly expropriated. The landmark Mabo decision of the High Court of Australia was a watershed in the development of a home grown land law in Australia.

As a result, there has been a wide-ranging academic and professional review of many areas of land administration practice, especially land use regulation and, the closely related issue of compensation. Current developments in the area of Australian valuation law and practice show that the right to "just terms" compensation enshrined in the Australian Constitution has its genesis in the American Fifth Amendment. Such a heritage has provided guideposts for the development of a more culturally appropriate and inclusive approach to the assessment of compensation for indigenous common property resources.

The paper describes ground breaking research work in this area, which provides hope for a fairer and more just approach to compensation.

Introduction

The issue of compensation for indigenous common property rights and interests is characterised by an apparent lack of certainty as to how Australian Courts will address such matters. In particular, questions arise of whether the traditional approaches adopted in land compensation and appraisal law and practice will be built upon to produce a familiar formulaic approach for indigenous common property rights and interests, or whether new unfamiliar approaches will need to be developed.

The two related decisions of the Australian High Court in *Mabo v Queensland (Mabo No 2) (1992) 175 CLR 1* (*Mabo)* and *The Wik Peoples-v-The State of Queensland and Ors (1996) 141 ALR 129 (Wik*) highlighted the pressing need for the development of field techniques and appraisal methodologies for the assessment of compensation when indigenous common property is impaired, diminished or extinguished.

This task has been made immensely more difficult as there is almost no judicial guidance in this developing area of land compensation and appraisal law and practice. In this paper, it is proposed to canvass current developments in Australian research in this area, notably:

- the contrast between indigenous and non indigenous concepts of value
- indigenous common property as a bundle of legal property rights
- constitutional guarantees for compensation, and
- the vexed issue of compensation for cultural and spiritual attachment asserted by indigenous people.

In canvassing the above issues, this paper will hopefully provide the reader with an understanding of the provocative challenge facing Australian lawyers, appraisers and the judiciary in attempting to deduce meaningful compensation when indigenous common property rights and interests are impaired, diminished or extinguished.

Attitudinal contrasts in concepts of indigenous and non indigenous values

In any discussion on the interface between indigenous common property rights and economics, two issues are commonly identified as pivotal to understanding the developing relationship between the legal notion "native title" and existing anglo-Australian property rights.

The first issue is the economic impact of indigenous common property rights and interests upon other coexisting property rights, while the second is the amount of monetary compensation which the holders of the ancient rights are entitled to, in the event that their rights are impaired, diminished, or extinguished.

As mentioned previously, there is little case law in the area of indigenous common property to provide the accustomed comfort as in anglo-Australian land and appraisal law.

Notwithstanding, there has been a historic re-examination of the underlying principles of Australian real property as a result of the 1992 High Court decision in *Mabo*. This decision held that the Crown at the time of British settlement in 1788 did not necessarily acquire absolute beneficial ownership of all land. Indigenous common property rights and interests

and the associated traditional land use management systems were held to have survived if circumstances had not arisen since European settlement to cause a loss or extinguishment of those rights. Subsequently, in 1996 the *Wik* decision by the High Court extended the principles of *Mabo* to potentially vast tracts of Crown leaseholds, where previously indigenous common property was only thought to have survived on "waste Crown land".

It remains unclear which Crown leaseholds coexist or alternatively, extinguish indigenous common property, notwithstanding recent amendments by the Australian Parliament to the

Native Title Act 1993. These amendments identify a whole raft of leasehold interests throughout Australia, which extinguish indigenous common property rights and interests. However these legislative amendments have themselves now been clouded by two decisions of the Federal Court, namely Ward *v State of Western Australia* (1998) 159 ALR 483 (*Miriuwung Gajerrong)* and State *of Western Australia –v- Ward* (unreported FCA 3 March, 1999). It should be noted that this latter decision is likely to be appealed to the High Court for final determination.

However, all of the above is only a reflection of the great intellectual tension first evident in the *Mabo* decision, and the increasingly pervasive nature of indigenous common property rights and interests in the area of Australian property law and appraisal theory and practice. Indigenous values and anglo-Australian values are at their most visible contrast when the issue of compulsory acquisition of property rights arises.

The vexed issue of just how losses arising from extinguishment or impairment of indigenous values might be assessed, highlights the need for an accommodation between post-contact land law and the indigenous legal system, if indigenous people in Australia are to receive "just terms".

In attempting to assess these losses, it is clear that indigenous concepts of value and compensation are at the centre of the interface between indigenous land tenure and anglo-Australian land law. Experience shows that there is a stark attitudinal contrast in the nature of the value loss when indigenous people have their common property rights extinguished or impaired, as opposed to non-indigenous people having their property rights compulsorily acquired.

This contrast is the strongest manifestation of the different economic, cultural and spiritual values of the two peoples.

However, as Mr Justice Fitzgerald noted in his address to the Mens Reconciliation Dinner in Brisbane on 23rd October 1998:

> *Nothing is being sought by our Indigenous people, which is not occurring elsewhere in countries like Canada, New Zealand and the United State*
>
> (*Land RightsQueensland*, 1999, p.14)

As previously stated the *Mabo* decision irreversibly impacted upon the accustomed comfort in anglo-Australian land and appraisal law, which drives the assessment of compensation. However, as Mr Justice Fitzgerald informs us, international developments in human rights ensure that Australia is not alone in attempting to justly compensate its indigenous people.

Australian churches, companies and private individuals have all evidenced a growing willingness to recognise the need to accommodate indigenous concepts of value, while professional learned associations such as the Australian Property Institute (API) have also not been untouched.

Indeed, the API expressed great concern in 1997 over the implications of poorly drafted amendments to the *Native Title Act, 1993,* which did little to assist attempts to achieve administrative efficiency, and could be adversely viewed by the Australian Courts. Interestingly, these concerns are reiterated in the recent decision of the United Nations-Committee on the Elimination of Racial Discrimination (CERD) which considered the 1998 amendments concluding that they:

> *…wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act.*
>
> (Committee on the Elimination of Racial Discrimination, 1999 Australia Decision, para.8)

From my perspective, if the amendments do contain provisions that breach international convention, and extinguish or impair indigenous concepts of value, it is uncertain how the High Court (if asked) will view these amendments contained in the *Native Title Amendment Act 1998.*

However, what we can be certain of is that the "just terms" provisions of the Australian *Constitution* provide the fundamental framework within which compensation for the compulsory acquisition of all property rights by the Commonwealth and the States must proceed. The States are required to comply with this Commonwealth framework due to the compulsion of the *Native Title Act 1993* and the *Racial Discrimination Act 1975*, coupled with *s.109* of the Australian *Constitution* which states that:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

It would therefore appear that indigenous concepts of value ought not to be regarded differentially given that specific protections contained in the *Constitution* are to be respected.

Why try to calculate the incalculable?

The vexed question of how compensation can be calculated for the extinguishment or impairment of indigenous common property has resulted in an intellectual effort the like of which is unknown in the long history of the Australian appraisal profession. The current attempts by the API to develop a methodology for the calculation of compensation arising from compulsory acquisition is a direct result of the dyschronous (separate in time) land law mentioned earlier in this paper.

In addition, the belated recognition of indigenous common property in Australia has clearly acted as a catalyst for the emergence of an Australian land law rather than an alien transplanted one. However, there is a palpable fear that as more information about the nature and content of such rights emerges from research, greater indigenous awareness, and judicial decisions, Australian appraisers may not necessarily be provided with the means needed to formulate an appropriate methodology.

Furthermore, it has been argued by various commentators (Pritchard 1998; Nettheim 1999; ATSIC 1999) that should the *Native Title Amendment Act 1998* fail to demonstrate respect for the constitutional "just terms" provisions (viz. s.51 (xxxi)), protracted litigation can be anticipated.

Clearly, indigenous common property rights and interests must be recognised in all their complicated unexpected forms, and the intellectual effort over recent years to devise a compensation methodology has in an important but modest way attempted to seize an opportunity to rediscover and reconcile with the past.

The search for a methodology for the assessment of compensation has been driven by the deep-seated belief that an intellectually convincing and independent appraisal approach can be delivered to the Courts. This is an important issue, as there is reason to doubt whether the highly legalistic approach suggested by some legal academics and lawyers is feasible, given that such approaches appear to involve exhaustive judicial examination of each compensation claim for indigenous common property on a claimant by claimant basis (Lavarch & Riding 1998).

The alternative is for land compensation and appraisal law to build upon current practices, and to access the growing interdisciplinary knowledge base for indigenous common property, therein creating additional non-land components of a compensation package reflecting the special nature of indigenous life. With a sensitivity to cultural and spiritual differences coupled with a liberal evidentiary framework, indigenous losses to the degree quantifiable can be understood, and hence compensable.

There is an enormous risk that should the development of a traditional formulaic appraisal approach be derailed by well-intentioned, but nevertheless destructive legalistic approaches, indigenous common property will be misinterpreted and hence undervalued. This could arise primarily because the developing components in the new appraisal methodology do not meet the current technical standards or legal rules of evidence.

However, it is not suggested that such intellectual efforts should be conducted in a cavalier manner, without regard to the long established heads of consideration currently utilised when compensation is calculated for more familiar property interests. The notion of a new head of consideration, which is somewhat analogous to the existing heads of solatium and special value, is an attractive proposition, which both respects current case law and practice, and yet accommodates the special nature of indigenous life.

Before proceeding further, it is necessary to examine the notion of indigenous common property as a bundle of legal property rights as this can provide us with some understanding of where a methodology for the assessment of compensation resides.

Indigenous common property as a bundle of legal property rights

On 18th September 1998, the High Court confirmed in *Jim Fejo & David Mills* on behalf of the *Larrakia People v The Northern Territory & Oilnet (NT) Pty Ltd,* (1998) 156 ALR 721 *(Fejo)* that a grant of freehold title permanently extinguished indigenous common property.

The emerging pattern in this case law and other more recent cases decided by the Australian High Court suggest a more restricted view of the nature of indigenous rights and interests. Indeed some writers have proposed that the High Court is actually recasting these indigenous rights and interests.

Why is this so?

There are three views of the nature of indigenous common property rights and interests and the High Court is slowly revealing which view it prefers. First, these rights and interests can be viewed as a bundle of property-related rights and/or second, a right to the land itself, under anglo-Australian law, or third and alternatively as a manifestation of indigenous legal and cultural systems.

It is respectfully submitted that the High Court appears increasingly to be giving support to the first notion, and in *Fejo* the judgements referred to "the bundle of interests we now call native title" and " the rights, which together constitute native title."

In adopting this view of indigenous common property, the Court appears to be moving away from the view that such rights are unique, (or *sui generis*) in character. In some respects, these rights are being allocated a position in the hierarchy of anglo-Australian land tenures, and hence being made capable of comparison with other tenures such as freehold and leasehold.

Some commentators such as Strelein (1999, p.7) have noted that the High Court in *Fejo* contrasted the factual existence of indigenous common property with the artificial concept of "native title" in anglo-Australian law and that:

> *…to be enforceable under the common law, native title must fit within the cracks left by the Australian land tenure system.*
>
> *The High Court has made a distinction between native title which exists in fact and where it may exist in law. With this reasoning, native title has truly become a creature of the common law…As the Court moves to a bundle of rights approach, centred upon physical access, and continues to assert that the recognition of native title is dependent upon the common law, the idea that the source of the right lies in Indigenous law and society becomes difficult to reconcile with the doctrine that is developing.*

However, this approach has been viewed as contrary to *Mabo* where it was held that indigenous common property rights and interests are sourced in indigenous laws and customs. But, *Fejo* may represent a pragmatic realisation by the Australian High Court that future judicial decisions regarding compensation for the extinguishment of such rights will of necessity be rooted in existing land and appraisal case law.

Nevertheless, there are a number of hurdles to be overcome before anyone can express confidence in this classificatory approach to indigenous common property, not least being the general judicial caution toward recognising the existence of new forms of rights in property.

The bundle of rights approach appears increasingly sensible if Australian indigenes are to be afforded the long history of protection embedded in the anglo-Australian land law when valuable property rights are compulsorily acquired or extinguished.

While anthropological research continues to stress the strength of the spiritual and cultural relationship that indigenous people have with land, the bundle of rights approach nevertheless attempts to accommodate the intricacies of the various values evident in a diversity of such rights. A compensation methodology based upon a bundle of legal property rights need not conflict with the view that spirituality and culture are integral with indigenous concepts of land ownership.

Already there are cases, which have dealt with loss of cultural fulfilment, in which there has been concerted attempts by the Courts to gain sensitivity to cultural differences. In *Napaluna-v-Baker (1982)* 29 SASR 192, and *Dixon-v- Davies* (1982 17 NTR 31), such losses by indigenous persons was assessed and monetary compensation for denial of access to initiation was awarded.

Whilst imperfect, such attempts within a liberal evidentiary framework of the law, are increasingly being seen as capable of accommodating the non-material components of indigenous property rights (after Whipple 1997). While these non-material components are far from settled, and may vary from location to location, there is a substantial risk that they may be misinterpreted and hence undervalued primarily because they do not meet the usual technical standards or rules of evidence (see earlier discussion).

There is strong ground to argue that the material and non-material aspects of the bundle of rights comprising specific indigenous common property can be measured, and hence made compensable using existing appraisal law and methodology as the skeletal framework.

The constitutional guarantees for compensation in Australia strongly suggest that this existing legal framework ought not to be dismissed. The following section of this paper describes the notion of ‘just terms’ and what it means for indigenous common property.

Australian constitutional guarantees for compensation

The compulsory acquisition of any private property right in Australia by a Commonwealth-sourced action is subject to statutory provisions, which are the basis for the assessment of compensation. Generally these provisions are contained within *ss55-58* of the *Lands Acquisition Act, 1989 (Cwth).*

The High Court informs us that:

> *[a]ny acquisition of property by the Commonwealth will…attract the operation of s51(xxxi) [of the Australian Constitution] because it will be in pursuit of a purpose in respect of which the Parliament has power to make laws….*
>
> *(Toohey, J. Newcrest Mining (WA) Ltd & or.-v- The Commonwealth of Australia & or ((1997) 147 ALR 42)*

S51(xxxi) of the *Constitution* states:

> *The Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *…(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws*

Interpreting *s.51(xxxi)*, the High Court has stated that:

> *[t]he terms of s.51(xxxi) were intended to recognise the principle of the immunity of private and provincial property from interference by the federal authority, except on fair and equitable terms.*
>
> (Kirby, J. in *Newcrest* at *((1997) 147 ALR 42)*

We have however little guidance as to the nature of "just terms" notwithstanding that all existing compensation assessments involving Commonwealth legislation must be undertaken with a view to ensuring that the resultant compensation package respects *s.51(xxxi)*. Given the

important role that private property rights have in the Australian psyche, it is surprising that there has been little clarification of "just terms" in the ninety-nine years since Federation.

Importantly, this guarantee of compensation has both complexity and subtlety in the context of indigenous common property rights and interests. The multi faceted nature of such rights with their often complicated and unexpected forms, have never been encountered before in anglo-Australian land law. Also, the question of whether compensation is on "just terms" has not arisen greatly in past case law, because anglo-Australian tenures are in comparison to indigenous land tenures, quite simplistic. Nevertheless, there have been questions that have arisen in past cases as to whether a particular monetary compensation package adequately compensates the dispossessed landowner, such that it meets the criteria of "just terms". However, these issues have only arisen in the context of anglo-Australian land tenures.

Commentators such as Lofgren (1998) have indicated that for the terms of any compensation to be just, they must meet a test of reasonableness, or alternatively a test of the degree of being unreasonable. Further, it is argued that "just terms" must not be narrowly construed.

In the case of indigenous common property, the importance of compliance with "just terms" compensation is accentuated by the *sui generis* nature of indigenous rights and interests. Hence, it is argued that the nature of these rights is such that application of the "just terms" criteria may not necessarily restrict compensation to the narrow monetary base adopted for the expropriation of anglo-Australian land tenures.

Reinforcing this view, the concept of "just terms" for the compulsory acquisition of private property rights by the Commonwealth is one of the few guarantees of rights expressly stated in the Australian *Constitution.* The High Court has confirmed this view of "just terms" as a fundamental constitutional right saying that:

> *[t]his Court should ensure that the promise is kept.*
>
> (Kirby, J. in *Newcrest* at *((1997) 147 ALR 42)*)

Given the above, it is intriguing that indigenous common property described by the High Court as a valuable property right, should have been considered in the early days of the *Wik* debate for extinguishment, on terms which could only be described as less than just. Such ill-conceived notions of confiscation of property were subsequently viewed by many commentators as almost certainly in breach of *s.51(xxxi).*

As stated earlier in this paper, early debate surrounding the *Wik* decision prompted the API to express concern that any attempts to modify the protection afforded by s.51(xxxi) would be undesirable:

> *…any attempt to extinguish or modify the common law rights of native titleholders is ill conceived. The acquisition of any Australian's property rights, indigenous or non-indigenous is protected by s.51(xxxi) of the Constitution, which requires the Commonwealth government to compensate the dispossessed owner on "just terms".*
>
> *It has been suggested that ways may be found for the States to avoid this constitutional protection by acting on the Commonwealth's behalf using less rigorous State resumption legislation which could have the effect of reducing or removing the compensation to be paid.*
>
> *Such an action is viewed…with concern, [given]…that such action would create an undesirable precedent for all Australians.* (API 1997, p.1)

The subsequent limit on compensation enacted in the 1998 amendments to the *Native Title Act 1993,* attempt to cap compensation for extinguishment at that payable as if the property right compulsorily acquired were freehold. However, this limit is ameliorated by the requirement that such compensation may have to be increased should the quantum not satisfy the "just terms" criteria of *s.51 (xxxi).*

Whether this combined approach to compensation contained within the amendments to the *Act* is acceptable constitutionally remains untested. What is known, however, is the attitude of the High Court to the protection of the limited number of fundamental rights embodied in the *Constitution*, such as "just terms".

The attitude evidenced in the *Newcrest* decision indicates that a weakening of such rights is not contemplated.

Importantly for indigenous common property, entreaties for the continued protection of private property rights have also grown in response to increasing land use and environmental regulation both in Australia, and especially in the United States.

The decision in *Newcrest* was viewed by commentators such as Sperling (1997) as evidencing an unnecessary preoccupation by the High Court with private property rights, which in turn may constrain governments in regulating land use for fear of compensation claims. Paradoxically, Sperling saw the *Newcrest* decision as inhibiting moves towards sustainable development, noting that:

> *[h]istorical conceptions of property rights and the proper role of government became one of the central pillars upon which English and Australian law was based. The suggestion that there may be an alternative way of ordering and governing the relationship between humans and the land therefore fundamentally challenges the correctness of hundreds of years of thought, experience and law.*
>
> (Sperling 1997, p.428)

The decision in *Newcrest* was viewed as moving Australia down the American 'takings' path:

> *…for the first time under Australian law, land use restrictions have been held to constitute an acquisition of property for which there is a constitutionally guaranteed right to compensation. The High Court reached this decision despite the decision in the Tasmanian Dam Case, which had previously been regarded as settled law.*
>
> (Sperling, 1997, p.431)

It is alleged that for ecological sustainability of land use to be encouraged, the bundle of property rights must be untied and ownership separated from use. The flaw in this argument has been identified by Wakeford (1990, p.40) who notes that in the United States:

> *…generally,..regulations can go a long way before a taking requiring compensation is involved. This is because the courts have held that all potential economic uses have to have been extinguished before such a taking can arise.*

In the United States, the taking of private property rights are protected by the *Fifth Amendment* of the American *Constitution* which states that:

> *…nor shall private property be taken for public use, without just compensation.*

The central role of private property rights in the United States is viewed as that of a social contract, setting out the individual's rights and in turn guaranteeing that society will only act in a just manner when assessing compensation.

When the framers of the Australian *Constitution* looked to the *5th Amendment* of the U.S. *Constitution,* they encountered the words "just compensation". Hence, a prerequisite to revisiting "just terms" in the Australian context, is clearly an understanding of the American phrase "just compensation".

Why is this ?

The notion of property rights is remarkably fluid and has changed over time as conditions in society altered. Americans associate property rights and guarantees contained within their constitutional law with the ancient guarantees in 1215 of *Magna Carta* which states that:

> *No freeman shall be taken, imprisoned, disseised… except by the lawful judgment of his peers and by the law of land.*

They believe that landowners had a right to resist the compulsory acquisition of property rights unless due process of law occurs. Building upon this, the concept of a compact between the American people and their government was developed where the primary purpose of government was to ensure that property rights were protected.

The holding of property is seen as a natural right, and the power of government is viewed as being necessarily limited by its general duty to safe guard property rights.

This concept of protection of property rights cannot be overstated, and impacts heavily upon American thinking from the 17th century onwards. This is also the heritage of the political philosophy underlying the *5th Amendment*, and hence the Australian concept of "just terms".

The importance of this shared constitutional history also impacts upon the notion of compensation. American writers such as Ely (1998) also believe that *Magna Carta* partially recognised the principle of compensation, in that the Crown could not compulsorily acquire private property without payment. By the 17th century, the British parliament often allowed for the payment of compensation where land was taken, and American colonists viewed this as establishing a common law principle.

Importantly, in the development of a notion of "just terms" in the assessment of compensation for indigenous common property in Australia, this understanding of the meaning of

compensation by the American progenitors of our Australian *Constitution* is critical. American writers commonly use phrases such as "full indemnification" and "equivalence for the injury thereby sustained" when discussing the notion of compensation.

Legal development and constitutional interpretation of the fundamental right that a citizen ought not to be arbitrarily deprived of property rights is also reflected in the *Universal*

Declaration of Human Rights at *Article 17*, and also in earlier benchmark documents such as the 1789 French *Declaration of the Rights of Man and of the Citizen.* Importantly, this latter document recognises that where public need necessitates compulsory acquisition of property rights, this action can only occur "on condition of a just and prior indemnity".

More recent documents such as the Indian *Constitution* allude to a necessity to provide for compensation when compulsory acquisition of property occurs. The Malaysian *Constitution* requires adequate compensation, while the Japanese *Constitution* perhaps reflecting American influence states that private property rights compulsorily acquired can only be taken "upon just compensation".

In concert with the above, there has been a increasing recognition and articulation by the courts in the larger common law world of the multi faceted nature of compensation. In jurisdictions such as England and New Zealand, apart from the United States, the courts were developing an understanding of what compensation meant.

For example, last century an English court held that the diminution of natural light to an owner's property was a compensable matter, and was to be assessed (viz. *Eagle –v- The Charing Cross Railway Company* ((1867) LR 2 CP 638). In a much later example, a New Zealand court held that the right to sea access and the use and sale of sand and shells, had been extinguished and was a proper subject for compensation (viz. *Smale –v- Takapuna Council* (1932) NZLR 35)

In Australia, the courts have favoured more liberal estimates of compensation, and speak of "common sense" and reject a strict adherence to precise mathematical calculations. They also use phrases such as "common fairness" which are regarded as "a useful touchstone" by which mathematical calculations and established valuation procedures can be tested.

Importantly, the courts have stated that categories of special value to the owner, which can take compensation beyond the usual norms of market value, can never be closed. This is because such special values (perhaps those held by holders of indigenous common property):

> *…may be derived from an immense variety of circumstances exemplifying many forms of relationship and interdependence between the expropriated and retained land: but as a general practical proposition, the special value may be found in a positive advantage, or in an exemption from disadvantage, which the retention of the subject land would have conferred.*
> (*Commissioner of Highways-v-Tynan* (1982) 53 LGRA 1 at 6-7)

Such notions have particular relevance for the holders of indigenous common property rights and interests in their many and varied forms.

All of the above suggests that indigenous common property can only be acquired in a manner commensurate with the legal processes which the broader Australian community expect to be applied when compulsory acquisition of any property rights occurs.

To that end, it is clear that the increasingly evident view of the judiciary (as discussed earlier) that indigenous common property can be viewed as a bundle of legal property rights within the context of anglo Australian property law, offers considerable hope that a classificatory approach to such rights will afford holders “just terms” compensation.

Also as stated earlier in this paper, the development of a liberal evidentiary framework is seen as the avenue through which the various facets (material and non-material) of indigenous common property can be accommodated.

The development of an innovative jurisprudence that respects these qualities, but does not fatally fracture the skeletal framework of existing anglo-Australian land law, must occur through an obligatory revisiting of the notion of “just terms”.

This task will also involve the development of practical diagnostic markers for the various incidents of indigenous common property rights and interests, an undertaking which has only just begun in the area of compensation law and appraisal practice.

Finally, all of the above suggests that the notion of “just terms” will be heavily influenced by its long gestation as a legal concept in Australia and the United States, and it is clear that the assessment of compensation for indigenous common property will, as it is developed by the courts over the next few years in Australia, reflect this heritage.

Compensation for indigenous cultural and spiritual attachment.

For an accommodation to be reached between indigenous values and anglo-Australian values, indigenous common property in all its complicated, unexpected forms must be addressed if the constitutional protection of "just terms" is to be afforded to indigenous people in Australia.

"Just terms" as a fundamental Australian constitutional right was clearly identified in the previously mentioned *Newcrest* decision of the High Court. As stated earlier in this paper, during the debate arising from the decision in *Wik*, suggestions were made that indigenous common property ought to be extinguished on the Australian continent. As Solomon (1999, p.32) observes:

> *[t]he debate at that point became bitter and highly politicised.. Miners and pastoralists…wanted native title rights to be restricted or even eliminated. The debate in the Senate was the longest on record to that point. And the High Court came in for a great deal of criticism over its decision.*

Fortuitously, such suggestions were recognised as rhetoric, as the cost of this proposal would clearly have been immense, both socially and financially. At the time, Altman (1997, p.15) warned that:

> *[g]eneral extinguishment will result in delays, lack of certainty and a large compensation bill to be borne by the Australian public.*

However, the lack of clarity over the nature of compensation due to indigenous people for their common property rights and interests, arises from the simple fact that land is considered by Australian indigenes to be an inextricable component of their culture and identity. It follows that any impact on their right to use land will have a concomitant impact on the culture and identity of the dispossessed traditional owners. Critically, indigenous peoples contend that land, culture and identity are:

> *…inseparable in Aboriginal belief*
>
> (Atkinson 1997, p. 4)

Hence, one of the main issues in conceptualising a compensation regime, which respects indigenous common property rights and interests, has been the vexed issue of how cultural and spiritual attachment can be assessed. For holders of indigenous common property to be properly compensated, it must be recognised that all the rights asserted by traditional owners may not necessarily be encompassed by those rights which have visible expression. For example, in *Hayes v Northern Territory* (1999) FCA 1248 the control and management of spiritual forces was identified as a valid incident of native title.

Clearly, significant difficulties lie ahead in devising at this late stage in Australian land law, methodologies, which attempt to provide a formulaic framework for the appraisal of indigenous culture and spirituality.

Apart from reversing the established direction of compensation law and appraisal practice, which currently marginalises culture and spirituality, there is also the difficulty of devising a methodology, which correctly identifies and fully values the spiritual interaction existing within indigenous common property.

Regarding such spiritual interaction, Richard Eckersley of the Australian National University National Centre for Epidemiology and Population Health recently observed that:

> *[h]uman well-being is associated with the personal, social and spiritual relationships that give our lives a moral texture and a sense of meaning, of self-worth, belonging, identity, purpose and hope. Psychologists have shown that positive life meaning is related to strong religious beliefs, self-transcendent values, membership of group's dedication to a cause and clear life goals.*

Further, he noted that:

> *…spirituality offers something deeper. It is central to the age-old questions about the meaning of life…it represents the broadest and deepest form of connectedness*
>
> (Eckersley, 2000 p.4s)

Indigenous concepts of value strongly mirror Eckersley's observations. Traditional societies at a very early stage identified the repetition and sequencing of events in their world, such as day and night, the seasons, tidal movements, and even stellar movement. These natural patterns enabled indigenous people to connect with their landscape and to read order into their lives.

The natural events around which indigenous life and myth are constructed, ensure that traditional elders are critically aware of even minimal ecological perturbation of indigenous common property. Anthropologists explain that such awareness ensures that the past, present and future coalesce in indigenous culture and spirituality.

It is argued by writers such as Suzuki & McConnell (1997, p.10) that this need for order is deep seated, and lies within the human brain's "built-in ordering capacity". They argue that this holistic view of the world shared by indigenous peoples has been severed in Western societies, and there is a "sacred balance" that has been lost.

Paradoxically, indigenous concepts of value were remarkably similar to the values evident in the relationships between religion and medieval European societies. Medieval societies had social frameworks, work practices and property allocation policies which were essentially religious questions, such as:

> *…[h]ow people viewed the cosmos and their place within it, how they organised their social relationships, spent their time and allocated their resources…Typically the answers were enmeshed with religious ritual.*
>
> (McGillion 1999, p.4s)

Further, medieval land tenures and land management practices reflected those societies' traditional understanding that their world was a religious place.

Christian values in those times would appear to be analogous to indigenous concepts of value first recognised in Australia in the *Mabo* decision and which position spirituality as culturally, politically and socially determinative.

On first inspection, all of the above would appear to have led the search for a methodology for a compensation methodology for culture and spirituality into unchartered waters. However, the heritage of feudal land tenures which underpins much of Australian land law provides great prospects for a hitherto unexpected understanding of the many and varied indigenous common property rights and interests.

Perhaps these prospects are even further enhanced when it is realised that few rights, such as property are protected by name in the Australian *Constitution*. The indissoluble relationship between culture and spirituality, and indigenous rights and interests, may ultimately rely upon these constitutional protections if indigenous culture and spirituality is to be respected in future compensation determinations by the Australian Courts.

As stated earlier, spirituality pervaded medieval society, and it is not surprising that feudal land utilisation encompassed holistic notions such as soil conservation strategies, and village communism. The wastelands beyond the medieval village including forests and moors were held in common by every holder of land. These important communal rights, together with personal responsibilities within the village unit were the source of important bodies of customary rules. Moore (1945, p.17) provides a useful description of these surviving communal rights which were:

> *…something of a legal curiosity, and mixed up in…title-deeds were some of the principles of feudalism, capitalism, distributism, and* communism. *The hay crop belonged to a number of private owners, including the squire and the Abbey; their boundaries were marked mysteriously by means of little posts…*
>
> *But while the hay crop was private property, the meadow itself, the soil that grew the hay, belonged to "the burgesses"…[who] possessed no cows or sheep to graze upon it, so they too each season sold the aftermath by auction and distributed the proceeds, according to an ancient law…Nobody got more than a few shillings for his share; but at least every man, woman and child… had the right to walk and play in the field, which gave them a good possessive feeling about it.*

These village customs had the effective standing of law, and yet as legal historians note were far more difficult to change. Not all rights to land necessarily involved physical ownership of land, and often rights were enjoyed over other person's lands, commonly known as easements or profits. Profits in particular are an interesting feature of feudal land tenure and could be separated from the ownership of land.

Profits might allow the holders in common with others to graze stock, to cut grass, to cut and remove wood, and importantly the right to take fish and deer. Again, Moore (1945, p.18) usefully describes some of these ancient profits as follows:

> *[i]n the winter we shot snipe there, and sometimes hares, without let or hindrance. In the spring,…we hunted plovers' nests…From the banks of the river jutted out numberless fishing-rods; [fisherman] perched sedately on wicker creels ledgering for bream, while the more energetic ones, swift of eye and wrist, fished for roach, and the more adventurous wandered here and there, carrying a jar of minnows, live-baiting for perch.*

These property rights, known in modern appraisal terminology as *profits-a-prendre* have been recognised as a component of Australian land law which are strongly analogous to a large number of indigenous common property rights and interests.

While history has recorded the demise of feudal society, land law in Australia still reflects a heritage of feudal land tenure through the ultimate ownership by the Crown of all land, together with Crown proprietary rights subject to indigenous common property, in waste (unalienated) lands.

Apart from the above, the ghost of feudalism is also evident in those previously mentioned rights known as *profits-a-prendre.* A market price for these valuable property rights currently exists, reflecting the worth of access to resources accruing to the holder of the rights. It is however important to recognise that such rights had as their foundation the understanding that medieval society relied almost wholly on the produce of the land for its existence.

These subsistence needs influenced the development of feudal land law, and ensured that rights such as *profits-a-prendre* would be a marketable commodity.

The analogy with indigenous rights in natural resources is striking, notwithstanding the recent decision in the S*tate of Western Australia –v- Ward* (unreported FCA 3 March, 2000), where it was held that the native title right to control access to resources is problematic. As mentioned earlier in this paper, it is noted that this decision will almost certainly be appealed.

However, as stated earlier in this paper, there is clearly an indissoluble indigenous cultural and spiritual aspect not previously encountered in compensation cases in anglo-Australian land law. This is notwithstanding that European influence in Australia set in train a process of cultural and spiritual destabilisation, which according to leading Australian social psychologist, Hugh McKay produced:

> *…dispossession, the misery, the cultural carnage and the impression that our society and its governments have visited on Aboriginal people, unwittingly or not.*
>
> (McKay 2000, p. 20s)

If it is accepted that indigenous forms of *profit-a-prendre* may be analogous to those currently evident in anglo-Australian land law, what additional compensation should be added to their market price for cultural and spiritual attachment?

The answer to this question almost certainly lies in an examination of past approaches by Courts to compensation loadings for those matters which at the outset appear incalculable.

We have the example of the judicial discretion known as *solatium* , which is provided for in many compulsory land acquisition statutes in Australia. The term *solatium* was described in *March –v- City of Frankston (No.1)* (1969) VR 350 at 356 as:

> *…an expression apt to describe an award of some amount to cover inconvenience and in a proper case distress caused by compulsory taking. It is quite inapt to describe an amount awarded for provable loss to which the claimant is entitled.*

The Courts in addressing *solatium* have described it as a loading or percentage to be awarded to the dispossessed owner:

> *… merely by reason of the fact that the compensation was compulsory*
>
> (*Re Wilson and State Electricity Commission of Victoria* (1921) VLR 459)

The various judgements dealing with *solatium* use phrases such as "imponderable factors arising from the compulsory nature of the acquisition" (viz. *March –v- City of Frankston (No.1)* (1969) VR 350 at 356), and "intangible or non-pecuniary disadvantages" (viz. *R.K.Morgan Holdings Pty.Ltd. –v- Melbourne & Metropolitan Board of Works* (1992) 77 LGRA 102 at 115). The use of this terminology suggests that the Courts are aware that the nature of compulsory acquisition is such that unquantifiable losses, inconvenience, disturbance and disruption can be considerable due to the impact of the compulsory dispossession.

Notwithstanding, the problem in many of the cases is that the evidence for the award of *solatium* is difficult to establish and hence quantify in any meaningful manner. Awards of 2% and 3% loading by the Courts in such cases strongly suggest that successful claims under the heading of *solatium* for greater loadings than above must rely heavily on evidentiary proof of loss. Such losses as stated above, are notoriously difficult to quantify, and hence the need for reliance on such proof.

Various statutes provide for this judicial discretion to be exercised at loadings considerably in excess of that described above. For example, in Western Australia the compensation sum may be increased by up to 10% if evidence before the Court elicits support for such an award (viz. *s.63 Public Works Act 1902*).

It is respectfully suggested that percentage loadings, whilst possibly an anathema to dispossessed indigenous claimants, may nevertheless provide a useful benchmark from which a meaningful claim for a loading for cultural and spiritual attachment can be formulated.

Conclusion

The search for a methodology for the assessment of compensation for indigenous common property rights and interests such as *profits-a-prendre*, will almost certainly produce a formulaic approach which will please neither the acquiring governments or the dispossessed indigenous holders. My research since 1995 suggests that other common law countries such as New Zealand, Canada and Papua New Guinea appear to have deliberately marginalised the quantification of compensation for indigenous rights and interests, preferring to deal with compensation by way of ad hoc negotiated agreements.

In side stepping the issue of an "appraisal" approach to compensation, those jurisdictions would appear to have strayed away from a history of orderly evolution of land law. Flawed though any Australian methodology may well be, it ought not to evidence these failings.

The creation of a method of calculating the incalculable is probably the most important step in the development of our body of law since the continent of Australia received the common law from England.

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