

Centre for Native Title Anthropology  
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*Issues & challenges in native title  
compensation research*

# Questions & Issues: [slides available]

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Lawyers' briefs to anthropologists? Ensuring realistic expectations? Reports needed? Fieldwork & previous results? Breadth of research issues?

'compensable acts', 'cultural loss', 'the right people', 'effects on *connection* (n.t. rights)', 'collateral detrimental effects'?

Research approaches to suit very different settings across the continent?

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# Lawyer's brief to an anthropologist

*Stephen Wright's training draft: [4 pages] + 5 pages of questions for claimant witnesses [foreshadowing a minimum of 6 months full time research]*

*'overall issues': laws & customs -> connection (1975-present), effects of 'acts' on 'exercise' & connection & on 'individuals & collectively', + 'cumulative' effects, & do conclusions/opinions differ from determination findings? + 'likely' or 'possible' effects of acts e.g. on future generations, + effects of compensable acts cf. 'other things' [acts, developments] including those occurring pre 1975*

*'specific questions' for Indigenous claimant witnesses ['research participants']:  
access to country, ceremonies, topography & water changes, 'environmental impacts', obligations (for & to whom), future generations?, men/women?, any positive effects of 'acts' mixed with negatively experienced impacts?*

*'legal principles': both physical (actions) & spiritual (connection) aspects, 'feelings' not sole focus, effects may be 'indirect' (law ground, nearby road), can draw 'inferences' from other acts, effects may not be 'uniform'*

# Lawyer's brief, but simpler versions of the research task?

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Effects of [*potentially*] 'compensable acts' [footnote needed early in a report?], done after 1975, on native title 'connection' to country [effect on 'native title rights']

Separate but inter-related steps (see Timber Ck HC para 218):

1. Identification of the compensable acts
2. Identification of the n.t. holders' connection by laws & customs
3. Consideration of the particular and inter-related effects of the compensable acts on that connection [**'cultural loss'**]

**How can we narrow the issues? Importance of discussion prior to finalising the brief, bringing anthropologists in to that conversation**

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# ‘cultural loss’: re country & tradition

Timber Ck (HC para 154): Compensation (non-economic) is ‘**for that aspect of the value of land ... which is *inherent in the thing that has been lost, diminished, impaired or otherwise affected***’. So it is something *in the relationship to country* that has been ‘lost’.

At para 158: ‘the effects of the acts causing cultural loss’ cannot be divorced from ‘the content of the traditional laws and customs’. So cf. ‘loss’ of other kinds.

At para 154:

‘It is not just about hurt feelings, **although the strength of feeling may have evidentiary value in determining the extent of it**’.

In the research exercise: it is likely to be those ‘feelings’ that constitute ‘data’ supporting and informing the expert opinion of the anthropologist.

TC: The ‘hurt’ at particular locations can affect customary activities nearby (how far?), ‘collateral detrimental effects’? e.g. ritual ground in TC, & be experienced across a *continuum of persons* connected to the location of the compensable act(s) -> **a politics of expectation?**

# Practical issues: how much fieldwork?

How much fieldwork is needed? How long is needed to produce a report? for litigation **if needed**. Adequate funds available? Availability of consultants, in-house anthropologists? *How extensive is the available anthropological & related documentation?*

Availability of GIS material summarising historical sequences of modifications to landscapes at locations of 'compensable acts'? NB: some acts, having occurred any time over the last 45 years, may be recalled only in general terms or not at all, some physical 'effects' not visible since construction, e.g. a buried pipeline, & forgotten acts.

Existing familiarity of the researcher with a region, community & system of cultural connection? Not essential but advantageous.

One consultant/anthropologist required? Geographical extent of the effects of 'compensable acts' across a region? more than 1 claim group? collaboration & exchange of findings (consultants, in-house researchers)? when should that occur? (**early conferrals of experts?**)

# Methodological issues (1): available materials?

Previous connection materials available? Report(s) [different in litigated/consent determinations?], genealogies, cultural mapping of sites, **heritage** reports? Historical/archaeological report(s)? Summaries of them? Legal docs from a determination, particularly canvassing the anthropology opinions?

Anthropologist to **rely on** previous work? 'don't reinvent the wheel'? Satisfied of adequacy of previous research in terms of anthropological concepts and literature?

Satisfied on the basis of the new (limited) fieldwork? (avoid unnecessary revisions of findings used in the determination?)

What to do analytically with **disagreements** among n.t. holders, and others who may challenge the previous conclusions / opinions? (will the anthropologist advise/remind n.t. holders of the previous research findings? lawyers to do this?)

Legal view: it is '*the native title holders*' who claim compensation; local views may be that it is a broader deserving group according to 'law & custom', based on Dreaming tracks, regional systems of social classification ('skins'), socio-spatial dimensions of a culturally interconnected 'jural public', 'tribe'/'nation' assertions as adaptations to change?

## Methodological issues (2): local politics

Views about who are the 'right people': affected by events **since** the n.t. determination?

EG: Subsequent operation of a PBC, membership, money, agreements, local politics issues?

Perceptions of individuals &/or particular families having been 'left out', or wrongly included, or favoured in beneficial agreements, employment, receipt of funds, other resources, jealousies? NB: T Ck HC (para 233) 'particular commercial contracts were not material to the assessment' (**may or may not be how all those with 'connection' see it**)

Unravelling contests over expected / foreshadowed 'compensation', as to a basis in 'law & custom', or driven by financial/economic aspirations? so that arguments for 'traditional connection' can be *skewed* by interested individuals and families of polity?

But **change**: there are legitimate modes of *adaptation* so that a **broadened jural public may be** presented as compensation recipients, broader at least than what emerges from earlier ethnography, this becomes an issue for professional research opinion.



# Conceptual issues: across generations?

Intergenerational effects: how to investigate? T Ck HC para 230: ‘the loss is permanent & intergenerational’ → a challenging conclusion for a researcher to arrive at?

Robust social science inquiry into this kind of a *prediction*? Foreshadowing challenges to the reasoning and data supporting this kind of expert opinion.

Document from: elders, parents, youth? What will young people say? How to get beyond what young people feel they *ought* to say? Can’t assume all (the majority) will use the same language for the future as the oldest generation.

Is there *difference* across the generations as to ‘effects’ on country, connection & impacts of compensable acts? A risk of *enforced traditionalism* in the language of inquiry?

Distinguish ‘cultural loss’ into the future, in a context of a politics of cultural recuperation?

These questions won’t undermine opinions based on assertions of ‘effects’, and can strengthen the robustness of the anthropology. *What are the implications if we as social scientists (not advocates) do not address them?*

# Fieldwork questions: a tool kit?

What questions can be posed to investigate 'spiritual hurt', and if so, of what kind? (working suggestions, S Wright's 5 pages require separate discussion):

- Thinking about ... [that road, pipeline, mine, building, irrigation infrastructure ...], what happened to the country?
- Had country already been affected before ... [the compensable acts]?
- What is there in that country afterwards?
- Do you feel anything about what happened to the country?
- Do others feel the same way or differently?
- Was it OK, or good, or bad what happened to the country?

Possible 'feelings' likely to be articulated:

- 'I/we feel no good (*binji*, stomach, i.e. **somatic discomfort**)' (T Ck: 'no good inside, gut-wrenching')
- 'sorry' for country, Dreamings, ... &/or for 'old people' (who once occupied, are still there?)
- 'shame' (complex emotion encompassing embarrassment, in relation to spiritual entities, other members of the traditional 'jural public', oneself for not looking after country ...)

# A *politics* of expectations: not ignored

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Local level expectations about future distribution of compensation received (particularly \$)?  
My experience is that this topic quickly becomes germane to discussions.

Timber Ck (para 156): award to be made *in globo*, to the group, 'with the apportionment or distribution ... being an intramural matter'.

But this comfortable legal/ethical nicety may not help the anthropologist whose inquiries as to who are the 'right people' *affected* through the *effects on country* are likely to be shot through with strong views about who are the appropriate (& inappropriate) recipients of compensation.

Hence, in broad terms: Local vs Regional connections emerge significantly on this issue.

# ‘Owners’ vs others: politically charged

Primary & secondary connections, decision-making rights, rights to compensation & hence a continuum &/or hierarchy of connections encompassing ‘feelings’ about effects on country?

This kind of continuum may not be something legal views wish to engage with, but can give the anthropologist a way to form opinions in the face of contesting asserted connections and interests?

Scholarship relevant: Sutton – *core & contingent* rights; Williams – *presumptive & subsidiary* rights (some inchoate, some potential); Keen, Peterson, Sansom – *conversion* of secondary to primary rights; Maddock – *patrilineal vs matrilineal* inheritance of rights.

Basis for distinguishing *kinds of rights* will vary greatly: Dreamings, skin, kin connections; spiritual connections articulated through closeness / distance from particular ‘old people’ (deceased forebears) who lived on the country; ceremonial connections of living or, more commonly, deceased forebears; gender, age, ritual status.

# cultural change, cultural loss?

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Timber Ck (para 168): same rituals & ceremonies as were practised more than a century ago – in how many cases would that apply? A conservative oral tradition may well be argued for, say in the midst of a city or regional town, but the same evidence of its practice will not be there.

T Ck HC para 217: where land ‘has been developed may prove less than the sense of loss ... in remote areas ... **because the sense of connection to country may have declined ... before the act of compensable diminishment**’.

T CK (para 195): compensable acts ‘did not remove all of the native title’, evidence that **some developments acceptable under law & custom**, including some houses, bridge, a Resource Centre. Not *all* senses of place arise from traditional ‘law & custom’, e.g. work histories on farms, cattle stations, in other industries? Acceptance of some landscape changes?

Some slippery notions here requiring careful investigation and confident expert opinion.

# Research approaches to suit very different settings across the continent?

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- Laws & customs will be highly diverse (e.g. ‘law grounds’, ‘ceremonies’, mostly not relevant?)
- Level of detail as to kinds of connection, estate groups [patri/matri connections, ritual roles] vs ‘tribes’/‘nations’/regions?
- Highly different degrees of ‘cultural loss’, & consequent attempts at recuperation of connection in some cases
- Loss prior to 1975 has to be distinguished from ‘compensable’ acts -> more difficult in the south?

# Returning to practicalities

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- a) Ensure the brief (Terms of Reference) is appropriate in terms of anthropological / social science research inquiry, not just in terms of legal issues.
- b) Clarify the sufficiency of time to address all the issues in the brief. Narrow the issues?
- c) Clarify availability of all relevant documents, including those not provided by the party engaging the research services. Resist any suggestions that certain documents are not relevant from a legal perspective if they are relevant from an anthropological research perspective.
- d) Depending on how big an area is involved, more than one anthropologist engaged, authorship? Regional compensation claims?
- e) Are some issues best left separate from the core compensation research? E.g. the **form(s)** of compensation sought? (e.g. money, land); **future distribution** of compensation via canvassing existing corporations' arrangements? **'right to trade'** investigations? *These can be included but that is likely to expand the researcher's tasks, funding needed.*

# QUESTIONS & DISCUSSION

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THANK YOU