All the signs point to 2018 being another year of important developments for the emerging issue of native title compensation. The ever-increasing numbers of successful native title claims and new case law about quantifying compensation, mean growing implications for native title holders, government and land and sea users.

Native title compensation itself is not new. In his second reading speech on the enactment of the Native Title Act 1993 (Cth), then Prime Minister Paul Keating said: “In the interests of fairness for existing (tenure) grant holders, where compensation is owed to native title holders for validation of past grants, it will be government, not the grant holder, who pays. We recognise that the Commonwealth should make a proper contribution towards compensation costs. We will have further discussions with the States and Territories willing to join with us in this national approach, as well as on cost sharing for the legal and administrative regime.”

The Native Title Act went on to legally establish native title holders’ entitlement to compensation where native title had been affected by past acts involving either extinguishment or other affects on native title.

For compensable acts involving past tenure grants and public works construction, claims for compensation can reach back to the commencement of the Racial Discrimination Act 1975 (Cth) on 31 October 1975. For locations where the native title claim process determines native title still to exist, anything after the Native Title Act commenced on 1 January 1994 that extinguishes or is inconsistent with the enjoyment or exercise of native title can be a compensable “future act”.

Many local governments and other project proponents are already familiar with native title compensation as their future acts are often made valid, despite affecting native title, under Indigenous Land Use Agreements (ILUA). In those cases, the ILUA itself must provide for the compensation and it is usually paid by the person benefiting from the compensable act.

A similar outcome applies to future acts involving a compulsory acquisition of native title. The proponent themselves pays the compensation.

That can also be the case where the person, whether government or non-government, who does a future act fails to ensure that it is properly covered by an ILUA, compulsory acquisition or other statutory validation measure. These are called “invalid future acts”.

For past acts and types of valid future acts not covered by ILUAs or compulsory acquisitions, the liability for compensation rests with Commonwealth, States or Territories. However, keep a future eye on the power under the Native Title Act for them to make laws that “provide that a person other than the Crown... is liable to pay the compensation”; the so-called “flow-through” provisions.

For all these reasons, legal developments about how to calculate the monetary amount of compensation are not just relevant to native title holders and government.

The resolution of the methodology for quantifying compensation will likely lead to native title compensation becoming a much more prominent subject.
The main case is *Griffiths v Northern Territory of Australia (No.3)*; more commonly known as the “Timber Creek” case.

In August 2016, Justice Mansfield handed down his now well-known decision. It found that that monetary compensation for compensable acts for one or more parcels of land involves the aggregate of three component amounts – an economic loss amount, interest on the economic loss and a non-economic loss amount.

The economic loss amount is based on the full freehold value of the land at the time the compensable act was done. Valuation evidence based on comparable sales of similar parcels of land determines freehold value. Valuations of that kind can be made even where the compensable act occurred decades ago.

The economic loss amount is determined as a percentage of the full freehold value depending on whether the native title involves “exclusive possession” and whether the compensable act fully extinguished native title or not.

In his decision, Justice Mansfield assessed the economic loss on the facts of that case at 80% of the freehold value. This percentage was the only significant change the Full Federal Court made in an appeal decision in July 2017. The 80% was varied to 65%.

The Full Federal Court upheld Justice Mansfield’s decision about non-economic loss. This amount is for particular impacts on spiritual attachment and things like impacts on cultural sites, amongst other things. The assessment of $1.3 million across all parcels of land was upheld.

Expect further important developments on the road to resolving the unfinished business of compensation in 2018. A High Court appeal in Timber Creek will likely be resolved with an application for leave to make that appeal set for hearing in February. In the meantime the setting of principles for quantifying compensation have already resulted in compensation applications being lodged with the Court in Queensland and other jurisdictions.

On 20 December 2017, the Court in South Australia determined a compensation application on the basis of a confidential settlement reached between the Tjayuwara Unmuru native title holders and the South Australian government.

Many compensation discussions now underway for ILUAs and compulsory acquisitions are based on the new methodology. Many local governments and other land use proponents also see value in developing in-house systems to help ensure their activities do not get caught out as invalid future acts, hence risking them being directly liable for compensation.

Thought is also turning to the opportunity for innovation and collaboration between native title holders and government about cost-effective settlements that could provide inter-generational benefits for native title holders. In his Native Title Act second reading speech, now a quarter century old, Prime Minister Keating said: “Importantly, the bill makes provision that compensation may be non-monetary, for example, the granting to native title holders of alternative land. It permits such issues to be raised in compensation negotiations...”

In 2018, innovative approaches to settlement of that kind have the potential to make a big contribution to a lasting native title legacy of practical outcomes and enduring Indigenous economic development opportunities.

Find out more about IPWEAQ’s new Native Title and Cultural Heritage Compliance System portal on page 67 of this issue.