

2.1 The legal doctrine

23. I consider the following aspects of the legal doctrine to be relatively clear (paragraph numbers refer to High Court's decision in *Griffiths*):

- The acceptance of a broad distinction between economic and non-economic loss (or cultural loss) when considering just terms compensation under section 51(1) of the Native Title Act for the 'loss, diminution, impairment or other effect of the act on their native title rights and interests'.
- Economic loss is to be calculated by the usual valuation methods for the valuation of land at the time of the extinguishment/impairment (plus simple interest between that date and the date of the court judgement).
- In general terms, the procedure for assessing cultural loss is threefold: 1) identification of the compensable acts (typically the granting of freehold interests or leases or public works such as roads); 2) identification of the native title holders' connection with the land or waters by their laws and customs; and 3) consideration of the particular and inter-related effects of the compensable acts on that connection. (Para. 218)
- Because traditional 'connection' is spiritual/religious in nature, its loss or diminution is more than loss of the enjoyment of/use of land and more than the loss of enjoyment of life. It is better described as cultural loss. (Para. 152-155, 187; cf 'spiritual hurt' as the encompassing idea expressed in para. 216)
- When identifying the relevant connection the focus should not be narrowly on the precise areas of the compensable acts, but on where the more precise areas are placed within the wider totality of the native title holders' connection to land ('one indissoluble whole') (perhaps a regional rather than local approach) (para. 198).
- This approach should not be used to discount the loss attributable to the compensable acts, for example, on the basis the native title holders have alternative land on which to exercise their native title rights. (Para. 164)
- Nor should this approach be used to discount the loss attributable to the compensable acts on the basis that earlier non-compensable acts had already diminished the cultural value of the land.

- Rather, the earlier acts can be seen as punching holes in what could be likened to a single large painting, a single coherent pattern of belief in relation to a far wider area of land. The subsequent compensable acts punch further holes in separate parts of the one painting and the damage done was not to be measured by reference to the holes created by the compensable acts alone, but by reference to the effect of those holes in the context of the wider area. (Para. 205, 219)
- In assessing the effect of the compensable acts on connection the following can legitimately be taken into account:
 - the persistent aggravation of hurt feelings due to ongoing dispossession (Para. 190);
 - impairment of access to hunting grounds and impairment of the traditional food resources of those hunting grounds (para. 190);
 - destruction of or damage to particularly significant sites (para. 190);
 - depending on the facts of the particular case, the effect on adjacent areas ('collateral detrimental effect'), for example, an adjacent area no longer being a secure ritual ground (para. 190, 200, 202-205, 223-224);
 - the incremental and cumulative effect of a series of compensable acts, for example, in a mounting sense of failed responsibility to care for the land (para. 180, 200, 206, 225);
 - the effect of compensable acts on future descendants of the native title holders, i.e. the fact that the loss is permanent and intergenerational (para. 207, 228-231);

24. On the facts of that case I would characterise some of the recognised aspects of cultural loss associated with the destruction of sacred sites as:

- apprehension of supernatural retribution against the responsible native title holders and non-Indigenous people associated with the destruction;
- emotional shock and sadness at the loss of significant cultural heritage;
- the insult of not being acknowledged as the native title holders responsible for the site and not being consulted about it;
- impaired amenity of not being able to view the undisturbed site;

- apprehension about the ability of the native title holders to demonstrate the unimpaired site to future generations;
- shame, blame and loss of esteem and reputation of the responsible native title holders in the wider native title group and regional society;

25. Some of the uncertain aspects of the legal doctrine include:

- delineating the causal nexus between the compensable acts and the cultural loss;
- the meaning and application of the holes-in-the-painting analogy (cf the relevance of the amount of other traditional country available to the native title holders, separate from the areas of the compensable acts, on which the native title holders may exercise their native title rights); and
- distinguishing between the legal doctrine as endorsed by the High Court and some aspects of loss identified by the trial judge which may have been specific to that particular factual situation.