PACIFIC RIM PROPERTY RESEARCH JOURNAL
2021, VOL. 27, NO. 2, 75–88
https://doi.org/10.1080/14445921.2021.1992260

Routledge
Taylor & Francis Group

On solatium: towards a rethinking of compensation

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ABSTRACT

Sovereign governments generally benefit from the capacity to commute private property rights to public ownership in order to undertake projects for the public benefit. When private property rights are compulsorily acquired by Australian governments, the criteria for the assessment of compensation accruing to the dispossessed landowner ordinarily requires consideration of a raft of heads of possible compensation. The primary aim of this paper is to canvass how those elements of traditional concepts of solatium as one of the heads of compensation ought now be viewed in the light of the defining High Court decision in Northern Territory v Griffiths [2019] HCA 7. However, a secondary aim (of the authors) is also to give consideration as to how the notion of solatium now fits in the broader Constitutional framework of the heads of compensation for private property rights compulsorily acquired. NSW legislation is used in this paper as a general exemplar of the Australian legal milieu regarding compulsory acquisition law and practice.

ARTICLE HISTORY
Received 18 February 2021
Accepted 8 October 2021

KEYWORDS
Compensation; solatium; native title; just terms

Introduction

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Constitutional background

In the case of commutation of private property rights by the Commonwealth, *s.51 (xxxi)* of the Australian *Constitution* states that the Parliament shall have power to make laws with respect to the acquisition of property on *just* terms. Hence, compensation (see Winnett, 2010, pp. 776–807 for a discussion on monetary and non-monetary compensation on just terms) must be assessed on the basis of *just terms*, however such a requirement does not apply to the six States whose powers predate the *Commonwealth of Australia Constitution Act 1990* (*63 & 64 Victoria* (UK) *Ch. 12, s 9*; see also Coper, 1987). Candidly, the pre-Federation colonies' powers over land were grounded in the (now well recognised) "inappropriate cultural baggage" of "English law, derived from its class-dominated, hierarchical society" (Flannery, 1996, p. 15) yet in the post-Federation six States "[t]he protection of property rights is a fundamental objective of Australia's legal system" (Brennan, 1997, p. 77).

Hence, in the oldest and most populous Australian State, New South Wales (NSW), a statutory entitlement to compensation for the commutation of private property rights currently occurs through the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). The NSW legislation sets out at *s.55* six heads of compensation for which "regard must be had" namely:

(a) *the market value of the land on the date of its acquisition,*
(b) *any special value of the land to the person on the date of its acquisition,*
(c) *any loss attributable to severance,*
(d) *any loss attributable to disturbance,*
(e) *the disadvantage resulting from relocation,*
(f) *any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.*

In the Second Reading Speech by Deputy Premier Wal. Murray of the (then) *Land Acquisition (Just Terms Compensation) Bill 1991* (NSW), the notion of assessing compensation based on just terms was described as comprising six factors (Hansard, 1991, pp. 1977–1978), all being now legislated as *s.55 (a-f)* above. The drafters of the Second Reading Speech also cited the 1980 report of the Law Reform Commission on Commonwealth land acquisition and compensation which canvassed the various "ingredients" (The Law Reform Commission, 1980, p.120 para.237) that will provide just compensation, including solatium (at pp.143–145 para 268–273). Prior, the Commission of Inquiry into Land Tenures published its Final Report in 1976 (which was subsequently drawn upon by the Land Reform Commission) introducing solatium as:

> . . . a further extension of the compensation principle, whereby a 'removal solatium' would be awarded to compensate a dispossessed home owner for the numerous but largely intangible losses and inconveniences caused by the resumption of his home . . .
>
> These factors are not presently taken into account . . . and they are almost unquantifiable in monetary terms; but they are real cost to the owner and his family and should be considered. (Commission of Inquiry into Land Tenures, 1976, p.67 para 6.11).

However, as previously stated, assessing compensation on just terms is not a constitutional obligation of the State of NSW or indeed any of the other five Australian States (see *New South Wales v Commonwealth* (1915) 20 CLR 54 (known as the Wheat case)), hence the precarity of compensation given the various legislatures historically retain "sovereignty to make laws for the compulsory acquisition for private property without payment of compensation" (Raff, 2002, p. 40).

Nevertheless, the compulsory acquisition of private property without compensation by the six States is clearly recognised as "politically unacceptable" (Raff, 2002, p. 40) and defined (although limited) statutory rights to compensation have been created over time by each of the States' parliaments (Russell, 2014,p.14). Paradoxically, in NSW the Just Terms Act articulates the content of compensation to be assessed on the basis of a particular construct of the notion of just terms, a codification which may go further than the "problematic" Commonwealth constitutional guarantee of *just terms* (Winnett, 2010, p. 776; see also earlier comments on the absence of "authoritative statements of what constitutes "just terms" in Neate, 1998, p. 64).

It is suggested the statutory factors imbedded in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) through the enumerated heads of "market value" may indicate a head of compensation not present in that statutory construct of "just terms" given the Commonwealth constitutional guarantee of *just terms* at *s.51 (xxxi)* relates to acquisitions of property not just land. The NSW approach requiring the assessment of compensation on just terms was perhaps supported by Kirby J when he suggested in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 that an extreme departure from fundamental rights may be challenged on a constitutional basis, given the role of the Constitution for judicial protection of private property in the face of legislation is "substantial" (Kirby J. at [72]. Such views draw upon the earlier decision in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court) where the possibility was advanced of a constitutional limit in the power of the States because of rights deeply rooted in our democratic system of government and the common law (see also the ancient defence of private property and land limits in Seneca, Lucius Annaeus,49CE, p.86).

Further, the 1948 United Nations Universal Declaration on Human Rights also ameliorates State powers and recognises the right of citizenry to property, a right which ought not be "arbitrarily deprived" (United Nations, 1948, *Art.17(2)*).

Solatium

Notwithstanding, the *Land Acquisition (Just Terms Compensation) Amendment Act 2016* (NSW) revisited a number of sections of the 1991 legislation, and of note was the deletion of all reference to the conventional but recondite head of compensation known as solatium, which was replaced with the rather wordy "disadvantage resulting from relocation." (see *s.60(1)*). However rather than adopt an arbitrary percentage of the assessed compensation figure as an award of solatium, the existing system of a maximum lump amount payable was increased from $15,000 to $75,000 (see *s.60(2)*) subject to automatic indexation of the maximum amount in line with inflation. Conversely, the Victorian and West Australian compulsory acquisition legislation both adopt a maximum figure of 10% of the prior compensation assessed at *s.44 Land Acquisition and Compensation Act 1986* (Vic.) and *ss.241(8),(9) Land Acquisition Act*

1997 (WA).Whilst deletion of the word solatium was not explained in the 2016 NSW legislation, perhaps the fulsome description of solatium by Newton and Conolly hints at earlier consternation for State policymakers because of the uncommon apologetic tone the term solatium conveys, namely:

> . . . a sum to console the owner for his or her injured feelings in being evicted from the land. In the earlier resumption statutes provision was not usually included for payment of a solatium in respect of any hardship, inconvenience, trauma, depression, sentimental attachment, the adverse effect on the owner's family, or other unspecified loss caused by the resumption . . .
>
> . . . It may not be feasible for the owner to have been compensated for every foreseeable loss that the dispossessed owner suffers at being evicted from the land. It is a kind of sweetener, perhaps, reflecting some kind of apology (Newton & Conolly, 2017, p. 189).

However, solatium as a head of compensation remains the Cinderella amongst the other heads, because solatium is neither fully quantifiable nor capable of indisputable justification. Nevertheless, describing solatium as the Cinderella of compensation is appropriate given the word "Cinderella" can be applied to "a person or thing of unrecognised (sic) or disregarded merit or beauty" (The New Shorter Oxford English Dictionary, p. 402). The losses which are the components of solatium are obviously not specifically and wholly provable (if at all), and yet because they arise from the consequences of a compulsory acquisition of private property rights the losses incurred can unsurprisingly be regarded by the dispossessed owner as of visceral vertiginous concern which are very real. Indeed, the key economic concept of externalities aligns neatly with the concept of solatium which simply recognise this "major category of market failure" which according to Gittins is not:

> . . . reflected in the market or "private" prices paid and received by the buyers and sellers. These social costs or benefits are thus "external" to the private transaction and the private price mechanism. They constitute market failure because the market generates more costs (or fewer benefits) than is in the public's interest (Gittins, 2019, p. 2).

Therefore, solatium can be viewed through the lens of economics as compensation for the negative externality borne by the dispossessed landowner which arises through the compulsory acquisition of the private property right by the State. Edgeworth posits "the foundation for solatium" can be detected in the *Land Clauses Compensation Act 1845* (UK) because the compensation to be paid was:

> . . . by reference to the rather imprecise term of "value to the owner". In a series of judicial interpretations over the remaining decades of the 19th century, the term came to mean the amount that an "unwilling seller" would accept from a "willing buyer". By incorporating unwillingness into the compensation formula, the courts provided for a bonus payment above market value to address the subjective sense of loss felt by landowners. (Edgeworth, 2019, p. 194).

A lengthy and substantive genealogy of case law harking back at least to the late nineteenth century (see *Leslie v Board of Land and Works* (1876) 2 VLR (L) 21 per Stephen J.) supports this proposition. An instructive example is the much later decision of Perrignon J (*Robertson v Commissioner for Main Roads* 1987) 1987 63 LGRA 420, stating:

> . . . the words 'solatium for the necessity to relocate his residence' refer to subjective and imponderable factors such as nuisance, annoyance, inconvenience and distress which might be caused to an owner who, as a consequence of the compulsory acquisition of his place of residence, finds himself under the necessity of relocating his residence.(at [426])

Further but more broadly, Barber J in *March v City of Frankston (No.1) (City of Frankston)* [1969] VR 350 stated that "the solatium should be assessed in respect of imponderable factors arising from the compulsory nature of the acquisition" (at [356]). Usefully, Barber J also clarifies the meaning of solatium, stating:

> [on] my view of the meaning of solatium I should endeavor to compensate the claimants for the nuisance and annoyance resulting from the destruction of their business and the trouble caused them by the acquisition. Any such award must not include any of the factors which they have established and been compensated for . . . but represents only the imponderables which are not provable. (at [289])

The foregoing discussion reveals the notion of solatium had remained almost invariant for many decades and inherently, not evolvable. Indeed, all the heads of compensation (including solatium) have remained an insouciant epigrammatic topic. However, the emerging issue of compensation for the extinguishment or impairment of native title caused solatium as a partial compensation assessment tool to be revisited in the Federal Court decision (*Griffiths v Northern Territory of Australia (No.3) 2016)* 2016). Subsequently, solatium was again addressed in the Full Federal Court decision in (*Northern Territory of Australia v Griffiths* 2017) and finally, in the defining High Court decision in (*Northern Territory v Griffiths* 2019. The following section of this paper canvasses the content and implications of the above three decisions as regard the phenomenological aspect of compensation for native title known as solatium which must now be regarded as having a measure of evolvability.

Solatium revisited

Definitive judicial resolution of the methodology for the assessment of compensation arising from the compulsory acquisition of native title rights and interests has been well anticipated for nearly three decades since the decision of the High Court in *Mabo v Queensland [No.2]* (*Mabo*) (1992) 175 CLR 1 and in the subsequent *Native Title Act 1993* (Cth). Arguably, even much earlier in 1946–47 anthropologist Donald Thomson drew upon the intent of the *Indian Re-organisation Act, 1943* (US) as an elegant paradigm anticipating possible recognition of "full legal ownership" of Indigenous lands in Australia (Attwood, 2000, pp. 4–5). In October 1997, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) published its Tenth Report, focussing on the *Native Title Amendment Bill 1997* (Cth), which in part addressed the issue of compensation, noting:

> Courts have yet to establish authoritatively whether the compensation awarded to native title holders for extinguishment of their title may include an amount that reflects the special Indigenous attachment to the land (which may make the land more valuable to them than to a non-Indigenous freeholder.) (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund [PJC], 1997, p. 71 "Limits on Compensation" para 7.22)

Subsequently, in February 1998 a Compensation Workshop entitled "Compensation for Native Title: Anthropological Issues and Challenges" was convened by the Australian Anthropology Society at ANU (Australian National University) in Canberra culminating in the publishing of a subsequent compilation of five papers presented at the Workshop on the issue of compensation (Australian Anthropological Society, 1998). In 1999 the National Native Title Tribunal published a compilation of papers on compensation presented by various authors at earlier workshops held in Perth and Brisbane. Graeme Neate (then) President of the Tribunal observed in adapting valuation principles to compensation assessment for native title:

> An analogy may be drawn with the concept of solatium which is sometimes awarded for the compulsory acquisition of land . . .
>
> . . . In those instances where statutes provide specifically for the award of solatium for the necessity to relocate one's residence, the provision has been described as referring to "subjective and imponderable factors such as nuisance, annoyance, inconvenience and distress which might be caused to an owner" who as a consequence of the compulsory acquisition of his place of residence, has to relocate his residence. (Neate, 1999, p. 83).

However, Neate was not sanguine as to the prospect of successful adaptation of solatium and other heads of compensation to the assessment of compensation for native title, opining:

> . . . there remains a real question of whether the law does or will recognise or adapt those heads to native title cases. If the law does not extend that far, then those notions of special value and solatium (where it is allowed at all) could provide little, if any, assistance in such cases. (Neate, 1999, p. 84)

Subsequently in 2001, the Centre for Aboriginal Economic Policy Research (CAEPR) at ANU published a discussion paper by Diane Smith who from an ethnographic viewpoint strongly supported the concerns of Neate, stating:

> . . . native title compensation will require an innovative jurisprudential approach that acknowledges it to be a fundamentally new creature, belonging to the native title recognition spaces. It is, therefore, legally ethnocentric and reductionist to equate native title compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology . . .
>
> . . . the conventional principles of 'special value' to the owner, or 'solatium', will be of little if any direct applicability when trying to assess the 'value' to native title holders of their native title for the purposes of compensation. (Smith, 2001, p. 32)

The somewhat dystopian assessment by writers such as Smith seeking to extirpate established property compensation law and practice from native title compensation was rejected by John Sheehan (then) National

Native Title Spokesman for the Australian Property Institute (formerly the Australian Institute of Valuers and Land Economists (AIVLE)) who, opined.

> Fortunately, the Courts also have a long awareness of the losses arising from the compulsory acquisition of Anglo-Australian land tenures, and a large body of compensation and valuation law, and valuation practice has developed over the past 150 years. There is considerable hope that when compensation for native title is addressed by the judiciary, familiar land law notions such as "special value" and "solatium" will be revisited anew.

> These heads of compensation have been developed over a long period in an attempt by the Courts to compensate for intangible losses or even non-pecuniary disadvantages incurred by dispossessed property owners.
>
> The Courts are clearly aware . . . losses can arise which are difficult to quantify, often arising from inconvenience, disturbance or disruption arising from the compulsory acquisition. (Sheehan, 2000, p. 10)

Solatium emerges in native title compensation

Notwithstanding the above debates, for nearly three decades (or even earlier as previously mentioned) definitive judicial resolution of the methodology for the assessment of compensation arising from the compulsory acquisition of native title rights and interests has been eagerly awaited. Now, cognisant of the High Court decision in Griffiths 2019, the authors posit at a quite fundamental level that solatium ought now be subject to observation and reportage as in more familiar empirical tasks to determine that component of the heads of compensation accruing to a dispossessed property owner. Arguably, the High Court somewhat perversely dismissed the direct application of "the language of solatium" (Griffiths 2019 at [273] per Edelman J.] whilst recognising the need "to achieve parity of treatment with other rights" (at [271] per Edelman J.) suggesting a task of "gathering of uncertainties" which frankly lies at the heart of solatium (in the authors' view), irrespective of whether Indigenous or non-Indigenous property rights (see Brennan, 1997, p. 77).

A simulacrum of solatium was clearly inevitable, requiring somewhat imaginative legal thought rather than fidelity to comfortable familiar heads of compensation, particularly when specifically addressing compensation arising from the compulsory acquisition of native title rights and interests (Edgeworth, 2019, p. 302). However, native title was always going to be difficult for the High Court to address in terms of compensation. This is due to the embeddedness of spiritual and cultural incidents, expressed through media such as art, song and dance, pervading native title conceived as a property right. Bregman notes that hunter-gatherers globally "believed everything is connected. They saw themselves as a part of something much bigger, linked to all other animals, plants and Mother Earth"(Bregman, 2020, p.72).

Arguably, the actuation for the assessment of compensation was always going to be the prosaic head of economic value of land, the genesis of which can be detected in the 2003 dissenting decision of Kingham DP of the Land and Resources Tribunal in *RAG Australia Coal Pty Ltd and Theiss Investments Pty Ltd v Queensland Electricity Transmission Corporation Ltd., Barada Barna Labalbara Yetimarla People and Ors* NTML 00104/2001 et al. (24 June 2003) (*RAG Australia Coal*). Kingham DP opined it was appropriate to assess compensation by reference to the unimproved market value of the underlying land title. In *RAG Australia Coal* the underlying land title was pastoral leasehold, however in other situations it might be another class of land title such as freehold.

The trigger of unimproved market value in the 2003 dissenting decision of Kingham DP in *RAG Australia Coal* is subsequently repeated in the later 2013 decision of Mansfield J in *De Rose v State of South Australia* [2013] FCA 988 and then definitively by the High Court in Griffiths 2019.

However, for the compensation package to be fulsome (as stated earlier), the inevitability of including a simulacrum of solatium as the additional head of compensation had to be recognised to facilitate the assessment of the impact of compulsory acquisition upon holders of native title rights and interests. Gobbo had previously highlighted the dilemma eventually to be faced by the High Court, observing:

> . . . there is a compelling argument to be made that unless the scheme for compensation provides for a significant component over and above the market value of the land reflecting the intangible aspects of native title, such as its spiritual significance, and specifies how the component is to be calculated, the scheme for compensation may not provide just terms. (Gobbo, 1993, p. 1167).

Usefully (and in support) Sutton points out from the anthropological standpoint that many parts of the Australian continent tantalisingly contain:

> . . . Dreaming sites [which] are connected not only in myth but by sequences of verses in long song series. These songs are typically those performed in religious ceremonies. The landscape is thus crisscrossed with what have been called songlines (Sutton, 1998, p. 361).

Further, Sutton explains the extraordinary mix of cadence and allusion imbedded in a traditional Aboriginal painting (image) which can be comprehended in at least one of four "spatial-cultural categories":

> . . . (1) a specific tract of country, often once defined by specific episodes of mythic narrative; (2) a broad regional political geography; (3) a cosmological category, such as the earth and sky; or (4) a plan of a residential sites and its houses or shelters, a plan of a vessel, and its content.(Sutton, 1998, p. 361).

Whilst the notion of solatium as previously described clearly assisted the High Court in attempting to conceive an omnibus methodology to assess compensation for native title, the resultant methodology utilising separate heads of land value and solatium has been questioned. Hassing and Quayle (pungently) observed from a trauma standpoint:

> For many Aboriginal and Torres Strait Islander communities of native title holders, the significant pressure to produce evidence of connection as part of the requirements in native title compounds the effect of intergenerational trauma.
>
> It is now well known that between 1930 to 1960 Australia wide, governments adopted assimilation policies for Aboriginal peoples. These policies were designed to achieve the ultimate biological assimilation into white Australia . . .
>
> To require communities of native title holders to demonstrate connection to their lands and waters, language and culture and 'prove' their native title without sufficient consideration of the impact of historical attempted genocide represents a form of ongoing trauma (Hassing & Quayle, 2019, p. 15).

Similarly, the adoption by the High Court of two separate traditional heads of compensation starkly contrasts with ancient Indigenous interconnected spiritual and ecological land management techniques described succinctly by Gammage as "the need and reward in caring for country"(Gammage, 2011, p. 139), Pascoe similarly noting:

> The fate of the emu, people, and grain are locked in step because, for Aboriginal people, the economy and the spirit are inseparable.(Pascoe, 2014, p. 1; see also a critical questioning of Pascoe by Sutton & Walshe, 2021, and a more accommodating commentary by; Davis, 2021, p. 10)

Further, Goodall views the separation "between social, ecological and economic spheres" a product of neoliberalism with its roots in industrial and post-industrial societies, and thus unknown in Indigenous commons (Goodall, 2019, p. 8). Indeed, the foundational and symbiotic connectedness of Indigenous lands with their original custodians starkly demonstrates the crucial importance of personal and community past memories held by native title holders which are now being revealed through the developing science of memory, Ostby and Ostby noting from a neuropsychological standpoint that:

> [o]ur memories are the prerequisites for mental time travel into the future, for our plans, dreams, and fantasies . . . Visions of the future are a natural part of past memories, not only because the past helps us predict the future, but because the process that gives us vivid memories is the same as the one that we use to imagine the future. (Ostby & Ostby, 2018, p. 238).

Additionally, through the form of memory known as classical conditioning which occurs absent "any conscious awareness or will", they further observe:

> . . . even this . . . form of memory is the product of need, in all living beings, to be able to predict the future and thereby ensure survival (Ostby & Ostby, 2018, p. 241).

Hence through "visualising future scenarios", they conclude individuals are able to "test how the action will affect" them "and feel different outcomes" (Ostby & Ostby, 2018, p. 253). In support, physicist Davies notes all living organisms (which obviously includes humans) residing in "an unpredictable and fluctuating environment" have "the ability to learn from experience so as to better anticipate the future" (Davies, 2019, p. 65). Hence and unsurprisingly, Indigenous spiritual and cultural memory serves to validate incidents of native title.

The three Griffiths cases

Griffiths 2019, being the final chapter in the Timber Creek saga, provides a much-needed insight into the liability of the Commonwealth, States and Territories when extinguishing non-exclusive native title rights. Historically, this sort of compensation assessment had happened behind closed doors in confidential negotiation, such as *De Rose v State of South Australia* [2013] FCA 988.

Griffiths 2016 established a rudimentary methodology for assessing the loss of cultural interests in the manner of solatium. Once it was found that the *Ngaliwurru* and *Nungali* People held non-exclusive native title over land at Timber Creek, the Federal Court turned its mind to calculating compensation for action by the Northern Territory that extinguished that native title. There were three components to the compensation: economic loss, non-economic loss (solatium), and simple interest (see Griffiths 2016 at [466]). Mansfield J. applied a combination of existing principles and "intuition and the exercise of judicial discretion" (Flynn, 2017, pp. 71–73) to derive the "complex, but essentially an intuitive" compensation figure which includes solatium (see Griffiths 2016

at [302]). Crucially, a little over a third of the total compensation was for non-economic loss or solatium. Solatium up until that point, had been historically used for hurt feelings in relation to non-Indigenous property right holders (see *Carson v John Fairfax & Sons Ltd and Slee* (1993) q78 CLR 44). Mansfield J. deemed it "appropriate to adopt the description "solatium" as the tool to assist calculating compensation, calling it the "compensation component which represents the loss or diminution of connection or traditional attachment to the land" (Griffiths 2016 at [300]).

Although Griffiths 2016 was appealed and the total amount of compensation slightly diminished, the Full Federal Court agreed with the trial judge in relation to the "intuitive leap" (Griffiths 2017 at [395]) taken in the assessment of solatium (Griffiths 2017 at [394]). The Full Federal Court held that "Aboriginal rights and interests in land have dimensions remote from the notions enshrined in Australian land law" and the application of traditional compensation provisions was ineffective (Griffiths 2017 at [144]). The compensable action of the Northern Territory required the Full Federal Court to consider their effect in terms of "the pervasiveness of the Dreaming" (Griffiths 2017 at [309]). However, the Full Federal Court identified a problem of assessing compensation using two separate heads, land value and solatium-like compensation, and reflected on a "holistic" approach (see Griffiths 2019 at [86]). The "more holistic nature" of compensation viewed through the lens of *s.51(1) Native Title Act 1993* was viewed by the Full Federal Court to be an alternative approach "properly construed" (Griffiths 2017 at [142])., stating:

> [n]ative title rights and interests are of such a different type and significance to the holders that it may well be appropriate to loose the assessment from the shackles of Australian land law and approach the compensation exercise without dividing value into economic and non-economic components.(Griffiths 2017 at [144] per North ACJ, Barker and Mortimer JJ)

However, the notion of holistic compensation assessment for native title was not supported by the High Court, as it would obfuscate transparency of reasoning, and lead to an inconsistent application of compensation principles, and "be largely dependent on idiosyncratic notions of what is fair and just"(Griffiths 2019 at [86]). The above mentioned compensation conundrum identified by the Full Federal Court in Griffiths 2017 was however curmudgeonly addressed by the High Court in Griffiths 2019. Perhaps, the High Court was somewhat emboldened by much earlier prescient commentary by Gobbo on the lively mutability of the arcana of compensation for native title that "Australian legal history does not provide any direct precedent for the assessment of compensation for deprivation of these rights of native title" (Gobbo, 1993, p. 1166). Yet in Griffiths 2019 as previously mentioned, the High Court chose to not clearly identify solatium as a compensation tool, arguing that "the language of solatium" was not directly applicable. (Griffiths 2019 at [271] and [273] per Edelman J.)

Although the High Court in Griffiths 2019 (at [53] and [54]) expressly considered solatium to be a problematic term, the Judges clearly grasped the importance of a solatium-like head of compensation to address the four previously mentioned "spatial-cultural categories" (Sutton, 1998, p. 361) imbedded in the chthonic property right known as native title not being coterminous with non-Indigenous property rights. What was unanimously agreed by the High Court was that the assessment of compensation payable required a separate, or "bifurcated" assessment of economic and cultural loss

suffered by the native title holders (Griffiths 2019 at [84]). The High Court advocated for, and adopted, a highly intuitive approach, effectively rejecting the Full Federal Court's proposed "legally-imaginative" approach.

In respect of the economic loss, the High Court highlighted the preferred approach of assessment, being to firstly ascertain the value of freehold land for exclusive native title. Second involves a "percentage reduction" of non-exclusive native title that represents the proportionate limitations on that non-exclusive title (Griffiths 2019 at [70]). It was held that the native title rights held at Timber Creek were "essentially usufructuary, ceremonial and non-exclusive" (Griffiths 2019 at [69]) and so the High Court capped their value "as a percentage of freehold value [at] … no more than 50%." (Griffiths 2019 at [106]). This amount was substantially lower than 65% awarded by the Full Federal Court in Griffiths 2017 (at [139]) and 80% awarded by Mansfield J in Griffiths 2016 (at [232]). It is also worth noting that the High Court merely accepted 50% because "no party suggested that the percentage should be set at below 50%", hinting that it could have been lower. (Griffiths 2019 at [106] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.)

In respect of the cultural loss, the challenge was to compensate the *Ngaliwurru* and *Nungali* People for, inter alia, "loss of rights to gain spiritual sustenance from the land" (Griffiths 2019 at [3]), "loss of diminution in or disruption to traditional attachment to country" (Griffiths 2019 at [161]), and "loss of cultural and spiritual connection with the land" (Griffiths 2019 at [225]). Calculating the appropriate compensation involved "identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection" (Griffiths 2019 at [224]). Such a weighting of factors necessarily leads to an *in globo* approach, acknowledging that the compensable acts affect "not only the precise geographical area of the lot on which the act took place" (Griffiths 2019 at [225]) and that the land and everything on it are "organic parts of one indissoluble whole" (Griffiths 2019 at [223]). Hence, it was appropriate that the High Court did not commute the trial judge's figure of $1.3 million for cultural loss.

While the trial judge in Griffiths 2016 determined the assessment process to be "complex but essentially intuitive" (Griffiths 2019 at [163]), the Full Federal Court noted that a "process determined by intuition is open to criticism" (Griffiths 2017 at [385]). However, the High Court perhaps unavoidably, was required to import elements of intuition into their decision. Where other forms of compensation such as compulsory acquisition of non-Indigenous property rights, reveal well-worn paths and highly calculable (albeit sometimes problematic) assessments (see *Desane Properties Pty Limited v State of New South Wales* [2018] NSWSC 553), the compensation endeavour in relation to native title rights was found to be a "broad-brush approach" that is "not one of precision" (Griffiths 2019 at [301] per Edelman J.).

While the cultural loss component had previously been termed by Mansfield J.as solatium (Griffiths 2016 at [463]), the High Court in a contrariant observation stated the non-economic loss was "not solatium in the sense in which that concept should be understood in the law concerning compulsory acquisition" (Griffiths 2019 at [269] per Edelman J.). Native title rights were described as having two dimensions: exchange (or surrender) value, and cultural value not captured by exchange value. It was held by the High Court that neither of these involves the particular distress or mental anguish that

flows from compulsory acquisition, where that distress or anguish is termed solatium. The High Court accepted that there was loss of cultural value that occurred immediately upon extinguishment, and that the value of this loss was $1.3 million. However, the High Court held that *solatium* was something else entirely (despite the term solatium being used by Mansfield J.), for which no submissions were made and, as a result no claim was payable (Griffiths 2019 at [273] per Edelman J.). The intuitive leap relied on in Griffiths 2016 was necessary for the novel evaluation of the cultural loss, but, although it bore some semblance, it was not relevant to solatium. Edelman J. noted (at [315]) that the concepts of loss of cultural value and solatium "are closely related but distinct".

Conclusion

Griffiths 2019 has confirmed the severity of loss suffered caused by dispossession and no doubt plays a very important role for future compensation evaluation for non-exclusive and exclusive native title rights. The High Court confirmed a framework and methodology for compensation previously untested by the courts. Although it was held that non-economic loss as described by Mansfield J. was not in the High Court's view the same creature as solatium, it did nevertheless leave the door open to the subsequent inclusion of solatium, being mental distress arising from compulsory acquisition, being an appropriate head of compensation in future claims (Griffiths 2019 at [273] and [324] per Edelman J.). Unfortunately, because solatium and cultural loss had been conflated, no distinct submissions were made for a separate award of solatium for the additional mental distress caused by the compulsory acquisition, and so there is limited useful commentary from the High Court to utilise solatium. Obiter from Edelman J (at [323]) tantalisingly suggested that an award for the solatium for the pain and suffering of the native title holders "ought to differ according to the particular pain, suffering and distress endured by the individual group members." Further, Edelman J noted (at [327]) that solatium is usually added as a component of up to 10% of the value of compensation.

Notwithstanding the missed opportunity to better elucidate the minutia of solatium, Griffiths 2019 clearly envisages an appropriate part of compensation for compulsory acquisition of native title rights to include solatium, "properly so called" (Griffiths 2019 at [324] per Edelman J.). It is posited (by the authors) that the High Court in Griffiths 2019 did not properly consider the traditional head of compensation known as solatium, perhaps overlooked because of the overarching focus on the 2020 more narrow aspect of cultural harm to the native title holders.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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