

10

Compensation

Compensation and native title

The *Native Title Act* contemplated that the recognition of Indigenous rights to land might also require the payment of compensation where actions that occurred after the introduction of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975 by the Commonwealth, states or territories had either impaired or extinguished native title. Consequently, the *Native Title Act* ‘provides for the Federal Court to make determinations of native title and compensation’ (*Native Title Act* 4(7)(a)). The term ‘compensation’ occurs in the ‘Preamble’ to the Act several times, being presented in association with the ‘claims to native title’.¹ Listed as one of the topics covered by the Act is ‘compensation for acts affecting native title’ (*Native Title Act* 4(2)(b)), while a whole Division of the Act (Division 5) is dedicated to this matter. The compensation is to be calculated according to ‘just terms for any loss, diminution, impairment or other effect of the act on their native title rights and interests’ (section 51(1)). The payment of compensation is subject to qualifications relating to compulsory acquisitions (*Compulsory Acquisition Act* (defined in section 253)), partial extinguishment (sections 51(3), 240) and single payments (section 49). This is complex legislation and well beyond my expertise to

1 It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title *or compensation*’ (*Native Title Act 1993*, Preamble, 3. Emphasis added).

discuss further, although reviews of this aspect of the *Native Title Act*, as well as how the compensation issue might be addressed by the Federal Court, are not hard to find in the available literature.²

Given the relative prominence that compensation receives in the *Native Title Act* it is perhaps surprising that the issue of compensation has received little public or scholarly attention. After an initial period during which the matter was considered in an abstract and largely theoretical manner,³ the subject subsequently received scant attention while the scholarly debate and commentary focused on the principal business of the Federal Court in relation to the *Native Title Act*: the determination of applications for the recognition of native title. Compensation could only be awarded if there was evidence of an impairment or extinguishment of native title as a result of post-1975 acts. Claims for compensation are, then, post-native title actions so applications can only be made where native title can be shown to exist, a factor likely to limit the claims for compensation. The Yulara claim was a case in point where a failure to gain recognition of native title meant that the claim for compensation was dismissed.⁴ At the time of writing (March 2018), claims for compensation were thin on the ground. The National Native Title Tribunal (NNTT) website, 'Native Title Applications, Registration Decisions and Determinations', revealed there to have been only 41 compensation applications⁵ dating from February 1994, of which all but six had either been withdrawn, dismissed or discontinued and four determined.⁶ For both the Tjajuwara Unmurru Compensation Application and the Barkandji (Paakantyi) People #11, it was determined that native title did not exist, rendering the applicants ineligible for compensation. The terms of the De Rose Hill settlement were agreed in mediation and have not been publicly disclosed. However, the case set the precedent for the awarding of compensation under the terms of the *Native Title Act*.⁷ A recent attempt to gain compensation

2 See, for example, C. Humphry 1998, 'Compensation for native title: the theory and the reality', *E Law*, 5.1 (March 1998). www.murdoch.edu.au/elaw/indices/issue/v5n1.html accessed 23 December 2016. A short annotated reference list on 'native title compensation' was prepared by L. Wiseman in 2009, which contains some helpful references and comments (see L. Wiseman 2009, 'Native title compensation annotated reference list', Native Title Research Unit, AIATSIS 2009).

3 See, for example, Burke 2002.

4 *Jango v Northern Territory of Australia* [2006] FCA 318; 152 (31 March 2006) (Sackville J). Summary, 11 and 12.

5 www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx, accessed 15 March 2018.

6 Tjajuwara Unmurru Compensation Application, De Rose Hill Compensation Application, Town of Timber Creek and the Barkandji (Paakantyi) People #11.

7 See Whittaker and Bunker 2013, for a brief review.

in relation to the Gibson Desert Nature Reserve (WAD86/2012) was discontinued when the Federal Court found that petroleum tenures from the 1920s had extinguished exclusive possession rights. This significantly affected the state's compensation liability, and the claim group decided to discontinue the application in May 2016.⁸

Timber Creek, NT

In August 2016, the Federal Court handed down the first assessment of compensation in *Griffiths v Northern Territory of Australia* (Timber Creek).⁹ Mansfield J ordered payment of \$3.3 million to the native title holders (the Ngaliwurru and Nungali peoples). Of this some \$512,000 was awarded for economic loss, \$1.488 million was paid for interest that would otherwise have accrued and \$1.3 million was paid for non-economic loss. The payment of \$1.3 million for non-economic loss was in response to the claim for compensation for 'the diminution or disruption in traditional attachment to country and the loss of rights to live on, and gain spiritual and material sustenance from, the land' (Timber Creek [46]). In his judgment the trial judge, Mansfield J, identified the non-economic loss by the legal term 'solatium' following 'the term used by the Territory' (Timber Creek [59]).¹⁰ The decision was appealed to the Full Federal Court which handed down its decision in July 2017. The appeal court dismissed most grounds of appeal (*Northern Territory of Australia v Griffiths*).¹¹ However, the Full Bench did find that the discount on compensation for economic loss should have been 65 per cent of the freehold value (rather than the 80 per cent provided by Justice Mansfield). The court also did not uphold some damages awarded for invalid future acts. Significantly, however, the Full Federal Court endorsed Mansfield's decision to award compensation for non-economic loss and his 'intuitive' approach for determining the amount to be paid reflecting 'just terms'

8 See www.centraldesert.org.au/native-title-item/gibson-desert/, accessed 24 December 2016.

9 *Griffiths v Northern Territory of Australia* (No. 3) [2016] FCA 900 (Mansfield J). See McGrath 2017 for a discussion of this case.

10 His Honour was of the view that, 'It is also appropriate to adopt the description "solatium" to describe the compensation component which represents the loss or diminution of connection or traditional attachment to the land. To the extent to which the LAA [*Lands Acquisition Act* (NT)] principles apply, both the Territory and the Commonwealth accepted that adaptation of that principle would accommodate an appropriate allowance for solatium. The Applicant was also content with using that expression. In my view, it provides a suitable focus for ensuring also that there is no overlap of the compensation awarded for the economic loss discussed above, and for this element of the compensation to which the Claim Group is entitled.' Timber Creek [300].

11 *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 (Timber Creek appeal).

(Timber Creek appeal [394–396] and [420]). The judgements, as cited, are in the public domain at the time of writing. In February 2018, the High Court of Australia granted leave to the Commonwealth of Australia, the Northern Territory of Australia and the Northern Land Council (on behalf of the native title holders) to appeal the decision of the Full Court of the Federal Court of Australia ([2017] FCAFC 106). The appeal was expected to be heard in June or August 2018. Despite the appeal, the compensation claim and the ensuing legal process provide some useful indication of the role that anthropology might have in applications made to the Federal Court of this sort. That stated, it is important to bear in mind that this is an evolving and largely unresolved area of legal action, so the comments that follow may need to be revised in the light of the developing jurisprudence.

An initial but important observation that can be made in relation to the Timber Creek claim is that the majority of actions for which compensation might be sought are likely not to be the province of the anthropologist. Principal amongst these is the calculation of the value (in dollar terms) of land lost to native title. This seems clearly to be the province of land valuers and the trial judge devoted some time to a consideration of the experts and their opinions provided to the court in this regard (Timber Creek [393–434]). The applicant did employ an economic anthropologist (Professor Jon Altman) but his Honour stated that it was his ‘intention to exclude from this category [‘Consideration: non-economic loss’] of damages any element of economic loss’. Consequently, his Honour ‘preferred to place no particular weight on [Professor Altman’s] evidence for this purpose’ (Timber Creek [367]).

It is possible that economic anthropology might be brought to bear on the question as to whether customary activity (such as hunting and gathering) should be factored in to calculated land values. However, in this case it would seem his Honour decided that such value (should it be material) was factored in to the ‘less tangible cultural losses’ and was understood to be a part of the claimants’ ‘attachment to country’ rather than having any economic value ascribed to it (e.g. Timber Creek [364]).

With respect to compensation, economic loss is understood to include the quantum of interest that would have accrued on the sum had it been paid at the time the loss was suffered. An important issue here is whether the interest that might be paid is to be calculated according to simple or compound bases, the former being favoured by his Honour (Timber Creek [279]). This, again, is not a matter for social anthropology, although

it was a matter that substantially occupied the attention of the court and the judgment.¹² In these considerations I observe that case law seems to have informed the judgment rather than expert opinion (cf. *Timber Creek* [285]).

‘Intangible loss’

In the *Timber Creek* decision, Mansfield J sets out some legal principles for an entitlement to compensation paid as money despite the fact that there is no market value for what has been lost or diminished. His Honour wrote:

313. Nevertheless, it is important to recognise, as the parties accept, that the law provides an entitlement to compensation in money value even where there is no market for what is lost and where the value to the dispossessed holder rests on non-financial considerations: see e.g. *Wurridjal* at [337] per Heydon J. In *Crampton v Nugawela* (1996) 41 NSWLR 176, Mahoney A-CJ observed that:

‘There is no yardstick for measuring these matters. Value may be determined by a market: there is no market for this. There is no generally accepted or perceptible level of awards, made by juries or by judges, which can be isolated and which can indicate the “ongoing rate” or judicial consensus on these matters. And there is, of course, no statutory or other basis. In the end, damages for distress and anguish are the result of a social judgment, made by the jury and monitored by appellate courts, of what, in the given community at the given time, is an appropriate award or, perhaps, solatium for what has been done.’

314. Albeit in the context of an appeal from a significant award of damages in a defamation claim, those observations are nevertheless apt to the present circumstances.¹³

His Honour was of the view that the court needed to consider a number of issues that might be relevant to assessing the quantum of the amount to be awarded. These included questions of causation and the nature of the claimed loss. This claimed loss might include the spiritual significance of places within traditional country, the effects of the compensable acts, the nature and extent of intangible loss and the extent of traditional country

¹² *Timber Creek* [246–289].

¹³ *ibid.*, [313–314].

affected (Timber Creek [315]). Also identified were such things as “loss of amenities” or “pain and suffering” or reputational damage’ (Timber Creek [318]). In this regard there appears to have been common ground between the parties. Payment of compensation for non-economic loss had been agreed in principle (Timber Creek [316]), as was the view that it should be assessed according to ‘traditional laws and customs acknowledged and observed by the Claim Group’. There was also agreement that it be paid to the group as a whole¹⁴ (Timber Creek [317]). In terms of making an assessment of compensation to be based on these and related issues, his Honour was of the view that ‘evidence about the relationship with country and the effect of acts on that will be paramount’ (Timber Creek [318]).

In this regard, his Honour was strongly of the view that it was the totality of the land that had to be considered, not specific parcels within it as dissociated entities. He wrote:

The direct evidence of Alan Griffiths,¹⁵ and the anthropological opinion evidence, does not depend on any proposition that some parts of Aboriginal landscape are more important than others. As Dr Palmer¹⁶ observed, the 2002 paper of Professor Sansom¹⁷ is in relation to the damage of loss, and ‘the hurt feelings of a hunting ground, of a generalised area, a resource lost.’ The broad expanse of the *kulungra* area¹⁸ is a similar example in this case. As Professor Sansom accepted, the kind of contention advanced by the Territory and the Commonwealth that there can be a significant area of landscape that is unimportant to Aboriginal people, or that there could be an area that is devoid of spirituality, defies logic in the Aboriginal tradition.¹⁹

The trial judge listed three ‘particular considerations’ that he regarded as being of significance to the assessment of ‘the appropriate amount of compensation’ (Timber Creek [378]). The first was the construction of water tanks servicing the town water supply (‘the *kulungra* area’). They were built on the path of a Dreaming track, action which his Honour found had ‘caused clearly identified distress and concern’ (Timber Creek

14 With the qualification in parenthesis, ‘with the apportionment or distribution as between members being an intramural matter’. Timber Creek [316].

15 Footnote added: A senior claimant and native title holder of the area of the Timber Creek town site.

16 Footnote added: Expert anthropologist commissioned by the applicant.

17 Footnote added: Expert anthropologist commissioned by the first respondent. The article is Sansom 2002.

18 Footnote added: The area of Timber Creek where water tanks had been built, so damaging the track of the Dingo Dreaming (Timber Creek [352]).

19 Timber Creek [370].

[378]). The second were acts that had affected the claimants' ability to 'conduct ceremonial and spiritual activities' not solely in relation to parcels of land that had been alienated but on adjoining areas as well (Timber Creek [380]). Such a view is consistent with the finding that 'native title is a feature of a wider area of country than any of the particular and individual acts now under consideration' (Timber Creek [380]). Thirdly, his Honour found that compensable acts had 'to some degree' reduced the area over which the claimants could exercise their native title rights:

each in an imprecise way has adversely affected the spiritual connection with the particular allotments, and more generally, which the Claim Group have with their country. Again, the point should be made that that connection is not divisible geographically, but each chipping away of the geographical area necessarily must have some incremental detriment to the enjoyment of the native title rights over the entire area. Associated with that collective diminution of the cultural and spiritual connection with land, is the sense of failed responsibility for the obligation, under the traditional laws and customs, to have cared for and looked after that land. Again, that is not geographic specific, save for the more important sites, but it is a sentiment which was quite obvious from the evidence led from the members of the Claim Group. That evidence, understandably, was more focused on the area of the town water tanks, as that is clearly a more significant area, and in other areas in the vicinity of Timber Creek which were also of significant importance.²⁰

Accepting that the jurisprudence is still developing, these 'particular considerations' may be helpful when thinking about the sort of anthropology that might be embarked upon in future research that seeks to assist the court in determinations of native title compensation. His Honour's assessment of these specific considerations in terms of the quantum of the compensation for non-economic loss was founded on the evidence of the case as well as on the adoption of findings of prior native title judgments (Timber Creek [328] to [367]). The detail is beyond the scope of this review but is available for further analysis in the judgment, which is a matter of public record. The evidence to the court comprised complex ethnographic data. It was the product of claimant testimony as well as of the expert views of the anthropologists for the applicant (Palmer and Asche) and that of Sansom for the Territory. In summary, his Honour had regard to the particular and deeply spiritual relationship between the claimants and their countryside, understanding the latter comprised a totality of country rather than component parcels

²⁰ *ibid.*, [381].

of land that were the subject of compensable acts. This relationship and concomitant rights to the country also involved the exercise of a duty to protect and safeguard the integrity of that country, including through the conduct of (in this instance) restricted male ritual. Land alienated through European settlement and development rendered this duty impossible to acquit, resulting in guilt, pain, suffering and emotional distress. It also resulted in social opprobrium and even negative spiritual repercussions (Timber Creek [328–367]).

It was in the context of these understandings that the special spiritual relationship between Aboriginal people and their country had to be evaluated. This is the determinant of the anguish, emotional pain and suffering as well as the alienation of spiritually significant places that are relevant to the assessment of compensation (Timber Creek [376–377]). His Honour conceded that, given these considerations, ‘the assessment of the appropriate compensation is a most complex one’ (Timber Creek [374]).

Anthropological research and compensation claims

The research undertaken should always respond to the brief issued to the anthropologist. As the jurisprudence changes, the issues that the lawyers may consider will be helpful to the prosecution of their application will undoubtedly change. However, reviewing the judgment delivered in relation to non-economic compensation discussed above, I think it likely that some elements may remain constant. Compensation for non-economic loss is about emotional pain and suffering (‘damages for distress and anguish’). The anthropologist’s job is to provide understandings of how the pain and suffering might be manifest as well as how such emotional distress develops from the alienation of land – that is, the past acts post-1975 in the native title context. An understanding of emotional distress will depend upon a thorough appreciation of how the claimants relate to their country in terms of spiritual attachment. A concomitant of this relationship are the tenets of the system of proprietary rights to country and the duties in this regard that were required (under traditional law and custom) of the native title holders. It is the failure (or inability) to acquit these duties and responsibilities that lie at the heart of the emotional distress that is the basis for the calculation of the solatium. This analysis yields three research questions that are fundamental to the case law as it

now stands. The first relates to the spiritual relationship between the native title holders and their country. The second relates to what might be termed broadly the management of country, including the exercise of duties and responsibilities. The third relates to emotional distress and suffering. In what follows I consider each of these in reverse order, commencing with sentiment and suffering and ending with spiritual attachment.

Sentiment

It is helpful when developing an understanding of another culture to explore concepts expressed in the language of that culture. This may provide an insight as to how those with whom we work think and feel. Given the importance of emotions to the assessment of compensation, such research into ‘emic’ categorisation can be considered as fundamental, which is why I have considered it first. When I commenced research on the Timber Creek compensation application in 2012 with Wendy Asche, I identified words in the local language (Ngaliwuru) that captured what we considered might be key concepts relevant to loss or alienation of country and damage to it. In Ngaliwuru *paark* expresses the idea that something is ‘broken’, and can be used of a pencil or a human leg or of the countryside itself. Generally, *paark* conveys the idea that the damage is not remediable – that is, something that is *paark* could probably not be fixed. *Maring* was used of something that was damaged or ‘buggered up’, having the sense of being ‘spoilt’, and can be used in conjunction with the word for country (*yakpali*) to mean ‘spoiling the country’. Intense personal feelings that accompany an act of spoiling are termed *puru maring*. The word *puru* means ‘insides’, ‘guts’ but not specifically the stomach. The phrase then carries the general meaning of ‘broken up or spoiled inside’, which is presumably rather like English ‘broken hearted’ or perhaps better ‘churned up inside’ or ‘gut wrenching’.²¹ Similar phrases are found in other languages: *tuni kura*, for example, in Western Desert languages literally translates to ‘bad stomach’ but is a term used to express deep-felt emotional distress and upset, even anger. We were then able to explore and explain how the claimants’ responses to the loss of land in the determination area had adversely affected their feelings and their emotions. This gave the necessary background and explanation as to why claimants were distressed as a result of those actions for which they sought compensation. This included concepts of pain, suffering and reputational

21 See Timber Creek [350] for evidence adduced on this.

damage, particularly as a result of an inability to perform a duty. In this way we sought to comprehend how the claimants experienced these emotions in terms of their own language and culture.

Not all research relating to claims for compensation will be conducted in areas where the native title holders have fluency in their own language. In such cases terms from Aboriginal English or even standard English will need to be explored. In my experience words common to standard English may be used by native title holders in a very particular way. Moreover, the relationship between certain actions taken with respect to country and those who regard it as their ancestral country is quite distinct and should be explored fully, elaborated and thoroughly comprehended. There should be no diminishment simply because the words used to express the emotions are (apparently) words of standard English.

Duty and the management of country

This should be more familiar ground and, given that a claim for compensation follows the native title application, data relating to these issues should have been included in the expert anthropological report. If the application went to trial (as had been the case at Timber Creek) these matters should have been addressed in evidence and the judgments of the court. While these are the obvious sources for these data, good fieldwork should build on these materials and so affirm the vitality of the system in the context of the compensation claim. I have discussed the presentation of materials relating to the exercise of duty and the management of country elsewhere in this book (see Chapter 3). At Timber Creek and elsewhere where I have worked the collection of words from the local language are keen aids to exegesis. Thus words for ‘countryman’ or ‘traditional owner’ (*yakpalimululu*), ‘stranger’ (*miyakari*), speaking to the spirits of the country (‘calling out to country’ or *pampaya*), the concept of dangerous country (*mutkiyan yakpali*) are helpful to the ensuing analysis. The ritual of introducing strangers to country to ensure the safety and proper conduct of visitors may also have a place here. In the Timber Creek area the ritual is known as ‘head wetting’ or *mulyarp* in the local language.

What is, then, needed are data that show that, according to traditional laws and customs, those with proprietary rights to country are considered to hold not only rights to their country, but to be required to exercise a duty to others with respect to that country. Inability to perform that duty is a breach of customary law and brings with it sanctions, social opprobrium, reproach and fear of supernatural consequences both for

the visitor and owner. The Timber Creek judgment would also appear to indicate that the size of the country lost, the extent of the damage or impairment and the degree to which ‘amenities’ had been lost were relevant to the assessment of compensation. This probably means that the research should be undertaken with at least some basic knowledge of the location and extent of the potentially compensable land – information that was not made available to us during the Timber Creek research.²²

Generally in Aboriginal Australia, duties to be exercised in relation to country include looking after the countryside to ensure its physical safety and so its spiritual integrity. Good research in relation to this aspect of customary land management will reveal that this duty extends well beyond the actual physical policing of the countryside and attempts to prevent unauthorised access and subsequent damage that is deemed to be contrary to what is acceptable, according to customary law. Much ritual activity, including the spiritual maintenance of certain objects through performance and song, is believed to sustain and enliven the countryside and so is an important part of a countryperson’s duty to their land. An inability to perform these rituals could, then, be understood to result in emotional stress to those who feel it their duty to do so. These are matters that can rightly be examined in anthropological research undertaken with respect to a claim for compensation.

Spiritual assonance and total country

The third topic that can be identified from the Timber Creek judgment is also one that should find plenty of support from the prior anthropological native title literature, court transcripts and judgments. It is also a subject that I have discussed in terms of research approaches in an earlier chapter of this book (see Chapter 5). Although the actual areas of land that may be subject to claims for compensation will vary on a case by case basis, I think it likely that other applications will, like Timber Creek, include ‘parcels’ of land. In this case portions of the native title application area were excluded from the determination because they had been alienated. This raised the legal issue as to whether compensation should only be accorded in relation to the specific bounded parcels – an approach which Mansfield J rejected, as I have noted above.²³ It will,

22 Timber Creek [349].

23 His Honour found that ‘a parcel-by-parcel approach to the assessment of those consequences is not appropriate, having regard to the fact that many of the acts in issue occurred some 30 or so years ago. They were incremental and cumulative’ (Timber Creek [324]).

then, be an important consideration for the anthropological research to provide a full and comprehensive account of the relationship to country in terms of spiritual correspondence to the entirety of country. Mansfield J commented that the idea that land could be segmented and that parts were 'devoid of spirituality, defies logic in the Aboriginal tradition' (Timber Creek [370]). This finding was based on the evidence provided to the court. It is a matter that requires close attention in any anthropological research conducted in relation to a claim for compensation in the native title context.

Understanding our role

The awarding of an amount as compensation for the loss of native title rights and the emotional as well as financial consequences of this loss is a function of the *Native Title Act*. There is no necessity that it be shown to have parallels or correspondence with customary dealings within Australian Aboriginal or Torres Strait Islander societies. While the trial judge in Timber Creek made his assessment of compensation payable for non-economic loss according to customary considerations, straight economic loss (the value of the alienated blocks and loss of simple interest) are not matters that require any understanding of customary systems, beliefs, practices and normative systems. This necessarily means that there is much activity in making a compensation claim that is of no concern to the anthropologist and he or she will have no role to play in the legal agitation of these matters. It also means that the process of laying claim to compensation is even more centrally situated within the mainstream legal process than an application for recognition of native title.

These things admitted, the court has, to date at least, shown itself ready to accept that customary values and principles are central to an assessment of the compensation that should be paid as solatium for non-economic loss. Understanding this loss in terms that reflect the thoughts and feelings, hopes and fears of the claimants is very much the job of the anthropologist. The compass of the inquiry should, however, be constrained by the relevance the ethnographic data and accompanying exegeses can have to the legal matters likely to be of assistance to the court. As the jurisprudence develops further these issues may expand or contract. This is very much a question then of 'watch this space'.