ASSESSING COMPENSATION FOR NATIVE TITLE: A VALUATION PERSPECTIVE

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***ABSTRACT*:**
This paper draws partly upon a presentation by the author at the 1999 Aboriginal Land Tenure Summer School, University of Adelaide on 18th February, 1999, and upon research undertaken for the Professional Certificate in Native Title and the Anthropology of Aboriginal Land Tenure, awarded by the Department of Anthropology, University of Adelaide.

The paper extends the author's earlier work published in two Review papers on aspects of the highly topical subject of native title. In this article, indigenous values and anglo-Australian are contrasted, which – in turn – lead to discussion on the vexed issue of just how losses arising from extinguishment or impairment of native title might be assessed. He highlights the need for an accommodation between post-contact land law and the indigenous legal system if indigenous people are to receive "just terms".

Introduction

Indigenous concepts of value and compensation are at the centre of the interface between Aboriginal land tenure and anglo-Australian land law. There is a stark attitudinal contrast in the nature of the value loss when indigenous people have native title rights extinguished or impaired, and when non indigenous people have property rights compulsorily acquired. This contrast is the strongest manifestation of the different economic, cultural and spiritual values of the two peoples.

Muir (1998, p.2) asserts that:

[t]hat the operation of Indigenous laws affect every facet of Aboriginal and Torres Strait Islander peoples lives. Observances of these laws are then doubled with the observance of Australian laws. In many instances these laws collide, the area of property rights in land is the most public focus of this collision.

Furthermore, he states that:

[t]he value attributed to native title comes within two general themes, the first is equating the value to general Australian and common law experiences of title and the latter is to consider an Indigenous perspective.

These two themes have only arisen in a legal sense as a result of the recognition of native title by the High Court in *Mabo v. the State of Queensland* [No.2} [1992] 175 CLR 1.*(Mabo)*. Prior to the decision in *Mabo*, Blackburn, J, in *Milirrpum v. Nabalco Pty Ltd* [1971] FLR 141 *(Milirrpum)* had concluded that:

...doctrine of communal native title... does not form, and never has formed, part of the law of any part of Australia.

(Milirrpum at 244-5)

Even prior to *Mabo*, the absence of any recognition of native title was described by Hall J. in *Calder v. A-G of British Columbia*

[1973] SCR 313; [1973] 34 DLR)3d) 145, 200 (SC) as:

...wholly wrong as the mass of authorities previously cited, including Johnson v. McIntosh [1823] 8 Wheat 543 and Campbell v. Hall [1774] 98 ER 848, establishes

Subsequently in *Mabo,* the High Court recognised this anomalous position of the common law in Australia and decided that the *antecedent rights and interests in land* claimed by the Meriam people of the Murray Islands had survived the change in sovereignty. Whilst under Australian common law, the traditional laws and customs of the indigenous people were matters of fact not of law, the High Court in *Mabo* recognised that it was almost certain that an indigenous legal system existed at the time of assertion of British sovereignty.

Therefore, as Sheehan (1998, p.26) notes:

...this recognition in Mabo of indigenous property rights in Australia appears to have produced a dyschronous (separate in time) land law , which must now be addressed...

Furthermore the decision handed down by the High Court on 23 December 1996 in *Wik Peoples –v- State of Queensland [[1996] 141ALR 129] [Wik} confirmed the dyschronous nature of this emerging land law.*

The decision in *Mabo* in rebutting the concept of *terra nullius* led, according to Muir (1998, p.3), to:

...the presumption that where Indigenous laws are practiced and acknowledged then those laws will contain property rights. The process of inquisition into the nature, extent and incidents of property rights derived from the Indigenous laws is not essential to establishing the existence of native title.

This view of native title is however not supported by the emerging pattern in recent cases such as *Jim Fejo and David Mills on behalf of the Larrakia People and Northern Territory of Australia & Oilnet (NT) Pty Ltd* [1998] HCA 58, unreported 10th September, 1998. (*Fejo).* In these cases the High Court has espoused a more restricted view of the nature of native title, and has been suggested by some writers (Strelein 1999, p.18) that the Court is actually recasting native title.

Perhaps this is not surprising given that Brennan J. in *Mabo* expressed concern that:

...recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.
(*Mabo* at p. 43)

There are currently two views of the concept of native title and the High Court is slowly revealing which view it prefers. The concept of native title can be viewed as either a bundle of property related rights under anglo-Australian law or as a creature of indigenous legal and cultural systems.

The Court appears increasingly to be giving support to the first concept of native title, and in *Fejo* the judgements referred to

the bundle of interests we now call native title and *the rights which together constitute native title.*

In adopting this concept of native title, the High Court is according to Strelein, (1999, p.19) moving away from the *Mabo* concept that native title is rooted in traditional indigenous laws and customs. She states that by:

[a]ttributing a class of rights to native title in this way undermines its traditionally unique or sui generis character.

Muir (1998, p.4) raises strong objection to this concept of native title because:

[t]he difficulty from this selective myopia is that the Indigenous laws continue to operate regardless of the intrusions of Australian law. It continues to allocate rights and interests in country, dictate the nature of social interactions and acts as the basis of Indigenous social, cultural and political identity. The implications for land management, extinguishment and subsequent compensation is that acts which serve to extinguish the recognition of native title only really operate to extinguish recognition in the domain of Australian law. That is, a grant of an interest or a right under Australian law, which wipes out the recognition of native title over that land, may not necessarily do so under Indigenous law.

Importantly, when a grant of an interest or right under anglo-Australian law occurs, indigenous cultural, spiritual, emotional, social and economic values are often impaired or extinguished. As Muir (1998, p.4) points out there are:

... two levels at which the interaction of Indigenous and non-indigenous law operate, the first is at the level of recognition and the second is at the level of disturbance created by a lack of recognition. This cessation of recognition does not necessarily kill the Indigenous law; it does however throw it into chaos and results in detrimental effects throughout the Indigenous community.

While it is clear that anglo-Australian law now affords native title recognition, it is apparent in recent decisions of the High Court that:

[t]he underlying existence of the traditional laws and customs is a necessary pre-requisite for native title but their existence is not a sufficient basis for recognising native title.
(*Fejo* at p.20)

Furthermore, the Court noted that because native title rights are not created by the common law:

... very different considerations arise when there is an intersection between rights created by statute and rights that owe their origin to a different body of law and traditions.
(*Fejo,* at p.23)

Muir's contention that indigenous laws continue to exist irrespective of the action of anglo-Australian law, was reflected in the subsequent decision by Kirby J. in *Fejo* where His Honour said:

Of its legal nature, ...[a fee simple grant] was incompatible with the continuance in respect of the same land of the fragile native title right which the Australian legal system will recognise. Doubtless, the bundle of interests we now call "native title" would continue, for a time at least, within the world of Aboriginal custom. It may still do so. But the conferral of a legal interest in land classified as fee simple had the effect, in law, of extinguishing the native title rights.
(*Fejo,* at p.49)

Further, His Honour noted that because native title rights are not derived from anglo-Australian law, they are:

... inherently fragile and liable to defeasance ...and dependent for their effectiveness upon the extent to which a different legal system accords them its recognition.
(*Fejo,* at p.49)

In *Fejo,* the High Court's decision contrasted the factual existence of indigenous rights and interests with the artificial concept of "native title" in anglo-Australian law. Strelein (1999, p.20) argues that:

...the High Court distinguished between native title existing in fact and native title existing in law. As a result, it becomes increasingly difficult to reconcile the idea that the source of native title lies in Indigenous law and custom.

Whilst anglo-Australian law cannot really extinguish indigenous law, Muir (1998, p.4) states that:

...it does impact on the ability of Aboriginal and Torres Strait Islander peoples to maintain a way of life free of oppression, marginalisation and injustice. This impact on the life of Indigenous people then has compensable ramifications. Is very difficult to quantify without a comprehensive assessment of way of life of the people affected, and the impact on that way of life.

In the following sections of this paper, the kinds of cultural, spiritual, emotional, social or economic values which might be claimed by indigenous people to have been impacted upon as a result of extinguishment or impairment, will be canvassed.

Cultural, Spiritual, Social Emotional, or Economic Values As Native Title Rights

Before any assessment of the impact of impairment or extinguishment upon native title rights can be undertaken, it is necessary to establish what the component values of the specific rights are in the specific circumstances

where impairment or extinguishment has or may occur.
From a lawyers perspective, native title is:

[I]n the classical form...a belief system that establishes responsibilities over and duties in relation to land as the basis for ownership of that land. The origins of Native Title comes in the dream time – time immemorial – time of creation.

This is a heroic period in which the ancestors of living Aborigines conducted various deeds that not only created the landscape but also recorded the story of the land. Responsibility for maintaining these traditions and discharging responsibilities that flow from them is handed down generation to generation.

These responsibilities are inherited through family links Fundamental to the system is the notion of responsibility. In a sense this is not so different from the familiar notions of the leasehold tenure system. Under this system rights attaching to tenures are not articulated in great detail. Rather the predominant function is the outlining of obligations and responsibilities. This is also the case with Native Title.

(Lavarch, 1997 p.21)

Since *Mabo*, some writers in the legal and valuation disciplines (Whipple 1997;Neate 1998; Sheehan 1998) have suggested that dissection of native title into particular incidents would facilitate an understanding of the intricacies of the various values within a specific example of native title.

In addition, other disciplines especially anthropology have in the past assisted in the development of:

...institutional frameworks that enshrined the rights and processes of one system of law (Aboriginal customary law) within the legislative framework of another (Australian law).

(Morphy 1999, p.13)

The "fitting" of particular land claim cases with Aboriginal tradition and customary law under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), facilitated the process, and were according to Morphy (1999, p.13):

...broadly compatible with indigenous systems of land tenure. This facilitated the continued operation of these indigenous systems once rights in land were recognised under Australian law.

Whilst imperfect, such attempts to accommodate the intricacies of the various values evident in a diversity of native title rights in the Northern Territory have seen:

...the translation of land ownership under Aboriginal Law into land ownership under Australian Law.

(Morphy 1999, p.14)

Nevertheless, anthropological research continues to stress the strength of the spiritual and cultural relationship that indigenous people have with land and that this spirituality and culture is integral with Aboriginal concepts of land ownership.

Recognising the limitations of any dissection of native title, Neate (1998, p.67) observes that in the Canadian experience, jurisprudence suggests that while native title:

...has an inescapable economic component...there will be difficulties in determining the precise value of Aboriginal interest in the land.

In Australia, this situation is further complicated by the reluctance of the High Court to give:

...a comprehensive statement of what native title means for some groups of indigenous Australians.

(Neate 1998, p.3)

Nevertheless, as Neate (1998, p.11) points *out:*

[t]o attract legal recognition and protection, however, those rights and interests must also be recognised by the common law of Australia.

While native title can be described as both a bundle of rights and a bundle of responsibilities for land, Sheehan (1998, p.233) suggests that:

[I]n various cases dealing with loss of cultural fulfilment, there is an attempt by the courts to gain sensitivity to cultural differences. Within the evidentiary framework of the law, the

special nature of indigenous life is, to the degree achievable, made understandable, and hence compensible. The non-material components of indigenous property rights are far from settled and may vary from location to location.

There is a substantial risk that indigenous property rights may be misinterpreted and hence undervalued primarily because they do not meet the usual technical standards or rules of evidence.

Another writer, Whipple also identifies that there are material components of the various parts making up the content of native title, and also intangibles such as the spiritual content. However, he sees an economic logic element which can be valued, but considers that:

...valuers are not trained in predicting the price...non-market elements are likely to fetch, they should not be expected to do so-neither should they attempt it.

(Whipple 1997, p.34)

Somewhat confusingly, he then suggests that:

...there are some precedents in the common law which could offer a starting point . Under the law of nuisance, for example, compensation may be awarded for loss on enjoyment of property and it seems to me there should be ample precedent which would be helpful in the native title case.

(Whipple 1997, p.34)

Conversely, other writers such as Lavarch & Riding (1998), Muir (1998) and Garnett (1998) argue that this approach is misconceived.

Muir argues that the concept of material and non-material aspects of the bundle of rights comprising a specific native title is based on:

...two general themes, they are the physical and the spiritual attachment to land. The consideration of physical connection as a separate heading to spiritual relationship with country is entirely artificial as the spiritual relationship of Aboriginal people to country permeates their entire interaction with country. Under Indigenous law there is no demarcation of these areas.

(Muir 1998, p.5)

While Muir observes that there are two forms of caring for country, first, physical land management, and second spiritual caring, he also notes that:

[t]he country is also cared for spiritually by the physical act of visiting. There are many instances of people not visiting country for many years, when they visit they find it is largely a 'wilderness'. However within a short period of going back to the area a couple of times the country 'comes alive again'. People often meet on the land for cultural activities: visiting sites, discussing impacts on sites and now having native title meetings on the land. The active use of meetings on land usually serves to introduce strangers to country, better articulate ones relationship with country and meet to engage in social, cultural and economic activities.

(Muir 1998, p.6)

Stressing the significance of spiritual connection with country, which continues to control the activities conducted on land, he believes that:

...when considering equating the value of compensation to market values of land,...indigenous rights to the land do not translate to a bounded interest in an area of land on a lot by lot basis. It is in fact an interest that is based on spiritual, social, cultural and economic values flowing from the very culture of Aboriginal and Torres Strait Islander peoples.

(Muir 1998, p.7)

Nevertheless, he recognises that native title must be considered at two levels:

...the first is at the conceptual level of interaction between Indigenous and non-indigenous laws and the second is the impact that non-recognition has on Indigenous communities.

(Muir 1998, p.8)

In support of the above, Lavarch and Riding (1998, p.6) argue that native title ought not focus on analogies with anglo-Australian land tenures:

...and instead concentrate on two completely different things: maintenance of culture; and agreement.

Further, they argue:

...the point is that the central feature of the...[assessment of impact arising from impairment or extinguishment] is not the payment of a lump sum based on... [anglo-Australian tenure] value. The object of the exercise is to identify how, practically, the native title holders can continue their traditional laws and customs and continue to shoulder responsibility for country.

Whilst this altruistic approach to impact assessment by Lavarch and Riding is commendable, it however fails markedly where a compulsory extinguishment of native title is required to permit the construction of a significant public work. In a contradictory comment, they concede that to approach proper compensation for some indigenous values, these:

...must be costed and converted into money terms. However, the point is that the central feature of the exercise is not the payment of a lump sum based on freehold value. The object of the exercise is to identify how, practically, the native title holders can continue their traditional laws and customs and continue to shoulder responsibility for country.

(Lavarch and Riding 1996, p.6)

Furthermore, they state that:

[I]f it is necessary to incorporate native title into a Western scheme of reference, then the loss of native title is more akin to the resumption of a home-owner's possessions than the resumption of house and land.

(Lavarch and Riding 1996, p.5)

This concession strongly suggests that in some respects, native title is being allocated a position by Lavarch and Riding in the hierarchy of anglo-Australian land tenures. Clearly, this process is being performed by the authors to make native rights capable of comparison with other tenures such as freehold and leasehold.

Another writer, Garnett (1998, p.10) considers that Whipple's distinction between material and non-material elements of native title rights is arbitrary and is not reflective of indigenous culture and law.

However, Garnett (p.10) then concedes that:
[t]he courts need to develop heads of damage under which compensation may be awarded after hearing evidence...about the losses that native title holders will suffer when their native title rights and interests are extinguished or impaired.

She indicates that some heads of compensation such as solatium do not currently fully compensate dispossessed owners for the losses suffered, but then concedes that the Courts need to recognise the special nature of native title. There appears to be little difference between these views and the notion of material and non material aspects as previously discussed in this paper. The only difference is that Garnett believes that the material aspects of native title rights ought not to be equated to a freehold title base.

Contrary to Garnett's view, it is observed that in cases such as Miriuwung Gajerrong, the material aspects of native title rights held by indigenous people can be correctly described as being analogous to anglo-Australian land tenures, such as freehold title.

As Altman (1998, p.10) notes:

...getting the appropriate compensatory framework is important, and working within the existing law is unavoidable.

In summary, whilst native title is sourced in traditional laws and customs, the recent *Fejo* decision may represent a pragmatic realisation by the High Court that future judicial decisions regarding impact assessment arising from impairment or extinguishment of native title will of necessity be rooted in analogies with existing anglo-Australian land tenures.

To that end, the literature reviewed in this section of the paper strongly suggests that the High Court and the Federal Court has:

...equated native title (or at least so much of it as the common law recognises) with the right to use land for certain purposes.)

(Neate 1998, p. 28)

There are a number of hurdles to be overcome before anyone can express confidence in this classificatory (bundle of rights) approach to native title, not least being the jurisprudential

reluctance to recognise new property rights, such as those contained within native title. As McLennan (1998, p.24) observes:

...the mere extinction or diminution of a proprietary right residing in one person does not necessarily result in an acquisition of a proprietary right by another [and] is expressive of a general judicial caution toward recognising the existence of new forms of proprietary rights in property.

Nevertheless, the bundle of rights approach to native title appears increasingly sensible if traditional owners are to be afforded of the long history of protection embedded in the anglo-Australian land law when valuable property rights are compulsorily acquired or extinguished. As McLennan (1998, p.244) points out:

[t]raditionally the Aboriginal relationship to land has been considered not to amount to ownership because it did not consist in the right to exploit, the right to alienate and the right to exclude others.

The decision in Fejo strongly suggests that the Courts are not prepared to permit this indigenous concept of ownership:

...to exclude Aborigines from obtaining a legally enforceable interest in their ...property.
(McLennan 1998, p.244)

The question of cultural property remains unclear, but at least native title rights as a restricted legal concept appear to be moving towards an enforceable property right, analogous to forms of anglo-Australian tenure.

The next section of this paper examines the immediate impact upon those component cultural, spiritual, emotional, social or economic values derived from native title rights when an act of extinguishment or impairment occurs.

Immediate Impact Upon Indigenous Values Subsequent to Extinguishment or Impairment

Given the ebb and flow of the material and non-material components of native title, it is clear that any assessment of the short term impact of extinguishment or impairment upon indigenous values must of necessity recognise this complex inter-relationship.

Compounding this situation, Lane & Yarrow, (1998, p.148) have drawn attention to the inadequacy of current guidelines for environmental impact assessment (EIA) within existing Commonwealth and State legislation. They observe that:

...the guidelines issued provided insufficient guidance to proponents as to the nature of the studies required. In some cases, indigenous interests are largely ignored, and in others their interests are reduced to sacred sites.

Further, they observed that:

[t]he administrative triggers for EIA are another consideration. Biophysical criteria are usually used to trigger environmental assessment. These range from comprehensive assessment for projects considered to pose a high risk of environmental harm through to less rigorous assessments for projects considered to be of lower risk. Social and cultural criteria to trigger assessment are largely absent however. While developing effective social and cultural criteria is problematic, it is an important step to ensure that projects which may have significant social or cultural impact are comprehensively assessed.

One of the problems in attempting to assess the impact of extinguishment or impairment upon indigenous values is that archaeological and anthropological information is sometimes misunderstood and conflated. There is according to Lane and Yarrow (1998, p.148):

...a *lack of sufficient understanding, in commissioning agencies, of the difference between archaeological sites and sites of cultural significance. The net effect of this problem is that...archaeological surveys ...[are] conducted without any concern for sites of on-going cultural significance.*

Social and cultural impact assessment techniques have been developed by bio-physical scientists in the absence of any

guidelines specifying appropriate methods. As a result, such analyses which are:

...supposed to be an integral component of EIA...[are] therefore often a marginal and poorly resourced aspect of assessment. The poor quality of analysis in many impact assessment studies that attempt to deal with indigenous perspectives is a common issue. Problems include poor definition of the field of study, the use of inappropriate research methods, poor baseline studies and limited and often ineffectual opportunities for local participation.

(Lane & Yarrow1998, p.148)

Notwithstanding the shortcomings in impact assessment, some guidance is offered from experience gained under the right to negotiate provisions of the *Native Title Act 1993* (and complimentary State legislation) in EIA practice. An indication of the immediately perceived impact of impairment or extinguishment upon indigenous values is the inevitable emphasis in negotiations:

... with questions of environmental management and cultural heritage protection.

(Lane & Yarrow 1998, p.152)

This emphasis by indigenous people on environmental and cultural protection is not unexpected, given that when some aspects of native title have no equivalent in anglo-Australian land tenure:

...responsibilities for land are as much an integral component of native title as rights to the land...

(Neate 1998, p.44)

Further complicating any assessment of the immediate impact of impairment or extinguishment is:

....if spiritual relationships with land are at the core of a group's links to land and, although ideally the relationship would be given full expression on the land, those links can be and are maintained away from the land...What if other incidents or expressions of native title can be maintained away from the land

(Neate 1998, p.44)

Therefore, when attempting to assess the impact of impairment or extinguishment upon indigenous values, the prospect of those values continuing to exist away from the land should be recognised. As unwelcome and unpalatable as the public works may be to indigenous people, the impact may only be nominal or short term in particular situations. In addition, increasingly :

...government instrumentalities who acquire land are distinguishing between the acquisition of all native title rights and interests in land and the acquisition of only those native title rights and interests that need to be acquired before the proposed use of land can proceed.

(Neate 1998, p.45)

Such actions attempt to ameliorate the impact of public works (eg electricity easements) upon native title, through the acquisition of property rights limited to only what is necessary to permit the construction and operation of the facility.

As Muir (1998, p.7) observes, the indigenous cultural structure:

...is dependent upon continued access to land, This access is to hunt, gather, travel, camp, teach and maintain a relationship with other members of the group through the land. An 'extinguishment act' will prevent the people from participating in cultural activities on the land therefore denying the basic human right of passing on traditional knowledge and cultural information to future generations.

Attempts to ameliorate impacts upon indigenous values indicate a concern to reduce any loss incurred by indigenous people of their ability to exercise their laws and customs. It also attempts to mitigate any:

...loss of the ability to perpetuate traditional laws and customs – to continue tradition, to develop culture and to confirm (and sometimes find) personal identity.

(Lavarch & Riding 1998, p.5)

As stated previously, the impact upon native title rights in the short term (and also long term) is primarily on:

...the ability to exercise responsibility for country. It is generally accepted that native title holders have special obligations to the land on which they live. The oft-quoted remark

which attempts to explain this to Westerners is that of Blackburn J. in the Gove Land Rights case to the effect that the Aboriginal clan belongs to the land, rather than the land belongs to the clan. Native title holders often make the point that their responsibilities to country can never be taken away. That even if native title is acquired or impaired, these responsibilities subsist.

(Lavarch & Riding 1998, p.5)

Nevertheless, although these responsibilities for country may remain irrespective of whether they are exercised on or off land, and the assertions of anglo-Australian law, there is a need to recognise:

... that the acquisition of native title does hinder the shouldering of these responsibilities in practice. This is a loss which must be taken account of when determining compensation for native title. This is difficult for the Western mind-set to comprehend. The Western mind-set would conclude that the relief of a burden is good – that if someone is relieved of a burden, if they no longer have to exercise onerous responsibilities, then this is a benefit for which they should pay.

(Lavarch & Riding 1998, p.5)

There is almost no case law to assist in the assessment of the impact of impairment or extinguishment upon cultural, spiritual, emotional, social or economic values held by indigenous people. The short term impact may, as suggested earlier, be minimal or nominal in the particular circumstances.

Provided genuine attempts are made to ameliorate the impact of the public work upon native title, it appears increasingly likely that any losses (at least in the short term) can be minimised. However, it is in the domain of future losses that the vexed question of assessment of impact arises.
The following section of this paper canvasses the issue of future impacts upon native title rights.

Long Term Impact Upon Indigenous Values Subsequent to Extinguishment or Impairment

The quantification of the longer term impacts of extinguishment or impairment upon native title rights and hence indigenous values is a confused and largely unknown area of compensation. The manner in which the assessment of longer term impacts have been undertaken in the past:

...has often been based on ad hoc and confused objectives.

(Altman 1998, p.2)

Colonial attempts to assess the future losses domain as distinguished from immediate impact and consequential losses, reflected the scant regard given at that time to the cultural, spiritual, emotional, social or economic values of indigenous peoples. It is instructive to read the comments made by the Commissioner for Crown Lands, Charles Bonney in 1851 regarding compensation for the impact of dispossession upon indigenous people in the Port Lincoln district. He is quoted as saying that:

...'the only mode of meeting this difficulty [the failure to create reservations] that I can suggest is to compensate the natives for what they lose by any restrictions which it may be found necessary to impose upon them'...[Bonney] went on to suggest that supplies of 'provisions and clothing' might be provided to Aboriginal people at regular intervals as compensation for them being deprived of "their means of securing food'.

(cited in Foster 1998, p.3)

The experience over 125 years later of the *Aboriginal Land Rights (Northern Territory Act) 1976 (ALRA)* shows the difficulty that even post colonial Australia still has in attempting to assess impact especially within the future losses domain. She points out that:

...the possibility and then the actuality of claim, formal definition and recognition of [indigenous] interests in terms of Western law perhaps also the question of resources or benefits from the land quite dramatically recontextualise questions about [indigenous] relationship to the land. The notion of quarantining blackfella from whitefella domains and practices as a way of coping with the growing insistence of legalities and formal requirements seems to me to reflect a misplaced confidence on Aborigines' part in

the possibility of domain separation in the face of such processes

(Merian 1997, p.7)

Under the *ALRA* and *Native Title Act 1993* frameworks, the assessment of longer term impact upon indigenous values has focused:

...on major resource development projects (rather than exploration activity), because major impacts on land or native title rights with consequent just terms compensation is most likely in such scenarios.

(Altman 1998, p.2)

However, Altman also notes that compensation has in the past been confused with non-compensatory commercial payments and that there was commonly:

...no mention of loss of lands or social impact on Aboriginal people...

(Altman 1998, p.3)

All of the above is somewhat surprising given that there is a long history in anglo-Australian land law of dealing with an enormously broad range of compensable losses arising from the impact of compulsory acquisition and/or public works upon private property rights. Hyam (1995, p.206) cites the decision in *Commissioner of Highways –v- Tynan* ((1982) 53 LGRA 1 at 14), and suggests that the categories of losses are never closed:

The special value referred to may be derived from an immense variety of circumstances exemplifying many forms of relationship and interdependence between the expropriated and retained land.

Given the above, it would have been a reasonable expectation that when approaching the assessment of longer term impacts under the *ALRA* and the *Native Title Act 1993*, the above body of case law ought to have been utilised.

However as stated in the introduction to this essay, the alleged differences in values held by indigenous and non-indigenous people lies at the centre of the interface between the two legal systems. This perceived conflict arises from, according to Merlan (1997, p.9):

...the fixity demanded by Anglo-Australian law, bureaucracy and business interests.

However, as Hann (1998, p.1) observes:

[n]ew forms of property relations have come and gone as long as human societies have existed...

Hann also observes that the current preoccupation with private property rights and the resultant distaste for any communal forms of such rights, is based upon the myth that the former is liberal and complete, and the latter arbitrary and over-exploitative. He points out that:

...in all societies the property rights of individuals are subject to political as well as legal regulation. In many parts of the world the private property model has been resisted by indigenous peoples, sometimes covertly when any form of overt opposition seemed impossible, but sometimes through well-organised campaigns. The 1992 Mabo Judgement in Australia was a landmark which overturned the legal edifice that had hitherto denied the Aborigines title to their land.

(Hann 1998, p.2)

Limitations are thus an integral part of the anglo-Australian concept of land ownership, and as Dias and Hughes (1957, p.342) point out in their seminal work on jurisprudence, it is a distortion to suggest that such tenures were ever unlimited. Importantly, Speedy (1974, p.92) observes that even when the ownership of land gave the holder a reasonably free choice of economic development, there were restrictions imposed in the interests of public health and safety, and in recognition of the common law rights of neighbours and others.

Irrespective of such restrictions, when private property rights are compulsorily acquired, both Commonwealth and State legislation requires that the dispossessed holder is to have the impact of the expropriation assessed justly. The *ALRA* and the *Native Title Act 1993* are bound by the requirement that:

[a]ny acquisition of property by the Commonwealth will...attract the operation of s51(xxxi) [of the Australian Constitution] because it will be in pursuit of a purpose in respect of which the Parliament has power to make laws..

(Toohey, J. in *Newcrest Mining (WA) Ltd & or. –v- The Commonwealth (1997)* 190 CLR 513) *S.51(xxxi)* of the *Constitution* states:

The Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws.

As Neate (1998, p.65) points out:

[b]ased on these propositions it may be accepted that compensation should be on just terms, adequately and fairly recompensing the dispossessed native title holders for all losses sustained as a result of the acquisition or other extinguishing act.

Given the above, any attempt to assess the future impacts upon indigenous values ought to be widely construed, notwithstanding that there is little guidance as to the nature of just terms. Usefully, Lofgren and Kilduff (1997, p.67) observe that whether the assessment of the impact in terms of compensation is *just* is:

...whether they are reasonable or alternatively they are not so unreasonable that they cannot find justification in the mind of a reasonable person.

In summary, it can be said that the compensation flowing from an assessment of the impact of the action of anglo-Australian law upon native title rights is subject to a test of reasonableness or to a degree of being unreasonable.

However, no simple formulaic response is available to assess this future losses domain. Altman (1998) has suggested that a number of issues can be distilled regarding future losses, and in particular he raises the following questions:

- *How can native title rights and interests that are potentially affected by a future act be documented?*
- *How can social impacts be documented, especially in the absence of baseline data?*
- *How can other impacts be documented?*
- *How can these impacts, if negative, be valued in monetary or other terms?*
- *How should the appropriate beneficiaries of compensation be defined?*

(Altman 1998, p.9)

Further, he believes that:

[a]t present, there is also inadequate documentation and supporting evidence on the nature of impacts on native title that might require compensation. This might be partly because of a preoccupation with legal processes and insufficient attention to intended outcomes. There is also a lack of rigour in differentiating and defining inter-related economic, social and cultural components of loss experienced by indigenous land owners and affected communities (rarely as distinct entities).

(Altman 1998, p.9)

Rigsby in his useful examination of various claims cases in California cites research undertaken by Kroeber into the nature of landholding indigenous groups in 1954. Six incidents of indigenous land ownership were identified by Kroeber, namely:

- The occupancy by a group of its own estate, and its utilisation primarily for subsistence, but also for *travel, recreation, exploitation of mineral [and other non food] resources.*
- A *conceptual claim to land and authority over it*, which permitted the group to welcome visitors, grant permission to hunt etc, and to repel trespass and seek recourse.
- The ability to invite neighbours to share in the estate's benefits by way of attendance at formal occasions, and to provide *them with food and entertainment. The estates of owning groups had stable boundaries over time.*
- The estates had boundaries, defined *by traditional and natural landmarks.*
- Private ownership, which where it existed *was superimposed upon basic communal ownership and did not 'obliterate' it.*

(Kroeber, cited in Rigsby 1997, p.19)

Rigby recognises that the Californian claims cases were not directly analogous to the

Australian concept of native title, and considers that the above list:

...simply sets out six kinds of evidence for the ownership of land by California Indians.
(Rigsby 1997, p.30)

He is of the view that this information merely proved indigenous use and occupation of land, and that the anthropologists such as Kroeber:

... were not much interested in the conceptual dimensions of native title...
(Rigsby 1997, p.30)

In Rigby's respected view as an anthropologist, it is understandable that he was concerned that in none of the work reviewed by him in the Californian claims cases (including Kroeber), no references could be found:

... to either the wider social science or the anthropological literature on property and land tenure.
(Rigsby 1997, p.30)

Paradoxically, his criticism of their failure to theorise and conceptualise the basic notions of property and land tenure held by the Californian indigenous claimants, does not, in my view, lead to a similar criticism from a compensation assessment and land law perspective.

Whilst the anthropological research was clearly flawed by a lack of rigour in Rigsby's view, it is compelling that Kroeber's six point utilitarian test of indigenous land ownership when coupled with the six questions raised earlier by Altman are of merit when attempting to identify the nature of future losses arising from the impact of impairment or extinguishment.
It will be recalled that in *Fejo,* the utilitarian view of native title rights has strengthened such that Strelein (1999, p.7) believes that indigenous values have been:

...transformed, in law, to a 'bundle of rights' centred on physical control...

As unpalatable as this situation may be to respected anthropologists such as Rigsby, it is clear that:

[n]ative title parties must be prepared to enter a very fraught arena where they may be required to not only translate their culture to courts lawyers, mining companies and governments, but also to place a value on loss or damage to this culture.
(Altman 1998, p.9)

In this context, John Koowarta's responses to the interrogatories arising from *Koowarta –v- Bjelke- Petersen* (1982) 39 ALR 417, usefully show that apart from the immediate impact of the action of anglo-Australian law, he was able to list a number of future losses, namely:

- *Future education of new generations as to the Law of the 'lost' area.*

- *For younger people in the future the site locations would increasingly become an abstract matter and thus make the learning of the songs and other site knowledge appear less relevant.*

- *Loss of community developmental grants and enterprise development, (such as eco-tourism).*
(Sutton 1999, p.2)

Clearly, the range of cultural, spiritual, emotional, social and economic values that were claimed to have been impaired or lost by Koowarta would in any attempts at formal assessment for compensation purposes, be evocative of Hyam's earlier quoted comments that the class of losses which are compensable are not closed.
(Hyam, 1995, p.206)

However, the methods of such impact assessment and the quantification of the consequential losses remains unclear because of:

[t]he uncertainty and imprecision of this area of the law, and the difficulty of articulating the intellectual underpinning of submissions in support of awards of specified amounts for particular incidents of native title, may mean that few compensation applications come to Courts for determination.
(Neate, 1998, p.77)

In summary, it appears that the growing legal strictures around the notion of native title in Australia are leading to the somewhat unpalatable view that native title rights and the

range of indigenous values reflected therein will face:

> *...new demands of absoluteness and systematicity ...*
>
> (Merlan 1997, p.13)

In the closing section of this paper, the conclusions set out will attempt to provide some guidance as to:

> *What value should be placed on native title?*
>
> (Altman 1998, p.9)

Conclusions

At the outset of this paper, it was suggested that there are fundamental differences in the value systems of the indigenous and non-indigenous peoples in Australia.

It has been shown in an examination of the sorts of rights and values held by indigenous people that may be impaired or extinguished by the action of anglo-Australian law, that they constitute a broad range of cultural, spiritual, emotional, social and economic values.

These values can be divided in a manner which is not entirely arbitrary and through the adoption of a classificatory system based on material and non material components may assist in providing *just* compensation. In addition, the increasing trend to view such rights and values within the legal concept of a 'bundle of rights' need not necessarily produce an unjust compensatory package.

CASES CITED

Calder v. A-G of British Columbia [1973] SCR 313; [1973] 34 DLR (3d) 145,200 (SC)

Campbell v. Hall [1774] 98 ER 848

Commissioner of Highways –v-Tynan *[1982] 53 LGRA 1 at 14*

Jim Fejo and David Mills on behalf of the Larrakia People and Northern Territory of Australia & Oilnet (NT) Pty Ltd [1998] HCA 58, unreported 10th September, 1998.

Johnson v. McIntosh [1823] 8 Wheat 543

Koowarta –v-Bjelke- Petersen (1982) 39 ALR 417.

Mabo v. the State of Queensland [No.2} [1992] 175 CLR 1.

Milirrpum v. Nabalco Pty Ltd [1971] FLR 141

Miriuwung and Gajerrong People v. Western Australia [1998} Federal Court, unreported 24th November, 1998)

Newcrest Mining (WA) Ltd. & or. v. The Commonwealth [1997] 190 CLR 513

Wik Peoples v. State of Queensland [1996] 141 ALR 12

Indeed, because the class of rights capable of being claimed is not closed under existing compensation and land law, such a classificatory approach may ensure that the Courts are fully appraised of the broad range of rights claimed.

This is not to say that indigenous values are totally analogous to the various elements comprising the "bundle of rights" in every situation. Indeed, to suggest this would be misleading.

However, given that anglo-Australian law is attempting to accommodate an unfamiliar notion of 'caring for country' which is *sui generis*, it is clear that the impact upon indigenous values of impairment or extinguishment will require some interpretation. Indeed, for *just terms* to be achieved it may be that formal definition and recognition of native title rights in terms of anglo-Australian law will necessitate a degree of unpalatable transformation.

To do otherwise may see the marginalisation of native title rights and indigenous values when compensation is claimed and litigated. This insistence upon legalities and other contextual requirements is necessary if the outcome for indigenous people is to be just.

REFERENCES

Altman, Jon 1998. Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime. *Issues Paper no. 20, Land, Rights, Laws: Issues of Native Title.* Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Dias, R. & Hughes, G. 1957 *Jurisprudence* London: Butterworths

Foster, Robert. 1998 The Origin of the Protection of Aboriginal Rights in South Australia Pastoral Leases. *Issues Paper no. 20, Land, Rights, Laws: Issues of Native Title.* Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Garnett, M. 1998. Compensation for Extinguishment of Native Title. Paper presented at AIC Native Title Conference, Sheraton Hotel, Brisbane, 30th April, 1998.

Hann, C.M. 1998 Introduction: the embeddedness of property. In C.M. Hann (ed.) *Property relations: Renewing the anthropological tradition.* Cambridge: Cambridge University Press.

Hyam, Alan. 1995 *The Law Affecting Valuation of Land in Australia* 2nd ed. Sydney: The Law Book Company.

Lane, Marcus and Yarrow, David. 1998 "Development on Native Title Land – Integrating the Right to Negotiate with the Impact Assessment Process". (1998) 15(2) *EPLJ* p.147

Lavarch, Michael. 1997 *Compensation for Ancient Rights.* Paper delivered at "Working with the Native Title Act" AIC Conference 17 June 1997, Sheraton Hotel, Brisbane.

Lavarch, Michael & Riding, Allison. 1998 A New Way of Compensating: Maintenance of Culture through Agreement. *Issues Paper No.21, Land, Rights, Laws: Issues of Native Title.* Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Lofgren, N. & Kilduff, P. 1997 "Some just terms implications for native title". *Native Title News* (Butterworths) 3:5 (October 1997) pp.66-67.

McLennan, Amanda. 1998 "A Struggle between Owners? What is the Legal Status of an Interest in Cultural Property? " (1998) 15 (4) *EPLJ* p.241.

Merlan, Francesca. 1997. Fighting over country: four commonplaces in D .Smith & J. Findlayson. *Fighting over country: Anthropological Perspectives.* Research monograph No. 12, pp 1-13 Canberra: CAEPR, ANU.

Morphy, Howard. 1998, "The Use of Anthropology in the Reeves Report", 4 (18) *Indigenous Law Bulletin* p.13.

Mowbray, Martin. 1999 "Redefining Land Rights: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), 4 (18) *Indigenous Law Bulletin* p.9

Muir, Kado 1998. "The Earth has an Aboriginal Culture Inside: Recognising the cultural Value of Country", *Issues Paper no. 23, Land, Rights, Laws: Issues of Native Title.* Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Neate, Graeme 1998. Determining Compensation for Native Title: Legislative Issues and Practical Realities. Paper delivered at "Working with the Native Title Amendment Act 1998" AIC Conference 1 December 1998, Sheraton Hotel, Brisbane.

Rigsby, Bruce. 1997. Anthropologist, Indian title and the Indian Claims Commission: the California and Great Basin cases in D .Smith & J. Findlayson. *Fighting over country: Anthropological Perspectives.* Research monograph No. 12, pp 15-45. Canberra: CAEPR, ANU.

Sheehan, John 1998. "Native Title – an update: Towards a Methodology". (1998) 35(3) *Australian Property Journal* p.226.

Speedy, S. 1974 . *Property Investment.* Wellington: Butterworths.

Strelein, Lisa. 1999. "Fiction over Fact: Extinguishing Native Title in the Larrakia Case, 4 (18) *Indigenous Law Bulletin* 18.

Sutton, P. 1999. *Value and Compensation in a Native Title Context.* roneo: 1999 Native Title Summer School, University of Adelaide.

Whipple, RTM. 1997. "Assessing Compensation under the provisions of the Native Title Act 1993." (1997-98