Review of Forms of Cultural Loss and the Process and Method for Quantifying Compensation for Compulsory Acquisition

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Valuer General NSW

NSW GOVERNMENT

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Executive Summary

Under ss47 and 54 of the NSW *Land Acquisition (Just Terms Compensation) Act* 1991, the Valuer General is tasked with determining compensation for the acquisition of land, including any *native title rights and interests in relation to land,* which may include compensation for cultural loss.

Cultural loss may arise in many forms with the purpose of this review being to identify potential forms of cultural loss and a process and valuation method for quantifying compensation as the basis for discussion with relevant stakeholders.

This review considers the relevant statutes, regulations and policies pertaining to the determination of compensation for non-economic loss for cultural loss and loss of spiritual attachment in the context of land acquisitions. The relevant statutes for consideration include NSW *Land Acquisition (Just Terms Compensation) Act* 1991 (the Act) and the *Native Title Act 1993* (Commonwealth) (*NT Act*), with the principal case law of relevance being *Northern Territory v Griffiths* (2019) (*Timber Creek*) which, while providing clarification, does not provide clear guidance.

It appears that, currently, there is no clear process outlined in either Act or any other law applicable to New South Wales for ascertaining whether the determined amount of compensation is "just", nor is there any statutory guidance on the process by which non-economic loss for cultural loss and loss of spiritual attachment is to be determined, regardless of whether the interest is held by a native title holder or another person claiming the loss.

The Valuers General for each of the Australian States and Territories all confirmed that they had not undertaken determinations for cultural loss arising from compulsory acquisition, though the Valuer General of Victoria identified a matter currently before the Victorian Courts concerning six trees located within the proposed route of a highway which are contended to be culturally significant by the Djab Wurrung people. Depending on the Court's decision in this matter, there may be implications for the determination of compensation for cultural loss in New South Wales.

The International Property Tax Institute undertook a global review to establish if and how other countries approached the quantification of cultural loss, focusing on Canada, USA, UK, South Africa, New Zealand, Japan and Brazil as well as several international bodies. IPTI found little evidence of specific attention to the determination of compensation for cultural loss, though related examples identified included the Canadian Gift Lake Métis Settlement, the paper by Gregory et al (2020) concerning quantification of intangible losses using a community based multiple-attribute approach, the application of the contingent value approach in the UK, the cost of holding religious ceremonies to quell spiritual disturbance in Japan and settlement premised on an apology and acknowledgement of guilt in Brazil.

Associate Professor Garrick Small undertook a global valuation literature review, focusing on cultural loss in Canada, Fiji, New Zealand, New Guinea and Malaysia, in order to establish if existing valuation approaches and methods had been applied to the assessment of cultural loss. Associate Professor Small identified a helpful application of the contingent valuation approach by Pai and Blake

(2018) and also found the paper by Gregory et al (2020) to be informative, potentially offering a solution to the valuation question drawing on decision analysis, behavioural decision theory and cultural anthropology.

The Canadian Gift Lake Métis Settlement is informative as evidence was taken from GLMS Elders and community members which assisted in gaining an understanding of the way of life on GLMS and the role that the impacted area historically played in that way of life. While the Land Access Panel rejected GLMS's estimate of compensation based on non-market evaluation methods using a multi-attribute utility theory, the Panel recognised the growing application of such methods which have yet to be accepted by the Canadian Courts.

Gregory et al (2020) considered a case study of two indigenous Dene Nations in central and western Canada who suffered cultural loss, proposing a comprehensive, multi-attribute approach to estimating compensation to provide a more accurate depiction of impacts and a consistent, principles based approach to calculating compensation. The authors identified five major categories of losses based on interviews with community members and groups, including two visits to country, which were then quantified through eliciting values from community members to rank and weight the categories of loss, according to their relative importance, with compensation determined relative to calculated economic loss.

While contingent valuation was identified as a possible methodology for the determination of cultural loss, being a "stated preference" model which may be distinguished from a price based "revealed-preference" model and reflecting a desired scenario rather than a reality scenario, such shortcomings as sample size, sample composition, protest answers, strategic behaviour, response biases, uninformed responses and survey respondents disregarding any financial constraints can render the methodology of limited use for the determination of cultural loss in New South Wales. Such a methodology may also be considered disrespectful.

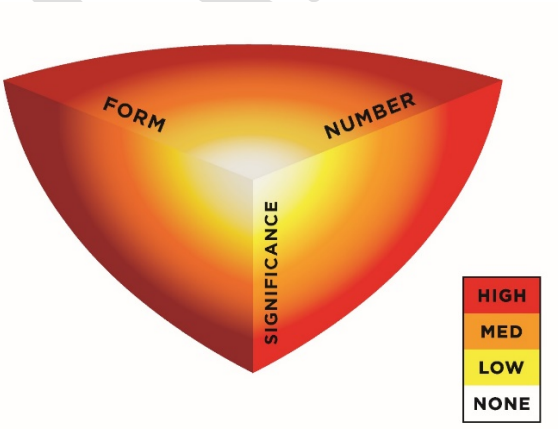
Compensation under the Act is premised on assessment of market value reflecting a transaction basis where the parties are commercially ambivalent and have no form of personal interest in the transaction with both the parties and the transaction being hypothetical. However, determination of compensation for cultural loss is more akin to an assessment of worth, acknowledging the actual parties and their interests in an actual transaction, removing commercial ambivalence and allowing reflection of the worth to a specified party. Accordingly, the requirement of the Act to express a notion of worth as a statement of market value presents a crucial and fundamental dilemma in the determination of compensation.

The High Court majority decision in *Timber Creek* is the principal authority in Australia pertaining to compensation for cultural loss, however the methodology for determining the amount of such compensation is developing law. Edelman J, who agreed with the majority on the basis on which cultural loss was awarded, distinguished compensation for cultural loss from solatium, while also contemplating the scope for cultural loss to be a form of special value. This distinction is yet to be tested by the Courts in the context of compulsory acquisition in New South Wales. *Timber Creek* identified forms of cultural loss and quantified an amount of compensation as an *in globo* amount

reflecting perpetuity but did not provide guidance on how such an amount was to be determined other than that it should be considered appropriate, fair and just in the Australian community.

While international and local experience, together with relevant statute and case law, provide broad guidance as to the issues to be considered in the determination of compensation for cultural loss and loss of spiritual attachment, a prescriptive guide to the process, forms and quantification of compensation for cultural loss was not discovered. Accordingly, the following policy guidelines are suggested as the basis for discussion and community feedback:

- process for the determination of compensation:
    - being that process adopted by the Valuer General for compulsory acquisition generally under the Act including submission of a statement of claim by the claimant identifying the forms of cultural loss suffered and compensation sought, submission of a list of issues by the acquiring authority, exchange of information, conference with each party by the Valuer General and provision of a preliminary valuation report and an issues response;
- forms of cultural loss:
    - it may be contended that the forms of cultural loss may include, but not be limited to, access, residence, activities, practices, ecology, sites, trauma and progressive impairment, each having a potentially different number of sub-forms with each then having a potentially different significance;
- quantification of compensation:
    - the Valuer General will have regard to the claimant's statement of claim and supporting evidence, the acquiring authority's list of issues and the form, number and significance of cultural losses within the context of the following conceptual diagram when independently determining compensation for cultural loss:



such that 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 numbers and lesser significance supporting lower levels of compensation.

For some, it may appear that the Valuer General is attempting to quantify the unquantifiable but, as the Act requires cultural value to be quantified as monetary value, the above methodology for the quantification of compensation is considered to be one possible route to a determination of compensation on "just terms" in accordance with the relevant legislation for the purposes of discussion and community feedback.

1. Introduction

The Act provides for the compulsory acquisition of *native title rights and interests in relation to land* (s7A) in compliance with the Commonwealth Native Title Act 1993, with compensation payable in whole or in part and in money or in a form other than money.

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.

Cultural loss may include loss of spiritual attachment, being premised on the connection which Aboriginal peoples have with land being essentially spiritual or a religious relationship *in which 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* (Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 at 167). In determining compensation for cultural loss, Edelman J observed in *Northern Territory v Griffiths* (2019) (*Timber Creek*) that:

> *312 Expressed more fully, it is compensation for the value of the loss of attachment to country and rights to live on, and to gain spiritual and material sustenance from, the land.*

Accordingly, under ss47 and 54 of the Act, the Valuer General is tasked with determining compensation on "just terms" for cultural loss where there is no established methodology. The purpose of this review is to identify potential forms of cultural loss and a process and method for quantifying compensation as the basis for discussion with relevant stakeholders.

This review is structured as follows:

2. Relevant Legislation and Case Law
3. Approach in Other Australian States and Territories
4. Approach in Other Countries
5. Valuation Literature Review
6. Gift Lake Métis Settlement, Canada
7. Paper by Gregory et al (2020)
8. Contingent Valuation
9. Dilemma – Worth v Market Value

10. Solatium
11. Special Value
12. Timber Creek
13. Summary
14. Potential Ways Forward

2. Relevant Legislation and Case Law

Relevant statutes, regulations and policies pertaining to the determination of compensation for non-economic loss (being cultural loss or loss of spiritual attachment) in the context of land acquisitions and how the legal landscape could inform the development of policy guidelines for arriving at a determination of compensation were considered in preparing this review.

It appears that, currently, there is no clear process outlined in the Act, the NT Act or any other law applicable to New South Wales for ascertaining whether the determined amount of compensation is on "just terms" - nor is there any statutory guidance on the process by which non-economic loss for cultural loss or spiritual attachment is to be determined, regardless of whether the interest is held by a native title holder or another person claiming the loss.

Non-economic loss may be regarded as the non-economic effects of the "loss or diminution of traditional attachment to the land or connection to country and for loss of rights to gain spiritual sustenance from the land" (see *Griffiths* at p. 212 [3]), which the High Court labelled "cultural loss" (*Griffiths* at p. 255 [154]).

2.1 Relevant Legislation

The relevant legislation that applies in NSW is the Act and the NT Act.

2.1.2 Commonwealth Legislation

Division 5 of Part 2 of the *NT Act* provides for the determination of compensation for acts affecting native title. The key provision of that Division is s. 51, which relevantly provides as follows:

> "*Just compensation*
>
> (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement 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.
>
> *Acquisition under compulsory acquisition law*
>
> (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria

> for determining compensation set out in the law under which the compulsory acquisition takes place."

Accordingly, for the purposes of determining compensation in New South Wales under the *NT Act*, it is appropriate to have regard to the principles or criteria under the Act.

2.1.3 NSW Legislation

In determining the amount of compensation to be offered to a person in the context of land acquisition, the Valuer General is required to determine non-economic loss for cultural loss or loss of spiritual attachment in appropriate cases to ensure that compensation is on just terms: ss. 47 and 54(2) of the Act.

Section 54(2) of the Act provides that if the compensation payable under Part 3 does not amount to compensation on just terms within the meaning of the *NT Act*, the person concerned is entitled to such additional compensation as is necessary to ensure that the compensation is paid on that basis. When read with s. 47, s. 54(2) of the Act requires the Valuer-General to determine non-economic loss for cultural loss or loss of spiritual attachment in appropriate cases so that compensation is on just terms for the acquisition of native title rights and interests

2.2 Relevant Case Law

Apart from the clarification provided in *Timber Creek*, Australian compensation cases have otherwise not provided clear guidance (if any at all) as to the considerations relevant to a determination of compensation for cultural loss or loss of spiritual attachment and the nexus between those considerations and the determination of compensation for non-economic loss under the Act remains unclear. This is not surprising considering that this is a developing area of law.

2.2.1 Timber Creek

Currently, *Timber Creek* is the leading authority for the law pertaining to compensation for acts affecting native title. It is the only case which has articulated the principles pertaining to the calculation of compensation for acts affecting native title. However, it provides limited guidance on the process or methodology of valuing cultural loss, whether in the native title context or otherwise.

Given the significance of the High Court's decision in *Timber Creek*, this is considered in greater detail in Section 12, below.

2.2.2 Determinations by Consent

In the recent decision of *Bandjalung Aboriginal Corporation Prescribed Body Corporate RNTBC obh of the Bandjalung People v Transport for NSW* [2020] NSWLEC 1008, the Court gave effect to a conciliation conference ordered under s34(1) of the *Land and Environment Court Act 1979*, in which the parties reached agreement as to the amount of compensation to which the applicant was entitled under the Act for the compulsory acquisition of their native title rights.

While the decision does not make any comment as to how the amount of compensation was settled upon, it is noteworthy that the initial offer for compensation for the applicant's native title rights and interests, $9,080, was increased to $42,000 plus interest following the negotiations. As the

negotiations occurred post *Timber Creek*, the parties may have been informed by the outcome and principles of that case.

Besides *Timber Creek*, there have been two determinations settling compensation applications for acts affecting native title which were both in South Australia, namely, *De Rose v State of South Australia* [2013] FCA 988 and *Pearson on behalf of the Tjayuwara Unmuru Native Title Holders v State of South Australia (Tjayuwara Unmuru Native Title Compensation Claim)* [2017] FCA 1561. Both were settled by consent, with the details and amount of compensation kept confidential.

Also of relevance is a NSW Land & Environment Court decision which imposed a penalty on a local council for the offence of harming an Aboriginal object (*Chief Executive, Office of Environment and Heritage v Clarence Valley Council* [2018] NSWLEC 205). While the reasoning does not illuminate how the Valuer General might determine compensation for cultural loss or loss of spiritual attachment for the purposes of the Act, the $300,000 penalty for the removal of a scar tree suggests that acts affecting particularly significant sites or objects could merit significant awards of compensation.

2.2.3 Other Australian States

Recent decisions in other States are not particularly helpful to the process for calculating cultural loss. In *Saunders on behalf of the Bigambul People v State of Queensland (No 2)* [2021] FCA 190 ("*Saunders*"), Rangiah J struck out an application for determination of compensation under ss50(2) and 61(1) of the *NT Act* on the basis that the original application failed to identify any compensable act, stating:

> "It may also be seen from *Griffiths* that compensation for non-economic loss is assessed by reference to the direct effects of an act upon the enjoyment of native title rights and interests in the area where the act is done and, in addition, collateral detrimental effects upon enjoyment of rights and interests in broader areas of country. Such collateral detrimental effects may be, for example, a sense of loss of connection to broader areas. However, the High Court did not suggest that compensation is payable in relation to an area where an act has *no* effect upon native title rights and interests. As is the case in respect of determination of the economic value of the affected rights and interests, determination of non-economic value requires identification of the area in which native title rights and interests are affected, directly or collaterally."

In *Wharton on behalf of the Kooma People v State of Queensland (No 2)* [2021] FCA 191, Rangiah J also struck out an application for a determination of compensation on the basis that the applicant failed to identify any relevant compensable act or any area in which it is alleged that any identified act extinguished or otherwise affected native title acts and interests.

It is noted that claims have been filed in the Northern Territory (*Galarrwuy Yunupingu (on behalf of the Gumatj Clan or Estate Group)* NTD42/2019 (filed 28 November 2019)*; Galarrwuy Yunupingu (on behalf of the Gumatj Clan or Estate Group) Compensation Claim* NTD43/2019 (filed 28 November 2019)) and Western Australia (*Naomi Smith on behalf of the Single Noongar Claim Group v State of*

Western Australia, WAD580/2019 and the Tiwari people WAD141/2020 and WAD142/2020 filed 17 June 2020), but these are yet to be determined.

3. Approach in Other Australian States and Territories

The Valuer General contacted the Valuers General for each of the Australian States and Territories to ascertain their involvement, if any, in the determination of compensation for cultural loss.

The Valuers General for Western Australia, South Australia, Northern Territory, Tasmania, Australian Capital Territory and Queensland each confirmed that they had not undertaken determinations of such losses.

However, while the Valuer General for Victoria confirmed he had not undertaken determinations of such losses to date, he noted a relevant matter currently before the Court concerning six trees located within the proposed route of the Western Highway Duplication Project between Buangor and Ararat which are contended to be culturally significant by the Djab Wurrung people. The Victorian Supreme Court granted an interim injunction to temporarily halt highway works in October 2020, after the Federal Environment Minister decided to reject an application for protection for a second time in August 2020 (ABC 2020A; ABC 2020B). Depending on the Court's decision in this matter, there may implications for the determination of compensation for cultural loss in New South Wales.

4. Approach in Other Countries

The International Property Tax Institute (IPTI) was commissioned to undertake a global review to establish if and how other countries approached the quantification of cultural loss or loss of spiritual attachment in the context of compulsory acquisition. IPTI reviewed the situation in detail in seven principal countries, considered other countries and had regard to relevant international organisations.

4.1 Canada

While Canadian legislation for "expropriation" compensates for land taken and other losses that directly flow, it explicitly seeks to exclude payments to First Nations for either cultural loss or loss of spiritual attachment:

> *Specific Claims Tribunal Act 2008*
> *s20 (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,*
> *(d) shall not award any amount for:*
> *(ii) any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature;*

However, in some cases, it appears that the payment of compensation may be made by either agreement (which is not disclosed) or by judicial determination (as in the Gift Lake Métis Settlement considered in Section 6). IPTI advises that examples of the quantification of such compensation include apparently subjective adjustments of between 20% and 50% to the existing use value of the land in some cases and a figure of C$400 per acre in another.

4.2 United State of America

US legislation for "eminent domain" is limited, being based on the "Takings Clause" of the Fifth Amendment ("just compensation"). IPTI was unable to find any examples of agreement or litigation concerning compensation for cultural loss or for the loss of spiritual attachment.

However, IPTI identified a paper by Gregory et al (2020) concerning quantification of intangible losses using a community based multiple-attribute approach, which is considered further in Section 7, below.

4.3 United Kingdom

UK legislation and case law for compulsory acquisition is both extensive and historic, being based on the principle of "equivalence" meaning that the claimant, as far as possible, is to be put back in the same position as they were prior to the taking of their land, as far as money is able to do so.

While the claimant may be compensated for the market value of land and other matters that flow directly from the compulsory acquisition, there is no recognition for losses associated with cultural loss or loss of spiritual attachment.

IPTI identified one asset valuation which concerned the valuation of intangible historic/cultural value where the contingent value approach had been applied. IPTI notes that an adapted contingent valuation approach may be one approach for consideration, along with others for comparative purposes, in the quantification of cultural loss though cautions that, by itself, it may be unlikely to provide a sufficiently credible approach.

4.4 South Africa

South African legislation requires compensation for "expropriation" to be "just and equitable", with market value for land taken seen to meet the requirements for just and equitable compensation with no additional amount for any alleged cultural loss.

However, IPTI advise that increasing recognition of cultural loss may lead to legislative change in South Africa in the future.

4.5 New Zealand

The New Zealand compulsory purchase system requires payment of "full compensation" to leave landowners no better or worse off following the taking of land. While New Zealand endeavours not to acquire Maori land where possible, if acquisition of such land occurs the present legislation precludes compensation for cultural loss or loss of spiritual attachment.

Though the New Zealand system includes payment of "solatium" with some literature suggesting this could be applied to the compensation for cultural loss and loss of spiritual attachment, IPTI notes that such compensation is not designed for that purpose.

While the Waitangi Tribunal may make settlements including what is termed "cultural redress", it acknowledges that the current situation is unsatisfactory but has not yet proposed an alternative solution.

4.6 Japan

The cultural preference in Japan for acquisitions to be resolved amicably results in the use of compulsory acquisition in Japan being both strictly limited and controversial. The dispossessed claimant is entitled to "just compensation" which generally means market value and other economic losses that flow directly from the acquisition and excludes cultural value unless reflected in market value (*Gifu Prefecture Waju-Tai Case, 1988*).

While there is no basis for the payment of compensation for cultural loss, the prevalence of acquisition by agreement may mean that such claims are reflected in the "adjustment" of compensation.

Interestingly, IPTI notes that:

> *IPTI's contacts in Japan provided an interesting and unusual example of expropriation of land owned in conjunction with a Buddhist temple which showed how "spiritual attachment" might be measured based on the cost of holding religious ceremonies to "quell the spiritual disturbance" caused by the construction of a tunnel and the relocation of stone statues.*
>
> (IPTI (2021), page 141)

which was quantified as ¥7,000,000 (approximately A$80,000) with additional compensation for transplanting 817 trees and relocating 21 outdoor religious statues.

4.7 Brazil

"Expropriation" in Brazil requires the payment of "fair compensation", though IPTI advise that there is no clear guidance as to how this should be assessed. An exception is the immediate expropriation of properties without compensation where Government inspectors prove the existence of slave labour, common in both rural areas (production of pine, sugar cane, coffee, fruit, etc) and urban areas (sewing workshops, hotels, domestic services, etc) and in the construction industry.

While Brazil has a significant indigenous population and controversial "expropriation" for mining, forestry and other purposes, IPTI was not informed of any examples of cases where compensation for cultural loss had been provided. However, a mediated settlement in 2020 for deforestation in the Brazilian Amazon in the 1980's to supply the European furniture industry included a settlement of US$3 million in instalments over 5 years which was only accepted by the indigenous people because

it included an official apology and an acknowledgement of guilt through a recognition of their "enormous importance as guardians" of the Amazon, being "moral reparation (that) transcends the financial settlement".

4.8 Other Countries

IPTI advise that most of the countries considered do not explicitly provide compulsory acquisition compensation for cultural loss or loss of spiritual attachment in the form considered in New South Wales.

In 2012, the UN Committee on World Food Security endorsed a set of voluntary principles known as the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGTs). Section 18.2 of the VGGTs calls for policies and laws related to valuation to take into account non-market values, including social, cultural, religious and spiritual values.

IPTI notes that, while India, Vietnam, Sri Lanka, Ghana and Tanzania have provisions concerning compensation reflecting historical and/or cultural connections with the land, the Philippines go further than most countries to recognise the rights of indigenous people to maintain their cultural and spiritual practices and to receive "just and fair compensation" for their loss through compulsory purchase. However, as IPTI note, the problem is that, while there is a right to compensation explicitly reflecting spiritual and cultural rights, there is no indication how such rights should be quantified if there is interference with them.

IPTI note that a common theme in their report is the absence of clear guidance on how such losses should be compensated, with several authors recommending "self-assessment" as a way to quantify such intangible losses.

4.9 International Organisations

IPTI identified a number of publications by international organisations, such as United Nations entities, the World Bank and the Lincoln Institute of Land Policy, which show that issues of social and cultural value, religious and spiritual value and environmental value are increasingly being recognised by international bodies noting:

> *However, recognising them is only the first part of the process. Trying to find ways to quantify them, particularly in monetary terms for compensation purposes, continues to be an elusive consideration.* (IPTI (2021), page 142)

IPTI advises that the Royal Institution of Chartered Surveyors (RICS), the International Valuation Standards Council (IVSC) and the International Federation of Surveyors (FIG) have recently published a document entitled *Valuation of Unregistered Land – a Practice Manual* (UN Habitat, 2021) under the auspices of the UN which specifically acknowledges that "social and cultural value, religious and spiritual value and environmental value" should, if significant, be reflected by valuers in their valuations, though it does not address quantification.

The United Nations Development Programme's Standard 4: *Cultural Heritage* recognises intangible cultural heritage (*includes practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith*) and Standard 5: *Displacement and Resettlement* refers to social, cultural and spiritual well-being, however neither address quantification of compensation for interference with such heritage. Similarly, publications of the World Bank recognise cultural loss and spiritual attachment by indigenous peoples but do not specifically address the issue of quantifying compensation.

5. Valuation Literature Review

Associate Professor Garrick Small was commissioned to undertake a global literature review on valuation issues in order to establish if existing valuation approaches and methods had been applied to the assessment of cultural loss.

Associate Professor Small extensively outlined the underlying issues rendering such assessment problematical, reviewed the literature concerning cultural loss and loss of spiritual attachment in Canada, Fiji, New Zealand, New Guinea and Malaysia and identified the paper by Gregory et al (2020) as being potentially helpful, however noting:

> *Almost every writer on the topic of compensation for loss of customary interest expresses in some way the incomparability of money compensation for the loss of spiritual attachment, at least in the eyes of the indigenous owners.*

and:

> *Attempting to estimate the money value of spiritual attachment is equivalent to the absurdity of attempting to measure the length of blue, or the weight of sweet.*

Acknowledging the complexity of the relationship between indigenous people and their land and the diversity of indigenous peoples, Associate Professor Small notes that, while the relationship between indigenous people and their land may be referred to as "customary property," "customary property rights," or "customary interests", none of these terms do justice to the complex relationship that exists between indigenous people and their land.

Associate Professor Small notes that the principal distinction between customary property and western property is the former's focus on spiritual attachment which is totally alien to western economic, cultural and even philosophical traditions. This spiritual attachment is evident in all instances of customary property found throughout the world.

Associate Professor Small suggests two categories of compensation value for loss of customary property rights, being material and non-material. The material deals with value attributes that can be valued using approaches drawn from recognised professional valuation practice. The non-material,

which consist of personal attachment and spiritual elements, presents the valuer with major challenges as the latter constitutes the unique character of customary property.

Associate Professor Small identifies four general classes of valuation for customary interests in land:

1. rental valuation of customary property;
2. sale or alienation of particular components of the land;
3. customary property held under freehold title; and
4. compensation for the loss of customary right,

noting the fourth to present a problem as it deals with non-material values that are usually referred to as "cultural and spiritual attachment" with each of the terms being significant in understanding the valuation challenges involved:

> *Attachment in connection with customary property has a meaning to indigenous people that is difficult for western minds to grasp. The western mind believes spiritual beliefs are personal and ultimately subjective. However, indigenous people view their spiritual attachment as primarily an objective metaphysical condition for their being, which results in grave moral imperatives that prevent them accepting alienation from their land. In their theological, legal, and moral framework, their attachment to their land is objective.*
>
> *In terms of compensation for loss of attachment, there is an immense difference between mere subjective attachment, and essential objective metaphysical attachment. Solatium for the hurt caused by the loss of a subjective attachment is incomparable to the loss of an objective necessary attachment.*

Given that quantification of compensation is required, Associate Professor Small focuses on a valuation methodology considering various aspects of the opinions of transaction participants and others. Pai and Blake (2018) examine application of a contingent valuation methodology based on the Willingness to Pay (WTP) by the acquiring authority and the Willingness to Accept (WTA) by the dispossessed party. Considered in the context of Gregory et al (2020), a valuation approach may be derived from decision analysis, behavioural decision theory and cultural anthropology including:

1. investigations into the willingness of those seeking compensation to accept particular monetary sums;
2. investigations into the willingness of those seeking to acquire control of customary lands to pay particular monetary sums; and
3. investigations into the opinions of various observers regarding the significance of the attachments being considered,

noting:

> *These studies have the advantage of being able to gather tangible evidence, either of behaviour or opinion, and thereby permit what could be referred to as a*

sociological solution to the valuation question. The disadvantage of these methods is that they do not directly consider the objective value of the thing valued, nor do they reliably reveal the beliefs and value judgements of the key people involved. In the case of customary land within the objective of determining just terms of compensation, the key party is the customary owner who is about to be disenfranchised. Ultimately, if their evaluation of the justice of the result is at variance to the compensation terms accepted, then the compensation will fail to achieve the "just terms" criteria.

though concluding:

Gregory et al (2020) has outlined an approach to the valuation of the solatium due to hurt resulting from cultural losses, and while the approach has been proposed for valuing the spiritual loss as well, its adoption for this purpose is argued to be less satisfactory despite being perhaps the most comprehensive and defensible.

6. Gift Lake Métis Settlement, Canada

This matter concerned a hearing by the Land Access Panel (LAP) of a dispute between Gift Lake Métis Settlement (GLMS) (Appellant) and Devon Canada Corporation (Devon) (Respondent) concerning compensation payable in respect of 10 surface leases involving 43 well sites and access roads in the Sandy Bay area on Gift Lake Metis Settlement. The Panel's decision was handed down in April 2007 with a later appeal to the Court of Appeal of Alberta dismissed.

One of the issues addressed by the LAP concerned whether GLMS presented evidence that established Devon's operations caused a loss of value of the parcels of land in relation to cultural value for preserving a traditional Métis way of life and/or impact on cultural environment.

In considering the matter, the LAP received evidence from GLMS Elders and community members which assisted in gaining an understanding of the way of life on GLMS and the role that the Sandy Bay area historically played in that way of life. Prior to oil and gas activity in the area, the Sandy Bay area was an important area used for hunting, gathering, fishing, trapping and other traditional activities with the Sandy Bay area historically used by approximately 35% of GLMS members to obtain their livelihood and had cultural value for all members of the GLMS.

Devon gave evidence that their operations created impacts such as noise from pumpjacks and the occasional service rig and routine visits by Devon personnel. This noise interfered with wildlife and hunting activities and affected the enjoyment of the area, having some negative impact on the social and cultural environment.

The LAP acknowledged the difficulty, if not impossibility, of assigning a monetary value to loss of cultural value for land or impacts on cultural environment. The LAP reviewed cases including an award of damages for cultural loss and concluded that the majority of cases did not explain how

damages for cultural loss were calculated or assessed and that it appeared that the awards may have been symbolic in nature.

Further, the LAP rejected GLMS's estimate of compensation based on non-market evaluation methods using a multi-attribute utility theory, though recognised the growing application of such methods which had yet to be accepted by the Canadian Courts. The LAP favoured a valuation methodology that was best supported by the evidence and that dealt with the impacts caused by Devon, expressed on an acreage basis:

- in estimating cultural impact on subsistence, Devon's expert estimated a value of $210/acre based on valuing the food requirements for the families on GLMS, adjusting that value to reflect a value for the subsistence economy and calculating the impact per acre of Devon leased area;

- in estimating the value of impact on traditional knowledge, Devon's expert acknowledged that such a task was "difficult if not impossible". In their opinion, the most appropriate approach was mitigation through education. They arrived at a value to hold a one-week cultural camp once a year, factored that figure up to account for inflation and divided the cost by the Devon lease area to arrive at $100/acre per year;

- in calculating the approximate cost to replace seasonal camping, Devon's expert arrived at $83/acre per year as a figure to account for impact on community land use; and

- allowing for cumulative effects measured at 2% of the overall impact, this summed to a round figure for compensation of $400/acre per year.

Devon's expert also undertook a "pattern of dealings" approach to determine that other compensation settlements supported their valuation, though GLMS contended that this was effectively a price comparison for something for which there was no market.

7. Paper by Gregory et al (2020)

The paper considers the neglect of social and cultural effects in Court sponsored negotiations and Government regulation because they are not represented in terms of economic markets or lack standard measures, being a particularly significant omission in the determination of compensation for indigenous communities given their fundamental connection to land and the negative impacts on language, governance, social systems and well-being that rely on the maintenance of shared, place-based practices.

Using a case study of two indigenous Dene Nations, the paper proposes a comprehensive, multi-attribute approach to estimating compensation to provide a more accurate depiction of impacts and a consistent, principles-based approach to calculating compensation.

7.1. Context

Canadian and US legislation require a wide range of impacts to be addressed as part of project assessments, with environmental impact assessments including economic, environmental, social, cultural and health related effects. Further, increased attention is now being given to compensation for damages due to past actions including tangible losses (material use of natural resources, air quality, etc) and intangible losses including:

> *adverse impacts on social relations, cultural practices and identity, governance systems, and nonphysical health, e.g., anger, trauma, shame. Impacts on identity and well-being, including spiritual well-being, due to disruption of land-based practices and the relations and knowledge that accompany these include the loss or disruption of ceremonial practices and knowledge systems as well as effects on family and social status*

The paper notes the dominant paradigm for assessment has been cost-benefit analysis, which focuses on the tangible and ignores, or extrapolates through questionable proxies, the intangible.

7.2. Multi-attribute assessment methods

The paper acknowledges the need to measure both tangible and intangible losses in multiple dimensions, including economic, social, health, cultural and spiritual losses, proposing the use of multi-attribute assessment methods developed across the decision and social sciences drawing on economics, anthropology and psychology with information about the extent and nature of impacts involving *traditional use studies* based on interviews with elders and community leaders which provide descriptions of traditional practices as well as evidence and technical data drawn from published material.

The authors stress the importance of the component dimensions of loss:

> *A basic element in a decision analysis or other structured decision-making approach to determining compensation is the explicit deconstruction of impacts, including (in the case of Indigenous communities) cultural and social values, into their component dimensions. These are discrete, nonoverlapping categories of value based on how any designated group characterizes or classifies their losses.*
>
> *For example, the loss of the ability to hunt moose represents several important values or categories of losses: food sustenance for the winter, the opportunity for older generations to teach hunting and food processing skills to youth, the inability to continue seasonal rounds, the loss of opportunities for family members to spend meaningful time together, the loss of the ability to provide for one's family and community, and the loss of ways of being deemed fundamental to identity and a community's experience of life and place (Coulthard 2014, Sharp 2004).*

For members of Indigenous communities these different categories of loss typically are interwoven and add up to a social and cultural whole that is "more than the sum of its parts."

7.3. Case studies

The case studies focused on two groups of Dene First Nations who have lived in central and western Canada for thousands of years, being traditionally hunters, fishers and harvesters of native plants living in a close relationship with the land. In the early 1950's, the Canadian Government took control of a large portion of territory to establish a weapon's testing facility with protection for continued use by the Dene First Nations, but no compensation. After years of Court action, in 2019 the Canadian Government agreed to pay monetary compensation creating the need for quantification with the paper's authors retained by the Dene First Nations to assist in constructing a logical and transparent process for determining compensation.

The author's determined their task to be two-fold:

- to place the information regarding impacts within a multidimensional evaluation framework that faithfully represents the nature and magnitude of losses experienced by community members; and
- organise the information in such a way that quantitative assessment of compensation would be viewed by all parties as rigorous, replicable and unbiased.

Five major categories of losses were derived and developed based on interviews with community members and groups, including two visits to country:

- trauma, fear, anger and related physical effects on health and well-being, exacerbated by use of the land for weapons testing and the resulting change in diet and lifestyle;
- cultural practices, identity and knowledge including epistemologies, world views and practical knowledge and skills;
- connection to families, society and animals with the loss of freedom to move around land contributing to a fundamental decline in spiritual and cultural well-being among community members, families and villages;
- access to places, knowledge and trails including loss of access to important historical, spiritual and burial sites and to trails used by people, animals and ancestors; and
- household livelihood and related economic loss, including loss of subsistence hunting and fishing opportunities and plant/berry harvest opportunities, loss of income from trapping and loss of travel corridors.

Therefore, quantification was based on what was most significant to the Dene communities rather than categories of non-economic loss assigned by non-indigenous experts.

The process of quantification was based on three main steps:

- calculate the current value of economic household, livelihood and trade losses experienced since 1953;
- elicit values from community members to rank and weight the categories of loss, according to their relative importance. These weights express context specific consequences relative to each other based on the type and severity of impacts to provide a method for establishing the equivalent value of non-economic losses with clear market equivalents of losses; and
- calculate the dollar value for each category of loss relative to the calculated household economic impacts.

The relative importance of the range of experienced values (losses) is then used as the basis for valuation and determination of compensation:

> *For example, noneconomic losses that are considered to be twice as important as economic losses, based on the range of experienced effects, are assumed to have a dollar value equivalent to twice the value of the economic losses.*

The authors used Canadian Government Department of Indian Affairs data from the 1950's to estimate the compensation for lost food resources and economic household, livelihood and trade losses and extrapolated this for the period 1953-2018.

The five main components of losses were tabulated and discussed with the Chief and Council of each Nation as well as elders and community members to review the categories and to provide information about the relative importance of the different categories of losses through an *importance rank of impact* (1 = high, 5 = low). To develop relative importance rankings for the five main components of losses, community members were also asked to assign *points given to impact type (maximum =100)* to determine the most important of the impacts through questions such as "which loss matters the most?" or "if you could select one impact and make it go away, which would you choose?".

Interestingly, community members preferred weighting to directly ranking and preferred to use sticky notes, each worth 10 points (some members adopted 5 points), to attach to a table of the five main components of losses on a white board. The resulting weighting showed fear, trauma and a general decline in health to be the most important receiving 39% of the total weight assigned to losses.

To quantify compensation, the dollar-based value associated with household economic losses to livelihood (being a quantifiable economic loss) was applied to the relative weights of the other components of loss to estimate the total value of loss.

It should be noted that while the choice and mechanics of the weighting of value categories may vary among communities, each still needs to adhere to analytic principles and to avoid strategic bias.

7.4. Summary

The paper is significant as:

- it adopts a multi-attribute approach;
- based on a comprehensive description of intangible losses provided by community members;
- who weighted the relativity of intangible losses; and
- then related this to an economically measurable tangible loss.

8. Contingent Valuation

Contingent valuation evolved as an economic valuation technique that has now been applied to the valuation of property interests where the interest does not have a market price, such as a mountain view, biodiversity or environmental issues. Contingent valuation was applied to quantitatively assess damages following the Exxon Valdez oil spill and in this region Callanan (2013) applied contingent valuation to high voltage power lines in Australia.

The contingent valuation method assumes the existence of a "contingent market" and seeks to estimate the value that parties place on the subject of the valuation by ascertaining a Willingness to Pay (WTP) amount for the subject or a Willingness to Accept (WTA) amount to give up a subject, usually derived by survey. As such, it is a "stated preference" model which may be distinguished from a price based "revealed-preference" model, reflecting a desired scenario rather than a reality scenario.

Critics of contingent valuation observe that surveys potentially suffer from such shortcomings as sample size, sample composition, protest answers, strategic behaviour, response biases, uninformed responses and survey respondents disregarding any financial constraints, resulting in a high burden of proof before the results may be considered meaningful. Further, in the context of cultural loss and loss of spiritual attachment, contingent valuation may be considered illogical and disrespectful as it seeks to quantify the unquantifiable, responses may be stated quickly and inconsistently in response to irrelevant clues, responses may be constrained by requiring comparison of difficult to compare alternatives and surveys rely on the perspective of the individual rather than the community.

Accordingly, while aspects of contingent valuation methodology, such as respondent views, may be of use in the valuation of cultural loss and loss of spiritual attachment, use of the method solely may not be helpful.

9. Dilemma – Worth v Market Value

In addition to the fundamental absurdity identified by Small (2021) (*"attempting to measure the length of blue, or the weight of sweet"*), the determination of compensation for cultural loss and loss of spiritual attachment faces the fundamental dilemma of expressing a notion of worth as monetary value through market value.

Section 54(1) of the Act states:

> *The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.*

with the definition of market value in s56 adopting several elements of the definition of market value published by the International Valuation Standards Council:

> *Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.* (IVSC, 2019)

Accordingly, compensation under the Act is generally premised on a transaction basis where the parties are commercially ambivalent and have no form of personal interest in the transaction with both the parties and the transaction being hypothetical.

Within the IVSC bases of value, cultural loss and loss of spiritual attachment are more akin to a notion of worth, being defined by IVSC as investment value or equitable value, respectively, as follows:

> *Investment Value is the value of an asset to a particular owner or prospective owner for individual investment or operational objectives.* (IVSC, 2019)

> *Equitable Value is the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties.* (IVSC, 2019)

As notions of worth, investment value and equitable value acknowledge the actual parties and their interests in an actual transaction, removing commercial ambivalence and allowing reflection of the worth to a specified party.

As such, while concepts of worth are more suited to the determination of compensation for cultural loss, the Act requires a determination of cultural loss in monetary terms through market value.

10. Solatium

Timber Creek established that a claim for cultural loss differs from a claim for solatium, as explained by Edelman J:

> *312 An award of cultural value in addition to exchange value is compensation to the Claim Group for loss of the cultural value to them of the native title rights.*

Expressed more fully, it is compensation for the value of the loss of attachment to country and rights to live on, and to gain spiritual and material sustenance from, the land. That value is lost at the moment of the act of extinguishment. The valuation of this cultural loss is distinct from the subsequent inconvenience and anguish caused by the compulsory manner in which the rights were extinguished. Compensation for the latter has traditionally been described as "solatium".

11. Special Value

Section 57 of the Act provides for compensation for special value where:

> ***special value*** *of land means the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land* (s57)

which may be awarded in only very limited circumstances such as the blacksmith's forge outside a racecourse referred to by Callanan J in *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64.

However, Edelman J contemplated the scope for cultural loss to be a form of special value in *Timber Creek*:

> *304 In conventional cases involving the valuation of land, the exchange value to the vendor will often include the value to the vendor of using the land, ie its use value. This is because the purchaser is assumed to buy the land for its highest and best use. But there are circumstances where the land has additional value to the vendor arising from a special use that the law recognises as a subject of compensation in addition to the exchange value. In this case, the "cultural value" of the land to the Claim Group was pleaded as "special value". In compulsory acquisition cases generally, a special use is exceptional. But in cases involving native title the special use, for cultural purposes, is entirely unexceptional. The special use of the land in native title cases is reflected in its cultural value, not in its exchange value.*

and:

> *308 Special value can encompass every matter of value to a claimant that extends beyond market value other than issues that are often described as mere "sentiment".*
>
> *309 A circumstance of special value pertinent to these appeals is the particular cultural value of native title rights. As the primary judge recognised, the cultural value that was lost comprised (i) the diminution or disruption in traditional*

attachment to country, and (ii) the loss of rights to live on, and gain spiritual and material sustenance from, the land.

Whilst "special value", as defined in s57 of the Act, has been the subject of New South Wales case law, special value in the sense contemplated by Edelman J in *Griffiths* has not been tested in the New South Wales Courts.

12. Timber Creek

Currently, *Timber Creek* is the leading authority for the law pertaining to compensation for acts affecting native title. It is the only case which has articulated the principles pertaining to the calculation of compensation for acts affecting native title. However, it provides limited guidance on the process or methodology of valuing cultural loss, whether in the native title context or otherwise.

Timber Creek is a remote community in the Northern Territory, approximately 600km south of Darwin. The proceedings were brought by Alan Griffiths (now deceased) on behalf of the Ngaliwurru and Nungali Peoples, for the loss of native title rights over an area of 127 hectares in and around the town of Timber Creek (IPTI, 2021).

12.1. High Court

The following is a brief high-level summary of the key points with respect to the award of compensation for extinguishment of native title in the High Court decision in *Timber Creek*:

1. In *Timber Creek*, the judge at first instance awarded $2.5 million to the Ngaliwurru and Nungali Peoples for acts affecting their native title rights, which included an award of $1.3 million for cultural loss. On appeal, the Full Court of the Federal Court rejected each appeal ground advanced by the Commonwealth and the Northern Territory in respect of the trial judge's assessment of non-economic loss, including a contention that this was manifestly excessive. The Northern Territory and the Commonwealth each appealed to the High Court, with the Northern Territory contending that the Full Court erred in affirming the trial judge's assessment of non-economic loss.

2. The High Court noted that the following principles were not in dispute:

    (a) an award for cultural loss was appropriate in the circumstances and was to be made on an *in globo* basis to the claim group with the apportionment or distribution of the award being an intramural matter in that it is to be resolved among those who have suffered the loss: at [156];
    (b) as cultural loss was suffered by the native title holders as a whole and given the nature of inter-relationships between related country groups, it would not be appropriate for the award to reflect the number of native title holders at the time native title was determined: at [157]; and

(c) the assessment of the effects of the acts causing cultural loss could not be divorced from the content of the traditional laws and customs of the claim group: at [158].

3. The High Court upheld the correctness of the trial judge's approach in assessing compensation for cultural loss pursuant to s51(1) of the *NT Act* via three "separate but inter-related steps" (*Timber Creek* at p. 269 [216]):

(i) identifying the compensable act;
(ii) identifying the nature and extent of the native title holders' connection to the land and waters pursuant to their laws and customs; and
(iii) considering the particular and inter-related effects of the compensable acts on that connection.

4. In assessing the acts affecting native title, whilst each act affected a particular parcel of land, it was also to be understood by reference to the whole of the area over which the rights and interests were claimed and as such could not be considered in isolation (*Timber Creek* at p. 270 [219]). The trial judge described this process as "complex but essentially intuitive, with the compensation being assessed by reference to the spiritual and usufructuary significance of the area of the land affected relative to the other land that remained available to the Claim Group for the exercise of the native title rights and interests" (*Timber Creek* at pp. 256-257 [163]).

5. The trial judge considered the evidence clearly established the extent to which the compensable acts negatively affected the claimants' spiritual connection to the land. The evidence demonstrated the pervasiveness of the Dreaming which manifested in the claim area and surrounding areas, including in sacred sites where the travels of major Dreamings occurred (*Timber Creek* at pp.258-265 [169]-[195]). Situated within this context, the cultural loss arising from the compensable acts was acute, being a spiritual loss. Of particular relevance, the trial judge made the following findings on the effect of the compensable acts (*Timber Creek* at pp.263-264 [190]):

(1) the effect of dispossession, being that unless the dispossession ends, the hurt feelings continue and are persistently aggravated;
(2) by erecting fences and buildings, the acts impeded the exercise of native title rights and interests including access to hunting grounds, and there was also evidence of a reduction of bush tucker;
(3) there was destruction or damage to significant sites, such as the construction of water tanks on the Dingo Dreaming on part of lot 70, which is addressed in further detail below;
(4) the acts had effects on adjacent areas, which were still of importance to the Claim Group, despite, for example, the area no longer being a secure ritual ground; and
(5) the acts impeded the ability of the Claim Group to practise their traditions and customs, even when the acts had not entirely destroyed that ability. (footnotes omitted).

6. The trial judge went on to outline a number of further factors which bear relevance to the effect of compensable acts on cultural loss (*Timber Creek* at p.266 [199]):

> *[T]he Aboriginal spiritual relationship to land encompasses all of the country of a particular group, and not just "sacred sites"; the destruction of a particular sacred site may have implications beyond its physical footprint because of the spiritual potency of the site or because of the level of responsibility or accountability for the site which has not been honoured; the relationship of the Claim Group to their country, including Timber Creek, is a spiritual and metaphysical one which is not confined, and not capable of assessment on an individual small allotment basis; there were areas of country of particular significance to the Claim Group and other areas less significant; and the appropriate level of compensation must take into account the fact that prior to the compensable acts, there had been a progressive impairment of native title rights and interests but that the compensable acts did not remove all of the Claim Group's native title within the area.*

7. Finally, the trial judge outlined three evidentiary considerations of particular significance in this matter (*Timber Creek* at p.266 [200]):

   (i) the construction of water tanks on a Dreaming path, which had caused significant distress and concern;
   (ii) the effect of the compensable acts on not only the geographical area, but also the more general impact on related areas; and
   (iii) the fact that each compensable act "chipped away" at the area, incrementally causing detriment to the claimants' ability to exercise their native title rights, which undermined cultural and spiritual connection to the land as well as leading to a sense of failed responsibility under traditional laws to uphold care obligations in respect of the land.

8. The fact that these three considerations had been experienced by the claimants for "some three decades and that the effect had not dissipated over time" and would continue "for an extensive time into the future" bore relevance to the assessment process (*Timber Creek* at p.268 [207]).

9. In upholding the correctness of the above approach, the High Court noted that the enquiries to be made in determining just compensation for acts affecting native title "will vary according to the compensable act, the identity of the native title holders, the native title holders' connection with the land or waters by their laws and customs and the effect of the compensable acts on that connection" (*Timber Creek* at pp. 269-270 [217]).

10. Of further relevance, the High Court pointed out that the amount of compensation will reflect "a social judgment, made by the trial judge and monitored by appellate courts, of what, in the Australian community, at this time, is an appropriate award for what has been done; what is appropriate, fair and just" (*Timber Creek* at p.273 [237]). The figure must be acceptable to the Australian community as appropriate

and to be consistent with acceptable community standards. The Court in *Timber Creek* affirmed that $1.3 million fell within this range (supra).

While it may be noted that *Timber Creek* makes clear the relevant considerations in the determination of an amount of compensation for the effect of compensable acts on cultural loss in that matter, it provides limited guidance on how those factors inform the monetary figure ultimately arrived at.

12.2. Federal Court

Prior to the High Court hearing, Mansfield J delivered judgment on *Timber Creek* in the Federal Court, examining the issues surrounding cultural loss in detail which may be summarised as follows:

12.2.1 Forms of Cultural Loss

The Court noted the following rights in accordance with traditional laws and customs of the claim group (14):

> *(1) to travel over, move about and have access to the land;*
> *(2) to hunt, fish and forage on the land;*
> *(3) to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin;*
> *(4) to have access to and use the natural water of the land;*
> *(5) to live on the land, to camp, to erect shelters and structures;*
> *(6) to engage in cultural activities, conduct ceremonies, to hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land, and to participate in cultural practices related to birth and death, including burial rights;*
> *(7) to have access to, maintain and protect sites of significance on the application area;*
> *(8) to share or exchange subsistence and other traditional resources obtained on or from the land (but not for any commercial purposes).*

At 46, the Court refers to *the loss of rights to live on, and gain spiritual and material sustenance from, the land* and at 302:

> *The process required is a complex, but essentially an intuitive, one. As the Territory pointed out, the compensation must be assessed having regard to the spiritual and usufructuary significance and area of the land affected, but relative to other land that remained available to the Claim Group for the exercise of the native title rights and interests.*

At 329 the Court noted:

> *Examples include high order ritual practice, initiating rites, head wetting ceremonies (Mulyarp), protection of Dreaming (Puwaraj) sites, traditional methods of hunting, fishing and gathering food, and ongoing practice of ritual and exchange (Winan*)

and at 336 that:

> *The major travelling Dreamings through Timber Creek reported on by Palmer and Asche include Wirup (dog), Marna (barramundi), and Wuguru (hunchback).*

In addition to the above, the Court also noted the emotional aspects of cultural loss including:

> *emotional, gut-wrenching pain and deep or primary emotions* (350) *accompanied by anxiety* (352)

and

> *the distress and anxiety caused by reason of loss of part of their country, which is manifested by deep or primary emotions of hurt, shame and worry* (368).

12.2.2 Valuation Process

At 318 the Court noted that *evidence about the relationship with country and the effect of acts on that will be paramount*, specifically citing the importance of evidence from traditional owners (348):

> *The Applicant also led evidence in the present hearing about the effects of loss of country and the effects of acts on the exercise of rights to country in these proceedings. The evidence given by the traditional owners was strong and compelling. The beliefs expressed were genuinely held and demonstrated a deep connection to country.*

However, at 325 the Court noted:

> *It is not possible to establish the comparative significance of one act over another. That is simply not how things are viewed according to the traditional laws and customs, in particular by the Ngaliwurru-Nungali people*.

12.2.3 Quantification of Cultural Loss

The Applicant claimed a lump sum (290) to reflect:

- additional advantage of the land represented by the connection or by reference to intangible disadvantage in loss;
- community standards of fairness, where there is no market for what is lost; and
- an assessment that best gives effect to the entitlement to compensation on just terms

with compensation to made on an *in globo* basis without separate allocation to particular compensable acts in respect of particular lots and disregarding the size of the native title holding group (316).

The Court noted considerations of significance to the assessment of the appropriate amount of compensation:

- the construction of the water tanks on the path of the dingo Dreaming;
- the extent to which certain of the compensable acts affected not simply the precise geographical area of the lot over which that act specifically related, but in a more general way to related area so as to have impaired the native title rights and interests more generally; and
- adverse effect on the spiritual connection with the particular allotments, and more generally, which the Claim Group have with their country. (378, 379, 381).

The Court did not explain the quantification process for compensation, noting at 383 that:

> *The selection of an appropriate level of compensation is not a matter of science or of mathematical calculation. Having regard to the matters to which I have referred, in my view, the appropriate award for the non-economic or solatium component of the compensation package should be assessed at $1.3m. I have not broken up that assessment by reference to the three elements to which I have referred above. I have listed the three elements in what I regard at descending order of spiritual significance. That does not mean that the first act should account for more than one third of the total sum awarded, as the cumulative effect of all the acts (putting aside the first two elements) is in my view a significant matter.*

12.2.4 Federal Court – Summary

While the Federal Court did not itemise in detail the forms of cultural loss being compensated, a broad guide to the types of forms considered relevant in this matter was provided. Similarly, while the Court did not outline a valuation process nor a method by which to quantify compensation, some broad guidance was provided which will be considered further below.

13. Summary

Under ss47 and 54 of the NSW *Land Acquisition (Just Terms Compensation) Act* 1991, the Valuer General is tasked with determining compensation for the acquisition of land, including any *native title rights and interests in relation to land,* which may include compensation for cultural loss.

Cultural loss may arise in many forms with the purpose of this review being to identify potential forms of cultural loss and a process and valuation method for quantifying compensation as the basis for discussion with relevant stakeholders.

This review considers the relevant statutes, regulations and policies pertaining to the determination of compensation for non-economic loss for cultural loss and loss of spiritual attachment in the context of land acquisitions. The relevant statutes for consideration include NSW *Land Acquisition (Just Terms Compensation) Act* 1991 (the Act) and the *Native Title Act 1993* (Commonwealth) (*NT Act*),

with the principal case law of relevance being *Northern Territory v Griffiths* (2019) (*Timber Creek*) which, while providing clarification, does not provide clear guidance.

It appears that, currently, there is no clear process outlined in either Act or any other law applicable to New South Wales for ascertaining whether the determined amount of compensation is "just", nor is there any statutory guidance on the process by which non-economic loss for cultural loss and loss of spiritual attachment is to be determined, regardless of whether the interest is held by a native title holder or another person claiming the loss.

The Valuers General for each of the Australian States and Territories all confirmed that they had not undertaken determinations for cultural loss arising from compulsory acquisition, though the Valuer General of Victoria identified a matter currently before the Victorian Courts concerning six trees located within the proposed route of a highway which are contended to be culturally significant by the Djab Wurrung people. Depending on the Court's decision in this matter, there may be implications for the determination of compensation for cultural loss in New South Wales.

The International Property Tax Institute undertook a global review to establish if and how other countries approached the quantification of cultural loss, focusing on Canada, USA, UK, South Africa, New Zealand, Japan and Brazil as well as several international bodies. IPTI found little evidence of specific attention to the determination of compensation for cultural loss, though related examples identified included the Canadian Gift Lake Métis Settlement, a paper by Gregory et al (2020) concerning quantification of intangible losses using a community based multiple-attribute approach, the application of the contingent value approach in the UK, the cost of holding religious ceremonies to quell spiritual disturbance in Japan and settlement premised on an apology and acknowledgement of guilt in Brazil.

Associate Professor Garrick Small undertook a global valuation literature review, focusing on cultural loss in Canada, Fiji, New Zealand, New Guinea and Malaysia, in order to establish if existing valuation approaches and methods had been applied to the assessment of cultural loss. Associate Professor Small identified a helpful application of the contingent valuation approach by Pai and Blake (2018) and also found the paper by Gregory et al (2020) to be informative, potentially offering a solution to the valuation question drawing on decision analysis, behavioural decision theory and cultural anthropology.

The Canadian Gift Lake Métis Settlement is informative as evidence was taken from GLMS Elders and community members which assisted in gaining an understanding of the way of life on GLMS and the role that the impacted area historically played in that way of life. While the Land Access Panel rejected GLMS's estimate of compensation based on non-market evaluation methods using a multi-attribute utility theory, the Panel recognised the growing application of such methods which have yet to be accepted by the Canadian Courts.

Gregory et al (2020) considered a case study of two indigenous Dene Nations in central and western Canada who suffered cultural loss, proposing a comprehensive, multi-attribute approach to estimating compensation to provide a more accurate depiction of impacts and a consistent, principles based approach to calculating compensation. The authors identified five major categories of losses

based on interviews with community members and groups, including two visits to country, which were then quantified through eliciting values from community members to rank and weight the categories of loss, according to their relative importance, with compensation determined relative to calculated economic loss.

While contingent valuation was identified as a possible methodology for the determination of cultural loss, being a “stated preference” model which may be distinguished from a price based “revealed-preference” model and reflecting a desired scenario rather than a reality scenario, such shortcomings as sample size, sample composition, protest answers, strategic behaviour, response biases, uninformed responses and survey respondents disregarding any financial constraints could render the methodology of limited use for the determination of cultural loss in New South Wales. Such a methodology may also be considered disrespectful.

Compensation under the Act is premised on assessment of market value reflecting a transaction basis where the parties are commercially ambivalent and have no form of personal interest in the transaction with both the parties and the transaction being hypothetical. However, determination of compensation for cultural loss is more akin to an assessment of worth, acknowledging the actual parties and their interests in an actual transaction, removing commercial ambivalence and allowing reflection of the worth to a specified party. Accordingly, the requirement of the Act to express a notion of worth as a statement of market value presents a crucial and fundamental dilemma in the determination of compensation.

The High Court majority decision in *Timber Creek* is the principal authority in Australia pertaining to compensation for cultural loss, however the methodology for determining the amount of such compensation is developing law. Edelman J, who agreed with the majority on the basis on which cultural loss was awarded, distinguished compensation for cultural loss from solatium, while also contemplating the scope for cultural loss to be a form of special value. This distinction is yet to be tested by the Courts in the context of compulsory acquisition in New South Wales. *Timber Creek* identified forms of cultural loss and quantified an amount of compensation as an *in globo* amount reflecting perpetuity but did not provide guidance on how such an amount was to be determined other than that it should be considered appropriate, fair and just in the Australian community.

While international and local experience together with relevant statute and case law provide broad guidance as to the issues to be considered in the determination of compensation for cultural loss and loss of spiritual attachment, a prescriptive guide to the process, forms and quantification of compensation for cultural loss was not discovered. Accordingly, it is proposed to suggest policy guidelines, below, as the basis for discussion and community feedback.

14. Potential Ways Forward

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 act 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 to this.

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 act has 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.

For the purposes of discussion and community feedback as part of the development of policy guidelines for the determination of compensation for cultural loss arising from compulsory acquisition, it is contended that regard should be given to the process for the determination of compensation, the forms of cultural loss and the quantification of compensation.

14.1 Process for the Determination of Compensation

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

- the claimant and the acquiring authority have a period of 180 days to negotiate a settlement;

- the acquiring authority serves a Proposed Acquisition Notice (PAN) on the claimant with a further period of up to 90 days for the claimant to negotiate a settlement with the acquiring authority;

- 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 which may include affidavits, on-country interviews, videos, artwork, historical documents or whatever the claimant considers best expresses their connection to the land and the cultural loss impact of the compensable act;

- 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 compensable act;
    - 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 compensable acts on that connection; and
- obtain claimant input into the relativity of significance of forms of cultural loss claimed to each other and to land value;

- 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 7 days of gazettal;

- the Valuer General holds a conference with the acquiring authority, if requested, to understand the list of issues;

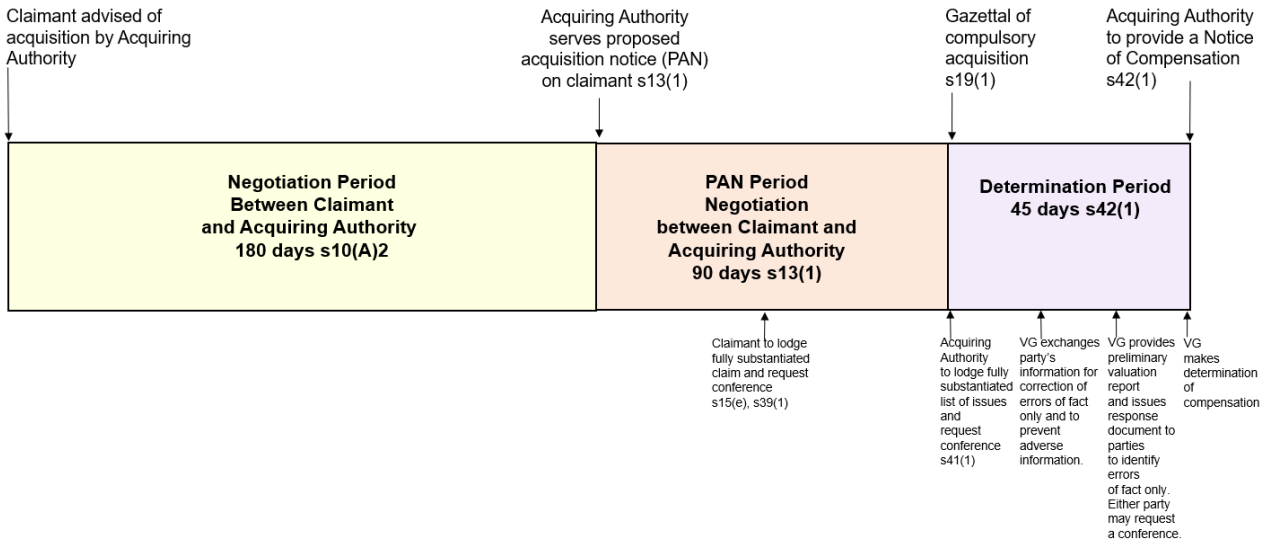
- the Valuer General exchanges party's information for correction of errors of fact only and to prevent adverse information;

- 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; and

- the acquiring authority provides the claimant with a notice of compensation.

The process adopted by the Valuer General for the determination of compensation arising from compulsory acquisition generally under the Act is illustrated below:



14.2 Forms of Cultural Loss

Court precedent and literature reviewed suggest 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.

For the purposes of discussion, 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 of travelling over, moving about and having access to the land
Residence	cultural loss of living on the land, to camp, erecting shelters and structures
Activities	cultural loss of gathering and using the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin cultural loss of hunting, gathering and fishing and foraging on the land cultural loss of having access to and use of the natural water of the land cultural loss of having access to, maintaining and protecting sites of significance on the land cultural loss of 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)
Practices	cultural loss of engaging in cultural activities and social uses of the land cultural loss of conducting ceremonies and rituals cultural loss of holding meetings cultural loss of holding family and community cultural gatherings cultural loss of 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 cultural loss of passing on resource use and practical skills cultural loss of participating in cultural practices related to birth and death, including burial rights
Ecology	cultural loss of impact on plants and animals, which may include species of totemic or other cultural importance

	cultural loss of impact on water quality and access which may have broader cultural impacts cultural loss of collateral ecological impacts on adjacent lands and waters cultural loss of impact on cultural responsibility to care for country from an ecological perspective
Sites	cultural loss of ability to look after and speak for culturally significant sites and areas cultural loss of physical access to sites and areas of significance cultural loss of physical damage to sites and areas of significance cultural loss of collateral damage or detriment to the wider zone around sites and areas of significance in the surrounding area cultural loss of damage to the land impacting on wider regions of cultural significance cultural loss of impact on significant tracks or pathways with associated stories crossing the land or surrounding region
Trauma	emotional, gut-wrenching pain and deep or primary emotions 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 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 spiritual and emotional distress arising from any damage to country including damage to significant sites, areas or ecological values feelings of loss of identity intergenerational loss of what otherwise would have been inalienable rights to country
Progressive impairment	progressive chipping away causing detriment to the ability to exercise rights and diminishing cultural and spiritual connection to country incremental and cumulative loss of feeling of connection to country 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

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.

14.3 Quantification of Compensation

The following principles for a methodology for the quantification of compensation are proposed for the purposes of discussion:

- that the compensation amount be determined as compensation for cultural loss rather than as compensation for special value under s57 of the Act;

- that the compensation amount be determined as compensation for cultural loss rather than as compensation for solatium under s60 of the Act;

- that the compensation amount be determined as monetary value 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 *in globo* 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 have 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.

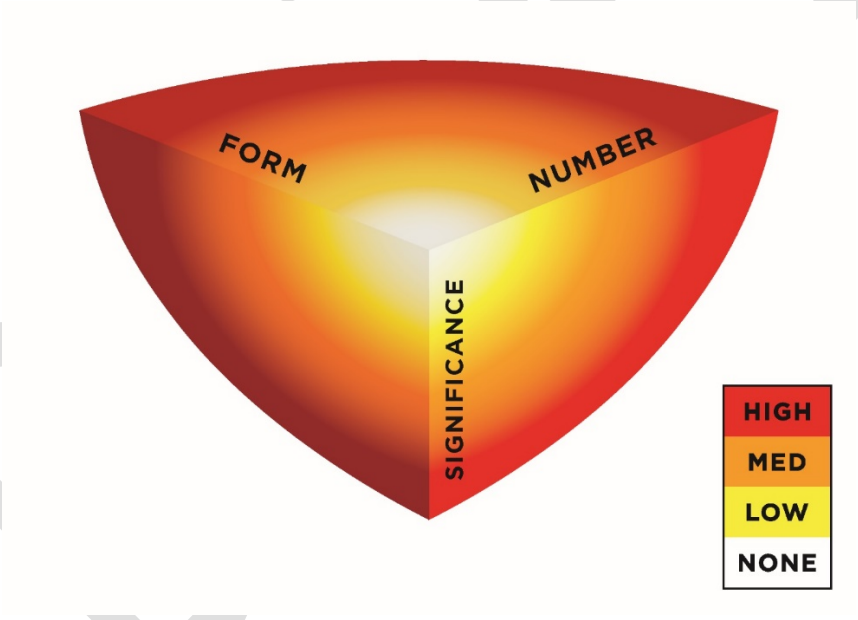
The following valuation methodology for the quantification of compensation for cultural loss is proposed for the purposes of discussion:

- 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 following conceptual diagram when intuitively determining compensation for cultural loss:



such that 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.

For some, it may appear that the Valuer General is attempting to quantify the unquantifiable but, as the Act requires cultural loss to be quantified as monetary value, the above methodology for the quantification of compensation is considered to be one possible route to a determination of compensation on "just terms" in accordance with the relevant legislation for the purposes of discussion and community feedback.

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