Compensation and Compulsory Aquisition Under the Native Title Act 1993

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The question of upon what principles traditional owners should be compensated for loss or impairment of native title rights and interests, due to acts of the Crown or third parties, remains unresolved. In this article, the author examines one aspect of this problem which arises under the Native Title Act 1993 (Cth). That aspect is how compensation might be assessed when areas of land (or waters) under claim are compulsorily acquired pursuant to state or territory land acquisition legislation. The relationship between those laws and the sometimes overriding impact of the Commonwealth Native Title Act is examined, as are relevant aspects of the long standing jurisprudence arising, particularly in Victoria, under state compulsory acquisition legislation. The author suggests some preferred approaches to assessing compensation in this context, drawing on the American experience as well as Northern Territory personal injuries decisions where compensation has been provided for loss of cultural enjoyment.

I. INTRODUCTION

A. The Scope of this Paper

Compensating native title holders for extinguishment or impairment of their native title rights and interests remains problematic. Land valuers have raised, broadly, two issues triggered by the native title phenomenon when valuing land.[1] First, what is the value of land and alternative uses of land where native title survives or co-exists with other rights? Second, what is the value of impaired or extinguished native title for compensation purposes? Only the second of these two questions is dealt with here. Whilst numerous commentators have discussed

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1 See, eg Bryan Horrigan 'The Legal, Political and Commercial implications of the High Court's *Wik* Decision - the Way Ahead' in B Horrigan & S Young (eds) *Commercial Implications of Native Title* (1997) 375-412, 401. As to valuation perspectives, see also Margaret Stephenson (ed), *Mabo: The Native Title Legislation* (1995) 135-54; and a special series of articles in (1996) 34 *Valuer and Land Economist* 7-30.

various aspects,[2] neither land valuers nor the courts as yet have reached any confident conclusions on these matters.[3]

Here I focus upon the main ways in which the *Native Title Act 1993* (Cth) ('NTA') triggers rights to compensation; major features of that regulatory scheme, especially the over-riding requirement of 'just terms'; rights to compensation following compulsory acquisition with reference to Victorian legislation; and how those lost entitlements might be valued for the purposes of providing compensation, with some reference to experience in the USA. My main focus here is upon the as-yet unanswered question: how are the well-recognised unique features of native title - especially cultural and spiritual aspects - to be quantified for the purposes of compensating traditional owners for loss of those elements?

One should begin by mentioning two matters. First, relevant common law and legislation in Australia - especially the NTA - significantly restricts the ability of traditional owners to seek compensation for the extinguishment or impairment of their native title rights and interests occurring since 1788, and into the future. As to the common law, the High Court has repeatedly held that on the assumption of sovereignty, governments may lawfully extinguish or impair native title, without compensation, by a positive legislative or executive act inconsistent with the continuation of native title[4] - at least until the coming into force of the *Racial Discrimination Act 1975* (Cth), ss 9 and 10.[5]

As to statute, the NTA validation and extinguishment provisions, coupled with complimentary state and territory laws, (discussed further below) in summary achieve the 'bucket loads of extinguishment' promised by the then Deputy Prime Minister in 1998. These laws have the result that no compensation is available to traditional owners for loss of native title, consistent with the common law, for acts of the Crown prior to 1 October 1975; but that thereafter, limited rights to compensation are available provided claimants can demonstrate the existence of native title in the relevant land in the first place. Achieving an award of compensation for loss of native title is thus a long and weary road: perhaps this is one reason why, as at 3 December 2001, throughout Australia, 622 'active'

2 See amongst a growing body of articles: NNTT *Compensation for Native Title: Issues and Challenges: Papers from Workshops held in 1997* (NNTT 1999) especially Graham Neate, 'Determining Compensation for Native Title: Legislative Issues and Practical Realities' at 3-95.

3 See as to land valuers, four articles at *Valuer and Land Economist*, above n 1; and more recently, J Sheehan, 'The Provocative Challenge of Calculating the Incalculable', paper to conference *Native Title in the New Millenium*, (Native Title Representative Bodies Legal Conference, Melbourne, April 2000), reproduced at B A Keon-Cohen (ed) *Native Title in the New Millenium* (AIATSIS, 2000, book and CD). The Sheehan paper and conference discussion is found on the CD. However, in 1996, two panels of the NNTT explored various aspects of this question in arbitration proceedings under NTA ss 35, 38. See discussion below concerning *WA v Thomas* (1996) 133 FLR 124; *Re Koara People* (1996) 132 FLR 73 at n 156 ff.

4 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 15, 63 (*'Mabo [No 2]'*); *Wik Peoples v Queensland* (1996) 187 CLR 1, 123-4, 207, 238-42; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 613; *Fejo v Northern Territory* (1998) 195 CLR 96, 130-1, [51]-[55], 147[95].

5 Operative as from 31 October 1975.

claimant applications for a determination of native title were being pursued under the NTA, but only 23 (additional) 'active' claims for compensation.[6]

Second, as at time of writing (March 2002) various Federal Court Judges, in claims before them, have enumerated the particular native title rights and interests found to exist on the evidence, or agreed between the parties, for the purposes of making a determination of the existence of native title over a claimed area.[7] But a jurisprudential description of what native title fundamentally is - being an important factor when, inter alia, approaching questions of compensation for the loss or impairment of that title - has not to date been authoritatively resolved. At one extreme is the declaration in *Mabo [No 2]* by the High Court of rights equivalent to an estate in fee simple.[8] At the other extreme (depending upon the evidence) the traditional rights and interests determined by the abovementioned Judges to exist in particular claims may comprise merely remnant rights to use the land and its natural resources for traditional purposes only, eg, typically, 'to hunt fish and gather', or 'to conduct ceremony'. Whether this formula includes rights to any minerals in the determination area will depend first, upon the facts as found concerning the claimants' traditional connection to country; and second, whether such traditional rights and interests (if found) have nevertheless, at some time in the past, been extinguished by various acts of the Crown, typically, by the effect of the mere passage of legislation appropriating such minerals to the Crown. Thus, for example, in *Ward v Western Australia*, Lee J at trial found that the native title rights he determined to exist included a native title right or interest in minerals found within the claim area.[9] However, on appeal, the Full Court, by a majority, set aside those findings and substituted a determination of its own.[10] As to minerals, the majority found that there were no surviving native title rights or interests in minerals or petroleum, as those terms were defined in the relevant legislation.[11]

Questions such as these were argued on appeal before the High Court in March 2001 and judgement is pending. The fundamental question upon which the judges below differed, and now presented to the High Court, is whether native

6 See (2001) 5(6) *Native Title News* (December) 109.

7 See NTA s 225 which states, in part: 'A determination of native title is a determination whether or not native title exists in relation to a particular area, ... and if it does ...a determination of ..(b) the nature and extent of the native title rights and interests in relation to the determination area....' Several determinations under this section have now been made, and are collected at Butterworths, *Native Title Service*, Vol 2 [130,000 - 140,060].

8 (1992) 175 CLR 1 at 217 where the court declared: 'The Meriam people are entitled, as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands'.

9 *Ward v Western Australia* (1998) 159 ALR 483

10 *Western Australia v Ward* (2000) 170 ALR 159 per Baumont and Von Doussa JJ, North J dissenting. See the Court's final determination, after further submissions from the parties, at [2000] FCA 611, unreported.

11 In Western Australia, the *Mining Act 1904 (WA), Mining Act 1978 (WA), Petroleum Act 1967 (WA);* and in the Northern Territory (the claimed area crossed the border) the *Minerals (Acquisition) Act (NT), Petroleum Act 1984 (NT)* and *Petroleum Act 1984 (NT)*. See the determination in this case reported at Butterworths, *Native Title Service*, Vol 2 [140,015].

title is a right to the land itself (as found by Lee J at trial, and North J, dissenting, on appeal), upon which various specific rights found to exist in a particular case (eg to use and enjoy the land) may be seen as dependent or parasitic; or a mere bundle of rights (as found by the Beaumont and Von Doussa JJ on appeal) to use and enjoy the land and its resources, any one of which may be separately extinguished, thus reducing the remaining bundle to be recognised at law and enjoyed by the 'successful' claimants.[12] The answer, of course, may have a significant impact upon the quantification of compensation for loss or impairment of that native title in any given case.

In what follows, I proceed on the basis that at law, native title may amount to - ie is capable of being recognised by Australian law as - a right to the land itself, equivalent to an estate in fee, as found (in effect) to exist in *Mabo [No 2]*.[13] Such a title would then attract compensation as if it were broadly equivalent to the most extensive title known to Australian law - being an estate in fee simple. If the High Court (or the parliament) decides otherwise, such that, as a matter of law, native title may not amount to such an interest in the land, then compensation for loss of this lesser form of title will be assessed in relation to the particular traditional rights to use and enjoy the area in question found to exist, and to have been extinguished or impaired, on a case-by-case basis. Such a fragmented approach is, in my view, not desirable for any of the stakeholders involved. But either way, unresolved compensation questions, addressed below, will arise. On a 'right to the land' basis, however, one might assume that the quantum of compensation

12 See, for discussion, Alex Rorrison, 'Native Title: 'A Bundle of Rights' or Interest in Land?' (1999) 4(3) *Native Title News* 49, 51; Katy Barnett, '*Western Australia v Ward* - One Step Forward and two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *Melbourne University Law Review* 462.

13 The impact of the Commonwealth, State and Territory legislative schemes following this common law result in 1992 upon the 'exclusivity' of native title rights and interests is neatly shown by the consent determination made under the NTA by Black CJ, sitting at the Murray Islands, on 14 June 2001. His Honour determined that native title existed in two small adjacent islands - Dauar and Waier Islands - being areas claimed in the Mabo litigation, but rejected by Moynihan J at trial, and subsequently claimed (again) under the NTA. Black CJ ordered, inter alia:

> '....(3) The nature and extent of the native title rights and interests ... are the rights and interests of (the Meriam people) to possess, occupy, use and enjoy (the Islands) in accordance with their traditional laws and customs and in particular to:
>
> (a) live on the (Islands);
>
> (b) conserve, manage , use and enjoy the natural resources of the (Islands) for the benefit of the (Meriam people) including for social, cultural, economic, religious, spiritual, customary and traditional purposes; ....
>
> (6) the native title rights and interests confer possession, occupation, use and enjoyment of the (Islands) to the exclusion of all others, subject to
>
> (a) the traditional laws and customs of the (Meriam People);
>
> (b) the effect and operation of the valid laws of the Commonwealth and/or of ...Queensland; and
>
> (c) .. other (third party) interests referred to (in the order).....'

See *Pasi v Queensland* [2001] FCA 697; Butterworths, Native Title Service, Vol 1 [40,040], unreported. For an account of such successes and failures at trial, see B A Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24 *Melbourne University Law Review* 893 - 951. Whether the Islanders now enjoy greater rights to Murray Island under the High Court than they do to these two off-shore islands under the NTA, is a nice question. The answer is probably no: the abovementioned legislation will apply across all areas.

awarded, in a given case, is likely to be higher than on the alternative 'bundle of rights' basis.

B. A Precedent: Geita Sebea[14]

One useful High Court precedent[15] concerning compulsory acquisition laws in the then Australian Territory of Papua, where indigenous traditional rights to land were in issue, should be noted here - *Geita Sebea* - decided in 1943. This case dealt with compensation for acquisition of indigenous traditional rights to land. In 1937, some Papuan natives vested with a 'communal usufructuary right' to occupy certain lands, leased these lands to the Crown. The Crown built an aerodrome on the land, and in 1939, the *Lands (Kila Kila Aerodrome) Acquisition Ordinance 1939* was enacted, providing for compulsory acquisition of this land. Questions arose as to the nature of the traditional owners' interests, and how those interests might be valued for acquisition purposes. Court proceedings were initiated, where the traditional owners alleged that the value of their interest was £4,549, plus 10% of this figure for the compulsory nature of the purchase, and £150 for severance. Starke J ruled that the claimant community held 'a right of enjoyment in the ... lands acquired: it is a communal or usufructuary occupation with a perpetual right of possession in the community'.[16] However, Williams J held that 'the appellants title to the land was a communal usufructuary title equivalent to full ownership of the land so that they were entitled to compensation on this footing.'[17]

As to assessing compensation, Starke J stated:

> The principle upon which compensation is assessed is the same as in English law. It is the value that a willing vendor might reasonably expect to obtain from a willing purchaser for the land with all potentialities, but any enhanced value attaching to the land by reason of the fact that it is being compulsorily acquired for the purposes of the acquiring authority must be disregarded.[18]

Relying upon a local Ordinance,[19] and Privy Council authority,[20] Starke J determined that compensation was to be valued on the basis that the natives were transferring 'an estate in fee simple title' to the Crown.[21] The valuation of that title

14 *Geita Sebea v The Territory of Papua* (1943) 67 CLR 544.

15 See also, more recently, Federal Court proceedings discussed at Simon Taylor, 'Compulsory Acquisition Acts in Native Title Claims: *Smith for the Gunggari People v Tenneco Energy Queensland*, (Unreported, Federal Court, Drummond J, 3 May 1996) 96' at 3 (85) *Aboriginal Law Bulletin*, 29, 29- 31.

16 *Geita Sabea v The Territory of Papua* (1943) 67 CLR 544, 551(Starke J).

17 Ibid 557 (Williams J, Rich ACJ concurring).

18 Ibid 551.

19 *Ordinance 1939 No 19* s 3.

20 *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399.

21 *Geita Sabea v The Territory of Papua* (1943) 67 CLR 544, 522. Williams J agreed, finding that '...the appellants' title to the land was a communal usufructuary title equivalent to full ownership of the land, so that they were entitled to be compensated on this footing' and cited *Amodu Tijani*. Whether this authority concerning Papua New Guinea and Nigeria will influence the High Court in *Ward* as to the nature of native title in Australia remains to be seen.

was however, in his Honour's view, difficult, since the land was situated in an 'uncivilized country and (such valuation) can at best be only roughly estimated.'[22] His Honour continued:

> It is useless to consider what the land with the improvements and structures upon it would bring in the open or any other market, for there is no market. Some artificial method must be adopted, and the most satisfactory, to my mind, is to take the agricultural value of the land as fixed by the [trial] judge [in Papua] plus an addition measured by what it would cost to ... establish the improvements and structures existing upon and forming part of the land at the date of valuation but taking into account a proper deduction for obsolescence or depreciation.[23]

His Honour rejected the claim for 10% added sums due to the *compulsory* acquisition of their traditional lands; and ruled that the circumstance that the laws of Papua (as with native title in Australia) restricted the ability of the natives to sell or otherwise deal with their lands did not affect the value of their interests in it for purposes of compulsory acquisition. On this topic, Williams J (Rich ACJ concurring) said:

> The [Papuan law] prohibits the disposal of land owned by natives by sale, lease or any other dealing and any contract made by them to dispose of land is void, but this restriction could have no detrimental effect upon the determination of the value of the land when compulsorily acquired, because in the hands of the Crown, it would be freed therefrom. [24]

These rulings concerning restrictions on alienability were specifically discussed, and not followed, in the New South Wales Court of Appeal in 1977.[25] In that case, the owner of the resumed land was a company limited by guarantee. By a declaration of trust made in 1923, the company bound itself to hold the land on trust for the accommodation of sailors, and was prohibited from alienating the land save with the State Governor's approval. Hope JA, after discussing the above rulings in *Geita Sebea*, distinguished that case[26] and preferred to follow Privy Council authority,[27] ruling that:[28]

22 Ibid 552.
23 Ibid 554.
24 Ibid 557.
25 *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106, 116-118 ('*Sydney Sailors Home*').
26 As 'a case concerned with the construction of three Papuan Ordinances, and the application of those Ordinances to particular circumstances'. Ibid 118.
27 *Corrie v MacDermott* [1914] AC 1056, affirming the High Court's decision, reported at (1913) 17 CLR 223.
28 *Sydney Sailors' Home*, (1977) 36 LGRA 106, 118, Moffitt P and Glass JA agreeing.

> I do not think that [*Geita Sebea*] can be treated as cutting into the principle affirmed in *Corrie v MacDermott.* .... [It] clearly requires the effect of restrictions on disposition to be taken into account in valuing land for compensation purposes.

If this be the rule to apply to 'inalienable' native title being acquired by the Crown, then the value of that title may be reduced.

Finally, in *Geita Sebea*, it is noteworthy that neither the argument presented for the appellants, nor Starke J, in his reasons, said anything about the issue of central concern here: ie how to value indigenous owners' spiritual connection to their traditional lands.

II. TRADITIONAL RELATIONSHIP TO COUNTRY

Courts at the highest levels, respected commentators, not to mention Aboriginal elders giving evidence to various courts and tribunals, have all repeatedly recorded, and accepted, a special spiritual element in traditional owners' relationship to their country. To combine the High Court, Federal Court and the eminent Professor W E S Stanner, O'Loughlin J recently stated in *Cubillo v Commonwealth*[29] when discussing damages in a personal injuries context:

> It is well known and accepted that Aboriginal people have an immensely strong attachment to their land. The unique relationship between Aboriginal people and their land was described by Professor Stanner, in a passage cited by Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 356-7:
>
> 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 may 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 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 used 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. At the same time it left each local band bereft of an essential constant that made their plan and

[29] (2000) 174 ALR 97 ('*Cubillo*').

> code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life, every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.[30]

III. COMPENSATION UNDER THE NTA

The NTA states that, generally speaking, the entitlement to compensation is

> an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.[31]

This general entitlement is subject to several qualifications. First (but subject to 'just terms'), total compensation payable under Part 2 Division 5,[32] for any activity that extinguishes all native title, cannot exceed the amount that would be payable if the activity complained of was instead the compulsory acquisition of a freehold estate.[33] Second, if compulsory acquisition of all or any native title rights and interests in the relevant land is involved, compensation on 'just terms' is required, and may be determined having regard to any criteria for determining compensation set out in the law (usually of a state or territory) under which the compulsory acquisition takes place.[34] Third, if the act affecting native title is not 'compulsory acquisition',[35] and if the 'similar compensable interest test'[36] is satisfied in relation to the act, compensation must be determined by applying any principles or criteria for determining compensation (whether or not on just terms) set out in the relevant law.[37] Finally it should be noted that claimants cannot 'double-dip': if any compensation is paid otherwise than under the NTA for essentially the same act, then that amount must be brought to account when determining any compensation to be awarded under the NTA.[38] This regime seems to contemplate that any compensation for cultural or spiritual elements is to be dealt with, if at all, as a 'top up' award above freehold market value, in order

30 Ibid 566-7.
31 NTA s 51(1); and see ss 17, 18, 20, 51A, 53.
32 See, NTA ss 48-54 dealing with the 'determination of compensation for acts affecting native title'.
33 NTA ss 51A(1).
34 NTA s 51(2).
35 Ie it is a past act, intermediate period act, or future act: see NTA s 240.
36 See NTA s 240, discussed below at n 149.
37 NTA s 51(3). However, it seems that a minimum standard of 'just terms' must apply: see NTA ss 51A(2), 53. 'The law' is any State, Territory or Commonwealth law under the authority of which the past, intermediate or future act was done.
38 NTA s 49.

to satisfy the requirement of just terms.

IV. SECTION 51(XXXI) JUST TERMS

The NTA enshrines 'just terms' as the overarching governing criterion for the provision of compensation for past, intermediate and future acts by the Crown which might extinguish or impair native title. To that extent, the parliament has advanced upon the common law, and it is thus necessary to have some understanding of this all-pervasive requirement.[39] To attract the operation of s 51(xxxi), there must be an 'acquisition' of 'property' for a purpose in respect of which the Commonwealth Parliament has power to make laws. The placitum is not a constitutional guarantee: it does not vest rights in individuals to claim just terms. Rather the section, if contravened, invalidates a law which provides for the acquisition of property by the Commonwealth on other than just terms.[40] Put another way: the placitum fetters the legislative power of the Commonwealth when it sets out to acquire property for any purpose in respect of which the Parliament has power to make laws.[41] 'Property' has been given a broad definition: that is to say, a liberal approach is taken to the interests which are protected under the rubric of 'property'.[42] Importantly for current purposes, 'property' includes:

> [A]ny tangible or intangible thing which the law protects under the name of property. The term has been extended beyond accepted categories of property ...The term is not to be 'confined pendantically' to interests recognised at law or in equity but extends to 'innominate or anomalous interests' provided something of a proprietary nature is identifiable.[43]

Thus, native title rights of a well-understood kind - eg to hunt, fish, gather, and reside on land - plus those of a more esoteric or sui-generis character - eg spiritual and cultural rights and interests - would all seem to fall, comfortably, within the notion of property for the purposes of s 51(xxxi) and thus need to be taken into account for the purposes of meeting the 'just terms' requirements of the NTA. The High Court has said as much. In *Mabo [No 2]* Deane and Gaudron JJ state:

39 Butterworths, *Halsbury's Laws of Australia*, Vol 5, 90 Constitutional Law, '3 Legislative Powers' [90-1695-90-1735; Richard Bartlett *Native Title in Australia* (2000) 419-21; E Williams, 'The Reeves Report and Acquisition Issues' (1999) 4 *IndigenousLaw Bulletin* (April/May) 12 - 15.

40 *Commonwealth v Tasmania* (1983) 158 CLR 1, 289 (Deane J) (*'Dams Case'*).

41 See *Newcrest Mining (WA) Ltd v Commonwealth* (1996) 190 CLR 513, 560 (Toohey J); 568 (Gaudron J).

42 *Minister of State for Army v Dalziel* (1943) 68 CLR 261, 285 (Rich J) who stated: 'The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system ... The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property' at 285.

43 *Halsbury's Laws of Australia*, above n 39, [90-1695] (numerous citations omitted).

> In so far as the Commonwealth is concerned, there is the requirement of s 51(xxxi) ... that a law with respect to the acquisition of property provide 'just terms'. Our conclusion that rights under common law native title are true legal rights which are recognised and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi).[44]

What amounts to 'acquisition' can be contentious, especially when the property rights in question are created solely by statute, without any foundation otherwise in the common law.[45] Such statutory rights (eg the 'right to negotiate' under Division 3 Subdivision P (ss 25 - 44) of the NTA) can thus be 'extinguished' or impaired without any 'acquisition' which triggers s 51(xxxi). Brennan CJ explains:

> Where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. Thus in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, the law which sterilised Newcrest's right under its mining lease to carry on 'operations ...' was ... a law for the acquisition of property because it extinguished the liability of the Commonwealth to have those minerals extracted from its land and thereby enhanced the property of the Commonwealth. But where a law of the Commonwealth creates or authorises the creation of a right that does not impose on the Commonwealth a reciprocal liability, the mere extinguishment of the right effects no acquisition of the right by the Commonwealth. The Commonwealth's position remains unchanged by the extinguishment.[46]

However, under the NTA, this issue of whether property has been *acquired* will rarely arise, since the past intermediate and future act regimes[47] mandate the effect of various statutory and executive acts by government (eg extinguishment), and where occurring, these are acknowledged by the High Court to amount to acquisition for the purposes of s 51(xxxi).[48] For current purposes, the significant issue is not whether property has been acquired, but what guidance, if any, the overriding requirement of just terms provides to the quantification of compensation for loss or impairment of native title rights and interests.

'Just terms' under s 51(xxxi) has defied clear and comprehensive definition - rather like the nature of 'judicial power' under Ch 3 of the Constitution. Kirby J,

44 *Mabo [No 2]* (1972) 175 CLR 1, 111.
45 See discussion in *Commonwealth v WMC Resources* (1998) 194 CLR 1, 15-18 (Brennan CJ).
46 Ibid 17 (Brennan CJ) citations omitted.
47 See discussion of these terms below, at n 63 - 73.
48 *Mabo [No 2]* (1972) 175 CLR 1, 111.

when discussing the meaning of these words, has recently written:

> Where the Constitution is ambiguous, this court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights[49]

and proceeded to discuss international norms as a source of guidance, especially the Universal Declaration of Human Rights.[50] Again, 'just terms' has been held to refer to 'what is fair and just between the community and the owner of the thing taken',[51] and that

> The process of evaluating the terms of acquisition requires a balance to be drawn between the interest of the individual whose property is acquired and the interest of the community in, for example, ensuring the ready supply of a basic resouce.[52]

In the native title context, the 'law' in question may be an amalgam of Commonwealth laws being the NTA and land acquisition laws; or more frequently, the NTA and relevant State or Territory laws, such as compulsory acquisition or other laws. Precisely what, in a given case, is 'fair and just' as between a claimant group on the one hand, suffering the ultimate impact of colonization (eg compulsory acquisition), and the responsible government on the other, in the context of 200 plus years of damaging colonization, is a nice question. One might anticipate that such overriding criteria, enshrined in the NTA, would augment awards otherwise available. One might also anticipate that if the debate is broadened in this way, and given the fundamental continuing antipathy of all governments to most things to do with native title, (especially its financial impact), a government might then seek to bring to account, by way of 'set offs', the costs of various government services provided to the aggrieved community over the years. Precisely this grossly inequitable course was followed in the USA since the 1850s in the Indian Claims Commission, discussed below.[53]

As to the requirements of natural justice in this area, a particular legislative solution may be 'just' and will not constitutionally be invalid even if other terms would have been 'fairer or more appropriate'.[54] However to be 'just', the statutory

49 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42, 147.

50 *Universal Declaration of Human Rights*, Art 17: ibid 147-50. His Honour also referred to Magna Carta 1215, Art 52; the French Declaration of the Rights of Man and of the Citizen 1789, Art 17; US Constitution 5th Amendment; and provisions providing the equivalent of 'just terms' from the constitutions of India, Malaysia, Japan and South Africa. Kirby J might also have referred to articles in international treaties and draft instruments protecting indigenous rights, such as the ILO Convention 169; and the UN Draft Declaration on the Rights of Indigenous Peoples. See for further like references *Durham Holdings Pty Ltd v NSW* (2000) 177 ALR 436, 444 and citations there given by Kirby J.

51 *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 569 (Dixon J).

52 *Halsbury's Laws of Australia* Vol 5, [90(1720] citations omitted.

53 See below n 168 ff and accompanying text.

54 *Dams Case* (1983) 158 CLR 1, 289 (Deane J).

scheme must accord an 'immediate' right to compensation - or at least not involve a scheme so protracted and delayed by bureaucratic decision-making processes, as to amount to, in effect, a denial of natural justice.[55] A system in which the claimant is forced to wait for years, is not an entitlement to 'immediate' compensation and may be ruled to be unfair and 'unjust'. In the *Dams Case*, Deane J, when considering the bureaucratic decision-making procedures set out in the relevant Tasmanian law, stated:

> The provisions ... do not confer any immediate right to be paid compensation upon the acquisition of property. All they confer is a right to set a procedure in train. If the Minister contests that there has been an acquisition, the Commonwealth is under no obligation to pay compensation unless and until the claimant has instituted proceedings in the High Court and obtained a declaration that there has been an acquisition. Inevitably, the obtaining of such a declaration will involve the passage of time. .... There is not, of course, anything intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process. There is, however, something intrinsically unfair in a procedure which, in effect, ensures that, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can, authoritatively determine the amount of the compensation which the Commonwealth must pay. In [this case] ... this intrinsic unfairness is heightened by a failure to make any provision in respect of the payment of interest during the period between the time when the acquisition is made, and the time when the person whose property is acquired can finally institute an effective claim for compensation.[56]

Whether 'just terms' requires a component of interest is, it seems, a matter not only of the laws under challenge, but also their practical implementation. As Deane J indicates above, in circumstances of delay, if the relevant laws provide no entitlement to interest, then the acquisition may not be 'just' under s 51(xxxi).[57] In the *Dams Case*, Deane J concluded in relation to the statutory compensation scheme before the court in that case:

> The system established ... for ascertaining whether compensation is payable and, if it is, the amount which should be paid is quite unacceptable and unfair according to the ordinary standards of 'fair dealing between the Australian

[55] It is sometimes argued that in order to be just, the terms of the acquisition must comply with the principles of natural justice: *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495, 569; Butterworths, *Halsbury's Laws of Australia*, Vol 22 Real Property, '2 Creation and Acquisition' [355-7015]; and *Dams Case* (1983) 158 CLR 1, 289 (Deane J) (quoted below).

[56] *Dams Case* (1983) 158 CLR 1, 290 (Deane J).

[57] See also, on this point, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 301 (*Bank Nationalisation Case*): 'Just terms ... involve, as a matter of elementary fairness, the payment ... of interest on the ascertained value of the property until payment'.

> nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence'.[58]

This notion of 'fairness' was referred to in the earlier *Nelungaloo* case, where Dixon J spoke of

> [t]he somewhat general and indefinite conception of just terms, which appears to refer to what is fair and just between the community and the owner of the thing taken ... when the question is one of fairness in any community the standard must depend upon the life and experience of that community ... Unlike 'compensation' which connotes full money equivalent, 'just terms' are concerned with fairness.[59]

In my view, real constitutional questions thus arise concerning the delays and consequent 'unfairness' of the current compensation scheme established under the NTA. This scheme involves two potential periods of mediation and litigation: ie, first, to establish the existence of the claimants' native title which has allegedly been extinguished or compulsorily acquired;[60] second, to establish an entitlement to and the quantum of compensation arising from acts of the Crown which have resulted in loss of some or all of that native title.[61] As the Yorta Yorta people in Victoria, to cite but one example, have discovered and continue to experience, these processes can take a decade.[62] But I leave these tantalizing issues of constitutional validity aside for the moment.

V. AVENUES TO COMPENSATION UNDER THE NTA

A. The Compensation Regime Generally

The issue can arise in a variety of ways. Broadly speaking, the NTA controls activities on land subject to native title or native title claims, by introducing regimes controlling past and the future activities on that land and mandating the legal impact of those activities, eg whether the grant by the Crown in colonial times of an interest in land extinguishes, impairs, or leaves unaffected, any native title then existing in that land; and if it has an impact, what it is, and what rights to compensation, if any, flow there-from, and against whom. This complex regime is not pursued here, save to say, for current purposes, that the NTA provides for inter alia:

- [T]he provision of compensation for various types of 'acts'[63] being, broadly,

58 *Dams Case* (1983) 158 CLR 1, 289, citing *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545, 600.

59 *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 569.

60 See NTA ss 13(2), 61, 62(3).

61 Ibid.

62 The Yorta Yorta people filed their claim for a determination of native title in 1994. The Yorta Yorta appeal to the High Court was heard on 23 - 24 May 2002 and (as at June 2002) judgment is pending.

63 NTA s 226(2) defines an 'act' to include passing legislation; granting a licence or authority; creating or renewing any interest in land or waters; the exercise of any executive power of the Crown; and an act having any effect at common law or in equity.

'past acts',[64] 'intermediate period acts'[65] 'previous exclusive possession acts',[66] 'previous non-exclusive possession acts'[67] and 'future acts';[68]

- the validation of these various historical acts attributable to the Commonwealth,[69] a State[70] or a Territory; and
- future acts[71] to take place either by agreement with native titleholders or by way of a valid compulsory or arbitrated act.

When an act within one of these categories gives rise to an entitlement to compensation, such compensation is payable in accordance with Division 5 of the NTA.[72] The NTA provides that an application for a determination of compensation may be made to the Federal Court by persons claiming to be traditional owners, or by a corporation on their behalf, known as a registered native title body corporate.[73]

B. Compensation for Future Acts

The NTA establishes a complex 'future act' regime, including the provision of a 'right to negotiate' for some proposed 'future acts' which affect land the subject of native title, or claimed native title.[74] This regime, once satisfied, ensures that the future act, once done, is valid, but it does not provide a statutory *right* to compensation: parties are left, in negotiations, to such leverage as they may bring to bear. The proponent wishing to take advantage of the future act (eg a mining

64 NTA s 228(2)(a) and (b): ie, legislative acts which occurred before 1 July 1993; and executive acts which occurred before 1 January 1994 which, apart from the operation of the NTA, would have been invalid to any extent due to the then existence of native title. The NTA provides that native title holders are entitled to compensation for past acts of the Commonwealth (s 17) or a State or Territory (s 20). Past acts are further sub-classified into Category A, B, C and D past acts with various specified effects upon native title: see NTA ss 230, 231, 232, and 232A respectively.

65 Defined at NTA s 232A. An 'intermediate period act' is one of a number of specified acts which took place between 1 January 1994 (when the NTA commenced operation) and 23 December 1996 (when the High Court delivered judgment in *Wik Peoples v Queensland* (1996) 187 CLR 1). Intermediate period acts are also sub-divided into categories A B C and D: see NTA ss 232B, 232C, 232D,and 232E respectively.

66 NTA s 23B: ie acts which occurred before 23 December 1996 (the date of delivery of the judgement in *Wik Peoples v Queensland* (1996) 187 CLR 1) which consisted of the grant of a freehold estate, most leases and the construction of any public works.

67 NTA s 23F: ie basically, non-exclusive pastoral leases and non-exclusive agricultural leases which were granted before 23 December 1996.

68 NTA s 233.

69 NTA s 14 (past acts), 22A (intermediate period acts), 22 F (state or territory may validate its own intermediate period acts), Part 2 Division 2B (previous exclusive and non-exclusive possession acts).

70 NTA s 19(1) provides that a state or territory may pass legislation in similar terms to the provisions in the NTA to validate its own past acts. All the states and territories have done so by various native title 'validation' enactments, eg *Land Titles Validation Act* 1994 (Vic).

71 Defined at NTA s 233. A future act is one which takes place after 1 July 1993 (legislation) or 1 January 1994 (executive act) and which affects native title.

72 NTA s 48.

73 NTA s 61(1).

74 See NTA Part 2 Division 3. In summary, the future act provisions divide future acts into several different categories. Each category is provided for in different sub-divisions of the NTA, which regulate how that type of future act may be done: NTA s 24AA(2)-(5). Subdivision P of Division 3 of the NTA sets out the right to negotiate regime which essentially provides that acts which attract the right to negotiate are not valid unless they proceed through the notification, negotiation and (if necessary) arbitration process set out in subdivision P. See Butterworths, *Native Title Service* Vol 2 [130,000] where the Deed of Agreement is published.

company seeking the grant of a mining tenement) and the native title holders, may negotiate terms and conditions concerning the doing of the future act (the grant by the relevant Minister of the tenement), including the delivery of 'compensation'. If the parties fail to agree, the question whether the future act may be done, and if so, under what terms and conditions, including the provision of any 'compensation', may be arbitrated by the National Native Title Tribunal (NNTT).[75] The issuing of a notice triggering compulsory acquisition processes is one category of activity deemed a 'future act' for which rights to compensation are available to aggrieved native title holders.

C. Crescent Head

In this future act area, one compulsory acquisition /negotiated outcome precedent is worth noting: the so-called Crescent Head Agreement reached in September 1996.[76] This concerned the resolution of a claim for a determination of native title filed by representatives of the Dunghutti people to, inter alia, blocks of land located at Crescent Head on the NSW north coast. Those blocks were, however, also sought by developers for sub-division and commercial development, and a compulsory acquisition notice was issued under relevant NSW legislation, thus triggering rights to negotiate. After two years of negotiations, the settlement involved, for current purposes, two instructive elements. First, by virtue of a consent determination in the Federal Court, the Dunghutti people were recognised as the native title holders of these blocks, totalling 12.4 hectares of land at Crescent Head. They thus became the first aboriginal group on the mainland to achieve recognition of native title under the NTA.[77]

Second, the claimants agreed to relinquish their native title in consideration of payment to them of monies by way of compensation for past and future acts[78] committed by the Crown. Those acts were, in short, the prior (arguably invalid) sale by the Crown of some of the relevant land in fee simple without complying with the future act provisions of the NTA; and the proposed compulsory acquisition by the Crown, and subsequent sale by auction to the public, of the blocks under claim. The price negotiated for these blocks was, anecdotally, market value plus 50%. Under the agreement (which is publicly available) sums

75 NTA ss 35, 38, and surrounding sections.
76 Reproduced at Horrigan, above n 1, 407-12.
77 (1997) 4 *Indigenous Law Bulletin* (December) 11.
78 These were, first, 'past acts' as defined under the NTA occurring since the introduction of the *Racial Discrimination Act 1975* (Cth) ie portions of land under claim were sold off in fee simple, without complying with the compensation requirements of the NTA. Those activities were thus rendered void by reason of the existence of native title, and qualified as 'past acts', triggering a right to compensation. Further, a 'permissible future act' (as then known under the NTA) was proposed, ie the acquisition by compulsory process of the native title rights and interests (if any) in the (claimed) land pursuant to s 135 of the *Crown Lands Act 1989* (NSW) and s 7A of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) for the public purpose of residential sites and thereafter to offer the lots for sale to the general public.

totalling $738,000[79] were paid to the claimants' specified body corporate,[80] the Kempsey Aboriginal Land Council. This quantum of itself, and devoid of context, has little meaning. What is important is the underlying principle: that the basis for calculation in that particular negotiation was 'market value plus'. The basis of the 'plus' lies at the heart of this paper, in particular, how might the sui generis features of native title - eg spiritual attachment - be quantified for the purposes of providing 'just terms' compensation in a situation of compulsory acquisition by the state of *claimed*[81] native title rights and interests?

VI. PRINCIPLES OF COMPENSATION UNDER COMPULSORY ACQUISITION REGIMES

In the *Bank Nationalisation Case*,[82] the High Court said:

> '[J]ust terms' require that a party whose property is acquired shall have the pecuniary equivalent of (that) property.... the ... owner of the land resumed ... is entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.[83]

Nevertheless, the search for 'formulas' or at least some guidance continues in this area. On one view, the whole exercise being prescribed by statute,[84] the search for guiding principles is quickly resolved. However, some examination of judicial discussion of these statutory heads of compensation, applied to the particular circumstances of native title interests, is of use. It should nevertheless be remembered, that:

> [W]here statute provides a remedy in damages or compensation, the extent of the applicability by analogy of the common law principles of damages is a

79 See *Crescent Head Agreement*, at Horrigan, above n 1, 407-12, cl 9(a) and (b); (1996) 3 (87) *Aboriginal Law Bulletin* (December) 11; Simon Blackshield, 'Crescent Head Native Title Agreement' (1997) 3 (88) *Aboriginal Law Bulletin* 9 - 11; Butterworths, *Native Title Service*, Vol 2 [130,000].

80 As required by the NTA: see *Native Title (Prescribed Body Corporate) Regulations* (S R 440 of 1994), amended by S R 1998 No 120, gazetted 9 June 1998. As to the role of 'prescribed body corporates' see NTA s 56; J S Fingleton, 'Native Title Corporations' in *Land, Rights, Laws: Issues of Native Title* (AIATSIS, No 2, July 1994); Keon-Cohen above n 3, at CD.

81 As mentioned above, since no authoritative judicial guidance as to the content of those rights and interests is available to the parties in this case, or generally, another important unknown is injected into the equation: what kind of native title rights will be accepted as the subject of acquisition, and thus properly compensable? These questions beg another: what is, in law, the nature of native title? See discussion above at nn 7 - 13.

82 (1948) 76 CLR 1.

83 Ibid 300 (citations omitted).

84 Eg, *Land Acquisition and Compensation Act 1986* (Vic) ss 40, 41, 44, and similar statutes of the States, the Territories and the Commonwealth.

> question of statutory construction. [Such] construction is aimed at determining the extent to which the purposes of the statute in question allow, modify or exclude the operation of the normal principles of damages whether for tort or breach of contract. The law of statutory compensation is not, therefore, a generic one, and the principles of compensation applicable to particular statutory regimes are considered in the context of the law generally applicable to those regimes.[85]

Thus compensation for extinguishment of native title, like compensation for breaches of consumer protection legislation, or for victims of crime, or for medical negligence, or for traffic accidents, or for compulsory acquisition generally, will vary according to the proper construction of the statute involved. Three significant differences (at least) between approaches to compensation under resumption legislation, as compared to civil suits, should be noted. First, under compulsory acquisition legislative processes, no question of 'liability' arises. The statute enshrines a right in the aggrieved owner to be compensated. In Victoria, this entitlement to compensation by reason of compulsory acquisition is set out in the *Land Acquisition and Compensation Act 1986* (Vic) s 30 *(LA&C Act)*. It refers to any interest 'divested or diminished by the acquisition' - reminiscent of the language of the NTA which speaks of native title being 'extinguished' or 'impaired' by various acts of the Crown. The only question for the parties in compulsory acquisition negotiation, and ultimately for the court, is to quantify the sum. Putting this another way:

> Compulsory acquisition cases differ ... from ordinary claims dealt with in the general jurisdiction (of the courts) in one significant respect: the claimant, unlike the ordinary plaintiff, had no choice whether to make a claim or not; the mere acquisition by compulsory process gave him, by virtue of ... the Act, a claim to compensation which he could hardly be expected to renounce.[86]

A second difference to note is that the court is not bound by the parties' (inevitably) different assessments of compensation sums to be awarded under various heads: the court may accept or reject any or all of these assessments - or award more than any figure mentioned. As Harris J has stated in the Victorian Supreme Court:

> As the Court is not bound by the amounts claimed or offered and may in appropriate cases make an award greater than the amount claimed or less than that offered, it was open to the claimant to seek from the court an award of compensation which was greater than the amount set out in his claim.[87]

[85] Butterworths, *Halsbury's Laws of Australia*, Vol 9 Criminal law to damages, '135 Damages' [135-15].
[86] *Minister for the Environment v Florence* (1979) 21 SASR 108, 134 (Wells J); cited in *Coastal Estates v Shire of Bass* [1994] 1 VR 210, 213 (Gobbo J).
[87] *James v Swan Hill Sewerage Authority* [1978] VR 519, 521-2.

A third difference between 'future act' compulsory acquisition processes and civil litigation seeking an award of damages is that, in compulsory acquisition processes, the acquiring authority is required to deliver an 'open offer' to the owner: ie the authority is required to assess the value of compensation to be properly owing to the owner in the particular facts and circumstances, and present this valuation to the owner.[88] This procedure would also, one assumes, apply to future act compulsory acquisition processes under the NTA (which utilise local compulsory acquisition laws). But this requirement that the Crown make an evaluation, and present this to the native title holders would not apply, as a legal requirement, in 'past act' or 'future act' compensation assessments not involving compulsory acquisition. How this anomaly will work out in practice remains to be seen since to my knowledge, save for *Crescent Head* mentioned above, no compulsory acquisition of native title rights and interests, and thus assessment of value to the traditional owners, has yet occurred.

VII. VICTORIAN LEGISLATION

A. THE PROVISIONS DISCUSSED

Compulsory acquisition laws of the various states, territories and the Commonwealth set down various principles, definitions, and heads of loss.[89] These vary, some being indicative lists, others said to be exhaustive. However, in this jurisdiction, two common factors should now be noted. First, as McHugh J recently stated in a case concerning injurious affection and the construction of Queensland acquisition legislation:[90]

> In the case of legislation dealing with the compensation to be awarded in respect of the compulsory acquisition of land ... a ... presumption operates. The legislation is intended to ensure that the person whose land has been taken

[88] See, for discussion of Victorian practice, *Coastal Estates v Shire of Bass* [1994] 1 VR 210, 214-19 (Gobbo J). Gobbo J recites the practice of 'giving detailed directions which not only compelled all valuations to be disclosed well before hearing but also compelled all evidence to be placed on affidavit...Where no offer had been made, there was invariably a direction given requiring a notice of sum offered to be filed and served. Offers ... usually state only a single figure and they do not spell out how the offer is calculated': 215, 216.

[89] See *Lands Acquisition Act 1989* (Cth) ss 55-61; *Lands Acquisition Act 1994* (ACT) s 45; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ss 54-55; *Lands Acquisition Act 1978* (NT) s 66 Schedule 2; *Acquisition of Land Act 1967* (Qld) s 20; *Land Acquisition Act 1969* (SA) s 25; *Land Acquisition Act 1993* (Tas) ss 24-27; *Land Acquisition and Compensation Act 1986* (Vic) s 41; *Land Administration Act 1997* (WA) s 24 reviewed at Richard Bartlett, *Native Title in Australia* (2000) 434 ff.

[90] *Marshall v Director General, Department of Transport* (2000) 180 ALR 351, 368. See also Gaudron J at 365: 'Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute'.

is justly compensated. Such legislation should be construed with the presumption that the legislature intended the claimant to be liberally compensated (citations omitted).

Second, (as mentioned above) is the imposition of 'just terms' requirements due to the overriding force, in the states and territories, of the NTA, being a requirement notoriously not otherwise required by state constitutions.[91] How these overriding requirements might impact upon principles and calculations applied to the measure of compensation reached under various Australian compulsory acquisition schemes when native title is acquired remains to be seen.

Be that as it may, in Victoria, the *LA&C Act* sets out the measure of compensation payable when interests in land are, as mentioned above, 'divested' or 'diminished'. The relevant provisions are mainly found at Part 4 ss 40-45, but the whole of this Part, headed 'Measure of Compensation' is relevant to this discussion. The key provision, s 41, headed 'General principles upon which compensation is to be based' states relevantly:[92]

Section 41(1) Except as otherwise provided in this Part, in assessing the amount of compensation payable to a claimant in respect of an interest in land which is acquired under this Act, regard must be had to the following factors:
(a) the market value[93] of the interest on the date of acquisition;
(b) any special value[94] to the claimant on the date of acquisition;
(c) any loss attributable to severance;[95]
(d) any loss attributable to disturbance;[96]
(e) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the implementation of the purpose for which the land was acquired;
(f) any legal, valuation and other professional expenses necessarily incurred by the claimant by reason of the acquisition of the interest.

(2) If the market value of an interest in land is assessed on the basis that the land had potential to be used for a purpose other than the purpose for which it was used on the date of acquisition, compensation must not be allowed for:

91 The legislative arrangements of the mainland territories provide for just terms. The *Northern Territory (Self Government) Act 1978* (Cth) s 50(1) provides that the power of the Legislative Assembly conferred in broad terms by s 6 thereof 'does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.' See also the *Australian Capital Territory (Self Government) Act 1988* (Cth) ss 23(1)(a) and 23(2). See, for discussion, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42 at 98, per Gummow J.

92 Other provisions in eg, ss 41, 42 and 43 may have relevance to the acquisition of native title in various circumstances, but are not discussed here.

93 Defined at LA&C Act s 40; discussed below at n 105 ff.

94 Defined at LA&C Act s 40; discussed below at n 139 ff.

95 Defined at LA&C Act, s 40.

96 Defined at LA&C Acts 40 as (in summary) any pecuniary loss suffered as the natural consequence of the owner's interests being divested or diminished by compulsory acquisition. Given the pecuniary nature of the loss, this head would seem to be unsuitable to native title claimants.

(a) any special value in respect of any pecuniary advantage that would necessarily have been forgone in realizing that potential; and
(b) any loss attributable to disturbance that would necessarily have been incurred in realizing that potential.

(3) If less than the whole of the land in which a claimant's interest subsists is acquired or less than the whole of that interest is acquired, the market value of the acquired interest is the difference between the market value of the interest before the acquisition and the market value of the interest after the acquisition.....

As to these heads, discussion in prior cases does offer native title participants some assistance. In particular, the relevant principles, still substantially applicable,[97] are well summarised in a much-quoted passage delivered by Barber J in 1969:

(1) In all cases the measure of compensation to the claimant is his direct pecuniary injury. The Court's first task is to determine what is the direct pecuniary injury.
(2) The basic element in such pecuniary injury will, in all cases, be the market value of the property at the relevant date. In some cases it will simply be this figure, eg where the property is vacant land.
(3) It is the value of the property to the owner that is to be considered, and the test of an amount which a willing purchaser and willing vendor will agree upon is merely a useful and conventional method of arriving at a basic figure to which must be added amounts for disturbance, severance and the like: *Minister for Public Works v Thistlethwaite* [1954] AC ....at 491.
(4) Where land is being used for a particular purpose by the owner, one considers whether it is being used for its highest and best use.
(a) If it is, then a factor for disturbance must be added to the market value;
(b) If it is not, that is, if it has a higher and better use, for example, farmland ripe for subdivision, and if the value on this basis is greater than the present use value plus disturbance the claimant gets the higher use value but no amount for disturbance: *The Commonwealth v Milledge* (1953) 90 CLR 157; *Crisp and Gunn v City of Hobart* (1963) 110 CLR 538.
(5) Disturbance is ... relevant to the difference between the hypothetical purchaser's price and the price which the owner of an existing business would give rather than fail to obtain the premises: *The Commonwealth v Milledge* (supra); *Horn v Sunderland Corporation* [1941] 2 KB 26.[98]

[97] The following comments relate to prior legislation, but the principles enunciated remain substantially applicable. In particular, under the LA&C Act, s 41(1)(d), disturbance, although always claimable as part of the value of the land to the owner, is now listed as a separate head of compensation, contrary to the legislation in force in 1969. I am grateful to Stuart Morris QC, of the Victorian Bar, for this and other insights and clarifications.

[98] *March v City of Frankston* [1969] VR 350, 355-6. This discussion pertained to prior legislation, but the principles here enunciated remain applicable.

In addition to the above, the Victorian *LA&C Act* contains an elaborate provision concerning solatium. It states:

> Section 44(1) The amount of compensation may be increased by such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition.
>
> (2) In assessing the amount payable under sub-section (1), there must be taken into account all relevant circumstances applicable to the claimant including, without limiting the generality of the foregoing:
> (a) the interest of the claimant in the acquired land; and
> (b) the length of time during which the claimant had occupied the land; and
> (c) the inconvenience likely to be suffered by the claimant by reason of removal from the land; and
> (d) the period of time after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land; and
> (e) the period of time during which, but for the acquisition of the land, the claimant would have been likely to continue to occupy the land; and
> (f) the age of the claimant; and
> (g) where the claimant at the date of acquisition is occupying the land as the claimant's principle place of residence, the number, age and circumstances of other people (if any) living with the claimant.
>
> (3) If no solatium is paid to the claimant, a person other than a claimant who, at the date of acquisition, had occupied the acquired land for a continuous period of not less than 12 months before that date as the person's principal place of residence may claim from the Authority such amount, not exceeding 10% of the market value of the land, by way of solatium as is reasonable to compensate the person for intangible and non-pecuniary disadvantages resulting from the acquisition.
> (4) In determining the amount payable under sub-section (3), there must be taken into account all relevant circumstances applicable to the person, including the matters referred to in sub-section (2)(b), (c), (d), (e), and (g).

One further section should be noted. Section 3(1) defines 'interest' as follows:

> 'interest' in relation to land, means -
> (a) a legal or equitable estate or interest in the land; or
> (b) an easement, right, charge, power or privilege in, under, over, affecting or in connexion with land.

'Interest' in relation to land is thus defined in a manner which should embrace

most if not all, native title rights and interests. Whether this is so, however, may well depend upon the results of the current appeal to the High Court in *Ward* which focus upon the precise content of native title, mentioned above.[99] The Victorian Act nowhere mentions 'native title'.[100]

Further aspects of the Victorian compulsory acquisition scheme are worth noting. First, the *Geita Sebea* ruling, discussed above, which refused to 'top-up' an award due to the compulsory nature of the acquisition, accords with Victorian decisions. In *Re Wilson* and *the State Electricity Commission*,[101] land was sought to be compulsorily acquired by the Electricity Commissioners under the *Electricity Commissioners Act 1918* (Vic). The question of compensation to the owner, under this statutory scheme, was referred to arbitration under the *Lands Compensation Act 1915* (Vic). The Victorian Supreme Court held that the arbitrator, having assessed the true value of the land to the claimant, may not add to such value an amount, whether by way of percentage or otherwise, merely by reason of the fact that the acquisition proposed was compulsory. Thus, in Victoria at least, absent statutory direction, if extra 'top up' is claimed merely by reason of the fact of compulsion, these decisions must be overruled, or distinguished in a native title case.

Second, compensation 'may be paid to...the person who is entitled ... to sell ... the interest to the authority'.[102] At first sight, this prescription may compromise native title holders, since their interests are inalienable at common law. However, the language of this provision may be seen as empowering rather than prescriptive. If this is wrong, the *LA&C Act* s 65, seems to retrieve the situation by, effectively, providing for such a grant 'despite any other law' (which might include the *LA & C Act* s 49). However, the only other relevant law, the NTA, by s 11(1) stipulates that native title 'is not able to be extinguished contrary to [the NTA]' and the NTA makes no provision for traditional owners to 'sell' their traditional rights, other than by agreement under, for example, an Indigenous Land Use Agreement.[103] Whether this satisfies the requirement in the Victorian *LA&C Act* s 49 remains to be seen. If inconsistency arises (an issue I do not explore here) then clearly, the 'no-sale' prescription in the NTA prevails by reason of the effect of s 109 of the Constitution - a troublesome result for native title holders wishing to access compensation under the Victorian Act.

These provisions, and their forebears, have been the subject of much judicial discussion in Victoria, as might be expected. As might equally be expected, not

99 See above, nn 7 - 13.

100 Cf the Victorian *Pipelines Act 1967* which, at s 3A and other sections, in relation to acquiring land for pipelines, refers to and incorporates the language of the NTA.

101 [1921] VLR 459.

102 *LA&C Act* s 49.

103 As to which, see papers in Keon-Cohen, above n 3, 331-51; S Kee 'Indigenous Land Use Agreements' in Butterworths, *Native Title Service*, Vol 1 [1900-1975].

much of this assists in resolving the key question under discussion here, ie how to quantify compensation for the sui generis aspects of native title, being spiritual and cultural features. However, some dicta are helpful, especially in the area of solatium. For current purposes, I merely note the various heads of compensation quoted above in *LA&C Act* ss 41(1) and 44(2) which the Victorian Parliament declares, *must* be taken into account; mention in passing the numerous well-established heads of compensation that might, or might not, arise in particular cases[104] around the country; and focus here on three aspects which appear to offer particular assistance to courts, tribunals and advisors when called upon to quantify 'cultural and spiritual' aspects of native title rights and interests, ie: notions of market value (s 41(1)(a)) and the associated issue of reinstatement; solatium (s 44(1)); and special value (s 41(1)(b)).

B. Market Value

One starts, necessarily, with market value. The classical statement of principle is that of Griffith CJ in the High Court in 1907:

> In my judgment the test of value of land is to be determined not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, ie whether there was in fact on that day a willing buyer, but by inquiring 'what would a man desiring to buy the land have to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?[105]

The notion to apply, therefore, is the coming together of 'a desirous purchaser and a not unwilling vendor'.[106] The *Spencer* definition may be re-stated as the price that a willing purchaser would, at the relevant date, have had to pay to a vendor not unwilling, but not anxious to sell. We should here recall that market value does not embrace issues of disturbance, severance, injurious affection, and special value.[107]

As to appropriate methods of assessing market value in a native title context, these in other contexts have traditionally included 'an analysis of comparable sales of *in globo* parcels of similar land'; the 'hypothetical sub-division method';[108]

[104] Eg depending upon the governing legislation and the particular facts and circumstances, factors such as, severance, injurious affection, reinstatement, disturbance, special compensation, events subsequent to acquisition, secret facts, enhancement, pointe garde principle, and so on. For discussion of some of these in the context of native title, see Margaret Stephenson, 'Compensation and Valuation of Native Title' in Stephenson, above n 1, 135, 146-9. For more general discussion, see Alan Hyam, *The Law Affecting the Valuation of Land in Australia* (1983) 118-98; (2nd ed 1995) 153-276; Graham Fricke, *Compulsory Acquisition of Land in Australia* (1982) 27-34, 322-56; *Valuation Principles and Practice* (Australian Institute of Valuers and Land Economists, 1997); Douglas Brown, *Land Acquisition* (4th ed, 1996); Marcus S Jacobs, *The Law of Resumption and Compensation in Australia* (Law Book, 1998).

[105] *Spencer v The Commonwealth* (1907) 5 CLR 418, 432; cf *James v Swan Hill Sewerage Authority* [1978] VR 519, 522 (Harris J).

[106] *James v Swan Hill Sewerage Authority* [1978] VR 519, 522.

[107] Fricke, above n 104, 330; and *LA & C Act* s 41(a) and (b) where 'market value', and 'special value' are separately defined.

[108] Both discussed in *Coastal Estates Pty Ltd v Bass Shire Council* [1993] 2 VR 566 (Gobbo J).

and others.[109] Any of these methods might be appropriate in particular circumstances. As Gobbo J has noted when faced with parties asserting differing valuations based on different methods: '[i]t is a question of fact in each case as to what is the appropriate method and it is unwise to seek to lay down prescriptive rules in this matter.'[110]

I agree - and note two further aspects relevant to market value peculiar to the native title case. First, whatever method it utilised, and whatever result is achieved, it must amount to 'just terms' - otherwise, it will not comply with the requirements of the NTA. Whether this factor results in an award more or less than that which might be achieved otherwise remains for assessment in the particular facts and circumstances of each case.

Second, traditional owners often seek compensation in the form of access to alternate land (preferably within their traditional country), not dollars and cents Given this, principles likely to be of use for such native title applicants are the 'reinstatement' rules applied when the land acquired has no readily ascertainable market value at all, or where there exists a special value to the owner. O'Rourke notes in relation to native title compensation:

> [R]esumption law already allows in appropriate cases for additional criteria to market value to be applied. These instances usually occur where there is no comparable market or where there is a special value to the owner. In the (Australian) legislation[111] or common law of all jurisdictions, the 'West Midland' principle[112] applies and allows for compensation to be assessed on a reinstatement basis where there is no market demand for the resumed interest The principle is often applied in connection with the resumption of churches, hospitals and schools and requires that the claimant would, but for the resumption, have continued to use the land for the particular purpose. [113]

C. Reinstatement

Reinstatement is an option developed by the general law as a basis for compensation in unusual situations where no market value exists, or where interests in land are not readily calculable in monetary terms, eg a church. Native title may certainly qualify under these principles. Compensation may then be

[109] See, eg further methods suggested by a Professor in Valuation and Land Economy, R Whipple 'Assessing Compensation under the Provisions of the Native Title Act 1993: Part I' (1997) 3 *Native Title News* 30-4; 'Part II': 49-52, discussing 'contingent valuation' and the 'Coarse theorem'. See also for a useful discussion of 'property law, 'personal injury' principles, and more, John Litchfield, 'Compensation for Loss or Impairment of Native Title Rights and Interests: An Analysis of Suggested Approaches: Part I' (1999) 18 *Australian Mining and Petroleum Law Journal* 253-66.

[110] *Coastal Estates Pty Ltd v Bass Shire Council* [1993] 2 VR 566, 577.

[111] Citing *Lands Acquisition Act 1989* (Cth) s 58.

[112] See *Birmingham Corporation v West Midland Baptist (Trust) Association* [1970] AC 874, 894, discussed at Hyam, above n 104, 151-6.

[113] John O'Rourke, 'Native Title: Solatium for Extinguishment' (1998) 3 (10) *Native Title News* 158.

assessed not with reference to market value of the acquired land, but the cost of acquiring replacement land. The basic principle is well set out in 1981 by Mahoney JA:[114]

> Within the ... field [of] compensation for the resumption of property, the tests or verbal formulae whereby the money equivalent is determined take different forms depending upon, inter alia, the nature of the asset, its relation to the owners' activities, and the context in which it is taken. The reinstatement formula is merely one of those available to be used, to be applied when and is so far as the circumstances require ... Normally, where what is taken is a market asset and there is a market, the appropriate compensation will be the value of the asset determined according to a 'willing but not anxious sale' in that market. ...Where there is no appropriate market or for some reason a market sale is not seen as the appropriate measure of compensation, other approaches may be adopted. The court may adopt the conventional capitalization formula[115] or some other formula, more or less artificial. ... But in some cases the ordinary formulae may be, of their nature, inapplicable. There may be no market. The property may not have been income-producing. Or the application of the more normal formulae may simply not 'produce a fair result'.[116] The reinstatement principle may, in an appropriate case, be used.

Bearing in mind that native title is most often located on Crown land, in remote areas where no market is readily available (if at all) and recalling that, at common law, native title is inalienable save to the Crown,[117] re-instatement based compensation, or the provision of such alternative land itself, may certainly be of use. Under the Victorian *LA&C Act*, the reinstatement principle is an independent, all-embracing method of assessing compensation following compulsory acquisition.[118] In a Victorian case concerning acquisition of land used as a Jewish Synagogue, for which, it was argued, there was no market value, such that reinstatement should become the basis of compensation, Barber J adopted the following statement of the law:[119]

> Reinstatement must not be overlooked as an illustration of the way in which a loss caused by resumption may be met. In the case of building such as churches, schools, libraries, or lands such as parks, which would be costly to acquire because perhaps on some special site, the resuming authority

[114] *Housing Commission of NSW v Falconer* [1981] 1 NSWLR 547, 570.
[115] *Geita Sebea*, 1943 67 CLR 544, and other cases cited.
[116] *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874, 893 per Lord Reid cited.
[117] See the discussion of *Geita Sebea*, and the *Sydney Sailors' Home case*, above, n 25 ff. The High Court in *Geita Sebea* did not consider that this factor limited compensation payable to the owner, since such inalienability did not apply to the Crown, ie it could on-sell the land at market value.
[118] See *LA & C Act* s 42, which regulates this head of compensation.
[119] *Trustees of Carlton United Hebrew Congregation v Housing Commission* [1970] VR 56, 58, citing Collins, *Valuation Compensation and Land Tax* (3rd ed, 1949) 216- 217.

> sometimes meets the difficulty by buying another suitable site and establishing the owner therein. When such a course is adopted, it is sometimes said that the compensation has been assessed on the basis of reinstatement, but the expression seems to mean no more than that the person whose land has been resumed is entitled to full compensation for his loss, and if there is a difficulty in acquiring similar premises, this difficulty is an item to be taken into consideration in assessing the value to him of the land and buildings taken. It certainly does not mean that the resuming authority must find new and suitable premises at whatever cost, and is only applicable when land that can be used for reinstatement is available or can be had on terms that are reasonable. The site ought to be as nearly as possible the same as the old site, and the (claimant/owner) ought not either to gain or lose in acquiring the new site.[120] (citations omitted)

It might be anticipated that, in cases involving the acquisition of native title, these requirements might be readily met. However, in the *Synagogue case*, Barber J added (or perhaps emphasised) that:[121]

> ... certain fundamental requirements ... must be established to support the application of the reinstatement principle. These may be summarized as (1) there must be an identifiable and clearly defined body of people for whom the acquired premises are to be reinstated; (2) there must be a specific site for the new premises, already identified at the date of the assessment of compensation; and (3) it must be established that there is a firm intention to reinstate, that is, that the acquired premises are to be reinstated in substantially the same form.

In the *Synagogue case*, Barber J rejected the claim for compensation on this reinstatement basis, since the evidence before him failed to satisfy these three requirements. As to identifying the 'religious group', for example, the 'evidence as to membership of the congregation was not satisfactory' since 'no members' roll or any similar document was produced'.[122]

Of these three tests, identification difficulties may well arise in native title cases Although the unincorporated group of people who make a claim, called the 'native title claim group' is well known to the NTA,[123] and although the NTA requires a level of identification for the purposes of filing a claim for a

[120] This passage is partially cited in Hyam, above n 104, (1st ed 1983) 151-2.
[121] *Trustees of Carlton United Hebrew Congregation v Housing Commission* [1970] VR 56, 58-59.
[122] Ibid, 59.
[123] See, for example, NTA ss 61(1), 61(2)(a) and (d), 61(4), 190B(3)(5)(a) and (b), (7); 190C(3),4(b). See also ss 41(1) and (2) and s 62A in relation to the group being bound, as a group, by contractual obligations.

determination of native title, or for compensation,[124] this claimant group may not be sufficiently identified for other purposes, eg to satisfy the stricter identification tests applied when the claimant group seeks the right to negotiate in relation to future acts proposed over the claimed area;[125] or to enable enforcement of a contract against it following agreement with eg a mining lease applicant; or to pass Barber J's first test to achieve an award of compensation upon compulsory acquisition. However, these potential difficulties will usually be most acute in the early stages of a claim and thus may not arise in a compensation setting since, by definition, a compensation claim can only follow a determination that native title exists in the first place.[126] That being so, the native title claim group, by the end of the claim process, will normally have incorporated under the NTA as a Prescribed Body Corporate,[127] when Barber J's identification pre-condition will be satisfied. Indeed, part of the Federal Court's determination function is to ensure that a Prescribed Body Corporate is established to hold the title determined to exist.[128]

As to the second and third matters - identification of specific replacement land at the date of assessment of compensation with a firm intention to reinstate - where traditional land is compulsorily acquired, further difficulties can be envisaged. As with a synagogue, locating replacement land of the special character (to the owner) of that which has been acquired might prove difficult or impossible, since that special character may be irreplaceable, when the aggrieved land-owning group's loss is irrecoverable under this head of compensation. The loss, by compulsory acquisition, of 'irreplaceable' (ie unable to be relocated, and unable to be replicated) areas - dreaming tracks, conception places, business places or similar 'sacred' sites, rock-art sites, or scarred trees or middens - are all obvious examples. In such circumstances, a second-best option under the reinstatement approach might be to obtain a replacement area located within the claimant group's traditional boundaries, thus replacing, in a general sense, the special cultural or spiritual features of the lost land which attracted this approach in the first place. But such areas might not be readily available - or if available might be expensive to purchase - eg if located within a neighbouring pastoral lease. A third-best solution might then be to secure any broadly equivalent area: eg rural

[124] NTA s 61(4)(b) requires that any claim filed in the Federal Court must 'describe the persons (in a native title claim group) sufficiently clearly so that it can be ascertained whether any particular person is one (of the members of the native title claim group)'. See also, in regard to accessing the right to negotiate, NTA s 190B for language to the same effect.

[125] See NTA ss190A, 190B.

[126] See NTA ss 50(2), 61(1), which provide for the making of compensation claims.

[127] NTA Part 2, Division 6, ss 55 - 60AA; David Ritter 'Prescribed Bodies Corporate' in Graeme Neate (ed) Butterworths, *Native Title Service*, Vol 1 [2910-2928]; Martin and Mantziaris, *Native Title Corporations: A legal and Anthropological Analysis* (Federation Press, 2000).

[128] See NTA ss 56, 57, especially 57(2). For difficulties in practice with the establishment of Prescribed Body Corporates, see G Irving, 'Prescribed Body Corporates' in Keon-Cohen, above n 3, at CD.

land of similar dimensions or quality. Just how these unusual features of native title compensation cases are to be resolved must await judicial decisions.[129]

D. Solatium

Professor Richard Bartlett states:

> Reference to the heads of loss of value or market value, severance and disturbance does not provide any accommodation of the unique loss suffered upon the extinguishment or impairment of native title rights and interests. They do not address the intangible losses arising from the severing of spiritual, cultural and historical connections to land.[130]

Whilst, in my view, the above is probably too absolute a position - much depends on the facts and circumstances of each case - equally solatium as a head of compensation able to accommodate such 'intangible losses' is also likely to be of limited use. By contrast John O'Rourke, after noting the various forms that native title might take, comments:

> Non-native title land that is resumed may be the subject of mortgages, leases, easements, restrictive covenants, and profits a prendre. Under resumption legislation, compensation has to be paid to the holders of these interests, as well as to the holders of the fee simple. In some situations it may only be the lesser interest, eg an easement and not the fee simple, that is resumed. The fact that a diversity of non-native title interests is presently compensated under resumption legislation should facilitate the application of this legislation to various forms of native title interests.[131]

Barber J has also noted that in his view, solatium 'does not cover or include any amount awarded in consideration of disturbance'.[132]

Immediate questions arise when, as always, statements of principles such as these are applied to the new phenomenon (new at least to compensation jurisdictions in this country) of native title. Perhaps the first and most obvious question is from whose perspective are these notions - eg 'higher and better use' - to be assessed? The answer in this cross-cultural setting may significantly impact upon valuation. If an aboriginal claimant group considers the 'highest and best use' to be that the disputed area remain undeveloped and pristine - despite a market for 'higher and better' subdivision - there is good authority, particularly in Canada, for the

[129] See for further discussion of reinstatement, (amongst many cases) *Keogh v Housing Commission of Victoria [No 2]* (1969) 18 LGRA 295; *Commissioner of Highways v George Eblen Pty Ltd* (1975) 10 S A S R 384.

[130] Richard Bartlett, *Native Title in Australia* (2000) 435-6.

[131] John O'Rourke 'Native Title: Solatium for Extinguishment' (1998) 3 (10) *Native Title News* 157, 158.

[132] *March v City of Frankston* [1969] VR 350, 356.

proposition that the issue should be considered through indigenous eyes.[133] This process, if followed might reduce the quantum of monetary compensation. The equivalent question to ask might be: for a Melbourne-based white anglo-saxon 'not unwilling vendor' of the Anglican branch of the Christian faith on the one hand, as against a practising Roman Catholic on the other: what price St Paul's Cathedral? Or (to be even-handed) St Patrick's? Whilst this tantalizing scenario is not exactly analogous (the cultural gulf is probably, in modern times at least, not as great between the various Christian churches, as compared to the gulf between the indigenous and the colonizing cultures) it does pose a useful question. Clearly, solatium has limited potential. Leaving aside for the moment the 10% cap applied in Victoria, founding monetary compensation upon elements such as lost spiritual relationship with, or long-standing affection for, land, is a clumsy approach at best.

As to solatium referred to in *LA&C Act* s 44, the cases suggest however that this is likely to arise as a claimed head of loss to embrace quantification of indigenous spiritual, cultural and historical connections - despite the unfortunate 10% cap. As discussed above, the courts have recognised such aspects as deserving of compensation at law. In Victoria, the nature of solatium has been helpfully discussed by, again, Barber J:

> The use of the word 'solatium' is significant. As a matter of ordinary English usage, it means 'a sum of money or other compensation given to a person to make up for loss or inconvenience'. See the *Shorter Oxford English Dictionary* 3rd Ed., which adds to the above definition the following: *'Specifically in Law a sum of money paid over and above the actual damages as solace for injured feelings'*. It is 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. ... It is a discretionary power in the Court and the solatium should be assessed in respect of imponderable factors arising from the compulsory nature of the acquisition. [134]

On the found facts in the case before him, Barber J concluded that:

> [O]n my view of the meaning of solatium I should endeavour to compensate the claimants for the nuisance and annoyance resulting from the disruption of their business and the trouble caused them by the acquisition.[135]

[133] See *Delgamuukw v British Colombia* (1993) 104 DLR (4th) 470 at 644, 646, 653, 707, 712-713, 721 per Lambert JA (dissenting) (B.C. Ct. App); and on appeal, *Delgamuukw v British Colombia* (1998) 153 DLR (4th) 193 at 256, 259 per Lamer CJC (S. Ct Canada).

[134] *March v City of Frankston* [1969] VR 350, 356. The statute there under discussion was *Valuation of Land Act 1960* (Cth). See also *James v Swan Hill Sewerage Authority* [1978] VR 519, 524.

[135] *March v City of Frankston* [1969] VR 350, 358.

As to the statutory maximum of 10%, Barber J accepted that:

> The correct approach [is] to decide what percentage would be fair in the particular case, without regard to any others, and ... [to] give that percentage up to a maximum of 10%, without any kind of grading in relation to other cases known or imagined.[136]

In that case, Barber J awarded a sum by way of solatium calculated at 5% of market value of the land.[137] In a later case, after citing the above principles, Gobbo J stated, usefully:

> [I]t is of the nature of solatium that it covers matters not otherwise covered by ordinary principles of compensation for loss attributable to disturbance ... To take an example, what is to happen to distress caused to the owner of land by reason of the notification by the resuming authority that it intends to resume the land for a public purpose? In some cases, of course, a much greater weight will be attached to that distress than others. For example, the dismay caused to an owner who had expected to make a substantial profit in developing the land will be of a different category and of a lower order and of lesser weight than would be the distress caused to an owner of a home who had lavished particular care and affection upon that home and its garden in a way that could never adequately be reflected in any valuation of that land on a market value basis or in any special value assessment.[138]

Here, perhaps, we approach a basis upon which Professor Stanner's gulf of meaning might be bridged when seeking to compensate for loss of traditional 'hearth, everlasting home and spirit centre'. However, faced with this gulf, in Victoria and other jurisdictions, a question immediately arises as to whether the 10% cap on any solatium award, if adhered to, may render the entire scheme in danger of being struck down as not according just terms within the meaning of s 51(xxxi). For example, if a Judge in a particular case decides that when all heads of available compensation are calculated, including solatium capped at 10% of (let us say) a low market value of remote and vacant Crown land, the sum total is nevertheless not 'fair' (ie it does not amount, in his view, to just terms), one assumes that that Judge may top-up the award to achieve just terms, with reference to no particular head of compensation set out in the *LA&C Act* (or its equivalent). And if this is allowed, why bother with relating compensation for

[136] Ibid.

[137] For another example, see *Equity Trustees Executors and Agency Co Ltd v Melbourne and Metropolitan Board of Works* [1994] 1 VR 534. When discussing solatium, Gobbo J noted, at 550: 'All three claimants had a long family connection with the subject land and all, I accept, had a strong and genuine attachment to a beautiful and picturesque property. All had grown up on the property and one had spent almost her entire life there. These links extended over many years. I accept that each suffered anxiety and frustration because of the decisions of the authorities to take the property at some indeterminate date in the future'. These notions come close to the basis of claims one might expect from indigenous owners regarding loss of native title.

[138] *King v Minister for Planning and Housing* [1993] 1 VR 159, 188-9.

loss of native title to various statutory heads at all? Why not just quantify by reference to what is 'fair' and be done with it? In such a scenario, a case can be made for deleting, or significantly increasing, the 10% cap provision in relation to native title acquisition. Given that native title is usually found on Crown land, a 10% top-up of minimal market value is of questionable utility, suggesting that solatium is likely to be of limited use to native title holders faced with compulsory acquisition. A more useful avenue for native title holders to achieve equitable compensation may be special value.

E. Special Value

The *LA&C Act* s 40 defines 'special value' as follows:

> 'special value' in relation to an interest in land, means the value of any pecuniary advantage, in addition to market value, to a claimant which is incidental to his ownership or occupation of that land.

As to special value, Gobbo J states:

> It is difficult to see what is the pecuniary advantage to [the] claimant that is incidental to its ownership of the land and which is not comprehended by the market value. If it is past expenditure, then this will ordinarily have enhanced the market value. If it has not done so, it will be difficult to show how it can none the less be a pecuniary advantage. In some cases it may be an advantage, such as particular knowledge or expertise or associated goodwill, which advances this owner but not another owner in the market.[139]

As is well documented, traditional owners of a given community, especially the elders, possess considerable detailed knowledge of, and have expertise concerning, their particular ancestral land, its features and natural resources; the spirit forces that gave it birth and that replenish it; the song-cycles, rituals, and ceremonies that are associated with it; traditional rights and obligations in relation to it, and so on. As Professor Stanner indicates, loss of access to the land (eg by compulsory acquisition) and loss of its life-force, can be devastating. These features are peculiar to that community, and suggest a 'special value' to it, and to individuals within it, worthy of compensation. This special value attached to the native title interests is certainly not shared by the acquiring authority, nor by other non-indigenous persons. Nor, for that matter, is it necessarily shared by neighbouring indigenous communities. To the aggrieved traditional owner, the land is 'priceless' or at least has a value to him or her which exceeds the Australian economy's market value.

[139] *Coastal Estates Pty Ltd v Bass Shire Council* [1993] 2 VR 566, 596.

However, 'special value' is defined in the *LA&C Act* as 'the value of any *pecuniary advantage*'. The native title features described above would not seem to fit easily within this head of compensation. How these cultural features attract a pecuniary 'value', let alone 'advantage', which translates into dollar figures in a particular case is hard to envisage - unless for example, those cultural matters were, or were related to, identifiable features on the land. These might be rock art attracting tourist dollars; or the paintings themselves, being art capable of valuation, in situ, in a western economy by eg Southerbys, or (to raise another dimension of 'value'), a museum concerned to preserve antiquities. But these scenarios raise their own, additional compensation problems. What price the Elgin marbles?

This provision of the *LA&C Act* might be more responsive to native title claimants if it was amended to read 'pecuniary feature' or 'pecuniary element', when the courts could assess damages for 'special value' guided by a less restrictive regime. However, to the extent that money can compensate - then money should. Perhaps this head of compensation provides an escape from the 'inability to provide just terms' discussion above: special value, at least, is not capped at 10% or any other figure.

VIII. SOME ANALOGIES

A. Loss of Culture and Damages for Personal Injuries

Despite the distinguishing features of civil litigation mentioned above, recent personal injuries cases concerning aboriginal plaintiffs are worth noting. It is well held that:

> [T]he object of an award of damages at common law is to place an applicant, whose rights have been violated, in the same position, so far as money can, as if the applicant had not suffered a violation of rights.[140]

Similarly, 'compensation' is taken to mean the restoration of the plaintiff to the position that he or she occupied before the wrong, eg prior to the tort being committed; or to the position that would have obtained if the contract had not been breached, ie if it had been performed.

An associated principle of real significance in the law of damages, in contract and tort, is that of mitigation. Here, the plaintiff is required to respond reasonably to the defendant's wrong. He or she cannot 'simply lie by and let the losses flowing from that wrong multiply'.[141] As *Halsbury's* succinctly states:

[140] *Cubillo* (2000) 174 ALR 97, 560 (O'Loughlin J) (citations omitted).
[141] Butterworths, *Halsbury's Laws of Australia*, Vol 9 Criminal law to damages, '135 Damages' [135-25].

> [Plaintiffs] must act to keep the damages down as far as is reasonable in all the circumstances of the case. If they fail to do so, their award of damages will exclude recovery for those losses which could reasonably have been avoided. If they do act reasonably in response to the defendant's wrong, they will not recover damages for losses which have been avoided, but they will be able to recover for losses associated with their reasonable actions.[142]

As is usual with native title, how these hallowed principles apply to the native title jurisdiction is not altogether clear. Is a traditional owner who has lost access to a sacred site required to make reasonable efforts to substitute another? Or to conduct the relevant ceremony elsewhere - even when the reason for the ceremony in the first place is closely associated with that particular site? One would think not, but the resolution of such issues must be left to the facts and circumstances of each case.

Further basic principles of damages should be mentioned. The High Court has laid down the following (adopted by O'Loughlin J in *Cubillo*):

> Certain fundamental principles are so well established that it is unnecessary to cite authorities in support of them. In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained injuries. Secondly, damages for one cause of action must be recovered once and forever and (in the absence of statutory exception) must be awarded as a lump sum; the court cannot order the defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages.[143]

Again, intriguing refinements arise when these rules are applied to the statutory scheme for compensation for extinguishment of native title. For example, NTA s 61(1) does provide a 'statutory exception': applicants may make an application to amend a determination of native title or of compensation so that, to that extent, a determination of compensation is not 'once and for all'. Next, NTA s 87 may enable a court, even in a consent-order compensation situation, to inquire into whether the making of the award, or its quantum, is 'just' in all the circumstances; but the court will have no mandate to inquire into how the traditional owners plan to spend their money.

Equally hallowed are the heads of non-pecuniary or general damages which a court habitually has regard to when making an award; ie pain and suffering; loss

[142] Ibid.
[143] *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs CJ and Wilson J).

of enjoyment of life, and loss of expectation of life. To these in the native title context may be added cultural loss. Whether this element is tacked-on as an extra head, or subsumed under loss of enjoyment of life probably doesn't much matter. As to cultural loss concerning traditional life-styles being pursued by aboriginal claimants,[144] the courts have in recent years accepted such losses as compensable in personal injuries cases. In *Cubillo*, O'Loughlin J summarized this line of recent authority as follows:

> I do not think that it could be argued that the cultural loss that a part-aboriginal person has suffered does not sound in damages. *Napaluma v Baker* (1982) 29 SASR 192, *Dixon v Davies* (1982) 17 NTR 31 and *Weston v Woodroffe* (1985) 36 NTR 34 were all cases where the plaintiff, an Aboriginal person, was injured in a road accident. In each case, the nature of the injuries detrimentally affected the plaintiffs' aboriginal culture or was otherwise related to it and the assessment of damages reflected that fact. In *Napaluma*, Zelling J said that the plaintiff would not 'be advanced to further degrees of aboriginal lore for two reasons, firstly, he may not keep secret what is entrusted to him, and secondly, he has not the ability to pass on accurately the secrets to others': at 194. O'Leary J in *Dixon* said that the plaintiff's pain and suffering had to include the plaintiff's 'loss of standing within his own Aboriginal community and his lowered expectation of ever being able to enjoy full tribal rights' at 34.[145]

The Judge discussed two further cases[146] and awarded damages (notionally) in the 'stolen generation' case before him for such cultural losses - although the final global figures were not broken down into their constituent elements.[147] These cases were also referred to by a panel of the NNTT in *WA v Thomas*[148] when discussing the 'similar compensable interest' test, set out at NTA s 240.[149] The NNTT stated:

> [I]f owners of ordinary title are entitled to compensation for 'all loss and damage' suffered or likely to be suffered by them resulting or arising from the actual mining, then native title holders are entitled to no less, even if the nature of their loss or damage is different from that of a non-Aboriginal land owner. An analogy can be drawn with personal injuries litigation where superior courts have held that Aboriginal people can be compensated for such things as inability to complete initiation rights,[150] inability to gain and enjoy full tribal

[144] See Graeme Orr, 'Damages for loss of Cultural Fulfilment in *Indigenous Community Life*' (1997) 4 (6) *Indigenous Law Bulletin* 17 - 18.

[145] *Cubillo* (2000) 174 ALR 97, 564.

[146] *Weston v Woodroffe* (1985) 36 NTR 34, and *Milpurrurru v Iindofurn Pty Ltd* (1994) 54 FCR 240, a copyright case.

[147] Gunner was awarded a global figure notionally of $125,000, Cubillo of $110,000, being, in each case, damages for false imprisonment and other wrongs.

[148] (1996) 133 FLR 124.

[149] The relevant part of that definition states: 'the compensation would, apart from this Act, be payable under any law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned and to the land adjoining, or surrounding, any waters concerned'.

[150] *Dixon v Davies* (1982) 17 NTR 31, 34-5 cited.

> rights,[151] loss of ceremonial function,[152] inability to partake in matters of spiritual and tribal significance,[153] and loss of social standing in the tribal or clan group.[154]

The NNTT in *Thomas* further discussed this type of cultural damage when considering the impact of the relevant state laws being, in that case, s 123 of the *Mining Act 1978* (WA). Section 123(1)(d) states, in effect, that claims for compensation will lie for 'any loss or damage for which compensation can ... be assessed according to common law principles in monetary terms'. The Tribunal considered that:

> .... loss or damage may be suffered in ways which are peculiar to a group of native title holders. For example, even if areas and sites of particular significance to them are not physically damaged by mining activity, the native title holders may be deprived of the use of part of the surface of the land for ceremonial or sustenance purposes. Social disruption may result from the presence of other people on the land or from the use of the land for purposes which cause grave concern to the native title holders.[155]

B. Nervous Shock Cases

In an action based upon the tort of nervous shock, the plaintiff must show that his or her damage resulted from a sudden affront to his psyche such as to cause a recognisable psychiatric illness. The rule was set down in *Jaensch v Coffey* in 1984.[156] The artificial nature of this rule - a need to show a 'shock' and a single cause of resulting illness - was criticised by Kirby P in *Campbelltown City Council v Mackay*[157] but the rule still stands, despite advances in psychiatric knowledge since 1984. This would not appear to offer much assistance to native title claimants - particularly when it is recalled that a claimant group - not identified individuals - is the entity seeking compensation. Could a group satisfy the above test and prove compensable 'nervous shock'?

Similarly, damages due to vexation, stress and worry arising from negligent conduct have been allowed. In *Campbelltown* McHugh JA stated:

> In *Perry v Sidney Phillips & Son* (1982) 1 WLR 1297 the English Court of Appeal allowed a plaintiff damages for the vexation, distress and worry which had been caused by reason of the negligence of a surveyor in inducing them to purchase a property with serious defects. The reasoning of that decision was

[151] Ibid 34; *Napaluma v Baker* (1982) 29 SASR 192, 194 cited.
[152] *Napaluma v Baker* (1982) 29 SASR 192, 194; *Weston v Woodroffe* (1985) 36 NTR 34, 35 cited.
[153] *Napaluma v Baker* (1982) 29 SASR 192, 194; *Dixon v Davies* (1982) 17 NTR 31, 35 cited.
[154] *Dixon v Davies* (1982) 17 NTR 31, 194 cited; *Western Australia v Thomas* No WF96/3; WF 96/12, Perth, 17 July 1996, at MS p 77.
[155] *Western Australia v Thomas* op cit at MS 76.
[156] (1984) 155 CLR 549.
[157] [1988] 15 NSWLR 501 at 503-4.

adopted by the (NSW Court of Appeal) in *Brickhill v Cooke* [1984] 3 NSWLR 396, a case in tort.[158]

This doctrine may be applied to the 'vexation, stress and worry' suffered by a group of traditional owners when faced with proposals to compulsorily acquire their traditional country - or parts of it.

IX. INTERNATIONAL EXPERIENCE

A. Statutory Settlements

Numerous countries have struggled with the general issue of how to 'compensate' indigenous communities for the loss of their ancestral lands consequent upon the colonisation of the new world. Of most relevance here, is to note that those schemes have included resolving particular claims by legislative intervention. Thus, for example, in the USA:

> Congress has chosen at times to resolve claims by legislative fiat, enacting special legislation to resolve disputes involving individual tribes or tribes located within a specific geographical area. For example, [in] 1971, Congress passed the *Alaska Native Claims Settlement Act*[159] extinguishing all claims based on Aboriginal title in Alaska while providing for US$962.5 million and 40 million acres of land as compensation for those claims. Similarly, Congress enacted legislation in 1978 to resolve Indian claims to lands in Rhode Island by appropriating federal funds to purchase lands for the Indian claimants.[160]

Similar initiatives have occurred in New Zealand[161] with the Sea Lord deal of 1992;[162] and, on one view, in Tasmania in recent years, with the passage of legislation designed to set aside for Aboriginal inhabitants of that state specified land.[163] These statutory schemes are subject to their own macro political and economic forces during such negotiations as might have occurred and there seems little point in pursuing these here. Of interest to the current Australian debate, however, is the comment by the eminent American scholar, Felix Cohen, writing in 1947:

158 Ibid 511.

159 Pub.L. No 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C # 1601 - 1628).

160 See Act of Sept 30, 1978, Pub. L. No 95-395, 92 Stat. 813 (codified at 25 U.S.C.A. # 1701-1712.)

161 See generally Alan Ward, 'New Zealand Experience: The Treaty of Waitangi' (2001) 5(1) *Newcastle Law Review* 65, 65 - 81.

162 The Sea Lord deal was essentially a grant of rights in deep water fisheries to compensate in broad terms for the Maori People's loss of most of their traditional inshore fishery. The *Treaty of Waintangi (Sea Fisheries) Act* 1992 (NZ) states that the settlement is intended for *all* Maori. See A Ward, *An Unsettled History* (1999) 50-1; Catherine Wickliff, 'The Sealord's Deal' (1996) 3 (82) *Aboriginal Law Bulletin* 11.

163 See L Griggs 'Tasmania's Legislative and Administrative Response to Native Title' in B A Keon-Cohen, above n 3, 169-75.

> While nobody has ever calculated the total sum paid by the United States to Indian tribes as consideration for more than two million square miles of land purchased from them, and any such calculation would have to take account of the conjectural value of a myriad of commodities, special services, and tax exemptions, which commonly took the place of cash, a conservative estimate would put the total price of Indian lands sold to the United States at a figure somewhat in excess of US$800 million.[164]

Using this 'conservative' figure as a starting point, one could here engage in a range of calculations and come up with a global figure, in Australian dollars, for the areas of this country now unavailable for native title claims by reason of historical extinguishment achieved by ever expanding settlement - Olney J's 'tide of history'[165] - up to, say, 1 January 1994. But as in America under *Johnson v McIntosh*,[166] so too in Australia under *Mabo [No2]*, such extinguishment, absent legislative intervention, is not wrongful and gives rise, (at least prior to the advent of the Racial *Discrimination Act 1975* (Cth), to no right to compensation.[167] Such claims, therefore, revert to the moral and political arena.

B. US Indian Claims Commission[168]

However, the USA has experience (as in many things) of such legal and moral claims. During the American Civil War, a Court of Claims was established[169] in 1855 to permit claims to be brought by US citizens against the United States. Despite these laws, prior to 1946, Indian claims for, inter alia, compensation for loss of traditional lands, could be litigated only if Congress passed special legislation authorising each specific claim.[170] Since the classic decision of Marshall CJ in the Supreme Court in 1823,[171] Indian title has always been accepted as amounting to full ownership, including rights to minerals.

Even with this advantage, by the 1940s, Indian discontent with many such

164 Felix S Cohen 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28, 35.
165 See *Yorta Yorta Aboriginal Community v Victoria*, Olney J, VG 6001 of 1995, 18 December 1998; [2001] FCA 45 (Full Ct).
166 *Johnson v McIntosh*, 21 US (8 Wheat) (1823).
167 See, for Australia, *Mabo [No 2]* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).
168 See generally Michael Lieder and Jake Page, *Wild Justice* (1997) reviewed at (1998) 23 *American Indian Law Review* 207; David Getches et al (eds) *Federal Indian Law: Cases and Materials* (1979) 152-7; Felix Cohen, *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed) especially at 562-74; Glen Wilkinson, 'Indian Tribal Claims before the Court of Claims' (1966) 55 *Georgetown Law Journal* 511; Neil Jessup Newton 'Compensation, Reparations and Restitution: Indian Property Claims in the United States' (1994) 28 *Georgia Law Review* 453.
169 See 10 Stat 612.
170 By the 1940s, this cumbersome process had led to 142 such Acts being processed, contributing to calls for a better solution. See Getches, above n 168, 152.
171 *Johnson v McIntosh* 8 Wheat 543; 5 L Ed. 681 (1823).

enactments was severe.[172] The tribes recovered claims in only 28 of 134 cases docketed between 1886 and 1946.[173] Further, after 1920, the tribes almost always lost because special jurisdictional Acts allowed the government to offset sums expended for the benefit of the tribe. Thus by 1946, a consensus arose in Congress that a better mechanism was needed to resolve Indian claims. As a result, the *Indian Claims Commission Act* of 1946 was implemented.[174]

This Act established a three (later five) member Commission to determine Indian claims against the United States brought by 'any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska'.[175] Review of the Commission's decisions was available in the Court of Claims, and thereafter, in the US Supreme Court. The jurisdiction of the Commission was confined to claims accruing prior to 13 August 1946, but claims could date back to the time of the founding of the Republic in 1783. All claims were required to be filed with the Commission by 13 August 1951. A total of 370 tribal petitions were filed with the Commission under the Act, and more than 600 claims were docketed by the deadline - compared to 142 claims adjudicated upon by the Court of Claims in the period prior to 1946.[176]

Under the Act, a tribe could bring suit for monetary damages arising from any legal wrong committed by the United States. The Act also authorised the Commission to decide 'moral' claims based 'on contentions that treaties, contracts or agreements would not have been entered into but for the government's fraud, duress, or unconscionable actions' and 'upon fair and honourable dealings that are not recognised by any existing rule of law or equity'.[177]

The idea of exposing a government to orders of monetary compensation founded on such 'moral' bases raises interesting prospects in Australia today, especially in relation to the as yet unsatisfied claims of the 'stolen generation'. All that aside for the moment, claims brought to the Commission of most relevance for current purposes concerned complaints about unconscionable or fraudulent treaty dealing between Indian tribes and the US, where tribes ceded large areas of their traditional homelands in exchange for often pitifully inadequate 'compensation'

[172] For example, 'most special Acts before 1946 required that judgments be reduced by the value of 'gratuities' rendered to the tribes by the United States. Such "gratuitous set-offs" significantly reduced many awards by subtracting the value of health services, education services, blankets, tools, farm implements and the like. For the twenty years before (1946) interlocutory awards before off-sets were US$49,000,000. Offsets were US$29,000,000, thus diminishing total awards by almost 60%': Ibid 156-7.

[173] Lieder and Page, above n 168, 56.

[174] Act of August 13 1946, ch 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. # 70 - 70v-2).

[175] 25 U S C # 70a.

[176] Margaret Hunter Pierce, 'The Work of the Indian Claims Commission' (1997) 63 *American Bar Association Journal* 227, 229; Lieder and Page, above n 168, 89-90.

[177] Ibid.

by way of sums of money, annuities or provision of other lands.[178] According to one American scholar:

> [A]lthough some treaties executed in the eighteenth and early nineteenth century were the products of arms-length bargaining, many were procured by fraud or simply by the threat of force so great that the tribes had no choice but to cede more land.[179]

Initially, the Commission was given five years to complete its work, but the many complex cases moved slowly, and Congress extended the life of the Commission many times. Finally, Congress dissolved the Commission as of 30 September 1978.[180] To that time, the Commission had decided 610 claims brought by 170 Indian tribes; 65 remaining cases were transferred to the Court of Claims.

The great majority of claims filed involved disputes about land, especially whether inadequate compensation was paid when Indian groups ceded territory to the government, or were forcibly removed. The history of this jurisdiction has not been a happy one from the Indian perspective. Although the Act does not specifically so provide, awards were limited to monetary payments, without consideration of an alternative form of compensation, being return of at least some of the land originally taken. Some of the payments originally provided to tribes may be seriously questioned today: for example, Manhattan Island was sold to the US for $24.00![181] Again, a 'no-interest' rule, inherited from the former rulings of the Court of Claims, provides that (subject to exceptions) interest on monies owed is not recoverable against the United States.

One exception is of relevance here: ie when a 'fifth amendment'[182] taking is involved, interest payments are required - although this requirement is applied only to a limited class of Indian lands, ie lands involving 'recognised' title, being title held pursuant to treaty, statute, or agreement with the US.[183] Original or 'unrecognised' Indian title - ie land in which Indian title was claimed solely under the common law - was initially found, in 1946, to give rise to liability for the payment of interest in claims cases.[184] A subsequent case, however, *Tee-Hit-*

[178] This sad history of treaty making in the US is told in many places: see, eg F Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (1975) 105-45; J Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (1988); Charles Wilkinson and John Volkman 'Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth" - How Long a time is that?' (1975) 63 *California Law Review* 601.

[179] Newton, above n 168, 459.

[180] By Act of 8 October 1976, (90 Stat. 1990). Since 1982, the US Court of Federal Claims has assumed all of the original jurisdiction of the Court of Claims - including Indian tribal claims against the US.

[181] Felix S Cohen, 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28, 34.

[182] The fifth amendment to the US constitution states, relevantly: '[N]or shall private property be taken for public use without just compensation'. This protection has been held to apply only to Indian property rights 'recognised' by Congress.

[183] See *United States v Creek Nation* 295 US 103; (1935).

[184] *United States v Alcea Band of Tillamooks* 329 US 40; (1946) (*Alcea I*). See however for a different result *Alcea Band of Tillamooks v United States* 341 US 48, 71; (1951) (*Alcea II*).

Ton,[185] decided in 1955, reversed this decision. The Supreme Court, in *Tee-Hit-Ton*, relied on

> [t]he rule derived from *Johnson v McIntosh*[186] that the taking by the United States of unrecognised Indian title is not compensable under the fifth amendment. ... Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States.[187]

Getches comments:

> Although *Tee-Hit-Ton* clearly stands for the proposition that some takings of original Indian title do not give rise to [a right to] compensation [under the fifth amendment], possible limits on Congress's power to take without just compensation may exist when a taking is inconsistent with Congress's trust responsibility towards Indians.[188] Uncompensated takings, however, were the exception not the rule. ... most takings of Indian land was compensated by negotiated treaties or agreements; by (the abovementioned) special legislation permitting individual claims; or by claims brought pursuant to the *Indian Claims Commission Act* of 1946.[189]

Again, Commission awards were valued as at the date of taking: eg 1850. This left some claimants with awards (without interest if the claim involved original Indian title) of one or two dollars only per acre in relation to land worth several hundred times that amount today. Even for 'recognised' Indian title (where interest, as mentioned above, was required by reason of the fifth amendment), interest was awarded at only 5% simple rates, not compound.[190]

The 1946 Act cured some of these problems - but not all. The Act is more favourable to Indians in relation to gratuitous off-sets, exempting many 'gratuities' - eg health and education expenditures.[191] The claims process has proven long, adversarial, and arduous - somewhat like many native title determination hearings in Australia. In the Court of Claims, the history of an Indian group's dealings with the United States may require close examination and

[185] *Tee-Hit-Ton Indians v United States* 348 US 272; 75 S Ct 313; 99 L Ed 314 (1955) ('*Tee-Hit-Ton*').

[186] 21 US (8 Wheat) 543 (1823); 5 L Ed. 681 being the classic and still influential judgment of Marshall CJ, referred to by the majority in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

[187] *Tee-Hit-Ton* 348 US 272, 285 (1955).

[188] As to which see ibid 204-52; Cohen, *Handbook of Federal Indian Law*, above n 168, 220-28.

[189] US courts have held that claims for loss of original Indian title were compensable if brought under the provisions of the *Indian Claims Commission Act*. See *Otoe and Missouria Tribe v United States* 131 F Supp 265 (Ct Cl 1955), cert denied. *Tee-Hit-Ton* held to the contrary because the claim arose after 1946 and thus was not within the jurisdiction of the Indian Claims Commission. See Getches, above n 168, 149, 156.

[190] See Getches, above n 168, 156; Friedman, 'Interest on Indian Claims: Judicial Protection of the Fisc' (1955) 5 *Val. Law Review* 26, 46.

[191] See generally *Ponca Tribe of Oklahoma v United States* 183 Ct Cl 673 (1968); and *United States v Pueblo de Zia* 474 F 2d 639 (Ct Cl 1973).

claimant tribes call a range of evidence, including from anthropologists, historians, sociologists, and other experts.[192]

As to principles of valuation, these are illusory and of no great assistance to Australia, since results are very much tied to the statutory scheme in question. Felix Cohen records, however:

> In general, the proper valuation date for recovery in cases involving the sale or other disposition of tribal land or natural resources is the date of that sale or disposition. ... The value of timber and mineral resources is to be included in determining the value of the land itself. ... Valuation of the land interest at the time of its taking or injury requires consideration of a multitude of factors, including the location of the land, the sale price of similar lands, and actual use of disposition of the land after the taking. The date of valuation is that point at which the tribe is legally deprived of the land or land interest, even if a treaty or agreement ceding the land was never ratified ... Whenever the extinguishment of tribal title or the infringement of tribal occupancy amounts to a taking under the fifth amendment, interest must be awarded on the judgment from the date the claim accrued, that is, from the date of the taking. .... Whether a claim constitutes a taking or (merely) an exercise of congressional regulatory power over Indian affairs depends upon the general tests for a taking under the fifth amendment and whether Congress has attempted to provide compensation for the interference. If the interference with recognised title is substantial, and Congress has made no effort to afford compensation, the claim generally will be considered to be founded upon the taking clause, and interest [will be] awarded.[193]

Interestingly, this account of valuation experience for the purposes of compensation in the USA contains no reference to compensating for loss of cultural impact, spiritual connection, or similar aspects of the Indian tribes' relationship to their traditional lands. Perhaps this aspect - so apparently troublesome in Australia - has not been a prominent feature of cases run before the Claims Commission or the Court of Claims because, as mentioned above, it would be embraced within the full panoply of rights and interests constituting Indian title in the first place. That aside, one American scholar, following an exhaustive comparative examination of this US process, and processes in place in New Zealand, particularly the work of the Waitangi Tribunal, concluded that the New Zealand scheme was far superior in terms of delivering compensation outcomes for indigenous claimants.[194] He concludes:

[192] Getches, above n 168, 157.
[193] *Shoshone Tribe v United States* 299 US 476 (1937); *United States v Pueblo of Taos* 515 F. 2d. 1404 (Ct. Cl. 1975); Cohen, *Handbook of Indian Law*, above n 168, 570.
[194] See Carter D Frantz, 'Getting Back What was Theirs? The Reparation Mechanisms for the Land Rights Claims of the Maori and the Navajo' (1998) 16 *Dickinson Journal of International Law* 489.

> [C]ompared to the Waitangi Tribunal, the ICC pales in effectiveness because it could not return land as compensation. ... The ICC was a satisfactory mechanism for monetary compensation; but its limited window for filing claims, its inability to grant land awards, and its ultimate termination (in 1978) preclude labelling it an effective mechanism through which the misdeeds of the past could be redressed. For the Navajo, reclamation of traditional land, if possible, must now proceed by actual purchase of the land from its present owners. [195]

X. CONCLUSIONS

The above review suggests some avenues of enquiry, and answers few questions However, refining the questions is perhaps a useful exercise in a jurisdiction where robust global assessments, not addiction to detailed mathematical formulas and calculations, is the preferred course. If the overarching - and open-ended - requirement of 'just terms' is kept in mind, it is suggested that reference to judicial exegesis of the heads of compensation under resumption legislation is a useful starting point, as is reference to recent attempts by judges to assess damages with reference to cultural loss in personal injuries cases. The creation of a market place, and thus monetary equivalents, (if this form of compensation is desired) for loss of spiritual life should be no more difficult than, say the development of a market through Southeby's auctions, and the like, for Aboriginal paintings of, say, the Utopia school.

Working from analogy and utilizing the flexibility inherent in compensation law, it is suggested that much of the alarm expressed by the land valuation profession is misplaced. In the field of compensation for compulsory acquisition, the principles are set out and may now be applied and developed flexibly to take account of new factual situations raised by native title claims. This adaptation of principle to new factual circumstances is nothing new to the courts. Thus, it might be argued that if a particular community prefers dollars by way of compensation for loss of their traditional rights over particular land, then 'special value', as a head of compensation, may provide their best prospects of a worthwhile award Likewise, for a community that seeks not money, but land, then clearly, 'reinstatement' would for it be the preferred avenue for compensation And as with certain other financial calculations in the law, if all else fails - start with a figure then double it!

[195] Ibid 506, 518.