

# **Towards equitable compensation: Inclusion of cultural values in valuation of customary land takings compensation**

Andrew Pai<sup>a\*</sup> and Andrea Blake<sup>b</sup>

*<sup>a</sup>School of Civil Engineering and Built Environment, Faculty of Science and Engineering, Queensland University of Technology, Brisbane, Australia;*

*<sup>b</sup>School of Civil Engineering and Built Environment, Faculty of Science and Engineering, Queensland University of Technology, Brisbane, Australia;*

Full correspondence details for the \*corresponding author

*School of Civil Engineering and Built Environment, Faculty of Science and Engineering, Queensland University of Technology, GPO 2434, Brisbane, QLD 4001, Australia. Email: [andrew.pai@hdr.qut.edu.au](mailto:andrew.pai@hdr.qut.edu.au)*

## **Abstract**

In plural land tenure societies that have identifiable and prevailing customary land tenure, the ostensible need for equitable compensation when customary land is expropriated by State for public purposes is becoming recognisably prevalent and portentous. Equity in process and outcomes of expropriation is central to the issue and the critical question is, ‘how much compensation should State pay the expropriatee customary land owners?’

Quantification of compensation requires valuation which is a necessary and inevitable function to the expropriation decision. However, unlike valuation of compensation for legal property takings that is predicated on established legal paradigms and statutory pronouncements and prescription, customary land poses critical challenges to valuation because of its incompatibility to legal property systems and regimes. The default position of valuation has been the adoption of legal property conceptions and application of conventional real property valuation methods. This paper posits that valuation for customary land takings compensation predicated on this basis is vulnerable to inequitable outcomes and not responsive to customary land tenure and the principle of equivalence that underpins compensation. Against this status quo, this paper proposes the inclusion

of cultural value in valuation formulation of customary land takings compensation assessment.

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**Keywords:** cultural value; customary land; equitable compensation; principle of equivalence; sui generis; takings

## **Introduction**

The confluence of incompatible land tenure systems in contemporary plural land tenure society invariably engenders debates on notions of social, political and economic equality. The tensions that arise are ubiquitous and undeniably challenging normative property paradigms and constructs and this is recognisable in the relationship between customary land tenure and introduced legal property systems. The underlying feature in this tenure arrangement is that for all formal land administration functions, the legal property system is dominant at all levels and shapes the questions and answers to societal issues of land.

Against this backdrop, this paper focuses on compensation and its valuation where customary land is expropriated by State for public purposes. The ostensible need for equitable compensation when customary land is expropriated is becoming recognisably prevalent and portentous in these societies. Equity in process and outcomes of expropriation is central to the issue and the critical question is, *'how much compensation should State pay the deprived customary land owners?'*

In these intimations, the aim of this paper is to provide an answer to the equity question by advocating the inclusion of cultural values in the valuation of compensation for expropriation of customary land. For the purposes of this paper, references are made intermittently to Papua New Guinea (PNG) to provide objectivity, substance and coherence to the theme and its discussions. This is because PNG is a country that the author is familiar with and that it presents itself as relevant case for the theme under consideration.

The question of equitable compensation inevitably implicates the value and valuation proposition. This, therefore, necessitates the examination of the

equitable compensation theme and its valuation proposition. In doing so, this paper addresses two critical questions which provide the framework for assessing customary land takings compensation. Incidentally this also serves as the outline of this paper.

Firstly, the fundamental question ought to be, ‘what is the object of value and valuation?’ In essence, ‘what is customary land and what are its entitlements in takings compensation?’ This query implores the conceptualisation of customary land and its explication provides clarity to the valuation and value objective.

Secondly, having established the object of valuation and compensation, the enquiry must now logically proceed to the standard of compensation. The standard guides the valuation function of compensation.

Thirdly, based on the discussions appropriated in the two enquiries, the methodology of quantifying compensation (valuation) is presented. This is followed by a discussion of the apparent implications arising from the advocated customary land conception, compensation standard and proposed valuation methodology. The paper is then concluded highlighting its objective and key elements that address the objective.

## **Background**

The increasing assertion by indigenous land owners of the worth of their customary land tenures and land management practices and arguments against its arbitrary extinguishment has gained international realisation that there is a surviving indigenous world demanding recognition of its tenure and practices (Sheehan, 2002).

The significant feature of plural land tenure arrangements is the incompatibility of tenure. In this co-existence, the relationship has not been without tension especially when institutionalised land administration functions intersect with customary land tenure such as that typified in expropriation and compensation. The prevailing status quo is made more confounding by the pressures of change from modernity and globalisation.

### ***The status quo of customary land compensation and its valuation***

Contemporary literature on compensation for customary land expropriation portrays a dismal view on current practice of customary land compensation in expropriation matters. Empirical studies in the African continent point out the weaknesses and inadequacies in the land administration systems and procedures of governance, legislation and valuation methodology (Atatguba 2014, Sule 2014, Alemu 2014, Ajibola 2012, Odame 2011).

Alias and Daud, (2006, 2012) and Lee (2015) in their empirical studies of land compensation for indigenous property in Malaysia echo these inadequacies.

In similar vein, Gregory and Trousdale (2009) support the argument of the weakness of conventional practice by identifying the following problems including

- lack of context,
- inadequate participation from aboriginal communities,
- exclusion of important losses, and
- reliance on market-based measures

The status quo in PNG is reflective of what the consensus describes and that compensation claims are unending, mutating and endemic. It is a vexatious issue that is confronting PNGan society.

Though questions of compensation are context defined and empirical, the consensus of findings articulated by the literature point to two identifiable issues;

- (1) the inadequacy of the system of the established legal property system to deal with takings compensation of customary land and
- (2) the inadequacy of compensation outcomes as a consequence of the process or system of the established legal property regime.

Drawing from the literature, this paper contends that what makes compensation inadequate for customary land expropriation is the adoption of legal property paradigms and conventional valuation methods. In spite of the incompatibilities of the tenure systems, customary land is defined by legal property conceptions. This is paradigmatically impressionable however questionable because the fact remains that the tenure systems are diametrically incompatible. Therefore one tenure system cannot be easily substituted by the other.

By extension, the superimposition of legal property conception on customary land and application of conventional real property valuation methods in determining compensation methods bears heavily on the takings compensation outcomes including compensation integrity, authenticity and adequacy. Ultimately it is the deprived customary land owner that is affected. As the universe of land tenure evolves and changes with time and against the present issue of inequitable compensation, it is reasonable to reconsider valuation methodology (formulation) for determining customary land takings compensation.

However, like it or not, the legal property regime is here to stay, period. On the other hand, customary land and tenure has not lost social (and political) consensus and is honoured in plural land tenure societies. Therefore when customary land and tenure is breached as in expropriation, society is affected (adversely or otherwise) and gives rise to legitimate concerns.

The logical and rational thing to do in this context is for the perceived customary land and its compensation entitlements (claims) to be recognised for what it is and integrated in compensation and valuation considerations. That is let customary land be customary land.

The 'raison d'être' for customary land is custom and the culture it creates. Cultural values therefore, need consideration in compensation and its inclusion in the valuation (considerations) of customary land takings compensation is therefore a reasonable and necessary reason from the perspective of all parties concerned, especially, the State and deprived customary land owner).

### **Conceptualisation of customary land**

Underlying the question of compensation and valuation approaches for determining the value of compensation is the nature of customary land. From the landscape of property conceptions, there are two options available for conceptualising customary land. The first option is the adoption of the concept in vogue. This is the legal property conceptions on customary land. Secondly and alternatively, customary land can be meaningfully understood for what it essentially is.

### ***Legal property conception of customary land***

It is important to understand the conception of customary land from the perspective of the legal property system and regime because of its dominance in all formal land administration functions and constructs including expropriation, compensation and valuation.

In democratic and private property owning societies, the concept of private property is fundamental to the legal property system and ideation of property. The concept of private property has been rightly regarded as the cornerstone of economic progress of society. Private property confers exclusivity to property rights which are individualised and alienable. Therefore the legal property system ensures that private property rights are guaranteed and protected by the State. From the common law system, the highest interest that can be held in land is the freehold (fee simple absolute in propriety). From freehold interest other lesser interests are carved out including leasehold interests. PNG adopted the common law system with a prevailing customary land tenure system in its national land tenure framework.

### ***Implication of legal property conception of customary land***

From the outset, legal property and customary land tenure are incompatible in many facets and at many levels including definition, concept, objectives and modus operandi. In a domain such as PNG that has a plural tenure of this kind, the dominant tenure tends to be the legal property system. Customary land tenure continues to co-exist with the legal property system and customary land is owned by the customary land group and regulated by the custom of the landowning group. The legal property regime does not interfere with customary

land unless there is a public need for it or as the sovereign laws requires or necessitates. In land administration functions such as expropriation of customary land, compensation is determined on the basis of the legal property conception. In PNG, customary land compensation is assessed on the basis of the unimproved (land) value of the fee simple (freehold). Freehold is a legal property conception as described earlier. In the absence of statutory powers, conditions and incidents, it is likened to absolute ownership. It is a proprietary interest and inheritable. It confers exclusive private property rights and interests and can be alienated. This brief description portrays incompatible characteristics to customary land.

Moreover, the superimposition of the private property rights ideation on customary land especially the individualisation and alienability features is a default position. This is adopted purposely for convenience and practicality because for the purposes of compensation and valuation, the concept and definitions of customary land and tenure remain vacuous. Customary land is communally held and is inalienable. The default position assumed in this consideration is that customary land is fitted into the legal property paradigm and the legal strictures that regulate expropriation and compensation and its valuation. Valuation in this instance is predicated on market value of property. This paper posits that the default position accorded to customary land is a story that no longer fits the facts or reality.

The inconvenient fact is that custom exists and underpins the cultural values to which it gives customary land its character and meaning. The conception of customary land in the legal property construction obviates these fundamental values and therefore a whole host of compensable value claims (entitlements) are

unaccounted in the compensation formulation. This gives rise to the inadequacy question of compensation.

### ***Customary land as sui generis property***

Various authors have proffered an answer to this question in the concept of sui generis characterising customary land in compensation and land administration considerations (Smith 2001, Sheehan 2002, Burke 2002, Boydell 2011, Pearson 1997).

Sui generis is a Latin phrase meaning of its own kind and used to describe something considered unique. Burton's Legal Thesaurus defines sui generis as

*in its own category, in its own group, of its own character, of its own class, of its own classification, of its own denomination, of its own designation, of its own genre, of its own kind, of its own nature, of its own type, of its own variety, peculiar, special, the only one of its kind, unique ("sui generis", 2007).*

Moreover, with respect to customary land, sui generis describes the relationship between the sovereign (State) and indigenous people within the domain in relation to customary land, title, rights, and treaties. These rights and relationships are "unique," "one of a kind," or "in their own class." This is due both to the unique place of these rights and relationships in the law of the domain and the source of the rights.

Customary land is sui generis property because of its cultural values that makes it unique from legal property. Customary land owners' awareness of the cultural elements related to the expropriated land may include;

- Place name,
- Sacred sites
- Rituals and festivals,
- Unique songs and poems,
- Historicity,
- Legends and stories,
- Architecture,
- Ancient bridges, pathways, footpaths, tracks, walkways, etc.

A proposed typology of cultural value for compensation claims under native title in Australia as exemplified by Smith (2001) include

- “inalienable affiliation to land and waters;
- possession, use, access, enjoyment and protection of those land and waters;
- sociality and social relatedness (including corporate identity, family life and parenting, marriage, kin systems, birthing and mortuary practices, social capital);
- systems of traditional governance, authority and decision-making;
- a religious life (including life cycle initiation stages, a corpus of religious beliefs and practices, personal and group relationships with the spirit world and creators, etc);
- an individual and group cultural identity and way of life (including language, socialisation, traditions, intellectual and artistic capital);
- economic structures and way of life (including exchange, distribution and sharing, means of production, barter);

- physical and psychological health and wellbeing; and
- future succession and generational native title rights, interests and responsibilities in land and waters.” (Smith, 2001).

This paper advocates the sui generis property conception of customary land and adopts it as the basis for discussing the object of valuation in takings compensation. The justification for adopting the sui generis conception for customary land is presented below with legal cases from PNG, Canada and Australia.

### ***The Geita Sebea case***

The precedent in Geita Sebea case is instructive for the purposes of understanding the nature of customary land and its valuation in Papua New Guinea (*Geita Sebea v Territory of Papua* (1941) 67 CLR 544).

The case in 1943 concerned compulsory acquisition laws in what was then known as the Australian Territory of Papua, where indigenous traditional rights to land were in issue. The court found that the question of the nature of title that the claimant community held and its valuation to be subject to common law principles (English law).

The nature of the title was held to be a communal or usufructuary occupation with a perpetual right of possession to the community and likened to communal usufructuary title equivalent to full ownership of the land. The court determined that the natives were transferring 'an estate in fee simple title' to the Crown.

As to the question of compensation, common law principles (English law) apply – the willing buyer and seller principle for the land with all its potentialities

but disregarding any enhancement in value due to the public purpose/taking. The court determined that compensation was to be valued on the basis that the natives were transferring 'an estate in fee simple title' to the Crown.

Geita Sebea is noteworthy that neither the argument presented for the appellants, nor the reasoning of the court, said anything about the issue of central concern here: i.e. the metaphysical relationship and entitlements of indigenous owners with respect to their land in both its nature and valuation.

For the purposes of this paper, for customary land in PNG, the question of sui generis of customary land has not been raised and that the common law principles still applies to customary land. However, legal precedents in common law jurisdictions are instructive on how customary land can be viewed in PNG. This paper posits customary land in PNG as sui generis property and when State acquires customary land through expropriation, it acquires a sui generis property.

### ***The Delgamuukw case***

A precedent for the nature of aboriginal title is found also in the Delgamuukw case (Delgamuukw v British Columbia [\[1997\] 3 S.C.R. 1010](#)).

This is a Canadian case where the court deliberated with the definition of aboriginal title. The inference to the title being a personal and usufructuary right did not aid the court in explaining the various dimensions of aboriginal title. The Supreme Court described aboriginal title in this case as an interest in land that is sui generis. This was necessary to distinguish aboriginal title from legal proprietary interests, such as fee simple. The Court recognised Aboriginal title to confer the right to exclusive use and occupation by the community of the land.

### ***Native Land Title***

Native land title in Australia is also referred to by various authors as sui generis property (Burke 2002, Sheehan 2002, Smith 2001, Litchfield 1999, Pearson, 1997). This has been made clear in the land mark case, *Mabo* (no.2), where native title is a unique form of title (sui generis) and is, therefore, valued according to its unique characteristics. Litchfield (1999) observes that although the amendments to the Native Title Act (NTA) cast the notion of sui generis in a particular light, it is not yet a settled matter as to how the courts will interpret this characteristic of native title.

There is scarcity (paucity) in empirical valuation studies on customary land takings compensation. Confounding the situation is the vacuous status quo in the modus operandi and standards of valuation of compensation in customary land takings. This is not adequately canvassed within valuation. It is a difficult issue (whether it is in the jurisdiction of valuation of assessing cultural values in takings compensation, or to accept that there is a very unfortunate circumstance of a gap in valuation practice and jurisdiction).

### ***Timber Creek case – Australia***

In 2016, the first ever litigated native title compensation decision was made in Australia in which the claimants in the Timber Creek case (Ngaliwurru and Nungali Peoples) were awarded \$3,300,261 as compensation for the extinguishment and impairment of their non-exclusive native title rights and interests. Compensation comprised:

- \$512,000 based on the 80% of the value of the freehold title that represented the economic value of their extinguished native title rights;

- \$1,488,261 in simple interest on this sum; and
- \$1,300,000 for non-economic/intangible loss or solatium as additional compensation award.

An appeal to the High Court, decided in August, 2017, provided a methodology for calculating the quantum of native title compensation.

In partially allowing the appeals by the Northern Territory and the Commonwealth (*Northern Territory of Australia v Griffiths* [2017] FCAFC 106), the Full Court found that:

- the economic value of the extinguished native title rights was reduced to 65% of the value of freehold title;
- the award of simple interest (on the lesser sum) continued to be appropriate; and
- adoption of the non-economic losses as fixed by Justice Mansfield in the initial case.

The Timber Creek case has at least provided some guidance as to how native title can be valued and is instructive to the theme under consideration.

### **Principle of Equivalence**

In democratic and common law regimes, when property is expropriated under sovereign powers, the presumption is that the dispossessed owners should receive compensation for the loss of the resumed land. The manner in which takings compensation should be effected is succinctly expressed by Brown (1991):

*“The purpose of compensation is that it gives to the owner compelled to sell the right to be put as far as money can do it, in the same position as if his land had not been taken from him. In other words, the disposed owner gains the right to receive a money payment not less than the loss imposed on him in the public interest, but on the other hand, no greater.”*

This, in essence, is the principle of equivalence. This means that compensation following a compulsory acquisition of land should place the dispossessed owner in a position where he/she is no worse off after the acquisition than he/she was before. Likewise the dispossessed owner should not be any better off.

The conventional practice based on legal precedent is that because the effects of the taking on the value of a property are ignored when assessing compensation, it is necessary to value the land on the basis of its open market value without any increase or decrease attributable to the scheme of development which underlies the taking.

However, the equivalence principle must go beyond that of the equivalence of market value and encompass physical or economic equivalences in acquisition cases (Mangioni, 2014). This research extends this view for compensation to encompass the sui generis nature of customary land takings. When State acquires customary land through expropriation, it acquires a sui generis property. Therefore what should be compensated is the loss or equivalence of this sui generis property.

## Application of Sui Generis Property and Principle of Equivalence

Moreover, in customary land takings, what is taken is a sui generis property comprising its tangible and intangible characteristics. When this sui generis property is expropriated for public purposes it is subject to formal compensation standards which the overarching principle of equivalence is instructive. Valuation translates the taken sui generis property with its value entitlements and is submitted to the test understood in the principle of equivalence to arrive at a compensable value. The process requires a valuation methodology that accounts for both the tangible (economic) and intangible (non-economic) value entitlements.

This paper is therefore framed within the concept of sui generis nature of customary land and its valuation is guided by the principle of equivalence that provides the standard of compensation. These two concepts when integrated provide the boundaries and context in which a valuation framework for customary land takings compensation is developed as depicted in Figure 1 below.

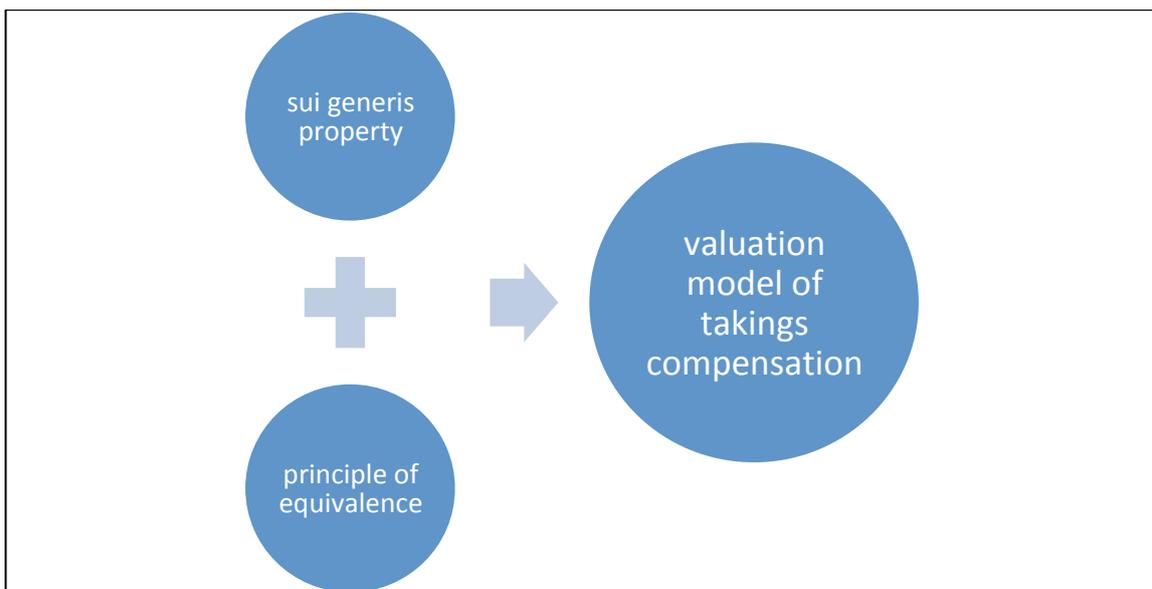


Figure 1: Theoretical framework

## **Proposed Valuation Method**

Valuation is critical to compensation decisions, however, there is neither a universal valuation standard nor valuation mode in practice for assessing compensation for customary land takings (expropriation). In this void, compensation for customary land takings is based on market value models informed by legal property paradigms. Compensation based on this approach is designed for legal property rights that can be easily identified and valued because referents are established in precedent, law and practice. However, the social welfare impact and host of subjective values including cultural values that dominates customary land are also important factors for consideration in takings compensation decisions, but this cannot be identified using the market value and legal property paradigms. In this situation, alternative valuation approaches need to be considered.

The sui generis nature of customary land and the distinctive connectedness that customary landowners have to this sui generis property has important implications on how the answer to the question of valuation and compensation should be designed (i.e., valuation model)

As a sui generis property, customary land has tangible and intangible elements to its unique nature. This should point to valuation approaches that embrace these elements and at the same time be responsive to the unique and distinctive connectedness of customary land owners to their land. This provides the primary motivation for utilising the Contingent Valuation Method (CVM) in this study. CVM is popularly used in compensation schemes for environment, ecological, heritage and cultural considerations. Thus, this study contends that

CVM is equally applicable to valuation of the non-marketable compensable value entitlements of customary land in takings compensation assessment.

Alberini and Cooper (2000) provide a comprehensive discourse on the applications of CVM in developing countries which is instructive to this study. From their explanation, CVM is a typical economic valuation method that falls in the category of stated preference methods. Moreover, CVM lends itself easily to the construction of hypothetical markets to determine valuations for non-economic or non-market goods. The market is created from the preferences of the occupants or owners and is expressed in terms of their willingness to pay (WTP) or willingness to accept (WTA).

In environmental valuation, the WTP format is utilised where the use or protection of a type of environmental item or service is considered. The WTA format, on the other hand, is used when it concerns the loss of some type of environmental good or service. Thus, the proprietorship of the property rights evaluated determines whether WTA or WTP is utilised. Where a good is owned, the preferred approach would be WTA, otherwise WTP is used. This paper identifies with the WTA format as in effect, it would be politically very difficult to ask owners their WTP for an imposed foregone use on land they consider their own.

For the purposes of this research the object is the valuation of customary land for compensation purposes. Customary land is land held under customary land tenure by the indigenous peoples claiming ownership over it. Thus, for the non-market value entitlements of customary land, this research will establish the compensation based on customary landowners' willingness to accept compensation (WTAC) model.

The argument from customary land as sui generis property is that customary land is identifiably distinct from legal property rights and therefore should be valued differently from conventional valuation approaches (IVSC 2005, Boydell 2008).

Smith (2001) argues that what is to be valued is indigenous land as sui generis property. Based on the argument from sui generis, Smith refers to indigenous land as cultural property. Accordingly, this research advances the cultural property intuition by referring to the value entitlements arising from customary land to as socio cultural entitlements. Equivalent labels in takings literature of legal property rights include idiosyncratic premium (Lee 2012) subjective value (Fennell 2013) and economic value (Chang 2013). Apparently these value entitlements are disregarded in conventional valuation practice.

From the empirical argument, the value of customary land is contextually and empirically defined therefore the compensation arrived at should be viewed through the lens of customary land (tenure). This view is supported by Gregory and Trousdale (2009) that conventional compensatory systems lack context and aboriginal input.

There is a need for the definition of value typology or entitlements that can be claimed for customary land takings compensation. These are the composite value elements that make up the package of compensation land takings compensation. This is exemplified in the proposal by Smith (2001) of Heads for compensation for native title claims in Australia indicated earlier.

In this vein, Burke (2002) suggests that non-economic values should form a category of compensation entitlement and proposes three subheadings compensable under native land title claims including;

*“Compensation for the insult associated with the loss of important rights without consent;*

*Compensation for disruption to social and cultural practices; and*

*Compensation for mental distress associated with the loss of homelands.”*

For the economic loss, Burke suggests selecting the closest analogy with existing interests in land and calculating the economic value of such an interest based on the usual principles of land valuation, referring principally to market value. In addition, Burke suggests the quantification of non-economic losses from the perspective of damages in torts law.

This categorisation is helpful in identifying the compensable value entitlements of customary land that will be clarified in this study. It also informs the question on how customary land takings compensation should be valued.

### **Models of compensation assessment**

Models of compensation assessment for indigenous property takings is an evolving theme in current takings compensation literature, however, for the purposes of this research, much of the literature is drawn from the Australian native title compensation discourse. The reason for this is that PNG has a shared history with Australia being historically a territory of Australia before independence and therefore possesses some commonality in its legal property framework.

Moreover, the prominent land rights case in Australia (Mabo and Others v. Queensland 1992) and the response in creating legislation recognising native title continues to generate a rich volume of literature on compensation of native land title.

However, according to Fortes (2005) despite a clear precedent set in Australia in the Mabo case, there is still not one compensatory model adequate for native title. However, the necessity for the development of methods for assessing compensation is compelling because,

*increasing acceptance internationally of notions of equity and fairness has raised an urgent need for the development of a legally defensible method of assessing compensation for customary lands. Such a method must be acceptable not only to the community at large, but also to traditional landowners (Sheehan, 2002).*

#### ***Conventional formulaic property valuation methods***

Drawing from the discourse on compensation for native title in Australia, Fortes (2005) presents an eclectic list of approaches including conventional formulaic property valuation methods listed below.

- Adoption of Financial Model for compensation based on many statutes throughout the common law world
- Present Value using rental model
- Comparative Market Approach
- Using other available methods including granting of rights like profits-a-prendre, solatiums, easements, reservations and leases. In PNG, the State has, for historical and closed expropriation cases, paid additional monetary compensation in the form of ex-gratia payments to disgruntled indigenous property owners. The reason is to appease them and allow essential public services to operate unhindered. This may be likened to solatium payment.

- A comparison of bundle of rights concept in common law to rights under native title for purposes of valuation.

The compensation models are very much informed and shaped by established legal paradigms and conventional valuation discourse as discussed in the measure and definition of compensation in the paper. In the absence of any statutory or practical guidance to takings compensation assessment for customary land, recourse to conventional means appears to be the option for convenience and practical reasons. This appears to be the case for PNG where valuation practice adopts the conventional valuation models.

### ***Inclusive compensation models***

Inclusive compensation models are also promoted by various authors including the following;

Smith (2001) promotes more culturally appropriate models incorporating Aboriginal compensatory values and approaches such as categorisation of claims under 'Heads of Damages' developed on the basis of actual losses experienced by individual, communal and future generation native title holders. This is instructive to addressing the case in PNG where values emanating and deriving from customary land tenure can be incorporated in the assessment and determination of compensation for customary land.

Fortes (2005) suggests compensation as redressing events and wrongs emphasising empathy as practiced in culture and reiterates Smith's suggestion above on constructions of a new paradigm outside of existing Anglo-Australian property compensation case law system. Fortes adds that quite unfamiliar and

even unknown notions of property might have to be conceived by the Courts, utilising case law and other principles from quite diverse areas.

Nau (2009) proposes restitution as an alternative to monetary compensation where alternative land of equivalent character and value is provided as compensation. This is practiced by developers in the extractive industry (mining and petroleum developments) in PNG.

Sheehan (2000) suggests ad hoc compensation agreements as in the case of PNG to be an alternative compensation approach. This appears to be the most practical approach applied in PNG, especially in the extractive industry sector.

Boydell and Baya (2012) contribute to the discourse by proposing an equitable integrated compensation model for resource rich countries in Melanesia citing PNG. The authors propose five models including

- Compensation tailored to exact rights of customary landowners
- Assumption of a prevailing common set of property rights and compensation tailored accordingly
- Developer driven quantification of compensation
- Compensation by Negotiated Agreement
- Hybrid approach accommodating Total Economic Value Concept

Building on their prior research, Boydell and Baya (2013) add option pricing model as an alternative to assessing compensation.

The models and approaches advanced are in the main conventional though in some instances theoretical and novel, however, informs the discourse and instructive for study and research. The main contribution drawn from literature for the purposes of this research is the recognition of customary land tenure as an

equal in addressing the question of compensation for customary land. Its definitions, meanings and processes in customary land tenure should be considered in the compensation process, thus promoting an inclusive approach.

### **Proposed compensation value formulation**

Traditional valuation methods are designed for market value determination. Whereas market value conveniently serves legal property rights in takings compensation assessment, it leaves out whole categories of value entitled to customary land. Based on this intuition, customary land compensation is vulnerable to inadequate compensation and subject to questions of equity.

In identifying and recognising this failure in prevailing valuation practice, this paper leans towards the notion of integrating cultural value entitlements of customary land therefore opts for alternative methods that can best facilitate this integration. For the purposes of this paper, the valuation approach considered most appropriate would be a (composite) hybrid method incorporating actual property (land) market and simulated market approaches. The rationale for this strategy is to situate and enable the valuation of customary land takings compensation within the prevailing context including its restraints, constraints, strictures and leverages. This essentially enables valuation to be cognisant of established norm and legal strictures, however, by the same token accounting for the non-economic and idiosyncratic values emanating and deriving from customary land tenure.

Drawing from the lessons of the Timber Creek case cited earlier coupled with the intimations presented, this paper proposes a valuation approach (model) that integrates non-economic value(s) of customary land and traditional valuation

models. This is a composite valuation model that incorporates market value models with the economic valuation models, namely Contingent Valuation model (CVM).

The proposed culturally inclusive customary land takings compensation valuation model is currently under development as part of the doctoral thesis of the author. The CVM envisaged in this proposal proposes to employ the Willingness to Accept (WTA) model which will be informed by the economic valuation literature. This will gauge the perspective of the dispossessed land owners willingness to accept compensation offered (bid) for the loss of their identified cultural value compensable entitlements inherent in the expropriated land. A logistic regression model will be employed to capture the value of the intangible compensable value entitlements that are lost by the action of expropriation.

The market value approach would utilise the three conventional methods (sales, cost and income) where data is available from the established property market to value the tangible assets of customary land. The rationale for this choice is that a legal property market exists and therefore market data can be used as a proxy for the valuation of tangible assets including land value, unexhausted building and improvements including plantings.

The contingent valuation method would form the simulated market approach and account for the intangible values which would include a typology of value entitlements that is typified in the typology advocated by Smith (2001).

The proposed valuation model will then be developed to integrate the cultural value entitlements of customary land in conjunction with the value of tangible assets obtaining from the market value models. This will constitute the

value compensable for customary land takings. A depiction of the model is provided in Figure 2 below.

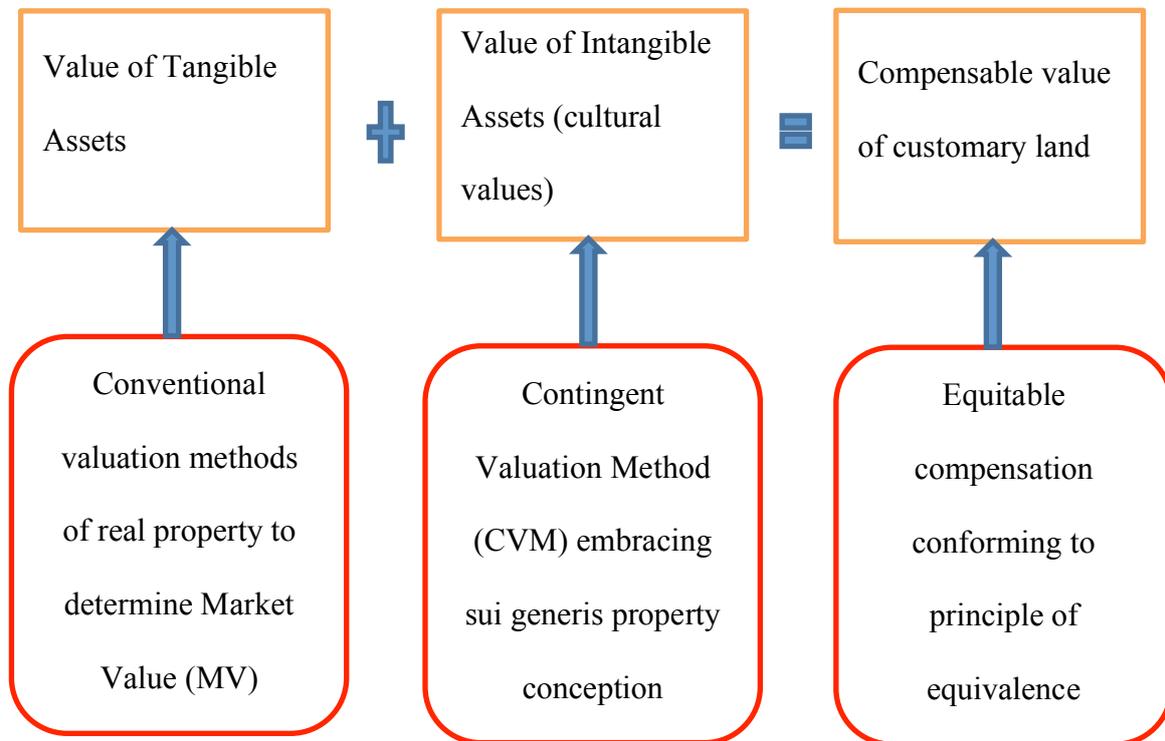


Figure 2: Proposed Compensation Valuation Method

### **Implications of proposed compensation value method**

The proposed inclusivity of cultural values in CLTC has implications at many levels.

#### ***At the social level,***

- For the case in PNG, it aggravates an existing sensitive and volatile status quo of endemic takings compensation claims; it gives customary land owners all the more reason to advance their compensation claims;
- It provides opportunity for customary land owners to divert their attention from the main objective of security and protection of their customary land;

instead this may contribute to the strengthening of the social culture of entitlement and dependency on the State.

*At the public policy level,*

Obviously economically the fiscal issue of absorbing the additional costs imposed by the inclusion of cultural value in the takings compensation package poses a real danger to budgetary concerns.

The increased cost and effort in valuation exercise in the application of the Contingent Valuation Model in assessing cultural values for compensation may be a concern.

On the other hand, it should be a welcome change as it enables and assures equity in customary land takings compensation and for a country like PNG, it should have the full faith and credit standing of the country behind every legitimate expropriation action and compensation claim/entitlement to deprived customary land owners. This is not a partisan issue; rather it is a societal issue.

**Conclusion**

When land is expropriated for public purposes by the State, the effects of the action are profound because a way of life and its contribution to the welfare of customary land owners is lost. Comprehending customary land in its context and significance is imperative for the determination of its value in compensation assessment.

Equity in compensation for customary land takings remains an issue in contemporary society where customary land tenure prevails. In addressing this issue, this paper has focused on valuation decisions not only as a function of

compensation but also a means to resolving the issue. This paper recognises that one of the challenges facing compensation valuation of customary land takings compensation is the incompatibility of traditional valuation models and legal property paradigms to customary land tenure.

This paper, therefore, proposes the proper conceptualisation of customary land and identification of its compensable value entitlements. Based on this, a valuation model can be developed that captures these entitlements and is responsive to the principle of equivalence and respects practices and values inherent in customary land tenure. This approach is considered suitable and relevant for plural land tenure societies where customary land tenure is active and prominent.

It is envisaged that this rethinking in valuation would enable compensation assessments and outcomes to be equitable and at the same time respecting values emanating from customary land tenure. Ultimately it is the dispossessed customary land owner who is affected by the expropriation and compensation outcome.

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