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Aboriginal land rights and infrastructure compensation assessment on Crown and non-freehold lands in NSW[1]

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Abstract

Statutory Aboriginal land rights in Australia were antecedent legislation more than a quarter century prior to recognition of native title by the High Court in *Mabo & Ors v State of Queensland (1992)* 175 CLR 1 *(Mabo No. 2)*. Unsurprisingly a notable body literature now exists on native title (and even Indigenous cultural heritage protection), whilst on the topic of Aboriginal land rights limited scholarship exists. Consequently, the primary aim of this paper is to canvass the legislative framework for Aboriginal land claims in the Australian State of New South Wales (NSW). A second aim of the paper considers how the notion of (albeit only statutory) rights to Aboriginal lands does not align with established compensation law and practice. Finally, a sobering comparison is made with the Australian State of Western Australia solely absent a statutory Aboriginal land rights regime.

Introduction

Statutory Aboriginal land rights together with native title and Indigenous cultural heritage items and sites comprise the three types of Indigenous estates that may be encountered when assessments of compensation are undertaken arising from the compulsory acquisition of infrastructure property rights on Crown or non-freehold lands. Adding obfuscation, Indigenous cultural heritage items and sites can be present on privately held freehold land as well as Crown and non-freehold lands Irrespective, the acquisition of infrastructure property rights can include a surprising raft of uses such as high tension electricity powerline easements, high pressure gas transmission pipeline easements, water pipeline easements, physical access easements, or on occasion a multiple of such uses included in a single easement (or land).

Whilst native title was first recognised in *Mabo & Ors v State of Queensland (1992)* 175 CLR 1 *(Mabo No. 2)* and was partially codified by the *Native Title Act 1993* (Cth.), statutory Aboriginal land rights predate the recognition of native title. The Commonwealth government enacted

[1] An early draft of this paper initially entitled "Encountering Indigenous property rights in infrastructure compensation assessments in Crown and non-freehold lands" was presented 8 November 2024 by the first author to the Australian Property Institute NSW Regional Far South Coast Valuers Group meeting, Club Malua, Malua Bay, NSW. The NSW legislation and the infrastructure described are provided merely as an exemplar

the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.)[2] although, the earlier *Aboriginal Land Trusts Act 1966* (SA) was antecedent legislation by a decade albeit limited to the State of South Australia. Much later in New South Wales, the *Aboriginal Land Rights Act 1983* (NSW) was enacted (Morphett, 2024, p.432. The claims regime under that legislation will be canvassed in the following section of this paper before subsequently addressing the issue of compensation. In the penultimate section of this paper, a comparison is undertaken of the NSW legislation with the somewhat disconcerting outlier legislation, *Aboriginal Heritage Act 1972* (WA).

NSW Aboriginal land rights claim regime.

The *Aboriginal Land Rights Act 1983* (NSW) (ALRA) requires that any land claim must fall within the category of **claimable Crown lands** as defined by s.36(1). The criteria to be resolved to the reasonable satisfaction of the Minister is whether the specific Aboriginal land claim should be granted. For claims to be successful the criteria of s.36(1) must be met, namely the Crown Lands claimed:

> *(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901,*
> *(b) are not lawfully used or occupied,*
> *(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,*
> *(c) are not needed, nor likely to be needed, for an essential public purpose, and*
> *(d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and*
> *(e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands).*

Whilst a proposed public work might be reasonably construed as an "essential public purpose" as defined by *s.36(1)(c),* as at the date of lodgement of an Aboriginal land claim identification of the Crown land for an essential public purpose has to be evident for the claim to be refused by the Minister.

This criterion was affirmed by Craig J. in *Coffs Harbour and District Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2013] NSWLEC 216 (24 December 2013) (Coffs Harbour)* stating:

> … [t]*he relevant date for determining whether land is "claimable Crown land" is the date that the claim is lodged. This necessitates consideration of those facts as they existed* [at the date

[2] For a fulsome discussion on the history of the 1976 Commonwealth land rights legislation see: Altman, J. (1996) "Aboriginal Economic Development and Land Rights in the Northern Territory: Past Performance, Current Issues and Strategic Options." in *Land Rights-Past, Present and Future: Conference Papers* (16-17 August 1996) Canberra: Northern and Central Land Councils, 54-62.

> of claim lodgement] *demonstrating that the likely need for one or more of the identified public purposes was then shown to exist.*[3]

Further, Craig J. stated:

> *…Section 36(7) requires that if the Minister "fails to satisfy the Court that the lands or a part thereof are not or is not claimable Crown lands" an order for transfer of the lands or relevant parts to the Land Council is required to be made, Thus, the Minister bears the onus of establishing … that the claimed land is likely to be needed for one or more of the identified essential public purposes…*[4]

Whether the Crown land had been identified for an essential public purpose as defined at *s.36(1)(c)* was considered by the Court of Appeal in the *Minister Administering the Crown Lands Act v Deerrubbin Local Aboriginal Land Council (No.2)* [2001] NSWCA 28 wherein it was held that satisfying the 'likely' public need criteria must be:

> *…real not a remote chance.*[5]

Further, in *Coffs Harbour* the contention that mere zoning (or drafting of a planning instrument) under the *Environmental Planning and Assessment Act 1979* (NSW) would satisfy the identification of an "essential public purpose" was rejected by Craig J. stating that:

> …[such an instrument] *does not elevate those topics such that they demonstrate a likely need, in the sense of being a requirement for an essential public purpose. Desirability does not translate to such an essential purpose.*[6]

The notion of "public purpose" was canvassed in *Desane Properties Pty Limited v State of New South Wales* [2018] NSWSC 553 (*Desane*) where Hammerschlag J. stated that a public purpose must be:

> *…a purpose contemplated by the [legislation]*[7]

Also in *Desane*, Hammerschlag J. affirmed the specific enablement for compulsory acquisition of land for a public purpose:

> *…can also only be exercised for purposes of the [legislation]….All of the above considerations drive to the conclusion that the … [acquisition notice] would be invalid as having been given for an improper purpose.*[8]

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[3] *Coffs Harbour and District Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2013] NSWLEC 216 (24 December 2013) (*Coffs Harbour)* at [11].
[4] *Coffs Harbour* at [12].
[5] *Minister Administering the Crown Lands Act v Deerrubbin Local Aboriginal Land Council (No.2)* [2001] NSWCA 28 at [57].
[6] *Coffs Harbour* at [151].
[7] *Desane Properties Pty Limited v State of New South Wales* [2028] 553 at [304].
[8] *Desane at* [336-337].

Importantly, this specific enablement criterion was recently affirmed by the Court of Appeal in *Goldmate Property Luddenham No.1 Pty Ltd v Transport for New South Wales [2024] NSWCA 292,* Preston CJ LEC stating there are clear limits to the "width of the expression public purpose" such that:

> *The public purpose…cannot include a purpose for which an authority of the State other than the acquiring authority is authorised to acquire land by compulsory process, but instead acquire land only includes a purpose for which the acquiring authority is authorised to acquire land.* [9]

Nevertheless, if an Aboriginal land claim does fall within the category of "claimable Crown lands", the Minister must grant the claim and transfer the land in freehold title to the relevant claimant Aboriginal Land Council. However, the tardiness of the claim assessment process by the Minister and the subsequent transfer (if successful) to the relevant Aboriginal Land Council remains problematic (Sanders, 2015, p.23). In the next section of this paper, the complex background to compensation assessment is canvassed when Aboriginal land rights are encountered arising from the prospective compulsory acquisition of infrastructure property rights.

Background to compensation.

If an Aboriginal land claim has either been granted in freehold to an Aboriginal Land Council or is yet to be determined by the Minister, the prospective acquisition of infrastructure property rights raises the issue of the assessment of compensation. Surprisingly and yet unapologetically idiosyncratic, such compensation is not to be assessed pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991*, notwithstanding an assessment would necessarily be informed by the market value of the land[10] together with any additional uplift in value asserted by the relevant Aboriginal Land Council as either freehold landowner or as a potentially successful claimant.

Ordinarily the relevant Aboriginal Land Council may through negotiation agree to delete a specific parcel of land impacted by a proposed infrastructure construction from the overall land claim in return for an agreed compensation package[11]. Such arrangements can be expected to comprise primarily monetary compensation and possibly other co-payments such as ongoing site management and employment. It should be noted that an Aboriginal Land Council if a successful claimant (or a prospective successful claimant) would be granted not only freehold title to the Crown land, but also the transfer of mineral and natural resources as set out in *s.45 (2)(a)*[12]. As such freehold title granted under the *ALRA* is distinguished from other freehold interests granted under the *Real Property Act 1900* (NSW) because:

[9] *Goldmate Property Luddenham No.1 Pty Ltd v Transport for New South Wales [2024] NSWCA 292*, per Preston CJ at {92}.
[10] *S.55 (a) Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
[11] A voluntary deletion prior to a claim being determined under s.36(6) during negotiations with the Minister or their representative.
[12] Excludes gold, silver, coal and petroleum.

> …. *actual ownership of certain minerals is vested in the Aboriginal owners who have absolute powers to refuse exploration and mining or, if they consent, to receive royalties* (McCrae et al,2003, p.225).

Before proceeding further, it is useful to note that the market value of any land that has been granted in freehold title to an Aboriginal Land Council (or is likely to be successfully determined by the Minister in favour of a claimant) should arguably also reflect a prudent uplift in value of the land in recognition of the value of any minerals and natural resources in situ.

In addition, whilst *s.36(1)(d-e)* directs that the existence of native title determinations or claims will preclude an Aboriginal land claim, the presence of native title on surrounding (or nearby) lands would suggest that the broader area could be of significant interest to Indigenous people who speak for traditional country. The discontinuance or dismissal of native title claims is not in itself an indicator that native title has not survived in the area, but merely a reflection of the artificial, albeit real legal threshold of *s.36(1)(d-e)*. Further, the absence of evidence of continued or recent physical occupation of land is not a prerequisite for "connection with the land" and hence the survival of native title (Australian Law Reform Commission, 2014, p.118).

Further the existence of any 'Aboriginal Sites' registered under the Aboriginal Heritage Information Management System (AHIMS) of the *National Parks and Wildlife Act 1974* (NSW) is increasingly regarded as a tool providing an alignment between Indigenous heritage protection legislation and recognition of native title (Productivity Commission, 2023, p.160). A search of AHIMS is an important exercise to identify any registered sites within an appropriate radius of the proposed infrastructure construction.

The importance of physical evidence such as scarred or carved trees (known as dendroglyphs, Etheridge,1919) as support for Indigenous contentions of "connection to land" as previously mentioned, is described as follows:

> *The carvings were not merely decorative but were believed to be the tribal markings by which the deceased was known during life, with in addition, mention of any special accomplishments*. (Unger, 1995, p.9).

Sites containing individual objects such as rock carvings and dendroglyphs demand an understanding according to Packham, of the:

> *Aboriginal perspective {which] involves looking at an individual object as forming part of a greater whole, from a "landscape perspective". Measuring degrees of strength of significance is "counterintuitive and perhaps counterproductive" and a more integrated approach that protects cultural landscapes, or "Country", is required.* (Packham, 2014, p.83)

In support, Sneddon observes Indigenous claimants often draw attention to:

> *…impacts on the site's "sense of place", which was taken to extend beyond mere visual, aesthetic and auditory impacts to a sense of responsibility to the site and a desire to honour ancestors… the boundaries of a heritage place will not always be definable by reference solely to physical features. Good heritage management demands an exhaustive definition of the broader heritage values that a site embodies*. (Sneddon, 2012, p.221)

For example, along the route of the (then) proposed Manildra-Parkes 132KV electricity transmission line it was recorded in the Indigenous heritage assessment that:

> *…scarred trees may be found anywhere but especially where there are remnant stands of native trees.* (Ozark Environmental and Heritage Management Pty Ltd, 2009, p.19)

Usefully, as regard such sites the *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales* of the (former) Department of Environment, Climate Change and Water (DECCW) advises:

> *. …[s]tone artefacts can be found almost anywhere Aboriginal people camped or lived, particularly around occupation sites, in sand dunes, rock shelters, caves, on ridges and near watercourses.* (DECCW,2010, p.20)

The presence of such Indigenous in-situ artefactual material and sites of significance on Crown land (or private freehold) has raised the prospect of separate property rights in such material or sites. Literature (Godwin, 2001; Sheehan, 2010) suggests such property rights may not be vested in the land holder but in the holder of the statutory rights to the Indigenous material or site. Importantly, such rights are separate to those the Minister may grant to any claimant Aboriginal Land Council under the *ALRA*.

Indeed, the lodgement of any Aboriginal land claim is necessarily informed by the Preamble to the *ALRA* which acknowledges:

> *…land is of spiritual, social, cultural and economic importance to Aborigines.*

Highlighting the importance of land as acknowledged in the *ALRA*, the Indigenous Land Corporation observed in its 1996 NSW Regional Indigenous Land Strategy:

> *…[w]ith the enactment of the NSW Land Rights Act 1983 land held by the Aboriginal Land Trust was transferred to Aboriginal people. The Act also provided scope for communities to make claims to Crown land of significance…* (Indigenous Land Corporation, 1996, p.15)

Given the above background, the final section of this paper addresses how compensation might be assessed arising from the prospective acquisition of infrastructure property rights in circumstances when Aboriginal land rights are encountered.

Compensation assessment.

From the foregoing discussion, it can be discerned that Aboriginal land claims can fall within two broad categories, first those Crown lands claimed which are of intrinsic importance to the local traditional owners or second, Crown land which is available in broader recompense for the omnibus dispossession of traditional owners since colonisation. Obviously, some land claims can cover both categories being Crown land not needed for an essential public purpose whilst also having intrinsic Indigenous importance. Any incomplete Aboriginal land claims may be merely aspirational within the previously mentioned category of broad recompense for dispossession.

Confusingly, it is also recognised that the *ALRA* assigns membership of claimant Aboriginal Land Councils "on the basis of residence" whereas residency may not necessarily reflect "traditional ancestral identification with an area" (Sutton,1999, p.41). Additionally, Aboriginal land claims do not necessarily:

> *…require proof of any traditional association with the land. Rather, land must be 'claimable Crown lands'…* (Kelly & Behrendt, 2007, p.81)

Nevertheless, some Crown lands claimed can have intrinsic importance to the local traditional owners who may also be resident members of a claimant Aboriginal Land Council, Laing observing:

> *[i]n claiming land rights, Indigenous people are seeking a grant of title from the government of their state or territory. The granting of such land may, in fact, recognise traditional interests in the land such as heritage or culturally significant sites; or what was colloquially known as 'sacred sites'...*
> (Laing, 2007, p.54)

As mentioned earlier, determining the value of the freehold title does not need to comply with the definition of market value, *s.56(1) Land Acquisition (Just Terms Compensation) Act 1991*(NSW), as the acquisition cannot be compulsory in ordinary circumstances. However, the above definition of market value can be of assistance as it reflects established case law. In *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam [1939] AC 302 (Raja's case)* it was established that a willing seller of land might reasonably expect to gain a price from a willing purchaser which reflected its location with its potentialities. However, such interaction between purchaser and seller is still based within the concept in *Spencer v The Commonwealth (1907) 5 CLR 418* of the value of land agreed between a willing purchaser and willing seller notwithstanding any additional advantages that the land may have.

Further, the value of the freehold title ought not reflect any uplift in value which could be attributed to the proposed infrastructure works reflecting the principle in *Geita Sebea v Territory of Papua New Guinea* (1941) 67 CLR 544 that any increase in value attributable to the public work cannot be taken into account. In *Cedar Rapids Manufacturing & Power Co v Lacoste* [1914] AC 569; [1914-15] All ER Rep 571; 16 DLR 168 the principle was established that the value of land has to be assessed as if the prospect of the public work was not available. Further, Speedy states that:

> …[a]*ny increase or reduction in the value of the land taken as a result of the public work, or the prospect of such work is not to be taken into account in assessing the amount of compensation.* (Speedy,1978, p.17.)

In *El Boustani v The Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 323 it was observed that the question to be asked in assessing land as a site for proposed infrastructure is:

> *…what was the "potential" the land "had" at the time on the date of acquisition to be used for a purpose other than that for which the land was currently used on that date.*[13]

In addition, as previously mentioned an uplift in compensation above that of the market value could be required to reflect the worth of the land to the relevant Aboriginal Land Council given any intrinsic Indigenous values. Ordinarily, such uplift in compensation for Indigenous spiritual and cultural attachment is expressed as a graduation directly reflecting the robustness of the attachment (Sheehan and Turner, 2013). If Indigenous reliquary is identified on such land (such as the presence of dendroglyphs[14], or traditional habitation sites), anecdotal evidence suggests any graduation in worth above market value might often not be greater than say 20 percent. However, in some circumstances where the reliquary is rare and evidence exists of intrinsic local importance, this percentage graduation can obviously be significantly greater than 20 percent.

However, in the penultimate section of this paper, the absence of statutory Aboriginal land rights in Western Australia provides a brief sobering comparison with the *ALRA*.

[13] *El Boustani v The Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 323 at [127].
[14] As mentioned earlier, dendroglyphs are carved trees which are found primarily in western NSW associated either with Indigenous initiation ceremonies or with a burial of a celebrated clan person, see: State Library of New South Wales (2011) Carved *Trees: Aboriginal cultures of western NSW*. Sydney, April.

Absence of statutory land rights in Western Australia.

While five Australian States and the two Territories all "have some form of land rights legislation" (New South Wales Department of Aboriginal Affairs 2000, p. 47), Western Australia remains the enduring outlier. Unlike the other jurisdictions, the Western Australian framework relies not on a land rights statute but upon a cluster of legislative instruments concerned primarily with heritage and community regulation, notably the Aboriginal Affairs Planning Authority Act 1972 (WA), the Aboriginal Heritage Act 1972 (WA), and the Aboriginal Communities Act 1979 (WA).

The principal statute, the Aboriginal Heritage Act 1972 (WA) (AHA), came into force on 15 December 1972 and was described[15] contemporaneously as a progressive legislative initiative—predating the High Court of Australia's recognition of native title by two decades. Its early emphasis on "tradition, culture and heritage" marked a departure from the merely archaeological orientation of earlier twentieth-century statutes[1617]. Yet over time the Act's operation proved paradoxical: a law framed with humane intent became, in practice, a mechanism through which disturbance and destruction of both tangible and intangible Aboriginal cultural heritage repeatedly occurred. The Chamber of Minerals and Energy of Western Australia conceded[18] that the legislation, having long pre-dated native title, now demanded modernization, "*… the current WA legislation pre-dates the recognition of Native Title further highlighting the need for modernisation*".

The gravity of this legislative obsolescence was laid bare following the Juukan Gorge catastrophe—the 2020 destruction of a rock shelter dating back some 46,000 years. In the ensuing public outcry the AHA was replaced by the Aboriginal Cultural Heritage Act 2021 (WA). Yet, remarkably, that reform survived scarcely five weeks before repeal[19] amid landowner backlash, leading to reinstatement of the 1972 Act. The episode starkly illustrated the continuing fragility of Aboriginal heritage protection in Western Australia and the political volatility surrounding Indigenous land recognition.

Historically, in the absence of a statutory land rights regime, the AHA provided the only limited statutory recognition of Aboriginal interests in land—restricted to discrete sites rather than encompassing territorial title. The 1980 development of the Argyle diamond mine exemplified this deficiency. The mine's proponents entered into a so-called good-neighbour

[15] Joint Standing Committee on Northern Australia 2021, *A Way Forward : Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, eBook, viewed 5 April 2025, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge>.

[16] AIATSIS, *Submission to A Way Forward : Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia 57.1A*, p. 259

[17] Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', p. 1, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA

[18] Chamber of Minerals and Energy of Western Australia (CME), *Submission to A Way Forward : Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* 83.1, p. 2.

[19] WALW - Aboriginal Cultural Heritage Act 2021 - All Versions

policy agreement with Aboriginal signatories under the auspices of the Western Australian Museum, then administrator of the AHA. As Connell and Howitt[20] observed, the legislation thereby offered "*…the only statutory recognition in Western Australia of Aboriginal rights in land—albeit rights limited to particular sites.*" Yet this accommodation was fraught. The Warmun community rejected the agreement as unrepresentative, while Premier Sir Charles Court feared that its terms, being *"… so specific that it must be interpreted as compensation and payments in lieu of royalty"*—thus setting a precedent for recognising Aboriginal land rights. Soon afterwards, the Act was amended to remove heritage protection over the mine, an omission which Connell and Howitt at p.146 concluded left Aboriginal people at Argyle having "lost both the battle and the war," with culturally significant sites damaged and aspirations for statutory land recognition denied

The Seaman Report[21] (Report of the Aboriginal Land Inquiry, 1984) which according to Snelling[22] (1984, p.18) recommended that "… land claims to be held under inalienable freehold title" and at page 20 ".. the power to veto a mine development. The Government response (Hunt, 1984, p.58), however, was to contemplate only a "protective and secure" [23] form of lesser title, thereby avoiding any true proprietary recognition.

In this retreat one can discern the political anxiety that statutory land rights—by conferring economic agency—might unsettle the State's extractive economy. Pierluigi explains with somewhat confronting frankness that:

The history of Aboriginal land rights in Western Australia is based on the denial of Aboriginal ownership, the systematic taking of land and encumbering Aborigines from the freedom to use and occupy the land in accordance with their traditions.
There are currently no proposals for Aboriginal land rights in WA. Instead, the State Government's policy provides three forms of tenure: a system of 99-year leases over existing Aboriginal Reserve lands; excisions of small plots of land on pastoral leases; and 50- or 25-year special purpose leases.
Further:
There is no provision for inalienable freehold title of Aboriginal land in this State. The best arrangements available are the 99-year leases over Aboriginal reserve land which give limited control to local people. (Pierluigi, (1991), p.1)

More recently, Cardaci notes that "the interests of the mining industry and the State remain intertwined and focused on resource-based development" to the detriment of Indigenous connection with land. (2025, p.192). Professor Alex Gardner also supports this observation noting that "there is a lingering pioneering attitude to the exploitation of natural resources and the environment; that Western Australia is the "resources state." (2025, p.305)

[20] Connell, J & Howitt, R 1991, *Mining and indigenous peoples in Australasia*, 1st edn, Sydney University Press, Sydney, Australia.
[21] Seaman, P., 1984. Aboriginal Land Inquiry (W.A.). 1984, The Aboriginal Land Inquiry : report The Inquiry [Perth, W.A.
[22] Snelling, J., 1984. The Aboriginal Land Inquiry, Western Australia. *AMPLA Bull.*, *3*, p.18.
[23] Hunt, M., 1984. Aboriginal Land Rights in Western Australia. *AMPLA Bull.*, *3*, p.58

Nevertheless, Western Australia has gradually come to acknowledge native title within the federal statutory framework. Contemporary determinations, such as the *Nyalpa Pirniku* claim[24] in the Goldfields–Esperance region, signal growing juridical acceptance of Indigenous connection to land, albeit through Commonwealth rather than State initiative

Yet native title remains conceptually distinct from land rights: it recognises pre-existing communal law and custom but does not, of itself, confer the inalienable freehold that statutory regimes in other jurisdictions have delivered.

From a valuation and philosophical standpoint, the Western Australian position exposes a persistent duality between mineral economy and moral economy. The State's reliance on resource extraction sustains a reluctance to concede Indigenous proprietary authority that might constrain exploration and production. Hence, the absence of statutory land rights functions not merely as a legislative omission but as a reflection of a deeper epistemological divide—between a settler polity grounded in utilitarian economics and an Indigenous jurisprudence centred upon spiritual responsibility to Country. In this light, Western Australia's policy stance can be read less as an administrative anomaly than as a continuing denial of equivalence between economic and cultural value, leaving the task of reconciliation once again to others, surprisingly such as the valuation profession and the courts.

Concluding remarks

This paper has pursued two closely related aims: first, to examine the legislative framework governing Aboriginal land rights in New South Wales and, second, to explore how such statutory rights intersect—often uneasily—with established principles of compensation assessment for infrastructure acquisition on Crown and non-freehold lands.

In addressing the first aim, the discussion traced the operation of the *Aboriginal Land Rights Act 1983* (NSW) and the jurisprudence interpreting its key provision, *s*.36(1). Through cases such as *Coffs Harbour and District LALC v Minister Administering the Crown Lands Act* and *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW*, it was shown that the Act embeds a clear and structured test for determining claimable Crown land, and that this framework continues to define the boundaries of statutory Aboriginal property in the State. The analysis demonstrated that the Act, though statutory and limited, provides an enduring mechanism for recognising Aboriginal interests in land independent of native title—an achievement still absent in jurisdictions such as Western Australia.

In relation to the second aim, the paper examined how this statutory land rights engage with the practice of valuation and the assessment of compensation when infrastructure property rights are acquired. It was shown that compensation in such contexts cannot be assessed directly under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*. Indeed, more

[24] National Native Title Register, WCD2023/002 - Nyalpa Pirniku

recently (albeit in the native title context) the Full Federal Court in *Northern Territory of Australia v Griffiths* (2017) 256 FCR 478 was moved to recognise the futility of compensation assessment pursuant to such legislative constraints given:

> *Aboriginal rights and interests in land have dimensions remote from the notions enshrined in Australian land law.*[25]

More recently in strong support (again in the broad native title context), Edelman J. in *Commonwealth of Australia v Yunupingu* [2025] HCA 6 contrasted how very different" the norms underlying traditional laws and customs "were from "common law concepts of property".[26] Yet holders of Indigenous estates (whether native title or Aboriginal land rights) are no strangers to societal transparency concerns. The opacity of such estates within the measured confines of Australian land law has provoked intensive scrutiny amid speculation that holders might gain advantages against holders of non-Indigenous estates.

Yet the underlying principles of market value, potentiality, and exclusion of public-work enhancement remain instructive. Moreover, it was argued that valuation must incorporate an additional dimension: the cultural and spiritual attachment that gives Aboriginal land its distinctive meaning and worth. This dimension, while not reducible to market metrics, is nonetheless capable of reasoned estimation within the profession's established frameworks.

The comparative analysis of Western Australia underscored the consequences of a jurisdiction without statutory land rights, where Aboriginal interests remain confined to heritage protection and native title determinations. The WA experience highlights by contrast the relative maturity of the NSW model and affirms the need for coherent integration of Indigenous rights within the legal and valuation systems that govern land and infrastructure.

Taken together, these analyses confirm that statutory Aboriginal land rights in NSW occupy a unique and necessary position between native title and conventional property law. They generate practical and conceptual challenges for valuers and lawyers alike, but they also offer a pathway for reconciling market-based assessment with recognition of Indigenous connection to land. The task for future policy and practice is to continue refining that reconciliation—to ensure that the processes of valuation and compensation fully reflect both the legal integrity of Aboriginal land rights and the cultural integrity of the lands themselves.

In conclusion, all that can be said is that the task given to the compensation assessor when encountering Indigenous laws and customs, especially spiritual and cultural attachment, requires:

> *..deductive argument resting on social, anthropological historical and ethical premises*. (Small, 2006, p.363)

[25] *Griffiths* at [144]
[26] *Commonwealth of Australia v Yunupingu* [2025] HCA 6 (12 March 2025) per Edelman J. at {290].

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