

Valuer General

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Compensation for cultural loss arising from compulsory acquisition

Guidance Note

February 2024



Acknowledgement of Country

The office of the Valuer General and Valuation NSW acknowledges that we stand on Aboriginal land. We acknowledge the Traditional Custodians of the land, and we show our respect for Elders past and present through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally, and economically.

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More information

Enquiries relating to this guidance note should be addressed to the office of the Valuer General via email to valuergeneral@dpie.nsw.gov.au.

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Introduction

1.1 Purpose

This document is intended to provide valuers guidance on the approach to be adopted to determine compensation for non-economic loss (including cultural loss) arising from compulsory acquisition.

This guidance note identifies:

- an indicative range of forms of cultural loss that may be compensable;
- a process by which the existence and significance of such forms of compensable cultural loss may be identified; and
- the valuation methodology to determine the amount of compensation payable for cultural loss identified.

This guidance note will ensure that the Valuer General's determinations of compensation for cultural loss are:

- appropriate, fair and just to the parties and to the Australian community;
- transparent; and
- in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* and case law.

1.2 Background

The Valuer General is an independent statutory officer appointed by the Governor of NSW to oversee the valuation system. The Valuer General is responsible for:

- providing fair and consistent land values in NSW, in line with the *Valuation of Land Act 1916*; and
- determining compensation when land is compulsorily acquired in line with the *Land Acquisition (Just Terms Compensation) Act 1991*.

Valuation NSW is the agency established to support the Valuer General.

1.3 Compulsory acquisition

Compulsory acquisition of land for infrastructure and other development by Government may be undertaken by a range of acquiring authorities including Transport for NSW and Government health and education authorities.

Land acquired by compulsory acquisition may include native title rights and interests in relation to land, for which non-economic loss (including cultural loss) may be compensable.

1.4 Legislation

Compensation determinations are determined in accordance with the Land Acquisition (Just Terms Compensation) Act 1991.

1.5 Delegations

Valuation NSW carry out functions, including the compensation determination process, on behalf of the Valuer General under formal delegations. Some valuation services may also be contracted out to private valuation firms. All valuation services provided by contract valuers are subject to a rigorous quality assurance process prior to issue to landholders.

Accordingly, references to the Valuer General in this document may be interpreted to include Valuation NSW and its contractors.

Recommended Approach

1.6 Scope

Compensation for cultural loss arising from compulsory acquisition

This guidance note advises valuers on the approach to be adopted to determine compensation for non-economic loss (including cultural loss) arising from compulsory acquisition.

Under the Act, the Valuer General is tasked with determining compensation for the acquisition of land, including any native title rights and interests in relation to land (section 7A).

Determination of compensation for land taken (economic loss) is now well settled in NSW, but determination of compensation for interests in relation to land (non-economic loss) is currently evolving and may include intangible losses, generally referred to as cultural loss or loss of spiritual attachment.

Other than for cultural loss, this guidance note does not address compensation under the Act which is addressed in the compensation following compulsory acquisition guidance note.

This guidance note should be read in association with the Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition published by the Valuer General.

1.7 General principles

Context

The Valuer General has a statutory obligation to determine compensation for the acquisition of land, which may include cultural loss. It is important to note that cultural loss is not referring to loss of culture and does not necessarily mean that connection or spiritual attachment to the particular area of Country is lost.

Cultural loss is perhaps best approached by understanding the cultural value of Country and what connection to the particular Country impacted by the compensable activity means from a cultural perspective. A proper understanding of the laws and customs of the compensable group and how they are connected to Country by those laws and customs is crucial.

An appreciation of the cultural value of Country and the cultural value of the particular parcel of land can then turn to the question of how the compensable activities have impacted on or would impact on that cultural value. That impact may take many different forms and may include feelings of spiritual and emotional loss or distress as well as such impacts as the ability to learn and teach cultural knowledge on Country or damage to sites of significance.

Acknowledgement

The Valuer General acknowledges the trauma and sensitivity of the compulsory acquisition determination process for First Nation peoples and the need to prioritise the physical, psychological, and emotional safety of traditional owners throughout the process.

The Valuer General acknowledges the difficulty in quantifying the nature and level of compensation payable for cultural loss in monetary terms.

Guidance note structure

This guidance note addresses the process for the determination of compensation, the forms of cultural loss and the quantification of compensation.

This guidance note will be updated in the future as necessary to reflect legislative change and court decisions.

1.8 Process for the determination of compensation

Key steps

Reflecting the process adopted by the Valuer General for the determination of compensation arising from compulsory acquisition generally under the Act, the following steps apply:

- the claimant and the acquiring authority have a period of six months to negotiate a settlement prior to the serving of a Proposed Acquisition Notice (PAN);
- the acquiring authority serves a PAN on the claimant with a further period of up to 90 days for the claimant to negotiate a settlement with the acquiring authority (with such periods variable by either written agreement between the parties or by the Minister in certain circumstances);
- during the PAN period, the claimant prepares and lodges a claim for compensation on the specified form (s39) identifying the forms of cultural loss suffered and nominating the amount of compensation sought with supporting evidence (as detailed below);

- the Valuer General holds a conference with the claimant, if requested and preferably following invitation to country by the claimant, in order to:
 - fully understand the claim and the nature and extent of cultural loss;
 - link the cultural loss to the acquisition;
 - identify the nature and extent of the claimant’s connection to the land and waters pursuant to their laws and customs;
 - consider the particular and inter-related effects of the acquisition on that connection; and
- obtain the claimant’s input into the relativity of significance of the various forms of different forms of cultural loss claimed, both to each other and to land value.

While the Valuer General acknowledges the benefits of an invitation to Country to receive evidence, this should be balanced with the cost to all parties of so doing with the Valuer General receptive to considering a good faith payment to a Prescribed Body Corporate (PBC) to undertake a small-scale exercise on the Valuer General’s behalf:

- following expiry of the PAN period, if agreement has not been reached between the claimant and the acquiring authority, the compulsory acquisition is gazetted and the Valuer General undertakes an independent determination of compensation payable;
- the acquiring authority then provides a list of issues to the Valuer General within seven days of gazettal;
- the Valuer General holds a conference with the acquiring authority, if requested, to understand the list of issues;
- the Valuer General exchanges party’s information for correction of errors of fact only and to prevent adverse information;
- the Valuer General provides a preliminary valuation report and an issues response document to each of the parties for the identification of errors of fact only. Either party may request a conference to identify errors of fact only;
- the Valuer General issues a determination of compensation;
- the acquiring authority provides the claimant with a notice of compensation; and
- if dissatisfied with the determination of compensation, objection may be made in the Land & Environment Court.

Evidence

Evidence provided by the claimant in support of a claim for compensation may include but is not limited to:

- affidavits (formal or informal, including affidavits based on evidence gathered as part of the native title process);
- on-country interviews;
- videos;
- artwork;
- historical documents;
- cultural mapping;
- materials provided for previous acquisition matters by the claimant;
- gender specific evidence (for which the Valuer General will ensure a culturally appropriate process is established);
- or any other material that the claimant considers best expresses their connection to the land and the cultural loss impact of the acquisition.

The Valuer General acknowledges the need for an agile and flexible approach to providing evidence, in a form appropriate to the circumstances, by claimants recognising the diversity in historical experience, capacity, breadth of knowledge across groups and previous involvement with native title or acquisition processes together with the benefit or otherwise of representation.

Valuer General may be supported by indigenous advisors or other specialist experts

While the Valuer General is the determining party under the Act, the Valuer General may be supported by suitably experienced specialist experts and/or indigenous advisers in making a determination.

Forms of cultural loss

The Valuer General acknowledges that the range of forms of cultural loss for which compensation may be sought are potentially wide and diverse.

Non-economic loss, such as cultural loss, should be distinguished from economic loss that arises from the loss of title, rights, and interests. For example, economic loss might comprise the loss of the land, entry to the land and living on the land whereas non-economic loss might comprise the cultural loss arising from being unable to travel over the land or camp on the land.

It may be contended that the forms of cultural loss may include, but not be limited to, the following, with the examples listed being indicative rather than exhaustive:

Form	Examples (sub forms) include:
Access	Cultural loss associated with travelling over, moving about and having access to the land.
Residence	Cultural loss associated with living on the land, to camp, erecting shelters and structures.
Activities	<p>Cultural loss associated with gathering and using the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin.</p> <p>Cultural loss associated with hunting, gathering and fishing and foraging on the land.</p> <p>Cultural loss associated with having access to and use of the natural water of the land.</p> <p>Cultural loss associated with having access to, maintaining and protecting sites of significance on the land.</p> <p>Cultural loss associated with providing, sharing or exchanging subsistence and other traditional resources obtained on or from the land with family and others (but not for any commercial purposes).</p>
Practices	<p>Cultural loss associated with engaging in cultural activities and social uses of the land.</p> <p>Cultural loss associated with conducting ceremonies and rituals cultural loss associated with holding meetings.</p> <p>Cultural loss associated with holding family and community cultural gatherings.</p> <p>Cultural loss associated with transmitting knowledge and stories to younger generations by teaching the physical and spiritual attributes of places and areas of importance on or in the land.</p> <p>Cultural loss associated with passing on resource use and practical skills.</p> <p>Cultural loss associated with participating in cultural practices related to birth and death, including burial rights.</p>
Ecology	<p>Cultural loss associated with impact on plants, animals and the ecosystem, which may include species of totemic or other cultural importance.</p> <p>Cultural loss associated with impact on water quality and access which may have broader cultural impacts.</p> <p>Cultural loss associated with collateral ecological impacts on adjacent lands and waters.</p> <p>Cultural loss associated with impact on cultural responsibility to care for country from an ecological perspective.</p>

Form	Examples (sub forms) include:
Sites	<p>Cultural loss associated with ability to look after and speak for culturally significant sites and areas (including, but not limited to, middens, ceremonial sites, habitation sites, song lines and including impact on impacted sites beyond a site's physical footprint).</p> <p>Cultural loss associated with physical access to sites and areas of significance.</p> <p>Cultural loss associated with physical damage to sites and areas of significance including, but not limited to, loss of artefacts.</p> <p>Cultural loss associated with collateral damage or detriment to the wider zone around sites and areas of significance in the surrounding area.</p> <p>Cultural loss associated with damage to the land impacting on wider regions of cultural significance.</p> <p>Cultural loss associated with impact on significant tracks or pathways with associated stories crossing the land or surrounding region.</p> <p>Cultural loss associated with lack of cultural monitors and loss of ability to identify artefacts or sites which may have been at the locations of the acquisition.</p> <p>Cultural loss associated with impact on spiritual landscape.</p>
Trauma	<p>Emotional, gut-wrenching pain and deep or primary emotions.</p> <p>Distress and anxiety caused by reason of loss of part of country and sites of significance, which is manifested by deep or primary emotions of hurt, shame and worry.</p> <p>Feelings of shame arising from a sense of failed responsibility under traditional laws to look after, speak for and uphold care obligations in respect of the land.</p> <p>Spiritual and emotional distress arising from any damage to country including damage to significant sites, areas or ecological values.</p> <p>Feelings of loss of identity.</p> <p>Intergenerational loss of what otherwise would have been inalienable rights to country.</p>
Progressive impairment	<p>Progressive chipping away causing detriment to the ability to exercise rights and diminishing cultural and spiritual connection to country.</p> <p>Incremental and cumulative loss of feeling of connection to country.</p> <p>Earlier acts which were not compensable but punched holes in what could be likened to a single large painting, being a single and coherent pattern of belief in relation to a far wider area of land.</p>

It should be noted that, for the purposes of assessing compensation for cultural loss, the various forms of cultural loss and sub-forms therein are considered as a cumulative whole rather than individually.

1.9 Quantification of compensation

Principles for Valuation Methodology

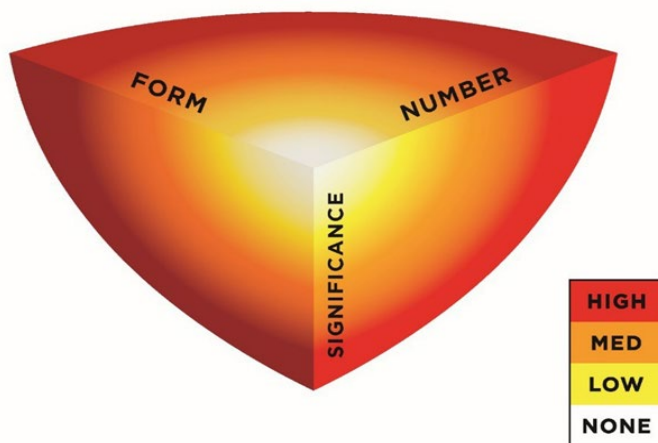
The following principles for a valuation methodology for the quantification of compensation will be applied:

- that the compensation amount be determined as compensation for cultural loss rather than as compensation for special value under section 57 of the Act;
- that the compensation amount be determined as compensation for cultural loss rather than as compensation for solatium under section 60 of the Act;
- that the compensation amount be determined as monetary value (or equivalent non-monetary value if the claimant seeks non-monetary compensation) being market value having regard to notions of worth through the proposed valuation methodology;
- that the compensation amount reflect a loss in perpetuity and compensated by the payment of a single capital sum for all generations;
- that the compensation amount be determined on an englobo basis without division by form of cultural loss or by parcel of land acquired (unless only one parcel acquired), with the apportionment or distribution of the award to be resolved among those who had suffered the loss;
- that the compensation amount has regard to the extent to which related areas have been impacted;
- that the compensation amount disregards the change in size of the claimant group over time;
- that the compensation amount disregards the size of the acquired land;
- that the compensation amount disregards the compensation amount for economic loss;
- that the compensation amount has regard to other determinations for cultural loss made by the Valuer General, the Courts or by Valuers General of other States and Territories;
- that the compensation amount be determined intuitively; and
- that the compensation amount be an amount that would be considered appropriate, fair and just in the Australian community.

Valuation methodology

The following valuation methodology for the determination of compensation for cultural loss will be applied:

- that the forms and number of forms of cultural loss be identified (acknowledging that they are potentially innumerable) through the claimant's submitted claim, through conference with the claimant and through submitted evidence;
- that the significance of each of the forms of cultural loss be identified through conference with the claimant, preferably following invitation to country by the claimant;
- that the significance of each of the forms of cultural loss be expressed by the Valuer General as none (not applicable), low (less significant), medium (significant) or high (very significant);
- that the Valuer General have regard to the whole of the evidence, including the claimant's statement of claim and supporting evidence, the acquiring authority's list of issues and any consultant advice that the Valuer General may seek, within the context of the following conceptual diagram when intuitively determining compensation for cultural loss:



A wide range of forms of cultural loss which are many in number and very significant would support the highest level of compensation with fewer forms, lower number and lesser significance supporting lower levels of compensation.

Iterative process

To ensure appropriate, fair, and just compensation, the Valuer General's determination may begin with the claim by the dispossessed party which the Valuer General will consider relative to other claims in other matters, other determinations for cultural loss made by the Valuer General, the Courts or by Valuers General of other States and Territories being, over time, an iterative and self-updating process.

References

Definitions

Term	Meaning
Acquiring authority	In NSW, State and local government organisations, including State owned corporations, can acquire land for public purposes. The government organisation acquiring the land is commonly called the acquiring authority. The acquiring authority manages the acquisition process including all negotiations with the landowner.
Compulsory acquisition	While acquiring authorities aim to acquire land by agreement with the landowner, this is not always possible or practicable. When this happens, the acquiring authority may need to acquire the land compulsorily.
Determination of compensation	The determination of compensation shows the amount of compensation payable as determined by the Valuer General.

Related documents and legislation

- [Land Acquisition \(Just Terms Compensation\) Act 1991](#)
- [Compensation following compulsory acquisition guidance note](#)
- [Compensation following compulsory acquisition involving possible conflicts of interest guidance note](#)
- [Compensation following compulsory acquisition of a substratum interest guidance note](#)
- [Compulsory acquisition advice guidance note](#)
- [Your guide to the Valuer General's role in compulsory acquisition](#)