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Technical Paper on the Methods of Calculating Economic Compensation and Reparations: Addendum to FNLRS Submission to Yoorrook Commission Submission

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Introduction

This paper is provided as an addendum to the First Nations Legal and Research Services (**FNRLS**) submission to the Yoorrook Justice Commission inquiry into Land, Water and Sky.

Chapter 1 examines how reparations for loss of ownership and control of traditional lands can be calculated to an UNDRIP standard. Chapter 2 addresses how compensation for native title rights is calculated under the *Native Title Act 1993* (Cth) (**Native Title Act**). Chapter 3 explores to what extent the method of calculation of compensation under the Native Title Act is relevant and applicable to the Treaty process, the limitations of the Native Title Act compensation framework and the difference between the assessment of broader economic reparations and native title compensation. Chapter 4 provides examples of processes for financial reparations for loss of ownership and control of traditional lands and other historic injustices in other jurisdictions.

It is important to make the distinction between compensation for loss of native title rights under the Native Title Act and economic reparations and redress for broader issues of loss of social, economic, political, cultural and spiritual values as a result of historic wrongs, assimilation policies, forced removals and discrimination. The method of calculation of compensation for the loss of native title rights should be informed by case law as applicable. However, the negotiation of economic reparations and redress for broader issues of loss of social, economic, political, cultural and spiritual values is distinct and should be a matter for negotiation with First Nations.

We note that our analysis of treaties and reparation processes in other jurisdictions is preliminary in nature, and does not constitute comprehensive comparative analysis. The examples are illustrative and provided for the purpose of demonstrating the importance of such comparative work to the treaty and settlement processes.

We recommend that as part of the Treaty Process, comprehensive comparative analysis be undertaken and that formal structures be put in place to facilitate engagement with other jurisdictions and relevant UN bodies, both by First Peoples and the State.

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Chapter 1 - How can reparations for loss of ownership and control of traditional lands be calculated to an UNDRIP standard?

1 Scope

This section of the paper considers how reparations for loss of ownership and control of traditional lands can be calculated to an appropriate standard in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

2 Summary

The UNDRIP is a comprehensive international instrument on the rights of First Nations Peoples, consisting of 46 articles, which all play a significant role in establishing a framework of minimum standards for the survival, dignity, and well-being of the First Nations Peoples of the world. The responsibility to provide reparation and redress for First Nations Peoples is underscored throughout the UNDRIP in numerous provisions. Article 28 is of the most relevance in relation to redress for loss of ownership and control of traditional lands.

Article 28 can be broken into 3 distinct "obligations" to be imposed in determining reparations for loss of ownership and control of traditional lands according an UNDRIP standard:

(a) in the first instance, reparations are to be in the form of restitution, i.e. the return of traditional lands to First Nations peoples (also supported by Articles 8(2) and 11(2) of the UNDRIP);

(b) to the extent restitution is not possible,[1] reparations are to be in the form of just, fair and equitable compensation, including the granting of land equal in quality, size and legal status, or monetary compensation or other appropriate redress; and

(c) reparations to be adopted are to be decided in light of what is appropriate to effectively restore the wrongs suffered according to the perception of First Nations themselves (also supported by Articles 8(2) and 38 of the UNDRIP).

There is limited international case law regarding the interpretation and application of Article 28. This is because although the UNDRIP is an authoritative international standard, it does not itself create legally binding obligations unless it is enacted in legislation. Few States have incorporated the UNDRIP into domestic law, however its principles are reflected in legally binding human rights treaties, including the African Charter on Human and Peoples' Rights and Inter-American Convention on Human

[1] At [234] of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* African Court on Human and Peoples' Rights, Application No 276/2003 (Ruling date: 4 February 2010) (**Endorois Case**); the Court held "…*when a State is unable, on objective and reasonable grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures*". Objective reasonable grounds may include where the land is being used for a public purpose.

Rights, and may be drawn upon to aid in the interpretation of domestic law in judicial decisions.[2] Australia has not codified UNDRIP into its own domestic legislation.

The 'test' or considerations for determining or calculating reparations to an UNDRIP standard are not settled, but there are cases which have been heard by the African Commission on Human and Peoples' Rights (**African Commission**) which have considered reparations under UNDRIP, and the reparation principles in UNDRIP are reflected in Canada's modern treaties to some extent.

In each instance, reparations are calculated to compensate for collective loss of social, economic, political, cultural and spiritual values to achieve appropriate redress for the pain suffered. In this sense, Western conceptions of just and fair compensation – which, in the context of land, generally provide for the payment of monetary compensation to individuals based on financial value, economic loss and other costs – do not apply.

The quantum of monetary reparations is often a difficult and imperfect exercise due to the challenge in quantifying collective losses of a non-financial nature, inadequate documentation of losses and inherent uncertainty in predicting what might have been the position of the victims if the violation did not occur. Consequently, the calculation of reparations is highly discretionary and often includes both pecuniary (material) and non-pecuniary (moral) damages.

Ultimately, reparations for the dispossession of First Nations Peoples of traditional lands must reflect the special, unique, particular and spiritual connection to Country that First Nations Peoples hold (collectively), and what is just, fair and equitable compensation must be determined by First Nations Peoples, according to their own cultural protocols and decision-making processes.

3 Relevant UNDRIP Articles

The responsibility to provide reparation and redress for First Nations Peoples is underscored throughout the UNDRIP in numerous provisions. Specifically,

(a) Article 8(2) affirms the right of First Nations Peoples to redress for:

  (1) actions depriving them of their integrity as distinct people, or of their cultural values or ethnic identities; and

  (2) actions dispossessing them of their lands, territories or resources.

(b) Article 11(2) affirms the right of First Nations Peoples to redress for the taking of their cultural, intellectual, religious and spiritual property without their free, prior and informed consent or in violation of their laws, traditions and customs.

(c) Article 20(2) affirms the right of First Nations Peoples to redress for the deprivation of their means of subsistence and development.

(d) Article 28 affirms the right of First Nations Peoples to redress for the confiscation, taking, occupation, use or damage of their lands, territories, and resources which they have traditionally owned or otherwise occupied or used without their free, prior and informed consent.

Articles 8(2) and 28 are of the most relevance in relation to redress for loss of ownership and control of traditional lands.

[2] In *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, the Supreme Court of Canada (**SCC**) considered whether Canada's obligations under the International Convention on the Rights of the Child could influence interpretation of the Immigration Act. Justice Claire L'Heureux-Dubé for the majority quoted Ruth Sullivan at para 70: "[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.".

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4 Article 8(2)

Article 8(2)(b) of the UNDRIP provides:

> *States shall provide effective mechanisms for prevention of, and redress for:*
> *…(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.*

According to the Oxford English Dictionary, 'redress' means "*reparation or compensation for a wrong or consequent loss*". The concept of 'redress' is thus commensurate with 'reparation' which ordinarily means "*the action of making amends for a wrong or harm done by providing payment or other assistance to the wronged party*".

Reparations "*consist in those measures necessary to make the effects of the committed violations disappear*".[3] Hence, the most appropriate form of redress will depend in each case on the needs and aspirations of the First Nations Peoples concerned to ensure that they perceive the reparation adopted as adequate to restore the wrong suffered.

Accordingly, 'redress' within the meaning of Article 8 is considered "*broad enough to consider the provision under discussion as an open-ended rule implying that, when one of the actions listed by paragraph 2 is perpetrated, the* ***specific kind of redress to be afforded is to be decided on a case-by-case basis****,* ***selecting the reparatory measure which appears as most appropriate to re-establish the pre-existing situation and/or to ensure effective redress for the victims****,* ***taking into primary account their own perception of the matter***".[4] (Emphasis added).

Given the purpose of Article 8(2) is to provide effective mechanisms for prevention and that the present tense is used in describing the action for which redress is to be provided, it is generally accepted that Article 8(2) cannot be applied retrospectively. That is, States have the duty to ensure redress for actions which have the aim or effect of dispossessing First Nations Peoples of their lands, territories or resources occurring after the adoption of the UNDRIP.

5 Article 28

Article 28 of the UNDRIP provides:

> *1. Indigenous peoples have the right to redress, by* ***means that can include restitution*** *or,* ***when this is not possible, just, fair and equitable compensation****, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged* ***without their free, prior and informed consent****.*
>
> *2. Unless otherwise freely agreed upon by the peoples concerned,* ***compensation shall take the form of lands, territories and resources equal in quality, size and legal status*** *or of* ***monetary compensation*** *or other appropriate redress.*
>
> (**Emphasis added**).

[3] Case of the Moiwana Community v Suriname, Judgment (15 June 2005), Series C No 124, [171].

[4] Federico Lenzerini, 'Part VI International Assistance, Reparations, and Redress, Ch.19 Reparations, Restitution, and Redress: Articles 8(2), 11(2), 20(2), and 28' in Jessie Hohmann, Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018), 573, 587.

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As with Article 8(2), 'redress' within the meaning of Article 28 implies that the form of reparations adopted are to be decided on a *case-by-case basis*, according to the needs and aspirations of the First Nations Peoples concerned.

It is clear from the wording that restitution of the lands, territories and resources is the *preferred form of reparation*. This was emphasised by the Indigenous representatives before the UN Working Group established in accordance with the Commission on Human Rights Resolution 1995/32, stating that:

> *"… financial compensation did not provide adequate redress for the loss incurred.* ***The notion of 'just and fair' compensation for indigenous peoples did not merely mean compensation based on 'fair market value' as indigenous peoples' lands, territories and resources were not simply real estate****. On the contrary, the profound relationship that indigenous peoples had with their lands and territories had critical social, economic, political, cultural and spiritual dimensions. In some cases, the return of land was the only means by which to provide redress and restore a people's ability to survive as a distinct people. In terms of compensation, States were reminded of the unique and particular status of land rights possessed by indigenous peoples. Indigenous peoples (p. 575) were distinct peoples who possessed a special, unique, particular and spiritual connection to the land* ***and in some cases no other redress but restoration could be adequate***."[5] (Emphasis added).

Where restitution is not possible, then just, fair and equitable compensation must be provided. Compensation is not limited to monetary compensation and may "*take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress*". Arguably, compensation in the form of lands, territories and resources equal in quality, size and legal status appears to be preferential to other forms of compensation.

Article 28 was heavily debated throughout the development of the UNDRIP text. Relevantly, in 2003, the Australian delegate *"expressed concern about the sweeping retrospective nature of [the then] article 27*", while acknowledging that "*applied prospectively the article was useful for governing the future relationship between indigenous peoples and States*".[6]

Despite this, in the final text of the UNDRIP that was adopted by the General Assembly, Article 28 is clearly articulated as having retrospective application. This interpretation is generally accepted by States. In particular, in explaining the initial decision to vote against the adoption of the UNDRIP the representative of New Zealand stated, "*the entire country would appear to fall within the scope of the article*",[7] thus appearing to acknowledge that Article 28 applies to past acts involving the confiscation, taking, occupation, use, or damage of lands traditionally belonging to First Nations Peoples.

For completeness, it should be noted that it is widely regarded that due to the unique relationship that First Nations have with their traditional lands, past acts of dispossession have an ongoing detrimental effect on First Nations Peoples. Accordingly, future generations of First Nations Peoples are entitled to redress for the pain they continue to suffer on account of that past act.

Ensuring reparation for past wrongs is a necessary or indispensable requirement in international law.[8] International standards and jurisprudence set out that reparation should consist of restitution, compensation, rehabilitation, satisfaction and guarantees of

[5] Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2002/98 (6 March 2002), [81].

[6] Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003), [34].

[7] UN Doc A/61/PV.107, GA Official Records, Sixty-First Session, 107th plenary meeting—Thursday, 13 September 2007, 10 am, 13.

[8] *Sine qua non*.

non-repetition.[9] Accordingly, retrospective application is, for the most part, an irrelevant consideration.

6 Calculating reparations to UNDRIP standard

6.1 Significance and challenges of calculation

Arguably, the UNDRIP prescribes the 'calculation' of reparations on a case-by-case basis. This is because in order to achieve proper 'redress', the value of the loss to the First Nations People concerned (rather than economic value of the land) needs to be ascertained. This requires a subjective inquiry rather than a principled basis for calculation.

The calculation for reparations in Australia under the Native Title Act is addressed in section 3 of Chapter 1 and internationally in Chapter 4.

6.2 Summary of Key Principles Case Law

At this stage, there is no Australian case law concerning reparations to an UNDRIP standard. Two noteworthy cases which considered Article 28 of the UNDRIP in determining reparations for loss of ownership and control of traditional lands were heard by the African Commission (the Ogiek case10 and Endorois Case). Detailed notes for both cases are set out in Attachment 1. It should be noted that while these cases refer to Article 28, the decisions relied primarily on the application of the African Charter on Human and Peoples' Rights.

The significant principles set out by the Court in the *Ogiek case* (and primarily the reparations decision) have been set out below:

(a) Reparations must aim to repair both material and moral damages and that while reparations may serve several purposes, their fundamental purpose is to restore an individual(s) to the position they would have been in had they not suffered the harm, while at the same time establishing means of deterrence to prevent recurrence of violations[11].

(b) In terms of quantifying the reparations, the Court noted the applicable principle is that of 'full reparation', commensurate with the prejudice suffered.

(c) When adjudicating reparations, the Court must balance the form and nature of the reparation and violation as well as the express wishes of the victim. The Court has applied a broad definition to the term 'victim'.

(d) In relation to reparations for moral prejudice, the Court observed that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to

[9] Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution, A/RES/60/147, 2005.

[10] The Ogiek case concerned two decisions:
1. *African Commission on Human and Peoples' Rights v Republic of Kenya*, , African Court on Human and Peoples' Rights, Application No. 006/201 (2017) (Ruling date: 26 May 2017) (**The Ogiek Decision**), and
2. *African Commission on Human and Peoples' Rights v Republic of Kenya*, , African Court on Human and Peoples' Rights, Application No. 006/212 (Ruling Date: 23 June 2022) (**The Ogiek Reparations Decision**).

[11] The Ogiek Reparations Decision, [41].

them.[12] Quantifying such harm at international law requires an exercise of the Court's equitable jurisdiction.

(e) Title was required because mere abstract or legal recognition of Indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This removes uncertainty for the Indigenous people in respect of the land to which they are entitled to exercise their rights[13].

(f) In international law, granting First Nations Peoples privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land to guarantee their permanent use and enjoyment of the same.[14] It therefore obliges States to attune their legal systems to accommodate First Nations Peoples' rights to property such as land[15].

(g) Where the land was already subject to leases or concessions, the Court ordered the Kenyan Government to commence consultation between the Ogiek and other concerned parties to reach an agreement on returning the land or establishing shared land rights.[16]

Similarly, the Court in the *Endorois case* made the following important observations which are relevant to the calculation of reparation according to the UNDRIP:

(a) the Endorois People are a distinct people whose culture, religion and traditional way of life are intimately intertwined with their ancestral land;[17]

(b) the conservation and economic development goals sought with the creation of the game reserve did not justify the government's infringement of Endorois cultural and religious rights;[18]

(c) the government's expropriation and denial of land ownership amounted to an infringement, or encroachment, of Endorois' right to property, therefore the government "*must grant title*" to Endorois to "*guarantee [their] permanent use and enjoyment*" of the land;[19]

(d) any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations (citing earlier case law);

(e) a State must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the First Nations Peoples, according to their own consultation and decision procedures; and

(f) the Commission recommended, inter alia, that the government "*pay adequate compensation to the community for all the loss suffered*".

Other cases which do not rely on principles of redress under the UNDRIP specifically, but that are demonstrative of the methods of calculating reparations to comparable standards under human rights law, including the Case of the Kalina and Lokono Peoples v

[12] Ibid, [86].

[13] Ibid, [107].

[14] Ibid, [110].

[15] Ibid, [111].

[16] Ibid, [117].

[17] Ibid, [162].

[18] Ibid, [173].

[19] Ibid, [173].

Suriname20 and the Case of the Sawhoyamaza Indigenous Community v Paraguay,21 are canvassed in greater detail in Attachment 1.

7 International comparison: Canada

It is useful to consider the approach taken by Canada, another common law jurisdiction. Although there are First Nations title assertions throughout Canada, in many areas of Canada First Nations land rights have been surrendered or modified pursuant to treaty, such as the claims of First Nations signatories to the 26 modern treaties and the 11 historic numbered treaties.

Canadian law provides primarily that any principles developed to provide appropriate compensation for impacts to First Nations land rights must incorporate the First Nations Peoples' perspectives.[22] This inherently involves significant dialogue between the parties to understand importance and use of land, historic, current, and future intended use.

Modern land claim agreements (modern treaties) were the subject of years of negotiation between the Crown and First Nations groups that specifically turned their minds to this difficult issue. Many underscore the desire for compensation to take the form of suitable alternative lands or equivalent reinstatement.

In reviewing the treaties in Canada, the clearly overarching principles are therefore that of:

(a) achieving the reinstatement of equivalent land; and

(b) if replacement lands cannot be provided, monetary compensation is payable "*as contemplated by the Expropriation Act of Canada*".

These values align with the views of the international law decisions concerning Article 28 of the UNDRIP. Both promote the surrender of alternative lands of equal extension and quality, which will be chosen by agreement with the members of the relevant First Nations Peoples, according to their own consultation and decision procedures. Detailed and effective consultation with First Nations groups is fundamental pillar of any reparation for expropriation.

The examples of reparation in Canada's modern treaties also coincides with the approach of the international courts to provide reparation for both material and moral damages, fundamentally being to restore an individual(s) to the position they would have been in had they not suffered the harm, while at the same time establishing means of deterrence to prevent recurrence of violations. The coinciding of these decisions and the modern treaties in Canada serves to uphold values articulated in Articles 8(2), 11(2), 20(2) and 28, by providing appropriate redress and reparation primarily for expropriation of land, but also the consequent impacts suffered and the damage to First Nations culture.

Examples of treaties in place in Canada, and the relevant principles of compensation follow are set out below. Each of these treaties has been examined in further detail in section 2 of Chapter 4 :

(a) The Inuvialuit Final Agreement – prioritised the provision of suitable alternative lands in the relevant Region (considered satisfactory by the Inuvialuit) in place

[20] *Case of the Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) (Inter-American Court of Human Rights Series C No 309, 25 November 2015), [72]-[73]. (**Kaliña and Lokono Peoples v Suriname**)

[21] *Case of the Sawhoyamaza Indigenous Community v Paraguay* (Merits, Reparations and Costs) (Inter-American Court of Human Rights Series C No 146, 29 March 2006), (**Sawhoyamaza v Paraguay**).

[22] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [81].

of expropriated lands over simply monetary compensation.[23] The exception to this principle is that a "higher of" calculation, as between fair market value of the land and an undefined "cost base," which may otherwise be agreed to by the parties.

(b) The Nisga'a Final Agreement – emphasised the market value and equivalent reinstatement principle. And obliges Canada to provide:

(1) the cost of equivalent reinstatement;

(2) the market value of the estate or interest expropriated;

(3) the replacement value of any improvements on the land that is expropriated;

(4) any disturbance caused by the expropriation; and

(5) adverse effects on any cultural or other special value of the land. [24]

(c) The Labrador Inuit Land Claims Agreement – again emphasising principles of market value and equivalent reinstatement but aimed at particular objectives.[25] Market valuation principles for the expropriated Labrador Inuit Lands are found in a list of compensation factors which an arbitration panel must consider. Compensation provisions strongly suggest that compensation for injurious affection-type harms is contemplated, as compensation is provided for:

(1) loss of use;

(2) adverse effects on other lands, damage to the expropriated interest, and nuisance (meaning injurious affection-type claims, as discussed);

(3) any cultural attachment of the Inuit to the expropriated land;

(4) effects on wildlife, harvesting, and habitats;

(5) any particular or special value of the expropriated land to the Inuit Peoples;

(6) reasonable costs of negotiation, mediation, or arbitration;

(7) market value of the expropriated land; and

(8) whether other land is offered in compensation and, if so, the significance and value of that land.

[23] *Inuvialuit Final Agreement*, 18 August 1979, s 7(51) (entered into force 25 July 1984).

[24] *Nisga;a Final Agreement,* 27 April 1999, Ch 3 (entered into force 11 May 2000).

[25] *Land Claims Agreement Between the Inuit of Labrador, Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 22 January 2005, s 4.18.5 (entered into force 1 December 2005).

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Chapter 2 How is compensation calculated under the Native Title Act?

1 Scope of question

This section of the paper considers how compensation is calculated under the Native Title Act, specifically:

(a) What process was used to calculate compensation in the Timber Creek Case? (see section 4)

(b) What process was used to calculate compensation in other native title compensation applications? (see section 5)

(c) What process was used to calculate compensation in the Tjiwarl compensation settlement? (see section 6)

2 Summary

The High Court confirmed in *Northern Territory v Griffiths* (2019) 269 CLR 1 (**Timber Creek Case**) that calculation for compensation under the Native Title Act where native title rights have been extinguished or impaired involves consideration of three components:

(a) economic loss;

(b) non-economic or cultural loss; and

(c) interest payable on economic loss.

While the Timber Creek Case is the leading (and only) judicial consideration of how compensation is to be calculated under the Native Title Act, the case does not provide a definitive test by which to calculate native title compensation. Figures will depend on the particular claim circumstances, including nature of the native title rights held, whether there was total extinguishment or partial extinguishment of native title rights, and the extent of "*loss sustained and disadvantage experienced*" by the claimants.

Jurisprudence on native title compensation will certainly develop to consider many more aspects of compensation under the Native Title Act. There are currently multiple cases currently before the courts considering different claims of compensation. Some of these are summarised in Attachment 2.

The compensation settlement in the Tjiwarl Palyakuwa (Agreement) Indigenous Land Use Agreement (**Tjiwarl Agreement**) between the Western Australian State Government and the Tjiwarl Aboriginal Corporation (**Tjiwarl AC**) on behalf of the Tjiwarl native title claimants settled a compensation claim Tijwarl AC had initiated against the Western Australian State Government, through the provision of financial and non-financial benefits (including land and water management rights).

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3 Legislative framework for compensation

Compensation for native title claims is assessed under Part 2, Division 5 of the Native Title Act. These provisions only apply to acts that are valid or validated under the law of the Commonwealth or a State or Territory.[26]

The core provision for calculating compensation under the Native Title Act is the 'just terms' provision in s 51(1) Native Title Act. The entitlement to compensation 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*".[27]

Other subsections of s 51 Native Title Act provide for compensation in relation to specific circumstances, such as compulsory acquisition,[28] or coastal 'onshore' places.[29]

Two other sections of note are Native Title Act s 51A, which provides that compensation shall not exceed the amount that would have been payable if the act was a compulsory acquisition of the freehold estate, and Native Title Act s 53, which qualifies s 51A with the constitutional requirement to provide "just terms" compensation to ensure that the compensation regime remains constitutionally valid.[30]

4 Timber Creek Native Title Act Compensation

4.1 First case to develop a test for Native Title Act compensation

The leading case on calculation of compensation under the Native Title Act is the Timber Creek Case.

The Timber Creek Case was the first time that the High Court assessed compensation for the extinguishment of native title rights and interests under the Native Title Act and, as such, was the first case to develop a test for calculating compensation. The case involved an appeal by the Northern Territory against a decision of the Full Federal Court,[31] which was itself an appeal from the trial judge's decision on the compensation payable for loss or diminution of native title due to historic government acts.[32]

In its decision in the Timber Creek Case, the High Court has confirmed that:

(a) For "*objective economic value of an unencumbered freehold estate in that land*", the correct test is the 'Spencer test', which is to ask what is "*the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's assent to the infringement*".[33]

(b) For non-economic loss, the correct figure is "*the amount which society would rightly regard as an appropriate award for the loss*".

[26] *Native Title Act 1993* (Cth) s 51(1) ('*NTA*').

[27] Ibid.

[28] Ibid ss 51(2), (4).

[29] Ibid ss 51(3), 240, 253 (definition of 'onshore place').

[30] *Northern Territory v* Griffiths (2019) 269 CLR 1, [49] ('*Timber Creek HCA*').

[31] *Northern Territory v Griffiths* (2017) 256 FCR 478; [2017] FCAFC 106 ('*Timber Creek FCAFC*').

[32] *Griffiths v Northern Territory (No 3)* (2016) 337 ALR 362; [2016] FCA 900 ('*Timber Creek FCA*').

[33] Ibid [3], [84]-[85].

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(c) For interest, the approach held in this instance was to calculate simple interest on the economic loss (from the date of the act giving rise to entitlement to compensation, i.e. the date the act interfering with native title occurred).

4.2 Basis for calculation

(a) What rights were held?

The native title and compensation claimants received a determination that they held exclusive possession and non-exclusive possession of native title over a large area of the Northern Territory. The claimants hold non-exclusive rights in relation to the Timber Creek and its beds and banks including the right to:

(1) travel over and access the area;

(2) take and use water and natural resources such as food and medicinal plants (but not for any commercial purposes); and

(3) engage in cultural activities and ceremonies.

The Timber Creek Case involved an application for compensation for the loss, diminution or impairment of only the non-exclusive native title rights held by the claimants. These rights were partially extinguished by various government acts, including the grant of pastoral leases, other land titles and public works. Of the non-exclusive determination area, 127 hectares of land were affected by the government acts.

There were three heads of compensation in dispute in the Timber Creek Case:

(1) the value of economic loss for the land subject to the native title claim;

(2) the value of non-economic loss for the loss of native title; and

(3) interest on the above two values.

(b) Dispute regarding economic loss

Economic loss refers to the value of the land affected by the extinguishment, diminution or impairment of native title.

The trial judge initially assessed the market value of the native title land to be $640,500. This figure for the freehold value of the lands was not contested in any of the appeals. What was in issue was the appropriate discount to that figure to account for the non-exclusive nature of the native title rights.[34] The Court noted that the market value of the freehold estate encompasses "*complete and exclusive possession"* of the land. Land subject to non-exclusive native title does not have that complete and exclusive possessory title, and as such, a willing but not anxious purchaser would be willing to pay a lower figure for non-exclusive possession of the native title land. A discount is required to be applied to the market value of the land to account for this. The trial judge held that the discount should only be small, and awarded 80% of the freehold value, resulting in a discounted value of $512,400.

Upon appeal, the Full Court of the Federal Court held that the discount should be greater and explained that the trial judge had failed to consider some matters properly. It was held that the award should therefore be 65% of the freehold value, totalling $416,325. The Full Court applied the test from *Spencer v Commonwealth* (1907) 5 CLR 418 (**Spencer Test**), which held that the compensation for just terms under the Constitution was 'the value which would

[34] *Timber Creek FCA* (n 7) [225]; *Timber Creek FCAFC* (n 6) [134]; *Timber Creek HCA* (n 5) [67], [87].

be paid by a willing but not anxious purchaser from a willing but not anxious vendor'[35] (ie 65% of the freehold value).

Upon appeal to the High Court, the High Court increased the discount even further to 50% of the freehold value, resulting in a final discounted value of $320,250. The High Court explained that the Full Federal Court had been correct to reduce the amount, but that they had not gone far enough. The High Court stated:

> ***[106]*** *Given the Claim Group's native title rights and interests were essentially usufructuary, ceremonial and non-exclusive, without power to prevent other persons entering or using the land or to confer permission on other persons to enter and use the land, without right to grant co-existing rights and interests in the land, and without right to exploit the land for commercial purposes, … [and] given the native title was devoid of rights of admission, exclusion and commercial exploitation, a correct application of [the Spencer test] dictates on any reasonable view of the matter that those non-exclusive native title rights and interests, expressed as a percentage of freehold value, could certainly have been no more than 50 per cent.*

(c) Dispute regarding non-economic cultural loss

Cultural loss refers to spiritual or religious hurt caused by the acts which extinguished, diminished or impaired native title.

In the decision at first instance, the trial judge held that the figure for non-economic loss should be $1.3 million. Following some general observations in relation to the interference with and disturbance of the native title areas (at [375]-[377]), the trial judge then set out three particular considerations relevant to the assessment of compensation. Those were:

(1) construction of water tanks on a spiritual "winan" path of "wirup", or dingo dreaming;

(2) impaired capacity to conduct ceremonial and spiritual activities; and

(3) diminishment of the geographical area that gave rise to a sense of failed responsibility to care for and look after the land.

Neither the Full Federal Court nor the High Court disturbed this assessment, with both courts holding that the figure was reached in light of social judgment and without any sort of legal error. In accepting the assessment of solatium by the trial judge, the High Court observed that this assessment was appropriate but potentially conservative[36].

(d) Dispute regarding interest on the economic loss

The courts at each stage of the proceeding held that interest was to be awarded on the economic loss amounts only for "*loss of value over time*". Interest was to be calculated from the date of the extinguishing act to the date of the High Court's judgment. This was held to be simple interest, not compound interest. However, the High Court did not exclude compound interest from being awarded in future cases.

The High Court also confirmed that the interest did not form part of the compensation, but was rather *on* top of the compensation.[37]

[35] *Timber Creek FCA* (n 7) [196].

[36] Ibid [Per Edelman J at 126]

[37] Ibid [141].

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4.3 Position in Australia is still unclear

Despite the findings in the Timber Creek Case, the case does not provide a definitive test by which to calculate native title compensation. Figures will depend on the particular claim circumstances, namely:

(a) The nature of native title rights held. The High Court only considered the value of certain non-exclusive rights, which did not include commercial rights. As such, the freehold percentage value for different native title rights may vary (such as exclusive native title rights).

(b) The methodology of land valuation can vary in each jurisdiction. The High Court in the Timber Creek Case relied upon the *Valuation of Land Act 1963* (NT) to assess economic loss under s 51(3) of the NTA and hence the methodology of assessments of the economic loss may vary across jurisdictions.

(c) Whether there was total extinguishment or partial extinguishment of native title rights. Only partially extinguishing acts which occurred between 1980 and 1996 were considered in the Timber Creek Case – compensation may be greater for total extinguishment.

(d) The extent of "*loss sustained and disadvantage experienced*" by the claimants, and the amount which reflects "*community standards of fairness*" to compensate for cultural loss. This will vary based on the evidence presented by the claimants.

(e) The type of interest on economic loss to be awarded. The High Court has indicated that compound interest may be payable where a claimant can show that they intended to invest any payment at the time of extinguishment.[38]

(f) Circumstances that trigger the property valuation principles of the special value of land[39], severance[40] or injurious affection were not pleaded in the Timber Creek Case. Accordingly, it may be that future compensation cases involve these circumstances which may influence future the economic loss assessment methodologies adopted.

5 Other cases

The first native title compensation claim to be determined by the courts occurred six years before the High Court's decision in the *Timber Creek Case*, in *De Rose v State of South Australia* [2013] FCA 988. This determination was made in 2013 by a confidential and not publicly disclosed settlement agreement. Thus, no principles relating to calculation of compensation can be drawn from the decision.

In May 2023, the Full Court of the Federal Court handed down its decision in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 (**Gumatj Compensation Claim**). In this decision, the Full Court held that pre-1975 acts of the Commonwealth could be compensable under the Native Title Act as invalid acquisitions of property contravening the just terms obligation imposed by s 51(xxxi) of the Constitution. While this decision is an important development in the native title compensation landscape, the decision relates to whether certain acts are compensable and not to how compensation is calculated. As such, the Timber Creek

[38] *Timber Creek HCA* (n 5) [342].

[39] Boland v Yates Property Corporation Pty Ltd & Anor. (1999) 167 ALR 575

[40] Davidson v Beaudesert Shire Council (2004) QLC 0055.

Case remains the only judicial consideration of principles relating to the calculation of native title compensation.

There are currently six active native title compensation claims across Australia (as at 19 October 2023), which are summarised in the table at Attachment . Notably the McArthur River Project Compensation Claim[41] brought by the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples outlined in Attachment 2 considers the effects of various post-1975 acts associated with the McArthur River Mine and Bing Bong Port and may be instructive to future mining and resources related compensation claims.

6 Tjiwarl compensation settlement

In May 2023, the Western Australian Government and the Tjiwarl AC on behalf of the Tjiwarl native title claimants, entered into the Tjiwarl Agreement. The Tjiwarl Agreement settled the State's liability for compensation to the Tjiwarl people in relation to acts the subject of the following proceedings:

(a) WAD 141/2020

(b) WAD 142/2020

(c) WAD 269/2020

The compensation claims were made pursuant to ss 24KA(5), 24ID(1)(d) and 23(4) of the Native Title Act, and related to activities such as the development of segments of the Goldfields Highway, gravel pits and water bores, segments of the Goldfields Gas Pipeline, renewal of pastoral leases, and various mining projects.

The compensation provided for in the Tjiwarl Agreement represents full and final satisfaction of the State's liability for compensation to the Tjiwarl people and any entitlement of anyone who holds native title in the Agreement Area which is recoverable from the State (clause 7).

However, liability remains for the following:

(a) any grant, renewal or extension of mining tenement after 17 June 2020 (excluding specified tenements and licences under the 'Compensable Acts' definition (clause 7.3));

(b) an effect on native title under Native Title Act and State Law, including entitlements to compensation in respect of any obligation to remedy contaminated sites or undertake rehabilitation works on contaminated sites (clause 7.4); and

(c) acts for which third parties are liable for (whether or not the subject of the compensation claims in this Agreement) under the Native Title Act including grant, renewals or extensions of a mining tenement on or after January 1999 or pursuant to s 125A of the *Mining Act 1978* (WA) to which Subdivision M of the Native Title Act applies (clause 7.5).

In exchange for the compensation, Tjiwarl agreed to:

(a) withdraw its compensation claims made against the State;

(b) not make or authorise any other person to make a claim against the State for exercising a 'Released Act' on any native title rights and interests in the Agreement Area; and

[41] McArthur River Project Compensation Claim (NTD25/2020)

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(c) do everything reasonably within its capability to ensure future members of Tjiwarl AC do not make further claim for compensation (clause 7.6).

The Tjiwarl people agreed not to object to future acts or challenge the validity of future acts that have been consented to. The future acts are set out in the Mining Business, Water, Land Estate and Conservation Estate schedules. These acts prevail over, but do not extinguish native title rights and interests (clauses 8.7 and 8.9).

The monetary compensation amounts provided under the Tjiwarl Agreement and reasoning for these amounts is summarised in Attachment . We note that the compensation paid to the Tjiwarl AC by mining companies for grant, renewals or extensions of mining tenements, on or after January 1999 (pursuant to s 125A of the *Mining Act 1978* (WA)), far exceeds the monetary compensation paid by the State under the Tjiwarl Agreement. However, the quantum of these compensation payments is not publicly available.

The Tjiwarl Agreement does not confer any ownership of land on the Tjiwarl AC or Tjiwarl people. Rather, it says that the Tjiwarl people will be involved in the process for managing resources such as water,[42] mining tenements,[43] and some freehold land.[44] It also provides mechanisms by which Tjiwarl AC, or another Tjiwarl Landholding Body may apply for ownership of certain lands. The non-financial benefits provided in the Tjiwarl Settlement are summarised in the accompanying Technical Paper on Methods of Establishing Non-Economic Reparations.

[42] *Tjiwarl Agreement* (n 16) 819.

[43] Ibid 820.

[44] Ibid 821.

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Chapter 3 - To what extent is the method of calculation of compensation under the Native Title Act relevant and applicable to the Treaty process?

1 Scope

The State of Victoria is currently engaging with the First Peoples' Assembly of Victoria (a voice for Aboriginal and Torres Strait Islander peoples), to advance a framework to support the negotiation of a future Treaty with Victoria's First Peoples (**Treaty Process**).[45]

This paper seeks to respond to the following questions related to the Treaty Process:

(a) To what extent the method of calculation of compensation under the Native Title Act is relevant and applicable to the Treaty Process? (see section 3)

(b) What are the limitations of the native title compensation framework? (see section 4)

2 Summary

In summary:

(a) The method of calculation under the Native Title Act is of some relevance and application to the Treaty Process noting that the Treaty Process has been developed having regard to the existing native title regime, including in relation to the co-existence of the regimes and the Treaty Process' deference to the rights held by First Peoples under the Native Title Act.

(b) While the Native Title Act provides an avenue for Aboriginal and Torres Strait Islander People to be compensated for the loss of, or impairment to, their native title rights or interests, the case law in relation to valuing economic and non-economic loss remains unsettled and limited.

(c) The rationale of compensation under the Native Title Act is designed to compensate for the loss of native title property rights, whereas reparations should consider broader issues of collective loss of social, economic, political, cultural and spiritual values as a result of historic assimilation policies, forced removals and discrimination.

(d) The method of calculation of compensation for the loss of native title rights should be informed by case law as applicable. However, the negotiation of economic reparations and redress for broader issues of loss of social, economic, political, cultural and spiritual values as a result of historic assimilation policies, forced removals and discrimination may include but is broader than Native Title Act compensation.

(e) Native title caselaw provides a methodology for assessing just terms compensation for the historic grant and conferral of rights to land that cause loss, diminution, and impairment of native title rights and interests. Under the Native Title Act, as it is currently understood, the right to such compensation would only accrue in Victoria from the time of enactment of the RDA. Under

[45] First Peoples' Assembly of Victoria and The State of Victoria, *Treaty Negotiation Framework* (20 October 2022) <https://content.vic.gov.au/sites/default/files/2022-10/Treaty-Negotiation-Framework.pdf> ('Treaty Framework').

UNDRIP Article 28 the right to such compensation would accrue from the time of the loss, diminution or impairment.

(f) Determining reparations and compensation for the loss of social, economic, political, cultural and spiritual values should be a matter for negotiation with First Nations, but should be informed by expert assessment of:

(1) the quantum of just terms financial compensation that would provide reasonable redress for the historic grant and conferral of rights to land that have caused loss, diminution, and impairment of native title rights and interests since the date of acquisition of British sovereignty; and

(2) the quantum of any additional compensation payable under UNDRIP Article 28 as restitution for loss of social, economic, political, cultural and spiritual values as a result of historic assimilation policies, forced removals and discrimination affecting First Nations' rights to land;

(g) Both financial and non-financial forms of redress for loss of ownership and control of land are often covered in Treaty Settlement agreements in other jurisdictions. Examples of these are covered in the accompanying Technical Paper on the Methods of Calculating Non-financial Reparations.

(h) It should (and must be up to the Aboriginal and Torres Strait Island People impacted by the loss of traditional lands to decide whether a financial or non-financial means of redress (or combination of both) is appropriate.

3 To what extent is the calculation of compensation under the Native Title Act relevant and applicable to the Treaty Process?

3.1 The Treaty Framework has been developed having regard to the existing native title regime

Although the Treaty Process is distinct from the processes under the Native Title Act, the Treaty Framework has been developed having regard to the existing native title regime, meaning the two are inherently linked.

In particular, the Treaty Framework:

(a) **Acknowledges that the Treaty Process will run alongside the existing native title regime.** Specifically, the Treaty Framework states that the Treaty Process has been designed to "*ensure that the hard-won rights secured by Traditional Owners are not diminished, while acknowledging that not all Traditional Owners have been able, or wanted, to engage with existing processes under the Traditional Owner Settlement Act 2010 (Vic), the Aboriginal Heritage Act 2006 (Vic) and the Native Title Act*." [46]

(b) **Establishes the "primary negotiating parties" for the purpose of the Treaty, having regard to the existing native title regime**. The Treaty Framework establishes that the primary negotiating parties for the treaty will be the State and the First Peoples' Treaty Delegations (clause 7.1). In order to be a part of a Delegation, 'Traditional Owner Groups' must meet minimum requirements and record a decision of their respective groups to enter into treaty negotiations (see clause 8.1).

[46] Treaty Framework (n 1) 14.

For land and waters within the boundaries of an area in which there has been a determination that native title exists, a registered native title body corporate within the meaning of the Native Title Act is taken to be a 'Traditional Owner Group with Existing Status' for the purpose of the Treaty Process (clause 8.2(a)).

(c) **Defines the bounds of the subject matters for negotiation as part of the Treaty Process.** A First Peoples' Treaty Delegation may not propose matters for negotiation where, if an agreement were reached on the matter, the agreement would adversely affect any native title rights and interests within the meaning of the Native Title Act held by Aboriginal and Torres Strait Islander People, or engage in any rights held by First Peoples under sub-div C, Div 3, Pt 2 of the Native Title Act, unless a Traditional Owner Group representing the Aboriginal and Torres Strait Islander People forms part of the Delegation and demonstrates collective agreement to the matter being discussed in the Treaty negotiations.[47]

(d) The assessment of economic reparations and redress should be distinguished from Native Title Act compensation. The rationale for the provision of each is distinct. Compensation under the Native Title Act is compensation for the loss of property rights, subsequent to the passing of the RDA in 1975. Reparations should consider broader issues of loss of social, economic, political, cultural and spiritual values as a result of historic assimilation policies, forced removals and discrimination, not limited to dispossession of land.

(e) Further, in the context of any negotiations of broader reparations and compensation, it may be useful to acknowledge that the continuing connection test under *Yorta Yorta HC* is often insurmountable in light of historic government policies of dispossession and removals and that accordingly native title and compensation is difficult to achieve.

(f) Using the Native Title Act compensation methodology to calculate reparations disproportionately impacts Victorian First Nations. Due to the large number of pre-1975 grants of freehold to large areas in Victoria for the purpose of farmland rather than pastoral leases as has occurred in other Australian jurisdictions, Victoria has a higher percentage of land where native title is extinguished than in other states and territories.

3.2 Compensation is relevant to facilitating self-determination as part of the Treaty Process

A central principle of the Treaty Process is the advancement of self-determination for Aboriginal and Torres Strait Islander People in Victoria.[48] This process intends to place Aboriginal and Torres Strait Islander People "*in the driver's seat so [they] can make the decisions that affect [their] communities, [their] culture and [their] Country*".[49]

The Treaty Process has been designed to support the right of "*Traditional Owners to decide how to come together politically and make collective decisions*", in accordance with the right to self-determination.[50]

Financial income is an essential means by which Aboriginal and Torres Strait Islander People can advance self-determination and, in that way, the method of compensation

[47] Treaty Framework (n 1) cl 25.2(d)(ii).

[48] Treaty Framework (n 1) Preamble, cl 2.5.

[49] First Peoples' Assembly of Victoria, 'Frequently Asked Questions', *First Peoples Victoria* (Web Page, 2022) <https://www.firstpeoplesvic.org/faqs/>.

[50] Treaty Framework (n 1) 14.

under the Native Title Act is relevant and applicable to the Treaty Process. In particular, access to monetary income (or other financial benefits) facilitates the exercise of freedom and power by Aboriginal and Torres Strait Islander People to make decisions for the benefit of their communities, including to advance their living conditions, in the manner they wish.

This notion was captured by Justice Crennan in *Wurridjal and Ors v Commonwealth and Anor* where, at [379], her Honour stated:

> *[i]t cannot be doubted that without satisfactory living conditions, traditional Aboriginal owners will not enjoy fair access to health, education and social and economic opportunities.* ***Satisfactory living conditions are essential*** *if traditional Aboriginal owners are to* ***achieve the personal autonomy and communal self-determination*** *expected to flow from the land.*[51] (Emphasis added)

If satisfactory living conditions are essential for achieving communal self-determination, then monetary income is an important piece of that puzzle. To this extent, the Native Title Act – as the principal statutory mechanism under which native title holders can claim compensation for certain past, intermediate period or future acts that affect their interests – is relevant and applicable to the Treaty Process.

However, in order to genuinely advance self-determination, compensation must be on "just terms" and therefore, not nominal. This is acknowledged in the Preamble of the Native Title Act, as follows (emphasis added):

> ***Justice requires that****, if acts that extinguish native title are to be validated or allowed,* ***compensation on just terms****… must be provided to the holders of the native title.*[52]

Accordingly, the method of calculation of compensation under the Native Title Act is of relevance to the Treaty Process, in so far as it provides a methodology for calculating the loss of property rights including prior to the enactment of the RDA. Thus, any Treaty negotiation should be informed by expert assessment of the quantum of just terms financial compensation that would provide reasonable redress for the historic grant and conferral of rights to land that have caused loss, diminution, and impairment of native title rights and interests since the date of acquisition of British sovereignty.

4 What are the limitations of the native title compensation framework?

As established in Section 3 of Chapter 2, the Native Title Act provides an avenue for Aboriginal and Torres Strait Islander People to be compensated on 'just terms' for any loss, diminution, impairment or other effect caused by an act that affects native title rights or interests.[53] Although the issue of how to determine compensation on 'just terms' to accommodate spiritual, social and cultural value that flows from land has been extensively considered in an academic context,[54] the position remains somewhat unclear in a judicial context. The leading common law case is the Timber Creek Case (see Section 4 of Chapter 2 above).[55]

[51] *Wurridjal and Ors v Commonwealth and Anor* (2009) 237 CLR 309.

[52] *Native Title Act 1993* (Cth) Preamble ('*NTA*')

[53] *NTA* (n 9) Div 5, Pt 2.

[54] K Muir, 'This Earth has Aboriginal Culture Inside: Recognising the Cultural Value of Country' (Issues Paper No 23, Native Title Research Unit, AIATSIS, July 1998) 7.

[55] (2019) 269 CLR 1 ('*Timber Creek*').

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The Timber Creek Case was a landmark decision, being the first judicial consideration of native title compensation. While the decision provided guidance on how to go about valuing economic and cultural loss, there remains a number of limitations and, to an extent, uncertainty, in determining native title compensation. A summary of key limitations and gaps is set out below:

(a) First, although the decision in the Timber Creek Case determined that compensation may be awarded where native title is wholly extinguished, the question as to whether compensation is payable where native title rights are not wholly extinguished or only temporarily suppressed has not been addressed in full.

(b) Second, it is unclear in what circumstances a native title group will be entitled to compound interest in equity or under the Native Title Act where:

(1) equity only allows for compound interest for suits for the recovery of money obtained by fraud or withheld or applied in breach of fiduciary duty and where the benefits gained by the State from the extinguishment of native title rights are statutory and not an "unjust enrichment";[56] and

(2) the claimants in the Timber Creek Case did not pursue their claim that it was necessary to award compound interest to achieve the requirement of compensation on just terms under section 51(1) of the Native Title Act (instead pursuing a claim in equity), such that the question was not determined.[57] The High Court noted that claimants only have a statutory right to just compensation for the lawful extinguishment of native title rights and interests (meaning that where the Native Title Act retrospectively validates acts, compensation will not be payable). In so doing, the High Court left the door open for a "*juridical basis for the award of compound interest*" and noted that compound interest may be awarded where there is evidence that a claimant would have put the compensation to work at a profit, or used it to pay for the costs of a business.[58]

(c) Third, the approach taken in the Timber Creek Case to the assessment of non-economic loss is not a settled rule. Further clarity, developed through further judicial consideration and comparable case law, is required to enable parties to fully understand their respective positions in settlement negotiations. The majority of the High Court stated at [86]:

> *At one point in the Full Court's reasons, their Honours reflected as to whether it might have been preferable to approach the assessment task on an "holistic" basis without the division of value into economic and non-economic components. Their Honours were correct to avoid that approach. There may be exceptions, but ordinarily the only way of achieving the degree of precision envisaged by s 51A of the Native Title Act — which, as has been seen, stipulates that the total compensation payable for an act which extinguishes native title must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters — is by the determination of economic value according to established precepts for the valuation of interests in land**. Given that there is no range of decided comparable cases such as those which may be called in aid, for example, in sentencing or when fixing damages for personal injuries, an holistic approach would mean that the**

[56] *Timber Creek* (n 12) [113].

[57] *Timber Creek* (n 12) [112].

[58] *Timber Creek* (n 12) [132]- [133].

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> ***determination of the economic value of native title rights and interests would be largely dependent on idiosyncratic notions of what is fair and just.*** (Emphasis added, footnotes omitted)

(d) The above reasoning in the Timber Creek Case identifies that the Courts are familiar with determining monetary compensation in different contexts, particularly in relation to sentencing and damages for personal injury, where there is a multitude of comparable cases, and land claims, where there are established regimes of compensation for the loss of rights or interest in land. However, these principles and regimes are not always useful or appropriate to apply to native title claims where there is an inherent difficulty in determining compensation for the non-economic impacts compensable acts can have on native title rights and interests. Furthermore, although more clarity may come with time and a growth in native title jurisprudence, this is likely to be a long and complex process because native title claims are historically fewer in quantity and slower to resolve compared to sentencing and personal injury damages cases.

(e) In circumstances where the legal position is uncertain and compensation only goes to the economic value of land, there is not always an appropriate or fulsome remedy for the extinguishment of Aboriginal and Torres Strait Islander Peoples' native title rights and other forms of redress for the loss of ownership and control of land require exploration. We discuss these alternatives in the accompanying Technical Paper on the Methods of Establishing Non-Economic Reparations.

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Chapter 4 - How are reparations for loss of ownership and control of traditional lands calculated internationally, in other jurisdictions?

1 Scope

This portion of the paper examines some methods for calculating reparations for loss of ownership and control of traditional lands internationally, in other jurisdictions. It primarily focuses on examples in Canada and the parameters placed on the calculation of reparations in treaties.

This is not intended to be a comprehensive comparative analysis, which is beyond the scope of our expertise. Rather the examples given are illustrative and given for the purpose of demonstrating the importance and relevance of international comparison.

2 Canada

2.1 Treaties

Canada has a long history of entering into treaties with its Indigenous People, which dates back hundreds of years. Modern treaties with Indigenous Peoples have been developed following years of negotiation.

There is no set method of calculation for the compensation for loss of ownership and traditional lands in Canada. The reparation outcomes (through both the reinstatement of land and monetary compensation) are highly negotiated. Of the examples reviewed, there is a clear alignment with the UNDRIP principles, and in particular, Article 28 of the UNDRIP, and the principles for compensation within Canadian treaties and legislation. In most modern treaties in Canada, the primary focus is on reinstatement of traditional lands or lands of equivalent status, size and value. If this is not achievable, the focus then moves to financial compensation. The considerations in determining the quantum of financial compensation go beyond the market value of the land expropriated, and also take into account other more holistic factors such as impacts to culture.

(a) Brief history

Canada has taken a different approach to the recognition of Indigenous (First Nations, Métis, and Inuit) land rights to Australia. The recognition of Indigenous land rights in Canada primarily takes form through treaties between the Federal, Provincial or Territorial governments and different Indigenous groups. The Aboriginal and treaty rights of First Nations, Métis, and Inuit Peoples are constitutionally protected through section 35 of the *Constitution Act 1982*. Section 35 recognises and affirms the treaty rights of Indigenous Peoples.

In Canada, there are two types of treaties:

- historic treaties (which were entered into by the British settlers and then subsequently, the Canadian Federal Government, between 1701 and 1921); and
- modern treaties (which are also known as comprehensive land agreements and were entered into from 1975 onwards).

The Canadian Federal Government recognises 70 historic treaties which were signed between 1701 and 1923. Canada has developed a ‘specific claims’ process which

provides an avenue for addressing issues with the implementation and fulfilment of obligations under historic treaties.

According to the Canadian Federal Government, there are currently 26 modern treaties in effect. Modern treaties are negotiated between the relevant Indigenous groups and government before being implemented through legislation. There are no set frameworks for the content of modern treaties or the calculation of compensation within those treaties. Modern treaties provide for a range of rights and protections, including:

- the transfer of land back to Indigenous groups;
- financial compensation;
- protection and preservation of cultural rights;
- recognition of rights to land and resource management; and
- recognition of the right to self-government.

The position on financial compensation under modern treaties in Canada is not binary or settled. The outcomes negotiated depend on the type and size of the land in question, and on the perspective of the Indigenous communities.

Nevertheless, the compensation frameworks included in modern treaties can provide useful context for how reparations for loss of ownership and control of traditional lands has been calculated by Government and Indigenous groups and how the considerations behind these calculations have developed after years of negotiation.

(b) Inuvialuit Final Agreement

The Inuvialuit Final Agreement was signed in 1984,[59] following ten years of negotiations with the Canadian Federal Government.[60] It was one of the first modern treaties to be signed.

Section 7(51) of the Inuvialuit Final Agreement states that monetary compensation for the Government's expropriation of land is secondary to the Government's primary obligation to "*provide suitable alternative lands in the Western Arctic Region, considered to be satisfactory by the Inuvialuit, in place of the [expropriated] lands if it is reasonably possible to provide*".[61]

If it is not possible to provide suitable alternative lands, monetary compensation is payable "*as contemplated by the Expropriation Act of Canada"*, however, monetary compensation is based on a calculation of the 'higher of' amount "*as between fair market value of the land and an undefined 'cost base', which may otherwise be agreed to by the parties*".[62]

As highlighted in the UNDRIP examples in Chapter 1 , the first and primary consideration of compensation for the loss of ownership and control of Indigenous lands under the Inuvialuit Final Agreement is restitution , i.e. the return of land to the Inuvialit People. It is only when such restitution is not possible, that monetary compensation should be payable.

(c) Nisga'a Final Agreement

[59] *Inuvialuit Final Agreement*, 18 August 1979, (entered into force 25 July 1984) (**Inuvialuit Final Agreement**), s7(51).

[60] Inuvialuit Regional Corporation, *'Inuvialuit Final Agreement*' (webpage)<https://irc.inuvialuit.com/about-irc/inuvialuit-final-agreement>.

[61] Inuvialuit Final Agreement, s 7(52).

[62] Inuvialuit Final Agreement, s 7(53). Sam Adkins et al, Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title, 2016 54-2 Alberta Law Review 351, 2016 CanLIIDocs 102, <https://canlii.ca/t/qp>

The Nisga'a Final Agreement is a treaty between the Nisga'a People and the Government of British Columbia.[63] It was signed in 1999 and took legal effect in 2000, when the *Nisga'a Final Agreement Act 1999* was passed.

Similar to the Inuvialuit Final Agreement, the focus for compensation of loss of land also begins with equivalent land reinstatement, followed by monetary compensation. The Nisga'a Final Agreement states that prior to the expropriation of land, the Federal Government must:

- consult with the Nisga'a Nation;
- ensure that reasonable efforts have been made to acquire the land through agreement; and
- provide the Nisga'a Nation with all information relevant to the expropriation.[64]

Canada must ensure that the Nisga'a Nation is compensated for the expropriation of land, and such compensation must take into account:

- the cost of equivalent reinstatement;
- the market value of the estate or interest expropriated;
- the replacement value of any improvements on the land that is expropriated;
- any disturbance caused by the expropriation; and
- adverse effects on any cultural or other special value of the land. [65]

(d) Labrador Inuit Land Claims Agreement

The Labrador Inuit Land Claims Agreement is an agreement between the Labrador Inuit Association, the Canadian Federal Government and the Government of Newfoundland and Labrador,[66] which came into legal force in 2005, following the passing of the *Labrador Inuit Land Claims Agreement Act 2005*.

Under the Labrador Inuit Land Claims Agreement, the Nunatsiavut Government was transferred the power from the provincial government to make their own laws relating to cultural affairs, education and health.

The methods for calculating compensation in the Labrador Inuit Land Claims Agreement are similarly focused on the principles of equivalent reinstatement, followed by monetary compensation.

Section 4.18.5 provides if a piece of Labrador Inuit lands is expropriated, the Canadian Expropriation Authority may offer compensation in the form of other land of equivalent significance and value.[67] However, the Nunatsiavut Government is not required to accept compensation in the form of other land. Further, if, at any time, 12% of Labrador Inuit Lands have been and remain expropriated, no further expropriation shall occur unless the Exploration Authority provides compensation that includes an amount for the previously expropriated Labrador Inuit Lands equivalent in significance and value to the Labrador Inuit Lands proposed for expropriation.[68]

[63] *Nisga;a Final Agreement,* 27 April 1999, (entered into force 11 May 2000) (**Nisga'a Final Agreement**).

[64] *Nisga;a Final Agreement*, s 77.

[65] *Nisga;a Final Agreement,* s82.

[66] *Land Claims Agreement Between the Inuit of Labrador, Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 22 January 2005, (entered into force 1 December 2005) (**Labrador Inuit Land Claims Agreement**).

[67] Labrador Inuit Land Claims Agreement, s 4.18.5.

[68] Labrador Inuit Land Claims Agreement, s 4.18.10.

The Labrador Inuit Land Claims Agreement sets out a list of compensation factors which must be considered in determining the compensation payable of expropriated Labrador Inuit Lands. Compensation is provided for:

- loss of use;
- the adverse effect of the expropriation on other Labrador Inuit Lands;
- damage that may be caused to any un-expropriated interest in the expropriated land;
- nuisance;
- the cultural attachment of Inuit to the expropriated land;
- the effect on wildlife, habitat and harvesting;
- any particular or special value to Inuit of the expropriated land;
- any and all costs reasonably associated with the expropriation and any related negotiations, mediation or arbitration;
- the market value of the expropriated land;
- whether other land is offered in compensation and, if so, the significance and value of that land; and
- any other matter that may be considered under relevant legislation.

However, no method for calculating the impact or losses set out in the list (ie for impact to the cultural attachment to the land).

2.2 Legislation

(a) Métis Settlement Act

In 1985, the Alberta Provincial Government passed a resolution committing to the transfer of land title back to the Métis People and to amend the *Alberta Act 1905* (which established the province of Alberta) to allow for constitutional protection of the lands held by the Métis People.[69] This led to the signing of the Alberta-Métis Settlements Accord between the Alberta Provincial Government and the Canadian Federal Government in 1989. In 1990, four legislative acts were passed creating self-governance rights and dealing with the transfer of Métis settlement lands, including the *Métis Settlements Act 1990*.

The Métis Settlement Act addresses the appropriate calculation of compensation for the grant of mining interests. Section 118(1) sets out the factors that must be considered when determining compensation,[70] including:

- the value of the land (which includes the cultural value, economic value and productive value);
- damage to the land by the project (including to improvements, crops, wildlife, livestock, trap lines and natural vegetation);
- the impact of the mining interest or project to the physical, social and cultural environment;
- the location of the mining interest or project in relation to existing or planned community uses;
- the cumulative effect of related project; and

[69] *Métis Settlement Act 1990*, recitals.

[70] *Métis Settlement Act 1990*, 118(1).

- any private agreements.

Whilst this compensation isn't directly related to loss of land, section 118 lists a number a number of traditional, market value-based consideration factors (such as the economic and productive value of the land), as well as taking into account cultural impacts, which mirrors the approaches taken in modern treaties.

Section 118 is useful in providing a scope for the factors that should be taken into consideration when determining compensation. However, there "*has been limited judicial consideration of the non-traditional market-based valuation principles set out in section 118(1) of the Métis Settlement Act*".[71]

(b) Framework Agreement on First Nation Land Management Act

In 1996, the Canadian Federal Government and 13 First Nations signed the Framework Agreement on First Nation Land Management (**Framework Agreement**). The Framework Agreement was ratified into Canadian law by the *First Nations Land Management Act 1999* (**FNLMA**). The FNLMA was repealed by the *Framework Agreement on First Nation Land Management Act 2002* (**Framework Agreement Act**).[72]

The Framework Agreement Act entirely adopts the Framework Agreement and provides that the Framework Agreement will prevail over any inconsistency with other Federal laws.

Clause 33 of the Framework Agreement provides:

- In the event of expropriation of First Nation land by Canada, Canada will provide compensation to the First Nation.
- The compensation will include alternate land of equal or greater size or of comparable value.
- If the alternate land is of less than comparable value, then additional compensation will be provided. The alternate land may be smaller than the land being expropriated only if that does not result in the First Nation having less land area than when its land code came into force.
- The total value of the compensation will be based on the following:
    - the market value of the land or interest or land right that is acquired;
    - the replacement value of any improvement to the land that is acquired;
    - the damages attributable to disturbance;
    - the value of any special economic advantage arising out of or incidental to the occupation or use of the affected First Nation land to the extent that this value is not otherwise compensated;
    - damages for any reduction in the value of a remaining interest or land right; and
    - damages for any adverse effect on any cultural or other special value of the land.
- If the value and nature of the compensation cannot be agreed upon by the federal department or agency and the affected First Nation, either party may refer a dispute on compensation to arbitration.
- In any province or territory other than Québec, any claim or encumbrance in respect of the interest, or in Québec any right, charge or claim in respect of the

[71] Inuvialuit Final Agreement, s 7(53). Sam Adkins et al, Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title, 2016 54-2 Alberta Law Review 351, 2016 CanLIIDocs 102, <https://canlii.ca/t/qp>

[72] *Framework Agreement on First Nation Land Management Act 2002*, preamble.

land right, expropriated by Canada may only be claimed against the amount of compensation that is otherwise payable to the person or entity whose interest or land right is being expropriated.

- Interest on the compensation is payable from the date the expropriation takes effect, at the same rate as for prejudgment interest in the superior court of the province or territory in which the First Nation land is located.

As noted above, Canada is at the start of the process of implementing its response to UNDRIP, through the Canadian Action Plan[73]. Its existing treaties therefore form the foundation on which Canada's UNDRIP reform process will be based. To understand how those treaties sit within the UNDRIP framework they should be read in conjunction with the Canadian Action Plan, and any provincial legislation and local action plans, such as the BC Declaration Act [74].

2.3 Canadian adoption of UNDRIP into Domestic Law

In June 2021, Canada passed The *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c C-14 (**UNDRIP Act**). The purpose of the UNDRIP Act is to affirm that the UNDRIP applies in Canadian law and to provide a framework for Canada's implementation of the UNDRIP.[75]

The UNDRIP Act requires the Federal Government of Canada, in consultation with the Indigenous people of Canada, to:

- take all measures to ensure the laws of Canada are consistent with the UNDRIP (s 5); and
- develop an action plan to achieve the objectives the UNDRIP and to prepare an annual plan reviewing the implementation of that action plan each year (ss 6 and 7).

In conjunction, with the existing treaty processes, it is anticipated that, amongst other things, the adoption of the UNDRIP Act will prevent future breaches of existing treaties and also give rise to better engagement and the negotiation of agreements with traditional owners when new projects involving land arise.

3 New Zealand Waitangi Treaty and Waitangi Tribunal

In New Zealand financial and commercial redress are generally included as part of packages awarded in the settlement of claims for breaches of the Treaty of Waitangi. By way of background, the Waitangi Tribunal was established to hear claims of allegations that the Crown has breached the Treaty of Waitangi.[76] The Treaty of Waitangi is considered a constitutional document in New Zealand, although its status in law is not settled. Treaty rights can only be enforced in a court of law when a statute explicitly refers to the Treaty.[77]

The Waitangi Tribunal is composed of up to 20 members. About half the members are Māori and half are Pākehā. They are appointed by the Governor-General on the

[73] Discussed in the accompanying FNLRS Submission at Chapter 2, Section 3 "Case Study: the implementation of UNDRIP in Canada"

[74] Ibid.

[75] *United Nations Declaration of the Rights of Indigenous Peoples Act* SC 2021, c C-14, ss 4(a)-(b) ('UNDRIP Act')

[76] "About the Waitangi Tribunal", Waitangi Tribunal (Web Page) https://www.waitangitribunal.govt.nz/about/>

[77] "Treaty of Waitangi", New Zealand Ministry of Justice (Web Page) <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/treaty-of-waitangi/>.

recommendation of the Minister for Māori Development. A panel of three to seven members is appointed to carry out an inquiry. Each Tribunal panel has to have at least one Māori member. The Chairperson of the Waitangi Tribunal is the Chief Judge of the Māori Land Court. Other judges of the Māori Land Court, while not members of the Waitangi Tribunal, can be appointed as a presiding officer for a Tribunal panel.[78]

There have been 86 settlements totalling $2.6 billion since 1995 for breaches of the Treaty of Waitangi[79]. Settlements under the Waitangi Tribunal process involve both economic and non-economic components. These settlements vary and can include monetary compensation and property transfers of government building subject to long term leases which provide rental income to the beneficiaries.

Further details on the Waitangi Tribunal process and other common non-financial aspects of Waitangi Tribunal settlements are discussed in the accompanying Technical Paper on the Methods of Establishing Non-Economic Reparations.

[78] "Members of the Waitangi Tribunal", Waitangi Tribunal (Web Page) https://waitangitribunal.govt.nz/about/members-of-the-waitangi-tribunal/>.

[79] "Waitangi 2023: Treaty Settlements under Labour, and what's happening with Ngapuhu country's largest iwi", New Zealand Herald (Web Page) <https://www.nzherald.co.nz/nz/politics/waitangi-2023-treaty-settlements-under-labour-and-whats-happening-with-ngapuhi-countrys-largest-iwi/XLPMDBEK4NCM5LODCUBV3MSFR4/>.

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Chapter 5 - Summary and Conclusions

1 Principles to Inform the Calculation of Economic Reparations

1.1 Distinction between Native Title Act Compensation and Broader Reparations

It is important to make the distinction between compensation for loss of native title rights under the Native Title Act and broader economic reparations for loss of social, economic, political, cultural and spiritual values as a result of historic wrongs, assimilation policies, forced removals and discrimination.

The method of calculation of compensation for the loss of native title rights should be informed by the Native Title Act and relevant case law and individual circumstances as applicable. The calculation under UNDRIP of economic reparations and redress for broader issues of loss of social, economic, political, cultural and spiritual values is distinct and should be a matter for negotiation with First Nations.

Such negotiation should be informed by expert assessment of:

(1) the quantum of just terms financial compensation that would provide reasonable redress for the historic conferral by the State of rights to land that have caused loss, diminution, and impairment of native title rights and interests since the date of acquisition of British sovereignty; and

(2) the quantum of any additional compensation payable under UNDRIP Article 28 as restitution for loss of social, economic, political, cultural and spiritual values as a result of historic assimilation policies, forced removals and discrimination affecting First Nations' rights to land.

1.2 UNDRIP Principles Should Inform the Calculation of Compensation, Reparations and Redress

The UNDRIP principles articulated in Article 28 should guide any calculation of compensation for loss of ownership and control of traditional lands, noting:

(a) in the first instance, reparations are to be in the form of restitution (i.e. the return of traditional lands to First Nations peoples) (also supported by Articles 8(2) and 11(2) of the UNDRIP);

(b) to the extent restitution is not possible, reparations are to be in the form of just, fair and equitable compensation, including the granting of land equal in quality, size and legal status, or monetary compensation or other appropriate redress; and

(c) reparations to be adopted are to be decided in light of what is appropriate to effectively restore the wrongs suffered according to the perception of First Nations themselves (also supported by Articles 8(2) and 38 of the UNDRIP).

There is limited international caselaw assessing claims for reparations, but in such cases reparations are calculated to compensate for collective loss of social, economic, political, cultural and spiritual values to achieve appropriate redress for the pain suffered.

The quantum of monetary reparations is often a difficult and imperfect exercise due to the challenge in quantifying collective losses of a non-financial nature, inadequate documentation of losses and inherent uncertainty in predicting what might have been the position of the victims if the violation did not occur. Consequently, the calculation of

reparations varies greatly case by case and often includes both pecuniary (material) and non-pecuniary (moral) damages.

1.3 Need for Further Work on Comparative Analysis of Treaty and Settlement Agreements in Other Jurisdictions

To inform the Treaty Process, and to ensure that it is consistent with the principles of international law enunciated in UNDRIP, a process should be established to provide expert comparative assessment of treaty and settlement processes in other jurisdictions, both in Australia and across the World. The comparative examples provided in this paper are preliminary and illustrative in nature.

We recommend that as part of the Treaty Process, comprehensive comparative analysis should be commissioned and that formal structures be put in place to facilitate engagement with other jurisdictions and relevant UN bodies, both by First Peoples and the State.

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Attachment 1

UNDRIP Case Notes

1 Cases referring to Article 28

At an international level, "UN bodies and specialised agencies are increasingly using the UNDRIP as a parameter of reference when interpreting international legal standards."[80] At the regional level, the Inter-American Court of Human Rights and the African Commission are relying on UNDRIP as a legal basis for their findings and decisions.

2 Ogiek Case

2.1 Facts

This case involved a challenge to the Kenyan Government over its eviction of 30,000 Indigenous Ogiek people from their ancestral homes, most recently in 2009. The land was often given to third parties. The Government's eviction and refusal to allow the community to access their spiritual home has prevented the Ogiek from performing their traditional cultural and religious practices.

In November 2009, the Ogiek referred the eviction to the African Commission, which ultimately required the Kenyan Government to suspend implementation of the eviction notice because of the implications the eviction would have for the Ogiek people. The eviction did not occur.

However, the Kenyan Government failed to provide the Ogiek people with any protections. The Commission therefore referred the matter under Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights on the grounds that the case concerned serious and mass human rights violations.

The Court handed down its substantive decision in 2017,[81] and made its decision on reparations in 2022.[82]

2.2 Decision

In the decision on reparations in 2022, the Court relied on Article 28 of UNDRIP, and the Permanent Court of International justice principle that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an

[80] Felipe Gómez Isa (2019) The UNDRIP: an increasingly robust legal parameter, The International Journal of Human Rights, 23:1-2, 7-21, 14.

[81] The Ogiek Decision.

[82] The Ogiek Reparations Decision.

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adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention…"[83]

The Court emphasised that the reparations must aim to repair both material and moral damages and that while reparations may serve several purposes, their fundamental purpose is to restore an individual(s) to the position they would have been in had they not suffered the harm, while at the same time establishing means of deterrence to prevent recurrence of violations.[84]

In terms of quantifying the reparations, the Court noted the applicable principle is that of "full reparation", commensurate with the prejudice suffered, the State responsible for the violation must "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[85]

The Court said when adjudicating reparations it must balance the form and nature of the reparation and violation as well as the express wishes of the victim. The Court has applied a broad definition to 'victim', which encompasses close relatives of the direct victim.[86] It also recognised that 'victim' is not limited to individuals and that groups and communities may be entitled to reparations meant to address collective harm.[87]

The Court acknowledged that the length of time over which the violations occurred, number of people affected by the violations, Ogiek way of life and general difficulties attaching a monetary value to the loss of resources in the Mau Forest, among other factors, make a precise quantification of pecuniary loss difficult. For these reasons, the Court was required to exercise its discretion in equity to determine what amounts to fair compensation to be paid to the Ogiek community.[88]

Because the violations were ongoing and affected a particularly vulnerable section of the State's population, the award of compensation must operate to ameliorate the overall condition of the Ogiek.[89]

The Court ordered that the State must compensate the Ogiek community in the sum of KES 57 850 000 for the material prejudice suffered.

In relation to reparations for moral prejudice, the Court observed that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them.[90] Quantifying such harm at international law requires an exercise of the Court's equitable jurisdiction, considering the specific circumstances of the case, including the nature of the violations, suffering

[83] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 – <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>; PCIJ: The Factory at Chorzow (Jurisdiction) Judgment of 26 July 1927 p.21; See also: Idem (Merits), Judgment of 13 September 1928, Series A, No. 7, p. 29.

[84] The Ogiek Reparations Decision, [41].

[85] Permanent Court of International Justice: The Factory at Chorzow (Merits), Judgment of 13 September 1928, Series A, No. 17, p 47.

[86] The Court in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples Rights v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 cited with approval the definition of 'victim' in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[87] The Ogiek Reparations Decision, [44]; Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993,14-15.

[88] The Ogiek Reparations Decision, [66].

[89] Ibid, [70].

[90] Ibid, [86].

endured by the victims impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations.[91]

The Ogiek community suffered from a lack of recognition as an Indigenous people, evictions from their ancestral land, denial of enjoyment of benefits emanating from their ancestral land, inability to practice their religion and culture as well as the right to fully participate in their economic, social and cultural development.

The Court observed that the violations established by the Ogiek community relate to rights that remain central to the very existence of the Ogiek. Thus, they should be compensated with the sum of KES 100 000 000.

The Court further ordered Kenya to take all necessary measures, legislative or otherwise, to identify, delimit and title Ogiek ancestral land and to grant them collective title to such land. Title was required because mere abstract or legal recognition of Indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This removes uncertainty for the Indigenous people in respect of the land to which they are entitled to exercise their rights.92

Because rights to land and natural resources remain fundamental for the survival of Indigenous peoples, the Court recognised that, in international law, granting Indigenous people privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land to guarantee their permanent use and enjoyment of the same.[93] It therefore obliges duty bearers to attune their legal systems to accommodate Indigenous peoples' rights to property such as land.[94]

Where the land was already subject to leases or concessions, the Court ordered the Kenyan Government to commence consultation between the Ogiek and other concerned parties to reach an agreement on returning the land or establishing shared land rights.[95] Further, it required the State to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months, into which the reparations ordered should be placed, to allow all members to benefit from the outcome of the litigation.

3 Endorois Case[96]

3.1 Facts

Endorois are a semi-nomadic Indigenous community of approximately 60,000 people who earn their livelihoods from herding cattle and goats in the Lake Bogoria area of Kenya's Rift Valley. Until 1973, the land was held on trust for the Endorois community. In that year, they were disposed of their land by the Kenyan Government, which created the Lake Hannington Game Reserve in the Central Rift Valley.

The community challenged their eviction with the Kenyan authorities and were assured that 400 Endorois families would be compensated with plots of fertile land, that the community would receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed.

[91] Ibid, [88].

[92] Ibid, [107].

[93] Ibid, [110].

[94] Ibid, [111].

[95] Ibid, [117].

[96] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Court on Human and Peoples' Rights, App No 276/2003) (**Endorois Case**).

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None of these terms was ever implemented: only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded.97 This was understood to be a means of facilitating relocation rather than compensation for the Endorois' loss.

The Endorois community challenged this treatment in the Kenyan High Court. The High Court held although Endorois were the former bona fide occupants of the land, their customary claim to the land had been extinguished as a result of the designation of the land as a game reserve in 1973 and 1978.98 It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities.

3.2 Commission findings

Represented by the Centre for Minority Rights Development (Kenya) (**CEMIRIDE**) and Minority Rights Group International (**MRG**), the Endorois community took the matter to the African Commission. The Commission found:

(a) that Endorois are a distinct people whose culture, religion and traditional way of life are intimately intertwined with their ancestral land and they are entitled to protection of the collective rights articulated in the African Charter on Human and Peoples' Rights (**African Charter**);[99]

(b) the Government of Kenya had violated Endorois' rights to cultural and religious freedom in contravention of Article 8 of the African Charter, by forcibly evicting them from their ancestral and sacred lands, thereby preventing them from maintaining their religious and cultural practices and threatening their way of life;[100]

(c) the conservation and economic development goals sought with the creation of the game reserve did not justify the governments infringement of Endorois cultural and religious rights;[101]

(d) the government's expropriation and denial of land ownership amounted to an infringement, or encroachment, of Endorois' right to property, therefore the government "must grant title" to Endorois to "guarantee [their] permanent use and enjoyment" of the land.[102]

The Commission considered Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples in finding that the redress offered by the Government of Kenya was inadequate .[103] Relevantly, the Commission cited the case of *Yakye Axa v Paraguay* in which the Court established that:

(e) any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations; and

(f) when a State is unable, on objective and reasonable grounds, to adopt measures aimed at returning traditional lands and communal resources to Indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the Indigenous peoples, according to their own consultation and decision procedures.

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[97] Claridge, L., *"Landmark ruling provides major victory to Kenya's indigenous Endorois"*, (2019) Minority Rights Group International < https://www.refworld.org/pdfid/4ca571e42.pdf>.

[98] Endorois Case, [11].

[99] Ibid, [162].

[100] Ibid, [173] and [251].

[101] Ibid, [173].

[102] Ibid, [173].

[103] Ibid, [232].

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The Commission concluded that this was not the case in respect of the Endorois on the basis that the land given to them was not of equal quality.104

The Commission recommended, inter alia, that the government "pay adequate compensation to the community for all the loss suffered."

The Kenyan Government did not follow this recommendation, instead seeing to have Lake Borogia designated a UNESCO World Heritage Site, without informing or consulting the Endorois. The ultimate responsibility for implementing the provisions of the African Charter rests with the State, in accordance with international law, the principle of *pacta sunt servanda*[105] (meaning "agreements must be kept") and Article 1 of the African Charter. Consequently, there are limited consequences for non-compliance.

4 Other relevant cases

The below cases do not rely on principles of redress under the UNDRIP specifically, however are demonstrative of the methods of calculating reparations to comparable standards under international human rights law.

5 Case of the Kalina and Lokono Peoples v Suriname

5.1 Facts

The land in dispute is the ancestral land of six Kalina and two Lokono villages, encompassing 133,954ha of eastern Suriname. State-created nature reserves now occupy 59,800ha (45%) of that land. The reserves are authorised by the Nature Protection Act 1954, which fails to address the rights of Indigenous groups with traditional land tenure.[106]

The land claimed by the Kalina and Lokono peoples contains a wealth of natural resources, biodiversity and archaeological artefacts.[107] It is vital to the Kalina and Lokomo peoples' lives because they rely on it for fishing, hunting, cultivation of fruits and medicinal plants.[108] It is also ancient sacred land, with which they have a spiritual connection and forms part of their cultural identity.[109] The Kalina and Lokomo peoples' seek to enforce their land rights to protect the territory from the damaging and irreparable effects of strip mining, water contamination, logging and poaching.[110]

The Inter-American Commission for Human Rights recommended that the State adopt legislation to recognise the and Lokono peoples' collective juridical personality and right of property, identifies and delineates ancestral territory, reviews non-Indigenous third-party land titles and mining concessions for modifications or nullification and remedies environmental damage to the land.[111]

[104] Ibid, [234].

[105] Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, 10 August 2001, 53rd Session, A/56/10; Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 1986, Article 26.

[106] *Case of the Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) (Inter-American Court of Human Rights Series C No 309, 25 November 2015), [72]-[73]. (**Kaliña and Lokono Peoples v Suriname**)

[107] Ibid, [84].

[108] Ibid, [84].

[109] Ibid, [33],[84].

[110] Ibid, [91]-[94].

[111] Ibid; *Kaliña and Lokono Peoples v. Suriname*, Merits Report, Inter-American Court of Human Rights, Case No. 12.639, "Recommendations" [168] (1)-(8) (Jul. 18, 2013).

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The State failed to adopt the Commission's recommendations and the Commission submitted the case to the Court, alleging the following articles of the Inter-American Convention on Human Rights were violated:

(a) Art 3: Right to Juridical Personality;

(b) Art 21: Right to Property; and

(c) Art 25: Right to Judicial Protection,

In relation to:

(a) Art 1(1): obligation of non-discrimination; and

(b) Art 2: Obligation to give domestic legal effect to rights of the American Convention.

5.2 Decision

The Court found 6:1 that the State had violated art 3 in relation to art 1(1), arts 2, 21 and 25 of the Convention to the detriment of the Kalina and Lokono Indigenous peoples. This was due to:

(a) the failure to recognize collective juridical personality;

(b) the failure to recognise and guarantee Indigenous communal property by failing to delimit, demarcate, grant title to, and guarantee use and enjoyment, as well as the adverse impacts resulting from the issue of titles to third parties, and due to different types of damage in the reserves, and

(c) the lack of effective participation in relation to the exploitation project within one reserve

Relevantly, under the principle of *iura novit curia*, the Court exercised its right to examine and rule on art 23 (right to participate in Government) in relation to arts 1(1) and 2, which it found to have been violated because the State had failed to consult with the Kalina and Lokono peoples prior to making decisions affecting their ancestral territory. It found the Kalina and Lokono peoples were denied the opportunity to effectively participate in discussions regarding land demarcation, property grants, mining concessions and nature reserves.

The Court unanimously ruled that (inter alia):

(a) the judgment itself was a form of reparation (likely given its value in strengthening the cultural identity of the Indigenous and tribal peoples, guaranteeing the control of their own institutions, cultures, traditions and territories in order to contribute to their development in keeping with their life projects, and present and future needs)112;

(b) the State had to recognise the collective juridical personality of the Kalina and Lokono peoples and grant collective property title;113

(c) the State must grant collective title of ancestral land;114

(d) the State must establish appropriate measures for the Kalina and Lokono peoples to access and enjoy the nature reserves;[115]

(e) the State must create and implement an action plan with the collaborative participation of Indigenous representatives and rehabilitation experts to assess and rehabilitate the damaged lands;116

[112] *Kaliña and Lokono Peoples v Suriname,* [272] and [329(4)].

[113] *Kaliña and Lokono Peoples v Suriname,* [279(i)(a)]

[114] Ibid, [279(i)(b)]-[283].

[115] Ibid, [286]-[287].

[116] Ibid, [290].

(f) the State must establish a fund for the advancement of the Kalina and Lokono peoples' general welfare and development;117 and

(g) the State must adopt a guarantee of non-repetition.[118]

As at 26 July 2023, 8 years on from the decision, Suriname appears to have not implemented or taken any steps to implement this decision.[119]

The Court ordered the State to pay a total of $1,043,141.65 (US):

(a) $1,000,000 for the community development fund, pursuant to a pecuniary award for damages for the breaches mentioned above;[120]

(b) $15,000 jointly for the Association of Indigenous Village Leaders in Suriname and the Organisation of Kalina and Lokono Indigenous Peoples of Marowijne for legal representation expenditures during the litigation;[121]

(c) $10,000 for the Forest Peoples Program for their legal representation during proceedings before the Commission;[122] and

(d) $18.141.65 to compensate the victims' legal representatives for costs incurred during the public hearing and site visit.[123]

6 Case of Sawhoyamaxa Indigenous Community v Paraguay[124]

6.1 Facts

This case also involves a litigation by a dispossessed and depauperized Indigenous community to reclaim their ancestral lands after being evicted from them when it was sold to non-Indigenous third parties.

The Inter-American Commission for Human Rights recommended the following, *inter alia*:

(a) The State enforce the community's property rights to its ancestral territory by officially demarcating the territory's limits and conveying the title to the Community so it can carry out its traditional subsistence activities;

(b) The State should provide effective remedies to allow these communities to protect and access their ancestral lands;

(c) The State should make reparations.

After the State failed to adopt any of the Commission's recommendations, the Commission submitted the matter to the Court.

The Commission alleged the following violations of the Inter-American Convention on Human Rights:

(a) Art 4(1): Prohibition of Arbitrary Deprivation of Life;

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[117] Ibid, [295]-[297].

[118] Ibid, [305(d)].

[119] Mandates of the Special Rapporteur on the rights of Indigenous Peoples; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, AL SUR 1/2023 (26 July 2023) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28173>.

[120] Ibid, [313].

[121] Ibid, [323].

[122] Ibid.

[123] Ibid.

[124] *Case of the Sawhoyamaza Indigenous Community v Paraguay* (Merits, Reparations and Costs) (Inter-American Court of Human Rights Series C No 146, 29 March 2006), (**Sawhoyamaza v Paraguay**).

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(b) Art 5: Right to Humane Treatment;

(c) Art 8: Right to a Fair Trial;

(d) Art 21: Right to Property; and

(e) Art 25: Right to Judicial Protection,

all in relation to:

(f) Art 1(1): Obligation of non-discrimination;

(g) Art 2: obligation to give domestic legal effect to rights of the American Convention.

7 Decision

The Court found that Paraguay had violated art 8 (right to a fair trial) and art 25 in relation to arts 1(1) and 2 of the Convention in part because the State had failed to provide adequate procedures for Indigenous peoples to claim their ancestral lands through a competent authority and had failed to process these claims in a timely manner.

Notably, the Court also found that Indigenous communities have an indefinite right to their ancestral lands as long as some kind of spiritual or material relationship exists with the land. For the Community here, the spiritual relationship with the land was manifest in its practice of traditional activities like hunting and gathering, even though there were hindrances to doing so.

The Court ruled that the State must, inter alia, take all measures to guarantee the Community's rights to own, use and enjoy its ancestral lands. As the lands are currently under private ownership, the State must look into purchasing or condemning the land. If this is not possible, the State must find alternative lands that the Community finds suitable.

The Court awarded a total of $1,390,000 in compensation:

(a) $5,000 to the Community for the great lengths it took to contact government authorities in making domestic claims for land restitution;

(b) Non-pecuniary damages for victims' pain and suffering and changed living conditions, considering their detrimental living conditions outside their ancestral lands and detriment to cultural identity and values – the State must create a project to develop the ancestral lands and a community development fund of $1,000,000;

(c) $20,000 to each of the next of kin of several members of the families of victims who died because of the impoverished living conditions suffered when removed from ancestral lands;

(d) $5,000 to the Community for the expenses incurred during proceedings.

It was not until 11 June 2014 that the President of Paraguay enacted a law returning approximately 55 square miles of land to the Sawhoyamaza community and the owners compensated.[125]

[125] Amnesty International UK, 'Paraguay: Victory for the Sawhoyamaza people', online (12 January 2018) <https://www.amnesty.org.uk/paraguay-sawhoyamaxa-indigenous-land-rights#:~:text=In%202006%2C%20the%20Inter%2DAmerican,to%20life%20had%20been%20violated.>

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Attachment 2

Native title compensation cases in Australia

	Claimant	Compensation claim area	Compensable acts	Compensation sought	Claim progress
Gumatji Compensation Claim	Gumatj Clan or Estate Group.	236 km/sq in the Gove Peninsula, Northern Territory.	Full Federal Court held that pre-1975 Commonwealth acquisitions of property were constitutionally invalid. Therefore, native title was not extinguished and the claimant is entitled to compensation.	Quantum of compensation yet to be determined.	Commonwealth applied for special leave to appeal the decision on 20 June 2023.
McArthur River Project Compensation Claims	Gudanji, Yanyuwa and Yanyuwa-Marra Peoples.	McArthur River Mine and Gas project and Bing Bong port areas in the Northern Territory. Claimant has filed two compensation claims over different areas.	Grants of mining and other tenure post-1993. Claimant argues that the non-extinguishment principle applies.	Quantum of compensation yet to be determined.	Hearing of the first claim continues from 21 November to 23 November 2023. The second claim is yet to be listed.
Yindjibarndi Ngurra Compensation Claim	Yindjibarndi Ngurra Aboriginal Corporation RNTBC.	Exclusive possession over the majority of FMG's Solomon Hub mining operations in the Pilbara, Western Australia.	Grants of associated mining tenure.	The media has reported that the claimant is seeking a 10% mining royalty, equivalent to approximately A$500 million per	Hearing commenced on 7 August 2023.

	Claimant	Compensation claim area	Compensable acts	Compensation sought	Claim progress
				year. For reference, the Pilbara standard is a 0.5% royalty.	
Malarngowem Compensation Claim	Malarngowem Aboriginal Corporation RNTBC.	Small area covered by exploration licence in the eastern Kimberly, Western Australia.	Grant of single exploration licence to Kimberley Granite Holdings Pty Ltd.	Quantum of compensation yet to be determined.	Mediation before the Federal Court Registrar currently underway.
Antakirinja Matu-Yankunytjatjara Compensation Claim	Antakirinja Matu-Yankunytjatjara Aboriginal Corporation RNTBC.	Over 60,000 km/sq in central South Australia.	Grants of over 1,000 freehold estates, pastoral leases, Crown leases, mining tenure and the construction of public works and roads.	Quantum of compensation yet to be determined.	Parties are currently preparing for a hearing of preservation evidence.
Pitta Pitta Compensation Claim	Pitta Pitta Peoples.	30,000 km/sq near Boulia, Queensland.	Grants of exploration and mining licences.	Quantum of compensation yet to be determined.	Case has stalled in the past 12 months. Mediation before the Federal Court Registrar underway since May 2023.

Attachment 3

Overview of financial compensation provided in the Tjiwarl ILUA

	Amount ($)	Spending conditions	Reasoning for amount
One-off cash payment	$18.81 million to be paid as a single instalment.	Tjiwarl AC has full discretion on how to spend this amount, with no obligations to the State.	Approximation of compensation for loss of native title rights under the Native Title Act.[126] Tjiwarl AC has previously brought compensation claims in the Federal Court for alienation of native title rights, exclusion from access to land and resources and loss of capacity to conduct spiritual and ceremonial activities.[127]
Research and Development Fund	Two instalments of $1,145,000 each ($2.29 million in total).	This amount is to be spent in consultation with the Research and Development Working Group for the purposes of funding research and development programs. Both parties may supplement this funding via other sources.	Spending purposes include funding language programs and arts development, establishing on-country operations and undertaking cultural heritage mapping (clause 10.4(b)).
Economic Empowerment Fund	Two instalments of $1,500,000 each ($3 million in total).	This amount is to be spent for the purposes of facilitating and funding economic opportunities for the Tjiwarl people. Both parties may supplement this funding via other sources.	Economic opportunities include support for Tjiwarl businesses and procurement and contracting opportunities with Main Roads (clauses 10.5(b)) and 13).

[126] Tjiwarl Agreement (n 16) clause 10.3(1).

[127] WAD 141 of 2020 and WAD 142 of 2020 were brought on 17 June 2020, hence the *Tjiwarl Agreement* sets 17 June 2020 as the cut off point. WAD 269 of 2020 was brought in November 2020. See also Narrier v WA [2016] FCA 1519; BHP Billiton Nickel West Pty Ltd v KN (Dec'd) [2018] FCAFC 8; Tjungarrayi v WA [2019] HCA 12.

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Overview of financial compensation provided in the Tjiwarl ILUA

	Amount ($)	Spending conditions	Reasoning for amount
Implementation Fund	$1.375 million to be paid as a single instalment.	This amount is to be spent by Tjiwarl AC for the purpose of supporting the implementation of the Tjiwarl Agreement.	N/A
Socio-economic Baseline Study	Up to $400,000 to be paid prior to registration of the Tjiwarl Agreement.	This amount funds the socio-economic baseline study for the Tjiwarl people.	N/A