

COMPENSATION FOR ECONOMIC AND NON-ECONOMIC LOSS BY EXTINGUISHMENT OR IMPAIRMENT OF NATIVE TITLE: A CRITICAL AND COMPARATIVE ANALYSIS OF DEVELOPMENTS IN AUSTRALIAN CASE LAW

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ABSTRACT

The recent developments in case law concerning compensation for extinguishment and impairment of native title do not adequately recognise its *sui generis* status as a right existing prior to the British colonisation of Australia. Both Australian legal principles and jurisprudence from other common law countries such as the US and Canada suggest that a restrictive view limiting native title rights and interests to those practised in antiquity should not be taken, and strict common law principles and limitations should not be applied by courts in compensating native title holders. The *sui generis* status of native title presents three propositions. The first is that inalienability should be irrelevant to economic compensation. The second proposition is that the economic value of native title should almost always be equal to the value of freehold title, unless specifically restricted by traditional laws or customs or by interference with title prior to the *Racial Discrimination Act 1975* (Cth). The last proposition arising from the *sui generis* nature of native title is that compensation for non-economic loss should include additional sums held in trust and invested for future generations.

I INTRODUCTION

Native title has been recognised by the Australian common law for over twenty-five years. When first recognised in 1992, many in the wider community voiced concerns that Aboriginal and Torres Strait Islander people would swamp the courts with litigation seeking large amounts of compensation for loss of their traditional lands. This feared state of affairs did not eventuate; until recently, no court had awarded compensation for extinguishment or impairment of native title.

This changed in 2016 with *Griffiths v Northern Territory of Australia (No 3)*¹ (*Timber Creek*), a case brought by the Ngaliwurru and Nungali peoples seeking compensation for the extinguishment and impairment of native title in their ancestral lands. Justice Mansfield of the Federal Court of Australia became the first judge to consider this type of compensation. In 2017, all parties appealed Justice Mansfield's decision to the Full Federal Court in *Northern Territory of Australia v Griffiths*² (the *Timber Creek Appeal*) on grounds including that Justice Mansfield's assessment of economic loss and calculation of non-economic loss were erroneous. The Full Court (Acting Chief Justice North and Justices Barker and Mortimer) handed down a decision largely supporting Justice Mansfield's findings, but differing in some key areas.

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¹ (2016) 337 ALR 362.

² (2017) 256 FCR 478.

The Full Court's decision was appealed to the High Court and heard in September 2018. The High Court's decision is keenly awaited within the legal community. However, in the meantime, there are several issues to consider regarding the judgments in *Timber Creek* and its appeal, as well as the native title framework of legislation and judicial opinions that lay the foundation for these decisions.

This paper analyses the assessment of compensation for economic and non-economic loss by the courts and suggests changes to the approaches of Justice Mansfield and the Full Court. Part III considers the background to native title compensation, covering the native title framework, a brief overview of previous cases that have touched on compensation, and a summary of *Timber Creek* and the *Timber Creek Appeal*. Part IV provides a comparative analysis of the conceptualisation of native title in Australia with 'Aboriginal title' in Canada and 'Indian title' in the United States of America and outline why the current conceptualisation of native title in Australia should be revisited by courts. Part V of the article uses the analysis from Part IV to argue that the *sui generis* nature of native title should mean that substantial changes to the courts' approaches to compensation for economic and non-economic loss by extinguishment or impairment of native title should be made.

II BACKGROUND TO COMPENSATION FOR EXTINGUISHMENT AND IMPAIRMENT OF NATIVE TITLE

A The Native Title Act framework for compensation

Native title has a long history of litigation, meaning that the legislative framework containing the right to compensation for extinguishment or impairment of native title in Australia must be understood with reference to the case law and legislation that preceded it. In *Mabo v Queensland (No 1)*,³ it was held that Queensland legislation extinguishing native title rights held by Torres Strait Islanders, but not affecting the rights of non-Indigenous landholders, was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth), which contains the right to enjoy equality of rights under the law for people of all races. As Justice Brennan, Justice Toohey and Justice Gaudron stated in their joint judgment, '...if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it now will fail.'⁴

This decision had major ramifications for native title. Not only did it allow the eventual recognition of native title in *Mabo v Queensland (No 2)*⁵ ('*Mabo (No 2)*'), it also set the stage to allow for compensation where there is any act extinguishing or impairing native title at any time later than the time the *Racial Discrimination Act* came into force on 31 October 1975.

Given that the Commonwealth only has constitutional power to acquire property from people 'on just terms,'⁶ it is not surprising that the statutory entitlement to compensation for extinguishment or impairment of native title itself that arose under the *Native Title Act 1994* (Cth) ('the Act') is 'an entitlement on just terms.'⁷ The Act includes a limitation whereby total compensation payable for an act that extinguishes native title

³ (1988) 166 CLR 186, 218-19, 232-3.

⁴ Ibid 219.

⁵ (1992) 175 CLR 1.

⁶ *Australian Constitution* s 51(xxxi).

⁷ *Native Title Act 1994* (Cth) s 51(1).

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must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate; however, this limitation is, again, subject to the requirement to provide ‘just terms’ compensation.⁸

The party who is to pay this compensation depends on who is responsible for doing the act that extinguished or impaired native title. It is likely that most claims for compensation will lie against the State or Territory governments, given that Crown land is managed by them. States and Territories are liable to compensation claims under s 20 of the Act. However, the Commonwealth, too, may be liable where an extinguishing or impairing act may be attributed to it.⁹ Finally, the Act effectively provides that the Commonwealth, States or Territories may legislate to pass on liability for compensation to providers of public infrastructure.¹⁰ New South Wales recently legislated to pass on this liability.¹¹

There are numerous other provisions relevant to compensation in the Act, but for the purposes of this paper, the above are sufficient to consider the problems presented by recent case law.

B Compensation prior to the Timber Creek cases

Until 2016, compensation under the Act had never been judicially considered. However, the issue of compensation was raised in two cases, *Jango v Northern Territory of Australia*¹² (‘*Jango*’) in 2006 and *De Rose v South Australia*¹³ (‘*De Rose*’) in 2013. However, the judges were ultimately not required to consider compensation in either case. *Jango* was a claim for compensation for the extinguishment of native title rights and interests over the town of Yulara near Uluru. In that case, Justice Sackville ultimately found that the claimant group could not satisfy the threshold issue that their native title rights and interests over the area existed at the time that the compensation acts occurred; accordingly, no requirement to consider the quantum of compensation arose. *De Rose* does not assist because the parties entered into a confidential agreement regarding compensation, and compensation was ordered by consent.

C The first consideration of compensation

In *Timber Creek*, Justice Mansfield became the first judge in Australia to consider native title compensation. Finding that the claim group were entitled to compensation for the extinguishment or impairment of several non-exclusive native title rights and interests, he was required to confront the task of quantifying the compensation entitlement.

Justice Mansfield determined that, as a matter of construction of the relevant sections of the Act, compensation should be assessed as at the date of the compensable act.¹⁴ He held it should be comprised of three separate components: an amount for economic loss, an amount for non-economic loss and interest on the amounts from the date of the compensable acts. While the issue of interest necessitates future academic discussion (indeed, the interest amounted to the largest discrete component of the compensation in

⁸ Ibid s 51A.

⁹ Ibid s 17.

¹⁰ Ibid s 24KA(6)(a)(i) and (6)(b)(i).

¹¹ See *Crown Land Management Act 2016* (NSW) pt 8 generally and specifically s 8.12.

¹² (2006) 152 FCR 150.

¹³ [2013] FCA 988.

¹⁴ *Timber Creek* (2016) 337 ALR 362, 387 [121].

Timber Creek),¹⁵ the interest component is outside the scope of this paper and will not be considered here.

1 Compensation for economic loss

As to economic loss, Justice Mansfield opined that the value of exclusive native title rights would be equal to the freehold value of land, with no reduction in value due to the inalienability of the land.¹⁶ This followed from his consideration of *Geita Sebea v Territory of Papua New Guinea*¹⁷ (*'Geita Sebea'*). *Geita Sebea* was a case regarding compensation for the compulsory acquisition of Indigenous traditional rights and interests of the Kila Kila people in land in the Territory of Papua (then an Australian territory), in which the High Court found that the inalienability of land should have no detrimental effect upon its value, given that the Crown would acquire an estate in fee simple that was freed from any such restriction.¹⁸ However, because the rights in question in *Timber Creek* were non-exclusive, and noting that, had the claim group had its way, it would not have surrendered the rights at all and the value of the rights to the Northern Territory would be close to freehold value,¹⁹ Justice Mansfield held that a reduction in compensation to 80% of the freehold value of the land at the time of the acts (totalling \$512,000) was necessary in these circumstances.²⁰

2 Compensation for non-economic loss

The claim group in *Timber Creek* sought compensation for two overlapping elements to non-economic or intangible loss. These were the diminution or disruption in traditional attachment to country and the loss of rights to live on, and gain spiritual and material sustenance from the land.²¹ Justice Mansfield found that the court should adopt the description 'solatium', in accordance with common law principles, to describe this element of compensation, and that in native title cases it required regard to the communal/collective ownership of the relevant rights and interests.²²

He admitted that the process required is 'complex, but essentially an intuitive one.'²³ He held that the proper approach was to consider only what, if any, non-economic effect there was upon the pre-existing native title by the compensable acts, and that acts adversely affecting native title prior to the compensable acts were to be taken into account, given that they lay outside the parameters of s 51(1) of the Act.²⁴

The parties accepted that non-economic loss was to be calculated on an *in globo* basis, that is, considering the overall effect on the two elements mentioned above. Justice Mansfield agreed that an assessment of the value of non-economic loss on a 'lot-by-lot' basis would be inappropriate.²⁵ He held that:

...loss or impairment of significant sacred places nearby to land affected by the compensable acts must necessarily have caused a loss or impairment of

¹⁵ Ibid 446 [466].

¹⁶ Ibid 404 [225].

¹⁷ (1941) 67 CLR 544.

¹⁸ Ibid 555, 557.

¹⁹ *Timber Creek* (2016) 337 ALR 362, 404–5 [232].

²⁰ Ibid 405 [232].

²¹ Ibid 416 [295].

²² Ibid 417 [300]–[301].

²³ Ibid 417 [302].

²⁴ Ibid 420–21 [322]–[323].

²⁵ Ibid 421 [324].

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spiritual/traditional attachment in respect of that land and in Timber Creek generally at the time of that loss or impairment. Any award of compensation for loss or spiritual attachment in respect of land affected by the compensable acts must properly take into account the extent to which the spiritual attachment to that land has already been impaired or affected by the loss or destruction of significant places on nearby land or in Timber Creek. In my view, it is open to the Court to infer from the evidence which does not specifically relate to an act or parcel of land, that a further sense of loss is felt in consequence of the determination acts.²⁶

To put it more briefly, his decision means that a court can take into account the loss of spiritual or traditional attachment extending beyond the boundaries of lots affected by compensable acts, to loss pertaining to nearby sacred places. Justice Mansfield went on to hold that the ‘sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after that land’ and preserve it for future generations was compensable.²⁷

Noting that the effects of the loss had been experienced for some three decades and had not dissipated over time, He held that compensation should be assessed on the basis of the past three decades or so of the loss of cultural and spiritual relationship with the land, and for an extensive time into the future.²⁸ Acknowledging that the selection of an appropriate level of compensation was ‘not a matter of science or of mathematical calculation’,²⁹ Justice Mansfield held that the appropriate component of the solatium component of the compensation package should be assessed at \$1.3 million.

He did not explain the exact basis for his calculations or what percentage of the solatium award related to the diminution or disruption in traditional attachment to country and what percentage related to the loss of rights to live on and gain spiritual and material sustenance from the land. Nor did Justice Mansfield discuss what proportion of the award related to a sense of failed responsibility, and what proportion was to compensate past, as opposed to future, loss.

D The Appeal

While there were six separate issues in the appeal, this paper focuses solely on the issues of assessment of economic loss and calculation of non-economic loss. Note, however, that the primary judge’s finding that compensation should be assessed as at the date of the compensable act was not among the issues appealed.

1 Compensation for economic loss

In the context of considering economic loss, the Full Court held that Justice Mansfield had overvalued the claim group’s native title rights and interests by finding they were an impediment to any other grants of interests and were exercisable in such a way as to prevent further activity on the land, stating that it is necessary to compare the legal content of the rights rather than the way in which the rights have been exercised.³⁰ The Full court also held that the primary judge erred in taking into account the value of the acquisition to the acquiring authority (the Northern Territory).³¹

²⁶ Ibid 421 [326].

²⁷ Ibid 432 [381].

²⁸ Ibid 433 [382].

²⁹ Ibid 433 [383].

³⁰ *Timber Creek Appeal* (2017) 256 FCR 478, 508–9 [78]–[84].

³¹ Ibid 510–511 [89]–[92].

A substantial portion of the Full Court’s judgment is dedicated to consideration of the effect of inalienability of native title land upon the quantum of compensation to be awarded. The Court was of the view that Justice Mansfield had impermissibly considered the unwillingness of the claim group to surrender their native title in determining the economic value of the land. This, the Full Court held, was a factor that was influenced by the claim group’s deep spiritual attachment to the land and not by any economic reason.³² This aspect was to be addressed in assessment of the non-economic value of the rights and interests, rather than in an assessment of economic value; accordingly, the Court held that trial judge had overvalued the economic value of the rights and double counted the non-economic factors.³³

Continuing its consideration of the effect of inalienability, the Full Court held that, contrary to the approach of Justice Mansfield, it was necessary to discount the value of the rights and interests held by the claim group because the rights were inalienable.³⁴ It held that *Geita Sebea* was a case specifically concerned with the construction of Papuan ordinances and did not alter the general principle expressed in *Corrie v MacDermott*³⁵ (‘*Corrie*’), meaning that the *Corrie* principle – that land is assessed at the value to the old owner rather than the new, and restrictions affecting the value to the old owner are to be taken into account in calculating compensation value – is applicable in the context of native title,³⁶ apparently despite its *sui generis* status.

The Full Court’s view is that the *Spencer*³⁷ test was applicable, even though the rights and interests were inalienable.³⁸ The *Spencer* approach requires a court to quantify the value of land at the amount a person desiring to buy the land would have to pay for it to a vendor willing to sell it for a fair price but not desirous to sell.³⁹ The Full Court held that to have applied the *Spencer* test would have reduced the economic value of the claim group’s rights and interests, ‘although not necessarily significantly.’⁴⁰

The Full Court set out an approach for the calculation of economic loss in the context of native title compensation comprised of the following principles:⁴¹

1. the starting point for calculation of economic value is an analogy of exclusive native title with freehold title;
2. freehold value is adjusted to account for the restrictions and limitations applicable to non-exclusive native title rights and a court must consider rights to use land, restrictions and inalienability; and
3. no allowance is made for the attachment of the native title holders to land; this will be considered as part of non-economic loss.

Ultimately, the Full Court held that the economic value of the rights and interests of the claim group was 65% of the value of freehold title.⁴² This amounted to \$416,325, a reduction of \$96,075 from the primary judge’s award.

³² Ibid 513–14 [109]–[111].

³³ Ibid 514 [111].

³⁴ Ibid 514–15 [115].

³⁵ [1914] AC 1056.

³⁶ *Timber Creek Appeal* (2017) 256 FCR 478, 515–16 [117]–[119].

³⁷ *Spencer v Commonwealth* (1907) 5 CLR 418 (‘*Spencer*’).

³⁸ *Timber Creek Appeal* (2017) 256 FCR 478, 516–17 [120]–[122].

³⁹ *Spencer* (1907) 5 CLR 418, 431.

⁴⁰ *Timber Creek Appeal* (2017) 256 FCR 478, 517 [122].

⁴¹ Ibid 519–22 [133]–[144].

⁴² Ibid 49[139].

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2 Compensation for non-economic loss

The Full Court held that there was no error in Justice Mansfield's approach to calculating non-economic loss and declined to exercise its discretion to fix the amount of the award for solatium.⁴³ While there was no alteration to the award, some parts of the judgment affirming the primary judge's views are important for the purposes of this paper.

The Full Court held that the effect of the compensable acts on sacred places and ritual grounds adjacent to affected lots can be considered where the place remains important at the time of the compensable act.⁴⁴ It also held that the *in globo* approach was correct as the evidence of the nature of the claim group's connection with land did not allow for consideration of the value of non-economic loss lot-by-lot.⁴⁵

The Court confirmed that a sense of failed responsibility to protect the land can be compensated where the failed responsibility is unrelated to the ability to control access to and use of the land (which are compensable at common law and not under the Act), and that this was the case with the claim group.⁴⁶ It then confirmed that the duration of the effect of the compensable acts was a proper factor for the primary judge to take into account.⁴⁷

Additionally, the Full Court held that the Northern Territory's argument that a principle of fairness and moderation that governs the award of solatium was found to be misplaced. The Court's view was that it was 'ambitious' to regard any requirement of fairness and moderation from prior case law as constituting a principle, but rather than such considerations provide a restraint on extravagant awards.⁴⁸ It held that there was no requirement to have regard to any such principle in fixing the amount of solatium in native title.⁴⁹

Finally, the Full Court considered whether the award of solatium calculated by Justice Mansfield was manifestly excessive. It considered the limitations in s 51(1), 51(5) and (6), 51A and 53 of the Act and concluded that notwithstanding these provisions, the task of fixing the amount of compensation requires an exercise of discretion.⁵⁰ The Court notes that the primary judge considered matters relevant to the assessment of solatium and did not make any errors in the selection or evaluation of those matters.⁵¹

However, because the Act requires that the compensation reflect just terms (as discussed above), the question for the Court was whether the figure was substantially beyond the highest figure which could reasonably have been awarded.⁵² Given that there was no judicial consideration of compensation for extinguishment or impairment of native title prior to *Timber Creek*, the Court looked to international decisions awarding compensation to native title holders. The international decisions were limited to two Paraguayan cases heard in the Inter-American Court of Human Rights, where

⁴³ Ibid 578 [420].

⁴⁴ Ibid 553 [300].

⁴⁵ Ibid 556–7 [317]–[319].

⁴⁶ Ibid 557–8 [323]–[326].

⁴⁷ Ibid 559 [333].

⁴⁸ Ibid 568 [376].

⁴⁹ Ibid 569 [378].

⁵⁰ Ibid 569 [379]–[380].

⁵¹ Ibid 572–3 [394].

⁵² The court recognised this principle as enunciated in *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292.

the claimants were awarded compensation substantially in excess of the amount awarded to the Ngaliwurru and Nungali people in *Timber Creek*.⁵³ The Court also looked at a 2002 discussion paper commissioned by the Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies,⁵⁴ which it held validated the amount of the award.⁵⁵

Ultimately, the Full Court held that the figure of \$1.3 million was within the permissible range on the evidence before Justice Mansfield and declined to alter the award for solatium.

III CONCEPTUALISATION OF NATIVE TITLE: WHAT IS BEING COMPENSATED?

To truly understand issues with the approach to compensation presented by the Full Court's reasoning in the *Timber Creek Appeal*, the fundamental questions of what native title is, what rights flow from a native title determination, and what they might be if they were fairly and correctly interpreted in accordance with the common law, must be answered. The answers given by Australian courts have largely been vague, unsatisfactory and confused. However, consideration of overseas authorities can provide some insight into the breadth of what native title could effectively entail — and, potentially, identify where Australian courts have been led astray.

A Conceptualisation in Australia

In Australia, judicial commentary has varied as to what rights are and are not held by traditional owners. It is generally accepted since *Mabo (No 2)* that the rights of native title holders are the rights to use and occupy their ancestral lands, in accordance with their traditional laws.⁵⁶

The Act provides the following definition of native title, based on the common law recognition articulated in *Mabo (No 2)*:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.⁵⁷

However, the majority of the High Court has since held in *Members of the Yorta Yorta Aboriginal Community v Victoria*⁵⁸ that native title is defined by s 223 of the Act with

⁵³ See *Timber Creek Appeal* (2017) 256 FCR 478, 573–576 [397]–[405] for discussion of the Paraguayan cases.

⁵⁴ Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion Paper, Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002).

⁵⁵ *Timber Creek Appeal* (2017) 256 FCR 478, 576 [406].

⁵⁶ See, eg, *Mabo (No 2)* (1992) 175 CLR 1, 51, 86, 184–8; Gary D Meyers, 'Implementing Native Title in Australia: The Implications for Living Resources Management' (1995) 14(1) *University of Tasmania Law Review* 1, 9.

⁵⁷ *Native Title Act 1993* (Cth) s 223(1).

⁵⁸ (2002) 214 CLR 422, 453 [75].

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reference to the traditional laws and customs of the group in question, and that native title is 'not a creature of the common law.' The Court further held that the rights and interests recognised by the common law are those 'those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected.'⁵⁹ Without consideration of whether that interpretation of the legislation and Parliament's intention in enacting it is correct, it is convenient for the analysis in this paper to be limited to consideration of the intersection of the Act with traditional laws and the interpretation of native title to be taken from those sources.

The definition of native title in s 223(2) of the Act goes on to state that rights and interests referred to in the definition of native title include hunting, gathering or fishing rights and interests, but the drafters have taken care to note that s 223(2) does not limit the primary definition. This could be taken to mean that the provision provides certainty that Aboriginal and Torres Strait Islander people may have additional rights to use land beyond those that other Australian landholders have, where their traditional laws and customs allow for certain uses of the land or waters. It is for this reason that the approach taken by the courts appears to be confused and potentially incorrect in law.

Since *Mabo (No 2)*, courts have become bogged down in what appears to be an attempt to itemise each and every activity Aboriginal and Torres Strait Islander traditional owners may carry out on their land by reference to traditional laws and customs, rather than allowing those laws and customs to simply prove the right to possess and occupy the land. If the latter approach was taken, traditional owners would be within their rights use their lands in the manner any landholder may use his or her land, other than in a way prohibited under traditional laws.

A prime example of this confusing 'itemisation' approach can be found in the High Court case *Western Australia v Ward*⁶⁰ (*Mirriuwung Gajerrong*). The majority noted that the metaphor of native title being a 'bundle of rights' is useful to draw attention to the fact that there may be more than one right or interest, and that there may be several different kinds of right or interest held by a group.⁶¹ In summarising their findings, the majority set out a handy list of the rights considered, including: rights to control access to, or the use to be made of, land;⁶² rights to be asked permission to use or have access to land;⁶³ rights to or interest in any mineral or petroleum;⁶⁴ and rights to fish.⁶⁵

Pearson argues that it is not the 'idiosyncratic rights and interests established by reference to traditional laws and customs' that are the native title rights and interests recognised by Australian law, but that that these idiosyncratic rights merely identify the right of particular Indigenous people to occupy particular territory, and to further identify the internal allocation of rights, interests and responsibilities.⁶⁶ This position has some merit; the High Court itself has said that the understanding of native title is

⁵⁹ Ibid 454 [77].

⁶⁰ (2002) 213 CLR 1.

⁶¹ Ibid 95.

⁶² Ibid 209.

⁶³ Ibid 210.

⁶⁴ Ibid 212.

⁶⁵ Ibid.

⁶⁶ Noel Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7(1) *Newcastle Law Review* 1, 10.

not stuck in 1788,⁶⁷ therefore the position the Court has taken here seems limited in terms of the present needs of Aboriginal and Torres Strait Islander people.

It is difficult to understand why courts have concluded that native title should be limited to what is specifically *included* in traditional laws and customs, as opposed to allowing any use of the land other than those uses that are specifically *excluded* under traditional laws and customs. The latter interpretation would not fail to satisfy the definition in s 223 nor would it be any less an authentic way to satisfy traditional laws and customs. Indeed, anything not expressly forbidden in Australian law is legal to do, and it would be absurd to expect Parliament or the courts to itemise everything that an Australian citizen can do. It is therefore unreasonable to expect Aboriginal or Torres Strait Islander law to do so.

At this point, consideration must be given to authorities from overseas jurisdictions. Particularly useful are judgments from countries with similar colonial histories to Australia, such as Canada and the United States of America, which have long jurisprudential histories with native title.

B Comparison with conceptualisation in Canada

Canada has a much longer history of court judgments regarding native title – usually referred to in Canada as ‘Aboriginal title’ – than does Australia. The first legal decision recognising native title rights was *St Catherine’s Milling and Lumber Company v The Queen*⁶⁸ (‘*St Catherine’s Milling*’), a case in which the Privy Council (on appeal from the Supreme Court of Canada) famously held that Aboriginal title is a ‘personal and usufructuary right, dependent on the goodwill of the sovereign’.⁶⁹ This formulation left a significant degree of uncertainty at play for the Canadian Aboriginal peoples, given that the ‘goodwill of the sovereign’ was a reference to the Royal Proclamation of 1763, in which the British Crown acknowledged the rights of the Aboriginal people to occupy and use their traditional lands.⁷⁰ The question of whether Aboriginal title arose *only* from the Proclamation, and not from any other source, persisted for almost a century. If this was the case, Australian native title, arising as it does from occupation, could have nothing to learn from Canadian jurisprudence.

This question was answered in 1973 in *Calder v Attorney-General of British Columbia*⁷¹ (‘*Calder*’), in which the Canadian Supreme Court held that the source of Aboriginal title was simply the occupancy of traditional lands prior to British settlement.⁷² This case and its ongoing acceptance shows that Canadian jurisprudence can be used as a tool to analyse its Australia counterparts, given that it shows that Aboriginal title, like native title in Australia, arises from occupation of the land and not from any treaty, proclamation or other instrument. However, unfortunately for the native applicants in the Canadian case, the Court went on to find that the British sovereign had extinguished Aboriginal title by opening the land for settlement.⁷³

⁶⁷ *Mabo (No 2)* (1992) 175 CLR 1, 61-2.

⁶⁸ *St Catherine’s Milling and Lumber Company v The Queen* (1888) 14 App Cas 46.

⁶⁹ *Ibid* 54.

⁷⁰ Garth Nettheim, Gary D Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 79, 81, 85.

⁷¹ (1973) 34 DLR (3d) 145.

⁷² *Ibid* 156.

⁷³ *Ibid* 167; Nettheim, Meyers and Craig, above n 70, 110 n 53.

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Some Canadian cases have been decided on issues relevant only to lands under treaty.⁷⁴ However, as is seen in *Calder*, treaties are not a source nor basis for Aboriginal title in Canada; treaties merely alter the original rights to land by agreement, in exchange for other rights. Cases relevant to the content of Aboriginal title arising from the occupancy and use of land by Canada's native people can therefore cast light on Australian jurisprudence as to the content and conceptualisation of native title, ignoring the effects of any treaty on those rights.

It is convenient to move past older cases relevant to the content of Aboriginal title in Canada⁷⁵ to the pre-eminent case of *Delgamuukw v British Columbia*⁷⁶ (*'Delgamuukw'*), which gives a strong and clear definition of Aboriginal title in Canada. *Delgamuukw* affirmed the *sui generis* nature of Canadian Aboriginal title, stating that it is *sui generis* because it 'arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward'.⁷⁷

Chief Justice Lamer laid out the definition of Aboriginal title:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.⁷⁸

The Court did accept in *Delgamuukw*, as it had in previous cases, that the land was alienable only to the Crown, but it went on to clarify that this does not mean Aboriginal title is merely a personal right. The Court stated that inalienability 'does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on equal footing with other proprietary interests'.⁷⁹ The reasoning for inalienability in Canada is similar to that in Australia, with the Court holding that '[t]he land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value'.⁸⁰

The *Delgamuukw* definition, should something similar be accepted in Australia, would put an end to quibbling about 'bundles of rights' and the absurd assumption that only activities specifically identified in traditional laws and customs or oral histories should be performed on native title land. It would provide Aboriginal and Torres Strait Islander native title holders with the freedom to fairly and equally, in line with the rights granted to non-Indigenous Australians, utilise their lands for whatever purposes they see fit, as long as the activity is not destructive to their connection to land.

⁷⁴ See, eg, *Guerin v the Queen* [1984] 2 SCR 335, which confirmed at 375-6 that the Crown is a fiduciary of Aboriginal lands due to its supervisory role adopted under treaty.

⁷⁵ See, eg, *Sparrow v the Queen* (1990) 3 CNLR 160, regarding fishing rights; *R v Van der Peet* (1996) 137 DLR (4th) 289, which held at 310 that 'an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right' to be an Aboriginal right.

⁷⁶ [1997] 3 SCR 1010.

⁷⁷ *Ibid* 1082 [114].

⁷⁸ *Ibid* 1080 [111].

⁷⁹ *Ibid* 1081-2 [113]-[113].

⁸⁰ *Ibid* 1090 [129].

As Chief Justice Lamer said in *Delgamuukw*, a ‘limitation that restricts the use of the land to those activities that have traditionally been carried out on it... would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land’.⁸¹ To conceptualise Australian native title as per the Canadian definition would give Indigenous people and bodies corporate the right to self-determination and self-reliance within the boundaries of Australian law. Of course, limitations that are applied equally to other Australians – such as restrictions on mineral exploration and the requirement for permits for certain activities – could fairly be applied to native title land in ways that are not discriminatory against Indigenous people and do not breach the *Racial Discrimination Act*.

Another reason recommending the Canadian formulation is to avoid necessitating voluminous anthropological evidence outlining each discrete activity traditionally performed on the land so as to itemise specific native title rights and interests. An acceptance that native title in Australia is a proprietary right under which land is able to be used for a variety of activities, not all of which need to be specifically outlined under traditional laws and customs, and which arises from the historic occupation of the land by the group in question, would not only be fair and non-discriminatory to Indigenous people, but efficient and less expensive for the courts and parties.

C Comparison with conceptualisation in the United States

The history of native title (or ‘Indian title’) in the United States (‘US’) is a long and fraught one, and an in-depth examination of the US jurisprudence is beyond the scope of this paper. For present purposes, two initial facts are important. The first is that Indian title has been recognised by US Courts.⁸² The second is that tribes have the right to use and occupy land until surrendered or extinguished by the sovereign⁸³ (meaning the lands are inalienable to anyone except the sovereign).

Much of the land that would have been held under Indian title by Native Americans has been surrendered under treaty (often procured by means of fraud, coercion, bribery and threats).⁸⁴ Even more Indian title has been extinguished according to US state and federal government legislation and policy,⁸⁵ with many Native Americans over the centuries having been moved onto reservations, sometimes far from their ancestral territories.

However, where the groups do hold Indian title to land that has not been surrendered or extinguished, they hold it under a right that is inherent and which has existed from ‘time immemorial’.⁸⁶ It is clear that treaties are not the source of Indian title; instead,

⁸¹ *Ibid* 1091 [132].

⁸² See, eg, *Johnson and Graham's Lessee v M'Intosh* 21 US (8 Wheat) 543 (1823) (‘*Johnson v M'Intosh*’); *Worcester v Georgia* 31 US (6 Pet) 515 (1832), 561-63.

⁸³ *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823), 574; Gary D Meyers, ‘Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada’ (1991) 10(1) *UCLA Journal of Environmental Law and Policy* 67, 71.

⁸⁴ Nettheim, Meyers and Craig, above n 70, 28.

⁸⁵ See generally Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press, first published 2005, 2009 ed).

⁸⁶ *United States v Adair* 723 F 2d 1394 (1983), 1399; Michael C Blumm, ‘Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration’ (2016) 92(1) *Washington Law Review* 1, 21-2.

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treaties typically impose restrictions in the exercise of some rights while reserving existing rights.⁸⁷

The ability of Native American groups to self-govern subject only to the sovereignty of the US is recognised.⁸⁸ The concept of inherent sovereignty arose from a trilogy of cases in the US Supreme Court headed by Chief Justice John Marshall.⁸⁹ The trilogy means that tribes are not independent foreign nations, but are, as Gould summarises:

...domestic dependent nations whose right to occupy their lands is subject to the "ultimate domain" of the federal government; they may not form treaties with foreign nations, but may govern their affairs without interference from the states, except when limited by treaties or by the acts of Congress.

Implicit in the Marshall trilogy is that sovereignty exists over territory (references omitted).⁹⁰

The US formulation of rights attaching to Indian title land thus goes far beyond the rights thought to be held by Australian native title holders. The scope of this paper does not extend to an argument that Aboriginal and Torres Strait Islander people should have sovereignty over their traditional lands (though such an argument could undoubtedly be made). Rather, the US example is included simply to show the extent of freedom with which Native American groups may use their land under Indian title.

There are no limitations on the use to which their land may be put, other than that they are inalienable to anyone other than the sovereign. There are certainly no requirements that tribes must only use the land for activities that were carried out under their historical laws and customs.

Like the position in Canada regarding Aboriginal title, the position taken with respect to Indian title in the US should be carefully considered by Australian courts. While some Australian judges have erroneously held that US precedents are inapplicable because the relevant rights arise from treaties,⁹¹ the analysis above shows that this is not the case: treaties or treaty substitutes such as negotiated agreements/co-management regimes, proclamations or even constitutional provisions are not the source of native title in the US or Canada (or New Zealand).⁹² The North American cases, in particular, can therefore be helpful when considering the content of Australian native title. While the current conceptualisation of Australian Indigenous rights is unlikely to extend to tribal sovereignty, there is no reason under either the *Native Title*

⁸⁷ Nettheim, Meyers and Craig, above n 70, 171.

⁸⁸ *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831), 16.

⁸⁹ *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832); for discussion, see L Scott Gould, 'The Consent Paradigm: Tribal Sovereignty at the Millennium' (1996) 96(4) *Columbia Law Review* 809.

⁹⁰ L Scott Gould, 'The Consent Paradigm: Tribal Sovereignty at the Millennium' (1996) 96(4) *Columbia Law Review* 809, 817.

⁹¹ See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 273[639] (Callinan J).

⁹² See Charles F Wilkinson, *American Indians, Time and the Law* 15 (Yale University Press 1987); *US v Winans* 198 US 371 (1905), 381; and *Washington v Washington State Commercial Fishing Vessel Ass'n* 443 US 658 (1979), 678. In *Sparrow*, above n 75, the Court is clear that the term 'existing rights' in s 35 means those Aboriginal and treaty rights in existence when the *Constitution Act 1982* (Can) came into effect, that is, those rights which though they may not have been exercised, were not extinguished at the time of the Constitutional amendments. For a similar interpretation of the Treaty of Waitangi, see Michael C Blumm, 'Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits A Prendre and Habitat Servitudes,' (1989) 8 *Wisconsin International Law Journal* 1, 30.

Act or the common law of Australia that native title holders should not, on their land, held under *sui generis* title, exercise all rights available to other Australians who hold freehold title to land.

IV FUTURE JURISPRUDENCE AND DESIRABLE OUTCOMES IN CONCEPTUALISATION AND COMPENSATION

The analysis of the concept of native title undertaken in Part IV of this paper leads to several conclusions, which themselves lead to envisioning a number of steps that may be taken to provide legally correct and more just outcomes for Aboriginal and Torres Strait Islander people when compensating them for extinguishment or impairment of native title. The suggested outcomes for calculation of economic and non-economic loss will be considered separately.

A Compensation for economic loss

The relevant concepts to be considered in view of compensation for economic loss are the relevance of inalienability to compensation given the *sui generis* nature of native title and the calculation of the value of native title rights given the conceptualisation analysis undertaken above.

1 Sui generis title and inalienability

If it is accepted that native title in Australia is *sui generis*, and not a creature of the common law, problems with the reduction of compensation for inalienability by the Full Court in the *Timber Creek Appeal* immediately become apparent. The Full Court did not adequately explain why the existing common law framework (as outlined in *Corrie* and *Spencer*) should be applicable to *sui generis* title, but they confirmed that it is. As discussed above, the Court did, however, state that *Geita Sebea* was not relevant to its analysis given it concerned Papuan ordinances.

These two views of the Full Court appear to be contradictory. It seems illogical to state that Australian common law should apply to *sui generis* title existing prior to colonisation, but that consideration of Papuan law (legislative or otherwise) is clearly inapplicable. The two types of law are equally inapplicable to native title. Although it appears the Full Court's view that *Geita Sebea* is distinguishable is correct, given that the reasoning of the High Court in deciding inalienability did not reduce the land value relied upon interpretation of specific ordinances,⁹³ this is no reason to conclude that *Corrie* and *Spencer* must apply instead.

The better view to take is simple — *sui generis* title is *sui generis* and nothing else. Common law property concepts should have no bearing on native title. A logical analysis of existing native title law must be undertaken outside these concepts. The first step in the analysis is that, since native title land is not alienable to anyone other than the Crown, extinguishment or impairment of native title is not by choice of the traditional owners in the absence of an agreement with the Crown. Given the Constitutional and legislative requirements of 'just terms' compensation, it does not seem that terms reducing the value of land of people who did not want to alienate it, for the reason that it is inalienable, are 'just terms'. For these reasons, inalienability should not be taken into account in calculating the value of economic loss for extinguishment or impairment of native title.

⁹³ *Geita Sebea* (1941) 67 CLR 544, 557.

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2 The value of native title rights for calculation of economic loss

As discussed in Part IV, it arguably makes little sense to define the scope of native title by reference to idiosyncratic rights *specifically permitted* under traditional laws and customs (the ‘permissive view’ of native title). Native title in Australia, in line with other international common law jurisdictions, should be conceptualised as equal to the rights held by owners of freehold, subject to cultural laws and traditions *specifically prohibiting* certain uses of the land (the ‘prohibitive view’ of native title).

If a prohibitive view of native title is adopted, the Full Court’s reasoning that the calculation of compensation should start at freehold value for exclusive native title and be reduced in line with the limitations applicable to non-exclusive native title should be revisited. While not exactly incorrect if a prohibitive view is adopted, the Full Court’s judgment in this respect has the potential to lead future courts considering compensation astray. In a prohibitive view of native title, there will be no enumeration of rights by which the value of the land to the traditional owners may be calculated, meaning that native title rights that have not been impaired prior to the *Racial Discrimination Act* coming into force will always be valued as equal to freehold title except where there is a specific prohibition on the use of the land that would impact the price of freehold land with a similar restriction.

However, the issue of non-exclusive native title would still arise under the prohibitive view, given that impairment of native title may indeed have occurred prior to the *Racial Discrimination Act*. In this circumstance, the reduction in value would in law still need to be considered, but it should not include any reference to the rights permitted to be practised by the Aboriginal or Torres Strait Islander traditional owners. Rather, the reduction in value of the land should be calculated by reference to the level of imposition on the freehold-level rights of the traditional owners that is presented by the use of the land permitted by non-traditional owners.

An analogy with easements or profits à prendre may be helpful here. When a property with an easement or profit à prendre attached is sold, the buyer may seek a reduction in price to reflect the inconvenience or loss incurred by the interest granted to someone else. Courts could potentially take this approach when valuing non-exclusive native title. No reduction in value would be made by considering enumerated rights of the traditional owners (except where there is a specific traditional prohibition), but a reduction in value could be made for the fact that government or lessors have used or will use the land, affecting the ability of the traditional owners to exercise their otherwise ‘freehold’ rights.

3 Suggested approach to valuing economic loss

It is suggested that in valuing native title under a prohibitive view, and in recognition of the *sui generis* nature of native title, courts should take the following approach to calculating compensation for economic loss (altering the approach taken by the Full Court in the *Timber Creek Appeal*):

1. the starting point for calculation of economic value is an analogy of exclusive native title with freehold title;
2. freehold value is reduced if traditional laws and customs prohibit a specific use of the land, and if prohibition of that use of the land would reduce the freehold value of the same land;
3. freehold value is also adjusted to account for the inconvenience caused by use of the land by non-traditional owners in cases where native title rights are non-exclusive;
4. no reduction is made in value for inalienability; and

5. no allowance is made for the attachment of the native title holders to land, which will be considered as part of non-economic loss.

B Compensation for non-economic loss for future generations

The approach that Justice Mansfield and the Full Court have taken to quantifying non-economic loss seems to be sound in all the aspects that were considered. The concept of solatium, though a common law property concept, appears apt in its application to native title, despite the *sui generis* nature of the latter. Additionally, the monetary value attached to non-economic loss was in line with international cases considered by the Full Court.⁹⁴

However, there was an absence of compensation in both courts for the impact on future generations. Although Justice Mansfield acknowledges that the loss would be felt for an extensive time into the future,⁹⁵ there was no suggestion that future generations should receive payments, despite suffering similar loss and pain. The *sui generis* nature of native title means it would be open to courts to order that future generations be compensated, despite it not being a part of Australian law regarding solatium.

Burke, in his discussion paper considered by the Full Court, argues that compensation should include ‘an additional amount that would, if invested in low-risk investments, reproduce the original amount of compensation for the children in the native title group when they become the senior generation’⁹⁶ (the ‘future generations sum’). This section of the paper was not referred to by the Full Court in its judgment. It is not clear why this was not addressed, and perhaps such an outcome was not sought by the claim group. However, considering the necessity of ‘just terms’ compensation for non-economic loss, the failure of Justice Mansfield and the Full Court to consider compensation for future generations seems to leave the analysis incomplete.

Burke’s suggestion is a good one on its face. However, if accepted as a component of compensation for non-economic loss, his suggestion would present a problem for the courts. The payment of a future generations sum without directions that it be carefully invested and distributed equally for future generations means there are no checks and balances guaranteeing that the funds will be competently managed and available for the compensatory purpose they were intended. On the other hand, a court giving strict directions on how such funds are to be held and invested reeks of past injustices whereby Aboriginal and Torres Strait Islanders were stripped of agency and their rights to self-determination by paternalistic legislation and the common law alike.

Although not ideal, a middle ground can be established between these two extremes. It is suggested that ‘just terms’ compensation would include a future generations sum, but that the court give additional directions that it be held in trust to be invested by trustees elected from within the traditional owners. No directions as to the nature of investments should be given, but the sum should include an amount that the trustees may access solely for the purpose of seeking independent legal and financial advice as to the investments. This approach allows traditional owners to retain their agency but also ensures that funds are not whittled away by mismanagement, given that the trustees will be bound by fiduciary duties to safeguard the trust property for future beneficiaries.

⁹⁴ *Timber Creek Appeal* (2017) 256 FCR 478, 573–576 [397]–[405].

⁹⁵ *Timber Creek* (2016) 337 ALR 362, 433 [382].

⁹⁶ Paul Burke, above n 54, 38.

V CONCLUSION

This paper has summarised the current law relating to compensation for extinguishment or impairment of native title and suggested substantial changes to the courts' approaches to assessment of economic and non-economic loss. As title that is *sui generis*, native title compensation should not be constrained by common law principles relating to other kinds of property but should instead be governed by the cultural laws and customs of traditional owners, accepted common law principles of native title and the *Native Title Act*. The High Court in considering the appeal from the decision of the Full Federal Court in the *Timber Creek Appeal* should make substantial changes to the present judicial approach to compensation for the impairment or extinguishment of native title.

In calculating economic loss, no reduction should be made for inalienability, reflecting the legislative and Constitutional requirements of 'just terms' compensation for land that was not freely sold to the Crown. Additionally, a prohibitive view of native title – where the content of native title rights and interests, and thus their value, are circumscribed only by what was specifically prohibited under traditional laws and customs – should be preferred to a permissive view under which the rights and interests are only those specifically *allowed* under traditional laws and customs. This means that the value of native title should always be taken to be the value of freehold land, unless traditional laws and customs prohibit a use that would reduce the value of land in the hands of another, or unless the native title has been impaired and become non-exclusive prior to the *Racial Discrimination Act* coming into force. A suggested approach to calculating economic loss is set out in Part V of this paper.

As to compensating non-economic loss for extinguishment or impairment of native title, while the approaches of Justice Mansfield and the Full Court are largely satisfactory, they failed to consider compensating future generations. Native title's *sui generis* status means that such compensation could be ordered, despite it not being ordered in cases of solatium more generally. A suggested approach is for courts to order additional sums be held in trust and invested for future generations by trustees elected from within the traditional owner group.

Further research and analysis should be done on compensation for extinguishment or impairment of native title, particularly once the judgment of the High Court is handed down. Additionally, the possibility of non-monetary compensation, which was not sought by the claim group in the *Timber Creek* cases and has therefore been outside the scope of this paper, should be considered.