



The compensation catapult

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ABSTRACT

Australian property law has steadily evolved to facilitate the recognition of new or previously unrecognised property rights. Concurrently, modern property rights have become increasingly complex. This evolution of property rights has had fundamental implications when addressing compensation for the impairment or acquisition of land (Indigenous or non-Indigenous) by government. Indeed as understanding of property rights advances, the ambit of compensation is catapulted into uncharted waters. This paper highlights the difficulty of containing property rights to a particular set of descriptors and the effect this has on compensation claims. Further, the current methodology for processing compensation claims exposes a disconnect between the public and the New South Wales (NSW) government. Finally, through an exploration of specific examples of compensation for private property rights, this paper concludes that there is need for a workable consensus on good, bad and fair compensation.

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Introduction

Eric Cline (2017) in his book *Three Stones Make a Wall: The Story of Archaeology* observes: “Many people...cannot accept the fact that mere humans might have come up with great innovations such as the domestication of plants and animals or could have built great architectural masterpieces such as the pyramids or the Sphinx all on their own.” (p. xvi)

As an archaeologist, Cline informs us that the record reveals “mere humans” have clearly been innovative in antiquity in agriculture, animal husbandry, and architecture and construction technology. Unsurprisingly, similar human innovation in modernity is also occurring but in quite different areas relevant to the current milieu, such as property rights. Indeed, Australian property law has revealed, with the belated recognition of native title (as a descriptor of Indigenous property rights) by the High Court in the 1992 decision *Mabo v. Queensland (No.2)* (1992) 175 CLR 1, that the ambit of prospective compensation for the commutation of property rights by government has widened significantly.

However, the language of Australian property law struggles to deal with Indigenous property rights known as “sea country”, first recognised in 2001 by the High Court in *Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56; 208 CLR 1. The Indigenous claimant Mary Yarmirr of the Croker Island people of Arnhem Land in the Northern Territory explained her understanding of sea country as follows:

...when I talk about sea country, I am not talking only about the waters of the sea.

I am talking about the sea bed and the reefs, and the fish and animals in the sea, and our fishing and hunting grounds, and the air and clouds above the sea, and about our sacred sites and ancestral beings who created all the country.

Our ancestors are still there. Our country, both land and sea, belongs to us, and we belong to it. For we cannot survive without the land and the sea, for it breathes, controls and gives life (Morris, 2002, p. 18).

Such disparities in the descriptors of property rights (Indigenous and non-Indigenous) are not unexpected given the increasing complexity of private property rights. One impact is that the compensation assessment of human losses from government actions is being catapulted into often wholly unfamiliar theory and practice territory. In particular, linguistic obfuscation remains a significant barrier in attempts to unravel the particular complexity of specific property rights, with such endeavours often thwarted by connotation integral to those tenures easily recognised as property, and hence readily compensable (Small & Sheehan, 2008). Whilst compensation for loss of native title is unsurprisingly infused with spiritual and cultural values, unanticipated or previously intentionally unrecognised losses have also emerged elsewhere (Sheehan, 2010, p. 114) providing a greater understanding of the losses incurred by holders of private property rights (Indigenous or non-Indigenous) when those rights are involuntarily commuted by government.

For example, the 2016 reassessment of how compensation claims in the Australian State of New South Wales (NSW) are to be processed and subsequently assessed arguably reveals an underlying flaw in the social narrative between the citizenry and the NSW government.¹ This paper canvasses the need for a consensus as to what is good compensation, bad compensation, and just plain fair compensation, such consensus created as a lens through which trust between the citizenry and the government is viewed. This paper commences with an overview of the origins of private property rights in Australia and concludes by demonstrating just how far the ambit of compensation has been catapulted into uncharted territory as a result of recent innovative legal approaches to assessing compensation.

The origin of Australian private property rights

Australia has sovereign control over more land (Instituto del Tercer Mundo and New Internationalist, 2007, p. 90)² and marine area (Resource Assessment Commission, Coastal Zone Inquiry, 1993, p. 8)³ of the globe than any other country except for the USA, Russia and Canada. Since European settlement in 1770 and up to the previously mentioned 1992 *Mabo* decision, all rights in property except for minerals were held in the land property right known more commonly as real property (Butt, 2001, p. 78).

Since *Mabo*, the notion of what are property rights under anglo-Australian land law has exploded with the identification of a raft of hitherto unknown separate private property rights, including: water property rights (Butt, 2001), biota property rights (Sheehan & Small, 2005), Indigenous property rights (native title) (Carter, 2016), carbon credit property rights (Sheehan & Small, 2005), saline property rights (Sheehan & Small, 2005), transferable development property rights (TDRs) (Sheehan, Kelly, Rayner, & Brown, 2018), and electromagnetic spectrum (Hazlett, 2008). All of the above except for electromagnetic spectrum are subsets of what was prior to 1992 known as land property rights created either by the common law, statute law, or through a mixture of both common law and statute law.

The appropriateness and resilience of conventional land titling systems to deal with these newly emerging property rights have raised fundamental issues rooted in our developing understanding of real property, which impact on issues of compensation. Ancient Australian property rights such as native title are probably incapable of being wholly accommodated within conventional property rights titling systems, and arguably have acted as a catalyst for much of the emerging property theory (Small, 2006). The Australian regime of property rights (excluding native title) has its deep roots in the Roman invention of real property based on earlier Egyptian and Greek concepts that required a satisfactory answer to the question of territoriality through:

...publicly delimiting land and registering it as an object controlled by mortal individuals and not by immortal families. No distinction was made with respect to benefits ('fruits'), access to them and the soil itself. In the sequel, the continuous struggling and arbitration disappears, heritage and succession becomes transparent. Transactions on the model of a contract between private parties, facilitated by surveyors, notaries, etc., make land a commercial good (Oestereich, 2000, pp. 223–224).

This is a poignant reminder that customs and laws of many societies have only undergone incremental change throughout history, notwithstanding the sometimes-violent precursors of such change. Australian property rights law, however is a complex amalgam, according to the linguist Masson (2001), studies of its post-Roman roots in English custom and law reveal: "... a curious and most marvellous gift for mutability and metamorphosis, rooted in a rich, complex and strange multilayered, multicultural history." (p. 8S)

Inescapably, property rights were of pivotal concern to those involved in conquest and dispossession, and hence once acquired the value of real property crystallised in the hands of the conquerors, notably the Normans in England. Similar to other areas of Western Europe, the value of rights to real property was central to the maintenance of civilised Norman England. Indeed, the concept of economic value with its inherent polity implications is the underlying thrust in many property rights discourses especially in North America, and in that context Ely (1998, p. 10) observes:

English common law provided the legal foundation for property ownership in the colonies. Common law was customary law, deriving its authority from long-established usage. Royal courts in England fashioned the common law into a body of rules that defined and protected property rights. ...

Conceptually, property rights and the concept of value necessarily emerged as the twin *leit motifs* of English common law, and its colonial American progeny. Australian property law was also a legal sibling of this tradition (Irving, 1997).

The concept of value, especially when given monetary expression, involves the allocation of worth to a particular property right, usually as an estimate of its capitalised future potentiality based on its current utility. The concept of ascribing monetary value to such rights in property has its roots, according to Anderson (1989), in the:

...perdurable inheritance of classical antiquity. The Roman Empire, its final historical form, was not only itself naturally incapable of a transition to capitalism. The very advance of the classical universe doomed it to a catastrophic regression, of an order for which there is no real other example in the annals of civilisation. The far more primitive social world of early feudalism was the result of its collapse, internally prepared and externally completed. (p. 420)

Marxist writers such as Anderson (1989) see medieval Western Europe in a slow although inexorable transition to the “capitalist mode of production”, yet these phenomena appear to have been unique to Europe because: “...European feudalism also underwent an evolution that had no parallel elsewhere. The extreme rarity of the fief system as a type of ... property... was never known in the great Islamic states, or under successive Chinese dynasties...”. (p. 424)

Earlier conditional private property rights were slowly transformed in late medieval times to absolute private property rights. Anderson (1989) notes this had a significant result:

[t]he formula, however, contains a profound truth if applied in a somewhat different sense: the transformation of one form of private property – conditional – into another form of private property – absolute – within the landowning nobility was the indispensable preparation for the advent of capitalism and signified the moment at which Europe left behind all other agrarian systems. (p. 425)

Importantly, private rights in property arose in with the emergence of “absolutist public authority” wherein according to Anderson (1989):

The increase in the political sway of the royal state was accompanied, not by a decrease in the economic security of noble landownership but by a corresponding increase in the general rights of private property. The age in which ‘Absolutist’ public authority was imposed was also simultaneously the age in which ‘absolute’ private property was progressively consolidated. (p. 429)

By the 18th century, the property rights revolution emerging from medieval times had, according to Adam Smith (1978), resulted in private property rights being regarded as a tenet of English society and enforceable at law: “Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government”. (p. 410)

It was with the emergence of private property rights, that there arose a need for the concomitant valuation of the worth of such rights (Lie, 1993). However, the activity of ascribing the worth of property rights can be traced back to at least biblical times where Ephron in selling his field to Abraham says: “My Lord, hearken unto me: the land is

worth 400 shekels of silver; what is that betwixt me and thee?” (Genesis 23:15, King James Version).

The emergence between the 16th and the 18th centuries of the early modern market for private property rights was a response to the arrival of absolute private property. These property rights were not necessarily ill defined but, as Lie (1993) points out in his important work on the social origins of English market society in the period between 1550 and 1750, the commodification of many previously communal natural resources required the ascribing of value, observing that: “[t]here was nothing automatic or laissez-faire about the growth of market society” (p. 277).

In addition, Lie (1993) points out that: “[t]he variety of commodities also expanded to include mechanical contrivances and luxury goods for the populace, leading... [writers] to characterise the period as ‘the birth of a consumer society’” (p. 280). Importantly, the “market society” entrusted with the smooth conduct of the open market in the various villages and towns included not only services such as toll-gatherers, cleaners and others, but importantly: “...appraisers were appointed to settle the value of goods in event of dispute” (Lie, 1993, p. 282).

In a similar vein to Lie, Moore (1946) in his classic description of traditional English village life in the fictitious “Elmbury” described the real property beyond the medieval village, which were held as communal rights, as:

...something of a legal curiosity, and mixed up in its title-deeds were some of the principles of feudalism, capitalism, distributism, and communism. The hay crop belonged to a number of private owners, including the squire and the Abbey; their boundaries were marked mysteriously by means of little posts...

But while the hay crop was private property, the meadow itself, the soil that grew the hay, belonged to “the burgesses”...[who] possessed no cows or sheep to graze upon it, so they too each season sold the aftermath by auction and distributed the proceeds, according to an ancient law...Nobody got more than a few shillings for his share; but at least every man, woman and child... had the right to walk and play in the field, which gave them a good possessive feeling about it (p. 17).

Spirituality pervaded medieval society, and it is not surprising that feudal property rights encompassed holistic notions such as conservation strategies, and village communism (Manion, 2008). Some of these rights, described as *profits-a-prendre* (Hyam, 2014, p. 39), for example the right to the Elmbury hay crop above, did not involve ownership of land, but were merely the right to something that could be taken from the property while the land remained, and yet were viewed also as valuable property rights. Such rights could be exclusive, or enjoyed in common with others, granted in perpetuity or for a fixed term. Moore (1946) also describes the exercise of other classes of use, such as the right to fish, in the following terms:

[f]rom the banks of the river jutted out numberless fishing-rods; little boys with willow wands conjured up minnows... [fisherman] perched sedately on wicker creels ledgering for bream, while the more energetic ones, swift of eye and wrist, fished for roach, and the more adventurous wandered here and there, carrying a jar of minnows, live-baiting for perch...and the very old, and the very stupid, content with the mere dregs of angling, heaved enormous lobworms impaled upon enormous hooks into the deepest and stillest backwaters and then went to sleep until Fate, in the guise of a shiny yellow eel, accepted... (p. 18)

Clearly many of these rights may be problematic as *profits-a-prendre* are recognised an essentially out-dated, ancient class of property. However, it does show the enormous breadth of communal and private property rights that until very recently existed in non-urban England.

Paradoxically, the previously mentioned 1992 *Mabo* decision reconfirmed the feudal genealogy (Rogers, 1995) of Australian private property rights, and hence the nuances of many of these feudal activity-based property rights of England demand our renewed attention (p. 184). Adding to this genealogical feudality, some “new” property rights such as biota, native title and water also require the convergence of property law and spatial science (“territoriality”) with other disciplines such as botany, zoology, anthropology, archaeology and hydrology, and even more distant cross disciplinary activities such as ethnobotany and others. (Sheehan & Small, 2005, p. 161; see also, 2002)

The statutory creation of separate water property rights in various Australian states, such as New South Wales (*Water Management Act 2000* (NSW)), severed the traditional common law nexus between land and water. This legislative action starkly highlighted the need for appropriate and robust regimes of property rights that use conventional land titling approaches melded with an urgent understanding of the nature and content of the particular natural resource, water (Butt, 2001). The conceiving of such “new” property rights requires attention to the twin issues of definitional territoriality or “exclusivity” and value ascription (Scott, 1999, p. 19), if these emerging freestanding rights are to have economic worth coupled with “third-party adjudication and enforcement” (Barzel, 1997, p. 4) as legal rights.

In Australia, both familiar and emerging private property rights are all held at the pleasure of the Crown (Commonwealth, State or Territory), which has the ability to compulsorily acquire those private rights subject to some safeguards (and even guarantees in some jurisdictional circumstances).⁴ The protection offered to holders of those private rights will now be considered.

Protecting private property rights

In common law countries such as England, the United States of America and Australia, the capacity of government to commute private property rights is contingent wherein “the compensation principle was partially recognised by Magna Carta” of 1215 (Ely, 1998, p. 23) and Roman Law inputs to the English common law in the 1230’s (Stein, 1999, p. 64). Magna Carta was kept alive throughout the 1300’s by lawyers, aided by a 1368 statute of Edward III declaring “if there be any Statute made to the contrary, [Magna Carta] shall beholden for none” (Harley, 2015, p. 6). Lord Chief Justice Edward Coke in the 1600’s utilised Magna Carta to challenge the Divine Right of Kings (Harris, 2015, p. 66) and to foster new American colonies (Charter of, 1606), the outcomes of which were the inspiration for more modern protections such as the Fifth Amendment of the US Constitution (Gardner, 1997, p. 542), the United Nations’ *Universal Declaration of Human Rights* 1948, and s 51(xxxi) of the Australian Constitution.

Common law countries like Australia are particularly impacted by international law, such as Article 17 of the *United Nations Declaration of Human Rights* 1948, which provides that “No one shall be arbitrarily deprived of his property”. Similarly the *Fifth Amendment* of the *American Constitution* was drafted as “the primary means of protecting private property from the excesses of government” (Gardner, 1997,

p. 545), and in Australia there is the re-occurring theme of protecting private property from such excesses through a guarantee of *just terms* compensation in the Australian Constitution (Irving, 1997, p. 96; see also De Soya, 2017a, p. 451). More recently, in 2008 the UNFAO published a guide to “good practice” entitled *Compulsory Acquisition of Land and Compensation*, which establishes various criteria pertaining to compulsory acquisition processes and compensation. As the Australian Law Reform Commission (2015) has noted, international instruments such as those mentioned above are not part of Australian domestic law until recognised in its statutes, but that “...where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations...” (p. 487).

However, the acquisition of private property rights presents a challenge to most holders who are “completely unfamiliar” with legislation and other processes involved in compulsory acquisition and significantly at a disadvantage to the “highly resourced, extensively experienced” acquiring authority or third party (Shannon, 2012, p. 9). For example, in NSW the Federal constitutional guarantee of *just terms* compensation does not apply to state acquisitions of private property. It is noted however that the High Court in *R&R Fazzolari Pty Limited v Parramatta City Council; Mac’s Pty Limited v Parramatta City Council* [2009] 237 CLR 603 at paragraph 5 observed: “...in accordance with established principles of statutory interpretation the preferable construction is that which authorises the least interference with private property rights.”

In *Fazzolari*, Parramatta City Council intended to acquire private land that would subsequently be sold and redeveloped to form part of land to be called the “Civic Place”. To compulsorily acquire the private land, Council issued Proposed Acquisition Notices (PANs) to various private landowners within the proposed “Civic Place”, one being Fazzolari. The intention was that once the private lands were acquired, a - \$AUD1.6 billion redevelopment would be undertaken by means of a Public Private Partnership between Parramatta City Council and a developer GROCON. The development proposal required Council to transfer some of the acquired land to GROCON in return for significant financial payments. In the Land and Environment Court, Fazzolari argued that this would constitute a “resale” for the purposes of *s 188(1)* of the *Local Government Act (1993)*, an unlawful action. The Court found in favour of Fazzolari and held the compulsory acquisitions were unlawful. Council subsequently appealed to the NSW Court of Appeal where the decision was reversed. Finally, Fazzolari was granted special leave to appeal in the High Court and the original decision of the Land and Environment Court was reinstated.

The High Court held that the power of local government (such as Parramatta City Council) to compulsorily acquire private land lies in *s 186 Local Government Act 1993*, but is constrained by *s 188*:

- (1) A Council may not acquire land under this part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale.
- (2) However, the owner’s approval is not required if:
 - (a) The land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale.

The first issue was whether the acquisition and then transfer to GROCON would be a “re-sale” within the meaning in s 188(1). The High Court held that the acquired land was to be transferred in exchange for money and other consideration, rendering it a “re-sale”. Further, it was enough to attract the constraint in s 188(1) that one of the purposes of the proposed acquisition was for re-sale, even if it could be argued that the dominant purpose was for redevelopment.

The second issue was whether the surrounding streets, Darcy and Church, being acquired at the same time meant that Council could also acquire Fazzolari’s land under s 188(2)(a). Parramatta Council delayed the acquisition of the streets so that it would coincide with the acquisition of Fazzolari’s land to rely on s 188(2)(a) in case the “re-sale” argument was not allowed. However, the High Court found that in this instance the Council’s ability to acquire its own roads (Darcy and Church Streets) was not found in the *Local Government Act 1993*, but rather relied on s 7B of the *Land Acquisition (Just Terms Compensation) Act 1991*:

An authority of the State that is authorized by law to acquire land by compulsory process in accordance with this Act may so acquire the land even if the land is vested in the authority itself.

The fact Council was acquiring land for the purpose of transfer for money and other consideration to permit development for a profit invalidated the compulsory acquisition. If the acquisition had been for a public purpose such as a park or library, Fazzolari would not have been able to prevent the acquisition. The High Court was unwilling to interpret statutory regulations in a manner that might unduly infringe on private property rights, and accorded with longstanding common law presumptions that Parliament’s intention is not to interfere with fundamental rights unless the precise wording of the statute says so (*Coco v the Queen* (1994) 179 CLR 427 at [10]).

Early commentary on the presumption from William Blackstone in *Commentaries on the Laws of England* (1765) (p. 135) articulates that the common law would not allow for the “least violation” of private property. In 1904, Griffith CJ (as he was then) expressed in *Clissold v Perry* (1904 1 CLR 363) that the construction of statutes is not to be interpreted to interfere with vested interests, unless the intention is obvious. Most recently in *Fazzolari* (2009, paragraph 43), French CJ stated that:

...[a]s a practical matter... where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights... Constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law.

In spite of such deeply rooted common law principles, and the result in *Fazzolari*, subsequently in 2009 the NSW Parliament amended s 7 of the *Land Acquisition (Just Terms Compensation) Act 1991* to permit compulsory acquisition of land by Councils for re-sale in s 188(2).

However, as Justice Kirby explained in *Durham Holdings Pty Ltd v the State of NSW* [2001] 205 CLR 399 (Durham) such an extreme departure from fundamental rights may be challenged on a constitutional basis. His Honour opined that the role of the Constitution for judicial protection in the face of legislation is “substantial” (Durham,

2001, paragraph 72). Hence, it is submitted that the 2009 amendment of the *Land Acquisition (Just Terms Compensation) Act 1991* constitutes an extreme derogation from fundamental rights remains an open question. The potential exploitation of this legal loophole by Councils undeniably falls outside the ambit of good or fair compensation.

Yet, soberly, it is recalled that the High Court in *New South Wales v Commonwealth* (1915) 20 CLR 54 (known as the Wheat Case) confirmed State Parliaments retain “sovereignty to make laws for the compulsory acquisition for private property without payment of compensation” (Raff, 2002) should a State so decide (p. 40). Indeed, there is a history of reduced compensation for specific projects such as the Eastern Suburbs Railway in Sydney where compensation was limited to 27 February 1967 irrespective of the settlement of the compensation claim many years later.

Notwithstanding, recent changes to procedures for compensation claimed by private land owners suggests the increasing complexity of property rights in NSW (and the expectations of the citizenry) is slowly forcing changes to current legislated restrictive practices (Sheehan, 2010, p. 109). It is these emerging changes that are considered next.

Changing compensation for impacted private property rights

Arnold posits in *The Reconstitution of Property* (2002), that property as being a “bundle of rights ... fails to consider a variety of factors that shape both human relationships with respect to objects and the content and scope of property arrangements” (p. 296). He proposes as a more appropriate metaphor for the notion of property the descriptor a “web of interests” (Arnold, 2002, p. 331). Just as Mary Yarmirr’s explanation of sea country involves a series of relationships between the reefs, fish, animals, the fishing and hunting grounds, the air, clouds, and sacred sites and ancestral beings, the metaphorical “web of interests” contemplates the various types of interconnections that exist in both “person-object relationships [and] person-person relationships” (Arnold, 2002, p. 331). Arguably, an early extension of that web was the recognition of spiritual and cultural values imbedded in specific native title rights in *Mabo*. As more emerging property rights (Indigenous and non-Indigenous) are recognised, the outliers of the web increase. However, more recently the expansion of property rights has catapulted the notion of compensation into unfamiliar territory, demonstrating that the web is ever more complex. Three diverse examples of this unfamiliar territory are provided: firstly the use of solatium to assess spiritual and cultural compensation (2016), secondly compensation for the impact of the Sydney Third Runway, and thirdly, compensation for biodiversity loss.

Solatium to assess spiritual and cultural compensation (Griffiths v northern territory of Australia (no 3) [2016] FCA 900 (Griffiths)

The 2016 decision in *Griffiths* is a recent example of the expansion of the notion of compensation for property rights, and has provided an emerging methodology for assessing the loss of spiritual and cultural interests through the existing tool of solatium. Before *Griffiths*, there had been only one successful determination of compensation for the extinguishment of omnibus native title rights and interests, namely the decision in *de Rose v State of South Australia* [2013] FCA 988. Unfortunately, the methodology for

assessing solatium and the amount assessed in this decision was confidential because mediation between the South Australian Government and native title holders resulted in a confidential compensation settlement.

In *Griffiths*, the court confirmed the *Ngaliwurru* and *Nungali* People held non-exclusive native title over land in Timber Creek, a township in the Northern Territory and that exclusive native title had been recognised in some town lots (*Griffiths v Northern Territory of Australia*, [2006] FCAFC 178, para [127]). Action by the Northern Territory extinguished (wholly or partially), impaired or suspended native title, which led to a claim for compensation under the *Native Title Act 1993* (Cth) (*NTA*). In *Griffiths*, Mansfield J held that compensation was payable, and an amount was determined to be approximately \$3.3 million for economic loss, non-economic loss and (simple) interest (Order 3).

Unhelpfully, s 51 of the *NTA* provides limited guidance for assessing native title compensation, stating that native title holders are entitled to compensation:

...on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests (*Native Title Act*, Cth, 1993 Cth, s 51).

The existing principles of the Northern Territory's compulsory acquisition laws when determining compensation were considered in *Griffiths*, when coupled with "intuition and the exercise of judicial discretion" (Flynn, 2017, p. 72) provided the vague framework within which Mansfield J was able to determine the appropriate amount of compensation.

Part of the \$3.3 million compensation comprised \$1.3 million for non-economic loss or solatium. Ordinarily, solatium is compensation awarded to non-Indigenous holders of property rights for injured or hurt feelings (*Carson v John Fairfax and Sons Limited and Slee*, 1993 178 CLR 44). In *Griffiths*, this was a particularly difficult task, because provisions of land compensation statutes used in assessing compensation for the loss of native title rights and interests are intended to value the land as a "material object traded in a market for a like or analogous commodity." (*Northern Territory of Australia v Griffiths* 2017 FCAFC 106, para [144]) To arrive at this solatium assessment of \$1.3 million, Mansfield J reviewed evidence about the Claim Group's relationship with the affected land, including testimony from elders and anthropology experts about the significance of certain sites. Further evidence that suggested an interference with Dreaming was also of particular interest to the Court.

The Commonwealth appealed almost every aspect of the 2016 decision. However, the Full Federal Court subsequently agreed with His Honour on most findings. Importantly, the Full Federal Court agreed with Mansfield J's assessment of the solatium component (*Griffiths*, 2017) though the findings were not without subsequent external criticism (*De Soyza*, 2017b). The Full Federal Court observed (*Griffiths*, 2017):

The unusual challenge presented by this case ... is that ... there is no history in Australia of analogous awards of compensation for non-economic loss from the extinguishment of native title rights and interests. (para [393])

Further, “Aboriginal rights and interests in land have dimensions remote from the notions enshrined in Australian land law” (Griffiths, 2017), which meant that applying provisions of land compensation statutes to loss of native title rights and interests was considered futile (para [144]).

There was no substantial guidance from past cases of damage to Indigenous cultural rights in the present circumstances, or from agreed compensation amounts in other commercial agreements made by the Claim Group. In making his determination, Mansfield J. had also given weight to whether the Australian public would view the outcome as fair to the Claim Group (Griffiths, 2017, paras [395]-[396]). The Full Federal Court concurred, finding that an award of \$1,000 “would not satisfy the moral sense of the community”, whereas \$1.3 million is a “substantial acknowledgement of a high level of damage done to the Claim Group.” (Griffiths, 2017, para [396])

The Indigenous owners’ unique bond with Australian land, which is vastly different to the relationship between non-Indigenous and their land, had resulted in both Mansfield J and the Full Federal Court being required to consider the effects of the compensable acts “in terms of the pervasiveness of Dreaming.” (Griffiths, 2017, para [315]) The effects of the compensable acts could therefore only be analysed *in globo*, as opposed to a parcel-by-parcel basis. The connection the Indigenous owners have with the land was not geographically divisible, meaning acts in one place could affect other places. Further, while no area is insignificant, there are areas that have a special power and importance (Griffiths, 2017, para 317). It was therefore impossible to establish the impact of the compensable acts within the boundaries of each distinct lot, requiring crucially Mansfield J to make a judgment about the effect over many lots generally.

It was suggested nevertheless by the Full Federal Court that dividing the compensation claims into economic and non-economic loss may create difficulties in future compensation claims (Griffiths, 2017, para [144]). The now well-recognised spiritual connection Indigenous peoples have with their land was documented in 1971 by Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 stating at [167]:

...the spirit ancestors, the people of the clan, particular land, and everything that exists on and in it, are organic parts of one indissoluble whole.

However, as the High Court subsequently observed, the NTA requires the “spiritual or religious [be] translated into the legal.” (Western Australia v Ward 2002 213 CLR 1WA v Ward, 2002, para 14) The task of assessing compensation for the loss of native title rights and interests is imbued with difficulties, partly due to native title as a recently recognised property rights species, and also due to minimal precedential guidance. However, as there are over 300 native title groups within Australia pressing compensation claims, (Flynn, 2017, p. 73) the significance of *Griffiths* cannot be overlooked.

Compensation for the impact of the Sydney third runway

A second example of the expansion of compensable property rights is the Sydney Airport Noise Amelioration Program (SANAP). To cope with increasing air traffic at Sydney Kingsford Smith Airport, a decision was made in 1994 to construct a new runway that ran parallel to the existing north-south runway. Between 1987 and 1998, the Federal Airports Corporation (FAC) was the body responsible for the operation of

Federal airports in Australia. The FAC could establish new airports, and vary existing airports pursuant to ss 25 and 26 *Federal Airports Corporation Act 1986* (Cth) enabling the FAC to construct the Third Runway. The (then) Minister for Transport announced that innovative measures would be taken to ameliorate the impact of cumulative aircraft noise in the area surrounding the enlarged airport. Accordingly, in 1994 SANAP commenced to reduce anticipated noise levels to *Australian Standard 2021 (Acoustics Aircraft Noise Intrusion Building Siting and Construction)* tables on Indoor Design Sound Levels (AS2021) (Department of Transport and Regional Development, 1997, p. 16). The constitutive elements of SANAP included voluntary acquisitions of all residences, churches and child-care centres in the Australian Noise Exposure Forecast (ANEF) 40 contour zone, the insulation of public buildings (such as schools, child-care centres, hospitals and healthcare facilities) within the ANEF 25 contour zone and the insulation of residential properties within the ANEF 30 contour zone (Department of Transport and Regional Development, 1997, p. 16).

Narang and Butler (1996) observed in various insulation and noise attenuation methods were successfully trialled, with resultant options for insulation treatment for residential owners to elect without affecting the livability or acoustics of the property (Burgess, Cotton, & Butler, 2000). One of the many features of this package of options was that a “scoper” (Department of Transport and Regional Development, 1997, p. 30) would assess each house to determine the appropriate type of treatment and the extent of the treatment from the menu of approved treatments, where the menu would allow for “more extensive treatments for the houses with higher aircraft noise level.” (Burgess, 1997, p. 4) Types of treatment were mostly confined to external insulation such as replacing and sealing external doors, blocking vents and openings of external walls, replacing and double-glazing windows and insulating roofing. This was because internal noise attenuation was considered (mostly) unacceptable to residential owners (Burgess et al., 2000, p. 2). After consideration of homeowner preferences the scoper would prepare a Scope of Works, present the quotes for the work and the lowest (workable) quoter would undertake the work. The maximum amount of money for treatments per residence was \$45,000 initially, although this increased to between \$47,000 and \$50,000 to reflect CPI movements (Burgess et al., 2000, p. 2; Department of Transport and Regional Development, 1997, p. 30).

In total, 147 of the 161 eligible residential owners accepted the offer for voluntary acquisition. The acquired lands were transferred to the local council and converted into park (Sydney Airport, n.d.). The 99 public buildings within the ANEP 25 contour zone were insulated to meet the internal design noise levels recommended by AS2021. Due to the architectural, functional and heritage differences of each property, an acoustic consultant was engaged to investigate and recommend a cost-effective solution for noise reduction (Burgess et al., 2000, p. 1). Ultimately, 4,083 of the properties that were eligible for the insulation program were insulated for noise impact (Sydney Airport, n.d.).

Initially, there were concerns that the suburb of Sydenham was being “sacrificed because it’s not a rich suburb” (McDonald, 1993). However, fears of the Sydenham citizenry of being unfairly affected by the impact of the Third Runway were not subsequently realised, with 88% of residential owners giving positive feedback about SANAP (Burgess et al., 2000, p. 4). Obviously, dwellings built of denser material such as

brick were more effectively insulated, while timber dwellings revealed only modest noise attenuation and hence, SANAP provided additional funding of up to \$15,000 for such less weighty construction (Burgess et al., 2000, p. 4).

Generally, SANAP was a successful (albeit expensive) Federal government undertaking that improved noise reduction for those areas affected by the new Third Runway. SANAP was the first such program in Australia, and demonstrated an innovative approach to compensation for impairment of property rights (NSW Government, Transport for NSW, 2017). This approach was considered innovative because it provided other forms of compensation outside of traditional compensation regimes such as compensation for compulsory acquisition. Interestingly, in 1993 impact of the Third Runway was anticipated to bring about a significant increase in air traffic of about 111% (McDonald, 1993), which was obviously a significant underestimation as air movements have continued to grow.

Compensation for biodiversity loss (the OEH model)

A third and final example of the expansion of compensable property rights can be found in the recent *Land Acquisition (Just Terms Compensation) Amendment Act 2016* (NSW) (the *Amendment*). The legislative change arguably has its roots partly in the 2006 NSW Court of Appeal decision *Leichardt Council v Roads and Traffic Authority of NSW* [2006] NSWCA 353 (*Leichhardt*) and the subsequent 2008 decision of the Land and Environment Court of NSW in *Sutherland Shire Council v Sydney Water Corporation* [2008] NSWLEC 303 (*Sutherland*). Both cases rejected the arguments by State agencies that a nominal value for Council land was appropriate compensation because a market value could not be readily ascertained. In the leading *Leichhardt* decision, the compensation for the parkland compulsorily acquired from Council was essentially market value being a replacement value, being the value of adjacent residential land, instead of the nominal value of open space. These two cases arguably instigated the resultant drafting of *s 56(3)* of the 2016 *Amendment*, which states that where land is used for a particular purpose, and a general market for that land use does not exist, alternative market values are to be determined on the basis that the owner will be reinstated in another, equivalent, location.

Importantly, *s 56(3)* of the *Amendment* also supports the wider notion of negative environmental externalities such that compensation ought to be ascertained for additional specific value losses detected such as biodiversity. In 1993, Berat proposed judicial liability in international law should exist for negative environmental acts which “kill the earth” (Berat, 1993, p. 327) and the authors suggest this notion now exists, albeit in a very limited way, through the creation of *s 56(3)* of the *Amendment*. In much the same frame as the decisions in *Leichhardt* and *Sutherland* and the subsequent *s 56(3)*, the NSW Office of Environment and Heritage (OEH) offset scheme has been applied in various circumstances throughout the State to attribute compensation for biodiversity losses additional to the familiar heads of compensation at *s 55(a-f)* *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

One example of the application of the OEH scheme can be found in the response to the “Ellerton Drive Extension” (Bypass) comprising an \$86 million, 4.6km long road providing an alternative route around the CBD of the regional city of Queanbeyan. The Bypass necessarily caters for forecast population growth and resultant traffic increases,

however the construction of the Bypass involved considerable clearing of native vegetation. Queanbeyan City Council (QCC) required approval pursuant to *Part 5* of the *Environmental Planning and Assessment Act 1979* (NSW) to construct the Bypass, involving a review of environmental factors (REF) and a species impact statement (SIS). There was local concern the Bypass would negatively affect the environment (Jetty Research, 2015, p. 4), however, this was not realised and construction of the Bypass commenced on 20 November 2017 with completion anticipated by mid 2020 (NSW Government, Transport, 2017).

The route of the Bypass encompasses native vegetation listed under the *Threatened Species Conservation Act (1995)* (NSW) and the *Environmental Protection Biodiversity Conservation Act (1999)* (Cth) (NGH Environmental, 2016, p. 33), and thus required a biodiversity compensation strategy (NGH Environmental, 2014, p. 92). Endangered native vegetation does not traditionally carry any economic value, meaning that negative environmental externalities such as loss of biodiversity are rarely considered. However, by 2017 the OEH had developed a set of principles utilising offsets as a means to counteract the negative environmental impact of certain developments. An offset scheme that conforms to the OEH offset principles requires that in any acquisition of land, any vulnerable or endangered species and/or habitat must be re-established elsewhere and result in a net improvement in biodiversity over time (NSW Government, Office of Environment and Heritage, 2017). The condition for choosing a particular relocation area requires the identification of similar ecological quality and characteristics of the destroyed land. Further, the relocation area must be of similar habitat quality to allow for adequate flora and fauna preservation, and conform to the standard methodologies published by the OEH and the Commonwealth Department of Environment (DoE) (Queanbeyan City Council, 2016, p. 48). Such methodologies are conceived to ensure biodiversity loss that occurs from the acquisition and destruction of the acquired land is compensated in an offset elsewhere.

QCC in consultation with OEH developed an offset program to “compensate for the loss of [biodiversity]” (Department of the Environment and Energy, 2016, p. 2) as well as for the cost of acquiring the land (NGH Environmental, 2014, p. 92). The offset program stipulated that no less than 50.0 ha of White Box, Yellow Box, Blakely’s Red Gum, Grassy Woodland and Derived Native Grassland ecological community; and 7,877 Hoary Sunray plants be offset in an area roughly 4.5 km southwest of Queanbeyan (Australian Government, Department of the Environment and Energy, 2016). Therefore, the compensation paid by QCC included both the acquisition by Council of replacement native vegetation lands together with a 20-year management plan under a Biobanking Agreement (Australian Government, Department of the Environment and Energy, 2016, p. 2).

Conclusion

Soberly, it is noted Australia falls within a group of countries including Canada, France and Greece that provide only “narrow compensation rights even for direct partial injuries” and “there are no compensation rights at all for indirect injuries”. (Alterman, 2010, p. 63) Given the guarantee of *just terms* compensation in the *Australian Constitution*, and the view in *Fazzolari* of French CJ that even within NSW, government should interfere “least with private property rights” (Fazzolari, 2009, paragraph 43), the restrictive nature of Australian compensation rights is surprising. The difficulty of containing private property

rights to a particular set of descriptors given the increasing complexity of existing and emerging property rights has resulted in innovative approaches to compensation, arguably devised to create a consensus between the citizenry and the government. These approaches exist outside the traditional compensation regimes.

The need for a consensus as to what is good compensation, bad compensation, and just plain fair compensation lies behind these innovative approaches to compensation. Clearly, for government to compulsorily impair or acquire private property rights without a full suite of compensation is unsustainable in a democratic country such as Australia, notwithstanding the constraints of compensational legislation in the state of NSW. How then, have these innovative approaches to compensation been achieved in such an adverse legal environment?

More progressive approaches to compensation have emerged through the use of specific purpose legislation such as the *Federal Airports Corporation Act (1986)* (Cth) for compensation accruing to nearby properties affected by the construction of the Third Runway, but crucially not acquired for that construction. A further more recent example is the NSW OEH biodiversity offset scheme, which effectively places a monetary value on the loss of biodiversity (NSW Government, Office of Environment and Heritage, 2017) in addition to the cost of acquiring the land (NGH Environmental, 2014). The OEH scheme imposes such obligations on infrastructure proponents such as QCC through the *Environmental Planning and Assessment Act 1979* (NSW). Neither of these innovative approaches to compensation have their source in obligations contained within the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), and indeed the result is that such approaches break free of the restrictive compensation regime in the 1991 legislation.

The decision in *Griffiths* provides another example, albeit through case law, of rights to compensation for previously unrecognised rights and interests, in this instance Indigenous rights and interests, which have not previously been dealt with in Australian compensation law and practice. The recognition of native title in *Mabo* presented the common law with an opportunity to re-examine how compensation is assessed when private property rights are impaired or extinguished, notably Indigenous property rights. *Griffiths* moves this recognition to the next level. The reconceiving of solatium to assess compensation for those elements of native title described as spiritual and cultural attachment is acceptance that compensation for intangible rights as understood in Australian law must also be on *just terms*.

These innovative legal approaches have fundamental implications for the assessment of compensation and have catapulted the ambit of compensation into uncharted waters, arguably to create a lens through which trust between the citizenry and the government can be more beneficially viewed.

Notes

1. NSW legislation is used in this paper when an exemplar is required for the Australian legal milieu.
2. The land area of Australia is 7,741,220 square kilometres.
3. The Australian marine zone comprises 8,900,000 square kilometres.
4. See for example, *Lands Acquisition Act 1989* (Cth), *Land Acquisition (Just Terms Compensation) Act*, NSW (NSW), *Local Government Act 1993* (NSW) and *Roads Act 1993* (NSW).

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