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**Divining Damages: Compensating Dispossessed
First Nations Peoples in Australia and Lessons
from Regional Human Rights Courts**

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Abstract

International and national legal instruments recognise the need to provide redress where First Nations peoples' lands and resources have been used, damaged or taken without consent. Globally, financial compensation remains the most common form of legal redress. This presents a fundamental challenge: how can non-pecuniary loss be quantified in pecuniary terms? The High Court of Australia confronted this issue in *Northern Territory v Griffiths* [2019] HCA 7 under Australia's *Native Title Act 1993* (Cth), endorsing an approach to assessing compensation for cultural and spiritual loss that relies heavily on judicial intuition. This thesis examines that approach, asking how Australian courts should compensate First Nations peoples for the non-economic impacts of dispossession and what role judicial intuition should play. As native title compensation jurisprudence remains in its infancy, the analysis turns to the more developed practices of the Inter-American, African and European regional human rights courts in awarding non-pecuniary damages. While these systems offer valuable insights, the central lesson is cautionary: unstructured reliance on intuition risks producing jurisprudence that is unclear and inconsistent. To mitigate these issues, this thesis draws on First Nations-led valuation methodologies from Canada, developments in European tort law and emerging Australian legal scholarship to propose more principled, culturally grounded and structured approaches, including the implementation of judicial guidelines, developed by an independent, co-designed body. Although focussed on the Australian experience, this thesis offers broader insights into how legal systems can respect the rule of law and appropriately limit the role of judicial intuition, while meaningfully recognising First Nations peoples' relationships with land.

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Table of abbreviations

Abbreviation	Definition
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACJ	Acting Chief Justice
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AM	Member of the Order of Australia
AU	African Union
AUD	Australian Dollar
CJ	Chief Justice
Cth	Commonwealth
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
EUR	Euro
FCAFC	Federal Court of Australia - Full Court
HCA	High Court of Australia
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
J	Justice
KC	King's Counsel
KES	Kenyan Shilling
NNTT	National Native Title Tribunal
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNGA	United Nations General Assembly
USD	United States Dollar
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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Article 3
Article 14
Article 17
Article 19
Article 20(1)
Article 21(1)-(2)
Article 22
Article 60

African Commission on Human and Peoples' Rights, 'Resolution on the Rights of Indigenous Peoples' Communities in Africa' (2000) ACHPR/Res.51(XXVIII)00

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978)

Article 1(1)
Article 2
Article 21
Article 63(1)

American Declaration on the Rights of Indigenous Peoples, AG/RES 2888 (XLVI-O/16) (adopted 15 June 2016)

Article XXIII

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953)

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Article 6
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Article 9
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Article 13
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Article 41
Article 1 of Protocol No. 1
Article 2 of Protocol No. 1
Article 3 of Protocol No. 1

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969)

Article 5

International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976)

Article 27

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

Article 1

Article 11

Article 13

Article 14

Article 15(1)(a)

International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples (adopted 27 June 1989, entered into force 5 September 1991)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)

Article 27

United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a))' (21 December 2009) UN Doc E/C.12/GC/21

United Nations Human Rights Committee, 'General Comment No 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5

United Nations Committee on the Elimination of Racial Discrimination, 'General Recommendation No 23: Indigenous Peoples' (18 August 1997) UN Doc A/52/18, annex V

United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (2007)

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Chapter 1 Introduction

For many First Nations¹ people, land is not merely property or territory, it holds a pervasive spiritual significance that is inseparable from identity, law, language and way of life. As Palyku woman Ambelin Kwaymullina writes, ‘Country² is family, culture, identity. Country is self.’³ When First Nations people are dispossessed from their lands, when their spiritual and physical connection to land has been severed or impaired, how can such loss be valued? The harm suffered cannot be meaningfully translated into the individualised, market-based logic of Western legal systems, it is incommensurable. Yet courts are tasked with measuring and pricing it.

International legal instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), call on States to protect the rights of First Nations peoples and provide redress when their traditional lands or resources have been taken or damaged without free, prior and informed consent. In both international and domestic legal systems, the most common form of redress is monetary compensation, including for non-economic harms arising from dispossession. Regional human rights courts, namely the Inter-American Court of Human Rights (Inter-American Court), the African Court of Human and Peoples’ Rights (African Court) and the European Court of Human Rights (European Court), each has an established practice of awarding compensation for non-economic (or ‘non-pecuniary’) harm resulting from human rights violations. In quantifying this harm, the three courts have often relied heavily on judicial discretion, guided primarily by the vague principle of ‘equity’.

In 2019, the High Court of Australia was asked for the first time to determine how non-economic loss suffered by First Nations peoples, whose rights in land have been impaired or extinguished, should be quantified under the *Native Title Act 1993* (Cth), Australia’s legislative

¹ This thesis uses the term ‘First Nations’ to describe indigenous peoples, regardless of where their ancestral lands are located. This terminology was chosen because it is the language adopted by the Uluru Statement from the Heart, which was issued in May 2017 by over 250 First Nations delegates at the First Nations National Constitutional Convention held at Uluru in Central Australia. See ‘The Uluru Statement from the Heart’ <<https://ulurustatement.org/the-statement/view-the-statement/>> accessed 5 July 2025.

² This thesis adopts AIATSIS’ definition for the term ‘Country’, which is used throughout this work: ‘Country is the term often used by Aboriginal peoples to describe the lands, waterways and seas to which they are connected. The term contains complex ideas about law, place, custom, language, spiritual belief, cultural practice, material sustenance, family and identity.’ See Jude Barlow, ‘Welcome to Country’ (*AIATSIS*, 25 May 2022) <<https://aiatsis.gov.au/explore/welcome-country>> accessed 19 June 2025.

³ Ambelin Kwaymullina, ‘Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country’ (2005) 6(10) *Indigenous Law Bulletin* <<https://classic.austlii.edu.au/au/journals/IndigLawB/2005/27.html>> accessed 30 April 2025.

framework for recognising First Nations peoples' traditional title in land and waters. In *Northern Territory v Griffiths*⁴ (the *Timber Creek* case), the Court awarded the Ngaliwurru and Nungali peoples AUD 2.5 million in compensation, including AUD 1.3 million for non-economic loss, which it termed 'cultural loss'. In assessing the appropriate quantum, the High Court upheld an approach that relies heavily on judicial intuition.⁵ While assigning a monetary value to something as pervasive and immeasurable as 'cultural loss' inherently requires a degree of intuition, concerns arise about adherence to the rule of law when intuitive judgment outweighs principled reasoning. These concerns are amplified in Australia's native title context, where litigation is often protracted, resource-intensive and emotionally burdensome for claimants.

At the time of writing, the *Timber Creek* case is the only judicially determined native title compensation case in Australia. This thesis therefore turns to the jurisprudence of regional human rights courts to consider what guidance it may provide for Australia in compensating dispossessed First Nations peoples. While aspects of these international approaches offer useful insights for reform, the most significant lesson is cautionary: reliance on intuition, when guided primarily by vague notions of fairness, justice or appropriateness, risks creating a body of jurisprudence that is opaque and inconsistent. With these lessons in tow, this thesis critically examines the role of judicial intuition in *Timber Creek*. Informed by HLA Hart and Ronald Dworkin's theories of judicial reasoning, it argues that the courts relied too heavily on intuition, while inappropriately downplaying analogies from other areas of law and market-based reasoning – reference points that likely shaped the judges' decisions, even if not explicitly acknowledged.

Drawing on the practices of regional human rights courts, native title scholarship, compensatory approaches in Canada and best-practice methodologies for assessing non-pecuniary harm in European tort law, this thesis argues for the development of principles and non-exhaustive criteria to guide judicial discretion in the assessment of non-economic loss. As native title compensation jurisprudence evolves, the absence of clear principles or structured guidance risks entrenching a model of decision-making that lacks clarity and accessibility, particularly for First Nations claimants navigating a legal system founded in colonisation, and a native title system that is already complex, inequitable and culturally unsound. This is not

⁴ *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7.

⁵ *ibid* [237].

merely a legal problem about assigning monetary value to non-economic loss. It is a human rights issue, one that goes to the heart of how settler-colonial legal systems reckon with the historical and ongoing injustices experienced by First Nations communities. In the absence of broader settlement processes in Australia, such as treaty negotiations between governments and First Nations peoples addressing reparation, self-determination and sovereignty, native title compensation functions as a shallow substitute. In this context, how courts approach the task of assessing cultural loss carries profound symbolic and practical consequences for justice and reconciliation in Australia.

1.1 Methodology and approach

This thesis draws primarily on legal and anthropological disciplines, using a case study analysis and comparative approach to examine the legal, cultural and policy challenges involved in compensating First Nations peoples for non-economic loss arising from dispossession. The next chapter introduces the key international legal mechanisms that affirm the rights of First Nations people to maintain their physical and spiritual connection to land and, in some cases, establish obligations for States to provide effective remedies where that connection is damaged. Chapter 3 analyses how the Inter-American Court, African Court and European Court assess non-pecuniary damages when determining reparations or just satisfaction for violations relating to cultural maintenance and victims' physical and non-physical connections to land. Chapter 4 turns to the Australian context, examining how compensation for non-economic loss was assessed under the *Native Title Act* in *Timber Creek*. Chapter 5 critically evaluates the reasoning of the courts in *Timber Creek*, focusing particularly on their reliance on judicial intuition, their rejection of more structured analogies from other areas of law, cultural and ontological comprehension issues, and the assumption that principles will evolve naturally as more cases are heard. Chapter 6 draws comparative insights from both international and cross-doctrinal contexts. These include regional human rights jurisprudence, First Nations-led valuation methodologies developed in Canada, European Union (EU)-funded research on best-practice frameworks for non-pecuniary damages in tort law and Australian scholarship on native title law. These examples are used to explore alternative approaches for improving transparency and consistency in the evolving jurisprudence of native title compensation in Australia.

1.2 Scope and qualifying remarks

I am currently a candidate for a master's degree in Human Rights and Democratisation at the Global Campus of Human Rights. Prior to commencing this degree, I worked as a native title lawyer, assisting First Nations peoples in northern Australia to obtain, exercise and protect their rights in land. This background has given me an informed perspective on how the Australian legal system engages with First Nations rights. However, as a non-Indigenous person, my perspective should be treated as necessarily limited.

This thesis contributes to the ongoing discussion of how First Nations groups should be compensated for the loss and diminution of their traditional rights in land. While its primary focus is Australia's *Native Title Act*, it is important to recognise that native title law does not sufficiently protect or restore First Nations land rights, nor does it offer adequate redress for their historical and ongoing violation. On the contrary, the *Native Title Act* has been the subject of sustained criticism for entrenching postcolonial legal frameworks and further subordinating First Nations relationships with land.⁶ As Irene Watson, Tanganekald, Meintang and Boandik woman and Professor of Law, observed, '...native title sanctifies white people's title as the rules of native title carry their own colonialist safety net of statutory validation and extinguishment.'⁷

A substantial body of scholarship supports the development of alternative redress schemes to address the impacts of colonisation on First Nations peoples' connection to land in Australia. This thesis, however, focuses on improving how compensation claims are assessed under the existing framework of the *Native Title Act*, drawing on international comparative examples to advocate for changes to judicial and institutional practice. This intentionally narrow focus is both timely and important. Following the High Court's 2019 decision in *Timber Creek*, First Nations groups across Australia are preparing compensation claims against Commonwealth, State and Territory governments for the loss and impairment of their native title rights and

⁶ See, for example, Noel Pearson, 'The Concept of Native Title at Common Law' [1997] Australian Humanities Review <<https://australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/>> accessed 22 February 2025; Irene Watson, 'Buried Alive' (2002) 13 Law and Critique, Kluwer Law International 253; Aileen Moreton-Robinson, "'Our Story Is In the Land": Why the Indigenous Sense of Belonging Unsettles White Australia' *ABC Religion & Ethics* (Australia, 9 November 2020) <<https://www.abc.net.au/religion/our-story-is-in-the-land-indigenous-sense-of-belonging/11159992>> accessed 2 March 2025; Claire G Coleman, 'The Crown Owns No Land' *The Saturday Paper* (Melbourne, 21 January 2023) <<https://www.thesaturdaypaper.com.au/comment/topic/2023/01/21/the-crown-owns-no-land>> accessed 13 April 2025.

⁷ Irene Watson, 'Buried Alive' (2002) 13 Law and Critique, Kluwer Law International 253, 266.

interests. The manner in which these cases are decided will have significant implications on the future of native title law and the broader project of reconciliation in Australia.

This thesis focuses specifically on judicially awarded monetary compensation for First Nations peoples. While monetary compensation has been widely criticised as inadequate or inappropriate, it remains the most common form of redress provided to dispossessed First Nations peoples. Under the *Native Title Act*, compensation must consist of the payment of money (subject to section 51(6)).⁸ While this thesis does not investigate the broader limitations of that statutory requirement, it is important to acknowledge that many scholars have demonstrated that monetary compensation is often a problematic form of redress for First Nations communities dispossessed of their traditional lands.⁹ Further, the most widely praised compensation outcomes have come from negotiated settlements that combine financial redress with more substantive measures, such as land return, legislative reform and ongoing economic opportunities.¹⁰

For its comparative analysis, this thesis primarily focuses on the regional human rights courts due to their substantial jurisprudence on non-pecuniary loss, including collective cultural harms suffered by dispossessed First Nations peoples under the Inter-American and African systems. It also examines innovative valuation methodologies developed with Canadian First Nations groups. It does not examine approaches in New Zealand or the United States, as neither jurisdiction provides a litigation-based route comparable to Australia's native title framework for compensating non-economic loss.

1.3 Defining judicial intuition and judicial discretion

Judicial intuition and judicial discretion are distinct but often interrelated concepts in law. Discretion generally refers to the broad powers vested in decision-makers to make a decision, subject to express or implied limits. These limits may arise from legislation, or from the principles and rules established through judicial precedent. HLA Hart characterises discretion as an exercise of practical judgment and wisdom, involving the assessment of relevant factors

⁸ *Native Title Act 1993* (Cth) s 51(5).

⁹ See, for example, Tracey Nau, 'Looking Abroad: Models of Just Compensation under Native Title Act' (2009) 18 *Australian Law Reform Commission - Reform Journal*; Celia Winnett, "'Just Terms' or Just Money? Section 51(Xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *UNSW Law Journal* 776.

¹⁰ See, for example, the Tjavarl Palyakuwa Agreement: State of Western Australia and Tjiwarl Aboriginal Corporation, 'Tjiwarl Palyakuwa (Agreement) Schedule 9 – Summary' (2024) <<https://www.wa.gov.au/system/files/2023-05/agreementsummaryscheduledulenine.pdf>>.

and principles, and shaped by experience and reflective reasoning.¹¹ Judicial intuition, however, lacks established legal framing. Normatively, ‘intuition’ is often used to describe an action or decision made according to feeling, rather than logic or reason. This is not how the term is used in the context of this thesis. Here, judicial intuition is used synonymously with Hart’s notion of a ‘leap’ in discretionary decision-making.¹² This leap refers to the point in decision-making where existing rules or principles can no longer provide conclusive guidance, yet a decision must still be made.

In Ronald Dworkin’s account of discretion, this leap is effectively non-existent. He argues that such a point is never reached because judges are always guided by principles, institutional practices, judicial history and community understandings, even in difficult cases where no clear legal rules apply.¹³ As will be discussed in Chapter 5, this thesis agrees that any such intuitive leap will inherently be informed by the normative and institutional factors identified by Dworkin. However, it maintains that in contexts where courts are required to assign a monetary value to non-economic harms arising from dispossession or cultural rupture, a degree of judicial intuition is necessary. In such cases, the loss cannot be adequately translated into Western conceptual frameworks, let alone legal ones. It is both culturally and legally incommensurable. Accordingly, even where all normative and institutional influences are identified and weighed, an intuitive leap is still required to convert those considerations into a specific monetary sum. The term ‘judicial intuition’ is therefore not used here to imply complete arbitrariness. Rather, it refers to those elements of a judicial decision that are not explicitly supported by articulated reasoning, but are nonetheless influenced by legal experience, internalised principles and reflective judgment. Accordingly, this thesis adopts Hart’s concept of that leap as its working definition of judicial intuition. The manner in which courts invoke and rely upon judicial intuition, particularly when quantifying compensation for non-economic losses, is a central concern of this thesis.

¹¹ HLA Hart, ‘Discretion’ (2013) 127 *Harvard Law Review* 652, 664.

¹² *ibid* 665.

¹³ Ronald M Dworkin, ‘The Model of Rules’ (1967) 35 *The University of Chicago Law Review* 14, 37.

Chapter 2 International legal frameworks and standards

To establish what is globally regarded as appropriate in recognising and protecting First Nations cultures, this thesis first turns to international law. Several international legal instruments set standards or create obligations for nation-states to protect the cultural rights of First Nations peoples. In some instances, these instruments also affirm, either explicitly or implicitly, a right to compensation where such obligations have not been met. The existence of these mechanisms at an international level reflects a broad global consensus on the need to recognise and protect First Nations cultures, and it may one day lead to such rights being protected as a matter of customary international law.

2.1 United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP was adopted by the United Nations General Assembly on 13 September 2007 and has been supported by 144 States.¹⁴ It establishes a ‘universal framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world.’¹⁵ The standards reflected in UNDRIP are the product of more than 25 years of research, consultation and deliberation.¹⁶ Although not legally binding, UNDRIP carries moral and political force in calling on States to enact domestic reforms consistent with the standards it sets out. Further, to the extent it is applied in practice, the Declaration may contribute to the development of customary international law.¹⁷¹⁸ In recognising its significance, Cobble Cobble woman and Professor of Law, Megan Davis observed:

It is within the United Nations human rights framework that Indigenous peoples have made the strongest impact upon international law. By mobilising the available human rights mechanisms, Indigenous people and their representatives have provided a

¹⁴ UN Department of Economic and Social Affairs, ‘United Nations Declaration on the Rights of Indigenous Peoples’ <<https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>> accessed 6 March 2025.

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples 2007 [Res 61/295] (13 September 2007) (adopted by 143 votes to 147; 11 abstentions).

¹⁶ UN Department of Economic and Social Affairs (n 14).

¹⁷ Megan Davis, ‘The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 11(3) AILR 55, 59.

¹⁸ Customary international law refers to those international legal obligations that are derived from the practice and *opinio juris* of States. For further explanation, see: Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press 1991).

critique of the Westphalian notion of sovereignty manifest in the narrative of dispossession that underpins the international legal and political system.¹⁹

Article 28 of UNDRIP recognises the rights of First Nations peoples to redress for land, territories or resources that have been taken, occupied, damaged or used without their free, prior and informed consent.²⁰ Unless otherwise agreed, such redress should take the form of ‘lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.’²¹ UNDRIP does not specify how monetary compensation should be assessed beyond the requirement that it be ‘appropriate’.

2.2 Treaties protecting First Nations cultural and land rights

Several international treaties have been interpreted to protect the rights of First Nations peoples to maintain and preserve their physical and spiritual connection to land. Although these instruments are often framed in terms of individual rights, rather than the collective rights more consistent with First Nations ontologies, their interpretation has developed to recognise the collective dimensions of First Nations cultural identity, including its intrinsic connection to land.

Article 27 of the *International Covenant on Civil and Political Rights (ICCPR)* affirms that individuals belonging to ethnic, religious or linguistic minorities shall not be denied the right to ‘enjoy their own culture, to profess and practise their own religion or use their own language.’²² In its General Comment No. 23, the UN Human Rights Committee acknowledges that for First Nations peoples, culture may manifest as ‘a way of life associated with the use of land resources’.²³ Dispossession or denial of access to traditional lands may therefore violate the rights protected under Article 27.

Article 15 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* protects the right to participate in cultural life²⁴ and obligates States to take positive steps to conserve and promote that right. In General Comment 21, the Committee on Economic, Social

¹⁹ Davis (n 17) 55.

²⁰UNDRIP art 28.

²¹ *ibid.*

²² *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27.

²³ UN Human Rights Committee, ‘ICCPR General Comment No. 23: Article 27 (Rights of Minorities)’ (8 April 1994) CCPR/C/21/Rev.1/Aff.5 [7].

²⁴ *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 15(1)(a).

and Cultural Rights adopts a more prescriptive approach with respect to First Nations peoples, recognising that their cultural life often has a strong communal dimension and encompasses ‘the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’.²⁵ The Economic and Social Council (ECOSOC) urges States to recognise and protect First Nations peoples’ rights to ‘own, develop, control and use’²⁶ these lands and resources. Where such lands have been taken or used without free, prior and informed consent, ECOSOC calls on States to take steps to return them. Dispossession may also impair the right to education under Articles 13 and 14 of the *ICESCR*, as it disrupts the intergenerational transmission of values, customs, law and language. It further affects the enjoyment of other protected rights, most notably the right to self-determination (Article 1) and, possibly, the right to an adequate standard of living (Article 11).²⁷

The *International Convention on the Elimination of All Forms of Racial Discrimination* also contains provisions relevant to First Nations land and cultural rights, namely Article 5, which guarantees the equal enjoyment of cultural and property rights. In General Recommendation No. 23, the Committee on the Elimination of Racial Discrimination interprets this as including First Nations peoples’ rights to access, use and control their traditional lands and resources.²⁸

Perhaps the most comprehensive international treaty concerning the rights of First Nations peoples is the *International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples (1989)*. This convention is widely regarded as the most concrete and binding legal recognition of First Nations peoples’ rights at the international level.²⁹ Notably, Article 15 establishes a right to compensation where First Nations communities are deprived of their ability to use, manage or conserve natural resources on their traditional lands. Article 16 further requires that compensation be awarded in cases of forced relocation, with a clear preference for the return of land. Where this is not possible, monetary compensation may be provided, but only where preferred by the affected peoples and subject to the condition that it is ‘appropriate’. Australia, along with other settler-colonial States like Canada, New Zealand and the United States, has not ratified the Convention.

²⁵ ECOSOC ‘General Comment 21: Right of Everyone to Take Part in Cultural Life (Art 15, Para1(a))’ (2009) UN Doc E/C.12/GC/21, 9 [36].

²⁶ *ibid.*

²⁷ *ibid* [2].

²⁸ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 23: Indigenous Peoples’ (18 August 1997) UN Doc A/52/18, annex V.

²⁹ S James Anaya, ‘Indigenous Rights Norms in Contemporary International Law’ (1991) 8 *Arizona Journal of International and Comparative Law* 1, 5.

The optional nature of ratification reflects a broader shortcoming of international law. Despite international legal instruments' acknowledgement of the collective rights of First Nations peoples, their ability to ensure these rights are upheld remains limited. Further, even when binding obligations exist, international mechanisms lack the authority to compel compliance. These instruments are, however, useful with regard to the political pressure they exert, their influence on domestic legal developments through soft law, and over time, their possible contribution to the development of customary international law in this area. Of particular relevance is the emphasis in both UNDRIP and *ILO Convention No. 169* on the need to redress harm caused by the dispossession or degradation of First Nations lands and resources. Both instruments recognise monetary compensation as a form of redress, framed as a substitute for the return of land when restitution is not possible. However, in the absence of a universal international human rights court there is limited guidance on how such compensation should be quantified. Accordingly, the next chapter turns to the jurisprudence of regional human rights courts.

Chapter 3 Regional human rights systems and the quantification of non-pecuniary harm

In the absence of a universal international human rights court, regional human rights bodies provide the most substantive jurisprudence on the interpretation and enforcement of human rights standards. Their case law is well developed in recognising and quantifying non-economic harm suffered by victims of human rights violations, including for First Nations peoples and other minority cultural groups as a result of dispossession or cultural rupture. The three principal regional human right courts are the Inter-American Court, the European Court and the African Court. Each is responsible for monitoring state compliance with regional human rights instruments within its respective jurisdiction. The competence of these courts is contingent upon States being parties to the relevant legal instruments.

It is an established principle of international law, and of legal systems more broadly, that a breach of a legal obligation resulting in harm entails a duty to provide adequate reparation.³⁰ Underlying this duty is the principle of *restitutio in integrum*, which holds that victims should, as far as possible, be put in the position they would have enjoyed had the violation not occurred. All three regional systems recognise that human right violations frequently cause non-pecuniary harm. Across these systems, the most commonly awarded form of reparation is financial compensation. Accordingly, despite differences in their legal foundations, all three courts have developed a compensation practice on quantifying the harm caused by human rights violations. These judgments have contributed significantly to the evolving body of international law on damages for non-pecuniary loss.³¹

There are clear consistencies in the approaches of the Inter-American, European and African Courts in quantifying compensation for non-pecuniary loss. Each acknowledges that the assessment requires the exercise of judicial discretion, guided by the overarching principle of ‘equity’. Equity has existed as a legal concept since Roman times and, at its most general, refers to fairness and reasonableness in the administration of justice.³² In international law,

³⁰ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) (1928) PCIJ Rep Series A No 17 PCIJ Rep.

³¹ Damian A Gonzalez-Salzberg, ‘Non-Pecuniary Damage under the American Convention on Human Rights: An Empirical Analysis of 30 Years of Case Law’ 81, 82.

³² Francesco Francioni, ‘Equity in International Law’, *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law: 2020) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1399?prd=OPIL>> accessed 14 April 2025.

equity functions as a tool for introducing elements of context-specific justice, particularly where the applicable legal framework affords courts a margin of discretion.³³ Judicial intuition plays a central role at the point in a court's reasoning where equity must be translated into a specific monetary sum for non-pecuniary damages. As there is no applicable mathematical formula, courts inevitably make an intuitive leap in determining how equity should be expressed as a financial award. As this chapter will demonstrate, each of the three regional courts exhibits an overreliance on judicial intuition, providing minimal justification for how compensation figures are derived or how the principle of equity has been applied to the specific circumstances of each case.

All three regional human rights courts, to varying degrees, commonly award compensation for non-pecuniary harm based on a presumption that such harm occurs as a natural consequence of grave or systemic human rights violations. This approach has been applied by the Inter-American and African Courts in cases involving dispossession and cultural disruption of First Nations communities.³⁴ In the European system, practice directions acknowledge that 'a causal link between the alleged violation and the moral harm is often reasonable to assume'.³⁵ The Inter-American and African Courts have articulated this principle more directly through case law.³⁶ These presumptions operate to relieve claimants of the burden of producing detailed, individualised evidence to prove the existence of emotional or psychological harm.

This chapter will examine each of these three systems in turn, outlining the key legal sources relevant to the protection of cultural and land rights, particularly as they relate to First Nations peoples. It provides a brief overview of each court's powers to order reparations and, through a case study from each system, analyses how these courts have assessed and quantified non-pecuniary losses arising from relevant human right violations.

³³ *ibid.*

³⁴ See, for example, *Case of the Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Series C No 125 Inter-American Court of Human Rights (6 February 2006); *Case of the Sawhoyamaya Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146 (29 March 2006).

³⁵ European Court of Human Rights, 'Practice Direction on Just Satisfaction Claims' (28 March 2007, Amended 9 June 2022) [10].

³⁶ *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabè Movement on Human and Peoples' Rights v Burkina Faso* (Reparations) [2015] App No 013/2011 (African Court on Human and Peoples' Rights).

3.1 The Inter-American Human Rights System

The Inter-American Human Rights System, established by the Organization of American States (OAS), aims to promote and protect human rights across OAS' 35 member States. Its principal treaty, the *American Convention on Human Rights (1969) (ACHR)*, created the Inter-American Court to adjudicate alleged violations of the *ACHR* and related instruments. The Inter-American Court only has jurisdiction over States that have ratified the *ACHR* and accepted the Court's contentious jurisdiction under Article 62.³⁷ States can also expressly accept jurisdiction for a specific case.³⁸

Under the Inter-American system, individuals, groups or organisations must first submit complaints to the Inter-American Commission on Human Rights, which is empowered to investigate alleged violations and may refer cases to the Court for legal determination. Although the *ACHR* frames rights primarily in individual terms, the Inter-American Court has developed substantial jurisprudence recognising the collective property rights of First Nations peoples (referred to as 'Indigenous and tribal peoples' in the system) over their traditional lands and natural resources. These rights are primarily recognised under Article 21 (right to property). Through interpreting Article 21 in conjunction with Articles 1(1) (non-discrimination) and 2 (the obligation to adopt domestic measures), the Court has consistently held that States must adopt special measures to guarantee First Nations peoples 'the full and equal exercise of their right to the territories they have traditionally used and occupied'.³⁹

The Court has also interpreted Article XXIII of the *American Declaration on the Rights on the Right of Indigenous Peoples*⁴⁰ to affirm that First Nations property rights are protected under the Inter-American human rights framework. The Inter-American Court has emphasised that collective property rights are fundamental to First Nations cultural, spiritual and social identity. As the Court has explained:

³⁷ The States that ratified *ACHR* include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. However, Jamaica has not recognised the jurisdiction of the Court and both Venezuela and Trinidad and Tobago have since withdrawn from the *ACHR*.

³⁸ Organization of American States, *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) art 62.

³⁹ *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 172 (28 November 2007) [91].

⁴⁰ American Declaration on the Rights of Indigenous Peoples, AG/RES 2888 (XLVI-O/16) (adopted 15 June 2016).

To guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.⁴¹

In cases involving forced removal or destruction of traditional lands, the Court has often found that other rights protected under the *ACHR* are violated as a direct consequence.⁴² In *Yakye Axa Indigenous Community v Paraguay*⁴³, for example, the Court found a violation of Article 4 (right to life), concluding that the community's dispossession deprived them of their traditional means of subsistence, placing them in life-threatening conditions and reliant on state assistance.⁴⁴

In cases of violation, Article 63(1) of the *ACHR* empowers the Inter-American Court to ensure the restoration of the right or freedom that has been violated. Where appropriate, it may also order that the consequences of the violation be remedied and that 'fair compensation' be paid to the injured party. The Court has interpreted this provision broadly, authorising a range of reparatory measures, including 'restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition'⁴⁵. In cases involving violations of First Nations property rights, the Court has awarded reparations pertaining to legal reform, land transfer and the creation of community development funds.⁴⁶ However, monetary compensation remains the predominant form of redress, addressing both material and 'moral' harm.⁴⁷

The Inter-American Court has had a significant impact on the development of international law relating to non-pecuniary damages for human rights violations,⁴⁸ with over three decades of reparation decisions. Court data from 2008 indicates that 'compensation for non-pecuniary damage amounts to 75% of the total sums of compensation ordered by the Inter-American Court'⁴⁹ over the years. Given the region's colonial history, the Court's jurisprudence

⁴¹ *Case of the Yakye Axa Indigenous Community v Paraguay* (n 34) [154].

⁴² Inter-American Commission on Human Rights, 'Indigenous and Tribal People's Rights Over Their Ancestral Lands and Natural Resources' (Organization of American States 2009) OEA/Ser.L/V/II. Doc. 56/09 <<https://cidh.org/countryrep/Indigenous-Lands09/Chap.III-IV.htm>> accessed 14 March 2025.

⁴³ *Case of the Yakye Axa Indigenous Community v Paraguay* (n 34).

⁴⁴ *ibid* [168].

⁴⁵ Arturo J Carrillo, *The Handbook of Reparations* (Pablo De Greiff ed, Oxford University Press 2006) 512.

⁴⁶ See, for example, *Case of the Xákmok Kásek Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 214 (24 August 2010) [172], [174]-[182], [321].

⁴⁷ Carrillo (n 45) 512.

⁴⁸ Gonzalez-Salzberg (n 31) 81.

⁴⁹ *ibid* 83, citing Secretaría de la Corte (Secretariat of the Inter-American Court of Human Rights), "La Corte Interamericana de Derechos Humanos: las reparaciones pecuniarias y su estado de cumplimiento" (2008) (unpublished edited preview) 5.

concerning violations of the rights and freedoms of First Nations communities is also relatively well developed.

To examine how non-pecuniary damages have been assessed in cases involving the dispossession of First Nations peoples, several key judgments were reviewed.⁵⁰ Below is an analysis of the approach taken by the Court in *Sawhoyamaxa Indigenous Community v Paraguay*⁵¹, which was chosen because the Court's reasoning in this decision is more detailed than comparable cases.

Sawhoyamaxa Indigenous Community v Paraguay (the Sawhoyamaxa case)

In the *Sawhoyamaxa* case, the Court found that Paraguay had violated several of its obligations under the *ACHR* by failing to progress the Sawhoyamaxa community's long-standing claims to their ancestral lands. The community began efforts to reclaim their lands in the early 1990s, following the progressive demarcation and formal allocation of their traditional territory to private ranching operations. Paraguay's failure to progress their claims was found to have prevented the community from accessing or using their land, leaving them 'in a state of nutritional, medical and health vulnerability'⁵², as they had little choice but to relocate and camp on the side of the road.⁵³ The Court held that this situation posed a continual threat to the community's survival and integrity.⁵⁴ Evidence presented to establish this included statements from community members and expert witnesses, primarily anthropologists and medical practitioners.

In determining reparations, the Court assessed harm on both an individual and collective basis, taking into consideration the number of community members affected but awarding compensation to the benefit of the community 'as a whole'.⁵⁵ The Court held that the most important form of reparation was the restitution of traditional lands to the Sawhoyamaxa community. As the lands were subject to private ownership, the Court ordered Paraguay to

⁵⁰ *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (n 34); *Case of the Yakye Axa Indigenous Community v Paraguay* (n 34); *Case of the Saramaka People v Suriname* (n 39); *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (n 46); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) (2012) Inter-American Court of Human Rights Series C No 245; *Case of the Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) (2015) Inter-American Court of Human Rights Series C No 309.

⁵¹ *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (n 34).

⁵² *ibid* [2].

⁵³ *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (n 34) [164].

⁵⁴ *ibid* [2].

⁵⁵ *ibid* [207].

either purchase or acquire them to return to the Sawhoyamaxa people, or if that was not possible, to allocate alternative land agreed upon with the community.⁵⁶

In respect of financial compensation, the Court distinguished between pecuniary and non-pecuniary damages. Pecuniary damage was defined according to established precedent as the loss of income, expenses incurred and other financial consequences directly linked to the violation.⁵⁷ Non-pecuniary damage was defined as damage that may ‘include distress and suffering caused directly to the victims or their relatives, tampering with individual core values, and changes of a non-pecuniary nature in the living conditions of the victims or their families.’⁵⁸ Recognising the impossibility of assigning a precise monetary value to such harm, the Court assessed compensation at its ‘discretion based on equitable grounds’.⁵⁹

The Court stated that in assessing the value of non-pecuniary damage, it considered the following:⁶⁰

- Paraguay’s failure to enforce the community’s collective property rights
- the poor living conditions suffered as a result of this failure
- the special meaning that the land has for the Sawhoyamaxa community, noting that the denial of their property rights undermined core values and threatened irreparable harm to the claimants’ lives, identities and the cultural heritage of future generations.⁶¹

The Court ordered a total of USD 1 million in non-pecuniary compensation. However, despite identifying factors it considered relevant to the assessment, it did not explain why this particular sum was deemed appropriate, nor did it draw a clear connection between the factors identified and the final amount awarded. It can be assumed that this is where the Court relied on judicial intuition – in making the leap from the listed considerations to the quantum of compensation. However, the only principle that the Court expressly identified as guiding its assessment was the principle of equity⁶², but it remains unclear how the principle of equity operated in practice, whether the listed considerations represented the extent of factors (criteria, principles or

⁵⁶ *ibid* [212].

⁵⁷ *ibid* [216], citing *Case of Acevedo-Jaramillo et al. v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 144 (7 February 2006) [301]; *Case of López-Álvarez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 141 (1 February 2006) [192]; *Case of Blanco-Romero et al. v Venezuela* (Merits) Inter-American Court of Human Rights Series C No 138 (28 November 2005) [78].

⁵⁸ *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (n 34) [219].

⁵⁹ *ibid* [219].

⁶⁰ *ibid* [221].

⁶¹ *ibid* [222].

⁶² *ibid* [201].

otherwise) taken into account or what weight was given to each consideration. For instance, while the Court referred to census data when identifying beneficiaries, it did not indicate whether this influenced the overall quantum or was used to estimate the intergenerational impact of the harm.

According to researcher Damian Gonzalez-Salzberg, this lack of clarity concerning what actually informs the Court's compensation award is a persistent issue throughout the Court's jurisprudence. In his analysis of nearly three decades of Inter-American Court judgments concerning the right to life (1987 to 2016),⁶³ he concluded that the Court's 'practice in assessing the quantum of non-pecuniary damage remains a (legal) mystery at large'.⁶⁴ While there are no explicit criteria published by the Court on what it deems relevant to determining non-pecuniary compensation, Gonzalez-Salzberg's review of 86 judgments identified five factors that judges have explicitly cited as relevant:

- the state's acknowledgement of responsibility
- the victim's vulnerability
- the severity of the crime
- the time elapsed
- the number of victims⁶⁵

Even so, Gonzalez-Salzberg found significant inconsistencies in the amounts awarded across cases where these factors were comparable.⁶⁶ This, he argues, suggests either the use of undisclosed or informal criteria, or a lack of coherence in the Court's practice.

The decision in *Sawhoyamaxa* also lacks any explanation as to whether the amount awarded aligned with, exceeded, or fell short of what the community had initially sought, and, if so, on what basis. Notably, the Court did not engage with its own jurisprudence (spanning approximately 36 years) to explain why the circumstances of this case warranted an award of USD 1 million. This absence of referential reasoning may reflect the Court's continued practice of invoking the principle of equity without clarifying how it is applied in the specific case before the Court, thereby limiting the utility of precedent. In *Kaliña and Lokono Peoples v*

⁶³ Gonzalez-Salzberg (n 31) 86.

⁶⁴ *ibid* 88.

⁶⁵ *ibid* 97.

⁶⁶ *ibid* 104.

*Suriname*⁶⁷ (*Kaliña*), for example, the Court offered no reasoning at all to justify why Suriname were ordered to pay the Kaliña and Lokono Peoples USD 1 million in non-pecuniary damages for its failure to recognise or protect the claimants' interests as collective owners of land and natural resources.

Regarding the Court's reliance on equity, Gonzalez-Salzberg cautions that while equity and discretion may be useful tools, they are 'vague standards that fail to provide transparency and foreseeability'.⁶⁸ This lack of clarity ultimately harms victims, who are left without guidance on the level of compensation to request, or the type of evidence needed to substantiate their claims.⁶⁹ When courts issue decisions that lack sufficient reasoning, this raises rule of law concerns,⁷⁰ undermining core principles such as transparency, accountability and equal treatment.

3.2 The African Human Rights System

The African Human Rights System, established by the African Union (AU), is governed by the *African Charter on Human and Peoples' Rights (ACHPR)*, adopted in 1981 and applicable to all 55 AU member States. Oversight of *ACHPR* is primarily entrusted to the African Commission on Human and Peoples' Rights. In 1998, the African Court on Human and Peoples' Rights was established by Article 1 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (the Protocol), which came into force on 25 January 2004. While 34 States are currently parties to the Protocol, only eight have made the declaration under Article 34(6) recognising the Court's competence to receive cases submitted by individuals and non-governmental organisations.⁷¹ The Court's jurisdiction is therefore significantly restricted, which, in turn, limits the ability of the AU to effectively monitor and enforce human rights protections across the broader region.

⁶⁷ (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 309 (25 November 2015).

⁶⁸ Gonzalez-Salzberg (n 31) 109.

⁶⁹ *ibid* 86.

⁷⁰ Robert Doya Nanima, 'A Retrospective Evaluation of the Determination of Reparations for Nonpecuniary Loss: A Comment on Lucien Ikili Rashidi v Tanzania' (2023) 5 *African Human Rights Yearbook / Annuaire Africain des Droits de l'Homme* 425 <<https://upjournals.up.ac.za/index.php/ahry/article/view/4781>> accessed 21 June 2025.

⁷¹ The States that have deposited the declaration recognising the competence of the Court include Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia. States that had recognised competence then withdraw their declaration include Rwanda, Tanzania, Côte d'Ivoire and Benin.

The rights of First Nations peoples (commonly referred to as the rights of ‘Indigenous communities’ within the AU system) are increasingly recognised within the AU’s human rights framework. Protection of these rights was significantly strengthened in 2000 when the African Commission adopted its *Resolution on the Rights of Indigenous Populations/Communities in Africa*.⁷² Since then, landmark decisions by the African Commission in the *Endorois* case⁷³ and by the African Court in the *Ogiek* case⁷⁴ have advanced the recognition and promotion of First Nations land rights, cultural protection and collective identity among member States.⁷⁵

Unlike other regional systems, the *ACHPR* explicitly recognises and protects collective rights, including:

- Article 19 (the right of all peoples to equality and the prohibition of domination by one people over another)
- Article 20(1) (the right to self-determination)
- Article 21(1)-(2) (the right to freely dispose of natural resources and to receive fair compensation in cases of dispossession)
- Article 22 (the right to economic, social and cultural development).

Additionally, First Nations communities have relied on individual rights provisions of the *ACHPR* to seek redress for dispossession or cultural harm, including:

- Articles 2 and 3 (rights to non-discrimination and equal protection of the law)
- Article 14 (the right to property)
- Article 17 (the right to education and to freely participate in cultural life).

The African system is further strengthened by Article 60 of the *ACHPR*, which explicitly directs the Commission and the Court to draw on other international sources, including UN

⁷² African Commission on Human and Peoples’ Rights, ‘Resolution on the Rights of Indigenous Peoples’ Communities in Africa’ (2000) *ACHPR/Res.51(XXVIII)00*.

⁷³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) (Communication 276/2003) (African Commission on Human and Peoples’ Rights).

⁷⁴ *African Commission on Human and Peoples’ Rights v Republic of Kenya (Merits)* [2017] Appl No 0062012 (African Court on Human and Peoples’ Rights); *African Commission on Human and Peoples’ Rights v Republic of Kenya (Reparations)* [2022] Appl No 0062012 (African Court on Humans and Peoples’ Rights).

⁷⁵ It is important to note, however, that Kenya’s implementation of both decisions has been significantly limited. For further discussion, see Stella Nasirumbi, ‘Revisiting the Endorois and Ogiek Cases: Is the African Human Rights Mechanism a Toothless Bulldog?’ (2020) 4 *African Human Rights Yearbook* 497.

instruments such as UNDRIP and the jurisprudence of other human rights courts, such as the Inter-American and European courts.

The African Court is empowered to award reparations under Article 27 the Protocol. Drawing from the Inter-American Court's approach, the African Court may order restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁶ As with the Inter-American system, the dominant form of reparation is monetary compensation,⁷⁷ which must be 'fair'.⁷⁸ According to the Court's reparations guidelines, compensation may be awarded for both pecuniary and non-pecuniary harm. Non-pecuniary (or moral) harm includes:

...the loss in dignity and reputation of the victim, as well as mental and emotional harm...intended to compensate victims for this suffering, including the psychological harm, anguish, grief, sadness, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation.⁷⁹

The African Court's reparations jurisprudence, as a much younger institution, is less developed. However, because it is explicitly directed to consider legal instruments and jurisprudence from outside the African human rights system⁸⁰, its approach has been significantly influenced by the case law of both the Inter-American Court and European Court. A clear example of this appears in *Zongo and others v Burkina Faso (Reparations)*⁸¹, where the African Court, in determining compensation for non-pecuniary loss, cited three Inter-American and two European Court decisions to support its use of equity as the guiding principle.

In 2022, the African Court handed down its reparations decision in the *Ogiek* case against Kenya⁸² which, to date, remains the only case decided by the African Court concerning First Nations peoples' rights (the *Endorois* case was decided by the Commission). The *Ogiek* case

⁷⁶ African Court on Human and Peoples' Rights, 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (2019) 8.

⁷⁷ *ibid* ix.

⁷⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) art 27(1).

⁷⁹ African Court on Human and Peoples' Rights, 'Fact Sheet on Filing Reparation Claims' (Adopted at the 53rd Ordinary Session, Arusha, 10 June-5 July 2019, revised October 2020) 5.

⁸⁰ 'African Charter on Human and Peoples' Rights' (1981) 21 ILM 58 art 60.

⁸¹ *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabè Movement on Human and Peoples' Rights v Burkina Faso* (n 36).

⁸² *African Commission on Human and Peoples' Rights v Republic of Kenya* (Merits) [2017] App No 0062012 (African Court on Human and Peoples' Rights); *African Commission on Human and Peoples' Rights v Republic of Kenya* (Reparations) [2022] App No 0062012 (African Court on Humans and Peoples' Rights).

will be analysed to determine the approach taken by the Court to quantify non-pecuniary compensation.

African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek case)

The *Ogiek* case was brought before the Court by the African Commission on behalf of the Ogiek community, whose ancestral lands lie within the Mau Forest region. In 2009, the Kenya Forestry Service issued an eviction notice ordering the Ogiek community to vacate the Mau Forest in 30 days, citing planned forestry and conservation operations. The Centre for Minority Rights Development and Minority Rights Group International, acting on behalf of the Ogiek community, submitted a complaint to the African Commission, which subsequently referred the complaint to the African Court in 2012.

In 2017, the Court found Kenya responsible for violating the Ogiek's rights to property, development, access to, and use of, natural resources and freedom of religion and culture under the *ACHPR*. In its 2022 reparations judgment, the Court ordered Kenya to provide monetary compensation for pecuniary and non-pecuniary harm, and to take steps towards recognising and securing the Ogiek's land rights, including the restitution of their ancestral lands. It also ordered other forms of reparations, including a public apology, the erection of a public monument, legal reform and guarantees of non-repetition.

The Court explained that pecuniary harm relates to loss of property, development and access to resources, while non-pecuniary harm (referred to interchangeably with 'moral prejudice') includes suffering, emotional distress, impairment of significant cultural values and changes in living conditions.⁸³ In addressing moral prejudice, the Court applied a presumption of causation, holding that moral harm is a natural consequence of serious human rights violations and does not require specific evidence.⁸⁴ In determining non-pecuniary compensation, the Court emphasised that such awards are a matter of judicial discretion, to be exercised in accordance with the principle of equity and tailored to the facts of the case.⁸⁵ It stated that the following factors, among others, were considered:

- the nature of the violations
- the suffering endured by the victims

⁸³ *Ogiek (Reparations)* (n 74) [86].

⁸⁴ *ibid* [87].

⁸⁵ *ibid* [90].

- the impact of the violations on the victim's way of life
- the length of time the victims have had to endure.⁸⁶

To guide its assessment, the Court referred to two judgments from the Inter-American Court, including *Sawhoyamaxa*, presumably to establish a comparative benchmark.⁸⁷ Reaffirming its reliance on equity, the Court ordered the Kenyan government to pay approximately KES 100 million (about EUR 654,500) in non-pecuniary compensation.

Like the decision in *Sawhoyamaxa*, however, the African Court provided limited reasoning to justify how the specific award was determined. Although it identified broad categories of harm and listed some of the considerations it relied upon, it did not explain how these were translated into the final amount awarded. This is not to suggest that a mathematical formula is required, but rather to question why, in this case, was KES 100 million considered appropriate to redress the non-pecuniary harm suffered? How was relevant precedent, such as the Inter-American Court's decision in *Sawhoyamaxa*, drawn upon to reach this figure? Further, why did the Court settle on this amount when the applicants had sought a different sum? In the absence of clear reasoning, the public is left to infer, or speculate, the basis on which the Court determined compensation for non-pecuniary loss.

This lack of transparency in reasoning is not unique to *Ogiek*. As Robert Doya Nanima observes, similar issues have arisen in other African Court judgments, including *Lucien Ikili Rashidi v Tanzania* (2015)⁸⁸, *Mtikila v Tanzania* (2011)⁸⁹, *Norbert Zongo v Burkina Faso* (2015)⁹⁰, *Lohe Issa Konate v Burkina Faso* (2016)⁹¹ and *Armand Guehi v Tanzania* (2015)⁹². In these cases, Nanima found that the Court either failed to provide any explanation for the quantum of non-pecuniary damages awarded or relied only on vague references to the principle of equity, without clarifying how that principle had been applied to the facts before the Court.⁹³ This persistent lack of clarity, he argues, undermines the development of consistent and

⁸⁶ *ibid* [70]-[76].

⁸⁷ See *ibid* [91]-[92].

⁸⁸ *Lucien Ikili Rashidi v United Republic of Tanzania* [2019] App No 009/2015 (African Court on Human and Peoples' Rights).

⁸⁹ *Christopher Mtikila v United Republic of Tanzania* [2013] App No 011/2011 (African Court on Human and Peoples' Rights).

⁹⁰ *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabè Movement on Human and Peoples' Rights v Burkina Faso* (Reparations) (n 36).

⁹¹ *Lohe Issa Konaté v Burkina Faso* [2014] App No 004/2013 (African Court on Human and Peoples' Rights).

⁹² *Armand Guehi v United Republic of Tanzania* [2018] App No 001/2015 (African Court on Human and Peoples' Rights).

⁹³ Nanima (n 70) 423.

accessible jurisprudence on the assessment of non-pecuniary loss.⁹⁴ Namina also contends that, in cases where the Court reduces or increases the quantum of damages from that which was sought by the applicant, like in *Ogiek*, its failure to justify that departure may amount to an abuse of the rule of law. In his view, this falls short of the Court's obligation to ensure fairness and accountability.⁹⁵ By not articulating how the principle of equity was applied to the specific circumstances of the *Ogiek* case, the Court missed a valuable opportunity to depart from the shortcomings of the Inter-American practice and to develop a more transparent and reasoned approach to quantifying non-pecuniary loss in cases involving the dispossession of First Nations people.⁹⁶

3.3 The European Human Rights System

The European Human Rights System is the oldest of the three. Established by the Council of Europe, its foundational treaty is the *European Convention on Human Rights (1950) (ECHR)*. The European Court, created under the *ECHR*, hears complaints from individuals who have exhausted domestic remedies. Its binding judgments shape human rights standards across the 46 member States.

The European Court and the *ECHR* primarily focus on the protection of individual civil and political rights, offering limited scope for addressing the collective cultural and land interests of First Nations peoples. This emphasis reflects the legal, political and historical context in which the Court operates. Accordingly, the Court lacks a comparable body of jurisprudence specifically focused on First Nations rights. Notwithstanding this, the Court has interpreted several provisions of the *ECHR* as capable of affording protection to aspects of collective cultural identity, particularly in relation to minority groups. These interpretations have addressed such matters as language, cultural heritage and the preservation of cultural and religious practices.⁹⁷ Relevant *ECHR* provisions include, but are not limited to:

- Article 8 (right to respect for private and family life)
- Article 9 (freedom of thought, conscience and religion)
- Article 10 (freedom of expression)

⁹⁴ *ibid.*

⁹⁵ *ibid* 426.

⁹⁶ *ibid* 434.

⁹⁷ European Court of Human Rights, Research Division, 'Cultural Rights in the Case Law of the European Court of Human Rights' (2011) 7–20.

- Article 14 (prohibition of discrimination)
- Article 1 of Protocol No. 1 (protection of property)
- Article 2 of Protocol No. 1 (right to education).

In *Buckley v the United Kingdom* (1996), for example, the applicant, a Roma woman, argued that the refusal to allow her to station her caravan on privately owned rural land violated her rights under Articles 8 and 14. Although the Court did not find a violation, it recognised, for the first time, that individuals who belong to groups following a traditional or culturally distinct way of life may require ‘special consideration’.⁹⁸ This principle was further developed in *Chapman v the United Kingdom* (2001),⁹⁹ where the Court affirmed that individuals from the Roma community may have ‘special needs’¹⁰⁰ that must be taken into account when States legislate and apply laws. Notably, the case was supported by a third-party intervention from the European Roma Rights Centre, which argued that there is ‘a growing consensus amongst international organisations about the need to take specific measures to address the position of Roma, inter alia, concerning accommodation and general living conditions’.¹⁰¹ This led the Court to consider a range of policy instruments and minority rights frameworks concerning the history and culture of Roma, as well as their general situation in Europe. Although the Court ultimately concluded that a clear consensus among States cannot yet be readily identified, it did observe an ‘emerging international consensus’¹⁰² regarding the need to protect the collective cultural identity and practices of minority groups.¹⁰³¹⁰⁴

The Court has also considered land-based cultural heritage claims brought by First Nations people. In *Hingitq 53 and others v. Denmark*¹⁰⁵, members of the Inughuit community in Greenland complained that Denmark violated Article 1 of Protocol No.1 by denying them the opportunity to use, peacefully enjoy, develop and control their ancestral lands following their forced relocation for the establishment of a United States airbase.¹⁰⁶ The community further

⁹⁸ *Buckley v the United Kingdom* App no 20348/92 (ECtHR, 29 September 1966) [71].

⁹⁹ App no 27238/95 (ECtHR, 18 January 2001).

¹⁰⁰ *ibid* [93].

¹⁰¹ *ibid* [89].

¹⁰² *ibid* [93].

¹⁰³ *ibid*.

¹⁰⁴ The Court’s reasoning has been criticised for its use of language that reflects stereotypical or problematic assumptions about Roma communities. For discussion, see Lourdes Peroni, ‘Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising’ (2014) 10 *International Journal of Law in Context* 195.

¹⁰⁵ App no 18584/04 (ECtHR, 12 January 2006).

¹⁰⁶ *ibid* [1].

alleged violations of Articles 1, 6, 8, 13 and 14 of the *ECHR* and Articles 2 and 3 of Protocol No. 1 in relation to their forced relocation, their access to legal assistance and the manner in which Denmark responded to their legal claims.¹⁰⁷ However, the Court found that no violation had occurred.

Under Article 41 of the *ECHR*, the European Court may award ‘just satisfaction’ where a State has failed to provide full reparation.¹⁰⁸ According to the Court’s practice directions, just satisfaction may include compensation for pecuniary damage, non-pecuniary damage, and costs and expenses.¹⁰⁹ Compared to the Inter-American and African Courts, the European Court interprets its remedial powers narrowly. Although the European Court does not have a comparable body of jurisprudence concerning the property and cultural rights of First Nations peoples, it does have a long history of awarding non-pecuniary damages, which has generated extensive academic commentary about its practice. In awarding ‘just satisfaction’ for non-pecuniary harm, the European Court’s guiding principle is also equity, which it defines as a flexible exercise of judicial discretion, involving ‘consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.’¹¹⁰

Unlike the Inter-American and African Courts, the European Court has disclosed that it internally standardises its approach to quantifying non-pecuniary compensation through confidential scales based on ‘equitable principles’.¹¹¹ Despite this, the Court has faced significant criticism for relying on the discretion inherently provided by Article 41 of the *ECHR* to shelter ‘behind the cloak of “equity” in adjudicating compensation’.¹¹² This criticism centres on the Court’s persistent failure to provide detailed reasoning in its just satisfaction judgments, particularly with respect to how the principle of equity is applied in the specific circumstances of a case.¹¹³ To illustrate the Court’s approach to assessing compensation in practice, what

¹⁰⁷ *ibid* [2]-[7].

¹⁰⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 41.

¹⁰⁹ *ibid*.

¹¹⁰ *Al-Jedda v the United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) [114].

¹¹¹ *Scordino v Italy (no 1)* App no 36813/97 (ECtHR, 29 March 2006) [176].

¹¹² Vanessa Wilcox, ‘Just Satisfaction under the European Convention on Human Rights’ (2016) 7 *Journal of European Tort Law* 357, 360; see, also, Veronika Fikfak, ‘Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It’s All about the State’ (2020) 33 *Leiden Journal of International Law* 335.

¹¹³ Octavian Ichim, *Just Satisfaction* (1st edn, Cambridge University Press 2014) 235.

follows is a brief summary of *Muñoz Díaz v. Spain*¹¹⁴, which is then discussed with reference to academic commentary on the Court's just satisfaction jurisprudence.

Muñoz Díaz v Spain

On 8 December 2009, the European Court found that Spain had violated Article 14 of the *ECHR* by denying the applicant a survivor's pension following the death of her husband. The applicant, a member of the Roma community with Spanish nationality, married her husband, also a member of the Roma community, in accordance with Roma cultural traditions and customs, which were accepted within their community but not formally by the Spanish State. The couple had been married for over 30 years and had six children together. The applicant's husband had contributed to Spain's social security system for more than 19 years, yet upon his death, the applicant was deemed ineligible for a survivor's pension on the basis that their marriage lacked legal recognition. The European Court held that this constituted a violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (peaceful enjoyment of possessions). In its reasoning, the Court reiterated that 'special consideration' should be afforded to Roma individuals, given their historically vulnerable position and distinct cultural lifestyle.¹¹⁵ The Court also emphasised the importance of respecting the applicant's cultural belief system as a member of the Roma community.¹¹⁶

The Court awarded EUR 70,000 to the applicant for both pecuniary and non-pecuniary damage but provided minimal reasoning to justify the award. It simply stated that the amount was awarded on an 'equitable basis'¹¹⁷ and having 'regard to the special circumstances of the case'.¹¹⁸ The Court did not separate the award into pecuniary and non-pecuniary components, leaving the reader to speculate on the division. Given that the applicant claimed EUR 53,320 in pecuniary damages, it is presumed that the remaining EUR 16,680 was awarded for non-pecuniary loss. However, the applicant had sought EUR 30,480 in non-pecuniary damages, and the Court offered no explanation for awarding almost half that amount. Further, while the Court acknowledged the vulnerability of Roma people in its assessment of whether a violation had occurred,¹¹⁹ it did not clarify whether this consideration influenced the amount of compensation awarded. Other potential factors that may have been considered by the Court include the

¹¹⁴ *Muñoz Díaz v Spain* App no 49151/07 (ECtHR, 8 December 2009).

¹¹⁵ *ibid* [61].

¹¹⁶ *ibid* [56].

¹¹⁷ *ibid* [86].

¹¹⁸ *ibid*.

¹¹⁹ *ibid* [61].

applicant's position as a single mother of six children, or the long-standing cultural recognition of her marriage. However, the judgment offers no guidance as to whether these factors were considered in determining the final sum awarded.

Scholarship on the jurisprudence of the European Court in awarding just satisfaction suggests these issues are common to the European Court's judicial practice. In his qualitative review of the Court's case law over 50 years,¹²⁰ Octavian Ichim concluded that the European Court remains reluctant to engage in interpretative analysis or to articulate a clear theory of equity. Rather than applying a defined set of principles, awards are often 'made by approximation with previous rulings'¹²¹ and the Court has often granted divergent awards in similar cases without offering any explanation for the differential treatment.¹²² According to Ichim, this results in a practice that lacks consistency and predictability,¹²³ and 'ultimately limits the efforts of the victims of human rights violations to access effective reparation for the prejudice suffered'.¹²⁴ Similarly, based on her study of cases relating to serious rights violations over a 13-year period, Veronika Fikfak found that the Court's approach to awarding non-pecuniary damages was largely intuitive and developed on a case-by-case basis, without the articulation of clear rules or guiding principles. This lack of transparency, she argues, makes it difficult to discern which factors the Court considers most relevant in determining the appropriate amount in compensation.¹²⁵

This is problematic for prospective applicants who are left without guidance as to what evidence they must provide or what level of compensation they might reasonably expect. For groups already facing systemic disadvantage, like people from the Roma community, this lack of clarity may deter legitimate claims from being pursued before the European Court – a process that is already procedurally complex, resource-intensive and drawn-out. To address these concerns, scholars have increasingly urged the Court to adopt a more transparent and standardised approach to awarding compensation. Proposed reforms range from the adoption (and publication) of flexible guidelines that clarify the criteria for assessing harm,¹²⁶ to the introduction of predefined monetary standards of compensation for specific categories of rights violations, adjustable through clearly articulated principles. As Ichim argues, any reform must

¹²⁰ Ichim (n 113) 4-5.

¹²¹ *ibid* 2.

¹²² *ibid* 236.

¹²³ *ibid* 258.

¹²⁴ *ibid* 2.

¹²⁵ Fikfak (n 112) 336.

¹²⁶ *ibid*.

be underpinned by a clearly articulated and principled theory of equity in order to meaningfully improve the consistency, transparency and legitimacy of the Court's just satisfaction practice.¹²⁷

3.4 Conclusion

This chapter has outlined the relevant legal frameworks within the Inter-American, European and African human rights system as they relate to the protection of cultural and property rights, particularly in the context of First Nations peoples. While the European Court frames such claims through individual rights, the Inter-American Court and African systems adopt a more holistic approach, recognising the intrinsic relationship between land, culture and identity, and affirming collective property rights as fundamental to the survival and dignity of First Nations communities.

In cases of violation, all three courts routinely award compensation for non-pecuniary loss. Yet common to each system are concerns regarding the courts' inconsistent and opaque compensation practices, stemming largely from a reluctance to explain how awards are calculated or how the principle of equity is applied in practice. This suggests an overreliance on judicial intuition in place of structured reasoning. This lack of transparent reasoning risks undermining the rule of law by reducing predictability, consistency and accountability. It also risks limiting the potential for out-of-court resolution, as the applicable principles remain unclear and are therefore difficult to apply in practice. This analysis forms the foundation for the thesis's broader argument that Australia can, and should, heed the lessons from regional human rights systems before adopting a similar reliance on vague, intuitive approaches to quantifying cultural loss compensation under the *Native Title Act*.

Chapter 4 Australian context: native title and the *Timber Creek* case

First Nations peoples have lived on the Australian continent for over 60,000 years.¹²⁸ Since British colonisation began in 1788, they have endured widespread dispossession of land and resources, forced relocation to reserves and missions, violence and massacres, and the

¹²⁷ Ichim (n 113) 264.

¹²⁸ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), 'First Peoples of Australia' <<https://aiatsis.gov.au/explore/first-peoples-australia>> accessed 15 May 2025.

suppression of cultural and religious practices, largely without compensation. In 1993, the Australian government enacted the *Native Title Act* to facilitate the recognition of First Nations' traditional rights to land, describing it as 'a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders'.¹²⁹ The Act includes provisions for compensation where native title rights and interests have suffered 'loss, diminution, impairment or other effect'¹³⁰ due to acts attributable to government.

However, it was not until 2019, 26 years after the *Native Title Act* was introduced, that a compensation claim under the Act was determined by the High Court of Australia. This significant passage of time was largely because First Nations groups spent the first two and a half decades focussing on securing legal recognition of their native title rights in land. In the landmark *Timber Creek* decision, the Court confirmed that governments (and in some cases, companies¹³¹) are liable to compensate native title holders for both economic and non-economic losses where their rights have been impaired, diminished or extinguished. Since that decision, no further compensation determinations have been made, but several significant claims are pending. These include the Gumatj Clan's claim for approximately AUD 700 million and the Yindjibarndi people's claim, which at the time of writing is awaiting judgment, seeking up to AUD 1.8 billion.

4.1 Overview of native title law

The *Native Title Act* was passed by Australia's Parliament in 1993, in response to the High Court's seminal decision in *Mabo v Queensland (No 2)* (1992) ('*Mabo*').¹³² In that judgment, the Court held that the doctrine of *terra nullius*, relied on by the British to justify its colonisation of Australia, was in fact a 'legal fiction'.¹³³ It also held that native title is recognised within the common law of Australia – being a form of communal title to land arising from the traditional laws and customs of First Nations peoples, which remains enforceable within Australia's contemporary legal system. The *Native Title Act* established a legal framework for the recognition of these native title rights. This recognition, however, is contingent upon the doctrine of the Crown's radical title, a legal principle affirmed in *Mabo* which holds that upon

¹²⁹ *Native Title Act 1993* (Cth) Preamble.

¹³⁰ *ibid* s 51.

¹³¹ In some jurisdictions, government liability may be transferred under legislation; see, for example, s 125A of the *Mining Act 1978* (WA).

¹³² *Mabo and others v Queensland (No 2)* [1992] HCA 23.

¹³³ *ibid* [112].

colonisation, the Crown acquired the underlying title to all land in Australia. Native title can only be recognised where it has not been validly extinguished by acts of the Crown, that is, where the government has not conferred rights in land that are inconsistent with native title.¹³⁴ For instance, the granting of freehold or leasehold titles to European settlers often resulted in the extinguishment of First Nations peoples' native title rights because such grants typically conferred rights in land that are incompatible with First Nations peoples' traditional rights to use, occupy and enjoy their ancestral lands (eg the freehold right to exclusive possession).

In order to be recognised as native title holders under the Act, First Nations groups ('claimants') must apply to the Federal Court for a judicial determination of their rights. Claims can be resolved either by consent with interested parties (such as, but not limited to, governments, pastoralists and miners) or through litigation. Both pathways are often lengthy and complex. In many cases, this is due to the development of native title jurisprudence requiring claimants to prove that observance and practice of their traditional laws and customs in connection with the claimed land has continued 'substantially uninterrupted' since before British sovereignty.¹³⁵ This standard imposes a high and inequitable burden on claimants given the grave impacts of colonisation, including dispossession, violence, forced removals and assimilationist government policies.

The Act also governs how native title rights may be exercised, affected and extinguished. Depending on the nature and timing of acts that impair or extinguish native title, affected First Nations groups may be entitled to compensation. Pursuant to section 51(1) of the Act, native title holders are entitled to compensation on just terms for any loss, diminution, impairment or other effect of a government act on their native title rights and interests.

4.2 The *Timber Creek* case

The *Timber Creek* case¹³⁶ marks the first judicial determination of compensation for the extinguishment of native title rights and interests in Australia. In 2017, at first instance in the Federal Court of Australia, Justice Mansfield presided over a claim for compensation brought by the Ngaliwurru and Nungali peoples, who hold determined native title rights in and around the township of Timber Creek in north-western Australia. During the 1980s and 1990s, the

¹³⁴ There are several exceptions to this under the *Native Title Act*; see, for example, ss 47A-C.

¹³⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [87].

¹³⁶ The term 'the *Timber Creek* case' is used in this thesis to refer to the proceedings and judgments at the trial, Full Federal Court and High Court levels.

Northern Territory government undertook a series of acts, such as the construction of roads, water tanks and other infrastructure, that resulted in the extinguishment of native title rights. Some of these acts occurred on sites of cultural significance. While the government parties accepted that compensation was payable under the *Native Title Act*, they were unable to agree on how the compensation should be assessed.

As explained earlier, under the Act, native title holders are entitled to compensation on ‘just terms’ for any loss, diminution, impairment or other effect of the Act on their native title rights and interests. The phrase ‘just terms’ reflects the requirement in section 51 (xxxix) of Australia’s Constitution, which empowers the Commonwealth to acquire property, provided the acquisition is made on just terms. In Australian jurisprudence, this has been interpreted to mean compensation that is genuinely fair, substantial and not merely nominal or illusory, assessed objectively by the courts.¹³⁷ This standard parallels with principles of equity found in the non-pecuniary compensation jurisprudence of regional human rights systems, where awards must also adhere to notions of fairness. A similar dilemma faced the courts in *Timber Creek*: how can one determine a just amount for loss that is both significant and pervasive, yet intangible? As the Federal Court operates within an adversarial legal system, Justice Mansfield’s decision was shaped by the arguments presented before him. He held that the compensation award should comprise two components: economic loss and non-economic loss – analogous to the ‘pecuniary’ and ‘non-pecuniary’ losses recognised in regional human rights jurisprudence. This bifurcated approach was adopted to ‘achieve parity of treatment with other rights’¹³⁸, namely property rights such as non-Indigenous land ownership (eg freehold title). Economic loss was assessed based on the market value of the land at the time of extinguishment, with adjustments to reflect the differences between freehold title and the nature of native title rights held by the Ngaliwurru and Nungali peoples. Interest was also awarded on this amount.

The second component, non-economic loss, was referred to by Justice Mansfield as ‘solatium’, a term traditionally used to describe an additional sum awarded in cases of compulsory property acquisition to account for the subjective distress or mental suffering resulting from the compulsory nature of the acquisition.¹³⁹ In this instance, the task before Justice Mansfield, as he put it, was to determine ‘how to quantify the essentially spiritual relationship which Aboriginal people, and particularly the Ngaliwurru and Nungali peoples, have with country

¹³⁷ *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 571–572 (Dixon J).

¹³⁸ *Northern Territory v Griffiths* (HCA) (n 4) [271] (Edelman J).

¹³⁹ *ibid* [272].

and to translate the spiritual or religious hurt into compensation'.¹⁴⁰ Much like the approach adopted by regional human rights courts when quantifying non-pecuniary loss arising from human rights violations, Justice Mansfield held that quantifying the non-economic loss experienced by First Nations peoples whose native title rights have been extinguished is, necessarily, an intuitive exercise.¹⁴¹ This approach, later endorsed by both appellate courts, will be examined in detail in the following chapter.

The claimants' case sought an *in globo* (lump sum) award of no less than AUD 2 million for non-economic loss.¹⁴² In support of their claim, they relied on evidence from the Ngarliwurru and Nungali peoples' successful native title determination in 2006, as well as direct oral evidence from claimants regarding the cultural and spiritual loss they had endured (heard by Justice Mansfield on their traditional lands) and expert anthropological reports. Upon judgment, Justice Mansfield ordered the Northern Territory government to pay a total compensation package of AUD 3,300,661, comprising AUD 1.3 million for solatium, AUD 512,400 for economic loss and AUD 1,488,261 in interest.¹⁴³ In assessing the solatium component, he identified three particularly significant considerations: first, the construction of water tanks on the Dingo Dreaming¹⁴⁴ path caused identifiable distress and concern; second, the government's acts affected the claim group's spiritual connection to their traditional lands across a broader area than the specific sites of interference; and third, each act, whether compensable or not, had a cumulative effect, progressively diminishing the group's enjoyment of their native title rights.¹⁴⁵ Justice Mansfield also observed that, although the relevant acts occurred some three decades earlier, their impact on the claim group had 'not dissipated over time.'¹⁴⁶ Accordingly, the compensation award was intended to reflect not only past harm but also ongoing and future loss, including intergenerational impacts.

The case was appealed to both the Full Federal Court and then the High Court, with one of the grounds of appeal in both courts being the government parties' claim that the amount awarded for non-economic loss was manifestly excessive.¹⁴⁷ In its 2019 decision, the High Court

¹⁴⁰ *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 [291].

¹⁴¹ *ibid* [302].

¹⁴² *ibid* [46].

¹⁴³ *ibid* [466].

¹⁴⁴ "Dreaming" is a term often used by First Nations people in Australia, with meanings that vary across language groups and communities. In this context and in this thesis generally, it refers to the ancestral spirits that are often central to First Nations cultural, spiritual and ontological systems.

¹⁴⁵ *Griffiths v Northern Territory* (Mansfield J) (n 140) [378]-[381].

¹⁴⁶ *ibid* [382].

¹⁴⁷ *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 [5.6]; *Northern Territory v Griffiths* (HCA) (n 4) [4].

affirmed Justice Mansfield's bifurcated approach to assessing compensation but reduced the overall compensation package by decreasing the economic loss component. However, the amount awarded for non-economic loss was upheld, with neither the Full Federal Court nor the High Court finding that it failed to align with acceptable community standards.¹⁴⁸ Notably, the High Court explicitly departed from the use of the term 'solatium' to describe the group's non-economic losses, arguably to emphasise the distinct and culturally specific nature of such loss – something that is potentially undermined if framed using terminology rooted in Western property law. Instead, the High Court preferred the term 'cultural loss'.

¹⁴⁸ *Northern Territory v Griffiths* (HCA) (n 4) [237].

Chapter 5 Judicial intuition in quantifying non-economic loss in *Timber Creek*

In all three *Timber Creek* judgments, the courts used similar reasoning to justify the extent of intuition relied on by the trial judge to determine compensation for the Ngaliwurru and Nungali peoples' cultural loss. This chapter critically examines what it considers to be the key justifications offered by the courts, which is summarised as follows:

- (a) A degree of intuition is inevitable in valuing intangible losses. Given the unique and profound nature of First Nations peoples' connection to land, no existing legal formula or principle can be readily imported to assist in its valuation.
- (b) The trial judge was best placed to make the intuitive leap, having heard the evidence of claimants and expert witnesses.
- (c) This is a new, *sui generis* area of law and the principles for quantifying compensation for non-economic loss will necessarily evolve as further cases are decided.

The chapter is divided into three sections, each addressing the points outlined above in turn. It incorporates anthropological commentary to examine key conceptual critiques of the legal approach to valuing First Nations non-economic loss and draws on previously discussed scholarship concerning the jurisprudence of regional human rights courts to support its analysis.

At the outset, it is important to acknowledge the immense difficulty of the task before the courts. The reductive exercise of assigning a monetary value to First Nations cultural loss was not overlooked by the primary or appellate courts. Each grappled with the inherent inappropriateness of a non-Indigenous judge applying a market-based lens to something well beyond the market's conceptual reach. Justice Mansfield illustrated this tension by citing the words of anthropologist William Stanner, acknowledging that he, as a non-Indigenous man, is 'tongueless and earless towards this other world of meaning and significance'.¹⁴⁹

Nevertheless, this chapter argues that the degree of judicial intuition relied upon by the courts was ultimately problematic. It has resulted in ambiguous and opaque jurisprudence. For instance, an unresolved question, which appears to have been obscured by the courts' reliance

¹⁴⁹ *Griffiths v Northern Territory* (Mansfield J) (n 140) [294] citing WEH Stanner, *The 1968 Boyer Lectures: After The Dreaming* (Australian Broadcasting Commission 1974).

on intuition, is why AUD 1.3 million was deemed the appropriate award for cultural loss. The claimants submitted that the award should be no less than AUD 2 million, yet received substantially less. Conversely, the Commonwealth argued that AUD 230,000 was sufficient. What justified the figure ultimately awarded? What made it more consistent with acceptable community standards than either of the proposed alternatives? In the absence of clearly articulated reasoning, claimants are left without meaningful guidance on how to substantiate non-economic loss claims or understand the basis on which such losses are valued. This uncertainty hinders their ability to anticipate judicial outcomes or to effectively negotiate settlements outside of court.

5.1 Justification 1: ‘there is no equation and no comparison’: rejecting analogies

As discussed, the *Timber Creek* case was the first judicial decision to establish a methodology for compensating native title holders for the diminution, impairment or extinguishment of their rights. In assessing the non-economic component, Justice Mansfield had ‘no yardstick’ for valuing such losses – no market, no statutory basis and no consistent judicial benchmark. Citing Mahoney ACJ in *Crampton v Nugawela*, he characterised the task before him as making ‘a social judgment...of what, in the given community at the given time, is an appropriate award’.¹⁵⁰ The appellate courts supported this approach, concluding that Justice Mansfield’s AUD 1.3 million award was neither ‘so large that it suggests a failure to apply proper principles by reference to relevant considerations’,¹⁵¹ nor ‘inconsistent with acceptable community standards’.¹⁵²

In *Discretion*, Hart cautions against equating judicial discretion with a ‘mere arbitrary choice’.¹⁵³ While terms like ‘intuition’ may suggest that decisions are made without reconciling competing values or applying principled reasoning, Hart insists this is not necessarily the case. In the realm of discretionary judgment, multiple outcomes may be reasonable, without any outcome being definitively *right*. Rather, what renders such decisions legitimate, according to Hart, is that the intuitive leap is made under ‘optimum conditions’ – namely, the exclusion of

¹⁵⁰ *Griffiths v Northern Territory* (Mansfield J) (n 140) [313], citing Mahoney ACJ in *Crampton v Nugawela* (1996) 41 NSWLR 176 [191].

¹⁵¹ *Northern Territory v Griffiths* (HCA) (n 4) [237].

¹⁵² *ibid.*

¹⁵³ Hart (n 11) 665.

private interest, bias and prejudice, reasoning informed by experience in the field and a deliberate effort to weigh relevant values.¹⁵⁴

The Full Federal Court referenced Hart's work while endorsing Justice Mansfield's decision-making process, framing the award as an acceptable outcome based on intuitive discretion. Although the courts did not explicitly set out the principles or factors that should guide the assessment of non-economic loss, such considerations can be inferred from Justice Mansfield's reasoning. These included, for example, the three key considerations outlined above in Section 4.2, the principle that non-economic compensation should be awarded *in globo*, that it should account for both ongoing and intergenerational harm, that the evidentiary threshold was one of causal connection and that the assessment of harm was not confined by temporal or physical boundaries.

One may consider that the articulation of these principles and factors meet the standard of 'optimum conditions' to legitimise Justice Mansfield's intuitive leap in quantifying the final award. However, even with the above principles articulated to the extent that they are, his Honour must make a much larger intuitive leap to arrive at the AUD 1.3 million compensation figure than one would usually expect from a judicial officer. Given the judiciary's established practice of converting non-economic loss into monetary terms, it is difficult to accept the absence of a more detailed explanation as to why the sum of AUD 1.3 million was considered reflective of acceptable community standards. It may be that courts choose to obscure such financial influences to avoid rigid precedent-setting and preserve the capacity for culturally sensitive, case-specific reasoning. Yet, as will be elaborated on below, it is questionable whether this approach achieves those aims, or whether, in fact, it contributes to a body of law that is less accessible, transparent and fair.

To assist in his determination of what was appropriate, the Ngaliwurru and Nungali claimants proposed that Justice Mansfield could draw analogies and borrow principles from other areas of law in which compensation for non-pecuniary losses has been awarded – such as personal injury (for emotional distress) and defamation (for harm to reputation), including cases where First Nations culture was a relevant factor.¹⁵⁵ However, Justice Mansfield dismissed the

¹⁵⁴ *ibid* 664.

¹⁵⁵ *Griffiths v Northern Territory* (Mansfield J) (n 140) [307]–[309].

relevance of such cases on the basis that they addressed personal, rather than communal, forms of harm.¹⁵⁶

Justice Mansfield's position was echoed by the intervening Native Title Representative Bodies in the Full Federal Court hearing, who submitted that the only relevant principles for determining compensation for cultural loss are those found in the *Native Title Act*. They argued that 'analogies to general damages for loss of amenities of life are inapposite to the assessment of compensation for loss of native title'.¹⁵⁷ The High Court majority agreed with this position, emphasising that the connection First Nations peoples have to land is a 'defining element in a view of life and living'.¹⁵⁸ It is, the Court stated, something that cannot be '...equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land.'¹⁵⁹

This position implicitly relies on the premise that the intuition of a non-Indigenous Federal Court judge is somehow uninfluenced by prevailing common law notions of just compensation, market-based valuation and non-Indigenous conceptions of land and culture. While it may seem inappropriate or even offensive to analogise First Nations peoples' connection to land with harms such as reputational damage in defamation, emotional distress in personal injury claims or special value or solatium awards in compulsory acquisition, such analogies are likely being drawn. Whether subconsciously or consciously, judges inevitably rely on notions of equivalence with these existing frameworks and with general market values when assessing what the 'Australian community' considers, at this time, to be an appropriate, fair or just award.¹⁶⁰ As Hart observes, judges do and should use their experience to exercise their discretion;¹⁶¹ however, in these cases, the influence of that experience is left unarticulated.

The Full Federal Court made this implicit market-referent reasoning explicit in its judgment, observing that an award of AUD 1000 would not satisfy 'the moral sense of the community'¹⁶² because most people would spend more than that on groceries in a year. By contrast, AUD 1 million was described as a 'substantial sum', as it was close to the median house price

¹⁵⁶ *ibid.*

¹⁵⁷ *Northern Territory of Australia v Griffiths* (FCAFC) (n 147) [367].

¹⁵⁸ *Northern Territory v Griffiths* (HCA) (n 4) [187].

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid* [237].

¹⁶¹ Hart (n 11) 664.

¹⁶² *Northern Territory of Australia v Griffiths* (FCAFC) (n 147) [396].

in Australia's major cities.¹⁶³ According to the Court, the AUD 1.3 million award 'reflects in money terms recognised by the community a substantial acknowledgement of a high level of damage done.'¹⁶⁴ Despite the Full Federal Court's explicit reliance on market-based benchmarks, such as grocery spending and median house prices, neither the trial judge nor the High Court articulated any such analogies in their justification of the AUD 1.3 million award. If such reference points are, in practice, unavoidable – if judges inevitably draw on their own economic and cultural reference points when making the intuitive leap – then it would seem preferable for courts to articulate this reasoning transparently. As Dworkin argues, the legitimacy of judicial decisions is enhanced when judges cite the normative principles informing their decisions, particularly when those principles are part of a broader, interconnected web of legal and moral interpretation.¹⁶⁵

In the absence of references to real market-based benchmarks (like a house or a grocery budget), and without guidance from comparative compensatory legal principles (such as in defamation, land valuation or personal injury law), trial judges are left with few factors to point to in the written reasons for their final figure. This results in judgments that are reliant on undefined principles of 'fairness', 'appropriateness' and 'equity', a pattern evident throughout the jurisprudence of the regional human rights courts. Further, when judges do not make a conscious effort to identify the factors or clearly articulate the principles that influenced their decisions, the intuitive leap is much larger. In these instances, one may question whether Hart's 'optimum conditions', a prerequisite for making the intuitive leap, have been met at all.

William Isdale (2022) presented a detailed argument in favour of a 'similitude approach' to the quantification of native title compensation, which aligns closely with aspects of this thesis. He argues that a similitude approach – being one which draws upon the existing, well-established body of jurisprudence in analogous areas of law – will enhance coherence, equality and adherence to rule of law standards.¹⁶⁶ He contends that existing legal approaches are sufficiently flexible to accommodate the particularities of native title, while still delivering just outcomes. Isdale's suggested approach will be explored further in Chapter 6.

The Full Federal Court, in endorsing the use of 'intuitive judgment' for assessing cultural loss, drew an analogy with criminal sentencing, where 'the cognate term "instinctive judgment" is

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ Dworkin (n 13) 42.

¹⁶⁶ William Isdale, *Compensation for Native Title* (The Federation Press 2022) 1–2.

often used'.¹⁶⁷ The Court cited the High Court's decision in *Markarian v the Queen*¹⁶⁸ to explain that:

[T]he task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'...not to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which...balances many different and conflicting features.

While this analogy highlights the discretion involved in both judicial tasks, criminal sentencing is often guided by legislatively prescribed maximum and minimum penalties, sentencing guidelines or sentencing judgments,¹⁶⁹ and pre-sentencing reports prepared by non-party officers.¹⁷⁰ In contrast, the assessment of cultural loss in native title compensation lacks such legislative or regulatory guidance. Isdale aptly observes that this analogy 'only serves to underscore the need for principles and factors'¹⁷¹ in native title compensation jurisprudence.

It is also worth noting that in *Markarian*, Justice Kirby's dissenting opinion warned that the instinctive synthesis approach risks undermining transparency and accountability in judicial decision-making.¹⁷² As he cautioned:

[Appellate courts] should not be encouraging the thought that there descends upon a judicial officer, following appointment, a mystical "instinct" or "intuition" that ensures that he or she will get the sentence right "instinctively". That approach discourages explanation of the logical and rational process that led to the sentence, so far as it can reasonably be given and is useful.¹⁷³

Justice Kirby's concerns are particularly relevant to *Timber Creek*, where the trial judge's discretion, though exercised in good faith, was largely deferred to by the appellate courts, despite the minimal reasoning offered in support of the cultural loss award. The following section examines the weight given to Justice Mansfield's discretion by virtue of his role as trial judge.

¹⁶⁷ *ibid.*

¹⁶⁸ [2005] HCA 25 (Gleeson CJ, Gummow, Hayne and Callinan JJ) [374].

¹⁶⁹ *ibid* [80].

¹⁷⁰ *ibid* [6].

¹⁷¹ Isdale (n 166) 117.

¹⁷² *Markarian v the Queen* (n 168) (Kirby J) [129].

¹⁷³ *ibid* [130].

5.2 Justification 2: ‘trial judge is best placed’: deference to firsthand observation

It is a long-standing principle in Australian and British common law that the trial judge is best placed to determine the outcome of a case when the decision is one involving discretion, having directly observed the evidence presented by the parties.¹⁷⁴ This principle underpins the general reluctance of appellate courts to overturn a trial judge’s decision, except in limited circumstances, such as where a compensation award or sentence is manifestly excessive. This principle carries particular weight in native title proceedings, where judges often hear evidence on the claimants’ traditional country and are taken to sites of spiritual and cultural significance. This was the case in *Timber Creek*, where Justice Mansfield conducted hearings on the claimants’ traditional estate and inspected several locations subject to acts that impaired or extinguished native title.¹⁷⁵

Hearing the evidence firsthand from claimants was especially significant for Justice Mansfield, who held that the assessment of non-economic compensation should focus on the effects of extinguishment on the Ngaliwurru and Nungali peoples, which ‘may include elements of “loss of amenities” or “pain and suffering” or reputational damage’.¹⁷⁶ Despite rejecting the application of principles from other areas of law on the basis that those laws address individual rather than collective loss, Justice Mansfield nevertheless appears to rely on the personal accounts of ‘hurt feelings’ provided in evidence to inform his assessment of compensation. Putting that irony aside, this individualised focus on loss will likely inform how evidence is prepared and framed in future compensation claims, for example, following Justice Mansfield’s *Timber Creek* decision, anthropologist Dr Pamela McGrath wrote that:

...expert anthropologists working on native title compensation claims would do well to focus more on individuals rather than societies, and specifically the impact of loss of a relationship with country on a person’s sense of self in relation to others. Testimony about embodied emotions such as anxiety, grief, hurt and gut wrenching pain.¹⁷⁷

There is, however, a significant body of scholarship that questions whether the effects of damaged connection to land, as experienced by First Nations peoples, can be adequately

¹⁷⁴ See, for example, *Northern Territory v Griffiths* (HCA) (n 4) [311].

¹⁷⁵ *ibid* [362].

¹⁷⁶ *Griffiths v Northern Territory* (Mansfield J) (n 140) [318].

¹⁷⁷ Pamela Faye McGrath, ‘Native Title Anthropology after the Timber Creek Decision’ (2017) 6 AIATSIS Research Publications 1, 2–3, citing *Griffiths v Northern Territory* (Mansfield J) (n 140) [350].

translated into Western legal frameworks, and whether non-Indigenous people can meaningfully comprehend such experiences, given the fundamental differences in their ontologies.

Drawing on her experience researching the impacts of native title extinguishment with First Nations communities in northern Queensland, anthropologist Sandra Pannell observes that it is impossible to isolate injuries specifically linked to extinguishment from the ‘many forms of “hurt” experienced by Aboriginal people’.¹⁷⁸ This difficulty arises not only in relation to the depth of what she terms ‘existential distress’¹⁷⁹ but also from the difficulty in identifying the contextual and temporal source of such distress. She suggests that this distress is caused by a range of factors, including the long-term degradation of traditional lands due to European colonisation and development, the ongoing alienation from those lands¹⁸⁰ and broader social issues such as ‘noise, aggression, ill health, death, and substance abuse’.¹⁸¹

Notwithstanding the difficulty, perhaps impossibility, of cross-culturally framing the ‘pain’ of dispossession within the confines of native title law, scholars argue that non-Indigenous people can unlikely conceive the scale or nature of loss experienced by dispossessed First Nations people. For example, academic Aileen Moreton-Robinson, a Goenpul woman of the Quandamooka people, highlights that the very conception of the ‘self’ fundamentally differs across cultures. She writes:

Indigenous women perceive themselves as being an extension of the earth, which is alive and unpredictable. Hence their understandings of themselves, their place and country also reflect this view. In their life histories Indigenous women perceive their experiences and others’ experiences as extensions of themselves.¹⁸²

Moreton-Robinson explains that although the ontological experience of the self for many First Nations people is constant and deeply embedded, it often remains elusive and unrecognisable to non-Indigenous people in their interactions and shared experience with First Nations communities.¹⁸³ This contrasts with Western ontological frameworks, where ‘the body is

¹⁷⁸ Sandra Pannell, ‘Framing the Loss of Solace: Issues and Challenges in Researching Indigenous Compensation Claims’ (2018) 28 *Anthropological Forum* 255, 265–266.

¹⁷⁹ *ibid* 266.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid*, citing Victoria Burbank, *An Ethnography of Stress: The Social Determinants of Health in Aboriginal Australia* (Palgrave Macmillan 2011) 96.

¹⁸² Aileen Moreton-Robinson, *I Still Call Australia Home: Indigenous Belonging and Place in a Postcolonizing Society* (Routledge 2003) 34.

¹⁸³ *ibid* 35.

theorized as being separate from the earth and it has no bearing on the way subjectivities, identities and bodies are constituted.’¹⁸⁴

Within many First Nations epistemologies, agency is not exclusive to humans. Animals, landscapes and natural objects are all understood as capable of acting with intention. Anthropologist Elizabeth Povinelli, in *Do Rocks Listen?* recounts a moment from the Kenbi Land Claim, where claimant Betty Billawag described that an important Dreaming site, Old Man Rock, ‘listened to and smelled the sweat of Aboriginal people as they passed by hunting, gathering, camping, or just mucking about’.¹⁸⁵ Povinelli observed that although the non-Indigenous arbitrator, the Land Commissioner, did not think Betty Billaway was lying, his conception of her evidence was nevertheless shaped by disbelief, for his Western epistemology meant he was unable to accept that a rock could literally perceive or act. This tension, later explored by Pannell (2018), led her to question: if Dreamings and natural entities are understood by First Nations peoples as capable of feeling angry or sad, and if there exists a symbiotic relationship between self and land, how can such harms be reconciled within compensation claims that prioritise accounts of personal loss?¹⁸⁶

Scholars have also critiqued the limits of language in conveying the depth of loss experienced by First Nations peoples when their connection to land is damaged. Drawing on the work of Schieffelin, Burbank and Myers, Pannell highlights that while language is often treated as an entry point into others’ worldviews, ‘the meanings of emotion words cannot be derived from the words themselves’.¹⁸⁷ Myers’ research with Pintupi communities in the Western Desert revealed that terms such as ‘anger’ or ‘fear’ derive their meaning from local social structures, relationships and cultural contexts, and therefore cannot be assumed to align with Western-conceptions of emotional states or to reliably represent particular feelings.¹⁸⁸

Despite such profound cross-cultural ontological differences and the inherent limitations in using language to convey culturally specific meanings, Australia’s native title system continues to position non-Indigenous people as the authorities in defining and determining the nature of First Nations peoples’ connection to land and, in the context of compensation, the nature and

¹⁸⁴ *ibid* 37.

¹⁸⁵ Elizabeth A Povinelli, ‘Do Rocks Listen? The Cultural Politics of Apprehending Australian Aboriginal Labor’ (1995) 97 *American Anthropologist*, New Series 505, 505.

¹⁸⁶ Pannell (n 178) 268.

¹⁸⁷ *ibid* 269, citing Victoria Burbank, *Fighting Women: Anger and Aggression in Aboriginal Australia* (University of California Press 1994), 48.

¹⁸⁸ *ibid* 269.

extent of loss when that connection is damaged. To quote Moreton-Robinson, '[c]onfirmation of the Indigenous belonging to country is dependent on the words of white people.'¹⁸⁹

The High Court's departure from the term 'solatium' in describing the non-economic component of compensation, in favour of the term 'cultural loss', may signal a preference for framing compensation around spiritual harm rather than emotional.¹⁹⁰ Justice Edelman went further in his dissent, suggesting that solatium, in its traditional common law sense, could be awarded in addition to compensation for cultural loss.¹⁹¹ Nevertheless, should courts and parties adopt an approach more focussed on spiritual harm in future claims, the conceptual and linguistic challenges discussed above would persist.

A particularly relevant difficulty in assessing spiritual harm lies in distinguishing between cultural *loss* and cultural *change*. Anthropologist Richard Martin (2020), drawing on Stuart Kirsch's work, notes that:

Cultural loss is a "critical blind spot of the culture concept," which tends to define culture as a process that continually undergoes change rather than something which can be damaged or lost.¹⁹²

Martin also grapples with the evolving nature of cultural loss, asking what happens when changes once embraced by one generation are later regarded as loss by another,¹⁹³ or when historical losses, rediscovered through research, cause emotional distress among those confronted with what has been forgotten?¹⁹⁴ These raise complex and sensitive issues that should be carefully considered.

This is not to suggest that the courts in *Timber Creek* failed to engage meaningfully with the conceptual realities expressed by the claimants. However, as demonstrated above, non-Indigenous individuals are not best placed to undertake this task, as the ontological disconnect limits their ability to fully comprehend the depth and implications of such loss. Without substantial reform of Australia's legal system, these conceptual issues will persist, along with criticism that Australia's native title system operates as a contemporary form of colonisation.

¹⁸⁹ *ibid* 36.

¹⁹⁰ *Northern Territory v Griffiths* (HCA) (n 4) [53]-[54].

¹⁹¹ *ibid* (Edelman J) [273].

¹⁹² Richard Martin, 'Cultural Loss and Compensation in the Anthropology of Aboriginal Australia' (2023) 50 *American Ethnologist* 632, 636, citing Stuart Kirsch, 'Lost Worlds: Environmental Disaster, 'Cultural Loss' and the Law' (2001) 42(2) *Current Anthropology* 167, 168.

¹⁹³ Richard Martin, 'Cultural Loss and Compensation in the Anthropology of Aboriginal Australia' (2023) 50 *American Ethnologist* 632, 641.

¹⁹⁴ *ibid*.

Within the existing framework, however, one step towards mitigating these issues is the inclusion of First Nations peoples in the deliberate and prioritised development of guiding principles for assessing cultural loss compensation. This proposal is further developed in Chapter 6.

5.3 Justification 3: ‘principles will evolve over time’: the argument for organic development

Most of the literature on compensation for the non-economic loss component of native title expresses optimism that, as more cases are brought before the courts and a broader range of arguments are tested, guiding principles will gradually emerge.¹⁹⁵ This expectation finds support in Hart’s essay *Discretion*, where he suggests that rules evolve through experience – as common factors across diverse cases begin to emerge, these will either eventually form the basis of principles or highlight the areas where discretion will always be required.¹⁹⁶ However, jurisprudence relating to non-pecuniary loss in the Inter-American and European regional human rights courts challenges the assumption that such development is a natural or predictable outcome. As discussed in Chapter 3, the Inter-American Court, over three decades, has awarded compensation for non-pecuniary harm, including to First Nations groups for cultural and spiritual harm. Despite the number of varied cases heard by the Court, critics contend that few clear or consistent principles have emerged, and the Court’s approach remains largely indiscernible and inconsistent.¹⁹⁷ Similarly, the European Court has awarded ‘just satisfaction’ for human rights violations for over 50 years.¹⁹⁸ Nevertheless, scholars argue that the Court continues to rely heavily on broad discretion, consistently avoiding the articulation of clear rules or guidelines for assessing compensation.¹⁹⁹ This criticism persists despite the existence of internal (confidential) standards that the Court purports to follow, and the *Just Satisfaction Practice Direction*, which outlines some of the factors considered by the Court when determining compensation, such as the economic circumstances of the respondent State.²⁰⁰

¹⁹⁵ See, for example, Aaron Moss and William Isdale, ‘Where to Next? Native Title Compensation Following Timber Creek’ [2019] Australian Public Law <<https://www.auspublaw.org/blog/2019/04/where-to-next-native-title-compensation-following-timber-creek>> accessed 18 May 2025.

¹⁹⁶ Hart (n 11) 664.

¹⁹⁷ Gonzalez-Salzberg (n 31) 85.

¹⁹⁸ Ichim (n 113) 7.

¹⁹⁹ Fikfak (n 112) 335.

²⁰⁰ European Court of Human Rights (n 35) [10]–[14].

It is probable that the European and Inter-American Court's reluctance to articulate clear principles and theories of equity or publish publicly accessible guidelines quantifying non-pecuniary loss stems from concerns similar to those theorised in the context of native title compensation. First, guidelines or formulas risk constraining judicial discretion, limiting the courts' ability to tailor remedies to the specific circumstances of each case. Second, attempting to reduce deeply personal and contextual experiences of human rights violations to standardised criteria may appear reductive and even disrespectful to victims.

According to Inter-American Court judge Francisco de Roux Rengifo, in quantifying compensation, the Inter-American Court typically begins with a figure derived from prior decisions, which is then 'queried for its adequacy for the case'.²⁰¹ While precedents should be used for guidance, the practice becomes problematic when the comparative exercise is not made explicit, and when earlier decisions themselves provide little or no justification for the amounts awarded. Scholars have termed this phenomenon the 'anchoring effect'²⁰² – a cognitive bias whereby amounts awarded or sentences imposed in earlier decisions disproportionately influence subsequent judgments, even when those initial figures (or 'anchors') are arbitrary or not clearly related to the facts of the present case. Just as referencing market comparisons (such as grocery prices) to determine 'community standards' can undermine the arguments against formalised principles and the drawing of analogies from other areas of law, so too can reliance on prior unreasoned awards. For instance, as discussed in Section 3.2, the African Court in the *Ogiek* case cited the Inter-American Court's decisions in *Sawhoyamaxa* and *Kaliña and Lokono Peoples v. Suriname (Kaliña)* as reference points for its compensation award.²⁰³ Yet, *Sawhoyamaxa* provided little reasoning beyond a general appeal to equity to justify the amount awarded, and *Kaliña* included no explanation at all for the USD 1 million awarded.

It is reasonable to anticipate that this trend will be replicated in native title compensation jurisprudence. In the absence of clear guiding principles, future claimants are likely to rely heavily on *Timber Creek*, drawing factual analogies and distinctions to support their claims. Courts, in turn, may treat *Timber Creek* as a reference point, adjusting awards in light of factual

²⁰¹ Gonzalez-Salzberg (n 31) 88–89, citing *Case of the "Street Children" (Villagrán-Morales et al.) v Guatemala* (Reparations and Costs) Inter-American Court of Human Rights Series C No 77 (26 May 2001) (De Roux J) 2.

²⁰² Colin Miller, 'Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions' [2010] SSRN Electronic Journal 1667 <<http://www.ssrn.com/abstract=1672442>> accessed 26 May 2025.

²⁰³ *Ogiek* (Reparations) (n 74) [91]-[92].

differences. This is problematic, as *Timber Creek* itself lacks a clear justification for the cultural loss award. If, however, these comparative exercises are clearly articulated, they could contribute to the emergence of a more coherent body of law. However, as seen with the regional human rights courts, there is a significant risk that the reasoning behind such adjustments will remain opaque. Courts may rely on vague terms such as ‘just’, ‘reasonable’ or ‘acceptable community standards’ to obscure the steps taken, in the same way ‘equity’ has been used by regional human rights courts.

As compensation jurisprudence continues to develop in Australia, it is essential that this new phase of native title law does not replicate the systemic challenges that characterised the first 30 years of litigation. These challenges include claims taking decades to resolve; requiring extensive financial, legal and anthropological resources; placing significant emotional burdens on claimants; and often fuelling intra- and inter-group disputes, largely due to culturally inappropriate legal processes requiring claimants to reach consensus on authority and custodianship of land. The ‘wait and see’ approach – the notion that guiding principles will emerge with time – risks exacerbating these very issues. In the absence of clear principles and coherent reasoning, the likelihood of negotiated settlements diminishes, while litigation becomes more complex, drawn-out and expensive. These consequences must be proactively mitigated, particularly when compensation claims often require claimants to revisit the trauma of dispossession and loss of Country, leading to significant risks of re-traumatisation.²⁰⁴ Importantly, these harms do not end at judgment. They are often compounded by disputes over the distribution of monetary awards, which can generate new tensions within communities already burdened by the native title process.²⁰⁵

²⁰⁴ McGrath (n 177) 5.

²⁰⁵ Pannell (n 178) 261.

Chapter 6 What next?

As Australia enters a new era of native title jurisprudence, it is critical that policymakers, courts, tribunals and native title representative and advocacy bodies take active steps to shape the future of the law in a way that mitigates the challenges of its formative decades. This chapter outlines a series of strategies aimed at fostering greater clarity, consistency and accessibility in the native title system. It concludes by drawing on Isdale’s work to advocate for the creation of guidelines to support transparent and structured judicial reasoning – guidelines, which should be actively developed in collaboration with First Nations peoples. While some issues will inevitably require judicial determination, there is significant scope for proactive reform and principled guidance. A more coherent and navigable system will not only reduce reliance on costly and protracted litigation but also encourage out-of-court settlements, which, as experience consistently shows, offer more enduring and equitable outcomes for claimants.²⁰⁶

6.1 Lessons from regional human rights courts

The previous chapter argued that Australia’s native title system should learn from the issues highlighted in regional human rights jurisprudence, namely the pattern observed in the Inter-American, European and African courts of relying on vague principles, offering insufficient legal reasoning and anchoring compensation awards to earlier decisions that themselves lacked transparency. Despite these shortcomings, certain practices from these courts may offer valuable insights for the Australian context.

One such example is found in the *Ogiek* case, where the African Court sought expert assistance from Dr Elifuraha Laltaika, former expert member of the United Nations Permanent Forum on Indigenous Issues and Victoria Tauli-Corpuz, then United Nations Special Rapporteur on Rights of Indigenous People. The Court stated that it drew on their advice to ‘inform its decision on the equitable award due to the *Ogiek*’.²⁰⁷ While the judgment does not incorporate or reference their advice in any meaningful way – thereby perpetuating issues of clarity and accessibility – the practice of engaging independent, culturally informed experts is nonetheless significant. Both Laltaika and Tauli-Corpuz possess expertise in First Nations rights and policy and are prominent First Nations leaders. Involving culturally informed experts in this way offers a potential model for Australia, particularly in addressing the cultural conception and

²⁰⁶ Isdale (n 166) 134.

²⁰⁷ *Ogiek* (Reparations) (n 74) [67].

epistemological gaps discussed in Section 5.2. It is also something that is open to Australia's Federal Court under Federal Court Rule 23.1, which enables the Federal Court to appoint independent advisers, known as 'Court experts', either on application by a party or on its motion.²⁰⁸

Another example is the European Court's *Practice Directions on Just Satisfaction Claims*. Practice directions are issued by the President of the Court to provide authoritative guidance on procedural matters.²⁰⁹ Although the Court's practice in awarding just satisfaction has been subject to sustained criticism for its lack of clarity and consistency, their practice directions, if followed, are intended to reduce this uncertainty. Of particular relevance is paragraph 3, which sets out the circumstances in which just satisfaction may be awarded; and paragraphs 6, 12, 13 and 14, which identify several contextual and equitable factors the Court considers when determining non-pecuniary compensation. Practice directions are, however, typically issued by courts only after patterns in judicial practice emerge. They are not instruments to resolve fundamental legal uncertainty where the law is still developing.²¹⁰ Nevertheless, in the Australian context, practice directions – or practice notes, as they are termed by the Federal Court – could play a valuable role in affirming and disseminating the guiding principles proposed in Section 6.4. This will be explained further below.

There are three additional examples of approaches adopted by regional human rights courts that, while beyond the scope of this thesis for detailed analysis, merit consideration in the Australian context. First, all three regional human rights courts examined adopt a presumption of moral harm or non-pecuniary loss following a human rights violation. That is, applicants are not required to prove such harm in detail, as the courts generally accept that human rights violations inherently cause distress or suffering.²¹¹ This stands in contrast to the approach in native title compensation, where there is presently no presumption, rebuttable or otherwise, that cultural or emotional harm has occurred as a result of the extinguishment or impairment of native title rights. Instead, the burden lies with claimants to establish the existence, significance and extent of that harm through evidence.

²⁰⁸ *Federal Court Rules 1979* (Cth) r 23.01.

²⁰⁹ European Court of Human Rights (n 35).

²¹⁰ Federal Court of Australia, 'Overview of the National Practice Notes' <<https://www.fedcourt.gov.au/law-and-practice/practice-documents/new-practice-notes>> accessed 2 June 2025.

²¹¹ See, for example, European Court of Human Rights (n 35) [10]; *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabè Movement on Human and Peoples' Rights v Burkina Faso* (Reparations) (n 36).

Second, the Inter-American and African Courts commonly consider the socioeconomic impacts of dispossession and cultural rupture on First Nations victims when determining quantum for a compensation award. For example, high mortality rates and poverty have been considered as consequences of dispossession.²¹² In *Timber Creek*, the Full Federal Court suggested that the ‘social disadvantage suffered as a result of the compensable acts’²¹³ may be compensable in native title. Notably, such harm may be substantiated through more objective and quantifiable forms of evidence, such as socioeconomic data, thereby reducing the emotional burden placed on native title claimants in the preparation and adjudication of their claims.

Third, the Inter-American and African Courts are empowered to employ a broad range of meaningful reparative measures beyond financial compensation, and in several cases concerning the dispossession or forced relocation of First Nations peoples, this has included the restitution of ancestral lands.²¹⁴ While some scholarship has already considered these approaches,²¹⁵ they should be further explored to assess their adaptability and practical relevance to Australia’s native title system.

6.2 First Nations-led valuation frameworks: lessons from Canada

As discussed in Chapter 5, it is foreseeable that future native title compensation claimants will largely rely on the cultural loss award in *Timber Creek* as a benchmark when preparing their own compensation claims. Researchers Robin Gregory, Philip Halteman, Nicole Kaechele and Terre Satterfield (Gregory et al.) propose an alternative approach to calculating compensation payments, a model termed a ‘mixed-method approach’.²¹⁶ Designed in collaboration with social scientists and First Nations communities in North America, this method draws on multi-attribute utility theory, decision analysis, First Nations methodologies and behavioural decision research to estimate the relative monetary value of non-economic harms.²¹⁷ Although it is presented in the context of environmental damage (eg oil spills), Gregory et al. suggest that the model is adaptable across a range of contexts.²¹⁸

²¹² See, for example, *Case of the Yakye Axa Indigenous Community v Paraguay* (n 34) [27]-[28].

²¹³ *Northern Territory of Australia v Griffiths* (FCAFC) (n 147) [405].

²¹⁴ See, for example, *Ogiek* (Reparations) (n 74); *Case of the Yakye Axa Indigenous Community v Paraguay* (n 34); *Case of the Sawhoyamaya Indigenous Community v Paraguay* (n 34).

²¹⁵ See, for example, *Nau* (n 9); *Winnett* (n 9).

²¹⁶ Robin Gregory and others, ‘Methods for Assessing Social and Cultural Losses’ (2023) 381 *Science* 478, 479.

²¹⁷ *ibid.*

²¹⁸ *ibid.*

Gregory et al. acknowledge that the losses experienced by First Nations communities, whether through environmental harm or dispossession, are often interconnected and multidimensional.²¹⁹ Their method, however, involves working closely with affected communities to identify and, as much as possible, distinguish between categories of loss. These may include:

- livelihood (eg hunting, fishing or gathering for domestic use)
- cash economy (eg income derived from local industries like forestry, mining, fishing or place-based tourism)
- social relations (eg ties to family, community and non-human kin)
- cultural knowledge (eg traditional language, ceremonial practices, cultural identity and intergenerational knowledge transmission).²²⁰

Once these categories are defined through community consultation, participants are asked to assess the relative importance of each category, without yet assigning monetary values. This is done by asking participants to compare the categories in terms of how much more or less important one is relative to another. For example, if ‘Cultural Knowledge’ is considered twice as important as ‘Cash Economy’, this is recorded as a 2:1 ratio. If a monetary value of say, AUD 400,000 is later assigned to ‘Cash Economy’ (based on measurable income losses), then ‘Cultural Knowledge’ would be valued at AUD 800,000. The total value of losses is then calculated by combining the scaled values across all identified categories.

This method was applied by Gregory et al. in 2018, in collaboration with two Denesuline First Nations communities in Canada, as part of a compensation settlement relating to the establishment and ongoing use of a military weapons range on their traditional lands.²²¹ Once community members identified relevant loss categories, of which there were five, researchers then established a monetary value for the category of household economic losses primarily from traditional, non-commercial activities like hunting, fishing and plant gathering for domestic use or local trade. As the community had been excluded from their land since 1953, these estimates were scaled up using population data from 1953 to 2018 and adjusted for the proportion of land access lost within the weapons range. They were then adjusted to reflect

²¹⁹ *ibid.*

²²⁰ *ibid.*

²²¹ Robin Gregory and others, ‘Compensating Indigenous Social and Cultural Losses: A Community-Based Multiple-Attribute Approach’ (2020) 25 *Ecology and Society* <<https://www.ecologyandsociety.org/vol25/iss4/art4/>> accessed 7 March 2025.

inflation. Estimates were informed by government reports and relied on several assumptions, such as that the economic value of berry harvesting was 50% that of hunting meat.²²²

Community members, without being informed of the monetary value assigned to household economic losses, were then asked to decide on the relative importance of the remaining categories of loss using a point-based system. Questions such as, ‘*Which loss from the weapons range matters the most?*’ or ‘*If you could remove just one of these impacts, which one would you choose?*’²²³ guided this exercise. Community members were instructed to assign points to each category, relative to a score of 100 points for the most important loss. In the final step, the researchers used these community-assigned point values to scale the previously calculated monetary figure for household economic losses. This allowed them to estimate corresponding monetary values for the other categories. Due to several uncertainties, such as unreliable government data, the researchers recommended presenting the Canadian government with a range of compensation figures, comprising low, medium and high estimates, rather than one single figure.²²⁴

Although Gregory et al.’s approach to quantifying cultural loss is more structured and group-specific than merely anchoring proposed awards to the *Timber Creek* precedent, several concerns arise when considering its application to native title. Most notably, the method may inadvertently imply a commensurability between economic values associated with the land, such as tourism potential or availability of fish, and its cultural significance to First Nations peoples. Put another way, if one community’s household economic loss is calculated to be double that of another, does that mean the cultural impact of native title extinguishment on that community should be considered twice as great? This logic risks conflating economic productivity with cultural value. Regardless of how communities rank the significance of different categories of loss, those communities with a higher economic reference point will inevitably be assessed as entitled to a larger overall compensation figure. While this thesis has argued that economic concepts and norms clearly inform the non-economic loss award in *Timber Creek*, the direct conflation of economic and cultural value is, to some extent, mitigated by its bifurcated approach to assessing compensation.

Consideration is warranted as to whether a different reference point, other than an economic one, could be used as an anchor for the valuation of cultural loss in native title. For instance, if

²²² *ibid.*

²²³ *ibid.*

²²⁴ *ibid.*

claimants identified a category of loss that included reputational damage and the experience of shame resulting from exclusion from traditional lands – therefore not being able to fulfil certain cultural obligations to protect Country – then legal precedents in defamation cases may offer a useful analogy. Like cultural harm, reputational damage is intangible, context-dependent and difficult to quantify, yet courts have developed a significant body of jurisprudence that provides guidance on how such harm should be valued. Drawing from an existing body of case law could contribute to a more principled and consistent approach for assigning monetary value to cultural loss in native title compensation.

Whether Gregory et al.’s mixed-method approach can be effectively adapted to native title compensation claims, using either economic or non-economic reference points, is a question that warrants further exploration. It may be that the model can be more appropriately adapted to the context of broader regional settlements, such as state- and territory-based treaty processes.

6.3 Lessons from the EU: best-practice guidelines for assessing non-pecuniary damages in tort law

This thesis contends that Australia can benefit from looking to other areas of law that involve the quantification of intangible losses, such as defamation and personal injury. While the High Court in *Timber Creek* was correct to distinguish the unique nature of non-economic loss suffered by First Nations peoples whose rights in land have been extinguished from the non-economic harms typically addressed in these other legal contexts, research aimed at improving consistency and transparency of non-pecuniary damage awards remains relevant and valuable.

One such initiative is the *FullCompensation* project, led by Andrea Parziale and funded by the EU through Maastricht University (2022–2023). This project aimed to improve consistency, efficiency and fairness in the quantification of non-pecuniary damages across EU Member States by developing a model legislative proposal and a set of guidelines for adjudicators.²²⁵ Parziale’s research used a ‘combined comparative-empirical methodology’,²²⁶ which involved:

- reviewing legal, economic and empirical literature on compensating non-pecuniary harm

²²⁵ Andrea Parziale, ‘FullCompensation - Rationalising Full Compensation of Non-Pecuniary Damages to Reconcile Equal Treatment and Personalisation - Model Legislative Proposal and Guidelines’ (Maastricht University 2022) 2 <<https://doi.org/10.34894/RHHGVV>>

²²⁶ *ibid* 2.

- reviewing existing guidelines and tools used across EU Member States
- examining case law from selected jurisdictions
- conducting interviews with adjudicators about their use of existing guidelines
- holding stakeholder focus groups to refine draft guidelines based on feedback.

His research found that, in the absence of structured guidance or regulation, adjudicators often rely on ‘individual perceptions and considerations’ when assessing non-pecuniary damages.²²⁷ He warns that this can create what he terms a ‘damage lottery’²²⁸ – a situation where similar harms receive notably different compensation awards. Such inconsistency undermines trust in the legal system, increases the risk of unequal treatment and can discourage parties from pursuing settlement outside of court.²²⁹

To address these issues, Parziale recommends several EU-wide reforms. First, he advocates for the adoption of clear, standardised yet flexible guidelines based on objective, accessible factors. These guidelines are not intended to impose rigid rules but rather promote consistency across jurisdictions and encourage predictability of outcomes. Crucially, Parziale argues that these guidelines should be developed and updated regularly by a competent authority, rather than adopted into legislation, allowing for regular and responsive revisions.²³⁰ However, he also recommends legislative reform to codify general principles governing the assessment of non-pecuniary loss.²³¹ He suggests that legislation should also empower the competent authority to issue and periodically review the guidelines, say, every three years, to ensure they remain responsive to evolving economic and social factors.²³²

Parziale advocates for the participation of a range of stakeholders to be included in the development of guidelines, stressing the importance of ‘a balanced representation of different perspectives and interests’²³³ to ensure the legitimacy and acceptability of the guidelines across the EU.²³⁴ His model proposal envisions a ‘National Observatory’, composed of judges, lawyers, associations of victims and injured persons, medical experts, insurers and academics.²³⁵ Significantly, he highlights the importance of including the perspective of

²²⁷ *ibid* 25.

²²⁸ *ibid* 24.

²²⁹ *ibid* 25-26.

²³⁰ *ibid* 18.

²³¹ *ibid*.

²³² *ibid*.

²³³ *ibid*.

²³⁴ *ibid*.

²³⁵ *ibid* 5.

‘laypeople’, noting that compensation for non-economic harms is largely perceived as ‘a form of atonement, whereby society recognises the loss suffered by the injured person and makes the injurer pay respect to this latter’.²³⁶ This reasoning echoes the Australian courts’ emphasis on community standards in determining what constitutes an appropriate, fair or just award in native title compensation.²³⁷

Building on this parallel, this thesis proposes that several of Parziale’s recommendations offer a useful foundation for improving how Australian law approaches the assessment of non-economic loss in native title contexts. Just as the instinctive synthesis model, used by judges in criminal sentencing, often includes consideration of sentencing guidelines, or as administrative decision-making is shaped by regulated non-exhaustive criteria and applicable principles, the assessment of native title compensation could similarly benefit from structured but flexible guidance. As discussed earlier, the development of adaptable guidelines has been consistently proposed by scholars in response to similar issues identified in the jurisprudence of the Inter-American and European human rights courts.

Parziale’s emphasis on stakeholder inclusion in the creation and revision of guidelines, particularly the involvement of perspectives from persons other than lawyers or adjudicators, should also be considered in relation to native title law. In the Australian context, this necessitates the inclusion of First Nations peoples in shaping how non-economic loss is conceptualised and valued. Their participation would not only enhance the legitimacy and broader acceptance of compensation awards but also help bridge the conceptual gap arising from the deep ontological differences that make it difficult for non-Indigenous Australians to comprehend the loss experienced by First Nations peoples dispossessed of their land.

In conclusion, while the cultural, historical and legal context of native title are distinct from the compensatory regimes in other areas of law, and particularly those in foreign legal systems, the underlying concerns with judicial discretion, consistency and accessibility in awarding compensation for non-economic loss are shared. Section 6.5 will focus on the practical realities of how Parziale’s recommendations might be adapted to the context of native title law in Australia.

²³⁶ *ibid* 18.

²³⁷ *Northern Territory v Griffiths* (HCA) (n 4) [237].

6.4 Lessons from land valuation law

Jurisprudence warns against conceiving native title as a creature of property law,²³⁸ however its legislative and judicial treatment is inevitably entangled with property law concepts.²³⁹ This is largely because property law offers the most analogous framework within the Western legal tradition, and by equating native title with property rights, equality can be monitored by ensuring that the enjoyment of native title is not deemed less important than other property rights granted by the Crown.²⁴⁰ The extent of this entanglement led the Full Federal Court in *Timber Creek* to suggest, ‘it may well be appropriate to loose the assessment from the shackles of Australian land law’.²⁴¹

In the context of compulsory acquisition, some Australian jurisdictions, including the Northern Territory, provide for an additional sum to be paid above market value when the land holds a ‘special value’ to the owner. Accordingly, in *Timber Creek*, this established legal norm was relied upon to support the argument that the quantum of compensation should account for the cultural value of the land to the Ngaliwurru and Nungali peoples.²⁴² In the hearing before the trial judge, the term ‘solatium’ was used by Justice Mansfield to refer to the harm caused by the extinguishing acts to this cultural value. Solatium, however, is traditionally used in property law to refer to an additional award of compensation intended to recognise emotional distress, personal attachment or inconvenience caused by the compulsory acquisition of land. On appeal, the High Court departed from the term ‘solatium’ on the basis that it fails to capture the collective, cultural and spiritual loss inherent in the extinguishment of native title rights.²⁴³ This thesis supports that reasoning. However, as solatium was conflated with special value at first instance, a separate claim for compensation for the mental distress arising from the compulsory nature of extinguishment appears to have been overlooked in *Timber Creek*. Notably, as mentioned in Section 5.2, this was discussed by Justice Edelman in dissent, who suggested that

²³⁸ *The Commonwealth v Yarmirr* [2001] 56 HCA, [12]-[14].

²³⁹ See, for example, the ‘freehold test’ at Subdivision M of the *Native Title Act*; ss 51(2) and 51(4), which suggest that regard may be had to Australia’s compulsory acquisition laws when determining compensation; and the ‘freehold equivalent cap’ in s 51A.

²⁴⁰ This is a requirement of Australia’s *Racial Discrimination Act 1975* (Cth) s 10.

²⁴¹ *ibid.*

²⁴² ‘Submissions of A Griffiths and Lorraine Jones on Behalf of the Ngaliwurru and Nungali Peoples’ in *Timber Creek* 1st Instance (21 March 2016) [143].

²⁴³ *Northern Territory v Griffiths* (HCA) (n 4) para [53]-[54].

an additional award akin to solatium could be claimed.²⁴⁴ This is likely to be tested in future litigation.²⁴⁵

Absent a settled legal position, this thesis contends that further consideration should be given to whether pain and suffering resulting from extinguishment could constitute a distinct head of compensation and whether its inclusion might be supported by a rebuttable presumption. Such a presumption would assume that harm has occurred as a natural consequence of extinguishment, unless evidence is provided to the contrary. This approach reflects established practice in regional human rights courts, which, as discussed, frequently infer or presume non-pecuniary harm in cases involving grave or systemic violations, thereby relieving claimants of the burden of proving emotional distress directly. The non-economic loss component of the award could then focus on the impacts of the extinguishing acts on the disruption of cultural maintenance and transmission, as well as on the social conditions of the claimants. Under such a model, the evidentiary burden on native title compensation claimants would be reduced. Rather than being required to describe and prove their pain and suffering explicitly, their claims could instead focus on more objective indicators, such as changes in the use and enjoyment of land before and after extinguishment and socioeconomic data. In doing so, this approach could reduce the emotional toll of legal proceedings on claimants and minimise the interpersonal risks associated with cross-examination on culturally sensitive or traumatic experiences.

6.5 Towards a more structured assessment of non-economic loss

With *Timber Creek* being the first judicial determination on compensation for the extinguishment of native title holders' rights and interests in Australia, many issues surrounding the assessment of compensation remain unresolved.²⁴⁶ This chapter contends, however, that while some questions require judicial clarification, there is also a present need to develop a more structured and principled approach to assessing non-economic loss. Without deliberate steps being taken, there is a serious risk of repeating the uncertainty, delays and contention that characterised the first three decades of native title jurisprudence. As demonstrated by the critiques discussed in relation to regional human rights case law, such challenges are unlikely to resolve themselves and only amplify calls for reform further down the track.

²⁴⁴ *ibid* (Edelman J) [273], [323]-[324].

²⁴⁵ John Sheehan, Jasper Brown and Kenneth Rayner, 'On Solatium: Towards a Rethinking of Compensation' (2021) 27 *Pacific Rim Property Research Journal* 75, 86.

²⁴⁶ Among the most pressing issues is the effect of s 51A of the *Native Title Act* on a compensation award.

Structured guidance on judicial discretion to assess compensation does not require the adoption of predefined standards tied to specific categories of compensable harm. Such rigidity would be inappropriate in the native title context, where the nature of loss is pervasive, incremental and cumulative.²⁴⁷ This thesis instead draws from the work of Parziale in the *Full Compensation* project²⁴⁸ to propose the development of flexible guidelines that articulate relevant but non-exhaustive factors for the Federal Court to consider when quantifying non-economic loss, along with a set of guiding principles for determining what constitutes an award that is ‘appropriate, just or fair’, by reference to community standards. Such guidelines are comparable to those used in administrative law to support consistent and transparent decision-making. This proposal for external support is based on the recognition that, while assessing non-economic loss in native title cases inevitably requires a degree of judicial discretion, it also presents profound cultural and ontological challenges for courts.

This approach is also supported by Isdale’s *Native Title Compensation*, which advocates for the development of non-exhaustive factors to guide judicial reasoning through an ‘instinctive synthesis’ methodology, similar to that used in criminal sentencing (as discussed briefly in Chapter 5). For Isdale, this method is well-suited to the native title context because it avoids rigid formulas and instead allows for the weighing of different considerations according to the circumstances of each case.²⁴⁹ Arguably, such structured yet flexible guidance would better fulfil Hart’s ‘optimum conditions’ for the exercise of discretion, as it facilitates the identification and articulation of the ‘various values’ that ought to be ‘considered and subjected in the course of discretion’.²⁵⁰ Following the *Timber Creek* decisions, Isdale identifies several key issues that, in his view, warrant judicial clarification or reconsideration before they can (and should) be distilled into guiding principles. These include:

- temporal issues (ie whether compensation can lawfully account for future generations and if it can, to what extent it should, and how to address evidentiary challenges in proving harm long after extinguishment has occurred)
- proportionality of loss (ie whether greater non-economic harm can be presumed when the extinguished rights represent a larger proportion of the native title previously held)

²⁴⁷ *Griffiths v Northern Territory* (Mansfield J) (n 140) [324].

²⁴⁸ Parziale (n 225)

²⁴⁹ Isdale (n 166) 128.

²⁵⁰ Hart (n 11) 664.

- size of native title holding group (ie whether the number of people affected should influence the quantum of compensation)
- nature and purpose of the award (ie whether compensation is restitutionary or purely compensatory and whether it should be based on general notions of fairness or community standards of reasonableness)
- timing of assessment (ie whether non-economic loss should be assessed at the date of extinguishment or the date of judgment).²⁵¹

Drawing on the work of Dr Brian Keon-Cohen AM KC²⁵² and submissions from the State of South Australia in *Timber Creek*,²⁵³ Isdale also proposes a number of relevant considerations that could form part of a non-exhaustive list under his proposed instinctive synthesis approach. These include, among other factors, the extent to which extinguishment or impairment has interfered with ceremonial activities, whether sites of significance were physically affected and the size of the group at the time of extinguishment.²⁵⁴ In the development of such guidelines, there are also a number of factors and principles that can be inferred from *Timber Creek*. Examples include that compensation should be assessed on an *in globo* basis, that collateral harm is not limited by temporal or physical boundaries²⁵⁵ (a point Isdale questions) and that the applicable causation standard is one of general causal connection.²⁵⁶ Regard should also be had to the social disadvantage suffered by First Nations groups as a result of the compensable acts.²⁵⁷ As discussed in Section 6.1, collateral harm of this kind often plays a significant role in cases concerning the dispossession of First Nations groups within the Inter-American and African human rights systems.

As discussed in Section 6.4, the potential recognition of solatium as a distinct head of non-economic loss also warrants consideration. Isdale, however, cautions against further fragmentation of awards, aligning with Sturt Glacken KC (counsel for the applicant in *Timber Creek*), who argued that dividing non-economic loss into separate components is incompatible with the complex and holistic relationship First Nations peoples have with land.²⁵⁸ However,

²⁵¹ Isdale (n 166) 119–125.

²⁵² BA Keon-Cohen, ‘Mabo, Native Title and Compensation: Or How to Enjoy Your Porridge’ (1995) 84 Monash University Law Review 84.

²⁵³ Submissions of the State of South Australia in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (11 December 2015) 14–15.

²⁵⁴ Isdale (n 166) 125–126.

²⁵⁵ *Northern Territory v Griffiths* (HCA) (n 4) 216.

²⁵⁶ *Griffiths v Northern Territory* (Mansfield J) (n 140) [321]–[322].

²⁵⁷ *Northern Territory of Australia v Griffiths* (FCAFC) (n 147) [405].

²⁵⁸ Isdale (n 166) 118.

as previously explained, if a solatium-like component were to be recognised, it could operate on a presumption that emotional harm is a natural consequence of extinguishment. Such a presumption may also reduce the risk of re-traumatisation and the emotional toll associated with requiring claimants to provide detailed personal accounts of distress and despair, as occurred in *Timber Creek*, while also lessening the overall evidentiary burden placed on claimants.

Principles and potential factors for assessing non-economic loss may also be adapted from areas of law with an established practice of quantifying intangible losses. For example, in personal injury law, awards for First Nations applicants have recognised harms such as the ‘inability to complete initiation rites, inability to gain and enjoy full tribal rights, loss of ceremonial function and inability to take part in matters of spiritual and tribal significance and loss of social standing in the tribal or clan group’.²⁵⁹ As discussed in Chapter 5, the courts in *Timber Creek* questioned the relevance of such analogies, due to the distinct and communal nature of the loss experienced by native title holders whose rights in land have been extinguished. However, this thesis contends that established practices from other areas of law should be drawn upon to promote clarity and consistency in assessing compensation, and because they are likely to influence judicial reasoning implicitly in any event.

Ultimately however, the development of non-exhaustive criteria and guiding principles for determining non-economic compensation should be undertaken in collaboration with First Nations peoples and experts familiar with the specific cultural and historical nature of such losses. This is particularly important in the current native title context, where, at the time of writing, no Federal Court judge in the native title practice area identifies as First Nations and the Court continues to rely predominantly on expert evidence provided by non-Indigenous anthropologists. Systemic barriers to First Nations representation persist, in part due to ongoing socioeconomic disparities in Australia – for instance, higher education completion rates for First Nations students remain significantly lower than those of non-Indigenous students, with national data indicating that only 47% of First Nations students complete their studies within nine years, compared to 74% of their non-Indigenous peers.²⁶⁰

²⁵⁹ John Litchfield, ‘Compensation for Loss or Impairment of Native Title Rights and Interests: An Analysis of Suggested Approaches (Part I)’ (1999) 18 *Australian Mining & Petroleum Law Journal* 235, 253, citing *Dixon v Davies* (1982) NTR 31 and *Napaluma v Baker* (1982) 29 SASR 192.

²⁶⁰ Bronwyn Fredericks and others, ‘The Importance of Indigenous Centres/Units for Aboriginal and Torres Strait Islander Students: Ensuring Connection and Belonging to Support University Completion’ (2024) 43 *Higher Education Research & Development* 859, 859.

To enhance the legitimacy and acceptability of compensation methods, this thesis recommends a readily achievable reform, similar to that proposed by Parziale in the *FullCompensation*²⁶¹ project: the creation of a dedicated body to develop, review and update guidelines for the assessment of non-economic loss. Such a body should be composed of different stakeholders, including First Nations representatives, anthropologists, lawyers and former judges. Its external authority and expertise could help mitigate the cultural and ontological challenges discussed throughout this thesis, while contributing to a more transparent and consistent compensation practice. Publicly available guidelines containing principles and non-exhaustive criteria would also assist claimants in preparing evidence and crucially, make it easier for parties to negotiate compensation settlements outside of court. This is particularly important given that, as stated by AIATSIS, settlements ‘can go beyond lump sum payments [and] address the harms caused and establish processes to prevent future harms.’²⁶² Or as Glacken KC, counsel for the applicants in *Timber Creek*, explained:

Compensation is not forward-looking – it’s for past actions. It does not provide a direct vehicle for empowerment over traditional country...Proper redress requires forward-looking solutions – they depend on negotiations of equitable interests by which Aboriginal people can participate in the economic development of their country.²⁶³

The National Native Title Tribunal (NNTT), with sufficient government resourcing, may be well placed to assume this role. It already functions as an independent agency with strong First Nations leadership and statutory responsibilities under the *Native Title Act*, including conducting inquiries and reviews and assisting with native title applications and negotiations. Under Division 5, Subdivision A (‘Special inquiries’), the Act provides that the ‘Commonwealth Minister...may direct the [NNTT] to hold an inquiry in relation to a particular matter or issue relating to native title.’²⁶⁴ However, as the NNTT primarily provides procedural support, expanding its role to include substantive contributions to compensation determinations may require legislative amendment. If such a body were developed and authorised to issue or review relevant guidelines on the assessment of non-economic loss, a Federal Court Practice

²⁶¹ Parziale (n 225).

²⁶² Mia Stone, ‘Developing a National Strategy for Native Title Compensation’ (2021) 1 *Native Title Newsletter*, AIATSIS 10.

²⁶³ Courtney Boag, Interview with Sturt Glacken, Wendy Asche and Mick O’Kane, ‘Compensation and Redress in South-Eastern Australia’, First Nations Legal & Research Services (16 December 2021)

<<https://youtu.be/HUzGp8xUZTs?si=vwxI0ThPVvA8lgn>>.

²⁶⁴ *Native Title Act 1993* (Cth) s 137(1).

Note could play a complementary role, explaining when and how the Court may refer to such guidelines and clarifying the purpose and limits of their application in judicial reasoning.

In the absence of such a body or pending the publication of formal guidelines, courts can still take important steps to mitigate the issues identified in this thesis. These include providing more transparent reasoning in compensation determinations, such as making a deliberate effort to identify the norms, factors and reference points that have influenced their final quantification. Also, as was done by the African Court in *Ogiek*, the Federal Court can and should appoint First Nations experts to advise the court on appropriate compensation in the specific circumstances of the case before them.

Chapter 7 Conclusion

It is impossible to present an ‘appropriate’ method to compensate First Nations peoples for the profound intangible losses suffered when their rights in land are impaired or extinguished. There is no market, the losses are incommensurable, and the Western legal system does not have the ontological and interpretative capacity to determine what is equitable, fair, appropriate or just in this context. For these very reasons, the Australian courts have determined that a wide scope of judicial intuition is necessary, as evident by the decisions in *Timber Creek*.

Through a close examination of the extent to which the courts relied on judicial intuition, including the reasoning to support this approach and the sources cited, such as Hart’s essay *Discretion*²⁶⁵ and the judgment in *Markarian v The Queen*²⁶⁶, this thesis has questioned both the legitimacy and utility of that reliance. Legitimacy, in the sense that while the courts ostensibly resisted analogies to other areas of law or market-based comparisons to respect the *sui generis* nature of native title, these reference points inform judicial reasoning implicitly. Utility, in the sense that, although well-intentioned, the rejection of Western reference points and the reliance on vague principles of fairness, justice or appropriateness to guide intuition have rendered the law opaque, limiting its ability to guide claimants in preparing their claims and reducing the transferable value of judicial reasoning in the context of negotiated settlements.

Comparative insight drawn from the jurisprudence of the Inter-American, African and European human rights systems reinforces these concerns. Though the mandate of these courts differs from that of the Australian courts in the native title practice area, they share the common challenge of quantifying non-pecuniary loss, and in many cases non-pecuniary loss for First Nations people who have been deprived of their traditional lands. What emerges from this cross-system analysis is not a model to emulate, but a warning that reliance on vague principles of equity or justice, without structured reasoning, produces inconsistency and unpredictability, undermining fundamental rule of law principles.

²⁶⁵ Hart (n 11).

²⁶⁶ *Markarian v the Queen* (n 168).

This concern is illustrated in the work of Damian Gonzalez-Salzberg,²⁶⁷ Octavian Ichim²⁶⁸, Robert Doya Nanima²⁶⁹ and Veronika Fikfak²⁷⁰ who have shown that the Inter-American, European and African courts have developed bodies of jurisprudence on non-pecuniary loss that are largely opaque and inconsistent. Their analyses demonstrate that compensation awarded without transparent criteria or without articulating the principles guiding judicial intuition erodes trust in the law and frustrates the development of a coherent body of precedent. The Australian context is not immune to these risks and *Timber Creek* may represent the beginning of a similar trajectory.

As *Timber Creek* was the first judicial determination of compensation for the extinguishment of native title in Australia, many legal questions remain unresolved. While some commentators express confidence that principles will evolve through case law, the experience of the regional human rights courts suggests otherwise. More likely is the emergence of a *Timber Creek*-bound pattern, in which the AUD 1.3 million cultural loss award becomes the anchor point for future awards, with arguments reduced to factual distinctions and a preoccupation with individual accounts of pain and suffering. In turn, judicial reasoning may lean heavily on vague references to fairness or appropriateness, rather than contributing to substantive legal development.

To avoid this outcome, courts and institutions should resist the temptation to treat intuitive discretion as an adequate substitute for structured legal reasoning. In the absence of more radical reform to Australia's legal system, this thesis has drawn on the work of Parziale in the *Full Compensation* project²⁷¹ and William Isdale's book, *Native Title Compensation*²⁷², to advocate for the development of principles and non-exhaustive criteria to guide judicial intuition in the quantification of non-economic loss. Such guidance should be developed in collaboration with First Nations peoples, potentially through a dedicated advisory body empowered to issue and review substantive guidelines.

Echoing Justice Edelman's dissenting opinion in *Timber Creek*, this thesis further argues that serious consideration should be given to recognising emotional harm resulting from native title extinguishment as a distinct head of compensation (ie a form of solatium) operating on a rebuttable presumption. This is consistent with compensatory practices in the European, Inter-

²⁶⁷ Gonzalez-Salzberg (n 31).

²⁶⁸ Ichim (n 113).

²⁶⁹ Nanima (n 70).

²⁷⁰ Fikfak (n 112).

²⁷¹ Parziale (n 225).

²⁷² Isdale (n 166).

American and African Courts and could help reduce the evidentiary burden placed on claimants. In doing so, it may also mitigate the risk of re-traumatisation for native title holders engaging in an already challenging legal process.

While these changes will not perfect the native title compensation scheme, they may render it more transparent, more coherent and ultimately more just. In turn, this will better enable negotiated settlements, which time and time again have proven to deliver more meaningful, enduring and forward-looking outcomes for First Nations peoples.

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