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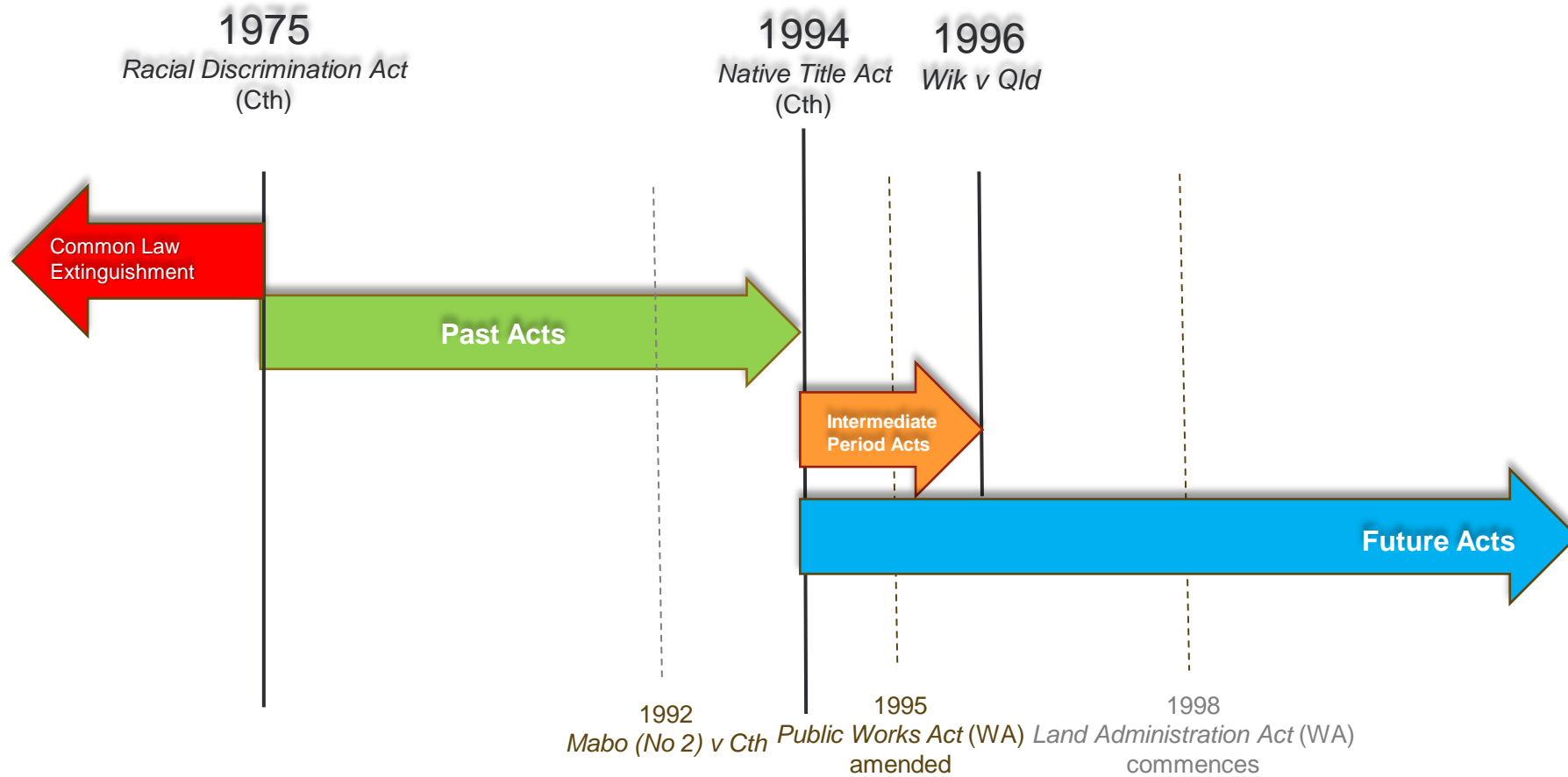
Cultural Loss: Issues for Negotiation of Compensation Settlements

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Overview

- How did the High Court assess compensation?
- How was cultural loss considered by the Court?
- What issues arise in approaching compensation settlements?
- What are some options for consideration of cultural loss?

How does compensation arise?



How did the High Court assess compensation?

Bifurcated approach

- Native title has both a physical and spiritual aspect
- Economic loss:
 - Objective: What is reasonable?
 - Physical aspect – **effect on rights**
- Non-economic loss ('cultural loss'):
 - Subjective: what else was lost from claim group's perspective?
 - Spiritual aspect – **effect on traditional connection to country**

Part 1: Economic Loss

- Court keen for precision
- Compensation for loss of rights – physical aspect
- **Only** about an **objective hypothetical negotiation value** (‘**surrender value**’) at the date of extinguishment
- Economic loss is capped at the equivalent of freehold:
 - exclusive native title is the same as freehold.
 - non-exclusive native title is something less than freehold.

Part 2: Cultural Loss

- Court not so keen for precision
- Compensation for effect on **'inherent value'** of the land to the claim group
- The inherent value lies in the **spiritual attachment** that native title holders have to country, i.e. 'cultural value'
- **'Cultural loss'** is compensation for the **spiritual aspect** being the effect on cultural value
- But cultural loss does not mean a total loss of rights, or that there is no longer any cultural value

Cultural Loss is not solatium

- Solatium is a statutory concept
- Can include an award for 'distress caused by compulsory taking'
- Mansfield J at first instance treated cultural loss as solatium
- High Court overturned Mansfield J on this point – cultural loss is not an award to cover the distress caused by extinguishment

Court's task in assessing cultural loss

1. Identify the **compensable act(s)**.
2. Identify the **native title holders' connection** with the land or waters by their laws and customs.
3. Consider the **particular** and **inter-related effects** of the compensable act(s) on **that connection**.

Some challenges for Anthropologists in determining cultural loss

- How do you reconcile the continuity argument relied upon to provide native title with the evidence required to show cultural loss for compensation?
- How do you collect the evidence?
- How do you assess cultural loss as at the date of extinguishment?
- How do you explain intergenerational loss when dealing with past acts?

What options exist for resolving native title compensation?

- Compensation claim filed in Federal Court (s50(2) of the NTA):
 - Resolved by the Court following a contested hearing
 - Settled by agreement
- Negotiated approach – settled by agreement (including as part of broader settlements incorporating claim resolution)

What could a settlement framework include?

- Co-designed policy approach – initially broad
- Fair, informal, empowering process
- Consistency across State / jurisdictions, including Commonwealth guidance
- Guiding principles for recognition & truth telling
- Use of connection evidence where available
- Consider learnings from other jurisdictions

What issues might arise in cultural loss settlement discussions?

- Requirements for information about cultural loss
- Emotional impact of talking about cultural loss
- Separating impact of pre-1975 acts from the post 1975 compensable acts
- Identifying impact of compensable acts on a global scale
- Equity across the State / other jurisdictions
- Compensation options

What could be included as compensation in an agreement?

NB – not all are applicable or achievable, and are dependent on aspirations of native title holders, government approvals

- Cash: for PBC operational support, investment in future funds to provide sustainability

Other components to facilitate economic independence, including:

- Transfer of Crown land, provision of commercial land
- Access to water for commercial purposes
- Joint management and joint vesting arrangements
- Revenue streams
- Business & tourism development & support
- Access to housing assets, Land Trust estate
- Support for management of cultural information & records
- Support for development of revitalisation of language and culture

What opportunities exist?

- Links to broader reconciliation discourse
 - Truth telling & recognition
- Defining regional structures and representative forums
- Developing broad Principles to commence compensation policy discussions

Questions